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The Institute of Public Auditors of India (IPAI)

The Institute of Public Auditors of India (IPAI) was established in 1996 with the main objective of assisting the authorities in establishing sound accounting, auditing and financial management practices. The Institute has established itself as a leading Institute in the country in the areas of management consultancy, audit and investigative examination, evaluation of programmes, system appraisals and setting up systems for efficient functioning of the organisations/ departments of the central and state governments and local bodies. IPAI has a presence across the country through its eighteen Regional Chapters located at Ahmedabad, Allahabad, Bengaluru, Bhopal, Bhubaneswar, Chandigarh, Chennai, Guwahati, Hyderabad, Jaipur, Kolkata, Lucknow, Mumbai, Patna, Ranchi, Shimla, Srinagar and Thiruvanthapuram. Each Chapter is equipped to undertake auditing, consultancy assignments and organize training programmes.

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From the President's Desk

Publishing a journal demands a substantial commitment of time and hard work from the authors as well as from the Editorial Board. However, the time spent and hard work is a fruitful exercise as the main purpose of academic journals is to facilitate scholarly communication; it also assists in spreading awareness on many topical issues. This apart, a journal gives opportunity to youngsters to share their thoughts with the academic world outside. For some one, to get an article published in an established journal for the first time could be a frustrating experience. While requesting for articles for the current issue of our journal, we identified a few youngsters and selected two articles from what all we received.

We have tried to ensure that the dateline for publishing the journal is maintained. We look for suggestions from our readers.

ANUPAM KULSHRESHTHA

EDITORIAL

Accountability of the executive to the Parliament is the bedrock of Parliamentary system of government. It is not enough that beneficial laws are well laid down by Parliament; it is also equally important that they are implemented well on the ground. Otherwise, it will be a case of well -intentioned efforts for public good not being matched by equally able efforts, failing to have desired effect on the targetted. Ensuring efficient and effective implementation on the ground of the governmental efforts requires that those in charge of implementation are appropriately kept answerable for their acts of omission and commission and their tardiness and lack of efforts. Governmental schemes over the years since independence have taken India many steps up in the ladder of development. But the question reverberating is whether achievements could have been much higher. The single most important cause of this situation of underachieving is lack of accountability for falling short either because of lack of total involvement or having a system with a sieve, which allows scope for twisting for self –serving.

It is here the Audit as envisaged in the Constitution has a major role to play, which it has played admirably but which could have been more effective but for absence of certain enabling legal provisions. Audit was the prime mover in highlighting the Bofors, 2G and Coal to the nation notwithstanding not investing it with full panoply of powers as has been done in the case of advanced democracies e.g. quasi- judicial authority in France, power of surcharge in New Zealand and Japan .Audit is also not invested with authority to audit RBI, Banks, FIs, the financial pillars of the Country. Had the Audit been there of these organisations, perhaps the Agencies would be constrained to discharge their functions as per prescribed process, on which Audit would be reporting impartially to Parliament. Audit should be pursuing and ensuring appropriateness of utilisation of public money where ever it flows; but it has been kept out of its purview a large part of public money spent through NGOs,DRDAs etc. Audit perhaps has even greater unpublicised role in its preventative role of keeping the executive

in the prescribed field being in their sub-conscious as a Damocles sword notwithstanding all bravado about audit impotence. The Audit Reports are not presented to the legislatures in the session following the sending of ARs to the authorities. About action taken on them, it is more in non-action than action. Should not Parliament prescribe time–bound action on AR by suitable amendment to the CAG DPC Act? Should there be an open and well-laid down procedure prescribed by Parliament for the appointment of CAG on the same lines as in the case of CVC and CIC etc, just for the sake of openness and public knowledge if not for any other reason?

These and other issues were highlighted in a Seminar on Audit and Accountability organized by IPAI on 16th December 2016 in which Dr M. M. Joshi, Chairman, Estimates Committee and other speakers called for greater delegation of authority to CAG in areas outside its present ambit and also for an open and prescribed procedure for appointment of CAG. The present issue of the Journal contains articles on structured and proper vetting of action taken notes either by executive or alternatively by Audit for facilitating discussion in legislative committees, on providing a helping economic environment instead of an economically unsustainable statutory right to employment, strengthening of micro-finance as an avenue for alleviation of poverty by meeting the credit requirement of low-income borrowers. It also contains articles recommending for suitable changes in procurement procedures by incorporating best practices of European Union e.g. competitive procedure with negotiation, competitive dialogue procedure for PP Projects and also on appropriate risk management strategies by an effective internal audit especially in regard to fraud risk management which has huge impact on the bottom-line of organisations.

AJIT PATNAIK
Editor

CAG's AUDIT REPORTS: IMPORTANCE OF VETTING GOVERNMENT RESPONSES

K.V.S.S. SITARAMARAO*

1. Introduction

The essential requisites of good financial governance in any country are, an effective legislative oversight of the financial performance of the executive governments and a sound and independent system of audit reporting to the legislatures. In the Indian context, the Constitution of India takes care of these requirements adequately, on one hand, by specifying the powers of the Parliament and State Legislatures (both hereinafter referred to as legislatures for convenience) on financial matters like, approval of budget estimates, appropriation of funds, scrutiny of expenditure vis-à-vis appropriations etc. and on the other, by providing for appointment of an independent auditor viz., the Comptroller and Auditor General of India(CAG) by the President of India and examination by the legislatures ,of the CAG's audit reports placed before them. The efficacy of the system, however, depends much on the practices followed in the long journey of the audit reports, from the stage of submission by CAG to their ultimate disposal by the legislatures. With due respect to the prerogatives of the legislatures in formulating their own procedures for disposal of the audit reports, an effort is made in this article to trace the different practices followed by different legislatures in India and what more can be done from an auditor's viewpoint

2. CAG's Audit reports

As per the Constitution and the Comptroller and Auditor General (Duties, Powers and Conditions of services) Act 1971, (the

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Act), the CAG audits the accounts of the Union and State Governments and submits his reports to the President or the Governor for being laid before the legislature concerned. The audit reports are prepared separately for each government, in one or more volumes for different departments/sectors/subjects as he considers necessary and convenient. Once the audit reports are placed on the table of the houses, legally, the responsibility of the CAG ceases and from then on, they become the property of the legislatures, which are the sole authorities for their follow up and final disposal.

Under the Rules of Procedure and Conduct of Business made by the respective legislatures, these audit reports stand referred to the House Committees known as Public Accounts Committees (PACs) and Committees on Public Undertakings (COPU), (both hereinafter referred to as committees) for examination and for making recommendations to the legislatures, about further course of action. **The Rules specify the procedures applicable to all legislative committees in general (for e.g.Rules 253 to 285 relating to Loksabha) and in addition empower the committees(e.g.Rule 282 ibid) to frame supplemental Rules to regulate procedures specific to them,subject to the approval of Speaker.**

3. Follow up action

Though, in theory, the committees could directly obtain the explanations of the governments to the audit reports and take further action thereon, it would be practically difficult for them to decide on the reports without the involvement and assistance of the CAG's officials who authored them. The "Regulations on Audit and Accounts, 2007" made by the CAG, in exercise of the powers conferred on him by the Act, are also in keeping with the inherent powers of legislatures and their practical constraints. These regulations are practically mandatory in so far as they concern all governments and all audit offices under the control of CAG.

Firstly, para 212 (chapter 15) of these regulations, lays down that the governments concerned have to submit to the committees, within the timeframe fixed, their first responses

known as Self-explanatory Action Taken Notes(ATNs),also known differently in different governments as Action Taken Notes or Explanatory Notes/Memoranda etc.

Secondly, according to para 213 ibid, a modified procedure is prescribed in cases where the legislatures or governments concerned desire the CAG to vet the ATNs. In these cases the governments have to send copies of the ATNs to the field office concerned of CAG for vetting, along with files and documents on which the ATNs are formulated. The audit office vets the ATNs with reference to the records supplied and returns the vetted ATNs along with their comments and suggestions about further course of action, to the governments for onward submission to the legislatures .The term vetting in this context has to be understood in the normal parlance, connoting critical appraisal or scrutiny for authentication etc. Particulars of States where vetting is desired by the legislatures/governments are furnished in sub para 5 (a) below.

In other cases, where the ATNs are required to be sent to the committees direct, no specific procedure is prescribed by the CAG in the Regulations, leaving the matter to the legislatures in their own right. However, the committees as a measure of expediency and in their considered judgement, normally seek the cooperation of CAG's field officers who authored the reports, to assist them in examining the reports and deciding on them. Thus, often, a simplified and informal procedure is adopted, whereby the governments send copies of the ATNs to CAG's field offices concerned too, to enable them to verify the general acceptability of the replies and to suggest further enquiries to be made and further action to be taken, by the committees (popularly known as Memorandum of Important Points). Here, the audit office, however, is guided only by the information furnished in the ATNs and does not have access to the supporting records. This verification, however, does not fall within the concept of vetting as laid down in para 212 of CAG's Regulations, as the scrutiny is not conducted with reference to the initial records.

In either of the situations, the head of the field audit office is invariably invited to participate in the meetings of the committees to help them in discussing the reports. Ultimately, the

ground realities of the procedures depend on the decisions of the committees and their working relationship with the local Audit offices. Particulars of states where vetting is not specifically desired by the legislatures/governments are furnished in sub para 5(b) below.

After receipt of the ATNs vetted or unvetted as the case may be, the committees convene a meeting of the government officials concerned to examine and question them on the audit observations. Taking into consideration the oral evidence too of the government officials during the meetings, the committees submit a report to the legislatures, containing their recommendations on further action to be taken by the government. Again, the government has to submit its responses to these reports, in the form of final or compliance ATNs, which are also reviewed by the committees, after vetting or verification as the case may be, by the CAG's officers and if necessary, a second report is also made out by the committees on issues which are still not sorted out.

4. CAG's role in the follow up action

Here, it is pertinent to note that CAG or his field officer concerned is neither a member of the committees nor has any statutory role in the proceedings and the decisions of the committees. Any assistance rendered by them is only informal and advisory. Generally, the members of the committees, who are peoples' representatives, are hard pressed for time, due to their preoccupations with public issues and other legislative business. So much so, they tend to depend more on CAG's officials for proactive assistance. Often, the assistance sought may even extend to selectively picking up a few important observations in audit reports for examination by the committees to adhere to their time schedule. After examination by the committees, the assistance may further extend informally even to drafting of their reports to be submitted to the legislatures. This is all understandable, as the committees are not generally equipped with exclusive and dedicated supporting staff to do the elaborate desk work and also, as the CAG's officials being the authors of the reports and custodians of necessary documentary evidence, would be better

placed to present the versions of both the audit and the government together with the opinion of the committees.

