Journal of Banking and Insurance Law

Volume No. 13

Issue No. 1

January - April 2025

ENRICHED PUBLICATIONS PVT. LTD

S-9, IInd FLOOR, MLU POCKET,
MANISH ABHINAV PLAZA-II, ABOVE FEDERAL BANK,
PLOT NO-5, SECTOR-5, DWARKA, NEW DELHI, INDIA-110075,
PHONE: - + (91)-(11)-47026006

Journal of Banking and Insurance Law

Aims and Scope

Journal of Banking & Insurance Law (JBIL) is a peer-reviewed bi-annual journal for Banking and Insurance Laws. JBIL aims to promoting the research which is not only academic in nature but can also pave a way for relevant law reforms in future. Law and policy makers are under constant pressure to guard the interest of consumers taking up banking and insurance services. JBIL aims to review the banking and financial regulations, and corporate governance practices of emerging market nations.

Journal of Banking and Insurance Law

Journal of Banking and Insurance Law

(Volume No. 13, Issue No. 1, January - April 2025)

Contents

Various Aspects About Uniformity Of Laws In India

Eakramuddin Malik[1], Dr. Ashish Singhal[2]
[1]Assistant Professor, Faculty of law, University of Delhi, India
[2]Assistant Professor.Faculty of Law,Sharda University, Noida, India

ABSTRACT

A Unified Code is very necessary for achieving the unity, integrity and solidarity of the nation which is given by the very preamble of the Constitution of India. The main purpose of Uniform Civil Code as provided under Article 44 is to provide dispensation of justice, equality, opportunity to the people of India which can be achieved by equal principles of law for each citizen.The idea of Uniform Civil Code came in the constituent assembly in 1947.The Sub- Committee on FR included the Uniform Civil Code as one of the DPSP. Article 35 of Draft constitution[1] read as follows:-"The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India."

At the time of debate, the subcommittee on FR recommended that the application of Uniform Civil Code for all citizens should be made on voluntary basis[2]. At the time of debate in the constituent assembly, the provision for ucc was strongly opposed by the members representing the muslim community. These members were Shri Mohd. Ismail sahib, Shri Poker Bahadur sahib, Shri Mahboob Ali Baig sahib bahadur, shri Naziruddin Ahmad and Shri hussain Imam. They all pleaded for the amendment to article 35 of the Draft Constitution that would allow the community to maintain their personal laws.Shri Mahboob Ali Baig sahib bahadurs moved a proviso to art 35 of the Draft Constitution that "nothing in this article shall affect the personal laws of a citizen[3]."Other members like Shri Mohd. Ismail sahib, Shri Poker Bahadur sahib, shri Naziruddin Ahmad and Shri hussain Imam also suggested their amendments to article 35 of the Draft Constitution. The members suggesting the proviso were speaking not only on behalf of muslims but for other communities also. These members unanimously raised the following points in Constitutional Assembly debate:

1.The fundamental rights guaranteed by the Constitution adherence to one's own personal law has been recognized, hence Uniform Civil Code would be in contravention of that right;
2.Interference by government with personal law would affect the life style of the people and hence it would violate the FR to life and the concept of Secularism.
3.Even the foreign Ruler did not disturb the personal laws of the people why this concept of UCC is going to be added.
4. The country is so vast and diverse that the uniformity of law is not possible.

[1]Art. 44 of the existing Constitution of India.

[2]Shiva Rao, "Framing of India's Constitution",Vol. 11, select doc., 206. Tripathi (1969), debate of 19 April 1947.

[3]CAD, Vol. 7, p. 543 (23rd Nov. 1948).

Dr. B.R. Ambedker, Shri K.M. Munshi, Shri Alladi Krishna Ayyar were main supporter of Uniform Civil Code and they strongly opposed any kinds of amendment to Art. 35 of the draft Constitution[4]. Mr K.M. Munshi supporting the Uniform Civil Code told that Article 19 of the Draft constitution[5] is covering the secular activities. He felt that a Uniform Civil Code was necessary for achieving the unity and solidarity[6] of nation. Dr. B.R. Ambedkar argued that we had already a Uniform Civil Code in all matters like a Uniform criminal code, Uniform property laws etc. He argued that muslim law may be changed in order to implement the provision of Uniform Civil Code because muslim law was ununiform up to 1935 i.e. North-west frontier was not subject to the Sariat Law. It followed the Hindu law in matters of succession and in other matters. Due to the above reason he opposed the amendment to Article 35 of the Dfaft Constitution.[7]

Shri Alladi Krishna Ayyar opposed any kind of amendment to Article 35 of the Draft constitution . he added in his argument that when the British occupied this country, they introduced a common criminal law in the country which shall be applicable to all citizens whether they be hindu, be muslim, be britishers and on that muslim took no exception. Further he added that we have a common law of contracts governing transactions between Muslims and hindu, between Muslims and Muslims. All are governed by the general law and not by the Quran[8]. For the above reason he submitted that the this Article 35 be passed.The main emphasis of debate was that all laws in India have been codified except the personal law. In other countries the personal law is in codified form so in India also the personal law should be codified at the earliest.After a long debate Art 35 of the Draft constitution was accepted without any amendment, as it stood and it was later renumbered as Article 44 of the Constitution of India and it read as follow:"The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India."

Constitutional Provision

During the struggle for independence our leader who came from different streams of the society, religion, caste, creed etc. They had visualized the picture of independent India. They wanted to make this republic on the four pillars of justice, liberty, equality and fraternity. They formulated some ideas which the succeeding Governments were to achieve. These principles were put down in Part-IV of the Constitution of India named as 'Directive Principle of State Policy'. The Govt. is bound to obey these directives. The Uniform Civil Code[9] is one of the directives or mandates to which the Govt. of India or the state shall consider in making law. This mandate is contained in Article 44 of the Constitution of India which reads as follows:-"The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India."

[4]The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India."

[5] Art. 25 of the existing Constitution of India.

[6]K. M. Munshi, CAD, Vol. 7, p. 548.

[7]CAD, Vol. 7, pp. 550-552.

[8]CAD, Vol. 7,p. 549 (23rd Nov. 1948).

[9]Article 44of the Constitution of India says, "The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India."

The term 'State' is defined u/Article 12 of the Constitution of India which includes the Central Govt., the State Govt., Union and State Legislatures and Local Bodies. As long as any Govt. assumes the office, after taking the oath of faithfulness to the Constitution of India, they cannot escape of the responsibility flowing from Article 44 of the Constitution of India. The expression 'Unity and Integrity of the Nation' was inserted in the preamble of the Constitution of India by The Constitution (42nd Amendment) Act, 1976. By the same amendment Article 51A has been introduced which provides that the duties of every citizen of India include-

Clause (a) - to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem;

Clause (c) - to uphold and protect the sovereignty, unity and integrity of India;

Clause (e) - to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

India is a secular state, for this purpose Article 25 of the Constitution of India has been introduced which guarantees freedom of religion, conscience and freedom to profess, practice, and propagate religion, to all persons in India. But this right is not an absolute right. State may, by law, restrict such right[10]. Article 44 of the Constitution of India is a mandatory provision for the State to make a uniform law on the matter of personal laws of the communities. The Supreme Court of India said,

"A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law….. But it is the state which is charged with the duty of securing a Uniform Civil Code for the citizens of the country."[11] Overall the writer is of the view that State is under duty to make and unify the personal laws of the community but it is escaping from doing so because of vote bank of the community in the election.

[10] Article 25(2) of the Constitution of India, "Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice."

[11] Mohd. Ahmad Khan v. Shah Bano Begum, AIR 1985 SC 945.

Uniform Law and Personal Laws-About Procedural Law

Article 44 of the constitution does not define the expression 'civil code'. In the present context, civil law would relate to various aspects of personal relations, such as, contract, property, marriage, succession, and the like. The concurrent list of Schedule 7of the constitution of India includes the following thing in civil code,- "Marriage and divorce, adoption, wills and succession, joint family and partition, transfer of property, contract, actionable wrongs, bankruptcy and insolvency, trusts and trusties, evidence, civil procedure".[12]

Civil code would relate to that branch of private laws (excluding public laws) which deals with the civil rights and obligations of individuals such as CPC, Evidence Act, TPA and the like.[13] Thus the Uniform Civil Code concerned with only a very small piece of civil law which we call the personal laws of different communities in India. The expression "Uniform Civil Code" denotes a very small piece of civil law relating to marriage, succession, adoption and maintenance and this field of personal law posing the problem because of its intimate relationship with religious injunction, practice and beliefs.[14]

Personal Laws?

The expression "Personal law" means the law which governs a person's family matters generally regardless of where the person goes. The framers of Constitution of India meant by the word 'personal law' as "marriage and divorce; infants and minors; adoption; wills; intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this constitution subject to their personal law".[15] The Government of India Act, 1935 says about personal law as "marriage and divorce; infants and minors; adoption; wills; intestacy and succession".[16]

Who protects the personal laws

The community opposing the Uniform Civil Code took the plea that Art. 25 of the Constitution of India guarantee the fundamental right to freedom of religion and unifying their personal laws would violate their fundamental right. But this is not true because this Article 25 guarantees only freedom of religion

[12]See Entries – 5, 6, 7, 8, 9, 10, 12 and 13 of list 3 of 7th schedule of Constitution of India.

[13]D.D. Basu, "Uniform Civil Code for India", 2nd Ed., p. 2.

[14]Krishnayan Sen, "Uniform Civil Code", economic and political weekly, vol. 39. No. 37 (sep. 11-17, 2004), p. 4196.

[15]See in Entry 5 of List 3 of the 7th Schedule of the Constitution of India.

[16] See entries 6 and 7 of The Government of India Act, 1935.

and it is based on relationship between person and God and not between person and person. It means that if the legislature enacts any law unifying the personal / family matters of the community then it does not violate any right of any community. It is because family matters relates between person and person and not between person and God. Article 25 guarantees religious freedom while Article 44 seeks to divest religion from social relations and personal law[17]. Therefore we can say that Article 25 does not protect the personal law of any community. The freedom of religion guaranteed u/Art. 25 of the Constitution of India is also subject to other provisions of Part III of the Constitution of India and therefore personal laws can't be remote the reach of Articles 14, 15(1) and 21 of the Constitution of India.

The SC observed that Article 44 is based on the concept that there is no necessary connection between religion and personal laws in a civilized society. Article 25 guarantees the religious freedom whereas Article 44 seeks to divest religion from social relations and personal law.[18]

We had uniform codes of laws which cover almost every aspect of legal relationship excluding those matters which are governed by the various personal laws personal laws.[19] The only that area which was not covered by the Uniform Civil Code was succession and marriage, it was the intention of the framers of Article 44 to bring that change.

Public Policy and Judicial Approach

Article 44 of the Constitution of India is one of the directive principles of state policy which provides for the Uniform Civil Code.[20] According to Article 37 of the Constitution of India the provisions of this Article shall not be enforceable by any court but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws. Today 60 years have been lapsed after the enforcement of the Constitution of India but the Indian Government had not yet enforced the directive of Article 44 of the Constitution of India. By seeing the non action on part of the government of India, the SC gave many verdicts in support of the implementation of Article 44 of the Constitution of India.

[17] M.P. Jain, "Indian Constitutional Law", Ed. 6th , 2010.

[18] Sarla Mudgal v. UOI, (1995) 3 SCC, p. 635.

[19] A.M. Bhattacharjee, "Muslim Law and the Constitution", 2nd Ed., p. 177.

[20] 'The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India'

In Mohd. Ahmed Khan v. Shah Bano begum[21], the Supreme Court of India observed that it is a matter of regret that till now Article 44 of Constitution of India[22] has remained a dead letter. It seems that the muslim community has to take a lead in the matter of reforms their personal law. The government of India is duty bound of securing a Uniform Civil Code for the citizens of India and no doubt it has legislative capability to do so.

In Jorden Diengdeh v. S.S. Chopara[23], the Supreme Court of India observe that the law relating to marriage, divorce and judicial sepration is far from uniform so the time has come to make a uniform law which would be applicable to all person irrespective of their religion and caste. The court suggested the government of India to legislate a Uniform Civil Code on marriage and divorce.In another landmark judgment in Danial Latif v. UOI,[24] the Supreme Court of India upheld the constitutional validity of the Muslim Women(Protection of right on Divorce) Act, 1986 and held that muslim divorced women has right to get maintenance even after iddat period under the Act of 1986. The Supreme Court of India has given this judgment with a view to unifying the family matters.

In John Vallamatton v. UOI,[25] the Supreme Court of India once again express regret for non enactment of Uniform Civil Code. In this case section 118 of the Indian Succession Act was challenged on the ground that it is violative of article 14, 25 and 26 of the Constitution of India. The CJ V.N. Khare in view of above fact forcefully reiterated that the Uniform Civil Code be enacted as it would solve the problem relating to family matters.

In Sarla Mudgal v. UOI, [26] the Supreme Court of India has directed the PM to take fresh step of Article 44 of the Constitution of India towards securing a Uniform Civil Code for Indian citizen which is necessary for the national unity and integrity. This judgment was pronounced by Supreme Court of India while dealing with a question that whether a Hindu husband married under Hindu law, and then converted into Muslim, without dissolving the first marriage, can solemnize a second marriage. The court held such marriage illegal and husband can be prosecuted for bigamy under section 494 IPC. This is the step which is going towards the Uniform Civil Code for Indian society.

