

PROMOTING SUSTAINABLE ECONOMIC AND SOCIAL REINTEGRATION OF RETURNEE MIGRANTS: BANGLADESH PERSPECTIVE

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ABSTRACT

There has been a general absence of a concrete framework for facilitating the reintegration of the returnee migrant workers. In that respect, reintegration is perhaps the least explored area in migration management in Bangladesh. In the absence of any formal support mechanism for the returnee migrants with mainstream economic activities, the capital and skills brought in may not be put to effective use. This article illustrates the specific problems faced by migrants returning to their home countries and families. It identifies the kinds of supports--logistical, legal, socio-psychological, employment, skills related and financial -- they need to enable them to achieve successful reintegration and avoid re-migration. It emphasizes opportunities for remunerative employment as key to successful reintegration. The final section provides some recommendations that may be adopted in social and economic reintegration process of returnee migrants.

Keywords: *Remittance, return migration, returnee migrants, social and economic reintegration, policy.*

1. INTRODUCTION

Migration has been an important livelihood strategy for the people of Bangladesh. It has remarkable positive impact on social development and empowerment through skill transfer and by fostering many community development initiatives. Globalization, modern communications and transportation have greatly facilitated the migration. People move continuously seeking better economic opportunities, family reunion and humanitarian relief International

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migration gives a person an opportunity for higher income and better lives. The higher income of the migrated person not only changes his destiny, but has also improved the lives of his family in the home country.¹

The migrant workers stay in the overseas country for a limited period. Sustainable reintegration of migrant workers can be ensured with appropriate utilization of their income. The migrant workers come back with skill, work experience and savings. Lack of opportunity for investment and appropriate counseling mostly hamper the initiative of the migrant workers towards appropriate venture. Country's development activities may get momentum with the active participation of returnee migrant workers.²

In the absence of any formal support mechanism for linking them with mainstream economic activities, the capital and skills brought by returnee migrants may not be put to effective use for national development. In that context the objective of the present article is to understand the return experience of migrants, identify the problems they face, assess the role of various government and civil society organizations in their reintegration process and the potentials of the returnees in contributing to the national economy.

2. PRESENT TRENDS OF MIGRATION FROM BANGLADESH

Bangladesh is considered as a resourceful country of a huge labour-force. About 60 million people constitute this vast reservoir of active manpower; fortunately Bangladesh is steadily turning her manpower into an asset through training and skill development with a view to meeting the needs of overseas employment. It is not possible for Bangladesh to absorb the full range of available less-skilled, semi skilled, skilled and professional manpower within the country in an appropriate manner and hence it is needed to find employment opportunities abroad. There are also a number

1 'K.A. Chowdhury, 2011, 'Maximizing the Development Impact of Remittances in Bangladesh' ; available at [http: Country Paper Bangladesh Chowdhury en.pdf](http://Country Paper Bangladesh Chowdhury en.pdf) last accessed on 20 May,2012

2 M.N. Islam, 2010, 'Strategy Paper For Re-integration of Returnee Migrants', International Labour Office, Dhaka, See at: <http://www.bmet.org.bd gy%2OPap%20for%2Ore-integration.pdf>; last accessed on 10 June 2012

of foreign countries who are in need of importing manpower from other countries.³

Currently two types of international migration occur from Bangladesh. One takes place mostly to the industrialized west and the other to Middle Eastern and South East Asian countries. Voluntary migration to the industrialized west includes permanent residents, immigrants, work permit holders and professionals. They are usually perceived as long term or permanent migrants. Migration to Middle East and South East Asia are usually for short term and that migrants return home after finishing their contracts of employment in the host countries.⁴

BMET⁵ data also shows that Bangladeshi workers are predominantly men. Along with the male overseas jobseekers, recent trend observes that the number of women overseas jobseekers has been increased remarkably. About 1,50,000 overseas women workers have been sent to different countries from 1991 to 2010.⁶ Unlike other labour surplus countries, in Bangladesh female migrants make up a low proportion of labour migrants - until 2004, only 1% of Bangladeshi labour migrants were female.⁷ During 1991-95, women constituted 0.98% of the total migrant flow. In 1997 it came down to 0.76%. However, the figure rose to .67% in 2003.⁸ The overseas women workers were 2.4% in 2008 which has been increased to 5% in 2010.⁹ IOM-INSTRAW¹⁰ and Siddiqui¹¹ estimated that the number of female migrants might be 10 to 50 times more than the official figure. Due to existence of government ban and strict restrictions on migration of unskilled and semi-skilled women till 2003, Women of the unskilled and semi-skilled

3 Chowdhury, note 1

4 Chowdhury, note 1

5 Bureau of Manpower, Employment and Training

6 Chowdhury, note 1

7 Migrant Forum Asia, 2010, 'CEDAW AND THE FEMALE LABOUR MIGRANTS OF BANGLADESH'; See at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/MFA_for_the_session_Bangladesh_CEDAW48.pdf; last accessed on 20 May, 2012

8 Tasneem Siddiqui, 2005, 'International Labour Migration from Bangladesh: A Decent Work Perspective', Working Paper No 66; See at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079174.pdf; last accessed on 20 May, 2012

9 Chowdhury, note 1

10 INSTRAW and IOM, 2000, 'Temporary Labour Migration of Women: Case Studies of Bangladesh and Sri Lanka', INSTRAW/IOM, Santo Domingo, Dominican Republic.

11 Tasneem Siddiqui, 2001

categories used to migrate through unofficial channels. Their number is not accounted in any statistics.¹² However women still represent a small minority in relation to overall Bangladeshi migrant flows.

Overseas employment from Bangladesh started officially in 1976 with a modest number (6,078) of workers. Presently about 7 million Bangladeshi workers are employed around 130 countries across the world, particularly in countries of the Middle-East and South Eastern countries. Saudi Arabia, UAE, Malaysia, Kuwait, Qatar, Oman, Bahrain, Libya, Singapore are major destinations for Bangladeshi worker. Today, Bangladesh is considered as a good source of manpower. Information on the short term labor migrants who officially go overseas for employment is available with BMET.¹³

The following table captures the flow of migration over different periods:

Table-1: Flow of Migration from Bangladesh during 2001-2010¹⁴

Worker's Category					
Year	Professional	Skilled	Semi-skilled	Less-skilled	Total
2001	5,940	42,742	30,702	1,09,581	1,88,965
2002	14,450	56,265	36,025	1,18,516	2,25,256
2003	15,862	74,530	29,236	1,34,562	2,54,190
2004	12,202	1,10,177	28,327	1,22,252	2,72,958
2005	1,945	1,13,655	24,546	1,12,556	2,52,702
2006	925	1,15,468	33,965	2,31,158	3,81,516
2007	676	1,65,338	1,83,673	4,82,922	8,32,609
2008	1,864	2,92,364	1,32,825	4,48,002	8,75,055
2009	1,426	1,34,265	84,517	2,55,070	4,75,278
2010	387	90,621	20,016	2,79,678	3,90,702

BMET has classified temporary migrant population into four categories. These are professional, skilled, semi-skilled, and

¹² Siddiqui, note 8

¹³ Chowdhury, note 1

¹⁴ Prepared from Bureau of Manpower, Employment & Training (BMET) data (retrieved from <http://www.bmet.org.bd>)

unskilled. Doctors, engineers, nurses and teachers are considered as professionals. Manufacturing or garments workers are considered as skilled; while tailor, mason, etc. as semi-skilled workers; housemaid, cleaner, laborers are classified as less-skilled.¹⁵

3. REMITTANCE FLOWS TO BANGLADESH

Bangladesh is considered as one of the major labour exporting countries of the world. Since independence over 07 (seven) million Bangladeshis went abroad. The cumulative receives from Bangladeshi migrants during 1976-2010 stood at around US\$ 78.67 billion. Bangladesh maintained a healthy growth in remittances through the formal channel. The trend of remittance has accelerated in recent years from \$2.07 billion in 2001 to \$11.00 billion in 2010, an average growth of 43 percent per annum, even in the global financial meltdown. The oil-rich Middle Eastern countries with more than 80 percent of the total stock of Bangladesh migrants accounts for a lion's share of remittances.¹⁶

The principal features of the remittance flows are as follows:

The Kingdom of Saudi Arabia is the most important source of remittances. Its share is about 29 percent of the aggregate remittances received in Bangladesh.¹⁷ The US, which saw a large inflow of migrants in recent years, accounts for the second largest source nearly 15 percent of the total.¹⁸

Table-2: Year-wise remittance statistics¹⁹

Year	Remittance in million US\$	Remittance in million BDT
2000-2001	1882.10	101700.10
2001-2002	2501.13	143770.30
2002-2003	3061.97	177288.20
2003-2004	3371.97	198698.00
2004-2005	3848.29	236469.70

15 Chowdhury, note 1

16 *ibid*

17 *ibid*

18 *ibid*

19 Bangladesh Bank. 2012. The Central Bank of Bangladesh, Government of the People's Republic of Bangladesh, Dhaka (see at <http://www.bangladesh-bank.org>)

2005-2006	4802.41	322756.80
2006-2007	5998.47	412985.29
2007-2008	7914.78	542951.40
2008-2009	9689.26	666758.50
2009-2010	10987.40	760109.59
2010-2011	11650.32	829928.90
2011-2012	12843.43	1019042.29

4. REMITTANCE AND ECONOMIC DEVELOPMENT IN BANGLADESH:

The remittance and economic development in Bangladesh can be broadly explained in two ways; overall Macroeconomic benefits of remittance and Microeconomic benefits at household level.

4.1 Macroeconomic Benefits of Remittance

The major benefit arising from migration of workers has been the worker's remittances. They have not only made a significant contribution towards the GDP (Gross Domestic Products) (13.56%), but also to meet the balance of payment's deficit. The remittance of migrant workers stands at US\$ 10.99b in 2010. Amount of remittance constitutes 6 times of ODA (Overseas Development Assistance) and 11 times of FDI (Foreign Direct Investment). It occupies the highest level of net foreign exchange earning sector of the country. Remittances play a crucial role in the Bangladesh economy today.²⁰

It has helped to ease our foreign exchange constraint, stabilizing the exchange rate and allowing Bangladesh to import much needed raw materials, intermediate goods and capital equipment. Comfortable reserves of foreign exchange have also contributed to overall macro stability and have reduced aid dependency, along with rapid growth of our export sector. Remittance increases with the expanding migration process and accelerating movement of people for overseas employment market. Some study predicts an ambitious achievement for the flow of US\$ 30b remittance by 2015 in Bangladesh. To attain this level of remittance,

²⁰ Ibid

skill development training and more women participation in the migration process are two essential factors among others.²¹

Table-3: Socioeconomic Impact of Remittance at Community & Household Levels in Bangladesh.²²

Major Indicators	Positive Impact of Remittances
Nutrition	Allow families of migrants to meet basic nutritional needs
Living condition and Housing	Living condition and housing improved
Education	Invest for education of children
Increased investment for healthcare	Social security for elderly people increased
Investment	Increased investment in business or income generating activities

4.2 Microeconomic Benefit at Household Level:

The remittance has significant microeconomic impact at household level. The macroeconomic impact of remittances at household level partially depends on the characteristics of the migrants and hence the recipients i.e. whether they constitute the rural poor, or the more educated sectors of the population generally residing in urban areas. The majority of Bangladeshi migrants abroad is unskilled, and originates from rural areas.²³ Unskilled workers take jobs in Saudi Arabia, the United Arab Emirates, Malaysia, and to a lesser extent US and UK as domestic staff and labourers. Saudi Arabia alone accounts for around 43% of migrants out of Bangladesh. According to official statistics, from 1976 to 2004, 46% of migrants were unskilled, lacked access to land and resources. The poverty profile of migrants is looked at

²¹ Ibid

²² Tom de Bruyn and U Kuddus, 2005 'Dynamics of Remi Utilization in Bangladesh', IOM, Geneva, See at: <http://www.iom.org.bd/publications/6.pdf> last accessed on 10 June, 2012

²³ Ibid

more closely in the social appraisal. However the evidence clearly shows that most short- term migrants abroad are poor and from rural areas. The poorer the household, the more impact or benefits remittance income can have on alleviating poverty. In the short-term remittances help loosen the budget constraints of their recipients, allowing them to increase expenditures on both durables and non-durables products, and provides them with protection against negative income shocks. Remittances are cited as making up around 60% to 70% of recipient poor households' total income.²⁴ Investment in health and education is valuable for long-term economic growth and poverty reduction. Studies conclusively found that migrant families invested more in these areas.²⁵

The most comprehensive review of the literature on remittances in Bangladesh lays out a number of benefits that are listed in the table below:

Table-4: Utilization patterns of Remittances in Bangladesh.²⁶

Purposes	Remittances used (%)
Food and Clothes	20.45
Medical Treatment	3.22
Child Education	2.75
Agricultural land purchase	11.24
Homestead land purchase	0.96
Home construction/repair	15.02
Release of mortgage land	2.24
Taking mortgage of land	1.99
Repayment of loan (for migration)	10.55
Repayment of loan (other purpose)	3.47
Investment in Business	4.76
Savings/Fixed deposit	3.07

24 Ibid

25 A.S. Murshed, Kazi Iqbal and Meherun Ahmed, 2002, 'A Study on Remittance Inflows and Utilization, IOM, Dhaka (mimeo).

26 Siddiqui, and Chowdhury R Abrar, 2003, 'Migrant Worker Remittances and Microfinance in Bangladesh', ILO, See at http://www.ilo.int/wcmsp5/groups/public/emy/documents/publication/wcms_11_7970.pdf, last accessed on 10th June 2012

Insurance	0.33
Social ceremonies	9.07
Gift/donation to relatives	0.94
Send relatives for pilgrimage	0.92
Community development activities	0.09
Sending family members abroad	7.19
Furniture	0.69
Others	1.05
Total	100

5. LEGAL AND REGULATORY FRAMEWORK OF RETURN MIGRATION

5.1 International Legal Instruments

The ILO pioneered the development of international labour standards to guide migration policy and protection of migrant workers. The ILO Conventions on Migration for Employment (Revised), 1949 (No. 97), Migrant Workers (Supplementary Provisions), 1975 (No. 143) and Private Employment Agencies, 1997 (No. 181) are widely recognized as lead instruments for the protection of migrant workers in addition to the International (UN) Convention on the Protection of the Rights of All Migrant Workers and their Families, 1990.²⁷

The 1990 UN Migrant Rights Convention ensures rights to both regular and irregular, and male female migrants. The human rights of migrant workers and their families are also universal, indivisible, interconnected and interdependent human rights. This convention asks the sending states to facilitate economic and social reintegration of the returnee migrants. Simultaneously, the instrument seeks to draw the attention of the international community to the growing trend of dehumanization of the migrant workers and members of their families as well. The Convention was strongly inspired by ILO principles and standards.²⁸

²⁷ Islam, note 2

²⁸ Hoque and Zafrin Andaleeb, 2010, 'Migrants Workers' Struggle for Human Rights: Bangladeshi Workers' Perspective', Human Rights and Sovereignty over Natural Resources, Empowerment Through Law of the Common

Bangladesh has ratified the 1990 UN Migrant Rights Convention in 2011.²⁹

The ILO Multilateral Framework on Labour Migration (2006), a non-binding framework, spells out principles, guidelines and good practices for the development/improvement and implementation of sound labour migration policies. It addresses the crucial issues of labour migration-good governance of labour migration, protection of migrant workers, promotion of migration and development linkages and enhanced international cooperation.³⁰

5.2 National Instruments

After the independence of Bangladesh, emigration from the country was regulated and controlled under the 1922 Emigration Act that the country inherited from its British colonial past. With the gradual increase in the flow of temporary labour migrants from Bangladesh to the Middle Eastern countries, the inadequacy of the existing 1922 Act was felt and major policy changes were envisaged.³¹

At the initial stages when migration of shop-term workers to the Gulf states began in the mid 1970s, it was the government in Bangladesh which was actively engaged in facilitating the process. With the passage of time, as the demand for labour continued, the government handed over the recruitment responsibility to private recruiting agencies. It was in this context the Emigration Ordinance of 1982 was framed. The Ordinance was designed to set the rules for governing the labour migration sector. The Ordinance elaborates the licensing and monitoring mechanisms of recruiting agencies. It also explicitly describes the punishment of individuals and private recruiting agencies involved in fraudulent practices. Gradually in 2002 rules were framed on the basis of the 1982 ordinance. Besides the Ordinance and rules, a policy has

29 People(ELCOP) & Palal Prokashoni, pp.237-256.

Tasneem Siddiqui ,and Md. Motasim Billah, 2012, 'Migration Trends Analysis 2011, Achievements and Challenges', Refugee and Migratory Movements Unit (RMMRU);

30 Islam, note 2

31 Migrant Forum Asia, note 7

also been framed in 2006 entitled ‘Overseas Employment Policy.’³²

Bangladesh government finalized the Overseas Employment Policy(OEP) on November, 2006 to accelerate manpower export, make it profitable and hassles-free, and ensure welfare of the expatriate workers. This policy was grounded on the constitutional rights of work as a right and duty under Article 20 and freedom of profession or occupation under Article 40. The policy is focused on protecting rights of the expatriate workers at home and abroad, preserving the existing market and exploring newer job markets, and welfare of the expatriates. Besides, the policy stressed enhancing professional skills of the workers going abroad, transparency in recruitment process, sending remittances through legal process and maintaining good behavior and discipline on part of the expatriate workers.³³

The scope of the policy includes both males and females, short-term labour migrants and long-term Diaspora populations. In order to ensure protection in the destination countries, the OEP stresses signing of Memorandums of Understanding with labour receiving states, providing legal assistance and ensuring welfare of migrants through Bangladesh missions abroad. Increasing the flow and better use of remittances as investment is another major issue covered by the OEP. The social and economic reintegration of migrants upon their return home is also an important concern of the OEP. In addition to the Bangladeshi migrant workers who go on short-term contracts, the OEP underscores the welfare needs of the long-term migrants. The responsibilities of various government agencies such as Ministry of EWOE,³⁴ the BMET, the DEMOs and TTCs and also those of BAIRA have been elaborated in the annexure of OEP.³⁵

Furthermore, the government is going to enact a new law titled ‘Migration and Overseas Employment Act’ which aims to govern migration by ensuring migrant rights. It upholds

32 Ibid

33 Ibid

34 Ministry of Expatriates’ Welfare and Overseas Employment

35 Migrant Forum Asia, note 7

the principle of non-discrimination and makes provisions for emergency return of migrants in case of crisis in destination countries.³⁶

6. PROBLEMS AND DIFFICULTIES IN SOCIAL AND ECONOMIC REINTEGRATION OF RETURNEES

6.1 Conditions of Workers after Return and Opportunities for Employment

A IOM³⁷ study found that most of the returnees did not have any specific idea about their rehabilitation plan.³⁸ The bulk of the remittance of the returnee migrants was used by their families in their absence and very little amount was left for their economic rehabilitation. Only a small portion of the remittance was used in productive purpose. Returnee migrants also faced enormous pressure to part with resources that they still commanded. A section of them managed to engage in economic activities on their own initiatives, without any institutional support. However, a good number of them were still unemployed. Some were left with no choice but to explore options for fresh migration.³⁹

The IOM study also shows that migrants tend to lose contact with the agents that may be very useful to connect themselves with any kind of livelihood earning activities. Some returnees expressed the view that during their absence new agents had come about with whom they had no contact. They felt there had been major changes in the social and economic environment since they had left for overseas. Returnees also identified a host of other economic problems that they had to reckon with on return. These include, lack of information on current business trends, lack of advisory services, lack of job opportunity.⁴⁰ However, a large number

36 Siddiqui and Makfie Farah, 2011, 'Facing the Challenges of Labour Migration from Bangladesh', Portfolio INSTITUTE OF INFORMATICS AND DEVELOPMENT (IID) Policy Brief, Issue 4.

37 International Organization of Migration

38 Siddiqui, Chowdhury R Abrar,,2002, 'Contribution of Returnees: An Analytical Survey of Post Return Experience', International Organiz of Migration(IOM),Dhaka, See at: [http://www.un-bd.org/pub/unpubs/IOM-- Contribution%20of%20Returnees-An%20](http://www.un-bd.org/pub/unpubs/IOM--%20Contribution%20of%20Returnees-An%20) accessed on 10 June 2012

39 Ibid

40 Ibid

of them identified lack of access to formal credit as one of the major impediments for reintegration. Most of the migrant workers knew that part of their remittance would be used for consumption purposes by their families. However, they expected that some amount would be kept aside for them for their use once they returned. Unfortunately on return some migrants found that their families had spent the entire amount, others had kept very insignificant portion.⁴¹

The social problems identified by returnee migrants constitute major impediments in their reintegration process. They reported that friends and relatives considered them to be fortunate ones among them and made different types of claim on their resource that are very difficult to withstand. Pressure for investment in business, pressure to arrange migrant visa and clear outstanding debt, pressure for expenditure in social ceremonies and help for weddings are some of common social pressures what returnee migrants often experience. Some returnees stated that all these have contributed to a sense of distrust towards surrounding environment. Problems such as those stated above encountered by the migrant workers on return stifle their initiative to start afresh and make them yearn for the life they left behind overseas.⁴²

The study also traced the changing pattern of employment of the migrants. It found that most of the migrant workers were unskilled when they went overseas. A good number of them had acquired new skills. However, a large segment of the skilled returnee migrants are currently engaged in occupations that do not have any relevance to the skills they acquired overseas. Only a handful was earning their livelihood by utilising their skills. The study also noted that while staying overseas the migrants were amenable to take up menial jobs, but at home there was a general reticence to do such job. The study also found that the level of unemployment among returnees was more than twenty-five percent as compared to fourteen percent before migration.⁴³

41 Ibid

42 Ibid

43 Ibid

For their effective reintegration the returnees underscored the need for business support and creation of enabling environment so that they could invest. This included improvement in law and order situation, controlling of extortion, access to business information, access to credit and technical assistance. Those returnees interested in setting up of manufacturing enterprises wanted the government to allot plots of land while others emphasised the need for access to capital, training on business organization and management, accounts book-keeping and marketing. Some of the returnees expressed their desire to migrate again. Others wanted the migrants associations to take up new service oriented roles such as business advisory service and co operatives for safe investment and facilitating credit.⁴⁴

6.2 Reintegration of Women

A recent IINSTRAW/IOM study threw some light on the economic impact of migration of women from Bangladesh, including their reintegration. The study categorized economic impact under three broad heads: families where overall economic impact of the migration was positive; families where economic impacts were negative and families that had experienced mixed economic impact.⁴⁵

With regard to employment it was found that although 45.5% of the total numbers of women migrants were working before migration, only 23.3% resumed work after return. Of course, a section of them were still undecided if they would seek employment at home or try to go abroad again. The garments workers and nurses did not have much of a problem in getting jobs after their return; however, those who were involved in other manufacturing and processing industries found it difficult to get jobs where they could use the skills learnt abroad. It may be worthwhile to note that those who worked as domestic aides before going abroad did not want to take up such positions any more.⁴⁶

An important element in effective reintegration process is the amount of remittance that woman migrants would have

44 Ibid

45 Ibid

46 Ibid

at their disposal on return. The INSTRAW/IOM study found that 55.65% of the total remittance was used in consumption, health care and education purposes of their families. Loan repayment constituted another 18.54%. If one takes into account savings, land purchase and investments in economic ventures then one would find that only 12.33% of remittance was used on these avenues. This is only a fraction of the total amount sent. And it may very well be that even this amount may not be under the control of female migrants themselves as their male relatives (father, husband or brother) are likely to have them under their disposition.⁴⁷

Reintegration process becomes difficult if debts incurred during migration are not cleared. The INSTRAW/IOM study reported that 68.15% of the respondents could pay off their debts and 23.56% could partially pay off. Only 8.25% constituted the hardship cases who could not service their debts as their migration plan suffered setback.⁴⁸ From the above discussion one may suggest that reintegration process of the female migrants is contingent upon a host of factors. Major among them are the scope and opportunity for use of skills acquired abroad, resources available to them and the ability of the women migrant workers to establish their command over such resources. It was also noted that the prospects for reintegration also differed on the occupational pattern of the respondents.

In certain cases women's migration may adversely affect the children. Very often effective substitutes are not found to fill the absence of mother. The male household head is unlikely to take up the role of his spouse in caring for the children. Often elder members of extended households are brought in to take care of the children, but they may not necessarily be successful in performing the task. This may result in children performing poorly in studies to drop out from schools. Sometime due to lack of adequate monitoring and supervision, children may mix with 'wrong crowd', get addicted to drugs and become social outcasts. In the absence of mother, the smaller children's immunisation schedule and attendance to health care clinics suffered. In other cases,

47 Ibid

48 Ibid

the education of the girl child who took over the role of her mother suffered. Women migration has also led to break down of marriages. The INSTRAW/IOM study reported a few cases where husband of the women migrant married for the second time in her absence; in other cases, their husband divorced them.⁴⁹

Obviously, the above scenario makes women returnees more vulnerable than their male counterparts. Not only they have to look for ways to economically reintegrate themselves, they would also need to cope with tremendous psychological stress. Sometime they suffer from guilt feeling of causing harm to their children, and perhaps their marriage, for pursuing material well being.⁵⁰

7. ASSESSMENT OF RETURN MIGRATION AND LEVEL OF REINTEGRATION ASSISTANCE

It is a common knowledge that there does not exist any systematic database on the migrant workers of Bangladesh. The BMET's Statistical Division keeps records of (i) yearly flow of migration by country of employment, (ii) yearly overseas employment statistics by categories of workers and institutions that sent them, and (iii) countrywise and year-wise remittance earned through the Wage Earners' Scheme. There is however, no record on returnee migrants. No other private or non-governmental body keeps record of returnee migrants. This leads to conclude that it is difficult to get accurate statistics on the return flow of migrants to Bangladesh.⁵¹

7.1. Reintegration Assistance: Support Availability in the Home Country:

A IOM study suggests that economic reintegration in the home country is a major problem for the returnee migrants. The problem is particularly compounded by the absence of any effective policy framework and support mechanism of the government institutions, or of any meaningful civil society initiative in this respect.⁵²

49 Ibid

50 Ibid

51 Siddiqui and Abrar, note 38.

52 Ibid

The existing level of support and reintegration assistance provided to the returnee migrants of Bangladesh suggests that none of the major actors in the migration process - the Government, the BMET; the private sector, particularly BAIRA,⁵³ or the non-governmental organisations, including the migrant workers associations have not developed any programme to have visible impact on reintegration of migrant workers.⁵⁴

BMET is the lead government agency in the labour migration process. It co-ordinates and regulates the migration flow and is the enforcing organisation of Emigration Ordinance 1982. Despite the fact that the agency's role is pivotal from the government's side in sending migrants abroad, it has done little on their return. There is no mechanism to record their return flow back to the country. Neither there is any concerted effort to provide guidance and support to the returnees, who in a way have to make a fresh start for economic and social reintegration. Perhaps the only way returnees can make use of BMET's service is by registering them with the district offices, like any other person seeking job in the country. There is also lack of effort for harnessing skills and insights gained by migrants during their deployment overseas. The returnees are not involved either in the briefing sessions or at the Technical Training Centers runs by BMET.⁵⁵

Of the private sector institutions BAIRA has been actively involved in suggesting policies for the sector and lobbying for the recruiting agencies. As BMET took up more of a regulatory role, BAIRA members have secured an overwhelming segment of the recruitment market. Reintegration of the returnee migrant workers is not high on the agenda of BAIRA. The twenty-two objectives of the Association do not include returnee migrant workers. Only two objectives make references to encouraging and advising Bangladeshi workers abroad to send money through official channels and them through "their beneficiaries at home for investments of their earnings in the productive pursuits

53 Bangladesh Association of International Recruiting Agencies

54 Siddiqui and Abrar, note 38

55 Ibid

in the country". So far, there has not been any concrete initiative of BAIRA with regard to the capacity building of the migrants.⁵⁶

In 2011, 39,401 workers were deported with passport or outpass. 16,017 of them were deported from Saudi Arabia alone. Outside this figure are the returnees from Libya. One of the most important challenges that the government faced in 2011 was ensuring security of its workers in the Gulf and North African countries where movements for democratization began. 60,000 to 70,000 workers in Libya for all practical purposes became refugees or internally displaced during the people's uprising there. Once the media, particularly the Bangladeshi media, started transmitting the hardship of the workers, within a short span of time the government of Bangladesh successfully repatriated 36,656 workers with the help of international community. By taking loan from the World Bank the government has also provided 11.50,000 to each of the returnees as one time grant. It took assistance of IOM in distributing grant. RMMRU⁵⁷ survey conducted on 10,000 returnees from Libya demonstrates that 92 percent of the workers on an average have Tk. 165,000 as debt. Only 13 percent of them could secure reemployment until August 2011 and a majority of them urgently needs job. National trade bodies such as FBCCI, BUMEA, BKMEA, and REHAB expressed their commitment. However, their statements were not followed up by action. In order to create opportunities to employ returnees RMMRU has created a website (libya.rmmiru.org) where profiles of returnees are available that includes gender, education, skill and work experience. This may be treated as the first complete database with skills of jobseekers. After the regime change in Libya infrastructural development projects will soon commence. A small number of companies have already called back 100 workers. The government needs to prepare a concrete plan of action for reemployment as well as clearance of due salaries and compensation to the affected workers.⁵⁸

56 Ibid

57 Refugees and Migratory Movement Research Unit

58 Siddiqui and Billah, note note 29

Some NGOs, like BRAC,⁵⁹ Manusher Jonyo Foundation, BOMSA, WARBE,⁶⁰ SSKS,⁶¹ OKUP⁶² etc. are operating some projects regarding awareness raising projects. Even that all these approaches are insufficient in comparison to the required ones. They don't have any significant investment also.⁶³

BNWLA⁶⁴ and BSEHR⁶⁵ have taken up cases of the returnees who have been dealt unfairly in the host countries. ASK has a close working relationship with Tenaganita, a Kuala Lumpur based NGO. It has undertaken research, placed Demand for Justice Notice and wrote protest letters a number of times to the concerned government officials. ASK is currently engaged in documenting cases of women migrant workers who are back from the Middle East.⁶⁶

The Dhaka University based Refugee and Migratory Movements Research Unit (RMMRU) has been involved in a number of research initiatives on migrant workers. The Unit also organises seminar and conferences to highlight the importance of the sector and draw attention of the policy makers on issues such as the need for a legal framework upholding the dignity of migrant workers.⁶⁷

BRAC, the world's biggest nongovernmental organization was working with Bangladesh BMET to create a database comprising the skills, experiences and contact information of the workers. With the help of 10 volunteers, BRAC staffs had already completed data entry for almost a third of the 30,000 workers. BRAC staffs in 36 districts visited households of the returnees and counselling them. The organization has been making appeals for funds from donors and non-resident Bangladeshis to rehabilitate 500 of such workers in

59 Bangladesh Rural Advancement Committee

60 Welfare Association of Repatriated Bangladeshi Employees working in relation to migration

61 SSKS is Shosti Samaj Kalyan Shanstha

62 Ovivashi kalyan Unyan Parishad

63 Islam, note 2

64 Bangladesh National Women Lawyer Association

65 Bangladesh Society for Enforcement of Human Rights

66 Siddiqui and Abrar, note 38

67 Ibid

these areas. BRAC now plans to link the workers to future opportunities so that they can earn their own living. In 2011, BRAC launched a pilot project named “Rehabilitation, Repatriation, Re-Integration and Re-Migration” aiming at smooth re-absorption of Libya-returnees into the economy. The local NGO worked round the clock for more than a week at Shahjalal International Airport providing emergency relief support to Libya-returnees. The NGO had done so at the request of the government and in partnership with the International Organization for Migration. It had also deployed Bengali-speaking team from its programme in Sierra Leone to assist in coordinating the evacuation of Bangladeshi workers from Libya.⁶⁸

There has been a general lack of interest of trade unions on migrant workers. The mainstream trade union movement in Bangladesh has not considered migrant workers as one of their own constituencies. A survey of thirteen trade unions and their federating bodies reports that none of these organizations had any meaningful involvement with the migrant workers, let alone returnees. However, all the trade unions surveyed felt strongly about the undocumented migrant workers of Bangladesh.⁶⁹ Over the last few years, a section of returnee migrant workers have taken initiative to form organizations of their own. WARBE was formed in 1997. The objectives of WARBE include (i) empowering migrant workers to become an effective advocacy group in influencing policies of the government for the welfare activities of migrant workers; (ii) hold pre and post departure AIDS awareness programme; and (iii) work as an information pool on returnee migrants. WARBE organizes numerous activities including lobbying for the ratification of the U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and for more effective reintegration programs for returning migrants. On International Migrants Day, December 18, WARBE organizes rallies in support of returned migrants, including producing street dramas, etc.⁷⁰

68 2011, ‘Brac to rehabilitate Libya-returnees’, the Daily S March See at: <http://www.thedailystar.net/newDesign/news-details.php?nid=178639>

69 Siddiqui and Abrar, note 38

70 Ibid

7.2 Ranks and Migrant Workers

Bangladeshi migrant workers face innumerable problems in the host country in managing and remitting their earnings. As the bulk of the work force is not exposed to banking system before their departure for overseas, there is a general ignorance of formal banking procedure. Even those who are interested in opening accounts face problems in doing so for lack of education, confidence and meeting the bank's condition of securing an introducer. Sometime their work conditions do not allow them to access bank at regular hours. They also face problems in remitting their money. Filling up the forms properly is a major hurdle for them. Delay in transferring the money, non-availability of information about transaction, rent seeking by bank and postal department functionaries in the home country are some of the routine problems that migrant workers face.⁷¹

Little effort has been directed to address these problems and to harness the resources if migrant workers in an organized way. Some state owned commercial banks have branches in the Middle-eastern and Gulf states. Their method of banking, however, continues to be traditional and not geared to the particular needs of the migrant workers. A good number of banks have facilities under which migrant workers can open Foreign Currency accounts and enjoy certain advantages that common account holders are not entitled to. Few commercial banks have introduced bonds and term deposits targeting the wage earners, while Sonali Bank has undertaken an industrial investment project worth US\$130m. These initiatives have mainly attracted the professional category of Bangladesh work force abroad. Small savings of migrant workers are yet to be drawn in by these institutions.⁷²

In this context the experience of the Islami Bank Bangladesh Limited (IBBL) has been unique and noteworthy. In order to effectively link up with its potential clients IBBL has established contacts with different exchange houses that are used by the Bangladeshi migrant workers to remit money. Intensive campaign about the advantages of sending

71 Ibid

72 Ibid

money through official channels (income tax rebate, future investment opportunities etc.) has been a major factor behind IBBL's success in earning the confidence of the migrant workers.⁷³

IBBL has also developed client friendly forms and simplified the system of opening accounts. Under such simplified procedure even those who lack valid documentation can also open account and remit money. Efforts have been made to keep the account holder regularly informed about the status of his account and individual transaction. The bank has also facilitated opening of accounts of various groups of migrant workers: clubs, association, savings cooperatives and professional cooperatives.⁷⁴

Efforts in the host countries were matched by the bank's extension of services to areas where the migrant workers originate. In order to provide effective service branches were opened in strategic locations so that beneficiaries of migrant workers and migrant workers themselves on return can access these accounts with relative ease.⁷⁵

Government has recently set up the Probashi Kallyan Bank (PKB) in April 2011 with a view to ensuring smooth transfer of remittance, financing migration cost and providing capital support to returnee migrants and their families to help productive utilization of remittance.⁷⁶ The aggregate capital of the bank is BDT 100 million. The bank received 95% of its capital from the subscription of departing migrants; in other words from the Wage Earner's Welfare Fund. In 2011-12 fiscal years, the bank secured Tk. 21 crore as allocation for migration loan programme. In the last 8 months, the bank provided Tk. 1 crore as migration loan to 175 potential migrants at 9% interest rate. The bank also provided 18 lakhs taka to 10 small entrepreneurs from its 10 crore taka investment loan allocations. In this regard, the interest rate for commercial sector is 12% and non-commercial sector is 10%.⁷⁷

73 Ibid

74 Ibid

75 Ibid

76 Siddiqui and Billah, note 29

77 Ibid

7.3 Glimpses of Saving Schemes and Account Facilities for Migrant Workers

Non-Resident Foreign Currency Deposit (NFCD)

Migrants can have a NFCD account in any branch of Bangladeshi and foreign banks. The account can be opened for different periods: one month, three months, six months or one year in foreign currency. This account can be maintained for an indefinite period even after the return of the wage earner (migrants). One is also eligible to open an NFCD account with his/her savings within six months of one's return to Bangladesh.⁷⁸

Wage Earners' Development Bond

The remittance of Bangladeshi migrants abroad can be invested in Bangladeshi currency in five-year Wage Earners' Development Bond. The profits are investable in Bangladesh and the bonds accrue an annual interest rate of 12%.⁷⁹

Non-resident Investor's Taka Account

One can open a NITA by the money remitted for investment in the share and securities of the capital market of Bangladesh. Such an account may be opened in any dealer branch of an authorized bank. The central bank also allows investment of funds in remunerative business projects to the account holders.⁸⁰

Most of the commercial banks, nationalised and private, offer the Bangladesh Bank facilities and instruments to Bangladeshi wage earners. These include the NFCD account, Wage Earner's Welfare Bond and Non-resident Investor's Taka Account.⁸¹

US Dollar Investment Bond, 2002

The IRD of the MoF (Ministry of Finance) introduced the US Dollar Investment Bond, 2002 in t6 October 2002 as an investment instrument in foreign currency for Bangladeshi

78 Bangladesh Bank. 2012;The Central Bank of Bangladesh, Government of the People's Republic of Bangladesh, Dhaka; See at <http://www.bangladesh-bank.org>; last accessed on 5 July,2012 79 Ibid

80 Ibid

81 Ibid

emigrants.⁸² It provisions for issuing US Dollar Bond in the name of a holder of a non-resident account against remittances from abroad to the account.