5. Practices in different governments

Now, a brief look at the practices prevailing in some of the governments:

Generally, the CAG includes a paragraph in his audit reports on the status of the responses by governments to his audit reports as also to the committees' recommendations thereon. In cases, where vetting is in vogue, the fact is mentioned in the report. Otherwise, the report does not discuss the procedures adopted in the absence of vetting. A study of the recent audit reports of some of the governments indicates that the system of vetting is in vogue in the Union Government, and only in some of the State governments.

a. The following are instances of audit reports where a reference to vetting is made:

   i. Union Government (Railways),reportno.24 of 2015 (para 1.10)

   ii. Union Government (Defence Services),report no.38 of 2015 (para 1.6.2)

   iii. Government of Punjab(Social, General and Economic sectors),report no.1 of 2016 (para 1.9)

   iv. Government of Uttar Pradesh(General and Social sectors),report no. 1 of 2016 (Para 1.7)

   v. Government of Assam (Social, General and Economic sectors),report no. 1 of 2016 (para 3.5.1)

   vi. Government of Madhya Pradesh (General and Social sector), report no.1 of 2016 (para 1.8)

   vii. Government of Maharashtra (Economic sector),report no. 1 of 2016 (para 1.7.3)

   viii. Government of Maharashtra (Revenue sector),report no.2of 2016 (para 1.5.4)

(As per the report at vii) above, the ATNs are required to be ***verified*** by audit, whereas according to the report at viii) relating to the same government the reports are required to be ***vetted.*** Possibly, the two terms were used synonymously).

b. The following are instances where no mention is made about vetting.

i. Government of Andhra Pradesh(Economic sector) report no. 3 of 2016 (para 1.6.2)

ii. Government of Telangana (General and Social sector) report no. 4 of 2016 (para 1.6)

iii. Government of Karnataka(Economic sector) report no.2 of 2016 (para 1.7.3)

iv. Government of Karnataka (General and Social sector) report no. 1 of 2016 (para 1.7.3)

v. Government of Gujarat(General and Social sectors) report no. 2 of 2016 (para1.7.3)

vi. Government of Kerala (Economic sector)report no 4.of 2016 (para 1.7.4)

vii. Government of Rajasthan (Revenue sector)report no.1 of 2016 (para 1.6.4)

6. Why is vetting necessary?

The crux of the issue in the whole process, however, is the nature and extent of vetting, to which the governments' ATNs on audit reports and also on committees' reports are subjected. The Regulations of 2007(Para 212) made by the CAG, lay down inter alia that the ATNs of the governments should contain (i) whether the facts and figures stated in the audit report are acceptable or not(ii)the action taken to fix responsibility on the individuals responsible for loss, failure, in fructuous expenditure etc. and (iii)current status of recovery of any amount due to government.

Thus, the nature of responses to the audit observations would vary from case to case. The governments in their ATNs may either accept or contest the observation of CAG, totally or partially

and with a different set of facts and figures. Also, at times, the reply may be compliant with the audit comment but at the same time incomplete or of interim nature. For instance, a reply could be furnished that an audit objection has been agreed to and the loss pointed out in audit has been ordered to be recovered or proposed to be recovered, from the persons responsible or disciplinary action is being initiated against the officials responsible. The reply could also be a simple statement that the loss has been recovered, without however, supporting it with particulars of recovery. In any case, the judgement on the acceptability of the ATN and the recommendation about the remedial action on the financial irregularity is fully within the remit of the committees. However, to enable the committees to take a considered decision, it is necessary that the facts and figures in the ATNs and the acceptability of the replies are checked either by the legislature officials assisting the committees or CAG's field officers, with reference to the departmental records on which the replies are based. This is exactly the process known as 'vetting', which is the most important requirement for a thorough scrutiny of audit observations and their compliance, ensuring effective and efficient financial governance.

7. Scenario without vetting

Of course, there may be an argument, that the governments too have to be trusted for their averments and therefore the ATNs could be prima facie accepted without vetting, which involves further verification or cross-check with basic records. True, but instances are not wanting, where the facts asserted or actions assured by governments in their ATNs are not supported by documentary evidence. It may not be the case, that governments intentionally furnish wrong information, but the fact remains, that the assurances though made in good faith remain to be implemented for long periods, for no significant reason. This in turn leads to repeated calls by the committees for submission of final compliance reports and consequent accumulation of outstanding audit observations. Besides, the committees may have to spend their precious time on calling for routine information on

compliance, rather than concentrating on the substantial aspects of the financial irregularities.

A few illustrations in support of this view, can be cited from the CAG's audit reports themselves as also from the recommendations of committees thereon. The proceedings of the committees and their reports being privileged documents may not be in public domain in some legislatures. But a few such reports available on the website of Andhra Pradesh Legislature. (www.aplegislature.org)have been accessed and discussed below.

i. In paragraph 13.1 of audit report no.19 of 2013, on the accounts of Union Government (Civil) for 2011-12, CAG observed that India Tourism offices in four countries paid agency handling fee to an advertisement agency, based on a working agreement, contrary to the orders issued by the Ministry of Tourism.

   He further commented in the para, that the Ministry's reply that the amount was recovered from the other pending bills, was not substantiated in the absence of documentary evidence. This kind of unauthenticated statements of governments all the more point to the need for a cross-check of facts and figures in the ATNs, with the initial records.

ii. In Paragraph 11.7.5 of audit report on the accounts of Government of Andhra Pradesh (Civil) for 2010-11, CAG observed that some private agencies, which were entrusted with supplying computers and providing computer education in School Education Department, were not subjected to penalty for downtime of the computers, as per the terms of agreement with them. According to the CAG's further observation in the same paragraph, though government replied that penalties were imposed on the agencies, no recoveries were actually made even as of August 2011. The committee in its 4th report for 2012-13, considered the above observation and recommended that the amounts should be recovered from the private agencies.

If a system of vetting had been in force, the details of recoveries would have been called for at the vetting stage itself, forcing the government to come up before the committee with full details of recovery and the issue would have been settled without wasting the committees' time in calling for routine information.

iii. In the audit report on the accounts of Government of Andhra Pradesh (civil) for 2001-02 (para 3.1.4B),the CAG commented that the Commissioner of Higher Education did not pursue with World Bank, the reimbursement of Rs.6.47cr due to the government.

In its third report, the committee(2009-10) observed that the government stated in January 2005 that, the Commissioner of Technical Education requested the World Bank for reimbursement of the amount. When the committee enquired during discussion(31 August 2010) about the current status of reimbursement and the action taken on the officials responsible for the lapse, the Principal Secretary to Government stated that the information was not readily available. The committee expressed its anguish at the reply and made a recommendation that the government submit a detailed report within a month.

Had a system of vetting been in place, this simple action of calling for details could have been done by the vetting officials, equipping the committees with more information to examine the subject in greater depth.

8. Pendency of Audit Reports

An issue incidental to improper or incomplete responses from governments is,the volume of unresolved audit observations of CAG's reports. Whether or not a vetting system is in place, the scrutiny of the audit reports by the committees will not yield results, unless the executive governments are actively responsive to the demands of the committees. And in case there is no vetting system, the total responsibility lies on the governments to provide their responses promptly and in a complete shape, to enable the committees to conduct an effective and speedy examination of the

reports. In his audit reports relating to almost all the governments, the CAG has been repeatedly pointing out the lack of adequate responsiveness on the part of the governments, as evidenced by the long pendency of inspection reports/audit reports etc. issued by his organisation.

In fact, a random look at some of his latest audit reports presented to the respective governments during the current year 2016-17, reveals an alarming position on both the counts viz., those with vetting system as also without vetting system. In some of the governments the unresolved audit observations date back nearly 20 to 25 years, due to either non- receipt of ATNs on the audit reports or ATNs on the committees' reports and in a few cases due to non-completion of discussion of the audit reports in the committees too. With the efflux of such a long time, the prospects of the audit observations, however, grave they may be, getting to a logical end are very bleak. Of course, this situation cannot be attributed wholly to lack of a vetting system alone, but also to a host of other reasons like lack of adequate concern from governments, constraints on committees with regard to time and staff etc. But, existence of such a system would surely help make a value addition to the function of legislative scrutiny and speed up the disposal of the audit reports.

Following are the instances taken from the audit reports, where vetting is not in vogue.

i. Government of Karnataka (report no.1 of 2016) ATNs were not received for 57 paras in the audit reports for 1996-97 to 2013-14. Further, the committees were yet to discuss 192 paras in the audit reports, relating to 1992-93 to 2013-14.

ii. Government of Karnataka(reportno.2 of 2016) ATNs were not received for 38 paras in the audit reports for 2003-04 onwards. Further, the committees were yet to discuss 161 paras in the audit reports relating to 1992-93 to 2013-14

iii. Following are instances where vetting is in vogue

   a. Government of Maharashtra (report no.1 of 2016): ATNs were yet to be received for 21 paras of the audit

reportsupto2013-14, including 5 relating to the period prior to 2009-10.

Further, ATNs were yet to be received on 137 recommendations of committees on the audit reports relating to 1985-86 to 2013-14.

b. Government of Maharashtra (report no.2 of 2016):ATNs were yet to be received for 100 paras of audit reports from 1998-99 onwards.

Further, ATNs were yet to be received on 337 recommendations of committees on the audit reports relating to 1986-87 onwards.

c. Union Government (Defence services) (report no.19 of 2016): 50 paras relating to the audit reports from 1989 were pending with the Government, due to non-submission of, either initial ATNs or revised ATNs after vetting by audit offices.

d. Union Government (Railways) (report no.13 of 2016): 115 ATNs were yet to be received from the government, including 54 which were returned by audit office with comments after vetting. These ATNs related to audit reports for the years 1998-99 to 2013-14.

9. Conclusions and recommendations: The need of the hour is a proper authenticated vetting, of the ATNs submitted by governments on CAG's audit reports, as also the ATNs on the committees' reports thereon, either by the staff attached to the committees or the CAG's officials authorised by the committees. It is hoped that, for this purpose, the following recommendations merit the consideration of the authorities concerned.

i. In the Indian context of public audit, as referred to in paragraphs 2 to 4 above, primarily it is up to the legislatures/committees to decide how best the audit reports could be followed up and remedial action taken. However, the CAG's organisation may perhaps like to consider whether it is desirable to urge all the legislatures/ committees concerned to put in place a structured uniform

procedure for follow up action and evaluation of such action through a proper 'vetting' of government responses.

ii. Alternatively, the CAG's organisation could also think of having their own internal follow up system to ensure that audited entities properly address their audit observations, as also the recommendations of the committees, as suggested in the International Standards of Supreme Audit Institutions (ISSAI)-Principle 7 of ISSAI 11- issued by the International Organisation of Supreme Audit Institutions. Adoption of a uniform procedure and detailed guidelines for such vetting both in the Union and State Governments will be a welcome measure.

iii. Till such time as a procedure is put in place, the heads of field audit offices may like to consider, whether a test check of the facts and figures in the ATNs relating to major irregularities, during their subsequent local audits of the auditee organization, would yield any interesting results. No doubt, heads of CAG's field offices may be doing this even now at their discretion. But evolving a system, within each Audit Office, whereby, there is constant flow of information of all the facts and figures needing verification, from the section interacting with the committees, to those engaged in field audit activity, and feedback vice-versa, would go a long way, as a precursor to the eventual institutionalization of the system.

iv. It would be enlightening, if all the CAG's reports, both of the Union and the States, indicate whether a system of vetting is in vogue or not in the government concerned and if not the reasons therefor.

v. The committees, in their best judgement may like to consider the modalities to enforce responsiveness on the part of the executive. Further, the impact of legislative oversight would also be known to the common man, if the committees' reports are also made accessible to the public at large.

vi. Lastly, a systematic process of vetting the ATNs will bring out the ultimate financial impact of CAG's reports. There cannot be a better indicator of the performance of CAG's officers and staff who literally sweat it out with heaps of files in the auditee organisations.

RIGHT TO EMPLOYMENT: A QUESTION OF TO BE OR NOT TO BE?

ANKEETA GUPTA*

While it is understood that the State is capable of assuming great many responsibilities yet implementing the right to employment is economically unviable. The State cannot be considered fully equipped to undertake the economic burden of providing salaries to an entire population as it would lead to a huge fiscal deficit capable of bringing the economy to the brink of collapse.

It is pertinent to note that employment generation is the result of an enabled economic environment rather recognition of a right and enforcement of a statute. Once the industries are allowed to flourish, demand for manpower will increase which in turn will lead to job creation. Present day efforts by the State should be directed at developing a thriving industrial sector where principles of ease of doing business are commensurate with international standards, the Make in India initiative is given an impetus by easing of laws while ensuring that the rights of employees are not diluted.