[21] (1985) 2 SCC, p. 556

[22] 'The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India'

[23] AIR 1985 SC, p.935.

[24] AIR 2001 Supreme Court of India, p. 3262.

[25] AIR 2003, SC, p. 2902.

[26] (1995) 3 SCC, p. 635.

Supreme Court Direction

The Supreme Court of India has held that all marriage must be compulsorily be registered, irrespective of their caste and religion.[27] The judicial attitude towards the Uniform Civil Code is a kind of several variants wherein it has responded to it in an indifferent way at different point of times. The judicial view in a case[28] was not to test personal laws on the standard of fundamental right. It was affirmed by the Supreme Court of India in Ahmadabad Women Action Group case.[29] Both these decisions made it clear that personal laws are not come within the preview of "laws in force" as given in Article 13(1) and so it cannot be tested on the touch stone of the constitution of India.[30]

But the Supreme Court of India in Lily Thomas v. UOI[31] observed that any direction for the implementation of Uniform Civil Code should not have been issued by only single judge as in Sarla mudgal case. In this case the Supreme Court of India finally observed that no court has power to give direction for the implementation of the DPSP as given in Part IV of the Constitution of India and which include the Uniform Civil Code because DPSPs are not judicially enforceable. But according to Article 37[32] of the Constitution of India state is bound to apply the principles contained in part 4 in making laws. Here we can say that if the govt. is failed to apply these principles ten the court can direct it. Again the govt. of India was directed in case of John Vallamattom v. UOI[33], that the Parliament has to enact a Uniform Civil Code for governing the personal laws of all the religious groups. Ultimately we can say that the Supreme Court of India has played its role very sincerely by directing the govt. to make a Uniform Civil Code for Indian society but it is the govt. that is competent to enact the Uniform Civil Code for citizens.

Uniformity and Justice

The Constitution of India by article 14[34] declares that there shall be equality before the law, it can be possible when there is a common law for all the citizens of India and they shall be on equal footing before the law. The Constitution of India has given equal right to women in respect of marriage, custody of children, separation, inheritance and property which is today understood as the justification for

[27] The times of India, feb. 15, 2006.
[28] State of Bombay v. Narsu Appa Mali, AIR 1952, p. 84.
[29] (1997)3 SCC, p. 573.
[30] Mrs. Tejaswini S. Malegaonkar, "Uniform Civil Code – Issues and challenges" , p. 186.
[31] AIR 2000, Supreme Court of India, p. 1650.
[32] "The provisions contained in this part shall not be enforceable by any court, but the principle therein contained is nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."
[33] AIR 2003, SC, p. 2902.
[34] The state shall not deny the equality before the law and equal protection of the laws within the territory of India.

Uniform Civil Code[35]. But till yet 60 years has been passed when Constitution of India came into force and the government of India is failed in unifying the personal law of the people. Equal right has to be given to women in matters of succession, marriage, separation, custody of children, inheritance in the property which is the foundation for a Uniform Civil Code. It is necessary to advance gender justice in today's modern developed society that even personal laws must be tested on the standard of the principle of fundamental right. The matters of personal laws based on religious freedom guaranteed by Article 25 of the Constitution of India, shall yield to the test of universal values of human dignity, gender justice and secularism.[36] By reading Articles 14, 15, 21 and many other provisions of the Constitution of India the researcher comes on the point that in India there is equality of status and of opportunity and the state is duty bound not to discriminate between persons on ground only of sex etc.

Muslim Law and Views

It may be said by little experience research that the Muslim women have no voice and no feelings relating to the issues concerning them. This is the case when it comes to the issue of gender justice this is the main issues which is highlighted again and again for several decades by the demand for making a Uniform Civil Code on matters of personal laws which will be applicable to all citizens of India.[37] The women raised this issue, i.e. demanding Uniform Civil Code which has been taken over by men. Some people were feeling that the personal laws of the different communities including Muslim law are gender unjust and gave their opinion that gender justice is possible only through enacting Uniform Civil Code. The researcher states here the following situations which makes gender unjust for Muslim women. These are as follows-

1. Muslim men may marry with four women at a time which a women cannot. It is a very big hurdle in balancing gender justice and it is not possible without making a uniform law that binds a person not to marry more than one woman.

2. Muslim husband may dissolve the marriage by pronouncing 'talak' thrice at spot but Muslim women do not.

These are the few instances which show that there is unequal gender justice in Muslim Law. Now the Indian government has to take step for removing such type of inequality. It is to be noted here that

[35] http://www.hindu.com/br/2007/05/29/stories/2007052900571500.htm
[36] Mrs. Tejaswini S. Malegaonkar, "Uniform Civil Code – Issues and Challenges", Indian Bar Review, vol. 32 (1&2) 2005, p. 186.
[37] Sabeeha Bano, "Women's Voices: Expanding Gender Justice under Muslim Law".
Source; eco and pol weekly, vol. 30, no. 47 (nov. 25, 1995), pp. 2981-2982.

there is mandate in our constitution under Article 44 that provides about duty of state to make a uniform law for all citizens of India irrespective of their caste, religion, sex etc.

Justice under Hindu Law-Under the traditional Hindu law there were some differences among the persons belonging to Hindu religion. For example- the Hindu women had a very small right in relation to property, they had no right to become 'karta' in a family etc. Now the government of India has taken step to unify the Hindu personal laws and made Hindu law in 1955. These are as follows:

1. The Hindu Marriage Act, 1955
2. The Hindu Adoption and Maintenance Act, 1956
3. The Hindu Succession Act, 1956
4. The Hindu Minority and Guardianship Act, 1956

The state has enacted the above laws for the purpose of unifying the Hindu law relating to marriage, succession, adoption and maintenance and minority and guardianship. Now there is no doubt to say that all aspect of Hindu law has been codified. Since social reform is a piecemeal process, the appropriate step would be to make a small beginning and work towards an eventual codification of the entire body of the personal laws.[38]

Various issues of Uniform Civil Code

It is important to note here that the provisions of Muslim law governing the Muslims and other personal laws governing the other religious communities are discriminatory to each other. The researcher wants to give some illustrations[39] which make the communities different to each other and which are the big hurdle in unifying the personal laws:

1. The Muslims are polygamous while other communities are monogamous.
2. The Muslims can dissolve the marriage without interference of court while the other communities can affect divorce only with the intervention of the court.
3. Muslims beliefs that their whole laws are based on the Quran that was come through the Prophet and the words of Quran are of God and they don't want to change in their personal law.

[38] Imtiaz Ahmad, "Personal Laws: Promoting Reform from Within", Economic and political weekly, vol. 30, no. 45 (Nov. 11, 1995), pp. 2851-285.

[39] A.M. Bhattacharjee, "Muslim Law and the Constitution", 2nd Ed., pp. 179&180.

4. The Muslim wife can be divorced by the husband at pleasure but the wife under other communities can be divorced on certain grounds specified and only through the court.
5. The divorced Muslim wife is not entitled to get maintenance after iddat period (controversial point) from the husband while other communities allow the divorced wife a permanent alimony.
6. Under Muslim law, a daughter inherits half the share of a son; under Hindu law, a daughter shares equally with a son.
7. A Muslim person cannot dispose of more than one-third of his properties by will while other personal laws do not impose such restriction.
8. Muslim law confers on person a right of pre emption of any property of which he is co-sharer or an adjoining owner.

Conclusion

On the basis of above analysis the writer comes to the point that our Constitution of India is sovereign, socialist, secular, democratic and republic by its nature. There is one of the directives under the Constitution of India i.e. Uniform Civil Code which is the secular provision and provides "The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India". This provision is based on the idea that there is no crucial connection between religion and personal law. Article 25 of the Constitution of India guarantees the right to freedom of religion. It provides that subject to public order health and morality all persons have right to profess, practice and propagate religion. Article 44 is a secular provision which has been adopted to unify diverse personal laws of all the communities in one civil code. In fact, in India, maximum number of civil laws has been codified and applicable to all citizens irrespective of their caste, religion, race, sex etc. but unfortunately still it could not be possible for the reasons unknown to unite all the diverse personal laws. Equality is the constitutional goal and fundamental law of the country. The Uniform Civil Code is one of the mandates by which constitutional goal of equality can be possible by making a uniform law relating to personal matters of the communities in India.

It is well settled that the interpretation by Supreme Court of India of several provisions of the Constitution of India and other laws in respect of making uniformity in India is satisfactory and the Uniform Civil Code as provided in the Constitution of India is mandatory and to be implemented by making a uniform law for the unity and integrity of India.

In this research paper the authors have formulated the following questions and have tried to explain in detail as per their research like What is the main purpose of the provision of Article 44 of the Constitution of India? What is the relationship between personal laws and religion? What is the role of

judiciary in directing the state to make Uniform Civil Code? Whether Article 25 of the Constitution of India protects the personal laws? The word "Uniform" denotes equality, similarity etc. in every field of life. Uniform Civil Code (UCC) denotes equal principle of law for the personal matters of human beings. Everyone is equal in democratic type of society as in India. Equality is a way of peace, fraternity, tranquility brotherhood and cooperation. Most of the laws are codified uniformly for every citizen in India. There are some fields of Muslim law which are not codified like marriage, succession, divorce, maintenance etc. Therefore it is obligatory on part of the State to make a uniform personal law for all the communities of Indian society.The India's national character is sovereign, socialist, secular, democratic and republic. Therefore the state is duty bound under the Constitution of India to grant all the citizens justice- social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and fraternity assuring the dignity of individual and the unity and integrity of the nation. Uniform Civil Code is one of the requirements to achieve the abovementioned constitutional objectives and goals. In India, these principles of constitutional goals demand the uniformity in the legislation.

Suggestion

The researcher is giving following suggestions which may be helpful in enacting the Uniform Civil Code for all citizens of India: Minority communities must be consented while enacting the Uniform Civil Code. To achieve this constitutional goal it is the obligation of all the sects of the society to make harmonious environment for the unity and integrity of India.

1. There should be an optional civil code for a period of time, it means to give people sufficient time to appreciate the new law and when substantial part is accepted by the people, it can be made compulsory.
2. There should be a gradual shift from diversified and unequal laws to a more complete code.
3. Article 44 of the Constitution of India imposes upon the state a duty to make the Uniform Civil Code; it means the duty is correlative of right. Here state's duty correlates with individual's right so individual's right must be protected and enforced by the court of law.
4. The directive principle of state policy and fundamental rights are supplementary and complimentary to each other so judicial interpretation of Article 44 should be done with the help of Article 14, 15, 21 and 25 of the Constitution of India.

References

Books:

1. Jain, M.P., "INDIAN CONSTITUTIONAL LAW", Ed. 6th, 2010, Wadhwa and Co Nagpur.
2. Basu, D.D., "UNIFORM CIVIL CODE FOR INDIA", Ed. 2nd 1997,Hall of India Pvt. Ltd.,New Delhi.
3. Bhattacharjee, A.M., "MUSLIM LAW AND THE CONSTITUTION", 2nd Ed.1994, Eastern Law House, New Delhi.
4. Bhattacharjee, A.M., HINDU LAW AND THE CONSTITUTION",
5. Rao, Shiva, "FRAMING OF INDIA'S CONSTITUTION", Vol. 11, select documents, 206. Tripathi (1969), debate of 19 April 1947.
6. CONSTITUTION ASSEMBLY DEBATE, Vol. 7, (23rd Nov. 1948).

Articles:

1. Imtiaz Ahmad, "PERSONAL LAWS: PROMOTING REFORM FROM WITHIN", Economic and Political weekly, vol. 30, No. 45 (Nov. 11, 1995).
2. Krishnayan Sen, "UNIFORM CIVIL CODE", ECONOMIC AND POLITICAL WEEKLY, vol. 39. No. 37 (sep. 11-17, 2004).
3. Mrs. Tejaswini S. Malegaonkar, "UNIFORM CIVIL CODE – ISSUES AND CHALLENGES".
4. Sabeeha Bano, "WOMEN'S VOICES: EXPANDING GENDER JUSTICE UNDER MUSLIM LAW".
5. The times of India, Feb. 15, 2006.
6. http://www.hindu.com
7. The Government of India Act, 1935.

Case laws:

1. Mohd. Ahmed Khan v. Shah Bano begum, (1985) 2 SCC.
2. Jorden Diengdeh v. S.S. Chopara, AIR 1985 Supreme Court of India.
3. Danial Latif v. UOI, AIR 2001, Supreme Court of India.
4. John Vallamatton v. UOI, AIR 2003 Supreme Court of India.
5. Sarla Mudgal v. UOI, (1995) 3 SCC.
6. State of Bombay v. Narsu Appa Mali, AIR 1952.
7. Lily Thomas v. UOI AIR 2000, Supreme Court of India, p. 1650.