The US Dollar Investment Bond(s) shall be matured for payment after completion of three years from the date of its issue. The Bond holder will be entitled to draw interest on half- yearly basis at 6.5% fixed rate per annum in US Dollar. However, the Bond holder may surrender the Bond(s) before maturity and encash the same at the paying office in which case interest will be paid as under:

- i) No interest for encashment within 1 year of issue;
- ii) 5.5% interest for encashment after completion of 1 year but within 2 years;
- iii) 6% interest for encashment after completion of 2 years but within 3years; and
- iv) 6.5% interest for encashment after completion of 3 years.

US Dollar Premium Bond, 2002

The US Dollar Premium Bond is one of recent investment instruments in foreign currency introduced for Bangladeshi emigrants by the IRJJ, MoF. It was announced in October, 2002 and became applicable from the next month.⁸³

The US Dollar Premium Bond(s) shall be matured for payment after completion of 3 years from the date of its issue. The Bond holder will be entitled to thaw interest on half- yearly basis at 7.5% fixed rate per annum in Bangladesh currency at the USD/BDT rate. However, the Bond holder may surrender the Bond(s) before maturity and encash the same at the paying office in which case interest will be paid as under:

- i) No interest for encashment within 1 year from the date of issue;

82 The US Dollar Investment Bond Rules, 2002, Internal Resources Division, Ministry of Finance, Dhaka.

83 The US Dollar Premium Bond Rules, 2002, Internal Resources Division, Ministry of Finance, Dhaka

- ii) 6.5% interest for encashment after completion of 1 year but within 2 years;
- lii) 7% interest for encashment after completion of 2 years but within 3 years; and,
- iv) 7.5% interest after completion of 3 years.

8. RECOMMENDATIONS

8.1 Short-term Strategies for Re-integration of Returnee-migrants

Awareness Campaign of Migrant Workers

Awareness campaign and information dissemination are two major contributors towards establishment of returnee migrants in the country of origin. These will facilitate the self-employment initiatives of the returnee migrant workers.⁸⁴ A continuous basis program may be adopted to implement the following activities in particular:

- i) Massawarenessraisingsforthereturneemigrantworkers and general masses including all stakeholders.
- ii) Preparation of Leaflets, Posters, Brochure, Information-booklets, etc. for awareness raising and information dissemination.
- iii) Preparation of short docudrama for TV publicity and awareness through Radio.
- iv) Counseling workshops at district level for proper utilization of remittances. Awareness may also be extended to address the health issues of the migrant welfare particularly STDs, HIV and AIDS.

Creation of Facilities

A resource center has been established in BOESL with the assistance of TOM and another resource center has been set up in BMET under a project assisted by UNIFEM which is meant for extending all sorts of cooperation and information dissemination for women migrant workers.⁸⁵

84 Islam, note 2

85 Ibid

Similar type comprehensive resource center may be established for dissemination of required information for the returned migrants to advise all sorts of assistance towards successful re integration.

ILO⁸⁶ may arrange awareness campaign and other promotional activities in relation to stimulate the conception regarding returning safe migration. Following components may specifically be addressed in these programs:

- i) Capacity building of District Employment and Manpower Offices and Probashi Kalyan Desks at DC Offices to deliver services to the returnee migrants more efficiently.
- ii) Another approach may be the introduction of services through establishment of Migrant Resource Centre both centrally at BMET and at the district level offices for returned migrants to provide all sorts of information regarding successful reintegration.⁸⁷

Skill Training Program

The issues of poverty alleviation and sustained economic growth emphasize the human capability development of the country. In the context of globalization process, it is felt necessary to develop appropriate human resources to meet the demand of international market aiming at improving effective skill and knowledge. There exists significantly excess supply of unskilled labour in the overseas employment market on the other hand there is a serious dearth of labour with specific skills. Utilization of returnee migrants may be adopted as a development strategy to use the real resources for Improvement of productivity. Skill development training is an essential approach toward improving the efficiency of the returned migrants. Its ultimate effect will result in higher level of productivity, earning of remittance and ensures better and improved standard of living.⁸⁸

Training to the returnee migrants would establish a better image of Bangladesh to create base for the potential skill

86 International Labour Office;

87 Islam, note 2

88 Ibid

re-migration. If it can be made possible to export more skilled workers instead of unskilled labour, foreign currency earning would be much more. Ensuring employment of more skilled workers, remittance can be enhanced to a great extent through their higher wages. Wages of a skilled worker is three to four times than that of an unskilled one. The need for skilled manpower both at home & abroad is increasing day by day and in the context of this ever- increasing need, vocational training activities should be expanded to face competitiveness in the world market. To create more employability, Language and soft skills of returnee migrants also need to be improved to prepare them for remigration.⁸⁹

Training may be operated in line with the National Vocational Qualification Framework (NVQF) recently developed in TVET reform project under implementation by EC-ILO. Skill training program may be operated in Technical Training Centers under BMET and also in other training institutes under the department of Youth Development. Trades of training may be selected on the basis of the choice of the returnee and their interest.⁹⁰

Loan and Micro Credit

Micro Finance Institutions (MFI5) has emerged as major actors in savings mobilization and credit disbursement at the grassroots level in Bangladesh. Their success in mobilization of savings and collateral free credit delivery system and door-to-door services through contacts at the grassroots make them potential institutions for encouraging savings and investment of remittance in Bangladesh. The major chunk of returnee migrants and their family members are interested to engage them in small business, agro-based farming like poultry, cow rearing, fish culture, improved cultivation, small transport vehicle, setting up shops, etc. Bank finance and credit facilities definitely augment their initiatives along with their own collateral and equity in investment. What they need is proper counseling in regard to appropriate

89 Ibid

89 Ibid

90 Ibid

place of investment and to attain the small entrepreneurship quality.⁹¹

Counseling Program for the Returnee Migrants

Most effective and needful service is counseling on how to invest and utilize the savings from remittances. Sometimes it is recognized that appropriate consumption strategy is much more difficult than. Improper use of remittance may compel them in unsuccessful migration and lead the returnee migrants to a worse situation on than before. Migrant workers are coming back with skill, knowledge and some savings. But without having proper guidance and information, they cannot invest the expertise and money in a productive venture. There should be program and plan aiming to contribute to provide orientation to the returnee migrant workers about all necessary information, knowledge and skills essential for the better management of their re-integration with a series of activities.⁹² It is necessary to provide various info services to the returnee migrants through various project activities.

A counseling cell may be established to provide the following services:

- i) Counseling for investment facilities.
- ii) Orientation on the entrepreneurship development.
- iii) Counseling on utilization of remittance and savings, etc.
- iv) Advice on training on new skills in demand.

Presently the services through mobile phone operators become very much popular and effective to reach the target groups. Information dissemination on different programs for the returned migrants can be facilitated through mobile phone operators, SMS call center or helpline services. It would be an automated, quick and efficient info service.⁹³

Special Efforts for the Women Migrants in Distress

Sometimes women migrant workers face a multiple forms of

91 Ibid

92 Ibid

93 Ibid

discrimination. Workplace and return to home may expose women migrant workers in the following situations:⁹⁴

- i) As a low skilled worker in an isolated work environment
- ii) Exploitation on return at home country
- iii) Gender-based violence at workplace
- iv) Problem in social reintegration
- v) Limited opportunities for investment at home
- vi) Lack of facilities in market oriented skills development for women
- vii) Less access to information, education and training than men

Concentration of employment opportunities in a few low paid and unskilled conventional jobs limits their opportunity for further overseas employment. Most of the female migrant workers are illiterate or less educated which lead them to more vulnerability of exploitation. The workers are not aware about the proper use of the remittance through savings and investment, which direct them towards similar economic conditions as previous status or sometimes worse than before. To rehabilitate and re-integrate the women migrant workers a special program may be designed in an appropriate manner for the women workers who experienced physical and psychological trauma during their stay abroad.⁹⁵

For the returnee women migrants, those faced problems in the country of workplace; assistance may be provided for reporting to police, filing complaints to BMET & special courts and liaison with law agencies. Returnee women can play a pivotal role in the development of human resources with appropriate training. It needs special emphasis to dedicate skill development of the workers. To meet the demand for skill training private sector and NGOs may be engaged in a big way in the vocational training field. The focus of world economy has been changed from the cheap unskilled labor to highly skilled and organized workforces.

94 Ibid

95 Ibid

Developing human resources through institutional and informal training should get priority. With these views, skill development training program of women workers should be strengthened and be made effective to cater to the needs of the overseas market. Specific demand may be explored for women workers in different trades other than house keeping trade for returnee migrants. Counseling program will be most suitable and necessary for female migrant returned.⁹⁶

Probashi Kalyan Bank (PKB)

PKB can be a viable approach to cooperate in the reintegration process. On 28 June 2012, Bangladesh Migrants Foundation, a migrant rights body alleged in a press conference that P grants loan of BDT 84000 in the maximum to an aspirant migrant who wishes to work in labour receiving countries situated in Middle East Asia whereas an aspirant migrant who eyes on Europe may receive a loan of BDT 120000 from PKB to finance his migration. As a matter of fact, the actual migration expense is found to be 3-4 times higher than the loan sanctioned to prospective labor migrants. Present approach of PKB is considerably maximizing propensity of prospective worker and returnees to take informal loans at high rates of interest and mortgage property to moneylenders. Thus migration expenditure is unreasonably mounting every year endangering the financial stability of prospective migrants workers and their families.⁹⁷ Not only that, PKB is yet to take effective steps with regard to economic reintegration of returnees. PKB should come up with more easily accessible credit facilities for returnees and their family members to ensure successful economic reintegration of returnees. As a specialized financial institution, this bank must forge partnerships with commercial banks and non-government organizations in processing, disbursement and recovery of loans. It can also use the extensive network of post offices in remittance transfer. Most importantly the operation of the banking should be completely automated.⁹⁸

96 Ibid

97 'Probashi Kallyan Bank theke puro khoroch deya hok', Daily Prothom Alo, 29 June, 2012 p.3

98 Siddiqi and Farah, note 36

Government should frame a policy keeping 20 per cent of total posts in Probashi Kallyan Bank reserved for the expatriate Bangladeshi.

Logistical Assistance

Logistical assistance tends to be reactive rather than proactive. It is usually only in response to a crisis on a large scale - e. g. on account of war, natural or economic disasters - or a crisis at the level of the individual migrant who has been abandoned by her/his employer or agent, who is escaping from physical or sexual harassment or threats, or who has a medical emergency not covered by the employer. Bangladesh has to develop bilateral and multilateral agreements with labour receiving countries to ensure the safe return of migrants and victims of abuse and exploitation. Labour attaches in consulates or embassies have to play an increasingly important role in negotiating for the release of undocumented workers, those in jail or stranded in embassies. In crisis or emergency situations, government has to ensure that an emergency plan is in place to cope with any sudden large-scale repatriation/deportation of migrant workers from abroad. Such plans should coordinate the efforts of various government and non-government agencies to ensure that the returnees have the necessary humanitarian, shelter, transport, monetary and other assistance needed.⁹⁹

Legal Assistance

Returning migrants often need legal assistance for a variety of reasons relating to, for example, the original recruitment process, and violations by employers, unpaid wages, illegal termination, contractual problems, violations committed by the migrants themselves, and other legal problems. Government and non-government organizations have a crucial role to play in providing such legal counselling and access to legal aid and conducting training on legal literacy, so that returnees can demand restitution for any abuse or exploitation that occurred during the migration process.

99 ILO 2003, 'Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide; Back Home; Return and Reintegration', Booklet 5, International Labour Office (ILO) Geneva, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/instructionalmaterial/wcms_116365.pdf last accessed on 10 June 2012

The government should ensure that legal aid is available for returnees who wish to take action against exploitative employers or recruitment agencies. As far as possible, the legal aid should be free - since those most in need of it are not likely to be able to afford to pay; Legal assistance should be gender-sensitive.¹⁰⁰

8.2 Long-Term Strategy

Strategies for reintegration may be adopted both in the short and long term for returnee migrants. Sustainable reintegration program for the returnee migrants needs a long term perspective plan, which is to be implemented in phases in successive projects. The implementation program will be planned on long term and short-term basis.

Some long-term programs may be adopted to encourage a sustainable return of the migrant workers. This program is to associate with phase-wise implementation starting from data collection to solutions towards economic stability.¹⁰¹

Phases may be designed as follows:

Data collection and Analysis

- i) Collection of data on return migration should be done in a systematic and comprehensive manner.
- ii) The ways through which the individual skilled migrants can most professionally utilize their skill after return should be examined.
- iii) Best practices of the returnee migrants to facilitate successful re-integration are to be studied and explored.
- iv) More information on the factors that contribute to successful re-integration should be secured.
- v) Analysis should be done on the ease and difficulty of setting up new initiatives and the socio-cultural context, particularly in terms of gender role.

100 Ibid

101 Islam, note 2

ICT Application

- i) An Internet based network of illustration of successful return should be established.
- ii) An informal network of skilled returnees who have set up business could offer a forum for idea sharing, support, advice and the provision of mentors for new returnees willing to establish business.
- iii) Links with Bangladeshi networks abroad may be promoted and supported.
- iv) Web based information about job opportunities in Bangladesh should be made available.

Institutional Support

- i) There should be national consulting services for connecting returnees to jobs or social networks to help in setting back.
- ii) Government has to explore the appropriate institutions to facilitate the reintegration of skilled migrants.
- iii) Entrepreneurship program for returnee migrant may be designed specially.
- iv) Suitable arrangement for the education of returnee migrants' children should be made.

Policy Support

- i) Appropriate re-integration assistance programs need to be introduced including financial packages, information dissemination, reintegration advice, long-term support for employment, microenterprise activities involving institutional support and business assistance.
- ii) Incentive package may be offered to the Diaspora for better achievement.
- iii) Dual citizenship may be offered to encourage productive investment.

99 ILO 2003, 'Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide; Back Home; Return and Reintegration', Booklet 5, International Labour Office (ILO) Geneva, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/instructionalmaterial/wcms_116365.pdf last accessed on 10 June 2012

- iv) Private sector entrepreneurship should be facilitated to create more opportunities for skilled returned migrants in a) IT, b) Health, c) Services sector, etc

8.3 Adopting a comprehensive project

With a view to achieving the objective of getting the end result from the migration, it is necessary to ensure economic and social re-integration of the returnee migrants. This is a profound issue in the complete migration discourse particularly for the returnee migrant workers. In this regard a project may be taken for implementation of all the relevant activities.¹⁰²

Stakeholders in migration process need to be involved in this project including government functionaries, local government bodies some relevant ministries and departments, Banks, Financial institutions, civil society and commercial corporate to make the project a success. Government and local Government bodies will facilitate the services with necessary guidance and monitoring Among other involved parties, civil society, media and press will play the lead role to maintain and uphold the motivational foundation and information base. It will disperse the cultural wave of the project to provide orientation to the target group.¹⁰³

The project may be taken to implement the following activities:

- i) Training on new skills in demand in the local market (computer training, garments machine operation, etc.)
- ii) Refresher training in some specific trades to upgrade the skills.
- iii) Entrepreneurship development training.
- iv) Community Based training (CBT) for women returnees

Community Based training is a successful project implemented by ILO with BMET addressing economic empowerment rural women. The selected women from village areas had

102 Ibid

103 Ibid

been trained in various trades in different modules, which ultimately lead them to facilitate in self-employment. This type of training program may be replicated for returnee women migrant workers for their economic reintegration. It will facilitate to provide adequate personalized support for returnee women migrants to be an entrepreneur.

CEDAW¹⁰⁴ is an international tool to ensure women rights in their overall working life. Provisions of CEDAW may also be useful in protecting the rights of migrant workers particularly in case of re-integration program.

CONCLUDING REMARKS:

The reintegration of returnee migrant workers demands development of a well-defined reintegration program with a concrete plan of action. Reintegration should be conceptualized as a process that begins in the receiving countries much before the actual return of the migrant worker. Such a program would help the migrant worker prepare for return and reintegration while still working abroad. Moreover, some manpower sending countries created very effective practices to establish sustainable re-integration of migrant workers to accrue the fruits of migration. These are Philippine, India, Sri Lanka, Pakistan, etc.¹⁰⁵ These programs can be replicated and be successfully implemented in Bangladesh with a view to promoting sustainable economic and social reintegration of returnee Migrants.

104 Convention for Elimination of all forms of Discrimination Against Women.

105 Islam, note 2

TERRORISM-A CRITICAL STUDY UNDER INTERNATIONAL LAW

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ABSTRACT

The main purpose of this paper is to address few issues which are closely related to the concept of “terrorism” i.e. how the problem of terrorism is related to the fundamental human right of self determination and how can such a problem be resolved? The issue that runs parallel to this issue is the question of legitimacy of “terrorism” on ground of self defence. Both the issue reflects the proposition of innocent terrorism i.e. assertion of right to “self determination” and “self defence” as an excuse to “terrorism”. Having this as a background the researcher furnishes following questions which he attempts to answer in this paper.

- 1. What the defences of terrorism are as recognized in International Law? Can we depart from such defence to maintain World peace and order as aimed by the International Community?*
- 2. In the backdrop of the existing problems associated with right to “Self determination” and state sovereignty, what are the probable solutions to achieve a desirable human rights situation?*
- 3. How can we prevent/ combat terrorism stemming from conflicts based on state sovereignty and right to self determination?*
- 4. How can we reconcile right to self determination with International world peace and security?*
- 5. Given the situation that states have a fundamental right to self determination and to self defense, is terrorism legitimate if it is perpetrated in self defense or in attempt to achieve self determination?*

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I. INTRODUCTION

The quest for self-determination by the national and indigenous peoples has reshaped the political structure in many countries, over the world in last few decades. Few states and many regions within states have been formed as a result of movements based on such right of self determination. Over seventy territories dominated by ethnic groups have waged war and armed conflicts for self independence at some time since 1950s². Two of these conflicts erupted since 2000 and were carried out by Albanians in Yugoslavia and Macedonia; both were results stemming from the situation of unrest and turbulence encountered by their ethnic tribes in Kosovo a few years earlier. Another conflict that was previously contained saw renewed hostilities since 2000: Igorots in the Philippines³. More than twenty two armed self determination conflicts are ongoing as of the beginning of 2003, including the Somalis in Eithiopia, Tripuras, Assamese, Kashmiris, Muslims and Scheduled tribes in India and many more. Hostilities intensified in past two years, most notably the breakdown in negotiations in the fightings in the Israeli-Palestinian conflicts. Despite instances of continued warfare, the last few years have seen a neutralizing shift in situation from warfare to serenity and reconciliation between previous conflicting nations through peaceful negotiations and settlement. In fact, more such conflicts of the past have been contained in the past two years than in other post World War II period. Nine major conflicts based on self determination were shelved in the year 2000-2002, which includes high profile conflicts involving Acehnese in Indonesia, Tamils in Sri Lanka, Tajiks in Afghanistan and Southerners and Nuba in Sudan. Another case was that of East Timor which obtained independence in the year 2002.⁴

An interesting point that one should notice in all the above discussed armed conflicts is the presence of a high degree of threat to life among people belonging to conflicting nations that frustrates the very purpose of conferring a right of self determination to nations and individuals by the international instruments. These conflicts

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2. Centre for International Development and Conflict Management, Peace and Conflict 2003, A Global Survey of Armed Conflict, Self Determination Movements and Democracy; p 26-32 [Peace and Conflict, 2003]
 3. Karen Parker on History of Self Determination (1993)
 4. Centre for International Development and Conflict Management, Peace and Conflict 2003, A Global Survey of Armed Conflict, Self Determination Movements and Democracy; p 26-32 [Peace and Conflict, 2003]

were perpetuated in the line of “terrorism” which was at times state sponsored and on few occasions non state sponsored. This draws our attention to the terror attacks in Kashmir which has its roots in implementation of the right of self determination of the people of Kashmir. There was and still is a situation of Bombing-per- day of violence which continues unabated killing millions of civilians than members of the combating groups. The struggle for self determination has galloped in a direction that is far away from civilized aspiration.

Another problem which is rather similar to this is the excuse of self defence which in most cases stems from the right to self determination or which runs parallel to situations grounded on self determination⁵. This is a case of Self Defense which is used as an excuse for “terrorism” in International Law. In the face of increasing threat of terrorism, states such as USA and Israel have resorted to retaliatory strikes against terrorist groups located in some sovereign states or as in an additional situation in case of USA, the attack was made in Sudan in anticipation to future attack by Sudan in USA. In international level though states contend that terrorist threats represent a legitimate justification for the use of force abroad, it can be argued that the use of force presents a greater threat to international order and security.

In this paper the researcher intends to discuss on the inexplicable link between terrorism and right to self determination on one hand and terrorism and self defense on the other hand without sidelining the problem of terrorism that crops up from the above pursuits of individuals or nations as the case may be and makes a further attempt to reconcile between right to “self determination” and “international peace and security” by suggesting few approaches as to how terrorism can be prevented in a nations pursuit to achieve the right to self determination.

2. SELF DETERMINATION AND TERRORISM

2.1 UNDERSTANDING THE CONCEPT OF TERRORISM

It is almost impossible to believe that a word like “terrorism”, which is usually so frequently used these days in various

5. Defining Terrorism in International Law, Ben Saul, Oxford University Press; 1999, pp.77-80

contexts either casually or in political, colloquial or in legal discussions, does not have a universally acceptable definition. Terrorism may be distinguished as state sponsored or non state sponsored terrorism and even as national or international terrorism or in many cases as falling under the laws of war or armed conflict.⁶ It is to be remembered before examining into the laws relating terrorism that terrorism has a hidden definition or a cluster of definition which might encompass a greater dimension of acts that are condemned in the international law. But to start with let us take a look at the simple elements of terrorism as defined by the Black's dictionary which defines "terrorism" as follows:-

"The use or threat of violence to intimidate or cause panic, esp. as means of affecting political conduct."⁷

Though with passage of time, different scholars have attempted to further define the term which can be clubbed into a standard definition consisting of the following elements:-

- The perpetration of violence by whatever means
- The targeting of innocent civilians;
- Any act committed with the intent to cause violence;
- With the purpose of causing fear, coercion or intimidating an enemy;
- In order to achieve some political, military, ethnic, ideological or religious goal;⁸

The above can be considered as benchmarks before declaring an act as "terrorist" act. For the purpose of this paper, all the above elements are essential to understand the concept of terrorism where the last element forms a core issue to be discussed in subsequent chapters of this paper. This element indicates acts of violence that might be resorted by individuals of a state or a state in independent capacity in order to achieve any political or ideological goal of which right to form one's own government or to take part

6. Christopher Blakesley, Terrorism, Drugs, International Law, and the Protection of Human Liberty; 1922, p.42

7. Black's Law Dictionary 1484 (7th edition) 1999

8. Ibid 2

in the political organisation of a state may find a reference. Therefore, a better understanding could be that it can be a method to achieve a political yet a fundamental right of self determination. According to many, even states response to civil disobedience has sometimes resulted into use of ‘force’. Similarly, peace time use of force by states in response to refusal to obey new state policy is considered an act of terrorism by many authors on human rights.⁹ In any definition that we come across on “terrorism” one element common to all such definition would be the act of “violence” which demands attention. On the basis of this it can be concluded that though there is no universally accepted definition of “terrorism”, the necessary benchmark to determine such an act is “violence”. On this assumption act of terrorism should be accordingly construed and understood in international politics despite the presence of innumerable controversies associated with such an understanding of terrorism that exist in the present national and international law.

This paper does not go into details of definition of “terrorism” but only attempts to examine the legitimacy of terrorism in achieving the goal of self determination. The question that needs to be addressed is: whether terrorism can be a justification at all in international politics?

The researcher addresses this question in this paper while examining the problem of “terrorism” in the light of right to self determination and self defense and its associated problems in international criminal law.

2.2 UNDERSTANDING THE CONCEPT OF SELF DETERMINATION

Self determination is a right conferred by the UN Charter upon every individual of nations to participate in the political structure of their nations and freely determine its political status and also pursue the nation’s economic, social and cultural development. This right was first authoritatively declared under Article 1(2) of the UN Charter which outlines the purpose and principle of the UN Charter which is – to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples

9. M. Cherif Bassiouni, *International Terrorism; Multilateral Conventions (1937-2001)*

and to take other appropriate measures to strengthen universal peace. This public international right is well established with the status of *jus cogens*, allowing no exceptions in public international law¹⁰. *Jus cogens* norms are the highest rules of International Law and they must be strictly obeyed at all times. Both the International Court of Justice and the Inter-American Commission on Human Rights of the Organization of American States have ruled on cases in a way that supports the view that the principle of Self Determination also has a legal status of erga omnes.¹¹ The term means ‘flowing to all’. Accordingly, erga omnes obligations of a State are owed to the international community as a whole. It is pertinent to note here that when a principle attains the status of erga omnes the entire international community is under a mandatory duty to respect it in all circumstances in their relation with each other.

The right to self determination was invoked by non self governing territories and people under the control of occupying state forces. This right was referred by the International Court of Justice as a right held by people rather than a right held by government alone.¹² The two important United Nations studies on the right to self determination set out factors of a people that give rise to possession of right to self determination: a history of independence or self rule in an identifiable territory, a distinct culture and a will and capability to regain self governance.¹³

Regrettably, this notion of self determination is often misinterpreted by many and has been reduced to a weapon of political expression. This is evident from various situations where this principle is invoked, (This paper will examine

10. Jyorri Duursma: Definition of Self Determination, International University of Monaco; 1985

11. Used in an earlier case (Barcelona Traction, Light and Power Co.(Belgium v. Spain)1970 International Court Of Justice3,32) Also used in Nicaragua case where the language of the Nicaragua Case, 1986 reflective of both a jus cogens and erga omnes duty to respect the principle of self determination. The Inter American Commission on Human Rights, Organization of American States, Press Communique no. 13/93 (May 25, 1993)

12. Western Sahara Case, 1975 International Court of Justice 12, 31.

13. Gros Espiell, op.cit. and Critescu,op.cit. at Karen Parker. Where Critescu defines “people” as denoting a social entity possessing a clear identity and its own characteristics” and implying relationship to territory.

many of such situations in particular to bring out the erroneous use of the principle) we must therefore, insist that the international community address those situations invoking the right to self-determination in the proper, legal way.

2.3 COMMAND OF DE-COLONIZATION

History adduces evidence of the application of the right to self-determination primarily in the arena of decolonization as a right to be free from European colonialism. The collapse of the USSR and Yugoslavia, as well as persistent ethno-nationalist conflicts around the world, has provoked new thinking about the right of self-determination in political theory. The situations of decolonization as called by Karen Parker can be understood by categorizing it into “Perfect decolonization” and “Imperfect decolonization”. According to him, the principle of self-determination arises in the decolonization process because in a colonial regime the people of the area are not in control of their own governance. In such situations there is an alien sovereign exercising power illegitimately. Decolonization then became a remedy to address the legal need of the suppressed to remove such illegitimate power.

Perfect Decolonization:

In a perfect de-colonization process the colonial power leaves and restores full sovereignty to the people in the territory. In these situations, the people have their own State and have full control of their contemporary affairs, with a seat in the United Nations and possess all attributes of a State in the International Law. Some decolonization that took place after the UN Charter can be viewed as “perfect” which does not necessarily mean that all States that were former colonial States have a perfect current government of that such a government in these states entirely respect human rights. However, the issue of self-determination no longer persist in such countries.¹⁴

Imperfect Decolonization

Imperfect decolonization occurs when there is an absence

14. Karen Parker on History of Self-Determination (1993)

15. Ibid

of restoration of full governance to a people having a right to self determination.¹⁵ There are several types of imperfect decolonization like situations where separate states conquered by a colonial power were amalgamated into “unitary” state which is a forced amalgamation between two or more formerly separate states. In such cases people of the separate states have different languages, ethnicities, religious beliefs and cultures. At the cessation of the colonial regime, the colonial power brings all these states under a single pool of power group essentially entrapped into the new decolonized state. In another case, these different groups may decide to continue as unitary state, but with an agreement that if it does not work out, then the various component parts would go back to their pre colonial status of independent units. This was the case of the decolonization process in Burma where the new Constitution of Burma in the year 1947 was framed following the process of decolonization having the ‘opt-out’ clause with respect to many different people of the territory occupied by Great Britain who were brought under one “unitary” rule by Britain colonial regime, which says that they would have the right to declare their reluctance to continue under the unitary rule post decolonization process which would be after a period of ten years from such commencement of the Constitution. This was a scenario of hit and trial method which did not work for Burma because when component parts seek to opt-out; the dominant power refuses as in the case of Burman decolonization process. Similar case was with that of the Moluccas arising in the area of Netherlands East Indies where Netherlands, as Great Britain amalgamated many unrelated nations and placed them under the colonially- imposed “unitary” state system under one rule.

Yet another situation of decolonization is when one State forcibly annexes a former colonial people, but the affected people, the international community or both do not recognize this as a legal annexation. This might also be akin to a case of force annexation. The international community may have even mandated certain procedures by which

16. Karen Parker on History of Self Determination (1993) through www.kmsnews.org

the effected people are given their choice regarding self-determination.¹⁶

There is yet another situation where a small component part of a colonially created “unitary” state agreed to continue under the unitary state but with no particular opt-out agreements signed.¹⁷ Rather, there were either verbal or negotiated agreements about how rights of the smaller groups would be protected in the combined state. However, such groups lose their rights over a period of years by the dominance of the unitary state and may lose the ability to protect its rights by peaceful means. This was the very peculiar case of Kashmir crisis stemming from an imperfect decolonization process in which the United Nations also got involved. The UN’s intervention in the situation of Kashmir began in the year 1947-1948 during the decolonization process of the British Empire in South Asia where Pakistan and India became the leaders which reached an agreement with the British that the people of Kashmir would decide their own nature of governance and political allegiances. The then Prime Minister Pt. Jawaharlal Nehru had gone on record publicly saying that the disposition of Kashmir people will be up to them.¹⁸ Owing to a great deal of furore in Kashmir due to outrageous revolts against the British imposed Maharaja in Kashmir, the UN addressed Kashmir violence in 1948. That year the Security Council established the United Nations Commission on India and Pakistan to act as the mediating influence and to undertake fact finding missions under article 34 of the Charter, which, in addition to the Security Council itself, adopted resolutions mandating that the final disposition of Kashmir was to be through a referendum carried under the auspices of the United Nations.¹⁹

India supported the steps taken by the Commission on the

17. Ibid

18. 3rd November 1947 radio broadcast, Mr. Nehru stated- “we have declared that the fate of Kashmir is ultimately to be decided by its people. The pledge we give not only to the people of Kashmir but to the world. We will not and cannot back out of it”. At Karen Parker- Statement on Definition of Self- Determination.

19. Security Council Resolution no. 39(1948), 47(1948), 80(1950), 91(1951) and 96(1951)

20. Resolution of the UN Commission for India and Pakistan, adopted on 5th January 1949.

question of accession of the State of Jammu & Kashmir to India or Pakistan to be decided solely through the democratic methods of free and impartial plebiscite.²⁰ However, before such plebiscite could take place, the armed forces to India seized much of Kashmir under the pretext of coming to aid the British- Maharaja who was attempting to quash the Kashmir's revolt against him. The Maharaja, in collaboration with the Indian Military succeeded in repressing Kashmiri rebels in exchange for an Instrument of Accession giving Kashmir to India. Since then India has maintained control over Kashmir and refers to Kashmir as an integral part of India. India supports this view in part because it manages elections taking place in Kashmir. However, the Security Council does not accept this view stating that such dominant and unilateral power does not constitute free exercise of the will of Kashmiri people and only a plebiscite carried under the auspices of UN shall be valid.²¹ In this context States Rapporteur Gros Espiell exclaimed: "A group of people under colonial and alien dominion is unable to express its will freely in a consultation, plebiscite or referendum organized exclusively by the colonial and alien power."²²

Regretfully, there was no plebiscite that took place and by mid 1950s the Cold War deepened and the alliances in the region fell under sphere of influence in Cold War. Today we find that the disposition of Kashmir had not been legally decided. We have failed utterly in the realization of the right to self determination of the Kashmiri people. Numerous brutal violence took place in J&K in which 5-7 lakh of Indian troops were present in the area carrying out military actions against the Kashmiri civilians and Kashmiri military forces which involved grave breach of human rights violence under the provisions regarding armed conflict under the Geneva Convention and the general laws and customs of war. Rape, disappearances, summary execution, torture and

21. Security Council Resolution no 122 of 24 January 1957. India had claimed that the Kashmiri people accepted secession to India because a Kashmiri Constituent Assembly approved it in 1956. However, the assembly was chosen by India and does not meet requirements of a Plebiscite as expressed in SC resolution 122.

22. Ibid

23. Lawrence Lifschultz: "Death of Kashmir: Perils of Self Determination"; economic and Political Weekly, Vol 37(August, 2002)pp. 3225-34 through www.jstore.org

disappearances related to the conflict are nearly every-day event in Indian-occupied Kashmir.²³

The area of Kashmir had a long history of self governance pre dating the colonial period which could also be seen in part during the British colonial period and therefore this factor forms importance in its claim for self determination and retaining such claim.

Also the mass violence in Punjab post decolonization attracts incorporation of some form of self determination in that region.

From the above scenario of conflict and unrest it can be concluded that such conflicts may be a result of amalgamation of mutually reinforcing domestic and international factors. The principle right of self determination springs from dominance by a unitary government upon the minority groups within such its territory which might be formed by a distinct race or language or one's own culture. In the light of such situation, the international community must understand the need of the post Cold War era and reconsider the doctrine of self-determination. To the present day people still suffer from the consequences of neo-colonial domination. Most of us aware of the situations outlined as in Kashmir or in Punjab or even in Sri Lanka or Tibet which brings the right to self determination in the fore front. These were situations where despite of the guarantee of the right to self determination under the UN charter and its express provision under the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights, such has yet not been realised. In such countries, there are armed conflicts where many of the states involved in attempting to militarily obliterate the peoples with the valid self determination claims, try to reduce such conflicts into "terrorism". The groups fighting for right to self determination fall into the peril of being called as terrorists. Some may call them as "freedom fighters" whereas some may call them "terrorists". This indeed forms the central subject of discourse in a part of this paper where the researcher tries to draw a connection between "self determinations" and "terrorism" specific question to address is- Whether

self determination forms a defence for terrorism? Along with examining their related problems with the most crucial being the mass violation of human rights in national and international arena. The researcher starts with the initial step by analyzing the problem of self determination in international politics thereby seeking to draw some policy conclusions in the light of various theories of self determination.

2.4 WHAT IS THE PROBLEM OF SELF-DETERMINATION IN THE INTERNATIONAL POLITICS?

The right of self determination as envisaged in the UN Charter is based on democratic and liberal values. However, the interpretation was given by the international community in a very restrictive construction which meant little more than right to be free from colonisation. It actually meant to be understood as a right to take part in political structure of the government of a nation²⁴. The UN conception of the right to self determination was closely associated with the world wide movements against colonialism and racism. This was initially referred as a principle of the UN Charter which was later on transformed as a right by the UN General Assembly Resolution granting independence to the colonial Countries and Peoples with the breakdown of the USSR and former Yugoslavia. It was therefore interpreted to be limited to emancipation from the European imperial rule and right not to be subjected to racial domination as in South Africa or an alien occupation as the situation in Palestine.²⁵ The right of self determination of peoples was linked to granting of independence to colonies with a view to convert them into nation-states.