Introduction

Unemployment is a major cause of concern among the policy makers across the world. Evidence indicates that,

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worldwide, the aggregate wage-bill-to-GDP ratio is declining[1] leading to a huge glut in the labour market both unskilled and skilled including qualified professional failing to get the jobs suited to their qualification, expertise and capabilities.

The problem of unemployment can be attributed to a large number of factors, ranging from improvement in technologies to global meltdown and slow down of economies. Currently the policy makers are engaged in discussion regarding creation of an enabling environment which could help generate jobs within the private sector, while not being averse to the idea of public employment programs and government run employment programs[2] evaluating their success as regards fiscal viability, inflationary impacts etc.

India is at the stage of reaping the benefits of demographic dividend; the economic survey of 2015-16 clearly points out that labour force participation rate continues to be 52% indicating that at least half the total population willing and able to work are able to find worthwhile and remunerative jobs while the unemployment rate continues to be less than 10 %.

It is in this light that the author is undertaking a study of Right to Employment: A Question of to be or not to be? i.e. whether the State should implement the Right to work for the citizens by imposing upon itself the duty to provide and generate jobs. This paper is divided into three sections beginning with the meaning of Right to Employment. Section B deals with the historical background regarding Right to Work, while section C details the impact the recognition of the right is likely to have on the Indian economy.

The right to employment as is generally understood would imply that the State must be held responsible in case the people are unable to find a dignified and livelihood suited to their needs. It is

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[1]PUJA DUTTA, RINKU MURGAI, MARTIN, RAVALLION, DOMINIQUE VAN DE WALLE, RIGHT TO WORK? ASSESSING INDIA'S EMPLOYMENT GUARANTEE SCHEME IN BIHAR, The World Bank (2014)

[2]Kaushik Basu *Forward* to RIGHT TO WORK? ASSESSING INDIA'S EMPLOYMENT GUARANTEE SCHEME IN BIHAR, The World Bank (2014)

this presumption, against which the author has attempted to study the concept of Right to Employment.

SECTION A

Part I: International Instruments

The Right to Employment has been interpreted differently at various levels. Many academics feel that the right envisions that the state provides for jobs and opportunities to all the jobless people, some feel that the right implies the right to be employed without any discrimination, while many others feel that the right merely provides the people with the freedom to decide their vocation, and consequently, the wages which they will command, and in others the right to employment has been understood to mean a right to not join the trade and other unions.[3]

The First question that has been generally raised is whether the right means the right of all able bodied men and women and others to be necessarily gainfully employed. It has been argued that the Universal Declaration on Human Rights[4] has categorically

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[3]William E. Forbath, *Social And Economic Rights: A Brief Guide To The Constitution Of Work And Livelihoods, Working USA:* 11 THE JOURNAL OF LABOUR AND SOCIETY, 1089-7011 · pp. 145–156 (March 2008)

[4] Universal Declaration of Human Rights

Article 23:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Art 25:

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

mentioned the Right to employment, however, in adopting this narrow stance they fail to appreciate the qualification provided within article 23 itself which stipulates that every individual has the right to choose his vocation, receive protection against discrimination, awarded a fair remuneration and provided with just and favourable conditions of work. No mention has been made of the duty of the State to ensure that every able-bodied person necessarily be given a job by the State. The directive given by the UDHR is more in the nature of a directive to the States to provide such enabling environments where the rights can be realized.

International Labour Organization pre-dated most of the human rights obligating instruments, and way back in 1919 initiated an unemployment convention where the states were obligated to create centrally coordinated employment agencies and take out insurance policies protecting workers of one state working in another. Since then various conventions have been ordained by the International Labour Organization viz: the Employment Policy Convention of 1964[5], Employment Promotion and Protection against Unemployment Convention of 1988[6], Equal Remuneration Convention, 1951, Discrimination (Employment and Occupation) Convention, 1958 etc. All these indicate that the right to work involves the right to persons to undertake a productive vocation while refraining from obligating the States to find and produce worthwhile jobs for the jobless persons. Most of these Conventions urge the Member States to create such enabling conditions within the economy that there is sufficient supply of jobs commensurate with the demand of the workforce as declared within the Philadelphia Convention[7]. We may also mention that the often quoted Covenant on Economic, Social and Cultural Rights under

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2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

[5] Convention No. 122

[6] Convention No. 168

[7] Declaration of Philadelphia, May 10, 1944 available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf

article 6[8] detailing the Right to Work, also qualifies it by mentioning the right to work with freedom to choose his vocation. Herein the State has been enjoined with the responsibility to provide such stable economic, political and social conditions including but not limited to vocational and professional training to the masses to make them employable. However, it begs to reason as to whether the international covenant implies a right to employment creating a duty on part of the State to provide a job or an allowance thereof, or whether it is purely a case of policy directive for an enabling environment?

It has been argued by various scholars that the Right to Employment merely implies the right to work without any discrimination as regards gender, caste, creed, nationality, regionalism, religion, remuneration etc. It has been argued that unless both forms of direct and indirect discrimination have been sent to the dungeons, and equality has been established the Right to Employment will remain a mere illusory expectation of the masses.[9] In the manner in which the right to employment has been defined above it seems hardly tenable to accept that the State be enjoined with the responsibility of providing jobs to the jobless. The right to employment should at all times come to mean only the favourable conditions which enable an individual to work, eke out a living, be permitted to choose the profession he wishes to practice along with the freedom to demand fair wages for the job done.

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[8] International Covenant on Economic and Social Rights, Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

[9] NATIONAL HUMAN RIGHTS COMMISSION, KNOW YOUR RIGHTS: RIGHT TO WORK, 2011 available at http://nhrc.nic.in/Documents/Publications/KYR%20Work%20English.pdf

Part II: The Right to Employment as enshrined under the Constitution of India

The Constitution of India provides for various fundamental rights viz: freedom of Speech and Expression[10], Right to form Associations[11] and Right to practice the profession of ones choice[12], thus apart certain basic human rights in the nature of Right to life and liberty with dignity have also been provided for.

The Directive Principles of State Policy enjoin upon the state to make effective provisions for securing the right to work and right to public assistance in cases of unemployment. They strengthen and promote this concept of welfare state which seeks to promote the prosperity and well-being of the people by seeking to lay down some socio-economic goals which the various governments in India have to strive to achieve.[13]

The Constitution of India provides that the adequate means of livelihood[14] for both men and women with living wage, protection against exploitation etc. shall be provided by the State to the extent of economic capability thereof. It is probably this inclusion of Right to Work in Article 41 within the Directives that has created confusion regarding the duty of the State to provide employment opportunities to jobless people.

The Hon'ble Supreme Court has observed that the State cannot be compelled by affirmative action to provide adequate means of living or work to the citizens, however, the State is under a negative obligation to not to deprive a person of this right without a just cause and fair procedure meaning thereby that the law must provide such procedural safeguards to ensure that no person is unfairly treated by the employers and discriminated against.[15]

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[10] Article 19(1)(a) of the Constitution of India 1950
[11] Article 19(1)(c)of the Constitution of India 1950
[12] Article 19(1)(g) of the Constitution of India 1950
[13] M.P. Jain, Indian Constitutional Law 6th Edition, 2015
[14] Article 39(a) of the Constitution of India 1950
[15] Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180

The Government of India has made significant efforts in ensuring that the directives mentioned in the Directive Principles of State Policy pertaining to employment are implemented by way of various rules, regulations, policies and schemes. The list is endless with the National Rural Employment Guarantee Act, National Policy on Safety, Health and Environment at workplace, the Minimum Wages Act, the Equal Remuneration act, Maternity Benefits act, Factories Act, Trade Unions Act, the Apprenticeship Act etc. The recent report by the World Bank titled The State of Social Safety Nets, 2015[16] has made significant positive observations in this regard.

SECTION B

Part I: History of Right to Employment Globally

At the dawn of the Keynesian dominion over the macroeconomic theory, various governments in the post the World War II era were for the first time keen on undertaking a general responsibility for employment, when they collectively and individually issued various official statements to this effect. The first of these was the White Paper on Employment Policy by the British Government in 1944 wherein it was expressly declared that the maintenance of a high and stable level of employment was now one of the government's primary aims and responsibilities. This declaration was followed up by the Canadian White Paper in 1945 which declared that a high and stable level of employment was a major Government policy. In 1946 the US Congress passed the 'Employment Act', which acknowledged that creating and maintaining useful employment opportunities was to be the continuing policy and responsibility of the Federal Government.[17]

All these, it should be noted were only policy initiatives which were undertaken in the wake of World War II. This in no

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[16] Ministry of Labour and Employment, National Policy on Safety, Health, and Environment at Work Place http://www.dgfasli.nic.in/npolicy/OSH-Policy.pdf

[17] SEAN TURNELL, THE RIGHT TO EMPLOYMENT: EXTENDING THE CORE LABOUR STANDARDS AND TRADE DEBATE, available at http://www.businessandeconomics.mq.edu.au/our_departments/Economics/econ_research/2001/3-2001Turnell.PDF

way indicated that the world powers were negotiating the right to work/employment creating an additional burden on them.

Part II: Background in India

It has been pointed time and again that the Framers of the Indian Constitution were weary[18] of incorporating the right to employment within the fundamental rights primarily on the grounds of practical and economic difficulties. However Shri H. V. Kamath[19] while echoing the views of many other leaders at that time argued that the Right to be employed should not be a right but a duty, quoting from the Ramayana, the Quoran and the Bible he stated that, *"We should inscribe on the portals of our temple of democracy that he who will not work shall not eat"*. While the world view gives us an insight as to why the world considers the Right to Employment as duty of the State to provide productive jobs to the jobless, the Indian view depicts that a clear form of duty has been relegated as a right due to sheer incorrect interpretation of the wording within the document of Constitution.

SECTION C

Part I: Whether there should be a Right to Work or Duty to Work

It is a commonly understood principle in jurisprudence that every right has corresponding duty creating a privilege in the person who has the right.[20] In case the Right to Employment is created, a consequent duty will be generated against the State which will have no right but an obligation to observe the right created in the masses. This is likely to have huge implications both economic as well as political, as the State then becomes liable for every person's unemployment whether genuine or otherwise.

Consequently, if the law creates an obligation out of the Right to Employment, the State shall be permitted to seek the employment from masses in times of need, and the persons

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[18]B.Shiva Rao, The Project Committee A Study on Then Framing of India's Constitution, Indian Institute of Public Administration.

[19] Constituent Assembly Debate dated November 23, 1948, available at http://parliamentofindia.nic.in/ls/debates/vol7p11.htm

[20]Hohfeld, Analysis of Rights

refusing to join the employment can be made liable for having to perform a fundamental duty. It is to be kept in mind that such employment will neither be free of cost of the Government nor forced labour on part of the masses. The Supreme Court in a landmark ruling[21] has enjoined upon the State the duty to fully compensate any individual who has performed any services for the State.

Further the manner in which the Chinese law categorically accepts right to work as a glorious obligation[22] and the observations made by Shri. Kamath which hinted that the concept of work be made as an obligation, must be accepted as the norm of employment within the country.

Part II: Pitfalls in Permitting the Right to Employment

In the view of the author, recognizing the right to employment as a statutory right would result in huge financial, economic and academic implications, a risk India is ill-suited to take at this juncture of economic development. Most importantly it needs to be highlighted that in an era of globalization India cannot risk going the socialistic route for creating jobs.