The Role Of Financial Institution Under Company Law

Dr. Ashish Singhal[1], Iqramuddin Malik[2]
[1]Assistant Professor,Faculty of Law, Sharda University, Noida, India
[2]Assistant Professor, Faculty of law, University of Delhi, India

ABSTRACT

It is assumed that the financial intermediaries are experts in information production and processing. As advisors to both targets and acquirers, financial institutions utilize their information gathering expertise to ascertain the reservation price of the merger counter party, the potential for synergistic gains, as well as the risks of the transaction.

Commercial banks may be well positioned to offer these services if they have established lending and other customer relationships with either party to a merger. During the course of a long-term customer relationship, a commercial bank obtains private information about a firm's cash flows, financial resources, and other exposures that can be useful in estimating the future prospects of a proposed merger. Indeed, if the role of the financial advisor in a merger is to mobilize information, then commercial banks, especially those with prior lending relationship spotentially have a comparative advantage over investment banks in advising their customers particularly since, until very recently, investment banks did not make commercial loans. The bankruptcy code of US prohibit the transfer of information from an investment bank subsidiary to a related commercial bank subsidiary, there are no restrictions on the reuse of information obtained in the course of a standard banking relationship (e.g., on information flows from the bank's lending department to the investment bank).

1. Introduction

Bank has the ability to mobilize private information about a customer, and to use this information in supplying services such as merger advice to the customer, as the certification effect. Investment banks mayalso be privy to private information obtained, for example, in the course of underwriting activities. However, underwriting episodes are discrete and intermittent, corresponding to the relatively short time period surrounding the issue registration, offering period, and after-market support period. In contrast, commercial bank lending and other relationships are often long standing and continuous, requiring the ongoing monitoring of the firm's activities. The selection and use of a commercial bank advisor in an M&A transaction provides a higher certification effect than that provided by traditional investment banks.

There are, however, countervailing influences to the certification effect that may limit the effectiveness of commercial banks in providing merger advisory services. This is especially so if the bank advisor is faced with one or more conflicts of interest. For example, the target firm may have financial problems

known privately only to its lenders (such as the major bank lender), or an acquirer firm may be financially weak to the private knowledge of the banker, and its ability to survive and pay off its bank debt may be enhanced through the acquisition of a target with a sizable free cash flow. In these situations, the commercial bank's certification may not be credible because of the bank's self-interest in assuring the completion of the merger. This conflict of interest effect is likely to be exacerbated in the case of hostile takeovers. For example, if a commercial bank customer (as a target) objects to an acquisition, perhaps because of entrenched managers' fear of loss of control, then the commercial bank may be either unable or unwilling to utilize fully its private information in advising a potential acquirer for fear of the loss of future commercial banking business should the merger actually fail to be completed.

Moreover, a commercial bank may be able to attract merger advisory business only on the condition that bank loans are made available to the merger counterparties, or alternatively, a bank may be more willing to advise a firm to undertake an acquisition if it believes it can earn large fees from financing the merger through its lending department. These may constitute conflicts of interest to the extent that the bank's advice is tilted by the bank's concern about the profit it earns from its lending as well as is merger advisory services.

Target firms are typically smaller and more informationally opaque (difficult to understand) firms than acquiring firms. Banks that advise target firms can reuse information obtained in the course of a prior banking relationship by certifying the value of the merger (e.g., whether the price the acquirer offers to pay for the target is appropriate). The target bank's private information about the target firmis particularly valuable because of information asymmetries that make it difficult to certify the value of the target, and because it is the target firm that must be priced in a merger. However, this certification effect is likely to be reduced if the target bank advises the acquirer, since the target's bank may be reluctant to reveal bad information about the target to the acquirer for fear that if the deal is not completed; the target will penalize the bank with the loss of its banking business. Acquirer's abnormal returns are either negative or statistically insignificant both when the target's bank and the acquirer's bank advise the acquirer, and that the use of commercial bank advisors with prior banking relationships has no significant impact on acquirer abnormal returns.

Acquirers are not indifferent to commercial bank relationships.However, if an acquiring firm has had a prior lending relationship with a commercial bank, then the acquirer is more likely to utilize that bank as its financial advisor. This is not because of an informational certification effect, but rather due to the bank's implicit (or explicit) promise of bank loans to finance the merger transaction and post-merger

transition. Thus, it is the combination of merger advisory services and access to bank credit that is the focus of acquirer concerns in choosing their financial advisor. This creates a potential conflict of interest for the bank advisors. Bank advisor abnormal returns are significantly reduced when banks offer these "package deals" that combine loan commitments with merger advisory services.

Merger Transction

It is assumed that the financial intermediaries are experts in information production and processing. As advisors to both targets and acquirers, financial institutions utilize their information gathering expertise to ascertain the reservation price of the merger counter party, the potential for synergistic gains, as well as the risks of the transaction.[1]

Commercial banks may be well positioned to offer these services if they have established lending and other customer relationships with either party to a merger[2]. During the course of a long-term customer relationship, a commercial bank obtains private information about a firm's cash flows, financial resources, and other exposures that can be useful in estimating the future prospects of a proposed merger.[3] Indeed, if the role of the financial advisor in a merger is to mobilize information, then commercial banks, especially those with prior lending relationships potentially have a comparative advantage over investment banks in advising their customers particularly since, until very recently, investment banks did not make commercial loans.[4]

Bank has the ability to mobilize private information about a customer, and to use this information in supplying services such as merger advice to the customer, as the certification effect. The Banks which has a good business relation with any particular firm, is able to advice those properly.

Managerial Risk

The market power hypothesisstipulates that mergers enhance the competitive position of the target. Berkovitch and Narayanan (1993) find evidence of the cooperation motive in mergers and acquisitions.[5] Hubbard and Palia (1999) find synergistic gains to targets in the creation of internal capital markets within conglomerates created by a program of diversifying mergers and acquisitions[6]

[1]Allen, L., Jagtiani, J., Peristiani, S., Saunders, A., The role of bank advisors in mergers and acquisitions.Journal of Money, Credit, and Banking (2004) 36.
[2]Ibid
[3]Ibid
[4]Ibid
[5]Supra n. 1, p. 8
[6]Ibid

Whereas targets must receive some expectation of gain in order to win the approval of their target shareholders for any merger, those acquirer firm managers, who are free by pressure from value maximizing shareholders, may embark on acquisitions that offer no ex ante gain to stockholders. The managerial risk diversification hypothesispostulates that acquiring firm managers undertake (value reducing) mergers in order to reduce their diversifiable human capital investment in their firm. In a European context, Cybo-Ottone and Murgia (2000) show that diversifying mergers are value reducing, whereas focusing mergers are value enhancing. In the winner's curse or hubris hypothesis, overly optimistic acquirers overbid for targets. For example, Roll (1986) shows that acquirers who overestimate the value of the target are more likely to successfully complete a merger, resulting in a decline in the acquirer's value to stockholders.

Banking Sector

The banking sector is split into two fundamental divisions: investment banking and commercial banking.[7] Commercial banks manage deposit accounts, such as checking and savings accounts, for individuals and businesses. They make loans to the public using the money held on deposit. On the other hand, Investment banks differ strongly; these institutions facilitate the buying and selling of stocks, bonds and other investments, as well as helping companies to go public with initial public offerings (IPO).[x] In other words, a commercial bank may legally take deposits for checking and savings accounts from consumers,[9] an investment bank operates differently; an investment bank does not have an inventory of cash deposits to lend as a commercial bank does[10]. In essence, an investment bank acts as an intermediary, and matches sellers of stocks and bonds with buyers of stocks and bonds.[11]

Kroszner and Rajan (1994), Ang and Richardson (1994), and Puri (1996), among others, find that the debt securities underwritten by commercial banks prior to Glass-Steagall's passage in 1933 were less likely to default than those underwritten by investment banks. In addition, yields tended to be lower and the credit quality higher for commercial bank under written issues than for issues underwritten by investment banks. Moreover, no significant difference was found in the performance of the equities underwritten by investment banks during the 1920s as opposed to commercial bank affiliates[12]. Indeed,

[7]http://smallbusiness.chron.com/investment-bank-vs-commercial-bank-3450.html last visited on 26.11.11 at 9:50

[8]ibid

[9]http://www.vault.com/wps/portal/usa/vcm/detail/Career-Advice/Job-Search/Commercial-Banking-vs.-Investment-Banking?id=1626&filter_type=0&filter_id=0 last visited on 26.11.11 at 1.00 am

[10]ibid

[11] Ibid

[12]Supra note 1, p. 7

Puri (1994, 1996) finds evidence of a certification role for commercial banks as they enhance their reputations by reusing private information obtained in the course of banking relationships.Although the Glass-Steagall Act did not prohibit banks from advising in mergers and acquisitions cases, the relevance of certification effects and of potential conflicts of interest, in the area of merger advisement, is the central empirical question being investigated in this paper.

Acquisition Procedure

The question is whether advisors add value to a merger. Bowers and Miller (1990) examine the relationship between an acquiring firm's stock returns and the choice of investment bank to determine whether first-tier investment banks generate better deals in terms of value creation. They report that total wealth gains are larger when either the target or acquirer uses a first-tier investment bank. The results suggest the importance of the advisor's credibility (reputation) in acquisitions. [13]

Hunter and Walker (1990) find that merger gains relate positively to investment banking fees and other proxies for investment banker effort. However, McLaughlin (1990, 1992) reports that some incentive features of investment banking contracts can create conflicts of interest between an investment bank and its clients, suggesting the importance of a potential for a conflict of interest between advisors and clients in mergers and acquisitions. [14]

Servaes and Zenner (1996) compare acquisitions that were completed in-house versus those that use investment bank advisors. They find that an investment bank is used in more complex transactions with asymmetric information, documenting the importance of the information collection process in mergers and acquisitions.

Building on the theoretical model in James (1992), Saunders and Srinivasan (2001) find that merger advisory fees include a relationship premium that is consistent with the existence of switching costs borne by acquirers when they hire new advisors with whom they had no prior relationship. If merger fees are set competitively, an explanation for this relationship premium isa certification effect, whereby rents are paid to banks with superior information obtained in the course of a prior relationship. Saunders and Srinivasan (2001) also find that top tier advisors charge higher fees than lower tier investment

[13] http://www.sciencedirect.com/science/article/pii/S1047831005000076 last visited on 27.11.2011, at 4:20 pm

[14]http://docs.google.com/viewer?a=v&q=cache:D2jh3brJ7jwJ:citeseerx.ist.psu.edu/viewdoc last visited on 27.11.2011, at 4:20 pm

banks, and that acquirers pay a relationship premium in merger fees that is highest for top tier advisors. Although Rau (2000) finds no impact of advisors on acquirer abnormal returns, he shows a positive relationship between investment bank market share and fees and deal completion rates. That is, top-tier investment bank advisors create value by increasing the likelihood that the deal will be completed.

Targets &Acquirers

There is difference between deals advised by top tier and mid-tier investment banks and those advised by commercial banks. The mid- tierindicates those deals using only mid-tier investment bank advisors during the time periods when these firms were independent. There were no commercial bank advisors at all in the investment bank advisor control groups.[15]

Several control factors are incorporated into the model to capture the impact on abnormal returns resulting from characteristics of the target or the acquirer. These control factors are as follows:

a) Control factors

The announcement returns to bidding firms who make cash offers are higher than when stock offers are made, since a bidder with private information about the value of its own assets offers stock when its shares are overvalued by target shareholders. Recognizing this adverse selection effect, target shareholders reduce their estimate of a bidder's value[16]. Thus, without some other benefit to target stockholders in receiving stock rather than cash as a means of payment, a "lemons problem" arises for stock offers. Stulz, Walking, and Song (1990) find that the relationship between a target's abnormal return and the target firm's ownership structure depends on the relative power of the bidder to successfully complete the acquisition without competition from other bidders (i.e., the stronger the bidder -in terms of either lower target management's ownership stake, larger bidder ownership stake, or fewer bidders, the lower the target's abnormal returns).

Cotter and Zenner (1994) document that abnormal returns are lower for hostile compared to friendly mergers, controlling for size, ownership factors, and other characteristics of the offer (e.g., whether there are multiple bidders and whether the target has a golden parachute). Targets may also be valuable because of their high profitability and growth rate.

b) Target abnormal returns with investment banks

Abnormal target return is higher when there is at least one top tier investment bank advisor as compared

[15] Supra note no. 1, p. 11

[16]Ibid

to a commercial bank advisor, although the difference is statistically insignificant. Without controlling for banking relationships, target abnormal returns are significantly increased when the deal is cash financed and when the target firm's growth rate declines.

c) Target abnormal returns with commercial banks

Priorbanking relationships affect the target abnormal returns. The targets get benefited from hiring their own banks as advisors in mergers and acquisitions. Thus, the nature of the prior relationship between the bank advisor and its merger counterparty is important in determining the size of a target's abnormal returns. Specifically, the target significantly increases its abnormal returns when it chooses to receive merger advice from its own bank, as compared to the base case of deals in which all advisors are either top tier investment banks or commercial banks with no prior relationships to either merger counterparty. The cash financed mergers have significantly higher target abnormal returns.The target firm growth rate significantly reduce target abnormal returns, consistent with the view that the expected cost of integrating a relatively larger, faster growing target into the merged firm reduces that target's abnormal returns.

d) Acquirer abnormal returns with investment bank

There is no difference, on average,between acquirer abnormal returns for deals advised by at least one commercial bank as compared to deals without commercial bank advisors and with at least one top tier investment bank advisor.

e) Acquirer abnormal returns with commercial banks

All banking relationship variables are statistically insignificant in all regressions. There is no gain to the acquirer from a specific relationship between the merger counterparties and the commercial bank advisors. The acquirers, as well as targets, benefit from avoidance of the "lemons problem" by the use of cash in financing mergers. [17]

Company Specific Characteristics

The identity of an advisor may be endogenously determined by either deal specific or company-specific characteristics. The importance of a bank advisor in explaining a target's returns may be attributable to a firm's (either target or acquirer) characteristics, such as leverage or size, rather than the identity of advisors themselves. Hence, target or acquirer should test for a potential selectivity bias by examining the importance of firm-specific characteristics in predicting advisor choice.