S.Hoffman stated: “Justice itself requires that the right to national self determination be granted: for there is no more certain injustice than alien rule imposed against on people”²⁶

24. The Right to Self Determination in International politics: Michael Freeman, Review of International studies, Vol 25, No3, pp. 356, Cambridge University Press.

25. A. Cassese, ‘Self Determination in the Era of Decolonization’, Occasional Papers in International Affairs, No.9, 1964, p.87.

26. Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics (Syracuse,NY: Syracuse University Press, 1981), p.34, citing Immanuel Kant.

The very fact of this right being envisaged in UN Charter (in the very first Article) and both the International Covenants i.e. the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights makes this a very essential right for human existence, though according to few this might contain an unclear interpretation. According to Hector Gros Espiell “The effective exercise of a people’s right to self determination is an essential condition for gaining existence of the other human rights and freedoms.”²⁷ Few assert that this right is the most important among all other human rights.²⁸ However, as emphasized by U. Thant, the concept of self determination was not properly understood. He suggested that what was less certain is what is that was not understood. Until recently, there was an understanding among the UN elites that it should not be literally understood as right of peoples to self determination as the literal definition was not intended by the makers of the UN Charter.²⁹ At the same time one should bear in mind that UN applied inconsistent application for self determination, as in case of right of the Tibetans to self determination was not recognized though they were eligible for such recognition except that their alien rulers were not European. Yugoslavia however clearly brought out the flaws in the conception of self determination. The first Western reaction was to reaffirm the territorial integrity of the Yugoslavia state which implied people of Yugoslavia had their right to their own governance. This was followed by Germany who led the European Union into the recognition of Slovenia, Croatia and Bosnia. The recognition of former Yugoslavia Republic of Macedonia was held by the Greek objections, even though Macedonia was deemed to have met EU criteria, whereas Croatia has not.³⁰ Here the point not to be missed out is that the very restrictive interpretation of right to self determination recognizing the principle of

27. Gros wrote on *The Right of Self Determination: Implementation of United Nations Resolutions* (New York: UN, 1980), para.59

28. E. Aveybury, ‘A Positive Legal Duty: The Liberation of the People of East Timor’, in D. Clark and R. Williamson(eds), *Self Determination: International Perspective* (Basingstoke1922), p. 221

29. Emerson on Right to Self Dtermination

30. *The Right to Self Determination in International politics: Michael Freeman*, Review of *International studies*, Vol 25, No3, pp. 359, Cambridge University Press.

territorial integrity and extreme caution in interpretation of the former right no doubt justified by the values of peace and international order, nevertheless, the priority given to territorial integrity over self determination by the United Nations, left ethnic and national minorities vulnerable to various threats in the newly recognized states where serious violation of human rights through practice of 'ethnic cleansing' and general massive persecution seems to take place giving rise to serious local and international ethno-nationalist conflicts out of which 'terrorism' becomes very common.

Therefore, it is now felt that clear conception of self determination be understood among all the nations through the international instruments which incites peace and harmony among nations and by suppressing havoc and unrest within nations. This can be achieved when one understands the various theories of self determination in the international level.

There are six theories of self determination as contemplated by Michael Freeman which are based on liberal- democratic values because as Freeman maintains that the liberal principles of human rights and the democratic idea of popular sovereignty are foundations of official ideology of the international community. Following are the theories as suggested by Freeman.

Liberal theory- Classical liberal theory is more concerned with the protection of the rights of individuals where government of a nation is under an obligation to guarantee protection and in occasion of failure of such guarantee, individuals have the right to resist and secede, the sole reason being the fact that the theory is premised on the rights of individuals where national self determination is a weapon to protect the fundamental rights of individuals.³¹

Democratic theory- Liberal theory is grounded on individual values like individual autonomy whereas democratic theory is based on democratic power where power is located in the people rather than in elite. It limits the power of the

31. Michael Freeman, Theories of self determination.

government whether they are democratic or not and on the other hand democratic theory places power in the people whether they are liberal or not. Former lays focus on individuals and later on the people where the popular will does not necessarily respect individual rights.

Communitarian theory- This theory argues that people are born in their nation and it forms part of their identity.³² According to this theory, if there is a right to self determination, it must be a communal right where political power should also be entrusted upon racial or ethnic groups residing within a state. This is primarily to protect their culture within the territory they reside in.

Realist theory- By realist theory, Freeman means something similar to theories that are normally called 'realist' in academic order of international relations where he refers two properties: first, they endorse concept of national right of self determination that could be permitted by the power holders and secondly, accordingly priority is given to stability to existing state status. Here, he also clarifies that the concept of self determination should balance between territorial integrity and aspirations of aggrieved people or nations and that there should be international organizations to settle self determination disputes in accordance with the rule of law and not by rule of force.³³

Cosmopolitan theory- Miller in his book on nationality, contrasts nationality with cosmopolitanism which he treats as shallow culture eclecticism.³⁴ His theory of self determination in itself has a cosmopolitan dimension, since it treats the right to self determination as a universal right. Freeman maintains that the basic principle of cosmopolitan theory can be found in Article 1 of the Universal Declaration of Human Rights which states: All human beings are born free and equal in

32. Raz, *The Morality of Freedom*, pp-207-9 at *The Right to Self Determination in International politics*: Michael Freeman, *Review of International studies*, Vol 25, No3, pp. 363, Cambridge University Press.

33. *ibid*

34. Miller, *On Nationality*, p 186.

35. M.C. Nussbaum and A. Sen (eds), *The Quality of Life* (Oxford: Clarendon Press, 1993); O'Neill, 'Justice and Boundaries', in C. Brown(ed), *Political Restructuring in Europe: Ethical Perspectives* (London Routledge, 1994), Gewirth, *The Community of Rights*.

dignity and rights. From this it can be inferred that human beings national identity and state borders is irrelevant for their entitlement to their necessary conditions of good life.³⁵ Therefore, according to this theory self determination is conferred on all individuals.

Cosmopolitan Realism theory- As observed by Freeman, it is a combination of Cosmopolitan and Realist theory where he refuses to accept that cosmopolitan is utopian and maintains that cosmopolitan is realistic. This is primarily not a theory but a balance between former and the later theory.

Analysing the theories of self determination it can be more or less suggested that self determination cannot be understood as an absolute right as rights protects interest and since interests conflict, rights can also conflict. Therefore it should be understood that such a right should strike a balance with peace and order.

2.5 SOVEREIGNTY vs. SELF DETERMINATION (WHEN EXERCISE OF THE RIGHT TO SELF DETERMINATION TRIGGERS TERRORISM)

Since 1948, over 65,000 people have been killed as a result of the government of Sri Lanka's attempt to preserve its territorial integrity and secure its sovereignty against the Tamil rebels attempt to exercise the right of self determination and establish a self governing region within Sri Lanka. Similarly, in Sudan, nearly two million people have been killed during the war of secession. Yet again, in Bosnia, 25,000 civilians were killed and over 2 million displaced in the course of campaign of genocide carried by Serbia in response to Bosnia's declaration of independence from the former Yugoslavia.³⁶ The period from 1957- 2002 there were more than 75 instances of conflict in the form of 'terrorism' based on self determination or state sovereignty.³⁷ By 2002,

36. Paul R. Williams and Francesca Jannotti Pecci;"Earned Sovereignty: Bridging the Gap between Sovereignty and Self Determination" *Stanford Journal of International Law* (2004) pp. 5-8

37. Centre for International Development and Conflict Management, *Peace and Conflict 2003, A Global Survey of Armed Conflict, Self Determination Movements and Democracy*; p 26-32 [Peace and Conflict, 2003]

38. *ibid*

only 12 of them have been resolved through military victory. The remainder were either contained with the assistance of international peacekeeping bodies or still ongoing.³⁸

One of the most important characteristics of these conflicts is that they frequently give rise to terrorism. Over one third of the Specially Designated Global Terrorists identified by the United States Department of Treasury are associated with self determination movements.³⁹ Of the increasing concern is the Globalisation of Terrorism arising from sovereignty based conflicts in terms of measures, weapons and cooperation. To take an example conflicts in Sri Lanka incited by the Tamil rebels though limited to the territories of Sri Lanka, they have their dubious accomplishments of suicide bombing that widely replicated in other conflicts.⁴⁰ Also the chronic status of Israel/ Palestine conflict fostered proliferation of dangerous Islamic groups who resort to terrorism as a means of political expression.⁴¹ Therefore such sovereignty self determination based conflict often involves the commission of massive human rights violation. For instance reports indicate that Indonesian forces seeking to suppress separatist forces in the province of Aceh have killed over five thousand civilians.⁴²

The intensity of the sovereign based conflicts and their tendency to increase worldwide terror and the lack of effective norms to combat such conflicts have given rise to a need for a new approach to resolving such conflicts by bridging the gap between state sovereignty and self determination . Such an approach can be called as “Earned Sovereignty” as rightly pointed by Paul R. Williams and Francesca Jannotti.⁴³ In seven recent peace agreements concerning sovereignty based conflicts, the parties relied on

39. www.treas.gov/office2004 on Office of Foreign Assets Control, U.S.Department of the Treasury, Specially Designated and Blocked Persons.

40. Thomas L. Friedman, Lessons from Sri Lanka, N.Y. Times, August 7, 2003, p-17.

41. ‘Self Determination, International Law and Survival on Planet Earth’, Arizona Journal of International & Comparative Law, Spring, 1994, p-2-4

42. Human Rights Watch, Indonesia: The War in Aceh (2001) available at www.hrw.org/reports/2001/aceh.

43. Paul R. Williams and Francesca Jannotti Pecci;”Earned Sovereignty: Bridging the Gap between Sovereignty and Self Determination” Stanford Journal of International Law (2004)

this approach. Such an approach is a recent approach which has been aided in its development by accelerated efforts by international organizations and powerful states to undertake global conflicts management including willingness to aid states in conflict resolution and undertake institution building in affected areas.⁴⁴

The concept of Earned Sovereignty as developed recently demands progressive devolution of sovereign power from the state to a sub state entity under international supervision. This concept naturally develops peace while addressing the issue of final political status of the sub state entity. As an emerging conflict resolution approach, earned sovereignty can be described by three characteristics viz. Shared sovereignty, institution building and determination of final status.⁴⁵

Initial state practice was confined to either sovereignty first approach or self determination first approach where either was given upper hand undermining the other whereas in recent times this new approach of a compromised state is mostly followed by states under the supervision of the international organisations to restore peace and international order within and among nation states. In order to refine the understanding of this new mechanism it's pertinent to fragment its elements and examine how it works at different levels as contemplated by Paul Williams and Jannotti.

Initial stage of Shared sovereignty- Whereby state and sub state entity may both exercise some sovereign authority and functions over a defined territory. Sometimes international institutions may also exercise sovereign authority in addition or in place of the parent state. This is primarily to monitor parties exercise parties' exercise of authority and functions.

Institution building- The second core element is institution building where the substate entity, frequently, with the assistance of international community, undertakes to construct new institutions of self government or modify

44. Samuel H. Barnes, Contribution of Democracy to Post Conflict Societies, 95 AM. J. International Law.86 (2001)

45. Earned Sovereignty: Bridging the Gap between Sovereignty and Self Determination, Paul R. Williams and Francesca Jannotti, p- 8

the existence political status in collaboration with the international institutions for exercising sovereign authority in harmony with the parent state.

Determination of final status- The eventual determination of the final status of the sub state entity and its relationship with the parent state is the final core element of the concept of earned sovereignty where the status will be determined by complete referendum. In other words it may be settled by way of an agreement between the parent state and the sub state through international mediation. This was attempted in case of Kashmir issue as already discussed. Invariably, the determination of final status is to be determined by the international community in the form of recognition.

But it has to be understood here that before determining final status of the sub state the latter has to undergo through certain optional tests like conditional sovereignty, phased sovereignty or the constrained sovereignty where international community determines the final status after supervising the practice and behaviour of such entity within the territory of the parent state for a considerable period of time.

Such Earned Sovereignty mechanism was practised by several international practices. For instance, in the issue of East Timor, UN Security Council Resolution 1272 provided for the creation of the UN Administration of East Timor after conflict resumed as a consequence of East Timor's rejection of Indonesia's proposal for autonomy within Indonesia⁴⁶. This resolution provided authority for a two and a half year period of shared sovereignty between the UN and East Timor during which East Timor was able to construct the institutions necessary for independent self government and after acquiring certain benchmark East Timor was recognized as an independent and was admitted to the UN.

Another situation which demands importance in this regard is that of independence of Kosovo where UN Security Council

46. SC Resolution 1272, UN Doc.S/Res/1272 (1999); East Timor Popular Consultation, May 5, 1999. UN SCOR, 53rd session.

47. The interim agreement for peace and self government in Kosovo, ch.2, art I, para2, available at Rambouillet Agreement.

Resolution 1244 with reference to Rambouillet Agreement, provided for the interim United Nations administration of Kosovo with security provided by a NATO- led force.⁴⁷ During this period the UN exercised authority over Kosovo requiring it to build institutions that will allow for autonomous governance for Kosovo. Gradually, as these institutions became capable to exercise their own authority, the UN entrusted sovereign authority and functions to Kosovo.

Thus this approach of Earned Sovereignty emerged as an answer to the conflicts based on sovereignty and self determination in order to resolve such long lived conflicts. As self determination movements became increasingly interlaced with global terrorist networks and as local conflicts destructed regional stability, as in the case of Kashmir, such an approach needs to be resorted to which provides a larger tool kits for resolving such conflicts. Moreover, with the emergence of a greater international human rights norm the governments compelled by public opinion is now less willing to take recourse to force to resolve such conflicts which frequently leads to greater prevention of massive human rights violations. The approach of earned sovereignty as developed in recent state practice seeks to bridge the 'sovereignty first' and 'self determination' first approaches and makes an unending effort to minimize the friction between states. In specific, earned sovereignty seeks to permit the legitimate realization of people's right to self-determination in a manner which protects the interests of the parent state and can be accomplished in a way which minimizes local and regional instability. Also, this approach may offer solutions to broader range of conflict situations beyond the regular practice of seccessation or break-up of states. Also, in this context it is pertinent to note here that the situation of Iraq is little different from other cases as Iraq as a sovereign nation has a final status which is not in question but the frequent security intervention of US military reflects an undeniable constrain on the sovereignty of Iraq but with the gradual refining and modification of the present approach of earned sovereignty we can expect a harmonised status in Iraq.

In part we have examined the various problems associated

with the right to self determination in particular, as to how this right results in threat to terrorism which frequently amounts to massive destruction of persons and property endangering world peace and stability though such right has been recognized as one of the fundamental human rights in the UN Charter and following two International Covenants. The problem lies in the interpretation of the provision and also to some extent with the demand for power by each sub territories. This also finds its roots in discrimination within nations on grounds of race, culture, language, religion and in most cases on political autonomy as in the case of serious mass extermination of life of ethnic group of the Tutsis in Rwanda which led to genocide in Rwanda or in Sudan on grounds of race. Such violations stem mostly from this cardinal right to self determination like the one in Northern Ireland, been largely internal matters although they never exist without external ties and effects. Others like the Sudan, Tamil rebellion in Sri Lanka where Tamils form a minority there along with the Sinhalese, facing racial and linguistic discrimination from the Sri Lankan government giving them an incite to rebel against the government. The sanguinary history of self-determination conflicts might by itself create for humanitarians a reasoned basis for discouraging secessionist claims as the problem starts when the sub states decide to secede from the parent state while the latter refusing to accede with such claim in order to maintain territorial integrity in the nation. Such a situation definitely could be cured by the approach of Earned Sovereignty to a greater extent. Another recourse that we can think about is that of humanitarian intervention in such armed conflicts as we can analyse in the following part of the paper.

2.6 HUMANITARIAN INTERVENTION IN SELF DETERMINATION STRUGGLE

National self determination claims draw their moral force in part from the qualified human right to association and in part from cultural rights within a national territory. Such claims are generally made by groups forming minority community facing oppression from the government of the sovereign territory in which they are a part. Such groups tend to draw pointed boundaries between themselves and the rest of the

world thereby leading a life free from oppression. In such a struggle it is desirable that international community should support non consensual secession only as a last resort to protect the human rights of an oppressed community. By the term self determination in this context it means both a full blown secessionist struggle and a case where groups seek extensive forms of autonomy within an existing state. This kind of situations call for intervention from international organization of other peace loving countries assisting in such attempt towards achieving autonomy through peaceful measures thereby justifying legitimate means to achieve legitimate ends. In this context, 'intervention' refers to direct or indirect projection of influence, across the frontiers of recognized states. Such may include dramatic action, calculated omission such as the refusal to extradite or rather a neutral stand and in extreme case of large scale violence, resort to military intervention which should be followed by extreme amount of caution and only in rarest of rare cases where no other remedies resolves problems. Such an instance of intervention was of India's invasion of East Pakistan in 1971 as a response to a massive campaign of rape and murder carried out in Pakistan's eastern half by armed force directed by ethnically distinct elite in the country's western half. It should be remembered that the UN Charter condemns such use of force and therefore such intervention was held illegal by many as it is true that use of force disturbs the territorial integrity of nations.

The question which arises in this case is- Can secession be prevented by Humanitarian Intervention?

In most cases of self determination, sub state entities yearn to secede from the parent territory to escape oppression. Under such circumstances it is essential for the international organisations to examine the veracity and the urgency of such secession. If a situation can be solved without jeopardizing the territorial integrity of a nation state through amicable settlement between the sub state/ group and the parent government such an approach should be resorted to through the medium of earned sovereignty approach and in case where secession is inevitable under given situations (as such depends upon circumstances of an individual case)

it is the obligation of the international community or under its authority, other peace loving nation state to intervene in such national matters in such a way where such intervention does not jeopardize the peace and integrity of the disturbing nation. In such case humanitarian intervention responds to the issue of conflicts specifically armed conflicts based on the right to self determination. Humanitarian intervention is an extraordinary means for the defense and promotion of human rights and so it should remain. By their nature, struggles to transform blood community into sovereign states primarily to sustain the sense of community resist such anticipation, particularly in a world already divided into sovereign states each of them increasingly occupied by plurality of communities. In such a world, respect for sovereignty, where the state reasonably accommodates the interests of diverse peoples, is the optimal norm for maintaining areas where human rights of individuals lives in which bridges the gap between communities and further fosters the harmony between various communities.⁴⁸ Therefore, the question of secession has to be carefully examined and should be allowed only where a dire necessity arises but in such case it should also be assured that such step of secession does not endanger internal peace and order.

The second question that needs to be addressed is- Given that states have fundamental right to self determination, is terrorism legitimate if it is perpetrated in an attempt to achieve such right to self determination?

In our pursuit to prevent terrorism while recognizing and protecting the right to self-determination it is essential to realize that our ends should justify the means. That is to say that no state can take recourse to terrorist act as a means to achieve the final goal of the right to self determination. The means to achieve such a goal should be therefore legal and terrorist act in the form of using military force cannot be an answer to achieve the goal of the right to self determination. One of the biggest disadvantages in the arena of International Criminal Law is that lack of a universally accepted definition

48. "The Ethics of Intervention", Human Rights Quarterly, Tom J. Farer, The Johns Hopkins University Press, vol 25, p. 406

of "Terrorism" which condemns such a phenomena as a crime in international law. Though few enjoys the fruits of such lacuna, the question here arise is- Is there an international legal advantage in not defining terrorism? The advantage is that such a situation encourages the denial of the non justification of terrorism. In national law a definition of "terrorism" is certainly required to prevent acts of terrorism from being judged by a national penal court as non-terrorist crimes. The protection of human rights is then better assured by national penal courts. It also avoids misuse of political rights by states hit by terrorist acts. It brings back the old legal principle of the middle ages i.e. "*nullum crimen sine lege*" and "*nullum poena sine lege praevia*" which means there should be no crime without law and no penalty without criminal law first. But the flip side is that most of the cases of rights exercised under the name of self determination take recourse to acts of terrorism by various groups in quest of power. In most cases the activists give such acts a name of political offence though in such cases they use armed force and escapes punitive measures, therefore it is desirable to have a universal definition of terrorism in the international and the national level to prevent such act from being committed by political, racial, ethnic or any religious group.

The UN member states should also take effective control of the respect of international human rights in order to combat terrorism. Terrorist groups should respect international human rights as well. This would further the political, religious and ideological purposes which they expect the states that are object to terrorism, to respect. As long as terrorist cannot claim successfully the right to self determination, human rights are the only public international legal right that can be claimed by these terrorists. By respecting international human rights, terrorist groups can stop the international, legal and often military defences which states are obliged to realize in order to stop criminal acts of terrorism and in order to realize their own human rights objectives. A two part definition of terrorism is then advisable in public international law because it better shows the international difference between the international legal reasons for

combating terrorism and human right of terrorists in the world that have to be maintained for terrorists during the international combat of terrorism. But it is also essential to realise that the very hurdle to overcome in an attempt to arrive at a universally accepted definition is the necessity to resolve the underlying paradox. The phenomena of terrorism stems from various conflicting political beliefs. When states have a fundamental right to self determination, terrorism become legal for them. Therefore, it is also the obligation of the UN instrumentalities to re frame a precise definition of self determination keeping in mind the aftermath of attempts to realize such right considering the present scenario in mind which does not make way to develop terrorism and such an attempt can be considered another way to prevent terrorism.

Therefore, terrorism cannot be considered legitimate rather it is the duty of the international organisation in collaboration with all the State parties to make countless efforts to combat terrorism and this could be accomplished by taking an initial step which could be to frame a universally accepted definition for “terrorism” thereby declaring such an act a crime per se in the arena of International Criminal Law and thus per se illegal.

3. TERRORISM AND SELF DEFENSE

The link between terrorism and self-defense is premised on a single question i.e. given the states have a fundamental right to self defense, is terrorism legitimate if it is committed in self defence?

The entire debate on terrorism and self defence is rounded on the above question which needs to be addressed scrupulously. Such a situation can be better understood in the light of the instance that broke out in Nairobi and Dar Salaam when two bombs ripped out the American Embassy there, thereby killing 224 people and injuring more than 5000 civilians⁴⁹. Based on information furnished by the National Security Council, United States of America identified Osama bin Laden as the mastermind behind the said attack and following the previous bombing, on August 20, 1998, the USA launched cruise missiles into two countries viz. Sudan

49. “Defending against terrorism: Legal Analysis”; Leah M. Campbell; Tulane Law Review, February 2000,p. 5

50. Ibid.

and Afghanistan causing severe damages to both the countries.⁵⁰ In the given situation it can be clearly stated that the unilateral use of force by USA is a complete violation of conventional and customary international law as enumerated in the UN Charter as such action is against the territorial integrity of a nation (this being one of the cardinal principle of the UN Charter). This situation focuses on the legality of the USA's action under international law concepts of permissible uses of force.

It is pertinent to note here that the sole justification for use of force against any nation as recognized by the International law is "self defense", considering the general rule of prohibition of the use of force in international law. And also that only on fulfilment of two elements of self defense can the excuse of self defense be permissible viz. Necessity and Proportionality. In the above situation we need to understand the crucial interlace between terrorism and self defense i.e. there might be situations where certain acts of terrorism incites a nation (attacked by terrorist acts) to retaliate back through authoritative use of force. In such situation the question presented by the threat of terrorism in general, and the actions of the USA in particular, is whether concept of self defense has been expanded to include anticipatory and retaliatory attacks against non state actors in a neutral state and the actor state in their own territory respectively?

It is necessary to realise in this regard is the problem of terrorism which also includes the consequences that is associated with such acts. As a matter of public International Law, terrorism presents several problems: the identification of terrorist is often difficult; the legal system fails to deter terrorist operations; and the complicated cross border nature of terrorist network makes it difficult to effectively diminish the threat.⁵¹ In face of these problems, states targeted by terrorists have essentially two options- they may capture the terrorists and prosecute them under the domestic law if the terrorist is residing in the local territory and if located outside the state borders, retaliatory strikes may be initiated in neutral territory. Therefore, in the above situation the retaliatory action taken by USA against Afghanistan can be to some extent justifiable under the convention and customary international law but the serious question from the point of human rights logic is

51. "Defending against terrorism: Legal Analysis"; Leah M. Campbell; Tulane Law Review, February 2000,p. 5

that- Can such act solve the problem of USA? Can USA restore back the lost peace and solidarity by initiating a retaliatory strike against Afghanistan or Sudan?

The answer would be a bold and categorical 'No' because such a resort have never restored and can never restore peace between two conflicting nations. Therefore, in the above case, though force is warranted on the "just war" doctrine, the underlying goal of the UN Charter of "International Peace and Security" gets diluted by frequent use of force by nations relying on the subsequent guarantee of Article 51 of the UN Charter.⁵² Also if one desires to rely on the said Article it would be advisable to concentrate more on the language of the article in entirety without leaving the impediment made by the role of Security Council which has a better capacity to restore peace in such situation of terrorist attacks by making good the loss already caused.

Keeping these aspects in mind it can be very well argued that the retaliatory attacks made by the USA against Afghanistan and Sudan are not justifiable on following grounds:

The elements of self defense viz. Necessity and Proportionality has not been fulfilled. The reason being that a situation of necessity arises only when there is failure to resolve disputes through peaceful means. In the above case no such attempt was made by either of the parties therefore, such reprisal actions violate the basic principles of the UN Charter. Secondly, the retaliatory actions taken against Afghanistan was not proportional to the damage caused by the latter's attack on the former. Also it is very important to observe that the attack against Sudan who was a non state actor was only in apprehension of later attack by Sudan on USA which makes such attacks by USA labelled as terrorist attacks on Sudan. Therefore; such acts are always condemnable under the International law.

It is important to realize that 'self-defense' is a right given to states and individuals and not might. Therefore, in the name of self defense no state shall be given the liberty to make retaliatory strikes at other states. This will further propel the fear of terrorism at a larger scale than combating terrorism. Therefore, recognized

52. Nothing in the present charter shall impair the inherent right of individual self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

codes of conduct should be resolved by states in order to safeguard state sovereignty rather than terrorist and retaliatory attacks. Hence, regardless of the future efforts at combating terrorism, the USA's bombing of two sovereign nations was a prima facie violation of international law and with this it can be concluded that the terrorism cannot in any case be considered legitimate even if committed in self defence. Therefore, in order to maintain integrity of the international "Rule of Law" in the world, the United States must endeavour to remain within legal bounds.

4. CONCLUSION

From the analysis made in the paper it is clear that "terrorism" is inexplicably intertwined with the concept of "self determination" and "self defense" which are internationally recognized as human rights of individuals and states collectively. However, "terrorism" is condemned internationally on reason of causing massive destruction to life of a large number of population and property thereby threatening international peace and security.

The question raised in the beginning of this paper as to the legitimacy of "terrorism" if committed in pursuit of the right to self determination and self defense, is already answered in negative whereby the reasons are meticulously explained by the researcher. The problem of terrorism stemming from conflicts based on self determination and self defense is unending which can be expected to get resolve only by framing a universally accepted definition by the international instruments and thereby constituting it as a crime under the Statute of International Criminal Court (i.e. the Rome Statute) as it is the only universal criminal law statute recognized, which shall there by remove the paradoxical nature of the concept. Judges should also understand the sensitive nature of prioritizing two conflicting rights of equal importance against armed attack in order to create climate for safe shelter. In this regard it is entirely accurate to concede that there is no justification for terrorism and not defensive to argue that terrorism needs to be viewed from a political context weighing the 'motive' of the actors and the sociological context under which the actors act. Such consideration is very much essential to differentiate the various causes for terrorism. This is applicable to both state sponsored terrorism and non state sponsored terrorism. Such an approach would legitimise acts of terrorists by claiming that ends

justify the means though such an approach is not acceptable by the principle of the Rule of Law. All these factors will be helpful to construe a universal definition of terrorism under the International Criminal Law by subsuming all the factors including the elements of 'actus reus' and the 'mens rea' though in this case motive plays an insignificant role, and there by eradicating the confusion that exists in the quarters of International Criminal Law.

In the light of the above analysis it is appropriate to accept the concept of "Earned Sovereignty" and non force "Humanitarian Intervention" as the only solution available to prevent and combat terrorism nationally and internationally.

PROPRIETY AND LEGALITY OF HIDDEN OR FORCED STING OPERATION AS EVIDENCE - A NECESSARY EVIL!

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The expression 'Sting operation' seems to have emerged from the title of a popular movie called the "Sting" which was screened sometime in the year 1973. The movie was based on a somewhat complicated plot hatched by two persons to trick a third person in to committing a crime. Being essentially a deceptive operation, though designed to nab a criminal, a sting operation raised certain moral and ethical questions. The victim who is otherwise innocent, is lured into committing a crime on the assurance of absolute secrecy and confidentiality of circumstances raising the potential question as to how such a victim can be held responsible for the crime which he would not have committed but for the enticement. Another issue that arises from such operation is the fact that the means deployed to establish the commission of the crime itself involves a culpable act.¹

Use of sting operation in evidence obtained unauthorisedly without consent or the knowledge of the stung person has been debatable due to the fact that;

First, it affects the privacy under Art. 21 and impose unreasonable restriction on freedom of speech under Art. 19 (1) (a) of the Constitution of India.

Secondly, it may provide state enforcing agencies to invoke secret devices to catch the criminals by way of entrapment which itself is dubious product unacceptable in Law of evidence.

In **R.K. Anand Vs. Registrar, Delhi High Court**² Supreme Court appears to have taken more progressive trend of admissibility of sting operation as a mechanism to expose the corruption of some underneath dealings in judicial trials. Basic legitimacy of the sting operation and sting programme telecast by N.T. T.V. Channel was upheld because it revealed the collusion between prosecution

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1. Rajat Prasad V. C.B.I 2014 (5) Scale 574: 2014 AIR (SCW) 3116. 2014 (7) JT 206; 2014 (6) SCC 495.
 2. 2009 (8) SCC 106

lawyer I.U. Khan and defence lawyer R.K. Anand for diluting the case of Sanjeev Nanda. Sanjeeva Nanda a business typhoon was the person who crushed his car on six steeping roadsiders in state of drunkenness.

The prosecution and defence lawyer connived with the alone witness Kulkarni who, after giving initial statements before police under section 162 of code of Crimianal Procedure and before Magistrate under section 164 turned hostile subsequently during tiral.

The three persons I.U. Khan the prosecution lawyer, R.K. Anand the defence lawyer and Sunil Kulkarni the prosecution witness were seen together in a car talking in terms of changing his earlier version of statement by Kulkarni in lieu of 1.5 crore rupees. Subsequently, Sunil Kulkarni had refused to identify the Sanjeeva Nanda as driver of the car while in earlier statements before investigating officer and Magistrate he had clearly stated for the identification of Sanjeev Nanda driving the car and stepping him down from the seat of car.

In this case the court did not condemn the sting program telecast as a piece of media trial. Programe anchored by Poonal Agrawal of ND T.V. and Barkha Singh respectively in two installments showing that some people were trying to subvert the BMW trial and state of criminal administration of justice in this country. Nothing in the programe suggested that accused in BMW case was guilty or innocent .The programe did not relate to the accused but mainly about two lawyers representing two sides.

What was shown was proved to be substantially true and accurately programmed thus not tended to influence the proceedings in BMW trial. The larger public interest served by it was so important that the little risk should not be allowed to stand in its way.³

3. Pronouncement for the test of credibility of video tapes in this case, for admission in evidence was influenced by the decision of the U.S. Court of Appeal of the State of North Carolina in case of State of **North Carolina V. Michael Odell Sibley** which itself referred the earlier decision of same court on **State V. Cannon 92 NC App. 246**. In both the cases the conditions land own for admissibility of videotape was:-

1. Testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purpose).
2. Proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape.
3. Testimony that the photographs introduced at trial were the same as those (the witness) had inspected immediately after processing (substantive purpose).

But judicial opinion as regards sting operation by enforcing agencies is still highly restrictive as courts are fearful of opening of Pandana's Box and hurting the right to privacy.

Evidence of sting operation in U.S.A. is recognized but not in India. Even in U.S.A. where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between the trap for the unwary innocent and the trap for run away and those criminal who are predisposed to crime and there is no other alternative to catch them.⁴

In USA, thus, sting into that situation is approved where government agents merely afford opportunities or facilities for the commission of the offence but censure "the situation where the crime is the product of the creative activity" of law enforcement officials. In the latter type of cases only the defence of the entrapment beyond reasonable doubt is recognised as a valid defence in the USA. If properly founded such a defence could defeat the prosecution.⁵

In **Keith Jacobson V United States**⁶ decided on 6th April 1992 by U.S. Supreme Court deprecating the entrapped sting, "that in their zeal to enforce law, law protectors must not originate a criminate design, implant in an innocent person's mind a disposition to commit a criminal act, and then induce the commission of the crime so that the government may prosecute, where government or their agents induce an individual to break the law and defence of entrapment is at issue, the establishing and answering by reasonable doubt that the defendant was predisposed to commit the criminal act prior to first being approached by Government agents". The Court further declared that law "enforcement officials go too far when they implant in the mind of an innocent person a disposition to commit an offence and induce its commission in order that they may prosecute". The Court held in very unambiguous terms that the Government should not play on the weakness of innocent party and beguile the party into committing a crime which the

4. Testimony that the videotape had not been edited and that the picture fairly and accurately recorded the actual appearance of the area photographed.

4. In *Sherman Vs. United State* (356 US 359 (1958))

5. *Saroell Vs. United States* (287 US 435 (1932))

6. 503 US 540

party otherwise would not have attempted. While artifice and stratagem may be employed to catch those who are engaged in criminal enterprises, there would be a need to prove that the person in question had a predisposition to commit the said criminal act prior to being approached by the enforcement agencies. The Government must not punish an individual for an alleged offence which is the produce because of the creative activity of its own officials.

In **R.V. Mack**⁷ it has been observed by Canadian Supreme court that illegality of entrapment occurs when

- (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bonafide inquiry and,
- (b) although having such a reasonable suspicions or acting in the course of a bonafide inquiry, they go beyond providing an opportunity and in doing the commission of an offence.

The Supreme Court of Canada illustrated following factors to test the acceptability of evidence of sting:-

- (1) The type of crime being under investigation and the availability of other techniques for the police detection of its commission;
- (2) Whether an average person with both strengths and weaknesses in the position of the accused would be induced into the commission of a crime;
- (3) The persistent and number of attempts made by the police before the accused agreed to committing the offence.
- (4) The type of inducement used by police including deceit, artifice, fraud, trickery or reward;
- (5) The timing of the police conduct in particular whether the police have instigated the offence or become involved in ongoing criminal activity.
- (6) Whether the police conduct involves an exploitation of human characteristics such as emotions or compassion, sympathy and friendship;

7. (1988) 2) SCR 903

- (7) Whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- (8) The proportionality between the police involvement as corrupted to the accused, including an assessment of the degree has caused or risked by the police as compared to the accused and the commission of any illegal acts by the police themselves;
- (9) The existence of any threats implied or express made to the accused by the police or their agents;
- (10) Whether the police conduct is directed at undermining other constitutional values.

In **R.V. Loosely**⁸ British House of Lord has shown a tougher judicial opinion. It has declared that:-

- 1) “A prosecution founded on entrapment would be an abuse of Courts’ process. The court will not permit the prosecutorial arm of the State to behave this way”.
- 2) Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and hence, to sentence as distinct from conviction. Entrapment goes to the propriety of their being a prosecution at all for the relevant offence, having regard to the State’s enrolment in the circumstances in which it was committed.

Earlier in **R V. Sang**⁹, where House of Lords observed, “The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence”.

Indian law regarding evidentiary value of sting operation is still in a flux. Sting operation conducted by the law enforcement agencies themselves have not been recognised as absolute principles of crime detection and proof of criminal acts. Such operations by enforcement agencies are yet to be experimented and tested in

8. (2001) UKHL 53)

9. (1980) AC 402

India and legal acceptance of those by our legal system is yet to be answered **Rajat Prasad V. C.B.I.**¹⁰ Nonetheless, private sting or media sting is being recognized by courts but criminal liability of individuals operating sting is still unclear. However, in case of **Court on its own motion V. State (Delhi)**.¹¹ The Delhi High Court observed: While trial by media ought to be deprecated, in the event any person feels victimized or unfairly treated by media, he may always free to invoke the proceedings for deformation or injunction. But the Court doubted an strict liability. Moreover, Court's observation about remedy sought to be the aggrieved was confined to the media trial and not in general sting hurting the person or privacy rights of the victim of a forced sting or sting made out without knowledge of the stinged.