The State cannot be considered fully equipped to undertake the economic burden of providing salaries to an entire population as it would lead a huge fiscal deficit capable of bringing the economy to the brink of collapse. Further, the State is incapable of providing as many worthwhile jobs to every citizen within the present economic set-up commensurate with their education, capabilities and remuneration expectations, unless it undertakes to run industries as part of its initiative which would imply increasing the space for Public Sector Undertakings. It is likely to impact academic development, creativity and progress in the field of the research and development as the State will then endeavor to control every facet of the lives of the people to suit its needs which may or may not have futuristic advantage.

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[21] The State of Gujarat v. High Court of Gujarat, AIR 1998 SC 3164

[22] Dr. T.V. Subba Rao and Dr. I. Ramabhrmam, *Public Policy and the Right to Work in India*, The Peace Magazine, Nov-Dec 1998

Part III: Practical Difficulties in Implementing Such a Right

Once a State undertakes the responsibility of implementing a right; significant efforts have to be made for ensuring implementation of the same. Once the right to work is made a fundamental right, the government would be required to provide gainful work opportunities to all those who are willing to work and an unemployment allowance to those who are either incapable of any work or do not get employment. As pointed above the State will then have to start creating jobs in the absence of which every individual would be entitled to approach the courts to enforce the right. Proper Institutional mechanism will have to be established to provide employment. Insurance will become necessary till gain full work opportunities are created. This is likely to hamper the distributive justice to all persons on account of fundamental right principle of one person.[23]

Other practical difficulties which arise in statutorily implementing the Right to employment will necessarily pertain to the budget constraints as faced by the government, as the job opportunity would necessarily include creation of a public utility asset (either manufacturing, or services or agriculture) which will entail a certain expenditure in the form of utilization of resources as well as payment to the laborers.[24] The State will have to collate the demand of the society as regards the service with the supply of the job seekers with the finances available with the government. In all such cases pure mathematics and economics do not suffice and a fair amount of political will and social acceptability is required. Unfortunately India has not graduated to the status of a mature economy where people will not take the government employment for granted. A bias against working in a governmental set up is so

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[23]V. HEMLATHA DEVI, SAYEED MASWOOD, AND B. YUVA KUMAR REDDY, RIGHT TO WORK AS A FUNDAMENTAL RIGHT: ILLUSION OR REALITY, Journal of the Indian Law Institute at Vol 44, Year 2002 pg 269, available at http://14.139.60.114:8080/jspui/bitstream/123456789/12553/1/020_Right%20to%20Work%20as%20Fundamental%20Right_Illusion%20or%20Reality%20(269-272).pdf

[24]K .S. GOPAL, "CAPTURING IMAGINATION OF STAKEHOLDERS – NATIONAL RURAL EMPLOYMENT GUARANTEE ACT

deeply ingrained within the psyche of the people that the possibility of people not working in the project initiated by the government under the Right to Employment is very high.[25]

Part IV: Implications of Right to Employment as a Statutory Right

It is the case of the author that in implementing the right to employment we as a society are likely to deteriorate in terms of our value systems, the will and capacity to work including the initiatives by the prospective employers who would feel threatened at the prospect of having employees who cannot be fired. In India job security regulations have been the central and most powerful tool of the government for intervening in the labour market in India. These have been criticized for restricting employment growth. It has been argued that job security regulation has had extreme negative effects[26] as the firms have changed work practices and reorganised job boundaries etc. with firms resorting to voluntary retirement of workers and increasingly hiring on the basis of flexible contracts. A two-tier system of employment currently prevails, with job security for the employed insiders and no protection to newly hired outsiders. Unorganised workers' employment prospects have been furthered in this emerging scenario, and their alliance with firms and the state results in an atrophying of job security regulations. There has been an immense outcry against the circumventing of the job security laws by the corporates. It is thus opinion of the author, that an attempt made by the state to incorporate a utopian law proving for the Right to work and such other labour law legislations essentially reduces the jobs within the market leading to an actual unemployment. It would be more practicable to allow the rights to be enforced in a phased manner while ensuring that the job creation is always on the upside rather than being on the downside.

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[25] KARTHIKA K T, IMPACT OF MGNREGA ON SOCIO-ECONOMIC DEVELOPMENT & WOMEN EMPOWERMENT, IOSR Journal of Business and Management, Volume 17, Issue 7.Ver. II (July. 2015), PP 16-19, available at http://iosrjournals.org/iosr-jbm/papers/Vol17-issue7/Version-2/B017721619.pdf

[26] Errol D'Souza, *The employment effects of Labour legislation in India: a critical essay*, Industrial Relations Journal 41:2, 122–135

The author wishes to a quote a study conducted[27] by the OECD in which it was shown by evidence that the unemployment levels went up in the France post the employee protection legislation was introduced. By comparison, during the trenteglorieuses, i.e. the thirty glorious years of economic growth in France from 1945-1975, France enjoyed a full-employment economy. In the 1960s, for instance, the unemployment rate was under 2%, and the entry of guest workers and immigrants was encouraged to keep up with the pace of economic growth. However, soon after the enactment of the Labor Code regulations that ensured that employment contracts were not terminable at will, firing an employee, even an unproductive employee, became extremely costly for the employer. With the exception of "serious fault," even terminations for economic reasons or just cause, which were permissible under the Code, imposed on the employer significant procedural costs and severance payments.

The employers in order to save the costs of terminating employees reduced the number of jobs and rarely created new jobs in France, leaving very few positions open to young people attempting to enter the labor market. Throughout the 1990s, 50% of the unemployed were young people between the ages of twenty-one and thirty. French business leaders claimed that they would hire more people if it were not so costly to lay off an employee. Without the severance pay obligations under the Labor Code, it can be inferred that businesses could take more risks and hire more people than absolutely necessary without worrying about firing costs if the business does not meet its projected targets.

As is evident from the French example, the immediate response of the industry to the labor code was reduction in jobs leading to huge unemployment.

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[27] Julie C. Suk, *Discrimination at will: job security protections and equal employment opportunity in conflict*, Stanford Law Review, vol 60 issue 1, page 73.

SECTION D

Conclusion

Based on the analysis above it is clear that implementing a justiciable right in the nature of Right to Employment is likely to be accompanied with huge social and economic costs which would not only reduce the employment opportunities but drastically affect the manufacturing initiative being undertaken by the State in the form of Make In India, Ease of doing Business etc., the initiatives undertaken by the State to improve manufacturing and thereby improve the sluggish growth.

It is the considered view of the author that the State can be asked to create an enabling environment whereby the economy receives a boost and with ease of doing business the employers are tempted to hire more people. The State should be obligated to create an environment whereby both the employers and the employees are allowed to coexist. Instead of the right to work, there is a need to introduce the correct framework whereby the State must establish and implement a national policy to promote equality of opportunity and treatment in employment and occupation with a view to eliminating discrimination. Such a policy applies to both the public and the private sectors, as well as to vocational guidance, vocational training and placement services under the control of national authorities.

The State must be required to cooperate with workers' and employers' organizations in the preparation and implementation of national policy. These organizations, in turn, must promote national policy at the workplace and within the organization itself. The State, must according to the specific national circumstances, determine the measures to be developed for the promotion of equal opportunity and treatment. Moreover, the elimination of certain forms of discrimination may require affirmative action measures. Thus, opportunity for employment has to be provided and protected by the State through appropriate governmental policies and qualitative execution of those policies rather than a limited Right to be employed.

CHANGING FACE OF MICROFINANCE: BUILDING ASPIRATIONS FOR NEW MICRO ENTREPRENEURS

PREETI GUPTA[28]

INTRODUCTION

Micro finance is the provision of thrift, credit and other financial services and products of very small amounts to the poor for enabling them to raise their income levels and improve their living standards. It has been recognised that micro finance helps the poor people meet their needs for small credit and other financial services. The informal and flexible services offered to low-income borrowers for meeting their modest consumption and livelihood needs have not only made micro finance movement grow at a rapid pace across the world, but in turn has also impacted the lives of millions of poor positively. Microfinance, according to Otero (1999) is "the provision of financial services to low income poor and very poor self-employed people". These financial services according to Ledgerwood (1999) generally include savings and credit but can also include other financial services such as insurance and payment services. Micro-Finance clients are typically employed, often house hold based entrepreneurs. In rural areas, they are usually small farmers and others who are engaged in small income generating activities such as food processing and petty trade. In urban areas, microfinance activities are more diverse and include shopkeepers, service providers, artisans, street vendors, etc. The Microfinance in India has grown tremendously in last few years and offers differentiated products for different

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segments of the society. Lots of people are living under poverty, but with microfinance they have the chance to lift themselves out of poverty. Today micro finance programs and institutions have become increasingly important components of strategies to reduce poverty or promote micro and small enterprise development. Micro finance is recognized and accepted as one of the new development paradigms for alleviating poverty through social and economic empowerment of the poor with special emphasis on empowering women.

MODELS OF MICROFINANCE

Micro Finance Institutions (MFIs) around the world follow a variety of different methodologies. The following are major methodologies employed by MFIs for delivery of financial services to low income families.

Self Help Groups (SHGs)

The Self Help Groups (SHGs) is the dominant microfinance methodology in India. In this case the members of Self Help Group pool their small savings regularly at a prefixed amount on daily or weekly basis and SHGs provide loan to members for a period fixed. SHGs are essentially formal and voluntary association of 15 to 20 people formed to attain common objectives. People from homogenous groups and common social back ground and occupation voluntarily form the group and pool their savings for the benefit of all of members of the groups. External financial assistance by MFIs or banks augments the resources available to the group operated revolving fund. Saving thus precede borrowing by the members. NABARD has facilitated and extensively supported a program which entails commercial banks lending directly to SHGs rather than via bulk loan to MFIs. If SHGs are observed to be successful for at least a period of six months, the bank gives credit usually amounting 4 times more than their savings.

Individual Banking Programmes (IBPs)

In Individual Banking Programmes(IBPs) there is provision by Microfinance institutions for lending to individual clients

though they may sometimes be organized into joint liability groups, credit and saving cooperatives. This model is increasingly popular through cooperatives. In cooperatives, all borrowers are members of organization directly or indirectly by being member of cooperative society. Credit worthiness and loan securing are a function of cooperative membership in which member's savings and peer pressure are assumed to be key factors.

Grameen Model

Grameen Model was pioneered by Mohammed Yunus of Grameen Bank of Bangladesh. It is perhaps the most well known and widely practiced model in the world. In Grameen Model the groups are formed voluntarily consisting of five borrowers each. The lending is made first to two, then to the next two and then to the fifth. These groups of five meet together weekly, with seven other groups, so that bank staff meets with forty clients at a time. While the loans are made to the individuals, all in the group are held responsible for loan repayment. According to the rules, if one member ever defaults, all in the group are denied subsequent loans.

Mixed Model

Some MFIs started with the Grameen model but converted to the SHG model at a later stage. However they did not completely do away with Grameen type lending and smaller groups. They are a mix of SHG and Grameen model. The main difference between these programs is rather marginal. Grameen programmes have traditionally not given much importance to savings as a source of funds where as SHGs place considerable emphasis on the source of funds. The SHG programs have compulsory deposit schemes in which the members themselves determine the amount. The SHGs model is widely used in India.