[17] Supra note no. 1

Deals using top tier investment bank advisors were less likely to use cash financing and had larger acquirers than deals using commercial bank advisors. This suggests that deal-related information production by commercial banks is more valuable to smaller acquirers that pay cash for targets.

Commercial Bank Advise

Any synergistic gains generated by a commercial bank's advice to a merger counterparty should be reflected in the advisor's returns, as well as in the returns to the target or the acquirer, since such gains are likely to add to the reputational value of the bank as an M&A advisor. Consequently, we also examine the impact of merger announcements on advisors' returns. Unlike targets and acquirers, advisors participate in deals as a normal part of their business, and, therefore, the distinction between “normal” and “abnormal” returns is not meaningful. A commercial bank experiences positive returns when it is hired as the target's advisor. Information about targets, obtained in the course of a prior credit/lending relationship, can be “reused” by banks to generate positive returns from merger advisement

Cif the role of a financial advisor in a merger is to mobilize information, then commercial banks potentially have a comparative advantage in advising their banking customers as compared to non-bank advisors (i.e., traditional investment banks). This is known as the bank certification effect. All else being equal, access to information generated in the course of a lending/credit relationship would enhance the merger counterparty's abnormal return upon announcement of a merger.

Conclusion

However, there is a countervailing influence to the certification effect in that the commercial bank may be faced with a conflict of interest that diminishes the value of any such certification effect. In particular, the bank may be unable to credibly relay information about the merger counterparty's value if there is concern that the bank is using the merger as a way to reduce its own lending exposure to the client. Whichever effect predominates determines whether using commercial bank advisors increases or decreases acquirer's and/or target's abnormal returns in mergers and acquisitions.

This certification effect takes the form of increased abnormal returns to targets whenever their merger advisor is their own bank (with whom the target has had a prior banking relationship). Moreover, bank advisors themselves also appear to benefit from certification gains to merger counterparties, particularly when they use their information generation and certification functions to advise targets. Consequently, the market appears to value an informed bank certification of small, relatively information ally-opaque target firms.

Suggestion

We have examined the role of Bank Advisors in Merger & Acquisitions. Further to see whether there is need to take advice of Bank Advisors while merging or acquiring and what are the benefits of such advice. The bank advisors play a central role in advising the firms while merger and acquisition takes place. At many places where the situation requires the bank advisors advice the firms not to merge or acquire as the case may be.

References

• *Companies Act, 1956*
• *BCI Rules, 1975*
• *FDI CIRCULAR 1 OF 2011*
• *Allen, L., Jagtiani, J., Peristiani, S., Saunders, A., 2004. The role of bank advisors in mergers and acquisitions. Journal of Money, Credit, and Banking 36, 197-224.*
• *Francis, B., Hasan, I., Sun, X. 2008. How do firms choose financial advisors in mergers and acquisitions and why do they switch? Journal of Banking and Finance, forthcoming.*
• *Servaes, H. and M. Zenner, 1996, "The Role of Investment Banks in Acquisition," The Review ofFinancial Studies 9 (Fall) 787-815.*
• *www.Lawkhoj.com*
• *www.legallyindia.com*

Corporate Law & Corporate Social Responsibility in India

Eakramuddin Malik[1], Dr. Ashish Singhal[2]
[1]Assistant Professor, Faculty of law, University of Delhi, India
[2]Assistant Professor.Faculty of Law,Sharda University, Noida, India

ABSTRACT

It is necessary to analyze the concept of Corporate Governance and show that this concept is an increasingly complex mixture of legal and self regulation. The reasons for such complexity are that the laws regarding the corporate governance have undergone changed over time and therefore the role of judiciary comes into front. Further, the author would like to focus on some recent corporate collapse which casts crucial doubts about the ultimate efficacy of self regulation. These developments raise the questions about the justifiability of modern corporate governance, whether there are any alternatives to the conventional adjudication and what should be the role of judges.

It is pertinent to note here that the courts do two things, first it adjust mandatory provisions provided by the statutes and, secondly it evaluates the contractual innovations agreed by the parties against the backdrop of the fiduciary duties of care and loyalty owed by directors and the managers toward the shareholders. "When courts adjust the mandatory rules imposed by statutes, they employ a hypothetical bargaining approach that first determines what arrangement the parties themselves would have adopted ex ante and then requires that subsequent transactions conform to that hypothetical bargain. It is only in this way that mandatory rules can properly be labeled.It indicates that the only respectable academic approaches to corporate law are those that accord judge the central, decisive role in corporate life".[1]

Key Words:Judiciary,Shareholders,Corporate Law,Statutes

1. Introduction

Investors have certain expectations of the role of judiciary in the enforcement of fiduciary duties. The judicial intervention is a key ingredient in the overall corporate transaction among the four parties involved—the stockholders, directors, management, and state government.Since the court has power to interpret the law only, the author would see whether courts play a central role in corporate governance even by interpreting statutes. The author will focus important cases in which the courts have played an important role and also see that whether courts have a role to enforce self regulation and what is the use of self regulation in legal proceedings. The aim of corporate governance is to enhance the interests of shareholders and the role of courts is to see whether corporate action is such that enhance the shareholders interests.

[1] Jonathan R. Macey, Courts and corporations: A comment on coffee,(1990) Hein Online -- 89 Colum. L. Rev. 1693 1989

Corporate internal Government

The term 'corporate governance' is much in use these days. Everybody who has anything to do with corporate sector talks about corporate governance.

The term 'Corporate Governance' was used, for the first time, in 1962, by Richard Eells of Columbia Business School in his book The Government of Corporations[2]. The genesis of corporate governance arises from the great business scams and scandals which are all common in the recent past.

The term corporate governance can be defined as a set of systems, processes and principles which ensure that a corporation is governed to the best interests of all the stakeholders of the corporation.[3] Here a corporation includes generally five stakeholders, namely

1) Shareholders,
2) Employees,
3) Customers,
4) Creditors, and
5) Community.

To serve the best interests of all the stakeholders, systems and processes have to be built keeping in the mind the interests of each of the above stake holders.

Corporate Governance can be considered as the system by which companies are directed and controlled. It is a set of standards which aims at improving the corporations' image, efficiency, effectiveness and social responsibility. The concept of corporate governance primarily hinges (depend) on complete transparency, accountability and integrity of the management, with an increasing emphasis on investors' protection and public interest. Corporate Governance involves self imposed discipline by the corporate. According to Sir Adrian Cadbury, “Corporate Governance is concerned with holding the balance between economic and social goals and between individual and community goals. The aim is to align as nearly as possible the interests of individuals, corporations and the society”.

According to the OECD, "Corporate Governance deals with the rights and responsibilities of a company's management, its board, shareholders and various stakeholders”.

[2] JH Farrar, Corporate Governance in Australia and New Zealand (2001), Chapter 1, p. 1.
[3] L.V.V. Iyer, Corporate Governance: Some thoughts, Corporate Law Cases, 2000, Journal 1.

In developing countries, Corporate Governance setting takes on additional importance. Good corporate governance is fundamental because of its role in attracting foreign investment. The extent of foreign investment shapes the prospects for economic growth for many developing countries While India's corporate governance structure is advanced for a developing country, it still should be radically improved. At the end we could say that a good corporate governance is based on the principles such as transparency, accountability, fairness and responsibility.[4]

The main objectives behind the corporate governance are 'enhance the long term share holders value and to protect the interests of other stakeholders in the corporation, viz, bankers, creditors, customers, employees of the company, suppliers, Government and the community at large.

Investment and Decision

Before making investment decision, Investors first of all consider two things, first, the rate of return on invested capital, and secondly, the risk coupled with the investment. In recent years, the attractiveness of developing nations as a destination for foreign capital has increased, partly because of the high likelihood of obtaining strong returns and partly because of the decreasing attractiveness of developed nations.[5]

The attracting a high rate of return, however, does not, by itself, guarantee foreign investment, the risk attached with it weighs equally in the investors' decision-making calculus. Good corporate governance practices reduce this risk by ensuring accountability, transparency and enforceability in the marketplace. A strong corporate governance system ensures a long-term success of the country; while weak system often leads to many serious problems.

In an open market, the firms which are more open and transparent, and thus well governed, are more likely to raise capital successfully because investors will have "the information and confidence necessary for them to lend funds directly" to such firms.[6] Moreover, the firms which are well-governed likely will obtain capital more cheaply than firms that have poor corporate governance practices because investors will require a lower risk premium for investing in well-governed firms. Thus, the investors will invest in those firms which are having good corporate governance because of the lower risks and the likely hood of higher return.

[4]Suresh Thakur Desai, Its Meaning and Scope, SEBI and Corporate Law Magazine, 2002, vol. 35, p. 95.

[5]Dr. Madan Bhasin, Corporate Governance in India: Past, Present & suggestions for Future.

[6] (http://www.manupatrafast.in/pers/viewdocMain.aspx) visited on 17.08.2011.

Good corporate governance helps the developing countries in getting more benefits in a number of ways. Good corporate governance practices can decrease the likelihood of a domestic financial crisis and the severity if such a crisis does occur. Further, I would like to say that a good corporate governance practice would create an efficient corporate management. Finally, it has been seen that the well-governed firms are valued much higher than firms with poor corporate governance practices. Moreover, the good corporate governance plays a role of reducing corruption and the reduced corruption significantly enhance the development prospects of the country.

Judicial Aspect and Corporate Law

The judiciary has to do two things, first it adjust mandatory provisions provided by the statutes and, secondly it evaluates the contractual innovations agreed by the parties against the backdrop of the fiduciary duties of care and loyalty owed by directors and the managers toward the shareholders. "When courts adjust the mandatory rules imposed by statutes, they employ a hypothetical bargaining approach that first determines what arrangement the parties themselves would have adopted ex ante and then requires that subsequent transactions conform to that hypothetical bargain. It is only in this way that mandatory rules can properly be labeled.

It indicates that the only respectable academic approaches to corporate law are those that accord judge the central, decisive role in corporate life".[7]

The judiciary's central role in corporate law arises from the existence of the policymaker's dilemma, which renders legislative enactments unhelpful in a wide variety of contexts. [8]

The author would like to give some examples on the basis of which the role of judiciary exist.

About Removal of Directors

In recent years, nearly 29 countries have adopted in their corporate law the provisions empowering courts to remove directors elected by shareholders, apparently under the assumption that sometimes shareholders would like to, but cannot, remove directors themselves.[9] This power of court is extraordinary in nature that it usurps the shareholders' inherent right. But unfortunately India is not a part of those countries having judicial removal of directors.

[7] Jonathan R. Macey, Courts and corporations: A comment on coffee,(1990) HeinOnline -- 89 Colum. L. Rev. 1693 1989.
[8] Supra note 1, p. 1699.
[9] Olga N. Sirodoeva Paxon, Judicial Removal of Directors: Denial of Directors' License to steal or Shareholders' freedom to vote?

Compensation

Executive compensation is an important area of corporate governance which has received much attention. Executive compensation is financial compensation received by an officer of a corporation. It is usually determined by the Board of Directors of the company. Executive compensation generally includes a fixed base salary, a bonus scheme, perquisites (including pension plans, company cars, use of company aircraft, and other "perks"), and conditional promises of separation payments.

There are two views in America, "one urges that American executive-compensation model is immoral, rewards greedy executives for company performance that is unrelated to an executive's performance, allows executives to essentially set their own compensation and to enrich themselves at the expense of shareholders, and causes significant economic harm. Others argue at American executive-compensation practices are efficient, reward talented individuals who compete in an extremely competitive market, and have contributed to economic growth."[10]

The settlement payment comes from the corporation which would be against shareholders' interest. The court held in SEC v. Bank of America Corp., that these settlements are frequently "neither fair, nor reasonable, nor adequate. Many executive-compensation problems will be significantly reduced or eliminated.

In 2006, the SEC passed new rules requiring that a company must explain how much compensation its top executives received and why. With the intervention of the judiciary regarding executive compensation the Shareholder Bill of Rights Act, 2009 was passed by the American Government to have control on executive compensation.

Shareholders and the Company

Generally the right to seek remedies for the wrongs committed towards the company vested in the company. The decision of the House of Lords in Ebrahimi v Westbourne Galleries Ltd[11] produced a new approach which was the beginning of a more interest based approach which arose in interpretation of the just and equitable clause in winding up but was carried over to the reforms of the statutory shareholder remedy, now in section 232 of the Corporations Act 2001. Now the share holder could file a petition in respect of wrong done to company.