As far as sting operation by T.V. Channels is concerned, it has been approved and even appreciated by Supreme Court as an independent crime exposure mechanism in the case of **R.K. Anand Vs. Registrar Delhi High Court**¹² and **Raja Ram Pal Vs. Hon'ble Speaker Lok Sabha**.¹³

In **Raja Ram Pal's** case A private T.V. Channel Aaj Tak had telecast a programme on 12th December, 2005 depicting 10MPS of Lok Sabha and one of Rajya Sabha accepting money, directly or through middlemen, as consideration for raising certain questions in the House or for otherwise speaking certain causes for those offering the lucre. This led to extensive publicity in media. Presiding officers of each Houses of Parliament instituted inquires through separate committees.

On the basis of the report of the Inquiry committees all the 11 Members from Lok Sabha and Rajya Sabha were expelled from their respective Houses and the Supreme Court affirmed the expulsion on the basis of credibility of sting operations and the genuine cause for exposure of corruption.

The expulsion of members after inquiry and approval by Supreme Court on the basis of evidence of sting operation made by the Aaj Tak T.V. Channel goes to give a clear hint of acceptability of evidence of sting operation conducted by T.V. channels for public

10. 2014 (5) Scale 574; 2014 AIR (SCW) 3116; 2014 (7) JT 206; 2014 (6) SCC 495.

11. 2009 (5) R.C.R. (Criminal) 652; 2009 Cri LJ 677; 2008 (05) DRJ 557.

12. 2009 (8) SCC 106

13. (2007 (2) JT 1; 2007 (3) SCC 184; 2007 (1) Scale 241)

purpose or the exposure of corruption on the part of govt. officials, ministers and legislatures.

But, since sting operation on one hand breaches the inviolability of privacy and on other hand susceptible to spoil the image of an honest and innocent person, if done by way of fabrication it can't be licensed in flat manner. Judgment of Delhi High Court in case of **Court on its own motion Vs. State Delhi**¹⁴ is a test illustration on the point. A news item was reported in daily News paper of Times of India dated 7 September, 2007 in respect of a sting operation relating to one Mrs. Uma Khurana. Prior to the said date, Live India, a Television News Channel aired a programme on 30th August, 2007 regarding the above said sting operation conducted by it showing Mrs. Uma Khurana a teacher with a Delhi Government school, purportedly forcing a girl student in prostitution. Subsequent to the said telecast aghast at the said act of the teacher a crowd gathered at the school gate and started raising slogans demanding handing over of Mr. Khurana to them. In the Communication and mayhem that followed some persons physically attacked Mrs. Uma Khurana and even tore her clothes. Shocked by the aforesaid incident and subsequent to public outcry the Directorate of Educational Govt. of Delhi first suspended Mrs. Khurana and later dismissed her from service, in exercise of special powers vested in the govt. Police also sprung in to action and started investigation. Later the aforementioned News was published in Hindustan Times which indicated that there was something more to the whole sting operation than what met to the eyes. In the aforesaid news it was stated that the girl who had been shown as a student who was allegedly being forced into prostitution by Mr. Uma Khurana was neither a school girl nor a prostitute but a budding journalist eager to make a name in the media world. Taking in to account gravity of the situation Delhi High Court took suo moto cognizance of the matter.

After investigation in police report evidence was not found against Mrs. Uma Khurana and whole story was false. The sting operation used against an innocent lady teacher damaged her reputation in the eyes of public and even her modesty was outraged in the sense that she was manhandled and her clothes were torn by some people.

14. 2008 (2) A.D. Delhi 1; 2008 (1) CCR 132; 2008 (146) DLT 429

Delhi High Court expressing grave concern about such incident and to ensure that sting operation might not be misused many guidelines to avoid its misuse.

Influenced by the judicial view point of U.S. Supreme Court delivered in Keith Delhi High Court declared:-

Firstly, There is no doubt and there is no second opinion that “Truth” is required to be shown to the public in public interest and the same can be shown whether in the nature of sting operation or otherwise but what we feel is that entrapment of any person should not be resorted to and should not be permitted.

Secondly, Giving inducement to a person to commit an offence, which is otherwise not likely and inclined to commit, so as to make the part of the sting operation is deplorable and must be deprecated by all concerned including the media. Sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.

Thirdly, the duty of the press as the fourth pillar of democracy is immense. It has great power and with it comes increasing amount of responsibility. No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with ugly underbelly of the Society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise he is not known and likely to commit. In such cases there is no predisposition. If one were to look into our mythology even a sage like Vishwamitra succumbed to the enchantment of “Maneka”.

Fourthly, It would be stating the obvious that the media is not to test the individuals by putting them though what one might call the “inducement test” and portray it as a scoop that has uncovered a hidden or concealed truth. In such cases the individual may as well claim that the person offering inducement is equally guilty and party to the crime, that he/

she is being accused of this would infringe upon individuals to privacy.

The Court cautioning the media to make sting in self restrained manner made following observations:-

- 1) Truth is required to be shown to the public in general interest and the same can be shown whether in the nature of sting operation or otherwise but entrapment of any person should not be resorted to and should not be permitted.
- 2) No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with ugly underbelly of the society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise is not known and likely to commit.
- 3) The press council of India should also examine and can take initiative in this regard.
- 4) There must be concurrent record in writing of the various stages of sting operation. While the transcript of the recordings may be edited, the films and tapes themselves should not be edited. Both edited and unedited tapes to be produced before a three members committee to be constituted by the Ministry of Information of Broadcasting. The committee will be headed by a retired High Court Judge to be appointed by the Government in consultation with the High Court and two members, one of which should be a person not below the rank secretary and another member to be not below the level of Additional Commissioner of the police. Before sting operation the permission must necessarily to be obtained by the said committee. The permission to telecast the sting operation will be granted by the committee after satisfying itself that it is in public interest to telecast the same. The safeguard is necessary since those who sought sting operation themselves commit the offences of impress ovation, criminal trespass under false pretence and making a person commits an offence.
- 5) The Chief Editor of the channel shall be made responsible for self regulation and ensure that the programmes are consistent with the Rules under?.....and complying with all

legal and administrative requirements under various statutes in respect of content broadcast on channel.

- 6) Broadcasters/Media shall observe general community standards of decency and civility in news content, taking particular care to protect the interest and sensitivities of children and general family viewing.
- 7) News should be reported with due accuracy which requires the verification (to the fullest extent possible) and presentation of all facts that are necessary to understand a particular event or issue.
- 8) Infringement of privacy is a sensitive issue and, therefore, greater degree of responsibility should be exercised by the channels while telecasting any such programmes, as may be breaching privacy of individuals.

Channels must not use materials relating to person's personal or private affairs or which invade the individuals' privacy unless there is identifiable larger public interest reasons for the material to be broadcast or published.

But unless specific civil or criminal liability is fixed on sting broadcast by legislation, these guidelines are more in the nature of judicial teachings and preaching and without any strictly enforceable sanction.

In **Rajat Prasad Vs. CBI**¹⁵ case Supreme Court declared that:

- 1) The cause of journalism and its role and responsibility in spreading information and awareness stands it on better footing than entrapment stings conducted by enforcement agencies in India. It is only in cases where the question reasonably arises whether the sting operation had a stake in the favours that are allegedly sought in return for the bribe that the issue will require determination in the course of a full judged trial. then only the sting operation or channel may have to face the trial for conspiracy under section 120B of IPC.
- 2) Not only a journalist even a citizen performs sting operation who has no connection with the favour that is allegedly

15. Rajat Prasad V. C.B.I 2014 (5) Scale 574; 2014 AIR (SCW) 3116. 2014 (7) JT 206; 2014 (6) SCC 495.

sought in exchange for the bribe, cannot be imputed with the necessary intent to commit the offence of abetment under section 12 of Prevention of corruption Act, or 2014 section 120 B IPC.¹⁶

Rajat Kumar's case, thus, permits the sting made by a disinterested journalist or person prompted by desire to expose corruption in public life without motive to seek any favour in exchange.

CONCLUSION

Thus, a few conclusions about the status of sting operation may be observed:-

- i Sting operation is covered by Art.19 (1) (a) if the private sting is made to exhibit the exposure of state of affairs which it believes to be true.
- ii Auto-visuals of sting operation may be permitted to be exhibited to the extent it does not amount to media trial and does not affect even unconsciously or sub-consciously merit of the case during pendency of trial. Moreover, Court must be pro-active and vigilant in protecting rights and reputation of individuals.

When a case is pending in court, the media may only report fairly, truly, faithfully and accurately the proceedings in the court without any semblance of bias towards one or other party. The media may also make a fair comment in pending case without violating the sub-judice rule. In the event of any person who is victimized by media, he may imitate proceedings for injunction of the report and civil or criminal proceedings for defamation in an appropriate case.

- iii A sting operation by a private person or agency is, by and large, unpalatable or unacceptable in a civilized society. A sting operation by a state actor is also unacceptable if the state actor commits an offence so that an offence by another person is detected.

16. In this case, a minister was made to accept bribe money him inducing (motive) him to do certain favour. Intention was to discredit the minister on eve of election to gain the political mileage. Offence under section 12 of Prevention of Corruption Act, 1988 and section 120B was made out against the conspirators i.e. sting operators.

- iv A State actor or a law enforcement agency may resort to hidden camera or sting operations only the criminality of a person who is already suspected of a crime.
- v The law enforcement agency must maintain the original version of the actual sting operation tampering with the original video or audio clips of sting operation may lead to a presumption of the spuriousness of the entire operation.
- vi A sting operation cannot be initiated to induce or tempt an otherwise innocent person to commit a crime or entrap him to commit a crime.
- vii Normally, if a private person or agency unilaterally conducts a sting operation, it would be violating the privacy of another person and would make itself liable for action at law.
- viii A sting operation must have the sanction of an appropriate authority. Since no such authority exists in India, and until it is set up, a sting operation by a private person or agency, ought to have the sanction of a court of competent jurisdiction which may be in a position to ensure that the legal limits are not transgressed.
- ix A crime committed by Investigative agencies or Tele board casters does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Stingers whether private or public authorities are judicially accountable for their conduct. Only public interest of urgent and emergency nature may overweigh the sting operation done clandestinely with hidden camera.

SURROGACY: HOW FAR NEW LAWS SUCCESSFUL IN COMBATING ISSUES IN REGARDS TO SURROGATE MOTHER AND THE CHILD

DR. SANTOSH KUMAR¹

MR. TUSHAR VED SAXENA

ABSTRACT

Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. Commercial surrogacy is legal in India, Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. Many infertile couples from all over the World come to India for surrogacy since commercial surrogacy is legal in India. Although this arrangement appears to be beneficial for all parties concerned, there are certain delicate issues which need to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents.

It is currently estimated to be a \$2-billion industry². Before November 2015, when the government imposed a ban, foreigners accounted for 80 per cent of surrogacy births in the country. This is because most countries, barring a few such as Russia, Ukraine and some U.S. states, do not permit commercial surrogacy. Many countries in Europe have completely prohibited surrogacy arrangements, both to protect the reproductive health of the surrogate mother as well as the future of the newborn child.

1. INTRODUCTION

The first scientifically documented test tube baby in India was born in 1986 and India legalized surrogacy in 2002.

Supreet Sidhu quoted that the next decade saw mushrooming

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1. Assistant Professor, Amity Law School II, Noida & TUSHAR VED SAXENA, Asst. Prof (Law), Amity Law School II, Noida
 2. Editorial, "why surrogacy is necessary", The Hindu, August 20, 2016

of IVF clinics in the country and India earned the tag of the ‘surrogacy capital’ of the world. In 2012, surrogacy tourism in India was valued at approximately \$500 million annually³.

Anand in Gujarat with its countless IVF clinics and ready availability of surrogates emerged as Ground Zero for Surrogacy for childless foreign couples.

The domestic factors that attributed towards the creation of a surrogacy market in India were poverty, relatively low medical costs, skilled medical personnel and laxity in laws.

Clinics charged patients between \$10,000 and \$28,000 for the complete package, including fertilization, the surrogate’s fee, and delivery of the baby at a hospital, which is believed to be just one third of the total cost for similar procedure to be carried out in UK⁴.

The procedure required to be followed by the foreign childless couple for surrogacy is fairly simple. They need to register with the Indian embassy, get documents from their doctor saying that they are unable to have a child and carry a medical visa.

Once the sanction has been obtained from the Indian Embassy, they could go ahead with the surrogacy agreement with the surrogate (invariably through a middle-man) and commence the process.

2. LEGAL ISSUES

Commercial surrogacy has been legal in India since 2002.

India is emerging as a leader in international surrogacy and a sought after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK⁵.

Surrogacy in India is relatively low cost and the legal environment

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3. Supreet Sidhu, Commercial surrogacy and lack of Regulations: comparative study, Lampert Publications, 1st edit 2007
 4. Editorial, Draft surrogacy bill violates fundamental right of people to choose modes of parenthood, The Indian Express, Aug 27, 2016
 5. DrMrsKaushalv.UOI SCC 2015BOM 8052

is favorable. In 2008, the Supreme Court of India in the Manji's case⁶ (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

Paula Gerber states that International Surrogacy involves bilateral issues, where the laws of both the nations have to be at par/uniformity else the concerns and interests of parties involved will remain unresolved and thus, giving due regard to the concerns and in order to prevent the commercialization of the Human Reproductive system, exploitation of women and the commodification⁷ of Children, the law commission has submitted its report with the relevant suggestion:

The Law Commission of India has submitted the 228th (August 2009) Report on "*NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY.*" The following observations had been made by the Law Commission: -

- (a) Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes⁸.
- (b) A surrogacy arrangement should provide for financial support

6. Baby Manji Yamada v. UNION OF INDIA & ANR. SCC 2008 SC 1656

7. Paula Gerber, Surrogacy Laws and Human Rights 194, Routledge 1st edition 2015

8. www.prsindia.com (visited on Dec 1, 2016)

for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child⁹.

- (c) A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.
- (d) One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. In case the intended parent is single, he or she should be a donor to be able to have a surrogate child. Otherwise, adoption is the way to have a child which is resorted to if biological (natural) parents and adoptive parents are different.
- (e) Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
- (f) The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- (g) Right to privacy of donor as well as surrogate mother should be protected.
- (h) Sex-selective surrogacy should be prohibited.
- (i) Cases of abortions should be governed by the Medical Termination of Pregnancy Act 1971 only.

The Report has come largely in support of the Surrogacy in India, highlighting a proper way of operating surrogacy in Indian conditions. Exploitation of the women through surrogacy is another worrying factor, which the law has to address. The Law Commission has strongly recommended against Commercial Surrogacy. However, this is a great step forward to the present situation. Legislation to come by early 2014¹⁰ with the passing of the Assisted Reproductive Technology Bill aiming to regulate the

9. Supra a

10. Available at <http://lawcommissionofindia.nic.in> (visited on Dec1, 2016)

surrogacy business is in the pipeline.

In *Jan Balaz v Union of India*¹¹, the Gujarat High Court conferred Indian citizenship on two twin babies fathered through compensated surrogacy by a German national in Anand district. The court observed: “We are primarily concerned with the rights of two newborn, innocent babies, much more than the rights of the biological parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance.” The court considered the surrogacy laws of countries like Ukraine, Japan, and the United States.

Because India does not offer dual citizenship, the children will have to convert to Overseas Citizenship of India if they also hold non-Indian citizenship.

Balaz, the petitioner, submitted before the Supreme Court that he shall be submitting his passports before the Indian Consulate in Berlin. He also agreed that a NGO in Germany shall respond back to India on the status of the children and their welfare. The Union of India responded that India shall make all attempts to have the children sent to Germany. German authorities have also agreed to reconsider the case if approached by the Indian.

In May 2010, the Balaz twins were provided the exit and entry documents that allowed them to leave India for Germany. The parents agreed to adopt them in Germany according to German rules.

3. IS SURROGACY PROFITABLE FOR ALL?

At a glance Gita Aravamudan states that, surrogacy seems like an attractive alternative as a poor surrogate mother gets very much needed money, an infertile couple gets their long-desired biologically related baby and the country earns foreign currency, but the real picture reveals the bitter truth¹². Due to lack of proper legislation, both surrogate mothers and intended parents are somehow exploited and the profit is earned by middlemen and commercial agencies. There is no transparency in the whole system, and the chance of getting involved in legal problems is there due to unpredictable

11. *Jan balazvUOI,AIR,2010Guj21*

12. Gita Aravamudan, *Baby Maker-Story of Indian Surrogacy* 89, Springer 1st 2014

regulations governing surrogacy in India.

Although in 2005, ICMR issued guidelines for accreditation, supervision, and regulation of ART clinics in India, these guidelines are repeatedly violated. Frustration of cross border childless couples is easily understandable who not only have to cope up with language barrier, but sometimes have to fight a long legal battle to get their child¹³. Even if everything goes well, they have to stay in India for 2-3 months for completion of formalities after the birth of baby. The cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage, and rights of a child. There are occasions where children are denied nationality of the country of intended parents and this results in either a long legal battle like in case of the German couple with twin surrogate children or the Israeli gay couple who had to undergo DNA testing to establish parentage or have a bleak future in orphanage for the child. There are incidences where the child given to couple after surrogacy is not genetically related to them and in turn, is disowned by the intended parent and has to spend his life in an orphanage.

If we look upon the problem of surrogate mothers, things are even worse and unethical. The poor, illiterate women of rural background are often persuaded in such deals by their spouse or middlemen for earning easy money. These women have no right on decision regarding their own body and life. In India, there is no provision of psychological screening or legal counseling, which is mandatory in USA. After recruitment by commercial agencies, these women are shifted into hostels for the whole duration of pregnancy on the pretext of taking antenatal care¹⁴. The real motive is to guard them and to avoid any social stigma of being outcast by their community. These women spend the whole tenure of pregnancy worrying about their household and children. They are allowed to go out only for antenatal visits and are allowed to meet their family only on Sundays. The worst part is that in case of unfavorable outcome of pregnancy, they are unlikely to be paid, and there is no provision of insurance or post-pregnancy medical and psychiatric support for them. Rich career women who do not want to take the trouble of carrying their own pregnancy are resorting to hiring surrogate mothers¹⁵. There are

13. Id 121

14. *Doreswamy Raju v State of Gujrat*, Sc 2004,SC 995

15. Pinki Virmani, *The perils of IVF, Surrogacy and modified babies* 188, Springer 2nd edit 2016

a number of moral and ethical issues regarding surrogacy, which has become more of a commercial racket, and there is an urgent need for framing and implementation of laws for the parents and the surrogate mother.

4. SOCIAL IMPACT OF SURROGACY IN INDIA

The laissez-faire approach to surrogacy laws in India raised questions about its impact in particular in surrogacy and the wider community. Surrogacy in India has been the subject of increasing attention by experts from a variety of disciplines, including health policy¹⁶, social work¹⁷, feminist ethnography¹⁸, and bioethics¹⁹.

The labor of bearing a child is more intimately bound up with a woman's identity than other types of labor. The work of pregnancy is long term, complex and involves an emotional and physical bonding between mother and fetus.²⁰

Commercialization of surrogacy is a contemporary legal issue, as there is a recent development in the ART technology, and thus, the proper laws regarding this issue has to be framed as it is a very sensitive issue bearing with many social, legal, moral and political implications. The 2015 bill claims for insuring the medical, social and legal rights of the surrogate mother and the genetic parents. In the projected bill various guidelines are laid down related to the procedures that the ART clinics have to follow. It includes the rights, duties, offences and the penalties the ART clinics, genetic parents, donor and the surrogate mother hold and has to follow. Also, in the last nearly 20 years have seen an exponential growth of infertility clinics that use techniques requiring handling of spermatozoa or the oocyte outside the body, or the use of a surrogate mother. As of today, anyone can open infertility or assisted reproductive technology (ART) clinic; no permission is required to do so. Therefore, it becomes essential to regulate and keep the check on the clinics, so that the services they are providing are ethical.

16. Andrea Whittaker, 'Challenges of Medical Travel to Global Regulation: A case study of Reproductive travel in Asia' 10 *Global Social Policy* 2010

17. *Ibid*

18. AdityaBharadwaj, 'The other Mother: Supplementary Wombs, Surrogate State and ARTs in India' ,*Indian Journal of Public Health* ,June 2015

19. Ethical concerns of Maternal Surrogacy and Reproductive Tourism,38 *Journal of Medical Ethics* 2012.

20. Margaret Jane Radin and Carole, *Patemanstres*,s2012

In the proposed bill, due moral, social and legal concern has been taken by the drafters, but the bill lacks on certain aspects like due compensation to the woman. In the west up to 50 per cent of the total cost goes to the surrogate mother while in India most of the money is appropriated by sperm banks, ART clinics and lawyers. The Reproductive Technology (Regulation) Bill 2008 and the amended Bill of 2014 has not touched many of the ethical and social issues related to surrogacy and the rights of a woman and a child. It particularly provides for an agreement, legally enforceable where the surrogate mother can receive monetary compensation.

Commercial surrogacy in India, dubbed as the “surrogacy capital of the world”, is projected to become a whopping US\$2.3 billion industry by 2012²¹. In India poverty rate is 32.7%, i.e. this no. of people lives below the International poverty line thus, and such high level of poverty level makes Indian citizens prone to exploitation from the western countries.

The question here arises is that if the Indian government is legalizing renting the women’s womb that why we can’t we legitimize the renting of women’s body i.e. prostitution. Or selling and buying of organs. Transplantation of Human Organ Act, 1994 has banned the sale of human organs, organ loaning, but the legalization of commercial surrogacy as per Assisted Reproductive technology Bill, 2014 is rendering the above act void.

Giving birth to a baby is not a manufacturing process rather it is the amalgamation of a very special bond which starts to develop when the fetus is in the mother’s womb.

“Surrogacy”²², means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate.

According to the ART bill 2015, estimated data of the infertility rate is 15% of the world. Total fertility rate of India is 3 per woman, whereas, the fertility rate per woman is 2 in United State. Moreover it is to be noted that the rate of infertility in India is due to the lack of proper health care facilities and not because

21. Sonia Malik, Surrogacy ethical and legal issues, Indian Journal of Community Medicine, Aug 2015

22. Black’s dictionary

of biological reasons. A country that has fertility rate of 3 per woman and the population of 1,241,491,960 is not in any need of promoting surrogacy.

5. THE SURROGACY (REGULATION) BILL, 2016

The Surrogacy (Regulation) Bill, 2016 was introduced by Minister of Health and Family Welfare, Mr. J. P. Nadda in Lok Sabha on November 21, 2016. The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple and agrees to hand over the child after the birth to the intending couple.

The Surrogacy (Regulation) Bill, 2016 proposes to regulate surrogacy in India by permitting it as an option for couples who cannot naturally have children, have a lack of other assisted reproductive technology options, are keen to have a biological child, and can find a surrogate mother among their relatives. Altruistic surrogacy, which means an arrangement without transfer of funds as inducement, is currently practised in some centres in India, though the majority of surrogacy centres use women who are paid for their services²³. The child born through surrogacy will have all the rights of a biological child. Indian infertile couples between the ages of 23-50 years (woman) and 26-55 (man) who have been married for five years and who do not have a surviving child will be eligible for surrogacy. The surrogate mother should be a close relative of the intending couple and between the ages of 25-35 years and shall act as a surrogate mother only once in her lifetime. Implementation will be through the national and State surrogacy boards. Any establishment found undertaking commercial surrogacy, abandoning the child, exploiting the surrogate mother, selling or importing a human embryo shall be punishable with imprisonment for a term not be less than 10 years and with a fine up to Rs.10 lakh. Registered surrogacy clinics will have to maintain all records for a minimum period of 25 years.

The bill manages to answer various questions like

Will surrogate arrangements be used only for infertile couples or even for same sex couple or just for the sake convenience of the couple who want the child but are not ready to bear pains for that?

23. www.prsindia.com (visited on Dec 1, 2016)

What happens when the child is born handicapped and no one wants it? Should the surrogate and the couple be unknown to each other? Should the child be told or there should be total confidentiality? What if wife's sister donates the eggs and the husband's brother donates the sperms and the fertilization in vitro is carried out and subsequently it is implanted into the wife's uterus? When after the multiple implantation the time comes to selective abortion, what criteria should be applied and which fetus is to be aborted? Will there be sex selective abortion?²⁴

6. ADOPTION V. SURROGACY²⁵

It is estimated that there are 160 to 200 million orphans worldwide. To have an idea of the enormity of the numbers compare it with the population of United States which is just 300 millions. Also, it is believed that most of the orphans, due to lack of care and affection, divert into criminal activities, which is again the problem that any society or state has to face. There are over 25 million orphans in India. 5,000 children under the age of 5 die every day in India due to preventable causes. More than 60% of women in India are chronically poor. India has the highest child malnutrition rate of the world's regions.

Indian government, instead of promoting commercialization of surrogacy, should divert its concentration towards the improved health facilities of the millions of women and children. In India, the infertility rate is estimated to be 10% in Indian women 98% have secondary sterility they have been pregnant at least once before but are unable to conceive again. Their problems are due to untreated disease, poor health care practices or malnutrition. Most of these can be avoided through effective antenatal and postnatal care and through good primary health care with basic facilities to diagnose and treat infertility.

Millions of children are living without love, affection and proper care all over the world, thus any government or authority instead of encouraging the complex process of surrogating, which can render the health of the surrogate mother, the child in risk, as bearing the child is a very complex and a risky procedure. Also the Mother

24. Amita Panda, *Wombs in Labor-Transnational Commercial Surrogacy in India*, Springer 2nd edit 2015

25. Editorial, Priyagupta, *The times of India*, July 2013

Mortality rate in India is 253.8, which is very high as compared to the first world nations. In Italy it is only 3.9, whereas in US 16.6. Thus, as per the Indian medical conditions, there is a high threat implicated to the woman's health, who is bearing a child.

Indian government, instead of catering the needs of the western society for the need of the child, concentrates its attention towards requirements of its citizens.

Surrogacy can be opposed on various grounds one such reason is that surrogacy is exploitative. Outsourcing surrogacy to India further degrades the women and takes advantage of their poverty and lack of opportunities. The status of women in India is already brow beaten and critics of commercial surrogacy put forward a common objection that gestational labor is different from other types of labor. A divide of the feminists believes that surrogacy brings with it a freedom of the woman to choose and thus promotes gender equality.

Treating children as commodities degrades them by using them as instruments of profit rather than cherishing them as persons worthy of love and care. Contract pregnancy also degrades women by treating their bodies as factories and by paying them not to bond with the children they bear.

Commercial surrogacy challenges the conventional assumptions of maternal bonding which is based on the concept of natural and instinctive link between the mother and her fetus/child. The Surrogacy (Regulation) Bill, 2016²⁶ The Bill prohibits commercial surrogacy, but allows altruistic surrogacy. Altruistic surrogacy involves no monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage.

The ends do not justify means. In the market of reproduction it is seen that the sperms and the eggs are sold and wombs are rented. The use of technology to bear a child by such means is contrary to the unity of marriage and the dignity of procreation of human being.

26. www.prsindia.com (visited on Dec 1 2016)

7. CONCLUSION

Recently researchers have contested this assumption and argued that most surrogate mothers do not bond with the babies they relinquish to the social parents. The detachment has been measured by the success rate of relinquishment, percentage of surrogates reporting satisfaction with the process and evidence of no psychological problems as a result of relinquishment. Attention can be drawn on findings of gestational surrogacy in India to contend that maternal bonding is effectively an emotion integral to the physiological process of child birth and is deeply rooted in the cultural context of motherhood. Some questions will always remain unanswered like What is the degree of stress on the couple and on the surrogate mother? Can anyone predict the intensity of emotions attached to that baby? What are the adverse psychological effects on the child when it is separated in his early infancy from the mother giving birth? What identity crisis might ensue a? Will there be desire on the part of the child to know his gestational father or mother?

In the final conclusion we can say that, it is very well understood that formalizing and legislating clearly defined regulations to prevent unethical practices in the domain of surrogacy are an immediate need. Concurrently, while drafting these legislations, there is also a need to be perhaps more flexible and identify various categories that can be accommodate for accord of permission to undergo Assisted Reproductive Technology. The rules and regulations must be stringent, but discretionary in nature. However, to impose an outright ban on surrogacy may be a very harsh step, especially when we look at millions of couples who are unable to have the joy of becoming parents.

EAGLE EYE ON THE NEW AGE OF CORPORATE GOVERNANCE: A CRITICAL ANALYSIS

DR. QAZI M. USMAAN¹

ABSTRACT

With the surfacing of several scams and frauds in the recent past, issues relating to Corporate Governance have gained a considerable importance in business world. The weak laws and policies on corporate law in India are only responsible for governance failure. In India, since 1990s, the regulators, policy makers and lawyers continuously and effortlessly have been working for the better corporate governance. And as result, the Companies Act, 2013 and Securities Law (Amendment) Act, 2014 have reframed several weak corporate governance norms. But it is interesting to watch, how much these new laws and policies guideline help corporate world to grow. The present research work in dealt with corporate governance divided into three parts, first part; discuss about the recent development in corporate governance particularly after the Companies Act, 2013. Second part; explain about SEBI amendment norms on corporate governance and final part of the paper discuss about the quasi-judicial and regulatory bodies framed to stop fraud and scams.

Keywords: *Corporate Governance, Fraud, Business ethics, Whistleblower*

1. INTRODUCTION

Nowadays Governance has become a key word which was rarely used by corporates few decades back. It has been experienced that number of organizations ranging from companies to universities, local authority and charity follow governance to run their organizations with particular emphasis on its accountability, integrity and risk management. Basically, corporate governance involves a set of relationships between a company's management,

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its shareholders, its creditors and other stakeholders. There were countless reasons which were accountable for underlining the importance of corporate governance. The surge of financial crisis in 1998 in Russia, some parts of Asia, and Brazil affected seriously the world economies and thereby destabilized the global financial system. Besides, the growing corporate scandals in United States of America and European countries were surfaced due to bad corporate governance practiced by corporates. In India, corporate governance has gained a lot of importance after the Satyam corporate fraud and other frauds of similar kinds. To cut down the cases of fraud, malpractices in companies and financial instability, both policy makers and business managers emphasized the importance of improved standards of corporate governance. Further, the advent and rapid pace of liberalization and globalization obligates companies to adopt effective strategy to implement improved standards of corporate governance to run their business concerns.

At international level, Organization OECD and World Bank continuously worked upon better corporate governance and adopted a set of principles to strengthen corporation. Similarly, in India there were several reforms taken through the Securities and Exchange Board of India (SEBI) and the Ministry of Corporate Affairs, Government of India (MCA) to improve the corporate governance norms among the corporations. The Companies Act, 2013 is one of the steps to improve corporate governance in India. In this paper we will focus on the new development and emergence of new Companies Act, 2013 and good practices incorporated in the Act.

2. NEED OF CORPORATE GOVERNANCE

Good corporate governance is utmost crucial for the emerging countries to achieve economic goals. The need for a good corporate governance image enhances the reputation of the organization and makes it more attractive to customers, investors and suppliers. Through good corporate governance the company can produce a number of benefits to the organization, such as, the first is the increased access to external financing by firms. This in turn can lead to larger investment, higher growth, and greater employment creation. Secondly, lowering of the cost of capital and associated higher firm valuation. This makes more investments attractive

to investors, also leading to growth and more employment. Thirdly, better operational performance through better allocation of resources and better management. This creates wealth more generally. Fourthly, good corporate governance can be associated with a reduced risk of financial crises. This is particularly important, as financial crises can have large economic and social costs. Lastly, good corporate governance can mean generally better relationships with all stakeholders. This helps improve social and labor relationships and aspects such as environmental protection.²

3. STATUTORY PROVISIONS TO CORPORATE GOVERNANCE

A. Companies Act, 2013

It has been seen that before Companies Act, 2013, corporate governance was mainly being followed by the Clause 49 of the Listing Agreement of the SEBI. But the Introduction of Companies Act, 2013 bring new provisions and regulations in corporate sectors. This Act deals with 470 sections spread over 29 chapters and 7 schedules, which replaced the old Act of 1956. The basic objective of the Act is to promote self-regulation and introduces novel concepts including one-person company, small company and dormant company.³ It also promotes investor protection and transparency by including concepts of insider trading, class action suits, creation of a National Financial Reporting Authority and establishment of Serious Fraud Investigation Office for investigation of serious fraud. Further, a mammoth section 2 containing 94 definitions has been added for better clarity.

In October 23, 2008, Companies Bill, 2008 was introduced in the Lok Sabha to replace existing Companies Act, 1956. In 2009, Companies Bill was reintroduced on August 3, 2009 in the Lok Sabha. Here the Bill was referred to the Standing Committee on Finance of the Parliament for

2. Available at <http://www.adfiap.org/ceoforumviii/wp-content/uploads/2011/09/Good-Governance-word-version-DevT-Bank-of-Turkey.docx> accessed on November 15, 2016 at 4:10 PM.

3. Geetika Vijay (2014), "Corporate Governance under the Companies Act 2013: A More Responsive System of Governance", Volume: 4 | Issue: 4 | Apr 2014 | ISSN - 2249-555X.

examination and submission of report. In 2010, report of the Standing Committee of Finance on Companies Bill, 2009 was introduced in the Lok Sabha on August 31, 2010. In 2011, Companies Bill 2011 introduced in the Lok Sabha on December 14, 2011 and finally in 2012 the Companies Bill, 2012 was introduced and got its assent in the Lok Sabha on December 18, 2012. Further, the Rajya Sabha passed Companies Bill, 2012 on August 8, 2013. After having received the assent of the President of India on August 29, 2013, it has now become the much-awaited Companies Act, 2013.⁴

B. Comparative Analysis of Companies Act, 1956 & Companies Act, 2013

Composition: The Companies Act, 1956 contains 13 parts having 658 sections and 15 schedules, whereas Companies Act, 2013 contains 29 chapters having 470 sections and 7 schedules.

New Definition: The Act of 1956 deals with very few definitions whereas, the Companies Act, 2013 deals with new definitions and also existing definition in broader sense on accounting standards, auditing standards, financial statement, independent director, interested director, key managerial personnel, voting right etc.⁵

One Person Company: In the Act of 1956, there was no provision one man company. It only dealt with private and public companies. While Companies Act, 2013 introduced a new class of company called 'One Person Company' (OPC), by which individual can carry business with limited liability⁶ along with private companies and public companies.

Prohibition on issue of shares at discount: The 1956 Act was dealing with power to issue share at discount, whereas under the Act of 2013 the companies cannot issue shares at discount except sweat equity shares subject to fulfillment

4. http://eduvisors.com/dwnld_assets/PDF/Ideas_Insights_by_Eduvisors_CSR_in_Education_and_Impact_of_New_Companies_Bill2.pdf accessed on November 15, 2016 at 11:40 PM.

5. See Section 2(60) of the Companies Act, 2013.

6. See Section 2(62) of the Companies Act, 2013.

of certain conditions as given under section 54 of the Act.⁷ The rights, limitations and restrictions and provisions as are for the time being applicable to the equity shares shall be applicable to sweat equity shares issued under discount and the holder of such shares shall rank *paripassu* with other equity shareholders.⁸

Prohibition on acceptance of deposits from public: The earlier Act stated that without advertisement deposits would not be invited,⁹ the current Act totally prohibits the acceptance of deposits from public.¹⁰

Corporate Social Responsibility (CSR): Earlier Act did not talk about CSR, whereas the new Act of 2013, deals with CSR. The Act established Corporate Social Responsibility (CSR) under section 135. Through this provision company who are making huge profits has to spend on CSR related activities. Companies net worth of Rs 500 crore or total turnover of Rs. 1000 crore or net profit of Rs 5 crore, shall ensure that these company spends at least 2 percentage of the average net profits during every financial year.¹¹ For that purpose, such companies shall have to constitute a Corporate Social Responsibility Committee comprising of three or more directors, out of which shall be an independent director.¹² Such Corporate Social Responsibility Committee shall formulate and recommend to the Board of Directors a Corporate Social Responsibility policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII.¹³

7. See Section 53 of the Companies Act, 2013.

8. See section 54(2) of the Companies Act, 2013.

9. See Section 58A of the Companies Act, 1956.

10. See Section 73 of the Companies Act, 2013.

11. See Section 135 of the Companies Act, 2013.

12. See Section 149(6) of the Companies Act, 2013.

13. Such activities relate to-

- (i) eradicating extreme hunger and poverty;
- (ii) promotion of education;
- (iii) promoting gender equality and empowering women;
- (iv) reducing child mortality and improving maternal health;
- (v) combating human immuno-deficiency virus, acquired immuno- deficiency syndrome, malaria and other diseases;
- (vi) ensuring environmental sustainability;
- (vii) employing enhancing vocational skills;

Serious Fraud Investigation Office(SFIO): There was no concept and provision of Serious Fraud Investigation Office on earlier Act, whereas the present Act, as per the Central Government by notification establishes an office to investigate the serious frauds relating to a company¹⁴. This Act under section 212, has given more power to SFIO to Investigate frauds in corporate sectors. It has the power to arrest in respect of certain offences and take action by penalty for frauds.