STRUCTURE OF EXISTING MICROFINANCE INSTITUTIONS IN INDIA

Indian Microfinance Institutions are predominantly NGOs i.e., nearly 80 % of the Microfinance Institutions operate under the Society/Trust form which is for the not-for-profit sector with a clear development agenda. Apart from this, other important legal

forms are being used by Indian Microfinance Institutions. 10 % of organizations operate under the company structure; 5% are section 25 companies (Section 25 of the Indian Companies Act, 1956); 2% as Cooperatives; 2% as Non Banking Finance Companies (NBFCs); and 1% as Local Area Banks (LAB). The Organization Structure of existing Micro Finance Institutions in India is given below:

Table:1 Legal Structure of Microfinance Institutions in India

Category	Types of MFIs	Estimated numbers	Legal Acts under which registered
1.Not for Profit	a. NGO MFIs & societies	2400 to 2500	Societies Registration Act, 1860 or Indian Trust Act, 1882.
	b. Non-profit companies	80	Section 25 of the Companies Act, 1956
2.Mutual Benefit	Co-operatives	2000 to 2500	Registered under State Cooperative Societies Act or Mutually Aided Cooperative Societies Act (MACS) or Multi-State Cooperative Societies Act, 2002
For Profit	NBFC		Companies Act, 1956 & registered with RBI
	NBFC-MFI	60	RBI Circular, May 2011

Source:http://nabardindia.com, M-CRILMicrofinanceReview2010,

PROFILE OF MICRO FINANCE IN INDIA

The profile of micro finance in India at present can be traced out in terms of poverty it is estimated that 350 million people live Below Poverty Line. The following are some components of micro finance:

a. Annual credit demand by the poor in the country is estimated to be about Rs 60,000 crores.

b. A cumulative disbursement under all micro finance programmes is only about Rs. 5000 crores.

c. Total outstanding of all micro finance initiative in India estimated to be Rs. 1600 crores.

d. Only about 5% of rural poor have access to micro finance.

e. Though a cumulative of about 20 million families have accepted accessed.

f. While 10% lending to weaker sections is required for commercial banks, they 0neither have the network for lending and supervision on a larger scale or the confidence to offer term loan to big micro finance institutions.

GEOGRAPHICAL SPREAD OF MICROFINANCE

MFIs currently operate in 28 States, 5 Union Territories and 568 districts in India. Table 2 shows the distribution of MFIs by state. In particular, it shows the number of MFIs operating in each state, their total number of branches in the state and the number of districts with microfinance operations. Twenty nine MFIs with a large outreach and portfolio have operations in more than five states, out of which five leading MFIs are operating in more than fifteen states. A total 27 MFIs (17% of the sample) are operating in two to five states, while 78 MFIs (50% of the sample) have confined their operations to only one state. MFIs with a smaller scale or regional focus have concentrated their operations in 1-2 states only whereas other MFIs have spread across a higher number of states in order to increase their size, scale and simultaneously mitigate concentration risk. MFIs operating in multiple states, in general, are typically larger in size and follow the legal form of an NBFC-MFI. The geographical expansion of bigger MFIs is indicated by the fact that while in 2013 -14 only 15 MFIs had operations in more than 5 states, that number increased to 29 in 2014 -15.

Table 2: No. of MFIs in Indian States/UTs and No. of Districts with MFI Operation

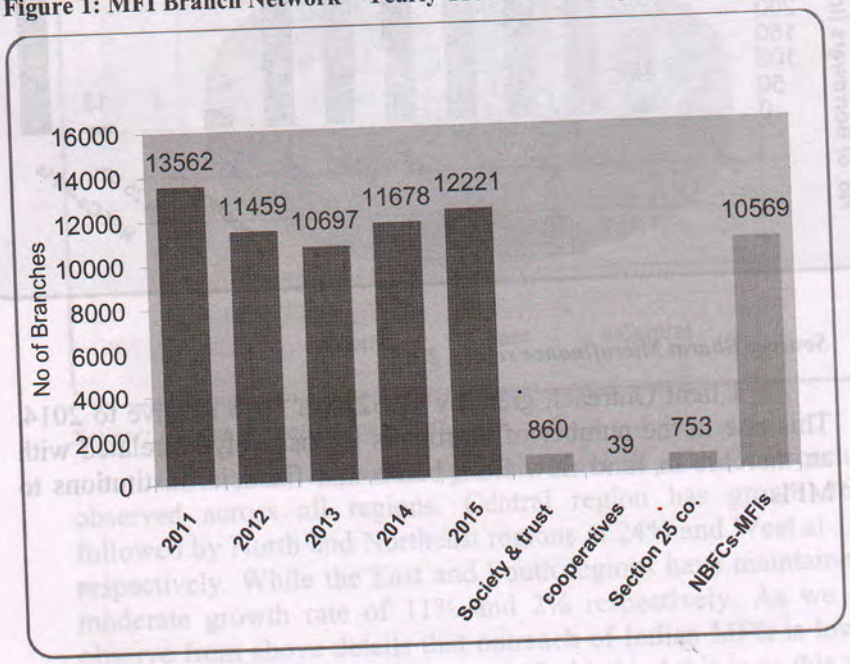
Name of the States/UTs	No. of MFIs operating in the state (including those having Head Quarters outside)	No. of districts of the state where MFIs operate	No. of Branches
Madhya Pradesh	37	48	870
Maharashtra	37	35	980
West Bengal	35	20	1740
Tamil Nadu	34	32	1377
Karnatka	29	30	1185
Bihar	28	38	915
Odisha	26	30	742
Uttar Pradesh	23	70	1063
Gujrat	22	23	386
Rajasthan	21	33	287
Assam	19	24	552
Jharkhand	19	23	231
Chhattisgarh	17	16	248
Delhi	13	7	70
Haryana	13	19	129
Kerala	13	14	220
Uttarakhand	13	10	95
Pondicherry	11	3	17
Andhra Pradesh (Telangana included)	10	23	776
Manipur	8	9	45
Meghalaya	7	6	26
Punjab	7	17	93
Tripura	6	6	99
Goa	4	2	7
Himachal Pradesh	4	4	6
Mizoram	4	8	34
Arunachal Pradesh	3	7	11
Sikkim	3	3	10
Nagaland	2	4	2
Andaman & Nicobar	1	1	1
Chandigarh	1	1	2
Dadra & Nagar Haveli	1	1	1
Jammu & Kashmir	1	1	1
Total		**568**	**12221**

Source: Bharat Microfinance report, 2015

BRANCH NETWORK

The MFIs in India had been consolidating their operations to cope with the effects of transition taking place in the sector. While 2012 and 2013 witnessed a decline in the branch network, the trend was arrested in 2014. In 2014 -15 too, MFIs have expanded their branches, posting a marginal growth of 4.57 %. As of March 2015, the reporting MFIs had 12221 branches spread across India. The distribution of branches among different categories of MFIs as of March 2015 showed that NBFC-MFIs had the lion's share of 10569 branches. Main reason identified behind decline in branch network during the year 2012-13 is increased government control on microfinance sector by imposing cap on interest rate charged (i.e.26%) by MFIs. Due to higher regulation bad loans increased Productivity of employees were also down so branch were not yielding enough profit to MFIs. So, many branches were closed down during this period

Figure 1: MFI Branch Network – Yearly Trend and Category wise breakup

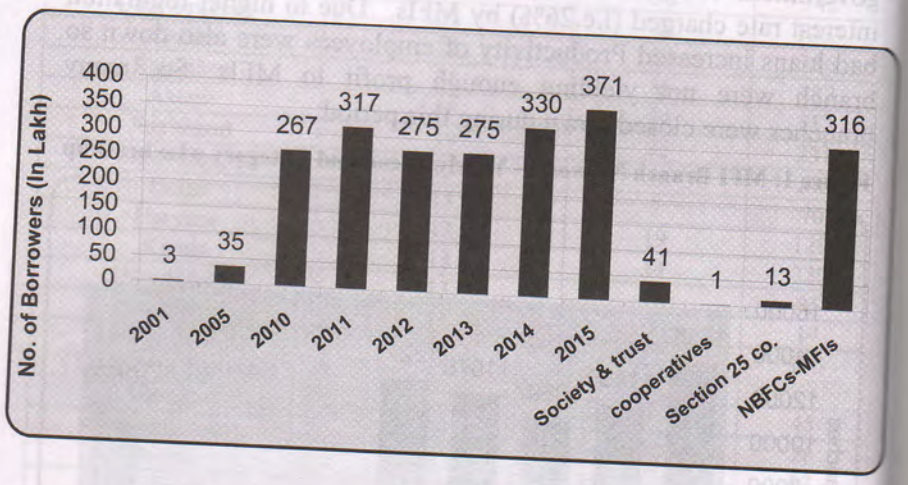


Source: Bharat Microfinance report, 2015

MARKET PENETRATION BY CLIENT OUTREACH

The total number of clients served by MFIs stood at 371 lakh as on 31 March, 2015. Client outreach of MFIs had grown substantially from 2005 to 2011, reaching a level of 371 lakh. This trend slowed down during 2012 and 2013 and the number of clients slumped to 275 lakh. The trend reversed in 2014 with a growth and reached a level of 330 lakhs. This trend continues in 2015 with an astonishing rise in clients/borrowers to an all time high of 371 lakh. Majority of these clients are being served by NBFC-MFIs (85.18%), primarily the larger ones.

Figure 2: Outreach to borrowers - Yearly Trend and Category wise breakup for 2015



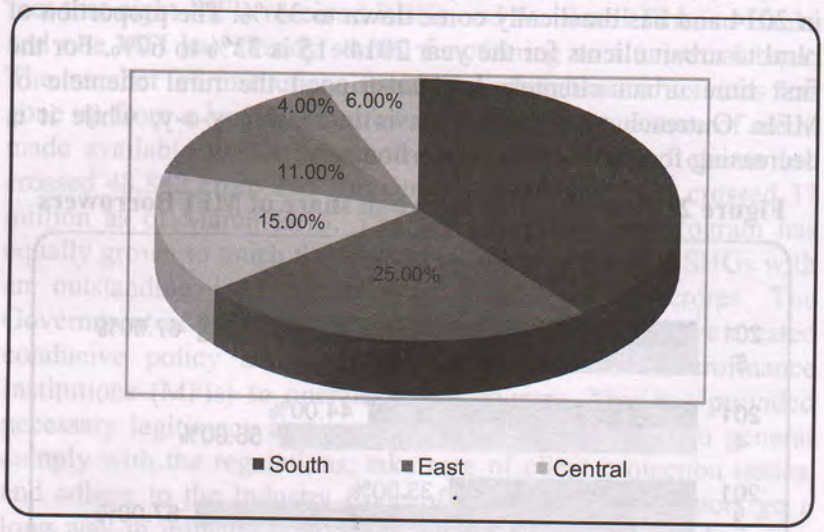
Source: Bharat Microfinance report, 2015

Client Outreach grew by 12.52% in 2015 relative to 2014. This rise in the number of borrowers is positively correlated with an increase in fund flow from banks and financial institutions to MFIs.

REGIONAL OUTREACH OF MFIS

Looking at credit demand from a geographical perspective, India can be divided into six regions. Based on population size and poverty levels, South India has the highest demand for microcredit, which is in part why MFIs have the highest percentage of their portfolio in this region. Out of the total client base of 371 lakh, South alone contributes to 39% followed by 25% in East. Central region and West have 15% and 11% of total outreach respectively. Northeast and North have the least client outreach numbers with 6% and 4% respectively. Share in outreach has expanded only in case of Central and North east regions from 13 to 15 % and 5 to 6 % respectively.