[10]Mathew Farrell, A Role for the Judiciary in Reforming Executive Compensation: The Implications of Securities and Exchange Commission v. Bank of America Corp, available at http://legalworkshop.org /2010/11/03/november-3rd visited on 20.08.2011.

[11] [1973] AC 360

Shahara Grop's Optionally Fully Convertible Debenture (OFCD) scheme case

The Supreme Court Directing the market regulator SEBI to proceed with the probe into Sahara group's Optionally Fully Convertible Debentures (OFCD) scheme said that the investors may not be aware about these products and might feel cheated like in the Harshad Mehta scam. SC was of the view that on the question of OFCD, it requires decision of (market regulator) SEBI. Let SEBI hear and pass an order. While hearing the case the SC observed that investors were not aware of this investment scheme and later they might feel cheated as was the case with Harshad Mehta securities scam that took place in 1990s.

Companies Act,1956: There are many provisions under the Companies Act, 1956 that make the role of judiciary in corporate governance. These are as follows:

1) Reduction of share capital: sections 100-105 provides that a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital. Here the resolution to reduce the share capital shall come into effect only after confirmation of court (now Tribunal)[12]. In case of TN Newsprint and Paper Lt[13]. the Madras HC allowed the company to reduce its capital which was found to be in excess of its needs by permitting it to pay the same to its creditors.

2) Power regarding compromise or arrangements: Sections 291-293 makes provisions regarding compromise and arrangements between company and its creditors, or between company and its members. Section 291 provides that where a compromise and arrangement is proposed between company and its creditors, or between company and its members, the court (now Tribunal) is empowered, on the application of company or any creditors or members as the case may be, to pass an order that a meeting of creditors or members be called and held in the manner directed by the court. The court has very wide powers in sanctioning or rejecting the scheme of compromise or arrangement. As per the provisions of Section 292[14] of the Companies Act 1956, the courts shall have the following powers-

[12]Companies (Amendment) Act, 2002.

[13](1995) 5 SCL 187 (Mad.)

[14](1) Where a High Court makes an order under section 391 sanctioning a compromise or an arrangement in respect of a company, it (a) shall have power to supervise the carrying out of the compromise or arrangement ; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under section 153 of the Indian Companies Act, 1913 (7 of 1913), sanctioning a compromise or an arrangement.

a. Power to stay any suit or proceeding

b. Power to supervise or modify compromise or arrangement

c. Power to make an order for winding of a company.

3) Winding up of company by court: Section 425[15] of the Companies Act, 1956 makes provisions for the winding up of a company. Subsection (1) (a) makes provision for the winding up of company under the order of the court. The court may by its order wind up of the company under the circumstances enumerated in Section 433[16] of the Company Act, 1956.

4) General Powers of court in case of winding up by court: The following are the general powers of the court:

a. To stay winding up [sec. 466]

b. To settle list of contributories [sec. 467]

c. To deliver property to liquidator [sec. 468]

d. To set off claims[469]

e. To make calls [sec. 470]

f. To order deposit in Reserve Bank [sec. 471]

g. To exclude creditors [sec. 474]

h. To adjust rights of contributories [sec. 475]

i. To order costs [sec.476]

[15] Section 425 provides that the winding up of a company may be either -
(a) by the Court (compulsory); or
(b) voluntary ; or
(c) subject to the supervision of the Court.
(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of those modes.

[16] Sec 433 provides that a company may be wound up by the Court,
(a) if the company has, by special resolution, resolved that the company be wound up by the Court ;
(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting ;
(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ;
(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two ;
(e) if the company is unable to pay its debts ;
(f) if the Court is of opinion that it is just and equitable that the company should be wound up.

j. To order public examination of promoters, directors etc.[sec. 478]

k. To arrest absconding contributory[sec. 479]

2) Power of Court to Appoint and Remove Liquidator: Section 515[17] of the Companies Act, 1956 provides that if from any cause, whatever, there is no liquidator acting, the court may appoint the official liquidator or any other person as liquidator. This section further provides that the Court may, on cause shown, remove a liquidator and appoint the Official Liquidator or any other person as a liquidator in place of the removed liquidator.

3) **Power of court to assess damages against delinquent directors, etc.:** Section 543[18] empowers the court to assess damages and require the delinquent directors and other officers of the company to pay the amount to the company.

4) Power of court to declare dissolution of company void: As per the provisions of Section 559[19] of the Companies Act, 1956 where a company has been dissolved in pursuance of the provisions of this Act, the court may at any time within 2 years of the date of dissolution, on the application of the interested person, make an order upon such terms and conditions as the court may think fit, declaring the dissolution to have been void.

---

[17]Section 515 provides, (1) If from any cause whatever, there is no liquidator acting, the Court may appoint the Official Liquidator or any other person as a liquidator.

(2) The Court may, on cause shown, remove a liquidator and appoint the Official Liquidator or any other person as a liquidator in place of the removed liquidator.

(3) The Court may also appoint or remove a liquidator on the application made the Registrar in this behalf.

(4) If the Official Liquidator is appointed as liquidator under the proviso to sub-section (2) of section 502 or under this section, the remuneration to be paid to him shall be fixed by the Court and shall be credited to the Central Government.

[18]Section 543 provides, If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company -

(a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

(b) has been guilty of any misfeasance or breach of trust in relation to the company;

the Court may, on the application of the Official Liquidator, of the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

[19]Section 559 provides, Where a company has been dissolved, whether in pursuance of this Part or of section 394 or otherwise, the Court may at any time within two years of the date of the dissolution, on application by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void; and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

Conclusion

The object of the write-up is to examine the role of judiciary in corporate governance. Further to see whether there is need to interfere by the judiciary in the self governance of the corporation and position in India. The writer has adopted the descriptive, comparative, analytical and case study methods as a research methodology throughout the course of this paper and he is relying on books, articles and online databases. The judiciary plays a central role in corporate governance even when they appear to be merely interpreting statutes. At many places where the situation requires the judiciary has laid down certain guidelines to be followed to enhance the good governance in the corporation. The writer has formulated the following questions and has tried to find out the answer-

- Whether judiciary plays any important role in corporate governance.
- Is there any effect on the rights and remedies of shareholders, directors, stakeholders etc. because of judiciary's intervention?
- What are the positions in India regarding the role of judiciary in corporate governance?

Suggestion

The author would like to suggest by stating that the judiciary has an important role to play in corporate governance. It is found that the court fills the missing terms in the contract by interpreting it as to enhance the shareholders' wealth. The corporate governance is the complex amalgamation of self regulation. The boundary of self regulation raises new challenges for the court to interfere. The court comes into front when the policy making body leaves some lacuna in the law. Only judiciary has power to interpret the law and thereby has the valid reason to interfere with the self regulation of the corporation.

Bibliography

• *Gower & Davies, Principles of Modern Company Law, ed. 8th, 2008, Sweet & Maxwell Publication, Landon.*
• *Majumdar, A.K. and Kapoor G.K., Taxman's Company Law, ed. 11, 2008, Taxman Publications (P.) Ltd.*
• *Singh Avtar Singh, Company Law, ed. 14th, 2005, Eastern Book Company, Lucknow.*
• *Mathew Farrell, A Role for the Judiciary in Reforming Executive Compensation: The Implications of Securities and Exchange Commission v. Bank of America Corp., available at http://legalworkshop.org/2010/11/03/november-3rd visited on 20.08.2011.*
• *Bhasin, Madan, Corporate Governance in India: Past, Present & Suggestions for Future, available at http://www.manupatrafast.in/pers/viewdocMain.aspx? Visited on 18.08.2011.*
• *Farrar, H. John, Corporate Governance and the Judges, Bond Law Review, vol. 15, 2003.*
• *Discussion paper on Corporate Governance in India: Theory and Practice, National Foundation for Corporate Governance, 2004, available at www.nfcgindia.org/library/cgitp.pdf, visited on 18.08.2011.*
• *Macey R. Jonathan, Courts and Corporations: A Comment on Coffee, Yale Law School Legal Scholarship Repository, 1990, available at digitalcommons.law.yale.edu/cgi/viewcontent.cgi, visited on 16.08.2011.*
• *Serodovea Olga N., Judicial removal of directors: Denial of Directors' license to steal or Shareholders' freedom to vote, available at papers.ssrn.com/sol3/papers.cfm?, visited on 16.08.2011.*
• *Vasey E. Norman, The Role of the Judiciary in Corporate Law, Corporate Governance and economic Goals, 2000, available at www.oecd.org/dataoecd/40/3/1857523.pdf, visited on 16.08.2011.*

Approach of Supreme Court in Double Taxation Relief in India

Jamshed Ansari[1], Eakramuddin Malik[2], Dr. Ashish Singhal[3]
[1]Assistant Professor, Faculty of law, University of Delhi, India
[2]Professor, Faculty of law, University of Delhi, India
[3]Faculty of Law, Sharda University, Noida, India

ABSTRACT

The object of this research paper is to examine the approach of Supreme Court in Double Taxation Relief. Further to see whether there is change of the view of the Supreme Court before and after the liberalization era. The authors have adopted the descriptive, comparative, analytical and case study methods as a research methodology throughout the course of this paper and he is relying on books, international treaties, articles and online databases. The authors have taken the view whether the Double Taxation Avoidance agreement between India and Mauritius is being abused by the "treaty shopping" for the purpose of fiscal evasion. The Supreme Court has interpreted the DTAA and the Income Tax Act, 1961 as to encourage mutual economic relations, trade and investment between the contracting countries and tried to give the answers to the following framed questions: What is the position where there is a conflict between the provisions of the statute and the provisions of the applicable Double Taxation Avoidance Agreement? Which country is entitled to tax a particular income where there is DTAA and in case where there is no DTAA between Countries? Whether empowering central government to define by notification in the official gazette the terms not defined in the DTAA or the Income Tax Act is in violation of principles of treaty jurisprudence. What are the approaches of SC regarding relief in Double Taxation? Whether DTAA entered into between India and different tax haven countries is abused through "treaty shopping". Why Double Taxation Avoidance Treaties are bilateral, rather than multilateral such as the GATT. The research paper is limited to examine the approach of Supreme Court in Double Taxation Relief. For which the authors have to go in history of DTAA and the Indian Income Tax Law, case laws and the surrounding materials.

1. Introduction

In the age of globalization, it is common to find companies making cross border investments. The need for the companies to constantly increase their market share has made the world a global village. The companies prefer to make a sound investment decision and take into consideration all aspect of investments. Taxation of income earned is also one among the important considerations before making the investment. To come out with the problem of double taxation the countries make tax agreement. The Tax Treaties occupied different positions among different constitutions of the world. For e.g., in America, treaty is an Act of Legislation and the courts are bound to enforce the same. The American Senate approves the treaty by two third majorities. The tax treaties in India are not approved by the Parliament. It is also debatable topic that whether tax treaty overrides the domestic law. Tax treaty will deal with the question of the overlapping jurisdiction and resolve the issues concerning the taxation of

income on the basis of residence or location. The conflict of interest has to be resolved by the application of treaty provisions. In order to strength economic cooperation and avail the better technology and larger capital, India has entered into DTAAs with many countries. In India, the power of Central Government to enter into an agreement with foreign country has been given under Sections 90 and 91 of the IT Act, 1961.The grant of double taxation relief in terms of Sections 90 and 91 of the Income Tax Act, 1961 has been an area of controversy. The implementation of Indo- Mauritius DTAA has also come in for criticism on the ground that it encourages tax evasion. The companies not actually based in Mauritius chose to route their investment in India through Mauritius taking advantage of the soft tax laws of that country.

The author is to examine the approach of Supreme Court in Double Taxation Relief. Further to see whether there is change of the view of the Supreme Court before and after the liberalization era. According to the Author the Double Taxation Avoidance agreement between India and Mauritius is being abused by the "treaty shopping" for the purpose of fiscal evasion. The SC has interpreted the DTAA and the Income Tax Act, 1961 as to encourage mutual economic relations, trade and investment between the contracting countries. The author cited many cases in favour of his hypothesis.

1.1. Double Taxation Relief & Double taxation avoidance agreement:

Double Taxation means taxing the same income twice, once in the home country and again in the host country. It has been held by the Supreme Court in case of Sri Krishna Das v. Town Area Committee[1], that the expression "double taxation" is generally used to mean taxing the same property or the subject matter twice, for the same purpose, for the same period. It is extremely important to mention here that no rule of International Law prohibit the Double Taxation. So it is for the countries of the international arena to solve the problem of Double Taxation. Therefore, the negotiations for the tax treaties became important to meet the end hence the countries have been entered in a large numbers of tax agreement based on Organization of Economic Cooperation Development (OECD) and UN models with suitable changes where necessary to meet the special needs of contracting countries. The tax agreements between countries are in the nature of contract.

Sections 90 and 91 given in Chapter IX of Income Tax Act, 1961 (India) deals with granting relief from double taxation to taxpayers.