Maximum number of members for private companies: According to earlier Act the maximum number of members in private companies was 50. But according to the new Act of 2013 the members' strength has exceeded to 200.

Maximum number of directors: As per the old Act of 1956, the limit is 12. More can be appointed by the approval of central government. However, section 166 of the Act of 2013 provides that a company may have a maximum 15 directors on the board.¹⁵ However, on the requirement of more directors, the company need special resolution and requires shareholders' approval. For the first time, the Act also defines the role and responsibility of Board of Directors and makes them accountable more and more with company's functions. Failure of these duties and responsibility will lead them to punish with fine.

Directorship & Women Director: According to the old Act, the maximum number of directorship of a director was 15. Whereas, under the new Act the maximum number of directorship of a director is 20 out of which 10 can be public companies.¹⁶ Similarly, in the old Act no women director was mandatory earlier, whereas, now under the new Act at least one women director is compulsory in Board of directors of

(viii) social business projects;

(ix) contribution to the Prime Minister' National Relief Fund or any other fund set up by the Central Government or the State Governments for the socio-economic development and relief and funds for the welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women; and

(x) such other matters as may be prescribed.

14. See Section 211 of the Companies Act, 2013.

15. See Section 149(1)(b) of the Companies Act, 2013.

16. See Section 165(1) of the Companies Act, 2013.

some class or classes of companies.¹⁷

Independent Director (IDs): The new Act, under section 149, introduced the concept of Independent Directors (IDs). It states that all listed companies must have at least one-third of the board as Independent Directors and the term of the IDs as five consecutive years. The Act also prescribes detailed qualifications for the appointment of an ID, such as independent director to be a person of integrity, relevant expertise and experience. About the duties of the IDs, the Act included professional conduct for IDs by prescribing facilitative roles, such as offering independent judgment on issues of strategy, performance and key appointments, and taking an objective view on performance evaluation of the board. This Act empowers the independence directors because of greater accountability and transparency in the company.

Special Courts: In the Act of 1956, no provision was there, whereas under the Act of 2013 the concept of Special Courts to deal with speedy results for offences has been introduced in new Act.¹⁸ Section 436 of the 2013 Act provided for the offences triable by Special Courts. For that purpose and in relation to a person accused of, or suspected to the commission, of an offence under this section who has been forwarded to it, Special Courts may exercise the same powers which a magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 in relation to a person who has been forwarded to him under that section.¹⁹

4. INSTITUTIONAL FRAMEWORK OF CORPORATE GOVERNANCE

The SEBI was established by the Government of India in 1988 and given statutory powers in 1992 with the passing of SEBI Act, 1992. Indian Government on August 25, 2014 notified the Securities Laws (Amendment) Act, 2014 (SLAA, 2014). The SEBI is managed by its members and situated at Mumbai. The main

17. See proviso to Section 149(1) of the Companies Act, 2013.

18. See Section 435 of the Companies Act, 2013.

19. See Section 436(1)(c) of the Companies Act, 2013.

objective of the SEBI is to “...to protect the interests of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto”²⁰. SEBI is known as quasi-legislative, quasi-judicial and quasi-executive body and worked as a multi-function body such as it conducts investigation and enforcement action in its executive function and it passes rulings and orders in its judicial capacity. Though this makes it very powerful, there is an appeal process to create accountability. There is a Securities Appellate Tribunal, which is a three-member tribunal.²¹

A. Securities Law(Amendments)Act, 2014:

The main objective behind the separate Securities Laws was felt by the government against the backdrop of lacs of small investors being duped by numerous fraudulent investment schemes across the country, like in the alleged Sahara scam and Saradha scam and other several scams of the same kinds.

New Powers of SEBI:

The Securities Laws (Amendment) Act, 2014 empowers the Securities Exchange Board of India (SEBI) to clamp down on illicit money-pooling schemes, arrest of defaulters, to access call data records and other frauds. It is a part of the government and regulators’ efforts to tighten noose around fraudsters in the wake of several cases of illicit money-pooling activities that includes ponzi operators. It would also facilitate setting up of a special SEBI court to fast-track the investigation and prosecution process. It also grants approval for search and seizure operations in suspected cases of frauds. It has as many as 57 clauses to amend various sections of the SEBI Act and two other related legislations.²²

B. SEBI on Corporate Governance Norms:

After implementation of the Companies Act, 2013, SEBI has made amendments to Clause 35B and Clause 49 of

20. See the Preamble of the Securities and Exchange Board of India, 1992.

21. Available at http://en.wikipedia.org/wiki/Securities_and_Exchange_Board_of_India#cite_note-6 accessed on November 18, 2016.

22. Available at <http://www.jagranjosh.com/current-affairs/union-government-notified-securities-laws-amendment-Act,2014> accessed on November 18, 2016.

the Listing Agreement, such as amendments relating to independent directors, related party transactions, disclosures etc.

Woman Director: SEBI amended Clause 49(II)(A)(1) which states that the appointment of woman director will be applicable w.e.f. April 1, 2015.²³

Limit on number of directorships for independent directors: The revised Act of 2014 has expanded the disqualification criteria for independent directors, and thus, makes the definition more restrictive. Also, the definition specifically excludes a nominee director. Provisions are made relating to Restriction on the limit on number of directorship, *i.e.*, maximum 7 listed companies. The company shall familiarize the independent directors with the company, their roles, rights, responsibilities in the company, nature of the industry in which the company operates, business model of the company, etc., through various programmes. The details of such familiarization programmes shall be disclosed on the company's website and a web link thereto shall also be given in the Annual Report.

*Definition of related party & approval of related party transactions*²⁴: The current amendment stated that all related party transactions should require prior approval of the audit committee. All material related party transactions shall require approval of the shareholders through special resolution and the related parties shall abstain from voting on such resolutions.

23. Available at <http://www.ingovern.com/wp-content/uploads/2014/12/Governance-Watch-October-2014.pdf> accessed on November 18, 2016.

24. Related party transactions are any contract or arrangement with related party with respect to –

- (a) sale, purchase or supply of any goods or material;
- (b) selling or otherwise disposing of, or buying, property of any kind;
- (c) leasing of property of any kind;
- (d) availing or rendering of any services;
- (e) appointment of any agent for purchase or sale of any goods, materials, services or property;
- (f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
- (g) underwriting the subscription of any securities or derivatives thereof, of the company. (Section 188 of the Companies Act, 2013).

Sale of a material subsidy: The revised Clause states that special resolution to dispose of shares in its materials subsidiary, which would reduce the shareholding to less than 50% or result in loss of control over the subsidiary. Further selling, disposing and leasing of assets amounting to more than 20% of the assets of material subsidiary shall also require prior approval of shareholders by way of special resolution.²⁵

Whistle Blower Policy: The revised Clause 49 has formalized the whistle blower policy requirements and mandates that the company shall establish a vigil mechanism for directors and employees to report concerns about-

- *Unethical behavior*
- *Actual or suspected fraud*
- *Violation of the company's code of conduct or ethics policy*

This mechanism should also provide for adequate safeguards against victimization of individuals who utilize such mechanism to report any concerns. The details of establishment of such mechanism shall be disclosed by the company on its website, and in the report of Board of Directors.²⁶

5. FUNCTIONING OF REGULATORY BODIES

The Companies Act, 2013 has changed many existing provisions and introduced many new concepts for better governance. The basic idea behind these new concepts and provisions not only established for better governance but also to watch like an eagle to protect corporate frauds. The Act has given more power to old institutions and established few new institutions for better result. This section explains the entire new establishment and their impact on corporate governance.

(A) National Company Law Tribunal (NCLT)& National Company Law Appellate Tribunal (NCLAT): Under

25. Available at http://gtw3.granthornton.in/assets/Strengthening_Corporate_Governance-Revised_Clause_49.pdf accessed on November 19, 2016.

26. Available at http://gtw3.granthornton.in/assets/Strengthening_Corporate_Governance-Revised_Clause_49.pdf accessed on November 19, 2016.

the Companies Act, 2013, the provisions relating to the establishments of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) have been incorporated which shall replace the Company Law Board (CLB). The National Company Law Tribunal and the Appellate Tribunal shall consist of both judicial members and technical members.²⁷ However, the President is the head of the Tribunal, while the chairman is the head of Appellate Tribunal. According to Companies Act, 2013, to become a judicial member at NCLT, an individual is or should have been a High Court Judge or District Judge for at least five years or with a minimum of ten years' experience as an advocate of a court. Similarly, to become a technical member, an individual is or should have at least 15 years of experience in chartered accounts or cost accounts or as a company secretary.²⁸ However, the process of formation of the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT) has been kept in abeyance on account of a legal challenge in the Supreme Court to certain provisions of the Companies Act, 2013 relating to the constitution and composition of these bodies. The detailed procedure for transfer of pending cases will be finalized by the NCLT after it is established.²⁹

Possible Impact of NCLT & NCLAT: Nowadays, the tremendous growth and development in corporate sectors required a dispute settlement mechanism like NCLT and NCLAT. The objectives of this mechanism is to handle the settlement of dispute, and to help to reduce the pendency of winding-up cases, shortening the winding-up process, and avoiding multiplicity and levels of litigation before high courts, the Company Law Board and the Board for Industrial and Financial Reconstruction. This Tribunal will also cover merger and acquisition disputes and the dispute arising while converting Public Limited Company to Private Limited Company. There is plan to set up 15 NCLT benches all over

27. See sections 408 and 410 of the Companies Act, 2013.

28. See sections 409 of the Companies Act, 2013.

29. Smt. Nirmala Sitharaman gave this information, MoS in the Ministry of Corporate Affairs in written reply to a question in the Lok Sabha on August 8, 2014. Available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=108368> Accessed on November 18, 2016.

India to speed up corporate dispute redressal. However, the final decision is yet to be taken. So it will not wrong if we say that it is a good decision taken by the government and policy makers to smother the governance system. However, we have to watch the further development regarding the setting up of the tribunal so that it could function.

(B) National Financial Reporting Authority (NFRA): A new regulatory authority known as National Financial Reporting Authority (NFRA)³⁰ is introduced under the Companies Act, 2013 replacing of National Advisory Committee on Accounting Standards (NACAS). The basic objectives to establish this authority is to advice, enforce and monitor the compliance of accounting and auditing standards as well as to act as a regulatory body for accountancy profession. The NFRA, is a quasi-judicial body, which consist of a Chairman and such other prescribed members not exceeding 15.³¹ The head office of the NFRA shall be at New Delhi and it may, meet at such places in India it deems fit. The NFRA consist of three committees such as; Accounting Standards Committee, Auditing Standards Committee and Enforcement Committee etc.

Possible impacts Corporate Governance: This is one of the crucial steps taken by government, as this national level body has to regulate standards of all types of reporting such as; financial as well as non-financial matters. This authority

30. See sections 132 of the Companies Act, 2013

31. 1) A Chairperson who is an eminent person and has expertise in accounting, auditing, finance or law.
- 2) A maximum of 15 members comprising of
- a) Member- Accounting,
 - b) Member- Auditing and
 - c) Member- Enforcement.
- 3) A representative of the Ministry of Corporate Affairs who is not below the rank of Joint Secretary or equivalent.
- 4) A representative of RBI, nominated by it and who is a member of RBI Board.
- 5) A representative of SEBI who is its Chairman or whole-time member and is nominated by SEBI.
- 6) A retired Chief Justice of a High Court or a person who had been a High Court Judge for not less than 5 years to be nominated by the central government.
- 7) President of the Institute of Chartered Accountants of India (ICAI).
- The Chairperson and other members who are in full time employment of NFRA cannot be associated with any audit firm including related consultancy firms during the course of their employment and two years after the expiry of such appointment.

has the power to recommend to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or their auditors. It also monitors and enforces the compliance with accounting standards etc. in best possible ways. Further, the Authority has also given the power to investigate suo moto or a reference made to it by the CG by bodies corporate or persons into the matter of professional or other misconduct committed CA and CS firms. By doing this, this will create fear among the firms and corporates to be honest and transparent in financial and non-financial matters, which will lead a good governance atmosphere inside the company.

- (C) **Investor and Education Protection Fund:** The Companies Act, 2013 also provided for the establishment of the Investor Education and Protection Fund (IEPF) Authority³². And Investor Education and Protection Fund (established under section 125(1) of the Companies Act 2013) to educate and protect interest of investors, constituted and notified under section 125(5) of the Act and managed by the Authority.³³ The head office of the Authority shall be at New Delhi and may established offices at other places in India with the prior approval of Central Government. Corporate Affairs Ministry Secretary would be the ex-officio chairman of the authority. Besides, there would be nominees from Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) an eminent legal expert and three members having at least 15 years' experience in investor education and protection related activities. The CEO would be on the level of Senior Administrative Grade (SAG) in Indian Company Law Services or similar central government Service and shall be responsible for day-to-day operations and management of the authority.

Possible impacts on Corporate Governance: Now MCA has notified under rules that Investor Education and Protection Fund made mandatory for every company to file e-form 5INV containing the information of unclaimed and unpaid

32. See sections 125 of the Companies Act, 2013.

33. See Chapter I and Chapter II of the Investor Education and Protection Fund Authority Rules, 2013. Available http://www.onepersoncompany.in/uploads/6/9/1/2/6912590/final_iepf_authority_establishment_rules_24_10_2013-1.pdf accessed on 19 November 2016.

amounts. Through this new rule, shareholders and debenture holders will be able to know their unclaimed amount (including interest on them) every year from the website of their companies and also from the MCA IEPF website. As a result there would be clarity and transparency within the company to maintain account matters.

- (D) Serious Fraud Investigation Office (SFIO):** To investigate corporate frauds, the Ministry of Corporate Affairs under the government of India has established the Serious Fraud Investigation Office (SFIO)³⁴. SFIO, a multi-disciplinary organization with a Director and experts from all backgrounds such as accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation. Generally, SFIO, take up investigation in such cases of fraud received from Department of Company Affairs. The Government has also granted statutory status to SFIO by incorporating its provisions under the Companies Act, 2013.

Possible impacts on Corporate Governance: According to MCA, in the last three years, 64 cases were referred to SFIO, out of which the SFIO completed 55 cases. Now, Ministry of Corporate Affairs developed a “Fraud Prediction Model” in SFIO for generating early warning signals for prediction of fraud and malfeasance in the corporate sector. The ministry also set up a High-powered Steering Committee with technical experts in various fields to design a comprehensive framework for a fraud prediction model. The Director of the SFIO, has got the power to arrest persons if he has reason to believe that such persons are guilty of certain offences, including fraud. The investigator of the SFIO, have now certain powers vested in a civil court under the Code of Civil Procedure with respect to discovery and production of books of accounts and other documents, the inspection of books, registers and other documents and the summoning of and enforcing of attendance of persons. Some of the major scandals investigated by SFIO are Satyam Scandal, Reebok and now Saradha Group scam, where SFIO proved its efficiency. So the recent fraud in Saradha group is also an

34. See sections 211 of the Companies Act, 2013.

example that shows the need and importance for effective investigation and prosecution of corporate fraud.³⁵ From the above points it is clear that SFIO has got its wing now to take certain steps to investigate corporate frauds independently, which is essential for good governance.

- (E) **SEBI Special Court to fast-track:** The new Securities Law Amendment Act, 2014 proposed to setting up of a special SEBI court to fast track to strict the investigation and prosecution process, including by granting approval for search and seizure operations in suspected cases of frauds. This step of setting up a designated court to hear SEBI cases, which will give the regulator for carrying out search and seizure operations, to crack down on fraudsters in the wake of several cases of illicit money-pooling activities, including by ponzi operators, across the country.³⁶

6. CONCLUSION:

From the above study, it is clear that really the government has taken all the best initiatives by amending different provisions to provide good corporate laws to regulate corporates. The new Companies Act, 2013 introduced many significant changes in the provisions related to governance, e-management, compliance and enforcement, disclosure norms, auditors and mergers and acquisitions. Also, new concepts such as one-person company, small companies, dormant company, class action suits, registered valuers and corporate social responsibility have been included. In addition to that that the major initiatives taken to set up SEBI courts, SFIO more power, and the establishment of other regulatory bodies to monitor governance and stop corporate frauds. Now it's the time to wait and watch the positive and negative aspects of these new laws and guidelines on corporate governance.

35. Giving teeth to Serious Fraud Office. Available at <http://www.thehindu.com/opinion/oped/giving-teeth-to-the-serious-fraud-office/article4807786.ece> accessed on 18 November 2014.

36. Available at <http://freepressjournal.in/special-court-to-hear-sebi-matters-likely-soon/> accessed on 18 November 2014.

MERGERS AND ACQUISITIONS (M&A): PROCESS & JUDICIAL RESPONSE

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ABSTRACT

“I believe in innovation and that the way you get innovation is you fund research and you learn the basic facts”.

— *Bill Gates*

Mergers and Acquisitions have been over a great extent used in developed economies as a growth strategy and is now increasingly getting accepted by Indian businesses as a critical tool of business strategy.

The doctrine of merger and acquisition of companies is neither a doctrine of constitutional law nor a doctrine as such statutorily recognized. It is a common law doctrine founded on the principle of property in the hierarchy of Justice delivery system. It should be noted that law is not what is being legislated within the four wall of the parliament but also what the Judiciary decides as according to realist school of Jurisprudence.

1. INTRODUCTION

The core goal of the any corporate is to maximize its wealth¹ and shareholder's value. This objective can be achieved internally either through the process of introducing new products or by enlarging the capacity of the existing products. On the other hand, the growth process can be facilitated externally by acquisitions, takeovers, mergers and so on. There are strengths and weaknesses of both the processes of achieving goals.

1. Machhi Hetal K. and Menon Preeti V., 2004 : Corporate Merger & Acquisition, Indian Journal of Accounting Vol.XXXV(I), PP. 7-12

2. MERGERS & ACQUISITIONS, AMALGAMATION AND RECONSTRUCTION: MEANING

According to the Oxford Dictionary, the expression “Merger” or “Amalgamation” means “combining of two commercial companies into one” and “merging of two or more business concerns into one” respectively.

Merger is a fusion between two or more enterprises, whereby the identity of one or more is lost and the result is a single enterprise. Amalgamation signifies blending of two or more existing undertakings into one undertaking, the blended companies losing their identities and forming themselves into a separate legal identity.

The various courts have defined amalgamation in different ways in **Saraswati Industrial Syndicate Ltd vs. C.I.T.** Haryana, Himachal Pradesh and Delhi III.²

Supreme Court held that ‘Amalgamation’ is a blending of two or more existing undertaking. The shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by transfer of two or more undertakings to a new company, or by transfer of one or more undertaking to an existing company where two companies are merged and are so joined as two amalgamating companies lose their identity.

In the **Central India Industries Ltd. vs. C.I.T.**³, It was held that amalgamation is an arrangement whereby the assets of two companies become vested in or under the control of one of the original two companies, which has its shareholders all or substantially all the shareholders of the two companies.

In **General Radio vs. M.A. Khader**⁴ Supreme Court held, that after amalgamation, Transfers Company doesn’t become tenant of premises, even if tenancy rights are transferred to transferee company.

In United Breweries vs. Commission of Excise⁵. It was held that

2. (1999) 70 com cases 184 (S.C), Hukamchand Mohanlal (1971) 82 ITR 624 (SC), General Radio and Appliances Co. Ltd. vs M.A. Khader, (1986) 2 SCC 656.

3. (1975) 99 ITR 211.

4. AIR 1986 SC, 1218.

5. (2002) 36 SCL 641

there exist ‘transfer even if shareholders are same, as Transferor Company ceases to exist after amalgamation.

Reconstruction:

“There is ‘reconstruction’ of a company when that company’s business and undertaking are transferred to another company formed for that purpose, so that as regards the new company substantially the same business is carried on and the same persons are interested in it as in the case of the old company”.⁶

A reconstruction may become necessary for several purposes. A court (now Tribunal) may not, for example, sanction a radical change of objects. New objects can then be adopted only by the process of reconstruction.⁷ A reconstruction may also become necessary to cause material alterations of the rights of a class of shareholders or creditors.⁸

Amalgamation:

“Amalgamation occurs when two or more companies are joined to form a third entity or one is absorbed into or blended with another”.⁹ The effect is to wipe out the merging companies and to fuse them all into the new one created. The new company comes into existence having all the property, rights and powers and subject to all the duties and obligations, of both the constituent companies. Explaining the object of an amalgamation and the scheme of the statutory provisions, the Madras High Court

6. J.A. Hornby, AN INTRODUCTION TO COMPANY LAW (1957) 174.

7. North of England Protecting & Indemnity Assn, re, (1929) 45 TLR 296.

8. See, Bank of India Ltd v Ahmedabad Mfg & Calico Printing Co, (1972) 42 Comp Cas 211 (Bom). Where the companies are situated in two different jurisdictions, the sanction of both the courts would be necessary to give to the scheme an all-round binding efficacy. Industrial Credit & Investment Corpn of India v Financial and Management Services Ltd, AIR 1998 Bom 305: (1998) 3 Bom CR 471: (1998) 3 Bom LR 677: (1999) 98 Comp Cas 241. The supervisory jurisdiction of the court was also stressed in this case. Mafatlal Denim Ltd v Sicom Ltd, AIR 2010 NOC 602 (Guj), on reconstruction of debts under a sanctioned scheme, the contract undergoes radical changes, only the altered contract can be enforced, course of recovery under the RBD Act are not interfered with.

9. Somayajula v Hope Prudhomme & Co Ltd, (1963) 2 Comp LJ 61. It is necessary that the transferee company should be in existence at the “appointed day” though not at the time of the preparation of the scheme. HCL Ltd, re, (1994) 80 Comp Cas 22.8 (Del). It is not necessary that both companies should have common objects. PMP Auto Industries Ltd, re, (1991) 4 Bom CR 387: (1994) 80 Comp Cas 289. The court can authorise necessary alterations in the memorandum after inviting the CLB to state its objections, if any. Rangkala Investments Ltd, re, (1995) 16 CLA 280 (Guj); Gujarat Organics Ltd, re, (1995) 16 CLA 280 (Guj).

observed in **WA Beardscill & Co (P) Ltd, re:**¹⁰

“The word ‘amalgamation’ has not been defined in the Act. The ordinary dictionary meaning of the expression is ‘combination’. Judging from the context and from the marginal note of Section 394 which appears in Chapter-V relating to arbitration, compromises, arrangements and reconstructions, the primary object of amalgamation of one company with another is to facilitate reconstruction of the amalgamating companies and this is a matter which is entirely left to the body of shareholders, (and) essentially an affair relating to the internal administration of the transferor company. The decision of the body of the shareholders ought not to be lightly interfered with”.

3. MERGERS & ACQUISITIONS, AMALGAMATION AND RECONSTRUCTION: TYPES

Mergers, Acquisitions and Takeovers etc. are terms that are commonly used interchangeably¹¹ but often differ by situation. Merger generally refers to unification of two equal players into one unit, while Acquisition refers to one competitor buying out another to combine the bought entity with itself.

A takeover may be defined as obtaining of control over management of a company by another. A company may have effective control over another company by holding minority ownership. As per **Accounting Standard-14**¹² which is for the purpose of amalgamations and mergers, the exhaustive classification of these terms is provided as:

- i) Transfer of all the assets and liabilities from the transferor to the transferee,

10. (1968) 38 Comp Cas 197, 204 (Mad). See also, Reliance Jute & Industries Ltd, re, (1983) 53 Comp Cas 591 (Cal), here a holding company absorbed its subsidiary and objections under S. 372 [now S. 232] were not sustained. The transferor company which is going to be amalgamated can be a foreign company, Bombay Cas Co (P) Ltd v Central Govt, (1996) 3 Bom CR 312: (1997) 89 Comp Cas 195. The court followed the decision to the same effect in Khandelwal Udyog Ltd, re, (1977) 47 Comp Cas 503, 511 (Bom). Banaras Breads Ltd, re, (2006) Comp Cas 548 (All), in a scheme of amalgamation, the arbitration award directed convening of a meeting for approval of the scheme. Certain applications alleging oppression and mismanagement were pending before CLB. The court said that the petition for confirmation of the scheme could not be kept pending till CLB decisions.

11. ICFAI - ARF GROUP, 2004 : Procedure for Merger and Amalgamation, The Chartered Accountant, PP. 1234- 1239.

12. Issued by Chartered Accountants of India, New Delhi.

- ii) Acceptance of shareholding in the transferee company by at least 90% of the shareholders of the transferor by exchange of equity shares,
- iii) Intention to carry on the transferor's business after amalgamation and
- iv) Non-adjustment in the value of assets and liabilities other than to ensure uniform accounting policies.

Notwithstanding terminological differences, mergers can be usefully distinguished in to three kinds

1. **Horizontal Merger** takes place when two or more corporate firms dealing in comparable lines of activity combine together due to variety of reasons such as reduction in competition, putting an end to price cutting and to get the advantages of economies of scale in production, research and development and marketing and management.
2. **Vertical Merger** is a grouping of two or more corporate firms involved in different stages of production or distribution. When electronic goods manufacturing company and electronic goods marketing company merged with each other.
3. **Conglomerate Merger** is a combination of corporate firms engaged in unmatched and unrelated lines of business activity. Diversification of risk constitutes the rationale for such kind of mergers. The mergers of L&T and Voltas Ltd. is the model of conglomerate companies.

4. LEGAL FRAMEWORK FOR MERGERS & ACQUISITIONS

The beginning to amalgamation may be made through common agreements between the transferor and the transferee but plain agreement does not provide a legal cover to the transaction unless it carries the sanction of company court for which the procedure laid down under section 232¹³ of the Companies Act,2013.

Procedure for merger and amalgamation is different from takeover. Formers are regulated under the provisions of the Companies Act,

13. Corresponds in Section 392 of the company Act,1956

2013 whereas takeovers are regulated under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations.

A. THE COMPANIES ACT, 2013

The following is the outline of legal procedures for merger or acquisitions laid down in the said Act are as follows-

- (i) Two or more companies can only be amalgamated if memorandum of association of such companies is permitted to do so. In the absence of this, permission of the shareholders, board of directors and the Company Law Board should be taken before affecting the merger.
- (ii) Both the companies should inform the stock exchanges where they are listed about the merger.
- (iii) The board of directors (BOD)¹⁴ of the individual companies should approve the draft proposal of mergers.
- (iv) A copy of draft proposal approved by the BOD of both the companies should be submitted to high court. High Court would convene a meeting of shareholders and creditors to approve the mergers but the notice of such meeting should be sent to them at least 30 days in advance¹⁵.
- (v) The individual companies should hold the meeting and at least, 75% of shareholders and creditors should approve the scheme¹⁶.
- (vi) After the approval of shareholders and creditors, on the petitions of the companies the high court will pass order to sanction the merger scheme.
- (vii) The true copies of high court's order will be submitted to the Registrar of Companies.
- (viii) Transfer of assets and liabilities of acquired company will take place as per approved scheme and

14. See Sec.232(2) of Company Act,2013

15. See Sec.230(4) of Company Act,2013

16. See Sec.230(2)(c) of Company Act,2013

- (ix) As per scheme the acquiring company will exchange share or debentures or cash for the shares and debentures of the acquired company.

B. SEBI GUIDELINES

Securities Exchange Board of India (SEBI) has provided guidelines for takeover only. The prominent features of the guidelines are:

- (i) When an individual or a company acquires five per cent or more of the voting capital of a company then Target Company and the concern stock exchange shall be notified immediately.
- (ii) There is a limit in acquiring shares of another company without making any offer to other shareholders that is ten per cent of the voting capital.
- (iii) If the holding of the acquiring company exceeds ten per cent, a public offer to purchase a minimum of twenty per cent of the shares shall be made to the remaining shareholders by a public announcement.
- (iv) If offer is made to the shareholders the minimum offer price shall not be less than the average of the weekly high and low of the closing prices during the last six months before the date of announcement of such offer.
- (v) The offer should disclose the detailed terms of the offer, identity of the offerer, details of the offerer's existing holdings in the offeree company etc. and this information should be made available to all the shareholders at the same time and in the same mode.

The main objective of the Companies Act and the SEBI guidelines for takeovers are to ensure full disclosure about the mergers and takeovers and to protect the interests of the shareholder especially the small shareholders.

C. Banking Regulation Act, 1949

Merger & Acquisitions of banking companies is controlled by the special provisions of Banking Regulation Act, 1949 as well as Reserve Bank of India Act, 1934. In India no company may carry on Banking company business except

under a license issued by the Reserve Bank of India and all such Banking companies are subject to provisions of the Banking Regulation Act and Reserve Bank of India Act.

D. Intellectual Property Due Diligence in Mergers and Acquisitions.

The increased profile, frequency, and value of intellectual property related transactions have elevated the need for all legal and financial professionals and intellectual property (IP) owner to have thorough understanding of the assessment and the valuation of these assets, and their role in commercial transition.

A detailed assessment of intellectual property asset is becoming an increasingly integrated part of commercial transaction. Due diligence is the process of investigating a party's ownership, right to use, and right to stop others from using the IP rights involved in sale or merger. The nature of transaction and the rights being acquired will determine the extent and focus of the due diligence review.

Due diligence in IP for valuation would help in building strategy, where in:

- i) If intellectual property asset is underplayed the plans for maximization would be discussed.
- ii) If the trademark has been maximized to the point that it has lost its cachet in the market place, reclaiming may be considered.
- iii) If mark is undergoing generalization and is becoming generic, reclaiming the mark from slipping to generic status would need to be considered.
- iv) Certain events can devalue an intellectual property asset, in the same way a fire can suddenly destroy a piece of real property. These sudden events in respect of IP could be adverse publicity or personal injury arising from a product. An essential part of the due diligence and valuation process accounts for the impact of product and company – related events on assets – management can use risk information revealed in the due diligence.

- v) Due diligence could highlight contingent risk which do not always arise from intellectual property law itself but may be significantly affected by product liability and contract law and other non intellectual property realms.

Therefore intellectual property due diligence and valuation can be correlated with the overall legal due diligence to provide an accurate conclusion the asset present and future value’.

E. The Depositories Act, 1996-

Depository Law to Facilitate Hostile or Friendly Takeovers:

Central government introduced the depository system to smoothen the registration of transfer of shares by the companies and eliminate refusal to such transfer, hereby facilitating takeovers both hostile and friendly.

The Depositories Act, 1996 has been enforced on September 20, 1995, and it will remove hindrance in transfer and transmission of shares and create healthy conditions in corporate world followed by SEBI (Depositories and participant) Regulations, 1996, providing for the rights and obligations of the depository and other constituents.

F. Provisions Relating to Stamp Duty for Mergers and Acquisitions:

Corporate combination (such as merger and acquisitions provides revenue to state exchanger in certain states stamp duty acts. Indian stamp Act provides for stamping of instruments.

While Maharashtra has amended definition of instruments to in order of mergers. Indian stamp act applicable to Delhi has not been so amended Gujarat state also levy stamp duty on business combination.¹⁷

In a recent case¹⁸ definition of instruments has been defined and their transfer has been declared transfer of assets and liabilities takes effect by an order of the court. Once

17. www.feel minds.com/forum/stamp-duty-on-merger-P38472

18. Hindustan Lever vs. State of Maharashtra (2003). 48 SCL 630

shareholders of Transferee Company receive consideration, it would be deemed as owner, has received the consideration.

In recent Judgment¹⁹ of Delhi High Court held that “the transferor company is a hundred percent subsidiary of the transferee company. In view of the requirement of item 55 of the notification, dated 25th Dec, 1937 requires a certificate to be produced by the parties to the instrument that the conditions prescribed in the instant case are fulfilled. Compliance with the notification cannot be waived. It is also held that the Notification dated 25th Dec, 1937 is applicable and binding. As a result, the stamp duty chargeable on approved scheme of amalgamation would stand remitted in terms thereof.

However, stamp duty being a state subject, the above would only be applicable in those states where the state government follows the notification of the centre. At present stamp duty payable as under-

- i) Maharashtra – 0.7% of value of shares allotted, or 7% of value of immovable properties in Maharashtra subject to ceiling of 10% of value of shares allotted.
- ii) Gujarat – Maximum 2% of value of shares allotted and other consideration (as per slab).
- iii) Karnataka-0.1% of value of properties in Karnataka.
At present no stamp duty is payable in other states.

G. Income- Tax Act, 1961- Provisions for Mergers and Acquisitions

Income Tax is life-sustaining among all tax laws, which affect the amalgamation of companies, from the point of view of tax saving and treatment of company's books of accounts.

It is a concern for mergers/demergers between two Indian companies. These mergers/demergers need to satisfy the conditions pertaining to section 2 (19AA) and section 2(1B) of the Indian Income Tax Act as per applicable situation.

In case of an Indian merger when transfer of shares occurs for a company they are entitled to a specific exemption from capital gains tax under Indian Income -Tax act. These

19. Delhi Towers Ltd vs. GNCT of Delhi (C.A. No. 466 of 2008 in Company Petition No. 50 of 2003 (Delhi))

companies can either be Indian origin or foreign ones. But there is different set of rules in foreign company mergers.

It can be noted that for foreign company mergers the share allotment in the merged company in place of shares surrendered by the amalgamating foreign company would be termed as a transfer, which would be taxable under Indian tax law. And under section 5(1), the global income accruing to an Indian company would also be included under the head of ‘**Scope of income**’ for Indian company²⁰.

Section 2(B) of Income Tax Act, 1961 defines Amalgamation as²¹-

“Merger of one or more companies with another company or merger of two or more companies to form one company in such a manner that-

- i) all property of amalgamating company or companies immediately before amalgamation becomes the property of amalgamated company by virtue of the amalgamation;
- ii) all liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of amalgamated company by virtue of amalgamation;
- iii) shareholders holding not less than 3/4²² in value of the shares in amalgamating company or companies become shareholders of the amalgamated company by virtue of amalgamation,

Otherwise than as a result of acquisition of property of one company by another pursuant to purchase of such property by the other company or as a result of distribution of such property to the other company after winding up of first mentioned company.

Section 47(IV) of the Income Tax Act, 1961 provides that amalgamation is not considered as transfer and hence there is no liability of capital gains tax.

20. www.economywatch.com/merger-acquisition/laws.html.

21. A.K. Majumdar and Dr. G.K. Kapoor, Company Law, 2004 at Pg.543; For details see section 2(1B) of the Income Tax Act.1961.

22. Substituted for “9/10” by Finance Act, 1999 w.e.f. 1st April 2000.

Section 2(22)(a) of the Income Tax Act, 1961 provides that the transfer of assets by one company to another in a scheme of amalgamation is not regarded as distribution of profits. Amalgamation involves merger and not liquidation and hence **Section 2 (22C)** of Income Tax Act, 1961 is also excluded. After amalgamation, profits of amalgamating and amalgamated company are calculated together.

Proviso to section 32 of Income Tax Act, 1961 provides that total depreciation allowable to amalgamating company and the amalgamated company cannot exceed the normal depreciation allowable under the Act if the amalgamation had not taken place.

In respect of unabsorbed losses (accumulated losses) of amalgamating company, these are permitted to be carried forward in hands of amalgamated company only if conditions of **section 72A** of Income Tax Act, 1961 are prescribed.

Sections 35AB (3), 35ABB(7) and 35E(7A) of Income Tax Act, 1961 deals with expenditure on license to operate telecommunication services or expenditure on prospecting is tax deductible in the hand of amalgamated company.

Under **section 35(DD)(1)** of the Income Tax Act, 1961 the expenditure incurred on amalgamation is deductible in 5-years in equal instalments@20% per year.

Section 72 of Income Tax Act, 1961 provides that loss of business can be set off against profits of subsequent year or years. Such carry forward loss is permitted up to 8-assessment year.

Section 72(A) of Income Tax Act, 1961²³ provides that loss of the amalgamating company can be carried forward in the amalgamated company subject to following conditions.

- i) Amalgamated company should hold at least 75% of the assets of amalgamating company acquired as a result of amalgamation, at least for 5 year.
- ii) The amalgamated company should continue business of amalgamating company at least for 5 years.