Figure 3: Regional Breakup for Client Outreach



Source: Bharat Microfinance report, 2015

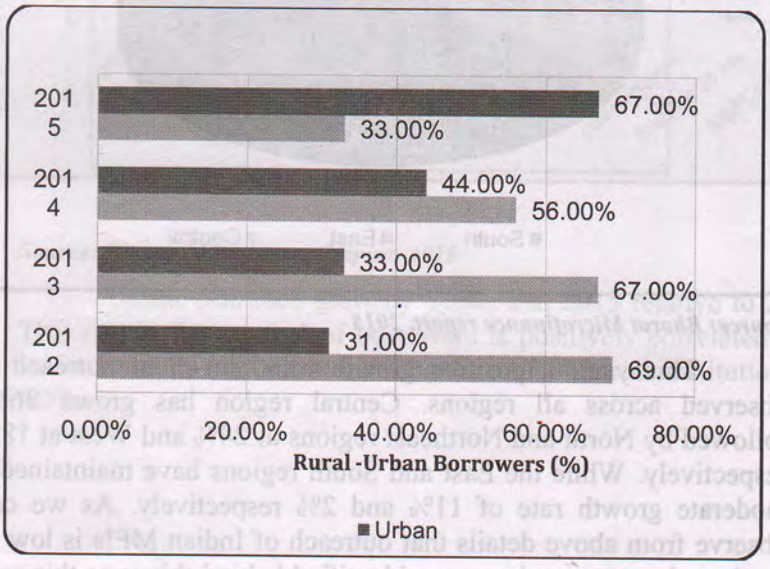
This year, a positive growth trend in client outreach is observed across all regions. Central region has grown 36%, followed by North and Northeast regions at 24% and West at 18% respectively. While the East and South regions have maintained a moderate growth rate of 11% and 2% respectively. As we can observe from above details that outreach of Indian MFIs is low in north region area, main reason identified behind this is as this area

has better penetration of banks due to near proximity to Delhi as compared to southern region so there are comparatively less number of MFIs, and in southern area there is not enough number of banks so MFIs are serving the poor people in that particular region.

RURAL – URBAN SHARE OF MFIS BORROWERS

2014-15 can described as watershed year as far as the rural-urban divide in Indian microfinance is concerned. Hitherto Indian microfinance was touted as basically a rural phenomenon as compared to microfinance in Latin America as also in large parts of Africa and Asia. But that statement is no longer valid. A very interesting trend is seen in the rural-urban focus of MFIs. The share of rural clientele which was 69 % in 2012 decreased to 56 % in 2014 and has drastically come down to 33 %. The proportion of rural to urban clients for the year 2014- 15 is 33% to 67%. For the first time urban clientele has outstripped the rural clientele of MFIs. Outreach to urban clients is increasing y-o-y, while it is decreasing for rural clients proportionately.

Figure 2: Trends in Rural-Urban share of MFI Borrowers



Source: Bharat Microfinance report, 2015

entrepreneurs outside the service area of regular banks. The bank will also ensure that its clients do not fall into indebtedness and will lend responsibly. Similarly RBI reemphasized its confidence in the sector by bringing forth the SRO setup.

BANKING SECTOR AND MICROFINANCE

The formal banking sector has played an important role in microfinance in India. Much of the microfinance initiative in India has involved Self-Help Groups (SHGs), predominantly of poor women. NABARD's Bank Linkage Program, pilot-tested in 1991-92 and launched in full vigor in 1996, has been a major effort to connect thousands of such SHGs across the country with the formal banking system. By late 2002, it connected about *half a million* SHGs to the banking system with total loan disbursement of about Rs. 1026 crores. Efforts of other organizations supplement that of NABARD. By March 2001, SIDBI, for instance, had disbursed over Rs 30 crore to SHGs through 142 MFI-NGOs.

Recently on 16th September 2015, The Reserve Bank of India announced that it has granted provisional "in principle licenses" to ten different financial entities to launch payment banks in India called Small Finance Banks. Out of the ten companies granted small finance bank licenses, 8 operate in the microfinance sector. This is an indicative sign of huge growth potential in Indian microfinance sector.

TECHNOLOGICAL CHANGE

The most prominent application of technology in the industry is the management of information systems (MIS) used by MFIs to support their transactional history and data management. The original 'microfinance revolution' took advantage of the technological advances in ICTs of the 1980s and 1990s. However, often this was as a relatively late adopter, with many MFIs having to convert manual records to electronic systems in the mid- and late 1990s. The dramatic reductions in the cost of new ICT products – mobile phones, palm pilots and even laptops – and the rise in connectivity through mobile phones and the internet mean that in the next decade there is enormous potential for MFIs to

develop new services: services that in the past would have been economically infeasible because of high transaction costs.

These technological changes have made it easier to address two main obstacles in providing financial services to poor people – managing information and service delivery costs (Economist, 2005). The challenge for microfinance institutions is to rethink their business models and to innovate with the ways they deliver and receive services, so that products are more convenient and cheaper for customers, services can be accessed by people in remote areas, and security is enhanced. Until now, the predominant use of technology among microfinance institutions has been to internally manage information. However, technology has an immense potential in other areas, such as payment services and credit underwriting.

THE ROAD AHEAD

The journey so far has never been a bed of roses for the MFIs. The usurious interest rates, limited products, lack of accessibility have always won them brickbats from the critics and skeptics. The emergence of regulatory body for MFIs, enactment of legislation, performance rating by industry bodies, increased funding, increasing spends on technology and innovative products indemnify the potential of MFI industry.

The path ahead is obviously sprinkled with challenges. Scaling up of projects and bringing millions of people within the fold of microfinance is no mean task. The most convincing feature of this form of financing, that justifies its admittedly higher costs, is the near-perfect repayment rates. The expansionary zeal of microcredit practitioners should be balanced with the quality of loans indeed a momentous challenge. Government aid almost always brings in its wake political favouritism and corruption. It is important to ensure that the government microfinance initiatives do not go the way of their several well-intentioned predecessors. The biggest challenge in development, however, is the simultaneous development of investment potential and improvement of skill levels of the borrowers. A glut of low skilled services is an unwelcome substitute for scarcity of credit. As microcredit

alleviates the credit availability problem, the need for micro-consulting, business planning and services like marketing, are being felt with greater acuteness. Microcredit cannot be expected to be a panacea to rural developmental problems. In some sense, its role is similar to that of credit in the general economy. It is a string that can hold back progress, but it is almost impossible to push on a string. There is a very real need of investments that yield higher returns than the sustainable microcredit interest rates for the microcredit initiative to be truly successful. Investment can be made by training MFIs' personnel, or better designing of insurance plans or products or services offered.

The untapped demand in the huge market for financial services at the base of the pyramid in India will continue to be the major growth driver for MFIs in the year to come. Strong regional players are likely to show moderate growth. In the coming year the sector in India could see the entry of more foreign players, such as ASA that has entered West Bengal, and some Indian MFIs, such as Basix, are seeking business opportunities abroad. Such cross border interactions could expedite the adaptation of best practices from more mature markets to the Indian context. MFIs will also continue to expand in virgin rural markets.

Microfinance is seen as a set of services that raises the prospects for low-income households, and some poor people, to achieve their goals in business, consumption, education, health and other areas – and not as a magic bullet that automatically lifts poor people out of poverty through microenterprise. While many factors will shape the future of microfinance, one crucial factor is the social energy of the tens of thousands of people who are committed to analysing microfinance and debating how additional financial services can be made accessible to the hundreds of millions of people who have very limited access to services. Few other development issues have managed to generate such passion and commitment as microfinance. It is the collective imagination and social energy of this dispersed community that has created the microfinance revolution of the late 20th century and will take it forward in the coming years.

CONCLUSION

The changing face of microfinance in India appears to be positive in terms of the ability of microfinance to attract more funds and therefore increase outreach. The concept and practice of microfinance have changed dramatically over the last decade. Conceptually, the financial systems approach has gained ground over poverty lending and most serious analysts now view microcredit as only one of several components of microfinance. Micro finance can contribute to solving the problem of inadequate housing and urban services as an integral part of poverty alleviation programmes. The challenges lies in finding the level of flexibility in the credit instrument that could make it match the multiple credit requirements of the low income borrowers without improving unbearably high cost of monitoring to end use lenders. A promoting solution is to provide multipurpose loans or composite credit for income generation, housing improvement and consumption support.

Micro finance remains a powerful tool for development. It may not be a panacea, but it has brought a sea of change in the lives of many. The sector has to persist with its focus on the three critical dimensions. One is the need for articulating the fact that microfinance is a strategic part of the financial inclusion agenda of the government and that of the central bank. The second is the criticality of re-demonstrating our collective intention to help the poor and the unbanked populace by way of having the right mission, social performance measures and client protection process. The third area is in projecting the fact that microfinance institutions are sustainable financial institutions and they continue to be the investible destination for the bankers and the investors. Micro finance can indeed be sustained in the long run in a profitable manner; going by the increasing number of commercial banks that have evinced interest in this area, the future does seem bright.

"Microfinance remains a potent apparatus for development. It may be a drop in the ocean, but it has made people self sufficient".

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RISK MANAGEMENT AND INTERNAL AUDIT.

AJIT PATNAIK*

Risk management has emerged as a major management concern. Without a proper risk management system, an organization is vulnerable from both internal and external destabilizing factors which may bring it down on its knees. It involves keeping the negative debilitating factors in check and also taking advantage of positive opportunities so that the concern avails 'the tide in the affairs 'of organization to rise to promote the interest of the stakeholders. Risk management has assumed special importance in view of the fact that frauds of various types have become pervasive in organizations due to employee greed and also rapid technological leaps, the unhedged vulnerabilities of which the fraudsters exploit. Perpetration of a fraud not only involves loss of financial assets but also loss of reputation and goodwill which is a bigger concern. It is to challenge the fraudsters to dare to break the organization and the challenge for the management to daringly and pro-actively seize the positive opportunities to add value to the organization. Hence, the iconic place of a risk-takers like Steve Jobs, in the business world, who propelled Apple to the pinnacle of success by venturing to areas which others thought a misadventure, as Walter Isaacs on, would tell us.

Risk is measured in terms of LoR (level of risk), which is a combination of the likelihood and impact of an event i.e. the possibility of occurrence of an event and the possible impact the event can have on the functioning of an organization. Organizations have inherent risks, control risks and residual risks. Inherent risks are those which are concomitant to any organization. Control risks are those which come out when the control structure is dormant or inadequate. Residual risks are those which remain

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even after implementing a control structure. Enterprise risk management is the process followed as part of the strategic action by management to identify occurrences which may affect the organisation and manage them within the risk appetite of the organisation, to generate reasonable assurance regarding achieving of objectives. It is an important part of the corporate governance process of an organisation.

The Companies Act 2013, unlike the Act of 1956,has made specific provisions for risk management. Sec. 134(3) mandates a report by the Board of Directors to shareholders which should include a statement indicating development and implementation of a risk management policy in the company. Sec. 177(4) prescribes that the Audit Committee should evaluate internal financial controls and risk management systems. Schedule IV requires that the independent directors must satisfy themselves that the system of financial controls and the system of risk management are robust and defensible. Clause 49 of the Listing Agreement of SEBI prescribes that the Company shall lay down procedures to inform Board members about the risk management and to review periodically these to ensure that the executive management controls risk through means of a properly defined framework. Sarbannes-Oxley Act 2002 in USA requires the management to give report to Board of Directors about the effectiveness of controls. COSO Enterprise Risk Management framework of 2004 provides a model for evaluating internal controls and risk management systems.

Risk management process involves identification of risks, risk analysis and risk treatment. The process begins with identifying the risks keeping the objectives of the organisation in view. Risk analysis involves detailed discussion about the identified risks and the attendant control structure. Since those events which are likely to occur and which impact the organisation are only to be taken into account, risk analysis is a multiplication equation of likelihood and impact. Likelihood is classified into rare, unlikely, possible, probable and almost certain. From occurring in exceptional circumstances, it is a grading of could occur in some time, might occur at some time, will probably

expected to occur in most circumstances. The markings are given in a scale of 1-5. Impact of an event is also classified as catastrophic, major, moderate, minor and insignificant. From those events likely to result in closure of the organisation, the classifications are made depending on impact on major objectives, effect on some objectives, or where the objectives are unaffected. The gradings are done on a scale of 5-1. Where it is not possible to ascribe values because of the amorphous nature of the events, these are classified as maximum, minimum and most likely value.