[1] (1990) 183 ITR 401 (SC)

According to Section 90[2] of the Income Tax Act, 1961 the Central Government has been empowered to enter into an agreement with the Government of any other country for the purposes of granting relief in respect of income on which income tax had been imposed both in India and in the foreign country under the law in forced in the respective countries. The Central Government may also enter into an agreement with the government of foreign country for granting relief in respect of income tax chargeable under Income Tax Act in India and the corresponding law in force in that country to promote mutual economic relation, trade and investment. As per the provisions of Section 90 the Central Government has signed the Double Taxation Avoidance Agreement with many countries.

1.2. Double Taxation Avoidance Agreement:

DTAA can be generally called as agreement between two countries for the avoidance of double taxation and for the prevention of fiscal evasion regarding taxes on income. The agreement for avoiding double taxation may also provide for the manner of recovery of income tax in India and in the foreign country and also for the exchange of information to prevent evasion or avoidance of tax coupled with investigation of cases relating thereto[3]. As per the provisions of sub- section (2) of Section 90, where the Central Government entered into an agreement with the Government of foreign country then in relation to the assessee the provisions of Income Tax Act, 1961 shall apply to the extent they are more beneficial to the assessee.

---

[2]Section 90 of the IT Act, 1961 provides, (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—
(a) for the granting of relief in respect of—
(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or
(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or
(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or
(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or
(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.
(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.
(3) Any term used but not defined in this Act or in the agreement referred to in subsection (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

[3] R. Santhanam, Double Taxation Relief under Treaties (2004) CTR, p. 90.

1.3. The objective of DTAA

The objectives of double taxation avoidance agreements can be following:

1) They help in avoiding the adverse burden of international double taxation by making an agreement for division of revenue two countries, exempting some incomes from tax liability in either country and by reducing the rates of tax on some incomes taxable in either country.

2) The tax treaties help the taxpayer of one country to know with greater certainty the probable limits of his tax liabilities in the other contracting country.

3) The tax treaty provides, from the taxpayer point of view, against non-discrimination of foreign tax payers or the permanent establishments in the source countries and the domestic tax payers.

The purpose of an Agreement is "avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains and for the encouragement of mutual trade and investment[4]".

1.4. Effects of the DTAA

Followings are the main effects of the DTAA:

i. "In case of difference between the provisions of the domestic Tax Law and the agreement, the provisions of the agreement will prevail over the provisions of the domestic Law and can be enforced by the Appellate Authorities and the Court,

ii. If the tax liability is imposed by the Act, the agreement may be resorted to for negating or reducing it,

iii. If no tax liability is imposed under the Act, the question of resorting to the agreement would not arise.[5]"

With respect to the agreement with Malaysia, the Karnataka HC in the case of CIT v. R.M. Muthaiah[6] , held that the agreement would override the provisions of the Income Tax Act, 1961.

---

[4] The preamble of the Indo- Mauritius Double Taxation Avoidance Agreement, 1983

[5] Kanga and Palkhivala, The Law and Practice of Income Tax, Ed. 8, p. 1000.

[6] (1993) 110 CTR (Kar) p. 153

1.5. General Principles of Double Taxation

2. Basis of taxation:

There are two bases of taxation i.e. the source of income rule and the residence rule. "The countries follow either of these rules, or a mixture of them. In India, the liability of an assessee depends upon his residential status during the previous year. The basis for taxation in most of the countries is similar to that of Indian system. For this the income must have been accrued or received in more than one country and the person may be liable to tax in more than one country[7]".

3. Relief against Double Taxation:

The relief against double taxation can be provided in two ways: a.) Bilateral relief, and b.) Unilateral relief. Where there is an agreement with foreign countries to avoid double taxation, it is called bilateral relief. As per the provisions of Section 90 of the Income Tax Act, 1961 the Central Government is empowered to enter into an agreement with different countries to avoid double taxation and thereby provides bilateral relief to the taxpayer. Where there is no agreement with the foreign country for the purpose of avoiding double taxation and the relief is granted then such relief is called as unilateral relief. Section 91 of the Income Tax Act, 1961 makes provision with respect to unilateral relief.

4. Sovereign power to enter into agreement:

As per the provisions of Article 265 of the Constitution of India, no tax shall be imposed save by authority of law. Further, according to Section 90 read with entry 14 of the Union List to the VII Schedule of the Constitution of India, only Central Government can enter into the agreement with the foreign country to avoid double taxation and to prevent evasion of taxes.

5.Model for DTAA:

In the matter of double taxation, it is extremely important to ensure that there is uniformity in granting relief. This is also to ensure that the assessee does not find himself in difficulty to order his affairs according to tax laws world over. The DTAA is often negotiated on the basis of standard form. There are two standard forms exist as of now and these help to attain the objective/ goal of uniformity. OECD and UN model are most popular. The OECD emphasizes the residence principle while the UN model compromises between the source and the resident principle. India follows either OECD form or UN model. In addition to the OECD Model, there is the UN Model Convention. The origin of UN model lies in a resolution passed by the Economic and Social Council of the U.N. in 1967 and was published in 1980 in the form of Model Double Taxation Convention between developed and developing countries.

[7]T.C.A. Ramanujam, Double Taxation Avoidance Agreements- Need for fresh look, (2004)192, CTR, p. 239

6. Scope of Section 90 of the IT Act, 1961:

As per Section 90 of the Act, the Central Government is empowered to enter into an agreement with the foreign countries for the purpose of avoiding double taxation or to case no agreement is entered within the countries, the relief is granted under Section 91 of the Income Tax Act, 1961.

1.6. Pattern of Taxation

The following heads of income are taxed in accordance with the Double Taxation Avoidance Agreements:

a. Income from the business is taxed in the country of residence to that place,
b. Income from immovable property, if the business entity has no action in the source state; if there is Permanent Establishment and to the extent it is attributable arising to a non-resident is taxed primarily in the state of its location, i.e. the source state.
c. Income from movable property such as interests, dividends and royalties are first and foremost taxed in the resident Country, but the source Country may impose a reduced tax.

Statutory framework to grant double taxation relief in India

2.1. Power under the Constitution of India:

As per the provisions of Article 265[8] of the Constitution of India, the sovereign power to levy taxes and to enforce collection and recovery thereof has been conferred on the State. The powers to levy taxes are conferred on the Central Government in respect of matters falling under the domain in Union List i.e. List-I of the VII Schedule to the Constitution and the powers to levy taxes conferred on the State Governments are falling under the domain in State List i.e. List II of the VII schedule to the Constitution of India. One of the Entries i.e. Entry 14 of List-I empowers the Union of India to enter into an agreement and treaties with foreign countries and to implement such an agreement, treaties and convention. Accordingly, the union of India has entered into DTAA with other countries to avoid double taxation. The DTAA binds both the countries.

2.2. Rationale for entering into an Agreement:

Section 90 of the Income Tax Act, 1961 is an enabling provision which empowers the Central Government to enter into an agreement with the government of foreign country to avoid double taxation. The main objective of the treaty/ agreement is to promote mutual economic relation, trade and investment and this is based on the principles of reciprocity. The agreement do not empower any contracting country to enjoy more power than vested in them or curtail any benefit to which the

[8] Article 265 of the Constitution of India provides, "No tax shall be levied or collected except by authority of law".

taxpayers are entitled. Thus, we can say that the agreement is designed to grant relief in respect of income on which income tax had been paid under the Indian Income Tax Law and the Tax Law of the treaty country.

In accordance with Section 90 read with Entry 14 of the Union List to the Seventh Schedule of the Constitution of India, the central Government has entered into agreement with many countries to avoid double taxation and to increase the investment and economic development.

2.3. Amendment of Section 90 of Income Tax Act, 1961:

The Finance Act, 2003 amended Section 90 of the Income Tax Act, 1961. Section 90 as it originally stood provides that the Central Government may enter into an agreement with the government of foreign country for granting relief in respect of income which has been doubly taxed in both of the countries. The amended provision now secures that the DTAA may be entered into for granting of relief in respect of the income chargeable under the Indian Income Tax Act or the corresponding Tax Law in force in the contracting country to promote mutual economic relations, trade and investment. The object behind amendment is to encourage international trade and commerce.

Amendment violates the principle of treaty jurisprudence:

Another amendment in Section 90 of the Income Tax Act, 1961 violates the principle of treaty jurisprudence. It is because; sub- Section (3)[9] of Section 90 reserves the Central Government the power to define, by the Notification in the Official Gazette, the terms not defined in the DTAA or the Income Tax Act. Notification of definition by the Central Government is not binding on the non- resident unless the same was made part of the agreement. The assumption of unilateral power by the Central Government in this regard is against the very spirit of DTAAs.

3.1. Which country can tax income?

It is to be noted here that there is always an issue regarding the implementation of Double Taxation Avoidance Agreement as to which country is entitled to tax a particular income. The DTAA is to determine the jurisdiction of the contracting countries to tax a particular income.

[9]Section 90 (3) provide, "Any term used but not defined in this Act or in the agreement referred to in subsection (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf."

3.2. Permanent establishment:

Generally, on a perusal of the various DTAA's, it is found that the taxation of the business profits depends upon the existence of the 'permanent establishment'. Permanent Establishment is one of the most litigated areas of the DTAA as to what would constitute a Permanent Establishment. Though the permanent establishment is defined in each and every Double Taxation Avoidance Agreement which a country enters into with another country.

As per paragraph 1 of Article 5 of India- Netherlands Tax Treaty, permanent establishment means any fixed place of business through the business of an enterprise is wholly or partly carried on.

As per paragraph 2 of Article 5 of India- Netherland Tax Treaty, 'permanent establishment' may include-

a) A place of management
b) A branch
c) An office
d) A factory
e) A workshop
f) A mine, an oil or gas well, a quarry or any other place for extraction of natural resources
g) A warehouse in relation to a person providing storage facilities for others
h) A premises used as a sales outlet
i) An installation or structure used for exploration of natural resources provided that the activities continue for more than 183 days.

In a case of CIT v. Visakhapatnam Port Trust[10], the Andhra Pradesh HC held that Permanent Establishment postulates the existence of the substantial elements of an enduring or a permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to a virtual projection of a foreign enterprise of one country into the soil of another country.

3.3. Some issues regarding Permanent Establishment:

a) Whether representative office is a PE:

Representative office is generally not allowed to carry on any business in the country where it is established. They merely act as a post office or a point of contact between the company and the customers in the other country. Therefore the representative office cannot be regarded as PE.[11]

[10] (1983) 144 ITR, p. 146.

[11] Dhanshyam Patel, Basic concepts of Double Taxation Avoidance Agreements, 2000, vol. 108, Tax Literature.

a) Whether moving vessel a PE:

The services are generally like installation of pipelines, burial, hook up, testing etc. There they have to work from the vessels which act as their base. It was argued by the assessee that the vessels cannot be regarded as PE as paragraph 1 of Article 5 envisages a fixed place of business and since the vessels move from place to place, it cannot be regarded as fixed place of business and hence not a PE. The issue came before the Mumbai Tribunal in Dy. CIT v. Subsea Offshore Ltd[12]. It was held by the Mumbai Tribunal that the vessels cannot be regarded as PE as paragraph 1 of Article 5 envisages a fixed place of business and since the vessels move from place to place, it cannot be regarded as fixed place of business and hence not a PE.

Approach of Supreme Court in Double Taxation Relief:

4.1. Pre- liberalization era

- ✓ Hindustan Construction Co. Ltd. v. V.S. Gaitonde, Income Tax Officer, Companies Circle I (3), Bombay and Anr.[13]

J. C. Shah, M. Hidayatullah, P. B. Gajendragadkar, R. S. Bachawat and S. M. Sikri, JJ.

In this case the appellant claimed the set off of taxes under Section 49E[14] and 59 of the Income Tax Act, 1922.

The question to be solved is whether there should be a prior adjudication existing before a set-off can be allowed under section 49E. The court was of the view that not necessary. But it held that there must be a subsisting obligation to make the payment of refund before a person is entitled to claim a set off under S. 49E. There is no debate on the fact that the income tax officer had already rejected the request of the appellant to refund his tax. Now it is clear that there is no obligation on part of the IT Officer to refund the same to the appellant. Finally the court held that the appellant cannot claim the set off as given under section 49E as there in no due on part of the IT Officer.

[12] (1998) 66 ITD, p. 296

[13] AIR 1965 SC p. 1316

[14] Section 49E reads as "Power to set off amount to refunds against tax remaining payable. - Where under any of the provisions of this Act, a refund is found to be due to any person, the income tax Officer, Appellate Assistant Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded, or any part of that amount against the tax, interest or penalty, if any, remaining payable by the person to whom the refund is due."

✓ **McDowell & Company v. CTO**[15]

In this case the SC laid down it is open to the Income Tax Officer in a given case to lift the corporate veil for finding out whether the purpose of the corporate veil is avoidance of tax or not.

4.2. Post liberalization era:

With the liberalization of international trade and commerce the Supreme Court too have changed its views favoring the globalization of international trade and commerce. In the series of cases the Supreme Court gave its decision which encourages the mutual economic relations, trade and investment between Government of India and the Government of different countries. Some of the important cases are as follows:

✓ **Shiva Kant Jha v. Union of India**[16]

In this case the Delhi HC quashed the Circular of the CBDT stating that the residence certificate issued by the Mauritius Authorities would constitute sufficient evidence. The HC had pointed out that the "treaty shoppers" were abusing the Mauritius rout for investment in India solely to avoid the lawful tax.