23. For details see, Section 72 (A) of Income Tax Act, 1961.

- iii) It should make efforts to ensure revival of the business of amalgamating company, as per conditions prescribed in Rule 9(c) of information Technology Act, 2000. After 5-years, the business of amalgamating company need not be carried by amalgamated company.
- iv) Rule 9(c) of information Technology Act, 2000 the amalgamated company shall achieve level of production of at least 50% of the installed capacity of the undertaking which was amalgamated (i.e. of amalgamating company). Within 4 years from date of amalgamation and continue to maintain the minimum leave till end of 5 years from date of amalgamation.

Section 47 was amended w.e.f. 1.4.1967 providing exemption from applicability of section 45 to taxation of capital gains on transfer of assets in case of amalgamation. After 1967 amendment, the Supreme Court need in **CIT vs. Madurain Mills Company Ltd.**²⁴ that no transfer is involved in getting shares from Transferee Company on amalgamation.

In **CIT vs. Master Raghuvver Trust**,²⁵ the Karnataka court held that no transfer is involved when a shareholder gets some shares or cash from the amalgamated company in lieu of his shares in the amalgamating company.

In **Shaw Wallace and Co. vs. CIT**,²⁶ it was pointed out that under the scheme of amalgamation, the amalgamating company, transfers their capital assets to amalgamated company, the scheme of amalgamation further provides that the amalgamating companies would be subsequently dissolved. It was held that transaction would not be classed as a transfer, or of any capital gains or loss resulting there from, even though their may be the extinguishment of rights. Similarly, any allotment of the shares as a result of amalgamation would not be treated as involving a transfer in the hands of the shareholders.

24. (1973) 89ITR45 SC.

25. (1985) 151 ITR 368 (KAR)

26. (1979) 119 ITR 399 (Col)

H. Accounting Standard (AS)-14

i) Accounting treatment of Mergers & Acquisitions under Corporate Accounting-

In India, Merger, Amalgamation and Takeover accounting is done in the traditional basis and in the case of vendor, whose books of accounts are to be closed as the business goes into liquidation. The transferee or the acquirer assumes the status as purchaser in whose books of accounts the acquisition is recorded as purchase transaction. All the companies are expected to follow the Accounting Standard (AS) -14 to record the merger transactions in their books. This standard is mandatory in nature.

There exist two main methods of accounting for amalgamations:

a) Polling of Interest Method-

Under the pooling of the Interest method, the assets, liabilities and reserves of the transferor company are recorded by the transferee company at their existing carrying amounts, after making adjustment required. If at the time of the amalgamation, the transferor and transferee companies have conflicting accounting policies, a uniform set of accounting policies is adopted following amalgamation.

The effects on the financial statements of any changes in accounting policies are reported in accordance with Accounting Standard (AS)-5 (Prior Period and Extraordinary items and changes in accounting period).

b) Purchase Method-

Under the purchase method the transferee company accounts for amalgamation either by incorporating assets and liabilities at the existing carrying amounts or by allocating the consideration to individual identifiable assets and liabilities of Transferor Company on the basis of their face values at the date of amalgamation. The identifiable assets and liabilities may include assets and liabilities not recorded in the financial statements

of Transferor Company.

Where assets and liabilities are restarted on the basis of their face value, the determination of fair values may be influenced by the intention of Transferee Company.

For example-The transferee company may intend to effect changes in activities of the transferor company which necessitate the creation of specific provisions of expected costs, i.e. planned employee termination and relocation costs etc. The consideration for amalgamation consists of securities, cash or other assets.

ii) Provisions relating to Valuation of Shares and Exchange Ratio During Merger and Acquisitions of Companies-

Valuation is a device to assess the worth of the enterprise which is subject to merger or takeover so that consideration amount could be quantified and price of one enterprise for the other could be fixed which in turn is to be paid in the form of exchange of shares, in merger and amalgamation, shares of companies are expert valuers comprising financial experts, accounting specialists technical and legal experts.

In case of amalgamation in third company, the shareholders of both the companies get shares in third company in proportion to share valuation.. In case of merger, the shareholders of the company being merged get shares of the company in which it is merging, in proportion to the valuation of shares of both the companies.

Valuation of shares is the matter of judgment and is often subjective as no strait jacket mathematical formula can be established. Valuation can be done on various methods like yield method, asset value method and market value method, but ultimately the valuer has to consider various intangible aspects.

5. JUDICIAL RESPONSE AS PER APEX COURTS IN INDIA

I. National Company Law Tribunal can reject expert's opinion if he acts negligently.

27. (2001) 43 CLA 259.

In **Mihir Chakraborty. vs. Multi Technology Computers**,²⁷ It was held that values is an expert, he cannot claim if he acts negligently in making valuation. He can be sued for negligence.

In **Sugar Cane Growers. Shakti Sugar Ltd.**,²⁸ Madras High Court held that if valuation is found to be erroneous National Company Law Tribunal is not bound to accept expert's opinion.

II. Absence of company's power to amalgamation memorandum of association.

In **Armco Pesticides Ltd., In.re.**²⁹ Bombay High Court held that there exists statutory power of amalgamation under the act even if the objects of the company are construed as not specifically empowering companies to amalgamate.

In **Feedback Reach Consultancy Services (Pvt) Ltd., In.re.**³⁰ Delhi High Court held that if power of amalgamation is contained in memorandum of company it need not seek the permission and approval of Court.

III. Court is authorized to reject the scheme when it is unfair against majority decision and public interest as well as oppressive to minority interests.

In **Lanco Kalahasthi casting Ltd, In.re.**³¹ and **Gernman Remedies Ltd., In.re.**³² It was held that Court has limited Jurisdiction that lies in checking whether the exchange ratio was so wrong or erroneous as would make the scheme of amalgamation unfair or oppressive to the minority members or any class of them.

IV. Notice to the Central Government under section 394-A.

In **YKIN Holdings Pvt. Ltd., In.re.** Delhi High Court held that notice is required to be given to the Central Government

28. (1998) 93, Comp Case 646 (Mad), Indo continental Hotels, Inre, (1990) 3 Camp. LJ 150 (Raj) Coimbatore Cotton Mills, Inre (1980) 50 Comp Case 623 (Mad)

29. (2001) 103 Comp Case 416 (Bom)

30. (2002) 115 Comp Case. 897 (Delhi)

31. (2005) 124 Comp. Case 523.

32. (2001) 105 Comp. Case 249 (Del HC) In.re Bangshwari Cotton mills Ltd., (1967) 37 Comp. Case. 195 (Cal) In.re. W.A. Bearshell and co. (1968) 38 Comp. Case. 197 (mad).

under section-394A if an application is made under section-391(2) and 394 but not required to be given at the initial stage of an application under Sec. 391(1).

In **Eita organic Ltd., vs. Narayan Prasad Lohia**,³³ Calcutta High Court held that while considering an application for sanction under section 391(2) of Act, 1956 following have to be considered.

Whether statutory requirement under sections 391-394 has been complied with -

- i) Whether meeting duly convened and scheme approved by requisite majority so that section 391(2) can be applied.
- ii) That the fact that transferor and Transferee Company carry on dissimilar business is no ground why the Court should not sanction scheme of amalgamation.
- iii) In the absence of objection from shareholders the central government has no right to raise the point.

In another case of **Vikram Organics Pvt. Ltd., vs. Anirox pigments Ltd.**, Calcutta high court held that one notice is sufficient to be given to the central government under section 394-A of companies Act, 1956 and companies (Court) Rules 1959, at the stage of an application for grant of sanction to a proposed scheme of amalgamation and also a prayer for dissolution of a transferor company to be dissolved without winding up.

V. **Power of Reserve Bank of India in case of amalgamation of Banks.**

In **Bank of Madura Shareholders Association vs. Reserve Bank of India**,³⁴ Madras High Court held that section 44A of Banking regulation Act empower Reserve Bank of India to grant approved for scheme of merger of the Banking companies and determining market value of shares hence NCLT won't express its opinion on valuation of shares for swap ratio.

33. (2000) 99 Comp. Case 276 (Cal)

34. (2002) 40 SCL 1 (Mad)

VI. SEBI Takeover regulation not applicable in case of scheme of amalgamation

In **Eaton Corporation vs. Chairman SEBI**³⁵, it was held that SEBI Takeover Regulations are not applicable in case of amalgamation or merger under any law or regulation, Indian or foreign. Hence the exemption is available even when foreign company due to which there exists change in ownership of Indian subsidiary company.

VII. Income Tax concessions under the scheme of amalgamation.

In **Castrol India Limited vs. State of Tamil Nadu**³⁶ Madras High Court held that ‘Stock’ transfer between Transferor Company and Transferee Company in amalgamation form transfer date cannot be considered and thus cannot be subjected to sale tax.

Major question arise after Vodafone case in last year about income tax provisions related to cross border mergers in industry.

Section 2 (1B) relating to income tax act provide condition to be followed in merger process for tax liabilities on both companies. According to Supreme Courts’s recent judgement in this case, liability of \$ 5 billion arise on Vodafone group.

A. Merger under the Income Tax Act in the case of **S. Shanmugavel Nadar vs. State of Tamil Nadu**³⁷ following principles emerged with regard to the merger of on order of an inferior authority on that of superior authority.

- i) Application of doctrine of merger cannot be rendered applicable by drawing a distinction between an application for revision and an appeal.
- ii) Doctrine of merger doesn’t apply where appeal is dismissed³⁸.

35. (2001) 43 CLA 249 (SAT)

36. (1999) 114 STC 468 (Mad)

37. (2003) 263 ITR 658 ;

38. V.M. Salgaocar and Bros. Pvt. Ltd. Vs. C.I.T. (2000) 243 ITR 383.

- a) For default.
- b) As barred by limitation.
- c) Having abated by reason of the omission of the appellant to implead.

B. The legal presentative of a deceased respondent.

Application of doctrine of merger depends on the nature of appellate or revisional order in each case and on the scope of the statutory provision conferring the appellate or the revisional Jurisdiction.

VIII. Scheme to be sanctioned even if alteration done in the memorandum of association of the transferee company.

In **Asian Investments Ltd., and others; In.re.**,³⁹ and **Gujarat organic Ltd.**, Gujarat High Court held that it would be permissible for the Court to accord sanction to a scheme of amalgamation under section 394 of companies Act, 1956, even if the scheme contemplates a consequential alteration in the object clause of memorandum of association of the transferor company⁴⁰.

IX. No statutory need for company Judge to decide question relating to allotment of certain shares to the appellant while considering the scheme.

In **National Organic Chemical Industries Limited vs. Miheer H. Mafatlal**,⁴¹ It was held that company Court exercising Jurisdiction under sections- 391 to 394 cannot decide on the issue of validity of certain shares allotted to the appellant which were pending adjudication before the Civil Court. No statutory need for the company Judge to decide this question while considering the scheme. It is only city civil Court which could decide the validity of the shares acquired by the appellate during the injunction.

6. SOME CONCLUDING OBSERVATIONS

In real terms, the rationale behind mergers and acquisitions is that

39. (1992) 73 Comp. Case 517 (Mad)

40. (1997) 86 Comp. Case. 754 (GUJ)

41. (2004) 121 Comp. Case. 5119.

the two companies are more valuable, profitable than individual companies and that the shareholder value is also over and above that of the sum of the two companies. Despite negative studies and resistance from the economists, M&A's continue to be an important tool behind growth of a company⁴². Reason being ,the expansion is not limited by internal recourses, no drain on working capital - can use exchange of stocks , is attractive as tax benefit and above all can consolidate industry- increase firm's market power.

With the FDI policies⁴³ becoming more liberalized, mergers, acquisitions and alliance talks are heating up in India and are growing with an ever increasing cadence. They are no more limited to one particular type of business. The list of past and anticipated mergers covers every size and variety of business - mergers are on the increase over the whole marketplace, providing platforms for the small companies being acquired by bigger ones.

The basic reason behind mergers and acquisitions is that organizations merge and form a single entity to achieve economies of scale, widen their reach, acquire strategic skills, and gain competitive advantage⁴⁴. In simple terminology, mergers are considered as an important tool by companies for purpose of expanding their operation and increasing their profits, which in facade depends on the kind of companies being merged.

Indian markets have witnessed burgeoning trend in mergers which may be due to business consolidation by large industrial houses, consolidation of business by multinationals operating in India, increasing competition against imports and acquisition activities. Therefore, it is ripe time for business houses and corporate to watch the Indian market, and grab the opportunity.

42. Schweiger David M., 2003 : M&A Integration : A Framework for Executives and Managers, ICFAI Journal of Applied Finance Vol.9, No.2, PP. 71-79.

43. Biswas Joydeep, 2004 : Corporate Mergers & Acquisitions in India, Indian Journal of Accounting Vol.XXXV(1), PP. 67-72.

44. Rathi Amit K., 2004 : M&A - Common Pitfalls and Remedies, The Management Accountant, Vol.39(12), PP. 952-958

RIGHT TO PRAY IN RIGHT PERSPECTIVE

DR. ARVIND P. BHANU*

ESHAN SACHDEVA**

1. INTRODUCTION

“There is no mysticism in the secular character of the State. Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion.”

S. P. Mittal v. Union of India, (1983)¹

As a secular nation every citizen of India is guaranteed with the right to freedom of religion i.e. right to profess and follow any religion. India is a *mosaïque culturelle* where every citizen has a fundamental right to practice and spread their religion peacefully. And if any incidence of religious intolerance occurs in India, it is the duty of the governing system to curb these incidents by following due process of law.

Word ‘secular’ was inserted in the preamble in 1976 by the Constitution 42nd Amendment Act. The object of inserting this expression was to spell out expressly the high ideas of secularism and the integrity of the Nation. But even before this landmark amendment the word has its applicability as a fundamental right under the set of Articles like 25-28 in the Constitution of India, 1950. Moreover, in *Kesavananda Bharti V State of Kerala*² and in *Indira V Rajnarain*³ the supreme Court observed that by secularism it is meant that the State shall not discriminate against any citizen on the ground of religion only and that the State shall have no religion of its own and all persons shall be equally entitled to the freedom of conscience and the right freely to profess, practise and

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1. (1983)1 SCC 51: AIR 1983 SC 1.
2. AIR 1973 S.C. 1461
3. AIR 1975 S.C. 2299

propagate religion. And as such secularism was treated as the part of basic structure doctrine.

Constitution not only protects the integrity of the religion in our society but also affirms to regulate it in a non-discriminatory manner under the purview of Article 15 and Article 16. But despite this commitment the patriarchal segment of our society is still suffering the prejudice on certain trivial subject matters like present one – a ban on entering shrines. As it is seen as an integral part of every channel of media now a days. The article argues in favour of and finds out the constitutional basis.

2. POSITION OF WOMEN’S RIGHT TO WORSHIP; SOME LATEST INCIDENTS

Although, Constitution asseverates no discrimination on the basis of sex, but even in spite of that the patriarchal management of shrines have successfully accomplished in creating menstrual cycle of a women as a taboo in Indian society.

To face these unprecedented challenge women marched with an aim to uproot the discrimination, towards the Shani Shingnapur temple in Ahmadabad district in Maharashtra. This act of ending gender disparity is been headed by Trupti Desai, who is the president of Bhumata Ranragini Brigade, which literally means “War-loving Brigade of Mother Earth.”

Shrine’s platform where idol of deity is embodied does not allow the entry of the women, only male priest and worshippers are allowed, as per the temple officials. To cease the ongoing customs, Bhumata Ranragini Brigade group earlier decided to book a helicopter to fly over the temple, so that Trupti could rope herself down to the platform where idol of deity is located. But police authorities denied her the grant of NOC to bring an aircraft to the area. To which the group planned to march towards the sanctum sanctorum. The whole agitation was in revenge to the act of purification conducted by the temple officials when a woman had climbed the platform and touched the deity.⁴

Temple’s website also says “after a pure bath, men should go to the deity’s foundation dressed in a wet cloth. Women cannot go

⁴ <http://indianexpress.com/article/india/india-news-india/ahmednagar-temple-trust-purifies-shrine-after-woman-offers-prayers/> (visited on 24/04/2016)

to the foundation”. And it states that it’s a 400 to 500 years old tradition that only the male priest who are celibate since childhood can worship inside the platform.

The above is one example, but the access to places of worship in India has long been an issue. The women have attempted to challenge these religious traditions. Activists have been challenging rules that block women from entering religious places and exclude them from certain roles in Hinduism, Islam and Christianity.

Through social media, several campaign have been ignited, one of them “happy to bleed” which was launched by an angry college girl, when the authorities of Sabarimala temple had put a bar on all women of reproductive age from entering the shrine.

The patriarchal mind-set assumptive dictation is that Lord Ayyappa was a bachelor therefore women are barred from entering the shrine, and only a celibate is allowed to enter into the premises. Temple official further announced that women would be allowed access there, only if a machine was invented to detect if they were “pure” - meaning that they weren’t menstruating. Does this assumption/belief have constitutional basis.

“Why can you not let a woman enter? On what basis are you prohibiting women entry? What is your logic? Women may or may not want to go (to worship at Sabarimala), but that is her personal choice,” Justice Dipak Misra⁵, who headed a three-judge Special Bench, wherein the board countered that the prohibition was prevalent as a customary practice followed for past half a century. Justice Misra analysing the cited contention observed that the Constitution rejects discrimination on the basis of gender. *“Unless you have a Constitutional right to prohibit women entry, you cannot prevent them from worshipping at the shrine.....”*

In this context, the substantial argument was framed with the corroboration of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, which states that *“women at such time during which they are not by custom and usage allowed to enter a place of public worship”*. Ultimately Kerala High Court upheld the ban in *S. Mahendran vs the secretary, Travancore*⁶, by dismissing the contention of the petitioners that

5. On January 11, 2016

6. AIR 1993 Ker 42

the discrimination was neither a ritual nor ceremony in Hindu religion, and an act towards anti- Hinduism. Another attempt was made to prosecute Jaimala, Kannada actor, on the ground of desecration, due to conduct of entrance and touching the idol of deity in 1987. The blasphemy was corrected by a special ritual to purify the whole place where idol is placed.

The other instance is in 2012, wherein the Haji Ali Dargah Trust, barred women entrance in the inner sanctum of Dargah. Bhartiya Muslim Mahila Andolan filed a PIL before the Bombay High Court, seeking access to the popular 15th century Haji Ali Mosque.

3. ANALYSING THE ISSUE; BY HOLY BELIEVES AND SCRIPTS, AND CONSTITUTIONAL PERSPECTIVE

A particular segment of the research paper is dealing with the applicability and pertinency of Constitutional rights to the pretended and soi-disant religious conduct by the matriarchal authorities of the sanctum sanctorum. But before progressing, the indispensable part of the issue i.e. 'religion' must be understood properly and accurately through the constitutional prism.

The term 'religion' means "a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being"⁷. A religion is not merely an opinion, doctrine or belief; it has its outward manifestation in acts as well. It is irrelevant that the religion is theistic or atheistic. The aforesaid explanatory propositions somewhat crystalizes the concept of religion, but it is to be taken into consideration that the professing and administrating a religion must be in accordance to the provisions of the Constitution- the higher law of the land.

3.1 Religion, Secularism and Essential practices

Indian Constitution guarantees the right to freedom of religion from Article 25 to 28. Under Article 25 freedom of conscience and free profession, practice and propagation of religion is enumerated. However this right is subject to certain limitations imposed by the Constitution, which duly involves the restriction to maintain public law and order,

7. Commissioner of Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiyar of Sri Shriur Mutt; (1954) SCR 1005 (definition laid down therein has been consistently followed in later cases including The Durgah Committee, Ajmer and Another v. Syed Hussain Ali & Others; (1962) 1 SCR 383)

morality and health⁸ in the country. Moreover it also limits the power of any individual or denomination to exercise the fundamental right, to the extent of its involvement in the operation of any existing law or preventing the state from making any law in regulation of any economic, financial political or other secular activity which may be associated with religious practices, or in providing for social welfare and reform in regard to the all classes and sections of Hindus.

This provision is based on the concept of secularism, which was explicitly incorporated in 42nd amendment, declaring the national religion of state as ‘no religion’. The limitation and restrictions imposed in the respective provision backed by the explanation given by Chief Justice Sikri in *Kesavananda Bharti*’s verdict wherein secular character of the Constitution is added in the basic structure doctrine . And it also upheld the A.V. Dicey’s rule of law, which mandates every subject matter inferior to the law of the land, correspondingly the above said provision is subordinate to the Constitution of India, making the characteristics of the provision ‘secular’.

However, Article 26 denotes the religious character of the Constitution, which allows the religious denomination or any section thereof, inter alia, to manage its own affairs in matters of religion and to administer such property in accordance with law in Article 26(b) and (d), respectively. It is henceforth analysed, that the right guaranteed under Article 25(1) and 25(2) (a) could enter into the nexus of rights guaranteed under Article 26(b) and 26(d), this predicament situation again calls for interpretation by the judiciary. For example, if any practice is under scrutiny, it could be resolved by evaluating the brackets of nexus of Article 26 and 25.

To resolve such issues Supreme Court formulated ‘Religious- Secular distinction’ to deal with the cases involving state intervention into the management of Temples,

8. Mohd Hanif Qureshi v State of Bihar, AIR 1958 SC 731

9. Supra Note 2. Also read, rationale of Justice Y.V. Chandrachud on basic structure doctrine, where the hon’ble justice considers secularism and freedom of conscience and religion in election case verdict. <http://judis.nic.in/supremeCourt/qrydisp.asp?tfnm=6074>

Durgahs¹⁰, Maths¹¹, Gurudwaras¹², which primarily include administration of estate, and appointment of officials.

Notwithstanding the theory formulated by the Supreme Court in various landmark judgments, there was a need to develop another theory to deal with the cases involving the relationship between the members of religious communities, or practices of those members (like- beef eating, cow slaughter¹³, *tandav* dance¹⁴, bigamy¹⁵ or ban on women to enter *sanctum sanctorum*). To deal with these types of issues Apex Court invented the doctrine of “essential religious practices”, as it was pertinent that; *Constitutional protection must be limited to essentially religious practices, otherwise religion would end up covering an unconscionably vast range of lived existence of most people.*¹⁶

*“We have therefore, to draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion.”*¹⁷

Consequently, whether the trust has the right to impose ban on the entry of the women under the right possessed under Article 26. Would such a ban be covered under the essential religious practices of the Hinduism in case of Shani

10. Durgah Committee, Ajmer v Syed Hussain Ali, AIR 1961 SC 1402

11. Commissioner v Lakshmindra Swamiar, 1954 1 SCR 1005; the Court while applying religious- secular distinction held that the matter of religion have to be determined “with reference to the doctrines of the religion itself”, and includes not just beliefs and thoughts, but religious practices as well.

12. Sardar Sarup Singh v State of Punjab, AIR 1959 SC 860. The Court held that there was no authoritative text to show that “direct election” to membership of the management committee was part of Sikh religion.

13. Mohd Hanif Qureshi v State of Bihar, AIR 1958 SC 731

14. Acharya Jagadishwara Avadhuta v Commissioner of Police, AIR 1984 SC 51

15. State of Bombay v Narasu Appa Mali, AIR 1952 BOM 84 and Ram Prasad Seth v State of UP, AIR 1957 All 411.

16. Dr. Ambedkar the Constituent Assemble Debates.

17. Justice Sinha in Sardar Saifuddin vs state of Bombay; 1962 AIR 853, 1962 SCR Supl. (2) 496

Shingnapur or Sabarimala temple, or Muslims in case of Haji Ali Dargah ban?

This question cannot be answered unless we examine and analyse the foundational text of a religion to the prevailing customary practices. The doctrine of that religion must be under scrutiny to resolve the anomaly in hand, it not only involves the beliefs and thoughts, but also the religious practices.¹⁸ For instance in *State of Bombay v Narasu Appa Mali*¹⁹ the judges went into the tenets of Hinduism and found that the scriptures did not mandate bigamy, later in 1957²⁰, the Court interpreted and found that although the Hindu religion stressed the need for having a son in order to perform funeral rights, but that could easily be accomplished through adoption. Also in *Ismail Faruqui v Union of India*²¹, the Court, with the help of the doctrine of essential religious practices, held that worshiping at any particular place is not an essential practice of Islam.

Considering the factual matrix in hand, not allowing women devotees to have direct vision or darshan of Lord Ayyappa is a cruel contradiction and limitation by male chauvinist. Lord Shiva as father and Lord Vishnu in his female form of enchantress, Mohini as mother, gave birth to Lord Ayyappa (also known as Hari (Vishnu) Hara (shiva) Suta (son)). How can a women be kept away, when it is a know that Lord represents the female aspect of sanctity and motherhood.

The basis of the restriction contented by the board and upheld by the Kerala High Court, includes the non-disturbance of Naisthik Brahmachari state of deity at Sabarimala. The terminology is very well explained by Chief Justice B.K Mukherjee in such a manner; “*Ordinarily therefore a man after finishing his period of studentship would marry and become a house-holder, and compulsory celibacy was never encouraged or sanctioned by the Vedas. A man however who was not inclined to marry might remain what is called*

18. The commissioner, Hindu religious endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt; 1954 AIR 282, 1954 SCR 1005

19. AIR 1952 Bom 84

20. Ram Prasad Seth v State of UP, AIR 1957 All 411

21. AIR 1995 SC 605

a 'Naisthik Brahmchari' or perpetual student and might pursue his studies living the life of a bachelor all his days"²²

.It is said that deity in temple is a form of a brahmachari or a yogi, and therefore he must not lose his senses at any cost, hence the ban. The argument was supported by the text of Manu Smriti, which says; *"from gambling, idle disputes, backbiting, and lying, from looking at and touching women, and from hurting others"*²³.

The reason stated, cannot be the sole reason for consideration in the essential religious practices. Bhagavad Gita categorises the human physio- mental personality into body, five senses, mind- centre of emotions, intellect and the Atma (Soul) wherein *"The senses are said to be superior to the body; the mind is superior to the senses, the intellect is superior to the mind; and what is superior to the intellect is Atma."*²⁴ Therefore, it is respectfully submitted that according to the Hindu scriptures the body of the devotee is irrelevant for seeking self- realisation. Moreover it also tells the devotee that *"what you are seeking is within yourself"* in the form of Atma (Soul),²⁵ which again upheld the argument of immateriality of body in devoting the Lord. Beside this, if the text of Rig Veda are taken into consideration, every devotee whose heart is pure and decent, have the right to worship. It says, *"If the heart is impure and malicious, then the God's worship will also be unfruitful. Therefore God's worship must be carried out with a 'nishpap' (sinless) heart."*²⁶

These context clearly establishes the acceptance of women to be a devotee at par with the men. The whole scenario is created due to the mind-set of patriarchal society in India which defamed menstrual cycle as a taboo. It could never be considered as an essential religious practice, as in other temples of Lord Ayyappa, the entry of women is not confined.

22. Sri B. K. Mukherjee, the fourth Chief Justice of India, in his Lordship's Tagore Law Lectures on the Hindu Law of Religious and Charitable Trust says at page 16 of the second addition

23. Laws of Manu, Chapter II, Sloka 179

24. Bhagavad Gita, Sloka 42 of chapter 3

25. Chandogya Upanishad (6-8-7)

26. Rig Veda VIII,61,11

It is pertinent to mention that Hindu religion itself upheld the natural cycle created by God which could significantly be seen in Tripura Sundari Ashtakam, authored by Adi Shankaracharya,²⁷ the deity is portrayed as a menstruating woman. Kamakodi Mandala²⁸ interpreted the deity as follows “*The Devi is described as being habituated in a blue sari with red spots, as the first menstrual flow, shows itself when a woman is ready to bear, so on the blue welkin (sky or heaven), the Devi’s raiment (clothing), signs appear, heralding creation.*”²⁹ Moreover, in Chengannor Devi temple, which is also called Bhagavathy temple in Kerala, Mother Goddess is worshiped every year, when the Goddess is considered to be in menstrual cycle. The temple celebrates a rare menstruation festival for Bhagavathy, called Thripputhu, the ceremony also resembles the puberty ceremony of high class girls in Kerala.³⁰

If ban on women devotees would have been essential in the eyes of Hinduism then above mentioned temples and their philosophy would not have ever emerged. These evil practices are mere superstitions; they do not hold any kind of *sine qua non* necessity. The Apex Court favouring the above stated argument held that “mere superstition” could never be considered for protection under Article 26 and 25 of Constitution of India. Supreme Court discarded superstition from the bracket of “essential religious practices” and stated that, “*in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such*

27. Tripura Sundari Ashtakam by Adi Shankaracharya – Stutimandal. stutimandal.com.

28. www.kamakodimandala.com

29. 6th Sloka of this Ashtakam

30. Hawley, John Stratton; Wulff, Donna Marie (1996). *Devi: Goddesses of India*. University of California Press. p. 215-6.

practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."³¹

3.2 Statutory instability of the ban

The ban over the entry of women is not only endorsed by the religious practices, customs or usage, but backed by legislation also. Rule 3 of the Kerala Hindu Place of Worship (Authorisation of Entry) Rules, 1965 supports such a ban³². Rule 3 prohibits the enumerated persons from entering or offering prayer or worship in any place of public worship, wherein sub- rule (b) specifically talks about the curtailment of women to enter any place of public worship. It says- "*women at such time during which they are not by custom and usage allowed to enter a place of public worship*".³³ Thus, this enforces the prevalent customs and usages.

The term 'Place of Public Worship'³⁴ has been defined under section 2(b) of the Act, 1965, *as a place, by whatever name known to whomsoever belonging, which is dedicated to, or for the benefit of, or is used generally by, Hindus or any section or class thereof, for the performance of any religious service or for the offering prayers therein.* As per the definition it could be ascertain that despite the fact that the temple is a private one, it shall be open to Hindus or any section or class thereof in its general sense.³⁵

However section 3 of the 1965 Act provides that "*every such place of public worship which is open to Hindus generally or to any section or class thereof shall be open to all sections and classes of Hindus and no Hindu of whatsoever section*

31. Durgah Committee, Ajmer v Syed Hussain Ali, AIR 1961 SC 1402

32. Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965, Act 7/1965

33. Rule 3(b) Kerala Hindu Places of Public Worship (Authorisation of Entry) Rule, 1965

34. Also defined under section 2(d) of The Protection of Civil Rights (PCR) Act, 1955 as a place, by whatever name known, which is used as a place of public religious worship or which is dedicated generally to, or is used generally by, persons professing any religion or belonging to any religious denomination or any section

35. Michael vs Paramara Group Devaswom; 2006 (1) KLT 979

or class shall, in any manner, be prevented, obstructed or discouraged from entering such place of public worship, or from worshipping or offering prayers thereat, or performing any religious service therein, in the like manner and to the like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform.” But the provision is subjected to the right of religious denomination, as the case maybe to manage its own affairs in the matter of religion,³⁶ in cases where temple i.e. place of public worship (herein), is founded for the benefit of any religious denomination.

Learned counsel for petitioners in *Sabarimala* case of 1991³⁷ contended that Rule 3(b) of the 1965 Rules is violative of section 3 r/w section 2(b) of the 1965 Act which confers the right to enter a place of public worship and offer prayer there, on every Hindu or any section or class thereof. This argument from the side of petitioners’ was dismissed by the Hon’ble bench by stating the fact that section 3 is subjected to certain limitations which are enumerated in the Rules. Therefore the rule amounts to reasonable restriction which is guaranteed by the proviso of section 3 of the Act.³⁸

It is respectfully analysed that the learned council erred in the not specifying on the fundamental rights as the supreme argument for the rights of the women. This conduct not only violates the definition of ‘place of public worship’ or ground for morality upheld by section 3 of 1965 Act, but dominantly it is violative to Article 14, 15, 25 and 26 of the Indian Constitution.

The issue is not only limited to the power of the board or trust, assured under Article 26, but it extends to the power of the state in its intervention in matters of the affairs of religious denomination. Generally, the State or any legislation has no such power to impede in the matters of religious denomination, which is fundamentally protected. But the question arises here is, whether the State legislature can enact any statute which upheld the fundamental power

36. As guaranteed by Article 26(b) of The Constitution of India, 1950

37. *S. Mahendran vs The secretary, Travancore*; AIR 1993 Ker 42

38. *Ibid*, ¶ 26

of the religious group but incarcerate the fundamental rights of the citizens as a whole?

The impugned statute is made by the state legislature of Kerala by invoking their power under Entry 28³⁹ of concurrent list (list III) of 7th Schedule. The respective law is made in consonance to Article 25 and 26, which upheld the freedom of religion encircling free profession, propagation, practice and conscience, and also empowers the freedom of religious denomination, herein Travancore Devaswom Board, to manage its own affairs in matters of religion, like restricting the entry of women in *sanctum sanctorum*.

This does not mean that the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act and Rules, 1965 is intra-vires. The Act is violating the fundamental rights of the particular section of the society by denying the right to equality⁴⁰ and by coercing with the discrimination on the ground of sex⁴¹.

It is submitted that the so-called umbrella of Article 26(b) cannot be invoked in the predicament situation because the impugned provision is also against Article 25 and 26. The framers of Indian Constitution undoubtedly inserted the limitation to the powers granted under the freedom of religion. Both the provisions are subjected to restrictions of Public Order, Morality and Health. The fundamental right to religion did not include practices which ran counter to the public morality, order and health.⁴² Hon'ble bench comprising of Justice T.S Thakur and Justice A.K. Goel upheld the above stated statement by dismissing the petition⁴³ filed by Khursheed Ahmad Khan against the Uttar Pradesh's Government decision to remove him from services as Irrigation Supervisor for contracting a second marriage when his first marriage was still in existence.

39. Charities and charitable institutions, charitable and religious endowments and religious institutions

40. Protected under Article 14 of the Constitution of India

41. Protected under Article 15 of the Constitution of India

42. <http://www.thehindu.com/news/national/right-to-religion-not-above-public-morality-sc/article6876039.ece>

43. Khursheed Ahmad Khan v State of U.P. & Ors.; CIVIL APPEAL NO.1662 OF 2015 (ARISING OUT OF SLP (C) NO.5097 OF 2012)

While pronouncing the judgement Justice Goel said “*What was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality.*”⁴⁴ On similar corollary it can be ascertained that the ban is against the public order and public morality, hence violates Article 25 of the Constitution. A practice does not acquire the sanction of religion simply because it is permitted.⁴⁵ Henceforth, ban cannot be upheld on a mere cause that it is been practiced and permitted for long, it must qualify the test of public order, morality and health to be sanctioned as a religious practice. Moreover in *Badruddin v. Aisha Begum*⁴⁶ the Allahabad High Court ruled that though the personal law of Muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution. Justice Gajendra Gadkar beautifully quoted that “*A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.*”⁴⁷

Eventually it is determined that the protection taken by the Travancore Board under Article 26(b) is baseless and unjustifiable. Hence the ban must be withdrawn when the issue is considered in the light of the public morality and order.

3.3 Usage and custom

The ban is advocated on the ground of prevailing custom and usage. Kerala High Court considered the testimony

44. <http://judis.nic.in/supremeCourt/imgs1.aspx?filename=42361>

45. *Javed vs state of Haryana*; (2003) 8 SCC 369, ¶ 60

46. (1957) All LJ 300

47. *State of Bombay v. Narasu Appa Mali*; AIR (1952) Bom 84, Page 86, ¶ 5,

of Thanthri of the temple, Secretary of the Ayyappa Seva Sangham and a senior member of Pandalam place, to conclusively establish the usage followed in the temple not permitting women of age group 10 to 50 in granting the right to worship. The then three witnesses held that there is a continuous practice of women of a particular age group being prohibited from worshipping in Sabarimala temple.

The entry of women is a prevalent ‘custom or usage’, is not the issue in hand, but whether such ‘custom or usage’ be evolved as a law enforceable by the Court of law. Usage is something which is regularly and ordinarily practised by the inhabitants of the place⁴⁸, can such a practice necessarily be enacted as a law?

The answer to the above stated question involves the importance of the interpretation of the terminologies like custom and usage in constitutional meaning. Basically ‘Usage’ and ‘Custom’ are words of cognate expression. The word usage denotes the reasonable and legal practice in a particular location, or among persons in a specific business or trade, that is either known to the individuals involved or is well established, general, and uniform to such an extent that a presumption may properly be made that the parties acted with reference to it in their transactions⁴⁹. Moreover in Black’s law Dictionary, the word ‘usage’ is described as different from custom as there is no usage through inheritance though a right can be acquired by prescription.