Following table illustrates the scoring of likelihood and impact of an event. The score can be a resultant of permutation and combination of likelihood and impact scores. The management has to make judgements on the gravity of the occurrence taking LI score as the guide. Events likely to result in huge loss to the organisation which may be with low likelihood score will have to be given higher priority than events with little loss but high likelihood score, though LI score may be same. Numbers are a guide only and they hide more than they express.

Likelihood	Score	Impact	Score	L*I Score	Grading
Rare	1	Catastrophic	5	5	3
Unlikely	2	Major	4	8	2
Possible	3	Moderate	3	9	1
Probable	4	Minor	2	8	2
Almost certain	5	Insignificant	1	5	3

Events likely to result in huge loss to the organisation which may be with low likelihood score will have to be given higher priority than events with little loss but high likelihood score, though LI score may be same. Numbers are a guide.

The important aspects of risk management process are risk analysis based on risk appetite formulated keeping in view the risk tolerance limit set by management. In the risk analysis, the first step is to identify the assets to be protected. For a retail company, currency and for a manufacturing concern, inventory will be critical.

Risk addressing can take various forms depending on the financial and non-financial analysis of the cost of treating the risk to the likely benefits. The risk can be avoided by dropping the asset if the cost of protecting the asset is more than the value of the asset. The risk or a portion of it can be transferred to an insurance company by purchasing fidelity insurance or bond. The premium paid is the cost to the organisation. The risk can also be mitigated by preventive and financial controls. Preventive controls are education of employees, ethical value dissemination and financial controls are established policies, procedures, segregation of duties etc. If the probability of likelihood or impact are low, the risk can be ignored. The risk response will be a resultant of a cost benefit analysis along with suitable factoring of non-financial factors.

The important aspects of risk management process are risk analysis based on risk appetite formulated keeping in view the risk tolerance limit set by management. In the risk analysis, the first step is to identify the assets to be protected. For a retail company, currency and for a manufacturing concern, inventory will be critical. Next step is to identify the threats to the assets. The threats to the financial assets are fraud schemes like misappropriation, tempering of cheques, financial statement fraud, corruption cash larceny etc. The probability of occurrence of an event can be assessed by gathering information on the internal control system, prior reports of fraud and also gathering information about fraud from similar organisations. The likely loss to the organisation can be arrived at by looking at the criticality of the assets to the organisation, value of the assets and revenue produced by the assets and the impact of the loss on the financial statements. While making fraud risk assessment, the management has to keep in perspective the hypothesis of fraud triangle- pressure on employees who are breadwinners or pressure from peer companies in the industry, tendency to rationalize as permissible a bit of unethical conduct for family or pilfer a bit from the resources of a successful company and opportunity presented because of organisational loopholes in control structure.

An example of a risk appetite table for a Company by way of loss of cash flow is given below-

Likely loss of cash flow	Above 100 lakhs	50 lakhs to 100 lakhs	25 lakhs to 50 lakhs	1 lakh to 25 lakhs	Below 1 lakh
Impact	5	4	3	2	1
Likelihood	1	1	1	2	2
I L Category	catastrophic	major	Significant	Minor	insignificant

An organisation tries to keep the risk vulnerability at the acceptable level by installing a control system, as in an actual world of business forces, total elimination of risks is an elusive, unattainable goal. An organisation will like to address the risks above significant level. The control structure consists of control environment, control activities, risk management, information sharing and monitoring. Control environment refers to total system and tone of controls in the organisation, the control activities refer to specific steps taken for an effective framework of controls.

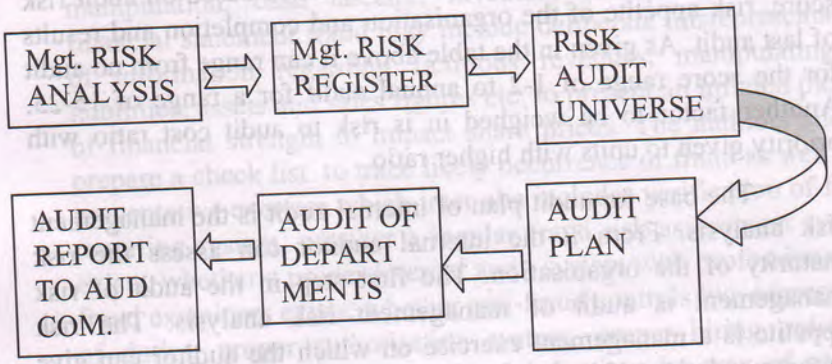
Audit of risk management

The organisations can be classified as risk naive, risk aware, risk enabled, risk managed and risk defined organisations depending on their risk maturity which indicates the extent of incorporation of risk management in the management policies. Audit of risk management is very essential to make the organisations function with a well-defined risk management system in place. While both internal and audit by national auditor can contribute to the installation of a sound enterprise risk management system, the difference on coverage of audit area will separate the two audits. The discussion in this article is focussed on internal audit.

Risk based internal audit-Internal audit, being an important management tool, plays a critical role in the risk management process. It can recommend a proper risk management system in risk aware and risk naive organisations. In organisations which have greater interplay of risk systems, the internal audit by its review of the control system and the risk management system can assure the management that the significant risks are being addressed effectively. Fixing of level of risk appetite, risk response

and accountability for risk management are beyond the domain of internal audit.

Performance Standard 2010 of the Institute of Internal Auditors states that the Chief Audit Executive should prepare his audit plan based on a risk assessment. The process of preparation of audit plan is diagrammatically represented below



While preparing the audit plan the internal auditor has to keep in view the likely risks for the audit process- inherent risk, control risk and detection risk. Detection risk is the failure of auditor to detect material misstatements in the financial statements, thereby making an opinion not based on facts. This can be the result of audit procedure not being suitable, insufficient audit quantum or inadequate audit supervision. Inherent risks are risks attendant to any audit exercise and control risk is the absence of an appropriate control structure. Audit risk formula is the resultant of IR*CR*DR. The detection risk has to be kept within tolerable limits as the objective is to provide reasonable assurance only.

The audit plan has to be prepared keeping in view risk maturity of the organisation. Based on the management risk analysis, risk appetite and risk register, the internal auditor prepares the risk audit universe incorporating the risks on which opinion is required by management. If the risks are within the risk appetite, no audit is done. The significant risks are to be identified keeping the risk appetite of the organisation in view, the resources

of audit and after discussion with management. Audit frequency in the audit plan is to be fixed based on the Likelihood Impact score fetched by the analysed events. A table given below is illustrative-

No audit	Quinquennial/ quadrennial	triennial	biennial	annual
1-2	3-5	5-8	9-12	15-25

The periodicity of audit units are fixed based on audit risk score, risk appetite of the organisation and completion and results of last audit. As given in the table above it can range from no audit for the score range of 1-2 to annual audit for a range of 15-25. Another factor to be weighed in is risk to audit cost ratio with priority given to units with higher ratio.

The base for audit plan of internal audit is the management risk analysis. From it the internal auditor can assess the risk maturity of the organisation. The first step in the audit of risk management is audit of management risk analysis. The risk appetite is a management exercise on which the auditor can give recommendations if it chooses so. The Auditor has to see whether the risk analysis has been done based on a risk appetite table. The points to be verified are i) whether there is a proper procedure for identification of assets to be verified ii) whether threats to the assets have been identified iii) whether the likelihood and impact of events have been worked out. The risk register developed by management is to be verified with reference to risk analysis. Another important area of audit is the installed control structure. It is the duty of the auditor to see to see that an appropriate and effective control structure is in place e.g. authorisation and approval procedures, segregation of duties, control over access to records, and reconciliations etc. It may be non-existence of a system of internal control, brushing aside of the existing system, absence of management review, lack of clear demarcation of hierarchical authority, absence of reporting channels etc. Audit expresses its opinion on the control risk.

Fraud risk management is an important area of audit. The fraud risk management policy of the organisation is the base to start audit. While auditing, the important thing to be kept in mind is the hypothesis of fraud triangle i.e. a triangle of pressure from

family, opportunity because of lack or overriding of internal controls and rationalising of unethical conduct and to verify whether appropriate systems are in place to hedge the tips of the triangle. For occupational, internal fraud, the auditor has to verify particularly the 'fraud tree' particularly in regard to asset misappropriation, corruption and financial statement fraud. Asset misappropriation may include cheque tempering, payroll manipulation, cash larceny, inventory manipulation etc. The financial statement fraud may include deliberate misrepresentation of information regarding fictitious revenues, manipulating of liabilities, assets and sales figures etc. to present an inflated picture of financial strength to impact share prices. The auditors should prepare a check list to trace likely occurrence of fraud as well as a preventative exercise which inter alia includes verification of fraud reporting system, whether a regular fraud risk assessment system exists, whether a proper internal audit system with professionals of fraud examiners exists, whether anti-fraud controls like segregation of duties, proper authorisation system, proper hiring policy, a proper system for ensuring ethical behaviour by way of penalty and training exists.

The auditor has also to see the extent of involvement of the top management and the Audit Committee in the whole process as the Bhagavad Gita says- **'yadyadacharati sresthastattadevetaro janah, sayatpramanam kurute lokastadanubartate.-** 'whatever the great men do and set up as the standard other people follow the same' and rot of the fish begins from the head. The magnitude of the fraud is directly proportional to the level in the hierarchy.

The internal audit report should contain inter alia the following points-

a) whether there is a enterprise-wise risk management policy

b) Whether there is a comprehensive control framework

c) Whether the risk registers are properly maintained to enable prioritisation of risks, whether the risk registers demonstrate the impact of risks on the business objectives. whether risk components of the branches have been incorporated in the framework

d) whether there is a monitoring mechanism for the risks

e) whether there is a risk committee to assess new risks

f) whether the residual risk and the risk tolerance have been segregated, whether a risk decision point has been identified taking into account risk vulnerability and risk appetite

g) whether risk mitigation actions have been properly documented

h) whether the management has developed a framework to highlight major risks.

i) whether management has taken action on earlier reports.

The audit approach has to be tailored to suit the type of organisation being audited-whether government or a Company and whether it is a manufacturing concern or a healthcare organisation.

The Report to the Nation 2016 of the Association of Fraud Examiners estimates that world-wide on an average an organisation loses 5% of its revenue as a result of fraud. It is said no risk, no gain; but even having an unmanaged risk with likely positive results for the organisation may result in likely undesirable and unanticipated consequences let alone leaving unattended risks with negative consequences which can have devastating, flattening effect on the organisation. Enron and Satyam tell their tales of collapse trigerred by unhedged risks. The organisations in a modern business world of cut-throat competition for survival can have risks which are not ring-fenced only at their mortal peril. Therein lies the ultimate, compelling justification for an integral and effective risk management system with proper system of audit as part of the corporate governance framework.

PUBLIC PROCUREMENT LAW IN THE EUROPEAN UNION

M.P. GUPTA*

The Public Procurement Bill, 2012, which set out to frame a law on best international practices, lapsed in 2014 when new Lok Sabha was formed. The lapsed bill lacked a few important provisions which the European Union introduced in its Public Procurement Directive 2014 issued by the European Union (EU) and the UK adopted in its Public Contracts Regulations 2015. The reason for this article is to spread awareness about the recent reforms in public procurement place outside India in the following directions.

1. Definitions

"**Common technical specification**" means the specifications in the field of information and communication technology for use in India.