✓ **Union of India & Anr. v. Azadi Bachao Andolan Anr.** [17]

The DTAA between the Government of India and the Government of Mauritius dated 1-4-1983 is the subject matter of the present controversy in the instant case.

In 1994 a Circular No. 682 was issued by the Central Board of Direct Taxes that capital gains of any resident of Mauritius by alienation of shares of an Indian company shall be taxable only in Mauritius according to Mauritius taxation laws and will not be liable to tax in India. Relying on this, a large number of Foreign Institutional Investors, which were resident in Mauritius, invested large amounts of capital in shares of Indian companies with expectations of making profits by sale of such shares without being subjected to tax in India. During the year 2000, Income Tax authorities issued show cause notices to some FIIs functioning in India calling upon them to show cause as to why they should not be taxed for profits and for dividends accrued to them in India. The basis on which the show cause notice was issued was that the recipients of the show cause notice were mostly shell companies incorporated in Mauritius, operating through Mauritius, whose main purpose was investment of funds in India. It was alleged that

[15] [1985] 154 ITR 148 (SC)

[16](2002) 175 CTR (Del) 371

[17][2003] 263 ITR 706 (SC)

these companies were controlled and managed from countries other than India or Mauritius and as such they were not "residents" of Mauritius so as to derive the benefits of the DTAC. These show cause notices resulted in panic and consequent hasty withdrawal of funds by the FIIs. As a result most of the investors withdrawal their funds. The Indian Finance Minister issued a Press note dated 4-4-2000 clarifying that the Circular did not affect or reflect the policy of the Government of India with regard to denial of tax benefits to such FIIs.

The CBDT issued another Circular no. 789 clarifying that the Indo- Mauritius DTAA, 1983 applies to both resident of India and Mauritius. As per the provisions of Article 4 of the DTAA, a resident of Mauritius includes the persons operating business in the Mauritius and hence they are to be benefitted by the DTAA.

The Circular no. 789 was challenged before the Delhi HC praying to declare the same as illegal and void. The HC declared the Circular illegal and void stating that the “Treaty Shopping", by which the resident of a third country takes advantage of the provisions of the Agreement, is illegal and thus necessarily forbidden.

The matter was appealed before SC. It has been held by the SC that it is not essential that the same income must be taxed both in India and foreign country simultaneously. The SC drew support from many judgments. Investors having place of business in Mauritius shall be deemed to be resident of Mauritius.

In the case of John N. Gladen v. Her Majesty the queen[18] the Federal Court held that the non- resident could benefit from the exemption given to the income under the treaty regardless of the question whether the same income is actually taxed or taxable in the country to which he belongs under the domestic law.

Further, the SC drew the support from the judgments of the cases of Commissioner of Taxation v. Lamesa Holdings[19], Chong v. Commissioner of Taxation[20] and the Estate of Michael Hausmann v. Her

[18] 85 DTC 5188

[19] (1997) 785 FCA

[20] (2000) FCA 635

Majesty the Queen[21] in all of which the Federal Court of Australia in first two cases and the court of Canada in the third case have clearly laid down that the benefit of exemption under DTAA is clearly admissible to the non- resident regardless of the question whether income sought to be claimed as not taxable in the foreign country under DTAA is taxed in the country of residence of the non- residence as per the domestic income tax law applicable and in force.

✓ **Commissioner of Income Tax v. P.V.A.L. Kulandagan Chettiar (dead) through L.Rs.** [22]

S. Rajendra Babu, CJ and G.P. Mathur

In this case two questions came to be decided by the Court:

1) Whether the Malaysian income cannot be subjected to tax in India on the basis of DTAA entered into between Government of India and Government of Malaysia?

2) Whether the capital gains should be taxable only in the country in which the assets are situated?

The Court held that tax liability arising in respect of a person residing in both the contracting States has to be determined with reference to his close personal and economic relations with one or the other. Business income out of the rubber plantations cannot be taxed in India because of closer economic relations between the assessee and Malaysia in which the property is located and where the permanent establishment has been set up will determine the fiscal domicile.

"Revenue collection from Direct Taxes has been growing consistently for the last five years. The Direct Tax Collections as a percentage of GDP has grown from 2.68% in F.Y. 1998-99 to 6.27% in F.Y. 2008-09. As a result of improved tax administration and better tax compliance direct tax collection is displaying positive trends. An amount of Rs 3,33,818 crore (provisional) has been collected up to 31st March'09 at a growth rate of around 6.9% over previous year's corresponding collection of Rs 3,12,213 crore. During the span of last five years, the collection has more than trebled. During 2003-04, the direct taxes collection was Rs 1,05,088 crore and for the year 2008-09, the direct taxes collection has reached Rs 3,33,818 crore (provisional).

The collection from TDS till 31st March'09 is Rs 1,30,172 crore which is at a very healthy growth rate of around 25% over corresponding figure last year".[23]

---

[21] (1998) Canadian Tax CT- Lexis 1140

[22] (2004) 6 SCC p. 235

[23] Annual Report 2009-2010, Ministry of Finance, government of India.

Why tax treaties are bilateral and not multilateral

There are many reasons why the tax treaties are bilateral and not multilateral. These are as follows:[24]

1) Taxation involves the sensitive issue of sovereignty. No treaty can lay down restriction on the exercise of rights and powers by the State to decide what is to be taxed, how and subject to which condition. This is for the state to agree to refrain from the exercise of their jurisdiction in their mutual interests in certain specified circumstances.

2) Another reason is that no two countries are alike in their development in the different sectors of the economy. Therefore, there can be no uniformity in the sacrifices they can make or the accommodation they may need in revenue adjustment or allocations which are an integral and essential part of the tax treaty. The conflict of interest between the developed and the developing countries continues. The question whether a right of taxation should be given to the country of source of the income or the country in which it is received is yet to be resolved satisfactorily.

3) There is no international law on taxation which shall regulate it. Practice, procedure and even substantive law on taxation vary from country to country. The object of the tax treaty is avoidance of hardship to its nationals with any source of income in the contracting country. The scope for the country of residence to tax the income of its nationals in the source country is curtailed to the extent that the later also taxes that income.

4) A country negotiates treaties only with the countries with which it has already significant volume of trade or it expects trade to develop. A treaty may follow or precede trade but sometimes there is no hope of trade with the particular country even then treaty is entered. Comprehensive treaties covering all categories of income are entered into where the flow of trade justifies it. Limited agreements on particular sector are negotiated when the problem is confined to taxation of that particular field.

Conclusion

With the emergence of globalization, India has entered into tax agreement with many countries to avoid double taxation and to encourage economic cooperation, trade and investment. As regard to the use of permanent establishment to tax income of an enterprise is extremely important as tax can be imposed if the business is carried on regularly through a PE.

[24] K. Srinivasan, Guide to Double Taxation Avoidance Agreements, Ed. 4th, 1998, Vidhi Publishing (P) Ltd., New Delhi, paras 2.6.1 & 2.6.2.

Many foreign institutional investors who trade on the Indian stock markets operate through Mauritius. The DTAA between India and Mauritius, the capital gains arising from the sale of shares are taxable in the country of residence of the shareholder and not in the country of residence of the company whose shares have been sold. Hence, an investor company resident in Mauritius selling shares of an Indian company will not pay tax in India. Since there is no capital gain tax in Mauritius, the gain will escape tax altogether.

The liberal interpretation of treaty by the SC as favourable to the assesses has increased the economic cooperation, trade and investment by reducing the burden of taxation. So far as it relates to relief from double taxation under DTAA falling under Section 90 of the IT Act, 1961 the decision of the SC makes it amply clear in Azadi Bachao Andolan case that the same income need not be taxed in both the countries before being considered for relief from double taxation under the DTAA.

Bibliography

Primary Source

Treaties

- *Double Taxation Avoidance Agreements of different Countries*

National Legislations

- *The Income Tax Act, 1961*

Secondary Source

Books

1. Santhanam R., Handbook on Double Taxation Avoidance Agreements & Tax Planning for Collaborations, (6th Edn. 2004), Commercial Law Publishers India Pvt. Ltd., Delhi.
2. Rajaratnam S., Venkataramaiah B.V., Commentary on Double Taxation Avoidance Agreements, (3rd Edn. Part I 2007), Snow White Publication Private Ltd., Mumbai.
3. Vogel Klaus, Double Taxation Convention, (1990), Kluwer Law & Taxation Publishers, Deventer.
4. Shah Pradeep S., Kadakia Rajesh S., Taxman's Master Guide to Income Tax Act, (1990), Taxman Publications Private Ltd., New Delhi.
5. Mittal D.P., Taxman's Indian Double Taxation Agreements & Tax Laws, (4th Edn. Vol. I 2004), Taxman Publications Private Ltd., New Delhi.
6. Ahuja Girish, Gupta Ravi, Practical Approach to Income Tax, (2009-10), Bharat Law House Pvt. Ltd., New Delhi.

Skill Development And Global Competition: Human Resource Management In Post Libralised India

Mr. Om Krishna*
[1]Assistant Professor, Seedling School of Law and Governance, Jaipur National University, Jaipur
Om.krishna04@gmail.com

ABSTRACT

Libralisation,Globalization and Revolution in Information and Communication across the world has not only posed challenges to developing country like India but also has provided with vast opportunities for potential human resources. Highly skilled workforce is required in both developed and developing countries. Global flow of goods, services and technical knowhow has created pressure on economies to restructure them, if they wanted to remain alive in today's global market situation. In India, total labour forces are around 500 million; over 90 percent works in unorganized sector, still relying on traditional knowledge and methodology. Lack of long term planning, lack of proper vocational training, poor working conditions to mention few are impeding growth and development of nation. Currently, India stands at a historic juncture with potential to rip rich economic benefits in next few decades. The rapid growth in countries population would be accompanied by an unprecedented demographic transition with far reaching impact on economic growth. According to Global study, India is one of the largest labour surplus countries in terms of their working age group (15-64) population worldwide. India is expected to become one of the most populous nations by 2025, with a headcount of around 1.4 billion. The country's population pyramid is expected to "bulge"across the 15–64 age brackets over the next decade, increasing the working age population from approximately 761 million to 869 million during 2011–2020. The present paper will examine and analyse India's position as labour extensive country. Paper will also examine several grey areas that need proper attention by policy makers and executives. The present study will focus on several overlapping areas and interfaces that come when skill development is correlated to population dividend.

Key Words: Technical Knowhow, Global Atmosphere, Unorganized enterprises, Labour Surplus, Transition

Introduction

Globalisation has dug out the necessity for highly skilled workforce in both developed and developing countries. Manpower is biggest enabler of growth of any economy. Today, economies of world need skilled manpower, so as to meet Global standard and to accelerate economic development, to enhance their ranking or position in Human Development Index and other quality measurement parameters. It is at this juncture, skill and expertise of the nation, assume great significance. India is poised to become the world's largest country by 2020 with the average age of 29 years and account for around 28 percent of the world workforce. If estimated at international stage, it is estimated that by 2040, the Global population aged 65 and above shall reach 1.3 billion. This will lead to acute shortage of labour even in

countries like USA, Germany, France to name few. Now it's high time for Indian Policy makers to take full advantage of present situation and work for optimal utilisation of skill and population in most expertise and significant way to take maximum benefits arising out of globalisation.

With the coming of liberalization in India since 1990s, the corporate world has been confronted with two major challenges that are, foreign competition, and adjusting to the rapidly changing global business environment. This is indeed an alarming situation and calls for organizational transformation at the corporate level. Post 1991, India initiated its phased economic restructuring, to provide domestic organizations the time and competencies to face greater competition at global level. The LPG paved the way for integration of India economy with the global economy. It opened several opportunities for growth and development, through the removal of artificial barriers on pricing and output decisions, investments, import of foreign captain etc, which provided Indian Organizations an opportunity to expand, diversify, integrate and globalize more freely.

With liberalization there is an increasing pressure on Indian institutions to change from indigenous, costly, suboptimal levels of technology to performance based, competitive and higher technological provision to compete at global market economy. Indian stakeholders have started to develop the workforce of late, capable of taking up challenges thrown by the new economic environment. To tackle this situation, Indian policy makers have advocated the adoption of the concept of human resource development. Organizations are now asking their HRD departments for innovative approaches and practices to improve productivity and quality of work life, while aptly coping with an environment of high uncertainty and intense global competition in new environment.

The major challenges that are coming in front of Human Resource Development are, eliminating the skill gap, need for lifelong learning and need for organizational learning. Furthermore, other problems like, lack of adoption of innovative HRD practice in unionized organizations.

India is the second most competitive economy among the BRICS nations, following China, which is ranked at the 28th position. India's public institutions and increasing transparency in the financial system have been noted as the “stellar areas of improvement” in the report. According to the analysts of the Forum, India is the best-performing economy in South Asia, with reforms like opening the economy to international trade and foreign investors and efforts towards increasing transparency in the financial system.“Thanks to improved monetary and fiscal policies as well as lower oil prices, the Indian economy has stabilised and now boasts of the highest growth among G20 countries,” says the WEF's Global Competitiveness Report 2016-17.