“Usage in its most extensive meaning, includes both custom and prescription, but in its narrower signification, it refers to a general habit, mode or course of procedure. A usage differs from a custom, in that it does not require to be immemorial to establish the same, but the usage must be known, certain, uniform, reasonable and not contrary to law.”⁵⁰

The reasonability and *in travires* characteristics of the usage certainly qualify it to be considered as a law. The above rationale was upheld in the appeal of the same case by the

48. Venkataramaiya’s Law Lexicon and Legal Maxims

49. West’s Encyclopedia of American Law, edition 2. Copyright 2008

50. Adithyan v. Travancore Devaswom Board, 1996 (1) KLT 1, ¶ 9

Apex Court while examining the scope of Articles 25(1), 26(b), 17, 14 and 21, as follows;

*“Any custom or usage irrespective of even any proof of their existence in pre-Constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country.”*⁵¹

Incorporating the interpretation of Apex Court in the question in hand, the ban on entry of women cannot be considered as a usage which could be enumerated as a law. The sole factor behind such a decision is the violative nature, against human rights, morality, social equality and mandate of Constitutional provisions, of such practice.

It is professed as follow;⁵²

*“The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species.”*⁵³

When no creature is allowed to disturb the equilibrium of the nature, then how can a sect be allowed to encroach the rights of the other section of the same creature.

4. CONCLUSION

No legislature can interfere in regard to the affairs in matters of religion guaranteed to religious body as a fundamental right⁵⁴. If this would have been an absolute demarcation then 1966 might not be the year of equality for non- Satsangi Harijan in entering the Swaminarayan Temple.⁵⁵ Contravention to Article 26(b) was

51. N. Adithayan v. Thravancore Dewaswom Board and Others (2002) 8 SCC 106, ¶ 8

52. Animal Welfare Board of India v A. Nagaraja & Ors., Civil Appeal No. 5387 of 2014, ¶ 44

53. Isha- Upnishad (1500-1600 BC)

54. Ratilal Panachand Gandhi vs The State Of Bombay, 1954 AIR 388, 1954 SCR 1035

55. Sastri yagnapurushadji and others v muldas brudardas vaishya and another, 1966 AIR 1119, 1966 SCR (3) 242

considered inferior to the solemn promise in Article 17 of abolishing untouchability. Likewise it is very paramount to understand the grievous contravention of Article 25, 14, 15 and 21, in outrageous conduct of curtailment of right to pray of women, merely on the ground of natural phenomenon.

Invoking Article 13 is the decisive remedy in such a predicament situation, which declares all inconsistent laws with the provisions of Part 3 i.e. fundamental rights, as void. The Bombay High Court wisely gave a nod while dealing with entering of women in Shani Shinganapur Temple and said “there is no law that prevents entry of women in any place. If you allow men then you should allow women also. If a male can go and pray before the deity then why not women? It is the state government’s duty to protect the rights of women.” Likewise, it is hoped that the apex Court would acknowledge the grounds and upheld the same in other sanctorum also.

Right to pray is an essential religious practice, which must not and cannot be chopped, the remedy lies in the hands of judiciary. India runs the risk of being in a condition that is termed as Judiciopapism , where judge’s discretion can completely overrule religious authority. Politics in a society like ours, with its many religions and sects, is likely to create logjams to even the most basic social reforms. Judiciary is thus the ultimate prerogative to revolutionize Indian society without hampering its footing, which lies within religion.

IS INDIA NEEDED SIN TAX AND FAT TAX?

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ABSTRACT

India has move ahead by achieving the overall development of the country like infrastructure ,economic development , education ,foreign trade and Good International Image Build up but for maintaining this growth, India require more revenue, and the other side of coin is that there are certain issues which are creating huddles in achieving such growth like obesity, heart diseases, Diabetes, Bp , gambling ,Smoking etc .To overcome these problems India will have to setup a mechanism by which India will be able to handle all these health issues and can generate extra revenue which can be used for the overall development of the country such mechanism can be named as Sin Tax.

With the objective of reducing the habit of consuming harmful product and increasing the revenue generation source, Government imposed extra tax burden on product that are harmful to the society like cigarettes, tobacco, drugs , soft drinks, candies, fast food ,etc which is known as Sin tax.

Descriptive Research has been used for doing the study on sin tax and data is collected through secondary sources like journal, reports etc.

This study attempts to find out the pros and cons of imposing Sin Tax .It will be beneficial for the society or it will create burden on poor and lower income level people.

Keywords: *Sin Tax, Fat Tax, Sugar Tax, Tax on Tobacco and Cigarettes.*

1. INTRODUCTION

India is a country which is having a plenty of resources at its hands and its optimum utilisation can make India one of the most developed country of the world. Out of these resources one of

the most important resource is manpower, India is having enough working manpower i.e. youth of our country.

But India is not able to utilise its manpower fully because the youths and children's are not in a position to give their best, it could be due to the addiction of the drinking alcoholic product and smoking or due to the health issues like obesity, heart diseases, Diabetes, BP.

Alcoholic Addiction is increasing due to the unawareness of youth about the harmful effect of alcohol products. Moderate price the product, easily accessible market, craze of adoption of the western culture by society, liberal policies of the States has also become a reason for promoting the habit of Alcoholic Addiction, Gambling and Crimes among youth.

Lifestyle disease like obesity, heart diseases, cancer, overweight, Diabetes in young children's, BP, Mental health, self confidence, depression in Teenagers etc are due to having junk food.

Now the time has arrived when India has to develop a mechanism by which it can reduce and control such health issues and alcoholic addictions.

Objectives of the study

1. To find out of the consumption level of Alcoholic products in India.
2. To find out whether Sin Tax Should be imposed or not.
3. To identify the advantages and disadvantages of imposing Sin Tax

Research Methodology:

Due to the limitation of time and resources the study on the topic of Sin Tax is done on the basis of secondary type data collected through various sources like Article, journals, Research papers and survey reports of the government etc and Descriptive research methodology is used to conduct this study.

Sin Tax: A tax imposed with a objective of reducing the habit of consuming harmful product and increasing the revenue generation source. Government imposed extra tax burden on product that are harmful to the society like cigarettes, tobacco, drugs , soft drinks, candies, fast food ,etc.

Thus, if a person wants to use any unhealthy product or promote such activity in the society then he has to pay the sin tax to the government for his sinful doing.

The products which can be covered by sin tax net is Alcohol, Tobacco, drugs, soft drinks, fast foods, coffee, gambling, cigarettes etc.

National perspective on alcohol and tobacco

Due to the lack of awareness and as a status symbol we have started using more alcoholic products and on the other hand for following western culture and lack of time we have moved towards the eating habit of junk food.

Various Reports and data collected by Government shows that the consumption of the Alcoholic products have tremendously increased during last few years which is not a good sign from the growth point of view of the country.

Alcohol

As per OECD (Organisation for economic cooperation and Development) report on alcoholism on May 2015 per capita consumption of alcohol is increased by 55 percent between 1992 to 2012 in India which is the third highest increase of the consumption of alcohol in the world, whereas in the some other countries member of the OECD, consumption of alcohol has fallen by 2.5 percent for the same period

As per WHO report, In India 30 percent of the population consumes alcohol on regular basis and an individual consume 4.3 litres alcohol in a year. Alcohol consumption is considered as the fifth leading cause of death and disability of the people of India. In 2012, 3.3 Million deaths are caused due to alcohol consumption which represents 5.9 per cent of the global Deaths. Alcohol consumption is not only a health hazard but also a major cause responsible for poverty in India.¹

Although some of the states of the country tries to reduce consumption of alcohol in the society where the Gujarat is the first state which ban the Alcohol. After that in 2014, Kerala also banned the Alcohol. Manipur, Nagaland, Lakshadweep are also following this policy. In 2016 Bihar government also took a

1. <http://www.mapsofindia.com/my-india/india/alcohol-consumption-in-india>.

decision of banning Alcohol in the state for ushering a positive Social change.

Not only this all the state of the country follow the Dry Days on which sale of alcohol is ban and bars are also not permitted to serve alcohol on these dry days i.e. 26th January (Republic day), 15th August (Independence Day), 2nd October (Gandhi Jayanti). To promote this first and last day of every month is celebrated as a dry day in some of the state like Assam.²

Tobacco

India has a second place in tobacco consumption and third place in production of tobacco in the world. In India two types of tobacco are available smoking and smokeless for example-Bidi, gutkha, misri, mawa, paan masala, hookah, cigarettes, cigars, chillum, gul etc.

As per the GATS (Global Adult Tobacco Survey) 2009-2010 report, more than one-third i.e. 35 percent of total adult population consume tobacco in which 48 per cent are male and 20 percent are females from which 25 percent population is from urban areas and 38 percent from rural areas.³

In the tobacco consumption Mizoram is the highest consuming state where the 67 percent of the total population are consuming tobacco and Goa is the lowest consuming State where the 9 percent of the population consume tobacco in smoking and smokeless form.

As per a Public Health Foundation Report of India 2011, Tobacco is highly consumed in India and to deal with tobacco related diseases for age-group 35-69 years it cost the economy 1 trillion dollar.⁴

Tobacco consumption is also a leading death and disability cause in India; near about 8- 9 lakh people die every year in India due to the consumption of Tobacco.

2. The Printers et al., First and last day of month “dry day” in Assam (Deccan Herald Jan. 28, 2015), <http://www.deccanherald.com/content/456246/first-last-day-month-dry.html>.

3. iipsindia, International institute for population sciences (2010), <http://www.iipsindia.org>

4. Bennett, Hike sin tax on tobacco by up to 40%: Health ministry (The Times of India Feb. 18, 2016), <http://timesofindia.indiatimes.com/india/Hike-sin-tax-on-tobacco-by-up-to-40-Health-ministry/articleshow/51033193.cms>.

Due to this an NGO of Assam (Voluntary Health Association of Assam) demanded 40 percent Sin tax on all tobacco products.⁵

Food Items

Not only the Alcohol and tobacco products are leading cause for death and disability but junk food or non essential energy dense food are also a big cause for many health issues and Lifestyle diseases like obesity, heart diseases, cancer, overweight, Diabetes in young children's, BP, Mental health, self confidence, depression in Teenagers, digestion etc.

In November 2015 FSSAI (Food Safety and standards Authority of India), take 74,010 samples of food from across the India out of which 14,599 were contravening laws and safety measures .

A sample test conducted in UP by FSSAI of 9600 food item out of which 43 per cent of the sample tested items did not meet the food safety regulations .

According to the test conducted by FSSAI, in 2015 around 20 percent of food samples tested by public laboratories were either adulterated or misbranded and did not meet safety standards.⁶

As per Techno pack, In 2013 junk food industry was 250 crore dollar and it will expand to 800 crore dollar by 2020. As junk food industry is growing day by day and leading to various lifestyle disease like obesity, heart diseases, cancer, overweight, Diabetes in young children's, BP, Mental health, self confidence, depression in Teenagers, digestion etc it becomes necessary to take major steps in this regard .

Kerala became a first state of India for imposing fat tax in July 2016, Kerala Government impose fat tax at the rate of 14.5% on fast food items like burgers, pizzas, pasta and sandwich and 5% on ready to chapatti as announced by state Finance Minister Thomas Isaac, Kerala government expect to generate 10 crore rupees revenue every year.⁷

5. The Indian express (The Indian Express Nov. 3, 2016), <http://indianexpress.com/article/india/india-news-india/sin-tax-on-tobacco-below-40-per-cent-to-have-negative-impact-3732253/>.

6. RJ Whitehead and FoodNavigator-A, Consultant (Nilabh Singh Dec. 9, 2015), <http://www.foodnavigator-asia.com/Policy/Sin-tax-of-40-proposed-to-cover-Indian-soft-drinks>.

7. Ratna Bhushan and Rasul Bailay, Article: In a first, Kerala imposes 14.5% "fat tax" on junk food - the economic times (The Economic Times 2017), <http://economictimes>.

A study conducted in 2014 in Stanford University recommended 20 percent sugar tax on sweetened beverages for averting obesity and type-2 diabetes in high income and middle income countries.⁸

The consumption rate of tobacco, alcohol, junk food and reports show that India needs extra tax on alcohol, tobacco and non essential energy dense food products.

In India the extra tax burden is always put on such alcoholic and harmful products, we are just corner to GST implication and rates proposed under GST are also giving extra burden to such harmful products i.e. 28 % plus Cess.

International Arena

Increase in the Consumption of alcoholic product and junk food is not only the problem of India but also a worldwide problem .As per the various reports, consumption of such products is increasing at a fast rate in every country. Today's generation finds Alcoholic products as a status symbol and young children's prefer to eat junk food instead of healthy food items because of which its sale is increasing day by day.

In some foreign countries there are certain products which have become necessary products for the citizens of that country and cannot be eliminated such as soda and junk food.

As per WHO report, 38.3 percent of the total population of the world consume alcohol on regular basis and an individual consume 6.2 litre alcohols per year.

The North American country , have a highest consumption of non-essential energy dense food due to which it has become one of the most obese population country in the world and has imposed sin tax of 8 percent on non- essential energy dense food which reduce the consumption of these products within a year by 25grams (5.1 %) per capita per month.⁹

indiatimes.com/news/politics-and-nation/in-a-first-kerala-imposes-14-5-fat-tax-on-junk-food/articleshow/53113799.cms

8. Sanjay Basu et al., Averting Obesity and Type 2 Diabetes in India through Sugar-Sweetened Beverage Taxation: An Economic-Epidemiologic Modeling Study, 11 PLOS MEDICINE e1001582 (Tony Blakely ed., Public Library of Science (PLoS) 2014).
9. R. Prasad, "Sin tax" reduces intake of energy-dense food in Mexico, HEALTH (The Hindu Jul. 5, 2016), <http://www.thehindu.com/sci-tech/health/sin-tax-reduces-intake-of-energydense-food-in-mexico/article8812187.ece>.

Fat tax on junk food was proposed for the first time in 1643 in Britain for solving obesity problem. Britain government also proposed for imposing sugar tax.

Fat tax on junk food has been successfully imposed in European countries such as Denmark and Hungary but later on in November 2012 Denmark government abolish such tax.

U.K, Sweden and Canada imposed sin tax on series of products and services liketobacco and alcohol, lotteries, gambling, cigarettes.¹⁰

Mexico imposed sin tax in 2013on soda. U.K is now also debating for Sugar Tax for reducing obesity problem.

In US Sin tax is imposed on cigarettes and alcohol and in 2014 Us government generated revenue of 1600 crore dollar by sin tax on cigarette and 610 crore dollar from alcohol.In US sin tax is also imposed on casino and video game.

2. ADVANTAGE OF SIN TAX

1. **Reduce consumption of harmful product:** The use of alcohol, tobacco or junk food is leading to various health problems in persons like cancer, obesity, overweight, Diabetes .The sole objective of applying Sin tax is to reduce consumption of such products as tax on such products will hike the cost of the products and thereby discourage consumers to spend on harmful products. Therefore sin tax helps in promoting healthy society and healthy habits among people of the country.
2. **Increase the revenue of the government:** The amount of tax imposed on such products will go in the hand of government. It will increase the amount of revenue of the governmentwhich it can use for the welfare of the society and citizens of India.
3. **Reduce Medical Expenses of the Society:** When an individual consumes such harmful products it affect their physical health and got caught by various harmful diseases. For the treatment of these diseases they have to spend large amount of their savings and the main source of the earning of the family also stops and lead to difficulty in

10. ZeeBusiness, YouTube: Discussion on Legitimacy of Imposing Fat Tax in Kerala | Part-I (YouTube Jul. 9, 2016), available at <https://youtu.be/kOIVVAuPJ70>.

surviving without money. Tax on such products will lower the consumption of such goods and thereby they will not get caught by diseases by which the medical expenses of the society will get reduce.

4. **Reduce Financial Burden on the government:** The government allocate a huge amount of fund from its the annual budget for the medical facilities by which government provide various medical facilities to the individual for the treatment of diseases which are caused due to the consumption of harmful products like mouth ulcer , cancer, diabetes etc.
5. **Easily Acceptable by the society:** Generally, decision of implementation of such type of tax of the Government gets support from the society because all the citizens of the society are not indulge in the consumption of such products and the major part of the society also wants that the consumption of such products should be reduced .The consumption of such harmful products badly effects the overall society so major part of society will easily accept the such type of taxes.
6. **Can Reduce the tax Burden on healthy Product:** Government can collect enough amount of revenue by taxing the harmful products so it can reduce the tax burden on useful goods and can give the relaxation to the society. This will promote the habit of consumption of healthy products among persons and will reduce the consumption of unhealthy products.
7. **Reduce Domestic violence and other crimes:** After having alcoholic and tobacco products, persons losses control on their mind which lead to domestic violence cases and crime like Rape, violence, teasing, driving while intoxicated etc. Sin tax will increase the price of these products which will make these products out of reach of the persons and thereby reduce domestic violence cases and other crime rate.
8. **Reduce poverty:** As the lower level persons are habitual of Alcoholic products and they spend their money and saving on consumption of such products because of which their level of living remains low and increase the rate of poverty in India. Sin tax will help in reducing spending on such products by lower level persons and thereby poverty rate will also decline or reduce.

3. CRITISISM OF SIN TAX

1. **Consumption of hazardous substitute will increase:** Instead of stopping the consumption consumers will start using cheaper hazardous products or substitute of the products which are available in unauthorised market to avoid sin tax. These products are more harmful and will affect their health more badly/seriously.
2. **Failed to change the habit of uneducated peoples:** Sin tax and fat tax is not able to change the behaviour of the Uneducated, moderate and low income people and they continue the use of such products despite of high cost because of not having knowledge about the motive of imposing tax on these products and what harm these products will have on their health.
3. **Negative effect on Industries dealing in these products:** Sin tax and fat tax raises the cost of the alcohol, tobacco and junk foods which increase the price of the products and decrease its sale which has direct effect on profit of the companies. These taxes will affect the image of the companies dealing in these products as these are said to be harmful for the health of the peoples.
4. **May reduce the revenue of the government:** Government is collecting a large amount of revenue from these harmful products though it is necessary to impose such taxes for the welfare of the society. But government has to take such tough decision and should bring a proper balance between harmful and necessary goods taxation.
5. **Smuggling of Alcoholic products will be increased:** When the price of alcohol and other harmful products will increase by sin tax. Peoples to avoid such sin tax will start smuggling these products in India from other states, city and countries where there cost will be low.
6. **Small vendors will be affected:** Sin tax will strongly affect the small businessmen, Retailers and wholesalers. As the price of the products will increase by such taxes they will find themselves with decreased sales and less profit as the consumers seeking to avoid tax will buy products from unauthorised market.

4. RECOMMENDATIONS

1. Sin tax should be levied on Alcoholic and tobacco for promoting healthy behaviour and generating revenue
2. Fat tax and sugar tax will also be a good decision for shifting consumers to healthy food items but the percentage rate of fat tax should not be higher.
3. If the sin tax is imposed on various harmful products like tobacco, Alcohol, junkfood the tax levied on the necessary goods like milk, medicines and other necessary goods should be decreased.
4. Proper precaution should be taken for discouraging smuggling and other illegal action which will increase due to imposing of higher tax on Alcoholic products.
5. Revenue Generated through Sin Tax should be used fortreating various diseasescaused due to consumption of these products.
6. More Informative and knowledge providing Advertisements regarding harmful effect of Alcoholic products on Physical health of the persons and reasons of imposing these tax should be communicated to the citizens of the country.

5. CONCLUSION

After analysing all the facts, we have reached to the conclusion that the consumption of Alcoholic, tobacco and junk foods are tremendously increasing at a higher rate which will be very harmful for the well being of the society as well as for the health of the citizens of the India.

So, it becomes necessary for the government to take remedial measures for discouraging unhealthy behaviour. Sin Tax can be used as a useful measure for discouraging use of such products. But sometimes it looks like that Sin Tax, Fat tax and sugar taxes are used as a weapon by the government for collecting extra revenueand it add the new products like soda, plastic bags whenever government finds low revenue for fulfilling various responsibilities towards society.

The government objective before implementing the Sin tax and fat tax should be to discourage the use of harmful Products rather

than a way of collecting revenue from imposing Sin tax otherwise it will become a short-term remedy.

Sin Tax, Fat tax and Sugar tax has been used all over the world as a first remedial measure to overcome the problem of unhealthy lifestyle and health issues of the citizens of the country so India should also move ahead and take a strict decision of imposing Sin Tax, fat tax and Sugar tax on various products which can come under these categories for the well being and development of the society as well as of the country.

UNIFORM CIVIL CODE: SHOULD BE OR SHOULD NOT BE

BUSRA NOOR¹

It won't be incorrect to call India a *secular republic de jure rather than calling her a secular republic de facto*. Though we declared our nation secular long back in 1976 by the 42nd Constitutional (Amendment) Act, we failed to adopt the concept both legally as well as practically. The Indian Constitution is stuck in a more or less compromise situation at present where the judiciary can be seen endeavouring to strike a balance between the Fundamental Right and the Directive Principle of State Policy. The significance of Uniform Civil Code could be inferred from the fact that the framers of the constitution devoted a full article to it. The Indian constitution includes the setting up of a Uniform Civil Code for its citizen under Article 44 in Part IV-The Directive Principle of State Policy. Article 44 states: "The State shall endeavor to secure for the citizens, a uniform civil code throughout the territory of India."

The issue of Uniform Civil Code has been in the limelight since 1995 when Supreme Court in the landmark judgment of **SARLA MUDGAL v. UNION OF INDIA**, AIR 1995 SC 1531, stressed on the need for the Uniform Civil Code in matters of marriage, inheritance, succession, etc. In the opinion of the court the Fundamental Rights relating to religion of members of any community would not be affected thereby. The Hon'ble Supreme Court served that permissibility of bigamy under Muslim Personal Law is inconsistent with the laws governing other communities in India and opposed to public morals and therefore should be supplemented by a Uniform Civil Code. Similar sentiments were expressed by the Hon'ble Supreme Court again in 2003 when while passing its verdict in the case of **JOHN VALLAMATTOM v. UNION OF INDIA** AIR 2003 SC 2902 directed scraping of section 118 of the Indian Succession Act 1925 applicable only to Christians. It can, therefore, be concluded that Uniform Civil Code is meant to constitute a legal framework of secular laws which shall govern activities like marriages, inheritance and

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divorce which are presently controlled by personal laws of various religions and lead to a state of *utter confusion, discrimination and injustice*.

The greatest benefit that would result from Uniform Civil Code is a more egalitarian society where every single individual would be guided by the same laws relating to personal issues. Absence of Uniform Civil Code undermines the credibility of secularism in India and promotes social disparity. Different personal laws have different ways of dealing with issues relating to marriage, succession and so on. There should be an element of uniformity governing such activities which should ideally be administered by the State.

Another problem with the personal laws is that these laws are generally biased against the women. Women are often seen at the receiving end of these laws. It became a matter of debate after the Supreme Court's verdict in the **MOHD. AHMAD KHAN v. SHAH BANO BEGUM 1985 SCR (3) 844** case. The case was about the right to maintenance after divorce. According to Muslim Personal Law, the husband was not obliged to pay the maintenance after divorce. This was challenged and the Court ordered that a husband has to provide maintenance for a divorced wife with no means of income. The judgment created an uproar among the conservative sections of the Muslim community as a result of which the legislation had to enact a law to cover up the judgment.

Such unreasonable and unexplainable discrimination against women is found in other personal laws also. For instance, the Hindu Succession Act favours men in issue of property rights. Similarly blatant discrimination against women in divorce law can be observed from the fact that in order to get a divorce, while a Christian woman has to prove charges against her husband on adultery along with bigamy, incest, cruelty, change of religion, etc, the husband gets away by proving the charges of adultery alone. Likewise the right to triple talaq bestowed upon the Muslim men is both discriminatory and derogatory against women at the same time. It is these practices which augment and accelerate the position in favour of a uniform civil code for all religion and for all gender.

Another advantage of Uniform Civil Code worth mentioning is

that it would *simplify the cumbersome legal process* involved with the matters governed by the personal laws. It would be way easier to seek redress for our grievances. The process will be *simple, uniform, justified as well as justiciable*. It will also help to adapt our legal system to the changing social realities and it would be easy to amend and re-amend it as and when required. **The prevailing personal laws are inadequate to deal with circumstances arising from growing economic self-reliance and literacy of women in present era.**

However, it is imperative and advisable to look into the other side also. Uniform Civil Code is covered under the Directive Principles of State Policies while Freedom of Religion and Conscience are guaranteed under the chapter of Fundamental Rights. It is often argued that State cannot frame and implement a policy which takes away or abridges the Fundamental Rights of citizen. Those who argue against the Uniform Civil Code are of the opinion that matters like marriage, divorce, maintenance, succession and so on are religious affairs and the Constitution guarantees freedom of such activities and therefore a Uniform Civil Code will be a violation of it. *The Supreme Court has observed that marriage, succession and like matters are of secular nature and cannot be brought within the guarantee enshrined under Art 25 and 26 of the constitution held that right to one's personal law is not a fundamental right.*

Another argument against immediate introduction of Uniform Civil Code is that India is a land of vast culture and diversity and it is very easy to initiate communal disharmony based on religious and social differences. India witnessed a large scale religious riot right after independence in 1947. The harsh history was repeated again during Babri Masjid destruction then re-repeated at Gujarat Riots and Muzaffarnagar Riot. There is, no doubt, that there are selfish political leaders who just in order to win elections are ready to sacrifice communal harmony and brotherhood. Keeping in view these harsh realities it should be understood that the time is not yet ripe for the implementation of the Uniform Civil Code. *Polarization in the society is very much alive in our country and Uniform Civil Code cannot be immediately introduced without vast bloodshed.* Therefore, it should be deferred until political and social consensus is achieved.

Thus, it is imperative that the demand for Uniform Civil Code should come from all sections of society, specially minority communities. The pros and cons of Uniform Civil Code should be thoroughly discussed and debated by all. Enlightened and responsible Statesperson should come forward and promote the need and necessity of Uniform Civil Code amongst the commoners and motivate them towards a common consensus that aims at establishing a Uniform Civil Code for the entire Republic of India.

UNITED KINGDOM IN EU SINGLE SUPERVISORY MECHANISM

MR. NIKHIL KASHYAP*

I. INTRODUCTION

European Union is a land of territorial and national diversity as it has 28 member nations with different culture and languages. This diversity is a challenge as well as an asset. The impact of the financial depression of US has adversely impacted on Europe's financial condition. There can be many causes to this depression. Due to this depression, European Union had to rethink and re-develop its financial policies. Around the World, nationalities have their self supporting regulating system to provide stability to their banking institutions. The tough times sets the rules in motion and prepare itself for the future.

SSM is a point where a big change is being created or realised in European Union. It is developed and designed with an aim to strengthen the financial system from the crisis. It is way to improvise the coordination amongst the member states of European Union. It is a way to reduce the 28 different system approaches for tackling the same problem. This will give a consolidated approach to deal with the crisis or to be particular recession. Therefore a system was devised to have a centralized supervision on banks to provide uniformity and stability to the financial system. It is a way to unite the system of banking in European Union. This will provide a better opportunity to tune the system centrally for better outputs and results.

“Single Supervisory Mechanism” (SSM) is one of the outcomes of the policy drift of the union. It can also be claimed that SSM is the first pillar of the European Banking Union. On 12th September, 2012, European commission¹ proposed for SSM to evolve from the financial crisis which was adopted by European Parliament. European Central Bank (ECB) is made to deal with bad times

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1. European Comm'n, Commission Proposes New ECB Powers for Banking Supervision as Part of a Banking Union 1 (Sept. 12, 2012), available at europa.eu/rapid/press-release_IP-12-953_en.pdf. Visited on 25 Dec, 2015 at 1430 hrs.

or crisis situations. ECB is well equipped to deal with all kind of banking crisis in EU. ECB has welcomed the decision of implementing SSM. ECB submitted its comprehensive supervision review on 26th October, 2014.

England plays a very important role in this regard being the London as the financial centre of European Union. There have been occasions when the United Kingdom negotiated or re-negotiated its position as well as participation in European Union. Through this study, the position of England will be discussed in detail with the nuances of SSM.

2. SINGLE SUPERVISORY MECHANISM

The main objective of SSM is to bring national integration of financial policies which will in turn provide financial stability and security. SSM will provide better cooperation and coordination to deal with financial issues of the European Union. Secondly, the SSM aims at reducing the hope of bail out options to EU banks. The aim is to take precautions before the problem create its roots.

The objective of SSM can be best understood in the words of Internal Market Commissioner Michel Barnier. He said: “Banking supervision needs to become more effective in all European countries to make sure that single market rules are applied in a consistent manner. It will be the role of the ECB to make sure that banks in the euro area stick to sound financial practices. Our ultimate aim is to stop using taxpayers’ money to bail out banks.”²

SSM regulation has created a two tier system of supervision. At one level the ECB will be supervising and at national level national authorities are created. It is pertinent to note here is that SSM is not applicable on investment firms etc. ECB is made a supervisor which will be taking care of large banks in EU. There are three main functions of central bank the monetary function, price stability; the financial stability (micro- and macro-prudential supervision); and payment systems.³ ECB is a centralized and independent institution whose powers were increased due the need in crisis. In other words, ECB is a creation of crisis of 2008.

2. Ibid

3. George S. Zavvos , Towards A European Banking Union: Legal and Policy Implications

3. ECB

The European Central Bank (ECB) is given the position of banking watchdog. ECB will be authorised to supervise banks of the euro zone and banks of other member states that join the banking union. Council Regulation No. 1024/2013⁴ provides “opt-in” option for the other European Member States. The regulation is drafted with the aim to provide comprehensive system of supervision on institutions dealing with banking.

Understanding the scope of ECB is very necessary. ECB will be able to supervise large banks. The criteria for entering into the category of large banks are based on the size, importance and cross border activities of the Bank. Secondly, ECB will be supervising three biggest banks of each member state. Lastly, ECB will be supervising all the beneficiary banks of European Stability Mechanism. The ECB is empowered with exceptional power to supervise any bank that will create a systemic threat. This rider will be exception to all the above mentioned rules. This exception is very important to curb the menace of non adherence to the rules and regulations created by banking union or European Union. ECB will be focussing on the important banking institutions whereas national supervisors will be working in subordination to ECB. ECB will work as the heart of the regulatory mechanism whereas the national authorities will work as real executives of the dictates of ECB.

According to Article 127(6)⁵ Treaty on the Functioning of the European Union, only specific supervisory tasks can be conferred on ECB. This is the reason that regulation dealing with SSM provides a list of supervisory tasks that limit as well provide the scope of working of ECB. This list focuses on the supervisory role of ECB. It provides:

- Monitoring of the compliance of European banking law

4. Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions; Council Regulation (EU) No 1024/2013 of 15 October 2013, Available at https://www.lb.lt/n24744/reglamentas_1024_2013_en.pdf Visited on 25.12.2015 at 2.30 pm

5. Article 127 Clause (6) The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings

with regard to liquidity as well as the financial health of the banks.

- The ECB is empowered to act as “host supervision” for the member as well as non member states of the banking union. The host supervisor plays a limited role that is of dealing with liquidity of the bank.
- The ECB will supervise the governance aspect of financial institutions i.e. mainly banks. Governance includes the appointment of management, risk management etc.
- The ECB will further supervise the role of banks with other companies but it shall be limited to banking only.
- ECB will be preparing the banks for crisis through periodic tests etc. Here it is pertinent to mention that SSM Regulation limits the powers of ECB by allowing it to conduct prudential supervisory tasks and not crisis management.
- ECB is empowered to provide or withdraw bank authorisation. The withdrawal of bank authorization is done on the ground non compliance with EU directives and rules. In other words, every bank has to be authorised at national level as well as ECB level. There may be a point in time when there can be a dispute between the national authority and ECB on which SSM Regulation is silent.
- The ECB will be supervising the mergers and acquisitions of banks with national supervisors.
- ECB will be participating in supervisory colleges. They help in developing the cross border cooperation.

The most important rule is that the ECB will be entrusted with power to implement single rule book for all the European Union members. This rule book covers the EU guidelines and directives. ECB is further empowered to tailor the rules for different national regimes and requirements. The only aim that is there with ECB is to minimise maximum national discrepancies from the system.

It is less clear what the ECB’s powers are in “bad times”, e.g. in a pre-crisis situation.⁶ Under ECB, a supervisory board will be established which will work under the governing council.

6. Concetta Brescia Morra, From the Single Supervisory Mechanism to the Banking Union The Role of the ECB and the EBA. Available at http://eprints.luiss.it/1322/1/02_Brescia_Morra-SEP.pdf visited on 28.12.2015 at 12.30 am.

The governing council will be more a formal organization than supervisory council. The powers of ECB will be limited to only the powers provided under the regulation.

ECB will be working with national authorities with regard to macro supervisory powers. It will try to keep an eye on national authorities that they don't indulge themselves into the working of covering of the institutions. The ECB is also empowered to order the national authorities to act in accordance with the national rules in case there is any violation to the national financial regime created by the member state/s of European Union.

Two additional institutions are established to bridge the linkage between the non member states of the union and ECB. The two institutions are European Banking Authority (EBA) and European Stability and Risk Board (ESRB). European banking authority comprises the bank supervisors of member states of European Union.

4. NATIONAL SUPERVISORY AUTHORITIES

National Supervisory authorities work on the banks which do not come under the supervision of ECB. In other words they work on those banks which are left from the supervision of ECB. Further national supervisory authorities will be supervising on branches of banks from other places than European Union. Further these authorities will also supervise issues relating to the consumer protection money laundering etc.

EBC will be having two branches. The branch will be of Governing Council. Second branch will be Supervisory board. The governing council will comprise of the members of the Executive Board of the European Central Bank and the Governors of the national central banks of the Euro area Member States.⁷ Supervisory board is a new body created by SSM Regulation. Supervisory board comprises of the supervisors of banks of the participating Member States, i.e. of the 17 Euro area Member States; members of the ECB Executive Board; and banking Supervisors of any other Member State that opts in.⁸ The major difference between the powers of governing council and supervisory board is that of the taking of the legally binding decisions. The governing council can

7. Supra Note 4

8. Ibid

take legally binding decisions where as supervisory board is not empowered to do. Supervisory conducts the inquiries and submit its recommendations as well as decisions to the governing council for approval.

There are few criticisms relating to the functional structure of SSM. SSM is having a problem of with regard to the participation in governing council. The first structural objection can be that the non eurozone members cannot participate in the governing council. This may lead to the conflict with regard to the decisions of the council. This may further lead to the non compliance of the decisions of the council. Secondly, the supervisory board has to prove its independence of decision making with regard to the matters dealing with the collective responsibility. The working of the supervisory board or the council has to be made bias less with regard to any nation or their interests. The collective interest of financial stability and profit should be kept as the only rationale of decision making.

The working of the SSM Regulation depends on the participation of the European Union members. It is to be seen how the decision of UK to opt-out from the banking union can affect the working of the union.

5. UNITED STATES & UNITED KINGDOM SUPERVISORY MODEL

United States (US) aims at financial stability and market discipline. In US, the bail-out has been an option with the financial institutions. In the recent past government in US has given bail out to its banks on various occasions. The existing US supervisory model aims at ending the expectation of bail-out through market discipline.

US has come up with various tools that helps in maintaining the discipline required for better and smooth functioning of the financial institutions of the country. The first tool is the reporting of the gaps to the congress by the supervisory board. Second tool is to bring in ambit the non-banking institutions as well as other financial organizations under the supervision of supervisory council through widening the scope of the supervisory council.

US established the ‘Financial Stability Oversight Council’⁹ in the year 2010. This institution was established with the aim to avoid like financial crisis created 2008. This council has 10 voting members and 05 non voting members. The main purpose of the council is to provide a forum for the financial institutions to discuss the risks involved in financial stability of the nation. According to Section 112 of Dodd-Frank Act, there are three purposes of the council.

Section 112 reads as “(A) to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace; (B) to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure; and (C) to respond to emerging threats to the stability of the United States financial system. Firstly identify risks to the financial system that may arise from large, complex financial institutions;”

Items (1) and (2) are arguably directed at minimizing the chances that particular firms will be viewed as too big to fail, or too connected to fail, or otherwise pose risks to the financial system. Item (3) is arguably a more general catch-all for any factors that might destabilize the financial system.¹⁰

The main functions¹¹ of the council are provided as under:

1. To enhance the Coordination amongst the financial regulators.
2. To facilitate data collection as well as evaluation by providing well trained and skilled staff to deal with the confidential information of the banking institutions. The data is collected from office of Federal Reserve, Financial Research and other

9. This institution was developed through the dodd Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, 124 Stat 1394), also known as the Dodd-Frank Act.