"**Economic operator**" means any person or public entity or group of such persons and entities which offers the execution of work, the supply of products or the provision of services on the market. (India does not have similar term; instead several words are used to express the idea, e.g. contractor, vendor or supplier, service provider.).

2. Public contracts between entities within the public sector Award of contracts to controlled persons. Public contracts between entities within the public sector are excluded when the contracting authority controls a legal person under it as if it were its own departments, and more than 80% of the activities of the controlled legal person are carried out on tasks entrusted to it

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by the controlling contracting authority or by its other controlled entities. (The Public Procurement Bill, 2012, since lapsed, included all public sector enterprises; it did not exclude subsidiaries of a PSU.).

3. Electronic communication is encouraged. Only electronic communications allowed except when:

a. Electronic format is not adequate for the kind of procurement

b. Physical models are to be supplied with the bid

c. Electronic communication is not safe for security reasons

d. Oral communication is allowed with tenderers for clarifications etc.

4. Procurement Methods

There are five procurement methods (called procedures in EU). These are:-

4.1 **Open procedure (Competitive Bidding)**
Already in use in India.

4.2 **Restricted procedure (Pre-qualification of bidders)**
Already in use in India.

4.3 **Competitive Procedure with negotiation (not in use in India)**

4.3.1 **India does not have an answer at present for the following market condition:**

(a) The readily available solutions cannot be used without adaptation;

(b) require design or innovative solutions;

(c) because of the nature, complexity, legal and financial make-up or risks attached"

(d) the technical specifications cannot be established with sufficient precision.

The EU provides a Competitive Procedure with Negotiation in these cases by following special procedure detailed below:

A. Method used by contracting authority

Step 1

(a) Identify the subject-matter in detail, indicate minimum requirements, state the criteria for qualitative selection of bidders, and specify the contract award criteria.

(b) state when and how the bidders may be limited to a specified number

Step 2

Invite only selected bidders to submit an initial tender for subsequent negotiations. Contracting authorities negotiates with tenderers of the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.

The minimum requirements and the award criteria cannot be negotiated. Contracting authorities may award contracts on the basis of the initial tenders without negotiation if so stated in the invitation.

B. Method for negotiations

Negotiations must: ensure equal treatment of all tenderers not provide information in a discriminatory manner inform all tenderers in writing of any changes to the technical specifications or other procurement documents not reveal to the other participants confidential information communicated by a bidder without its agreement for the specific information to be given; it shall not be a general waiver negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated.

4.4 Competitive Dialogue Procedure (Not in use in India)

4.4.1 Reasons for the Competitive Dialogue Procedure

In 2004, the EU has created Competitive Dialogue procedure after finding that many a time a public entity knows what outcome it wants to achieve in awarding a public contract but does not know how best to achieve it; that open competitive bidding with negotiations is unsuitable for timely implementation of complex infrastructure projects like EU environmental

legislation. This procedure allows discussions in confidence with selected candidates for developing one or more suitable alternatives capable of meeting its requirements; and then invites the selected parties to bid. Over 3000 contracts have been awarded on this basis.

This procedure is linked with the implementation of Public Private Partnerships (PPP) projects. Within 5 years of its start, France and UK used it in about 40% cases each, Germany using in 10% cases.

4.4.2 Method used

The current methods of conducting the Competitive dialogue phase are:

- to develop a hybrid solution after inviting several solutions, then narrowing the differences between them towards a single merged solution based on the best features of the solutions received.
- Inviting outline solutions and then one or more progressively more detailed solutions.
- A consecutive approach i.e. dialogue first on technical/ operational aspects and then on financial aspects of the offer.
- Starting from a provisionally preferred solution of the Contracting Authority and inviting bidders to comment on it by marking up the solution as the basis of the dialogue.

4.5 Innovation Partnership Procedure (Not in use in India)

Innovation Partnership Procedure aims to develop 'an innovative product, service or works' (when existing market solutions are not suitable) and to subsequently purchase 'the resulting supplies, services or works' at costs agreed between the contracting authority and the participants). Its procedure is similar to Competitive Dialogue, except that:

Selected partners will develop the new solution in collaboration with the contracting authority. The research and

development phase can be in several stages, during which the number of partners may be gradually reduced. The final partner will then provide the final solution (commercial phase). The contracting authority has to negotiate with tenderers 'the initial and all subsequent tenders submitted by them' (except for the final tender) in order to 'improve their content' Payment terms for different phases or stages will be stated. Tenders must be awarded on the sole basis of the award criterion of the best price-quality ratio.

4.6 India has no answer to the problem of persistent failure to get a workable bid. EU has solved this problem as follows:

4.6.1 Negotiation without prior publication (An exception to above five procedures. It is also known as direct award. Not in use in India except for proprietary items, spare parts or in urgency.)

Negotiated procedure without publication of procurement notice is least competitive and transparent process, to be used in rare exceptional cases. Its conditions for use are:

(a) First attempt. Tenders are invited. There is either no tender or no acceptable tender.

(b) Second attempt. Tenders are invited again after minor modifications of the terms; the result is still the same as in the first attempt.

(c) Third attempt. Invite economic operators available in the market including those who met the minimum qualification requirements mentioned in earlier attempts.

(d) This can also be used when there is only one supplier because of patent, licensing, copyright or other rights, for spare parts for certain complex machinery, whose technical specifications do not know any other alternative supplier, or in extreme urgency.

This procedure balances the likely higher price against waste of time and money in continuing to invite bids without success.

5. Payment of undisputed invoices within 30 days

In India, the payment of invoices gets delayed for the whole amount even if there is a disputed small amount. EU has tacked this issue as under:

The Contracting Authority shall decide within a reasonable period the amount payable on the invoice of the contractor and make payment within 30 days of its decision. The Contractor shall do the same for its sub-contractors who in turn will do it for their sub-sub contractors. Government's Guidance Notes shall provide the time limit for deciding the acceptance of invoice, otherwise it shall be considered accepted.

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MINISTRY OF LAW AND JUSTICE
(Legislative Department)

New Delhi, the 28*th February,* 2017

The following Act of Parliament received the assent of the President on the 27th February, 2017, and is hereby published for general information:—

THE SPECIFIED BANK NOTES (CESSATION OF LIABILITIES) ACT, 2017

NO. 2 OF 2017

[27*th February,* 2017]

An Act to provide in the public interest for the cessation of liabilities on the specified bank notes and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:—

1. Short title and commencement.

(*1*) This Act may be called the Specified Bank Notes (Cessation of Liabilities) Act, 2017.

(*2*) It shall be deemed to have come into force on the 31st day of December, 2016.

2. Definitions.

(*1*) In this Act, unless the context otherwise requires,—

(a) "appointed day" means the 31st day of December, 2016;

(b) "grace period" means the period to be specified by the Central Government, by notification, during which the specified bank notes can be deposited in accordance with this Act;

(c) "notification" means a notification published in the Official Gazette;

(d) "Reserve Bank" means the Reserve Bank of India constituted by the Central Government under section 3 of the Reserve Bank of India Act, 1934;

(*e*) "specified bank note" means a bank note of the denominational value of five hundred rupees or one thousand rupees of the series existing on or before the 8th day of November, 2016.

3. Specified bank notes to cease to be liability of Reserve Bank or Central Government.

(*2*) The words and expressions used and not defined in this Act but defined in the Reserve Bank of India Act, 1934 or the Banking Regulation Act, 1949 shall have the meanings respectively assigned to them in those Acts.

On and from the appointed day, notwithstanding anything contained in the Reserve Bank of India Act, 1934 or any other law for the time being in force, the specified bank notes which have ceased to be legal tender, in view of the notification of the Government of India in the Ministry of Finance, number S.O. 3407(*E*), dated the 8th November, 2016, issued under sub-section (*2*) of section 26 of the Reserve Bank of India Act, 1934, shall cease to be liabilities of the Reserve Bank under section 34 and shall cease to have the guarantee of the Central Government under sub-section (*1*) of section 26 of the said Act.

4. Exchange of specified bank notes.

(*1*) Notwithstanding anything contained in section 3, the following persons holding specified bank notes on or before the 8th day of November, 2016 shall be entitled to tender within the grace period with such declarations or statements, at such offices,

of the Reserve Bank or in such other manner as may be specified by it, namely:—

(i) a citizen of India who makes a declaration that the was outside India between the 9th November, 2016 to 30th December, 2016, subject to such conditions as may be specified, by notification, by the Central Government: or

(ii) such class of persons and for such reasons as may be specified by notification, by the Central Government.

(2) The Reserve Bank may, if satisfied, after making such verification as it may consider necessary that the reasons for failure to deposit the notes within the period specified in the notification referred to in section 3, are genuine, credit the value of the notes in his Know Your Customer compliant bank account in such manner as may be specified by it.

(3) Any person, aggrieved by the refusal of the Reserve Bank to credit the value of the notes under sub-section (2), may make a representation to the Central Board of the Reserve Bank within fourteen days of the communication of such refusal to him.

Explanation – For the purposes of the section, the expression "Know Your Customer compliant bank account" means the account which complies with the conditions specified in the regulations may be the Reserve Bank under the Banking Regulation Act, 1949.

5. Prohibition on holding transferring or receiving specified bank notes

On and from the appointed day, no person shall, knowingly or voluntarily, hold, transfer or receive any specified bank note:

Provided that nothing contained in this section shall prohibit the holding of specified bank notes-

(a) by any person—

(i) up to the expiry of the grace period; or

(ii) after the expiry of the grace period,—

(A) not more than ten notes in total, irrespective of the denomination; or

(B) not more than twenty-five notes for the purposes of study, research or numismatics;

(b) by the Reserve Bank or its agencies, or any other person authorised by the Reserve Bank;

(c) by any person on the direction of a court in relation to any case pending in the court.

6. Penalty for contravention of section 4.

Whoever knowingly and wilfully makes any declaration or statement specified under sub-section (1) of section 4, which is false in material particulars, or omits to make a material statement, or makes a statement which he does not believe to be true, shall be punishable with fine which may extend to fifty thousand rupees or five times the amount of the face value of the specified bank notes tendered, whichever is higher.

7. Penalty for contravention of section 5.

Whoever contravenes the provisions of section 5 shall be punishable with fine which may extend to ten thousand rupees or five times the amount of the face value of the specified bank notes involved in the contravention, whichever is higher.

8. Offences by companies

(1) Where a person committing a contravention or default referred to in section 6 or section 7 is a company, every person who, at the time the contravention or default was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention or default and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention or default was committed without his knowledge or that he had exercised all due diligence to prevent the contravention or default.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the same was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary, or other officer or employee of the company, such director, manager, secretary, other officer or employee shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purpose of this section,—

(a) "a company" means any body corporate and includes a firm, a trust, a cooperative society and other association of individuals;

(b) "director", in relation to a firm or trust, means a partner in the firm or a beneficiary in the trust.

9. Special provisions relating to offences.

Notwithstanding anything contained in section 29 of the Code of Criminal Procedure, 1973, the court of a Magistrate of the First Class or the court of a Metropolitan Magistrate may impose a fine, for contravention of the provisions of this Act.

10. Protection of action taken in good faith.

No suit, prosecution or other legal proceeding shall lie against the Government, the Reserve Bank or any of their officers for anything done or intended to be done in good faith under this Act.

11. Power to make rules

(1) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such

modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

12. Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made under this section after the expiry of a period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

13. Repeal and savings.

13. (1) The Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

Dr. G. Narayan Raju
Secretary to The Govt. of India

See more at: http://taxguru.in/rbi/law-on-cessation-of-rbi-liability-on-demontized-bank-notes-get-president-assent.html#sthansh.n9HYEmn9.dpuf

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