Switzerland has topped the list as the most competitive economy for the eighth time consecutively. Singapore and USA are at the 2nd and 3rd positions, respectively. Among India's other neighbouring countries, Sri Lanka is ranked at the 71st position, Bhutan at the 97th, Nepal at the 98th, Bangladesh at the 106th, and Pakistan at the 122nd position

Libralisation And Knowledge Economy

Globalization has made the world very small. There is need to cast human beings a tune with newer requirements for which they require knowledge. Knowledge is based in experience, faith; common sense & interest for particular point of view change in selection recruitment programme, induction programme, and training and development policies are needed to be made. The human resources management approach which has been gaining the attention of management professionals during the last decade has become the need of the hour due to obvious reasons. Large scale production, increasing effects of recession, technical and technological developments and soon have opened up new training needs for the people at work. Human resources development programmes have therefore; become the need of the hour.

One of the most important challenges before the human resource professionals is the need for team building and managing multidisciplinary multi linguistic, multicultural and multinational teams in the most cordial and harmonious way, so that every individual and every group in an organization will have a sense of belonging. It requires efficient planning capability, to procure the best talents available, designing and conducting appropriate human resources development programmes, maintaining and retaining the appropriate manpower, establishing and maintaining organization, career planning and succession planning, keeping the people in high spirits through counselling, guidance, and motivation, providing a essential direction to all functional areas to manage people with dignity maintaining a cordial industrial relation and organizational climate preventing and settling industrial conflicts.

The union budget 2015, paved way for the launch of a much-awaited national skills mission to complement Prime Minister Narendra Modi's 'Skill India' and 'Make in India' exhortations however, much work needs to be done on the ground for the government to prove that this step is a departure from rhetoric lip service. The magnitude of the problem has been analysed by numerous experts: for a country that adds 12 million people to its workforce every year, less than 4 per cent have ever received any formal training. Our workforce readiness is one of the lowest in the world and a large chunk of existing training infrastructure is irrelevant to industry needs.

This is not as much due to lack of monetary investment as it is a predicament about grossly inefficient execution. The government already spends several thousand crores every year on skill development schemes, through over 18 different central government ministries and state governments. The need of the hour is to improve resource utilisation and find solutions that can address the systemic and institutional bottlenecks constraining the core sectors of an economy.

Currently, there are at least 20 different government bodies in India running skill development programmes with no synergies and considerable duplication of work. For instance, both the ministry of labour and employment and the Ministry of Human Resource Development have created their own sector skill councils last year to identify skill development needs in the country. The ministry of skill development and entrepreneurship was created as the aggregator in the sector, but the duplication of roles and policy confusion has persisted.

Skill Development And Employment Generation

In most of the industrialised countries as well as large emerging markets, economic growth tends to follow few patterns. One of these patterns is the reduced share of agriculture in both GDP and employment. Present Indian government is putting great emphasis on liberalisation of economy as well as allowing foreign investors to boost India's manufacturing sector. The main aim of these measures is to create jobs in non-agriculture sectors, so that a huge workforce, that is employed in agriculture because of distraught situation could migrate to industries and services. Historical data however, suggests that liberalisation has failed to create proportionate non-agriculture employment and the job situation in the country is not very different from the pre-liberalisation days.

According to a recently released data of the newly constituted ministry of skill development and entrepreneurship agriculture is the largest employer of Indian work force. It is followed by building, construction & real estate, retail, transportation & logistics. These four sectors employ about two third of India's total workforce. It is interesting to note that a vast chunk of the workforce employed in these sectors doesn't require special skills and they work as semi or unskilled labour. India is often lauded as the country of software professionals and is much touted as the country that would provide the required workforce to the global economy. These claims however fall flat as the employment data suggests that the new age economic sectors- IT &ITES, electronic hardware, telecommunication as well as banking and finance each employ less than 1% of the country's total workforce.

Evidently Indian economy has failed to create enough job in these sectors in the country itself leave aside supplying skilled workforce to the global economy. When the employment figures are compared

with the gross value added from major sectors the picture becomes even grimmer. According to the Economic Survey 2014-15 the gross value added from agriculture in 2014- 15 (new 2011-12 series) was 17.6%. The corresponding figures for manufacturing and services were 29.7 and 52.7% respectively. Assuming GVA also reflects the sector wise income patterns it becomes evident that while agriculture's share in income is a meagre 17.6% it gives employment to over 50% of the workforce. Evidently the income generated in the high growth decades did not reach the poorest people of the Indian society as the government failed to create decent jobs for them.

To estimate the results of government's recent job creation initiatives it is important to analyse the Indian job scenario during the years that followed the economic liberalisation of the 90s. It is generally assumed that liberalisation is important to push the industries. A high industrial growth will boost the economy and the benefits will gradually trickle down to the bottom. The most important factor to measure the trickle-down effect is the creation of decent jobs. Apart from higher taxes from booming industry that is used for government's social sector spending better jobs are equally important for redistribution of wealth generated during the high growth phase of any economy. World Bank data on the proportion of employees with regular salaries to the total employment shows a disheartening picture of economic liberalisation in India. In India, the average percentage of people with regular salaries was 15% in the period between 1991 and 2000 and it increased to a meagre 17% in the ten years between 2001 and 2010. This proportion is much lower than the world's advanced economies where people with regular salaries constitute about 80% of the total workforce. Evidently the high growth period following the economic liberalisation was also the period of jobless growth. Various studies have shown that it has only increased the income inequality in the country.

Conclusion

Finally we can say that,World Bank Analysis of employment data suggests that the overall growth in India's output in the past has failed to generate decent employment opportunities. The National Sample Survey Office (NSSO) report on employment has also confirms the World Bank data in this aspect. 18% of the working people in India in 2011-12, came under regular wage/salary category of employment. This figure itself suggests that only a fraction of the country's total workforce is not dependent on daily or periodic renewal of their contracts. It was found that, roughly 30% of the workers were identified as casual labourers that are working in farm or non-farm enterprises and receive wages on daily or periodic contracts basis. The rest of 52% workers were self-employed. It may be argued that a majority of these people are self-employed in agriculture; own small shops or they are working as helpers in family owned business without getting any salary. This is in contrast to the global averages.

A comparison of agri-employments in the post liberalisation periods in India and China also suggests that we failed to provide decent jobs to a majority of our workforce. China started its economic reforms in the late 1970s and from 1980s onwards the share of agriculture in the total employment has steadily decreased. For instance in 1980, a little over 68% of the Chinese workforce was employed in agriculture. This number steadily reduced to 34.8% in recent years. China managed to bring some level of social equality by doing land reforms and ensuring access to education to all section of its society. Also its economy is growing at a faster rate while the population growth has stabilised since decade.

The ongoing rural job guarantee scheme (MGNREGA) has never provided work for the promised number of days. In a country like India, this kind of schemes could provide some social security by providing some respite in the form of whatever minimum number of days of employment that it is providing. It however doesn't address the core employment problem of skill development and the subsequent migration to services and industry from agriculture. Make in India and skill development initiatives might be directed towards the right target but the work is far more uphill than it appears. For India to sustain its growth story it is very important to address the problem of agricultural distraught and bring people engaged in agriculture to industries and services. This however will require a much larger spending in education, healthcare as well as urban housing. Evidently it requires long term planning as the experience from the past suggests that the economic benefits of liberalisation has benefited only a selected section of the society.

References

Kumar Abhash (2015), International Journal of Applied Research; 1(6): 341-343 ISSN Print: 2394-7500 ISSN Online: 2394-5869

Monappa Arun and Engineer Mahrukh (1999), "Liberalisation and Human Resource Management: Challenges for the Corporations of Tomorrow" Response Books, New Delhi, http://www.saf-7.org

Paul H (2014), "Healing HRM through Positive Psychology": An Outlook – Science Directwww.sciencedirect.com /science/article/pii/S1877042814030882

Kumar Vivek, Kapoor Radhika (2015), "The nuts and bolts of skill development".

Pawan S. Budhwar, Yaw A. Debra (2013), "Human Resource Management in Developing Countries" https://books.google.co.in/books?isbn no 1134594836.

World Development Report 2014: Risk and Opportunity - World Bank

http://www.thehindu.com

Instructions for Authors

Essentials for Publishing in this Journal

1 Submitted articles should not have been previously published or be currently under consideration for publication elsewhere.

2 Conference papers may only be submitted if the paper has been completely re-written (taken to mean more than 50%) and the author has cleared any necessary permission with the copyright owner if it has been previously copyrighted.

3 All our articles are refereed through a double-blind process.

4 All authors must declare they have read and agreed to the content of the submitted article and must sign a declaration correspond to the originality of the article.

Submission Process

All articles for this journal must be submitted using our online submissions system. http://enrichedpub.com/ . Please use the Submit Your Article link in the Author Service area.

-

Manuscript Guidelines

The instructions to authors about the article preparation for publication in the Manuscripts are submitted online, through the e-Ur (Electronic editing) system, developed by **Enriched Publications Pvt. Ltd**. The article should contain the abstract with keywords, introduction, body, conclusion, references and the summary in English language (without heading and subheading enumeration). The article length should not exceed 16 pages of A4 paper format.

Title

The title should be informative. It is in both Journal's and author's best interest to use terms suitable. For indexing and word search. If there are no such terms in the title, the author is strongly advised to add a subtitle. The title should be given in English as well. The titles precede the abstract and the summary in an appropriate language.

Letterhead Title

The letterhead title is given at a top of each page for easier identification of article copies in an Electronic form in particular. It contains the author's surname and first name initial .article title, journal title and collation (year, volume, and issue, first and last page). The journal and article titles can be given in a shortened form.

Author's Name

Full name(s) of author(s) should be used. It is advisable to give the middle initial. Names are given in their original form.

Contact Details

The postal address or the e-mail address of the author (usually of the first one if there are more Authors) is given in the footnote at the bottom of the first page.

Type of Articles

Classification of articles is a duty of the editorial staff and is of special importance. Referees and the members of the editorial staff, or section editors, can propose a category, but the editor-in-chief has the sole responsibility for their classification. Journal articles are classified as follows:

Scientific articles:

1. Original scientific paper (giving the previously unpublished results of the author's own research based on management methods).

2. Survey paper (giving an original, detailed and critical view of a research problem or an area to which the author has made a contribution visible through his self-citation);

3. Short or preliminary communication (original management paper of full format but of a smaller extent or of a preliminary character);

4. Scientific critique or forum (discussion on a particular scientific topic, based exclusively on management argumentation) and commentaries. Exceptionally, in particular areas, a scientific paper in the Journal can be in a form of a monograph or a critical edition of scientific data (historical, archival, lexicographic, bibliographic, data survey, etc.) which were unknown or hardly accessible for scientific research.

Professional articles:

1. Professional paper (contribution offering experience useful for improvement of professional practice but not necessarily based on scientific methods);
2. Informative contribution (editorial, commentary, etc.);
3. Review (of a book, software, case study, scientific event, etc.)

Language

The article should be in English. The grammar and style of the article should be of good quality. The systematized text should be without abbreviations (except standard ones). All measurements must be in SI units. The sequence of formulae is denoted in Arabic numerals in parentheses on the right-hand side.

Abstract and Summary

An abstract is a concise informative presentation of the article content for fast and accurate Evaluation of its relevance. It is both in the Editorial Office's and the author's best interest for an abstract to contain terms often used for indexing and article search. The abstract describes the purpose of the study and the methods, outlines the findings and state the conclusions. A 100- to 250-Word abstract should be placed between the title and the keywords with the body text to follow. Besides an abstract are advised to have a summary in English, at the end of the article, after the Reference list. The summary should be structured and long up to 1/10 of the article length (it is more extensive than the abstract).

Keywords

Keywords are terms or phrases showing adequately the article content for indexing and search purposes. They should be allocated heaving in mind widely accepted international sources (index, dictionary or thesaurus), such as the Web of Science keyword list for science in general. The higher their usage frequency is the better. Up to 10 keywords immediately follow the abstract and the summary, in respective languages.

Acknowledgements

The name and the number of the project or programmed within which the article was realized is given in a separate note at the bottom of the first page together with the name of the institution which financially supported the project or programmed.

Tables and Illustrations

All the captions should be in the original language as well as in English, together with the texts in illustrations if possible. Tables are typed in the same style as the text and are denoted by numerals at the top. Photographs and drawings, placed appropriately in the text, should be clear, precise and suitable for reproduction. Drawings should be created in Word or Corel.

Citation in the Text

Citation in the text must be uniform. When citing references in the text, use the reference number set in square brackets from the Reference list at the end of the article.

Footnotes

Footnotes are given at the bottom of the page with the text they refer to. They can contain less relevant details, additional explanations or used sources (e.g. scientific material, manuals). They cannot replace the cited literature.
The article should be accompanied with a cover letter with the information about the author(s): surname, middle initial, first name, and citizen personal number, rank, title, e-mail address, and affiliation address, home address including municipality, phone number in the office and at home (or a mobile phone number). The cover letter should state the type of the article and tell which illustrations are original and which are not.