10. Edward V. Murphy, Financial Stability Oversight Council: A Framework to Mitigate Systemic Risk available at <https://www.fas.org/sgp/crs/misc/R42083.pdf> visited on 25.12.2015 at 4.30 pm

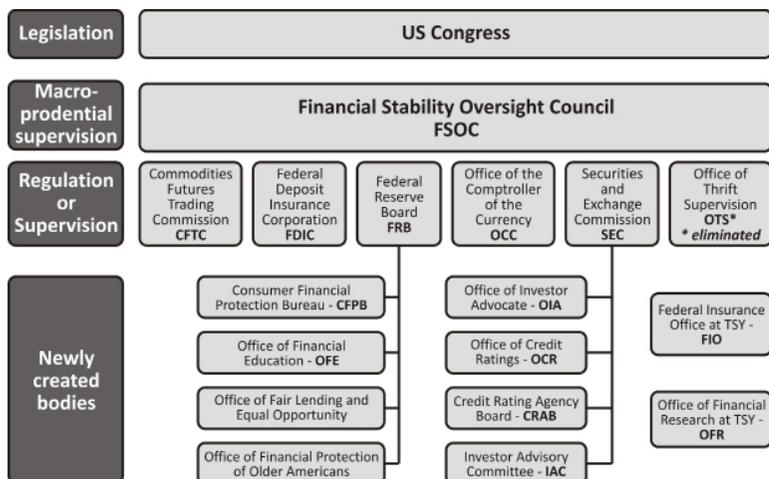
11. Section 112 Clause 2 of deals with duties of Financial Stability Oversight Council.

regulatory institutions which are evaluated by the FSOC.

3. The Council can designate the institutions for prudential regulation by Federal Reserve. This assessment is made on various parameters.
4. To decide the applicability of regulations on financial market utilities.
5. The FSOC will evaluate the rules for better consumer financial protection.

6. FSOC US SUPERVISORY SYSTEM¹²

UK has a financial policy Committee to monitor and assess the various processes in financial system. The existing regulatory mechanism is an integrated structure.



Source: Deutsche Bank Research, Macro-Prudential Financial Supervision in the US (12 April 2012)

Historically, Bank of England use to monitor financial institutions. It had power to issue directions to other banks which was rarely used. The Financial Services and Markets Act 2000 (FSMA) defines the pre existing regime. This act came into effect from end of 2001. The Financial Services Authority (FSA) was established under the Act. It regulates business as well as it has the power to make rules. Then came the Financial Services Act, 2012 developed the existing regulating system. The Current system of financial

12. Rosa M Lastra, Missing Pillars of Banking Union Available at: http://ec.europa.eu/finance/financial-analysis/docs/conferences/140925-rosa-lastra_en.pdf visited on 28.12.2015 at 12.30 am.

market regulation is a tripartite system involving the Financial Policy Committee (FPC) the Prudential Regulation Authority (PRA), and the Financial Conduct Authority (FCA). The PRA and FCA are the successors of FSA. The PRA is a part of the Bank of England and deals with the prudential regulation of the financial institutions. FCA deals with the Conduct regulation of the financial institutions and in addition to it deals with residuary micro prudential regulation. FPC was established with the aim of assisting the Bank of England as well as keeps a check on financial stability and to recommend changes with regard to systemic risks in the financial markets. In the new system the Bank of England is overall responsible for the financial stability of the system.

Now let us discuss the role of the above stated tripartite system.

PRA main function is to promote steady and stable working of the financial system. PRA also regulates various deposit taking institutions. PRA main objective is to ensure the smooth functioning of the business of its authorised persons while taking into the consideration of UK financial system. PRA is also empowered to regulate the institutions and minimise the destabilisation of the system. It is pertinent to mention here that PRA has to look that it does not affect the competition in the market by its working.

FCA works as a residuary agency after PRA. FCA regulates the conduct of various stakeholders for the better functioning of the markets. FCA focuses on consumer protection which in turn creates faith on the markets in UK. This further ensures healthy competition in the market. FCA has a wide rule making power. It is also empowered to take an enforcement action. The existing regulation requires cooperation as well as coordination of between PRA and FCA. PRA can order refrain to the FCA with the objective of maintaining stability in UK financial market. Further they need to coordinate with the Bank of England to achieve the stability in financial markets.

FPC is authorised to give directions to FCA and PRA. FPC is also considered as sub-committee of the board of directors of Bank of England. FPC comprises of 10 voting members, 5 executives from Bank of England, 4 external members, chief executive of the FCA, a non-voting representative from Her Majesty Treasury and FPC is chaired by the Governor of the Bank of England. The main function of FMC is to maintain financial stability of the institution.

It further takes care of the systemic risks in the Bank and tries to remove them.

7. SSM: THE ROAD AHEAD

SSM started with the limitation i.e. geographical limitation. It covers some part of European Union. Secondly, SSM only monitors the banking sector. It leaves other parts of the financial sector untouched. The other part of the financial sector refers to insurance sector as well consumer sector etc. This list is not exhaustive but only suggestive. Though SSM was a great achievement after 2008 crisis in the European Union is that there was an agreement on the centralising power to provide financial security and stability. It was a task to achieve as there was legal as well as political reluctance in the EU. At the same time, the compromise to get the financial security or stability is much wider, as the ECB will take the role of the banking supervisor. All the EU level choices will be made or dictated by ECB. This might result in difficult situations as there can be points of disagreement between the situations. The question remains unanswered is that if the European Commission may get in conflict with the ECB, who will be dealing with that situation? This kind of discontentment would tarnish the image of the banking union and in return will reduce the credibility for national and foreign investments at all levels. With regard to banking there will be a transfer of power from the national level institution to the union level institutions.

Now the second phase of the banking union will be implemented from 1st January, 2016 which will bring in Single Resolution Mechanism (SRM). SRM is the other pillar that will be working in coordination with SSM. SRM is also considered as corollary to SSM. SRM is a result of EU Regulation which got enforced on 19th August, 2014. SRM is applicable on all the members of SSM. The countries who are not the members of SSM cannot participate in SRM. SRM will comprise of Single Resolution Mechanism as well as European Resolution Fund. SRM will have similar power of ECB with regard to the de-authorizing any bank from carrying out its banking services. In future, SSM and SRM will be working in coordinated as well as systematic to avoid the situation of crisis in European Union.

8. UK IN EUROPEAN BANKING UNION

In today's world, no country can flourish in isolation. Economy of every country is based on the foreign investments which get attracted to national policies. Foreign investments or financial soundness of a country go hand in hand. National legislations which don't complement the investments affect the financial status of a country. UK is part of the European Union though it is outside the eurozone. UK is one of the biggest business centres of the world as well as European Union. UK always had an option of not being a member of EU. But it chose to be part of it. Subsequently UK had the choice of becoming the part of the banking union.

To take the decision, UK should consider the aspect of reliability by the world of its markets and its financial institutions. No doubt the benefit is mutual. If UK becomes the part of Banking Union it will provide the stability to the union. The pertinent question arises that other member states of European Union have surrendered their sovereignty to the banking union with the motive to seek help for their domestic banks whose financial condition are at risk and UK has such interest from the union or not?

UK has decided to keep its power of regulating its financial conditions rather than becoming the epicentre of finance of eurozone. UK has been regulating its financial institutions in much stricter ways at it is done in banking union. This point is very relevant as the UK has more stringent regulations with respect to liquidity and other support systems for stable financial conditions of the country. Financial institutions in UK have agreed to implement Vickers Commission¹³ which majorly deals with concept of retail ring fencing. European Union is applying the same principles of retail ring fencing to its institutions. UK has similar banking operations that are there of the Banking Union. But there are occasion as to the points of reservations exists between UK and EU. To site an example, UK has taken ECB to the European Court of Justice with regard to the location of the clearing houses. Britain has also objected over the financial transaction tax which was levied by the 11 member European Union state. They claimed that this move would generate unequal amount of taxes between the European Union member states.

13. Independent Commission on Banking, Final Report Available at http://www.ecgi.org/documents/icb_final_report_12sep2011.pdf visited on 29.12.2015 2.30 pm.

Banking Union was proposed in European Union. UK had an option of becoming part of the banking Union through ‘Opt-in’ option. The first question that is required to be answered is what will be the affect of the banking union on the financial status of Britain. EU designed a much better and a stable financial system in accordance with the crisis it had to face since 2008. The first fear that exists in the mind of Britain is the power will be concentrated in the hands of ECB which will consider the financial interests of the Eurozone above the interests of European Union. The financial sector of Britain had an apprehension that being a part of the banking zone would lead to more conflicts and tense situations that may worsen the conditions of financial stability of Britain.

The second uncertainty that exists is how the Britain based banks will take the control of assets that are in the hold of ECB. Further, there can be a point at which conflicts with regard to the control of assets arise which is under the control of Bank of England.

In the authors opinion the difference between the banking policies of EU and UK are not much. Further shift in banking policies will not affect the competitiveness of the Britain in dealing with the world. A very important point to be noted here is that the Banking Union has a ‘Double Majority’ voting system which means that if EBA proposes any rule or regulation or proposes any major change in the system it requires the approval of eurozone members as well as non eurozone members or outside members.

It can be summarised that as of now there was no threat to Britain from becoming the member of European Banking Union as they have a re-course to ECJ for the settlement of issues. The European Economic Community was started in 1958 with 6 nations. From European Economic Community the European Union was formed which consists of 28 Nations as on date. Euro (A single currency) was introduced in year 1999 replacing the European Currency Unit. The European Union has a whole should focus on strengthening the single currency system and share the wealth and prosperity as a community at large.

9. CONCLUSION

It is important the European Banking Union see its conclusive end as it is important to realize the dream of one single market. The European Banking union will also improvise on the stability

end of the financial institution. It is a method to avoid the crisis situations that may arise in future. European banking union will be regulation the liquidity as well the financing option of the banks with special regard to cross border financial transactions. The mitigation of the risk is another factor that has to be considered by the European banking union. The aim of the European banking union is to bring the banking regime of across European Union in order to achieve its goals of stability and prosperity.

The question still remain unanswered is that whether the European Banking Union can be successful with the epicentre of finance of European Union i.e. UK not being the member of the union. There are 19 members of the Banking Union whereas EU has 28 members. There is only one chance of success of the banking union when there is coordination between the non members of the banking union with the banking union. This coordination can be seen in the future in case the power is given by EU to the banking union to update the rules and regulations that govern the nation based banking system. No doubt, there can be a case where there can be conflicts or discontentment but the arbitration of those matters is a necessity for the smooth functioning of the banking union. Banking union has to be prepared with one aspect of implementation of the rules created by it or European Union in its strict sense. The aim of every member of European Union should be to focus on providing a profitable and stable financial market.

The threat exists of regulatory arbitrage as UK remains out from the banking Union. The first task of the banking union is to control the risk of arbitrage. The road in the future is not easy for banking Union or EU as UK may opt to move out of EU to maintain its freedom to decide on economic issues. The other option is that EU creates its own epicentre of financial market which is not easy and it is a long term process. This will require planning and support from the all the concerned stakeholders as it requires human resource, infrastructure, universal acceptance etc. It will never be simple to create another financial centre.

Another fear should be the long term effects of the experiment i.e. banking Union. The main concern that can arise anytime is that there is a requirement of management of member states or eurozone and other sector of European Union. There can be a time when the competitiveness of the financial institutions across

European Union is judged by the membership of banking union. Or there can be a state when the UK based banking operations don't remain that profitable as they could be before banking union. In future it can be said, that there can be a point of tensions when UK may take a call to withdraw from European Union. This will be very disadvantageous for UK as well as EU. AS of now there are many points of conflicts between the members of EU and Britain. The question that can arise is that with the banking union in place it will be difficult for UK to protect its interests.

This condition could be best explained in the words of Howard Davies in the year 2012:

*"I suspect that a banking union of some kind will be implemented, and soon. Otherwise, the eurozone banking system will collapse. But the consequences of such a step for Europe's great free-trade experiment could be serious, and, if not managed carefully, could lead to Britain's withdrawal. The political stakes are high – and the outcome is likely to reflect that."*¹⁴

Banking union has two main functionaries SSM and SRM. Both these functionaries have faced criticisms. In future these systems have to be proving their importance as well as convert theory into the reality of oneness and uniformity. The question that time will be answering is that of the delivery of results from the above stated mechanisms. There will be an issue of accountability that needs to be answered beyond the politics as well ideological differences. There is reluctance to change and adopt the uniformity created by the banking union. It is in human nature that there is reluctance to change and acceptance towards the change. As the Bentham said, "Greatest happiness of the greatest number" should be the aim of European Union and as well as the European Banking Union.

14. Howard Davies, European banking union raises unanswerable questions, Available at: <http://www.theguardian.com/business/economics-blog/2012/jun/29/eurozone-banking-union-questions>

A STUDY ON CREDIT FACILITY OFFERED BY BANK AND ITS IMPACT ON MANUFACTURING INDUSTRY

DR. DEVENDRA SINGH¹

ABSTRACT

The purpose of writing this paper is to analyze the effectiveness of the various credit facilities which is provided by the banking sector of India to manufacturing sector. The paper focuses on the constructive impact of credit facility provided by the banks to the manufacturing sector on its management of cash management & production capacity and actual problems which are associated with the timely disbursement of fund and its impact on production.

1. INTRODUCTION

Financial sector is the backbone of any economy and it plays a crucial role in the mobilization and allocation of resources. The constituents of the financial sector are Banks, Financial Institutions, Instruments and markets which mobilize the resources from the surplus sector and channelize the same to the different needy sectors in the economy.

Traditionally, commercial banks were the main source of finance during the pre-independence era. After Independence, the Government of India announced the Industrial Policy in 1948 with a view to build a sound industrial base and a strong village and small industry sector.

The development banks are of two types; namely, the all India level institutions like IFCI, ICICI, IDBI, SIDBI, NSIC and the State Level Institutions like the State Financial Corporations (SFCs), State Industrial Development Corporations (SIDCs) .

A loan is a legal contract between the lenders and debtors. The business of the banking company is to grant loan and advances to the traders and the commercial and industrial institutes.

Industrial loan

^{2c}In the present changing scenario of the banking industry it is

1. Assistant Professor, Amity Law School Centre-II
2. Report <http://www.financialexpress.com/news/india-inc-performance-below-par-on-corporate>

the aim of all financial institutions an bank to provide all short of financial problems and needs its clients. Therefore in the recent development of the financial sector we have been witnessing the lending institutions. Banks have also started financing long terms credit need of the industry. With the advent of the financial sector reform by the government of India and RBI to provide liberalized environment in the banking industry”.

The lending institutions are earlier aimed at proving long term credit requirement for industry but now they are providing working capital finance and also inland as well as foreign letter of credit. In a null shell ‘universal banking’ is the need of the hour to survive.

2. OBJECTIVE FOR LENDING DECISION

1. To know the criteria for granting banks loan to the industrial sector.
2. To find out the type of business availing the loan most.
3. To find out that which group (minority or majority) get the loan easily.
4. To know the legal structure of the firm in getting the loan.
5. Analysis of the relationship of the size of the company, financial system, business experience with the change of getting loan.
6. To access the association in between the government approval of the firm and sanctioning the loan.

3. LITERATURE REVIEW RESEARCH

A bank credit department will analyze a borrower and provide a credit rating used in a lending decision. Creditworthiness of borrower determined by the list.

1. Character

Banker should continually emphasize the importance of applicant credit history. It is nothing but the honesty and integrity of the person requiring loan.

2. Capacity

It is the firm ability to generate liquidity in the loan repayment process. generally the cash flow and

changing the capital structure are the primary source of capital repayment.

4. RESEARCH METHODOLOGY

Tools and techniques to be used

Tables bar diagram and the structures are used in explanations to bring out the point more clearly. Tabulation of the primary data was done. On the basis of these tablets, trends come out more visibly. Other statistical techniques those are to be used are.

Ranking method:- Its basic property is to arrange a number of attributes in a particular order.

Large sample test (z test):- It is used to test equality of two population proportion.

Anova:- It is used to test the significance of difference of the variability.

Multiple regression:- It is used to find out the relation of the variable with the group of variables.

Chi square:- It is used to study the independence of the attributes.

Collection of data (are of study)

³⁴The wide variety of bank regulation along with the existing environmental condition suggest a number of factors that would influence to accept/reject commercial bank lending decision. Specifically, the database includes such information on banks who supplied the information about the strategy of getting loan from the public and Private sector bank. In order to achieve the identified objective pertaining the priority and preference and views, a sample of 10 managers have been selected in the city greater noida and noida from the different branches of PNB,AXIS,SBI AND HDFC during march 2013”.

A pre tested questionnaire was administered to them, personal interview with the help of pre tested interview schedule, designed for this purpose was taken, beside, personal observation was done. A structured questionnaire was used for data collection tool.

3. Chrystal K. Alac, Federal Reserve Bank Of St. Louis Review, 'International Banking Facilities', 1994

5. ANALYSIS AND INTERPRETATION

1. Structure wise analysis

It is important for the for the bankers to note down the legal structure of the firm that is whether sole proprietorship, partnership or corporation. A one – an anova is performed to test whether there is any difference in the structure while availing the loan.

Null hypothesis:-

Ho: the is no difference in the structure of the firm

Source of variable	D.f	Sum of	Mean sum of	f
Column (type of	2	86.79	43.395	F1=12.07
Error	12	73	6.08	
Total	14			

$F_{0.005}(2,12)=3.88 < \text{cal. f} \text{----- } H_0 \text{ is rejected}$

Interpretation:- There exist difference in the structure of the firm in getting loan.

The following table show the percentage of the responses obtained against to each category.

Type of structure	Percentage
Sole proprietorship	14%
Partnership	0%
corporate	86%

2. Ownership wise analysis

Considering the ownership of the firm, it is important to note down the nature of business such as minority business(that is , fifty percentage or more minority owned) or majority business. For this purpose , we have to perform the large sample test(z) in order to know whether the proportion of the minority business owner is important than that of minority or not.

TEST statistics

$$Z = \frac{p - p_0}{\sqrt{p_0 q_0 / n}}$$

P = population proportion of the bankers favouring the majority group

N = sample size 100

$$\text{Calculation } z_{cal} = \frac{p - p_0}{\sqrt{p_0 q_0 / n}}$$

Where $p_0 = 0.05, q_0 = 1 - p_0$

P = sample proportion of the bankers favoring to majority group = $(73/100) = 0.73$

$$Z_{cal} = \frac{0.73 - 0.05}{\sqrt{0.05 * 0.95 / 100}} = 4.6$$

$Z_{tab} = 1.645$ at 5% level of significance

As $z_{cal} > z_{tab}$ H_0 is rejected, H_1 is accepted

Interpretation hence we can conclude that bank emphasize on majority group while sanctioning the loan.

3. Analysis of the relationship of the size of the company, financial system and business experience with chance of getting loan.

The chance of getting the loan is correlated with the size of the company, financial system and business experience. Here the basic interest is to find out the weightage of the independent variable on the predictor, the chance of getting the loan by using the multiple regression technique.

Let y be the independent variable = chance of getting the loan

B = coefficient of the determinant (a constant value)

X_1 = size of the company X_2 = financial company X_3 = business experience.

$$Y = b_0 + b_1 x_1 + b_2 x_2 + b_3 x_3$$

Step by step multiple regression

Table 1 model summary

Model	R	R square	Adjusted R square	Error of estimation
1	.987	.974	.968	2.65705

Adjusted r square value tells us that our model account for 96.8% of variance and it signifies the model as good one.

Table 4 correlation

	y	X1	X2	X3
Y	1.000	.980	.977	.542
X1	.980	1.00	.966	.516
X2	.977	.966	1.00	.541
X3	.542	.516	.514	1.000

Correlation is significant at 0.01 level (2- tailed)

This table gives detail of the correlation between each pair of variable. There is good correlation between the criterion and the predictor variable. The variable here are acceptable.

4. Analysis of the most important financial system of the firm to get the loan

Firms employing a year end complication accounting method for tax purpose can prove little financial information to the prospect lender. Here the basic purpose is to find out the type of financial record favourable to get the loan.

Financial system	Percentage
Keep document with compiled at the end of the year for tax purpose	2%
Maintain record which can provide information about the balance sheet along with the tax information at the end of the year	3%

Have a system which generates quarterly along with the end year financial statement and tax information.	10%
Utilize a system which provides monthly, quarterly and year end financial statement and tax information.	85%

Interpretation:- a majority that is 85% of the bankers are in favour in the fact that the firm should utilize the system which provide monthly quarterly and yearly end financial statement and tax information from the year.

5. Analysis the factor influencing for sanctioning the loan

IT is necessary to asses the important factor influencing the saction of the loan. There are so many factor but we have to include the following factor only.

The summarized rank order

Rank

Features	1	2	3	4	5	Rank sum	Rank
Taxes	6	19	20	26	29	353	4
Poor Scale	2	20	21	26	31	364	3
Financing and Interest Rate	2	10	12	35	41	403	2
Operating and Production Cost	0	4	20	23	53	425	1
Government Regulation	7	19	20	26	28	340	5
Availability and Quality of Labour	15	15	20	25	25	330	6

Cost of Insurance	20	15	25	20	20	305	7
Personal Review	17	20	25	18	20	304	8

Interpretation:- from the above analysis we conclude that the operating and the production costs, financing and interest rates, poor sales are more influencing factor for the bankers to sanction the loan.

6. Product wise analysis

The type of production such as FMCG, PETROLEUM and GASLINE PRODUCTION, STEEL PRODUCTION AND TEXTILE PRODUCTS to be produced by the company is of prime consideration of getting loan.

The differences among the different product are analysed statistically using one way ANOVA

Null hypothesis:- H_0 there is no difference of getting the loan.

The difference among the different products are analysed with statistically using Anova.

Source of variable	D.f	Sum of	Mean sum of	f
Column	4	81.267	27.089	$F_{1=}$
Error	12	77.2128	6.4344	
Total	15			

$F_{0.05(4,12)}=3.26 < \text{cal.f}$ ----- H_0 is rejected

Interpretation:- there exist difference in the products of getting the loan.

Lets further proceed to know which product has maximum weightage to get the loan.

Type of Product	Percentage
Fmcg	18%
PETROLEUM and GASLINE PRODUCT	55%

STEEL PRODUCT	12%
Textile product	15%
Other	10%

Interpretation:- majority bankers (55%) petroleum and gasoline products while sanctioning the loan.

7. Business-wise Analysis

The nature of the firm business such as retail, manufacturing or construction could influence the probability of loan approval. The could be positive or negative.

The difference among the different products could be analysed by ANOVA.

Hull hypothesis:- there is no difference in the type of business of getting the loan.

Source of variable	D.f	The Sum of Square	Mean sum of Square	F
Column	4	81.267	27.098	F1=4.21
Error	12	77.2128	6.4344	
Total	15			

$F_{0.05}(4,12)=3.26 < \text{cal } f$ ----- H_0 is rejected

Interpretation:- There exist difference in the type of the business of getting the loan.

Let us now see the the type of business has maximum weightage of getting the loan.

Type of Product	Percentage
Retail	20%
Manufacturing	65%
Construction	15%

Interpretation:- Maximum bankers favour the manufacturing unit business while sanctioning the loan.

6. CONCLUSION AND FINDING

Indian financial sector has undergone significant expansion during the last decade. A well developed infrastructure has been promoted to cater the need of growing industries and expanding capital market of India. Commercial bank has traditionally have played significant role in proving the debt financing to business. There is deadly completion among the industries availing the bank loan. So, it felt essential to study the factor influencing the banks lending decision. The research is one component in this direction only. this study provides the data to assess the role of financial information availing the lending decision.

The major finding of the research is given below

1. All most all the bankers favour the big corporation while giving the loan.
2. The bank emphasis the majority group while sanctioning the loan.
3. The bankers are giving more importance on the financial system, size of the firm and less importance on the business experience while giving the loan.
4. A majority i.e 85% of the bankers are in favour in the fact that the firm should utilize a system which provides monthly, quarterly and yearly-end of financial statements and taxation information from th year.
5. The opration and production cost, financing and interest rates an poor sales are the major influencinmg factor for sanctioning the loan.
6. Maximum bankers(55%) favored to petroleum and gasoline products while sanctioning loan.
7. Maximum bankers (65%)favoured to manufacturing units business while sanctioning the loan.

BOOK REVIEW

Mathew Thomas's "*Understanding Intellectual Property*", 1st Edition, Eastern Book Company, Lucknow, India, 2016, pp. LXXI + 501, Soft Cover, Price - Rupees. 595.

PARIMITA DASH¹

The book under review is an outcome of author's extensive research on various issues pertaining intellectual property rights. Author has given a very lucid analysis of the basic formulations of intellectual property as concept and has highlighted the justification behind protecting intellectual property under a sui generis legal framework. The book very coherently highlights the author's perspective on the relevance of intellectual property rights on today's world with a special focus on the evolution of intellectual property rights as a concept since its inception till today. At the outset of the book, i.e. in the preface itself, author has wonderfully explained the amazing journey intellectual property right has made through 21st century from being a mere patenting tool to cover anything and everything our creative mind can conceive and which can be physically manifested in to certain tangible forms. The practical relevance of intellectual property rights in other disciplines like that of medical, engineering, biotechnology etc. also has been emphasized by the author justifying the need for having a multidisciplinary approach while analysing and discussing various issues relating to intellectual property rights. One of the major highlights of this book is the author's meticulous study of each and every possible concepts relating to Intellectual property rights like Copyright, Patents, Trademarks, Geographical Indications, Designs, Protection of Plant Varieties and Farmers Rights, Semiconductor Integrated Circuits Layout-Design, Confidential Information and Trade Secrets etc. and dedicating individual chapters to all these mentioned areas signifies an extensive research on the part of author with a special focus on various other useful doctrines and various international legal frameworks concerning intellectual property rights.

The book has 11 chapters in total which discusses the above mentioned aspects of intellectual property rights in great detail

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yet in very simple language which can be easily comprehensible. Introductory part of the book differentiates between the corporeal property and incorporeal property and analyses the justification behind placing intellectual property concept under the intangible property category. This part of the book also highlights the major shift that this 21st century has witnessed from a collectively owned knowledge domain to a domain which identifies individual exclusive rights in knowledge & creativity giving way to the emergence of the negative right concept. It also discusses jurisprudential justifications behind various concepts of intellectual property rights by tracing their evolution from the ancient era to modern era.²

The first chapter of the book which is on Copyright starts with a famous saying by David Warren i.e. *Cartier has an ethic, "Never copy-always create"* is a comprehensive study on various dimensions of copyright as a concept of intellectual property right. Author gives a wonderful introduction to the concept of copyright by providing a historical development of copyright in U.K.³ and comparing that with the evolution of copyright law in U.S.A.⁴ and finally making his observation on the phases of development of copyright law in India. With this the first chapter proceeds with defining the concept of copyright formally with a clear comparison of the concept of copyright with the concept of copy left. The other aspects of copyright which has been dealt with in this chapter are works on which copyright subsists, concept of originality, authorship-ownership concept, the idea-expression dichotomy, moral rights of an author, transfer of copyright including the concepts like transmission assignment and licenses of copyright, infringement of copyright, remedies against a copyright infringement, exceptions to copyright infringement i.e. doctrine of Fair Use and Fair Dealing etc. Another feature

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2. In this context the evolution of the patent system has been traced from the Venetian Patent Statute of 1474 which is considered to be the earliest of its kind through the system of Royal Grants by Queen Elizabeth II for monopoly privileges to the Statute of Monopolies, 1624 was the first statutory patent law passed by an Act of Parliament.
 3. The Author here gives a vivid understanding of the Copyright law in European Union by referring to The Statute of Anne, which was the first statute on Copyright in England enacted during the year 1709-1710. (p.2)
 4. The Copyright Act 1790 also has been referred by the author with special focus on its objective which is to encourage learning by securing the copies of maps, charts, books to the authors and proprietors during the times therein mentioned. (p.2)

which makes this entire chapter a good reading for the readers is the balanced analysis of the plethora of cases on copyright not only confined to Indian cases but also discussing similar copyright cases of different jurisdictions.

Trademarks are very important for a healthy market as they are considered as source identifiers which in turn help in maintaining the distinctiveness of the various products and services in the market, helping customers to exercise their right of selecting the right products and services for them. This basic formulation behind the concept of trademarks has been very aptly discussed at the very outset of the second chapter which is on Trademarks. The author in this chapter very clearly justifies the incorporation of the concept of trademarks under the intellectual property rights regime by analysing the concept in the light of the concept of goodwill which is an intangible asset for any business entity in the market. Apart from defining a trademark, discussing various kinds of trademarks, the chapter deals in great detail two very important requirements for trademark registration in India i.e. concept of Distinctiveness and Graphical Representation in the light of series of cases of distinctiveness under Indian trademark regime and the various difficulties faced by non-conventional trademarks in registration of such trademarks under Trademarks Act 1999 in terms of graphical representation. This chapter also focuses on the concept of domain names in the light of trademarks and compare both these concept on the basis of the basic formulations involved in formulating these two concepts with special mention of no. of cases of domain names disputes in Indian and abroad. Additionally the chapter also covers other areas of trademark law like passing off actions, well known trademarks, seriousness attached with regard to pharmaceutical trademarks. And towards the end of the chapter, author discussed the trademark registration procedure in India in great length with extensive focus on infringement of trademarks and the remedies against infringement of trademarks both in terms of civil and criminal remedies. In terms of efforts on the part of the author, this chapter has received the maximum thrust as compared to the other chapters in the book, which very well can be justified in the light of the increasing no of trademark dispute cases in India and thereby giving rise to the need for having strict frameworks for protecting the intangible goodwill attached with trademarks against misrepresentations and unauthorised usage.

Chapter 3 of the book revolves around one of the most discussed areas of intellectual property law and i.e. Patents. This is one such area under IPR regime which witnesses the maximum interface with many other areas like that of medicines, engineering, biotechnology etc. and for that matter any area of research and development which can generate innovations. Considering this even the author has adopted a multidisciplinary approach while formulating this very chapter. With a general introduction to Patents and various international legal instruments⁵ relating to patents at an international level, the chapter proceeds with a detailed analysis of history of patents in India, the concept of invention and what constitutes an invention to be eligible to be patented with a special focus on the procedure to grant a patent in India along with the Patent Cooperation treaty (PCT) filing for obtaining a patent on an invention at an international level. In addition to this, understanding the need of technicalities in the light of patents author in this chapter also fairly discusses the various technical aspects a patent i.e. claim construction, drafting provisional and complete specification etc. along with general concepts like rights of a patentee & infringement and subsequent remedies against an action of infringement of patent more specifically under Indian patent regime.

Geographical Indications are turning out to be the next big thing under the IPR regime with the emergence in awareness of nations with rich cultural heritage in terms of various traditional practices and traditional products which they want to exploit commercially at an international level maintaining the geographical identity of these products and safeguarding them against potential threats in terms of misrepresentations and counterfeiting. Hence this book also dedicates a whole chapter in the form of chapter 4, on various issues pertaining to geographical indication like need for protecting geographical indications under a sui generis legal framework, concept of homonymous geographical indications, enhanced protection extended to wines and spirits under Article 23 of TRIPS, with an elaborate analysis of the various phases that a product will

5. Author meticulously mentions in this context various international legal instruments under the world patent regime like Paris Convention, Patent Cooperation Treaty (PCT), European Patent Convention etc. with a special focus on role of WTO and WIPO in promoting for the cause of identifying exclusive interest of the creator in his creations/ innovations and thereby promoting the research and development sector with larger interests. (pp.212-214)

have to undergo under Geographical Indications (Registration & Protection) Act, 1999 in India in order to get the status of a geographically indicated product. This chapter also contains few specimen of already registered geographical indications of India pertaining to various kinds of products originating from different parts of the country.⁶

Chapter 5 of the book provides the readers with a comprehensive reading on Design law under Intellectual Property regime. The various topics that have been covered with fair precision in terms of deliberations under this chapter are, fundamental concept of design and justification behind its incorporation under IPR regime, salient features of the Indian legislation on Designs i.e. Designs Act 2000 like designs that can be registered and designs that are prohibited from being registered under the Act, the interface between copyright law and law relating to designs, registration procedure for designs under the statute, what constitutes an infringement of registered designs and what remedies are available against an act of infringement of registered designs in India. The author has discussed all these aspects of designs fairly in the light of various decided case laws in this regard.

Incorporation of concept of Protection of Plant varieties and Farmers Rights under intellectual property regime has been the result of the lobby of the countries which have agriculture based economies and as a result of the bargain between the countries advocating for absolute individual rights and the countries promoting a balance between individual right and scope for collectively owned rights under IPR framework and this understanding has been very aptly been discussed by the author in the 6th chapter of the book which solely has been dedicated to Protection of Plant varieties and Farmers Rights. This chapter starts with the relevance of various provisions of various international legal instruments⁷ advocating for concepts like plant variety protection and farmers rights

6. For better understanding of the concept for the students, the author has provided information pertaining to an already registered geographical indication “ Nizamabad Pottery” by incorporating its released advertisement in official gadget under rule 41 (1) of Geographical Indications (Registration and Protection) Rules 2002. (pp.318-322)

7. Author has in this regard explained various relevant provisions of Biodiversity Convention 1993, Cartagena Protocol, Nagoya Protocol etc. like fair and Equitable Sharing of benefits arising out of commercial exploitation of bio resources, access to genetic resources, ABS clearing House etc. (pp. 366-369).

and analyses how far India has been able to comply with these provisions as far as its sui generis law on plant variety protection and farmers rights is concerned i.e. PPVFR Act, 2001. The chapter in detail explain concepts of farmers rights, breeders rights, researchers rights/ privileges, various plant varieties that can be registered under the statute, NDUS test to be conducted in order to determine a new variety of plant, registration of a new variety of plant, role of authority in granting registration to new plant varieties and ensuring protection to farmers and breeders rights.

Chapters 7 and 8 deal with “Semiconductor Integrated Circuits Layout –Design” and “Confidential Information and Trade Secrets” respectively. While the author in the former deals with various concepts relating to semiconductor and integrated circuits like TRIPS approach towards Layout designs of integrated circuits, need for registering such designs, role of registrar in registration of such lay out designs, conditions & term of protection of such registration with special incorporation of sample of advertisement of application of registration of layout designs of integrated circuits for bringing a practical touch and better understanding of the concept, the later revolves around the need and relevance of confidential information and trade secrets in today world of business by focusing on the various clauses of confidentiality agreements with respect to different subject matters, jurisdictional basis of confidential information, requirement of trade secret, springboard doctrine, kinds of trade secrets, subject matter of information that can be protected etc. These two chapters definitely stand out from other books written on intellectual property rights as most of such books do not have separate chapters on these less discussed allied areas of IPR in this detailed manner.

9th chapter of the book deals with “Damages in Intellectual Property”. Considering the fact that most intellectual property infringements result in economic loss, damages comes as the most preferred remedies against IP infringements and this has been well explained in this chapter by analysing the various parameters taken in to consideration by courts in awarding damages in the light of Panduit factors.

The last two chapters of the book i.e. chapters 10 and 11 respectively deal with “some useful doctrines, orders and rules involving intellectual property” and “international conventions on intellectual property”. Inherency doctrine, doctrine of equivalence,

reverse doctrine of equivalents, doctrine of exhaustion, merger doctrine, useful article doctrine, springboard doctrine, doctrine of inevitable disclosure are few such doctrines which have been thoroughly discussed by the author in chapter 10 and in the last chapter of the book author has discussed various international legal instruments relating to intellectual property law TRIPS, WTO, WIPO, Berne Convention, Paris Convention, Universal Copyright Convention, Rome Convention, WIPO Copyright Treaty, WIPO Performance and Phonograms Treaty, Patent Law Treaty, Budapest Treaty, Madrid Protocol concerning international registration of Trademarks, NICE Agreement, UPOV 1961 etc. This last chapters tries to incorporate all possible international legal instruments concerning intellectual property protection and provides readers with comprehensive study on international scenario for Intellectual Property protection and enforcement.

This book contains an extensive research on literature review that has been done by the author for writing each chapters. The entire arrangement of the contents like the way the book provides a meticulously drafted list of cases, statutes, abbreviations at the outset of the book, the unique feature of case pilot inserted at various places of the different chapters of the of the book indicating specific case law/ study on the concerned subject matter and a well drafted subject index at the end of the book are very impressive and hence make the reading interesting and breaks the monotony. However the author could have worked upon certain areas like incorporation of protection of biological resources under Intellectual Property framework. In this context the book does not live up to the expectation as it totally ignores a major area of IPR which is being discussed of late at various forums. Concepts like traditional knowledge including traditional medicinal knowledge over various biological resources found in most of the developing countries rich in biodiversity, Principle of National Sovereignty over biological resources, Access and Benefit Sharing model etc. have not been discussed in this book with proper focus. This book can be regarded as a material contribution to the existing literature on Intellectual Property Protection and Enforcement in India.