

LEGAL ASPECTS OF BRAIN DRAIN

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by

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"To all those who stay behind, and
make an adventure out of the
resources they have, believe me
- You will travel far"

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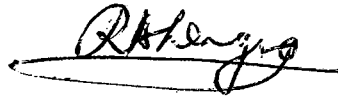
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Any error of omissions, or commissions, are all mine.

Thanking you

In Christ's name

A handwritten signature in cursive script, appearing to read 'Ratnakar Bhengra', written over a horizontal line.

RATNAKER BHENGRA

New Delhi

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INTRODUCTION

INTRODUCTION

Estimates made by the United Nations Conference on Trade and Development (UNCTAD) secretariat had indicated that between the early 1960's and 1972 skilled migration from the developing countries (consisting of engineers, scientists, physicians, surgeons and technical and kindred workers) to the United States, Canada and United Kingdom amounted to a little over 230,000 persons.¹ To this can be added a flow of about 29,000 to the United States during 1973-75 and 25,000 to Canada during 1973-76.²

Moreover the estimates took no account of skilled migration to other developed countries particularly those of Continental Europe, which is regarded as an important recipient of developing country skills. Therefore, even here the migration must be considerable. Gregory Henderson's earlier work also indicates the magnitude and sources of brain drain, and why it is a cause of alarm to developing countries, including India.³

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1. The Reverse Transfer of Technology. UN Doc. TD/B/C. 6/47. p. 4. See also The Reverse Transfer of Technology : Its Dimensions, Economic Effects and Policy Implications UN. Doc. TD/B/C. 6/7 Table 1.
 2. The Reverse Transfer of Technology UN Doc. TD/B/C. 6/47. p. 4.
 3. Gregory Henderson, The Emigration of Highly Skilled Manpower from the Developing Countries. UNITAR Report No. 3, 1970.

Another method of assessing the importance of the brain drain is comparing the figures of the value of aid given by developed countries to developing countries and the value of 'brains' drained to the developed countries. For instance, over a given period, assistance from the three developed countries amounted to \$ 46 billion, compared with an estimated \$ 50 billion for the imported capital value of brain drain.⁴

Apart from the above mentioned, other important factors are that the brain drain can cause damage to development. Related to this is the loss of stock of educated men and the effect of outflow on manpower requirements. It is obvious that developing countries need all the qualitative brains that are available in the early stages of their development and brain drain drastically reduces the manpower resources. Moreover, the migration of trained personnel deprives the homeland of the costs of that persons' education and of the services it provided during his upbringing, these it cannot recover either through increased national productivity or through taxes on the recipient of his salary as, frequent, immediate and permanent emigration takes place.

Finally, the most important losses centre around the contributions trained persons made creatively in terms of

4. The Revenue Transfer of Technology: Its Dimensions, Economic Effects and Policy Implications. UN Doc. TD/B/C. 6/7 p. 11-12. See also, The Revenue Transfer of Technology : Economic Effect of the Transfer of Trained Personnel from the Developing Countries UN.Doc. TD/B/C:6/7, p. 2.

leadership and talent in the areas of politics, development, planning, management, science etc. Trained men become masters in their fields and their potential contribution is lost from developing countries in favour of developed countries. Therefore it is imperative to mitigate the problem of brain drain by appropriate measures.

Conventional discussions of international economic relations have tended to concentrate exclusively on commodity and financial flows between countries "The evidence of history, however, regarding the importance of international human migration in the economic developments of nations seem overwhelming. Furthermore, the more recent experiences of the increasing flows of highly skilled manpower from developing to developed countries, under an unequal exchange system, indicates strongly the need to take explicit account of the reverse transfer of technology as an integral part of the wider framework of international economic relations".⁵ This phenomenon stems and continues on the part of some countries realizing the value of high level education for social, economic and cultural development. The magnitude of the problem has been empirically stated in some studies, indicating to what extent the aid by the developed countries is affected by the reverse transfer of technology from the developing countries.

5. Ibid. UN Doc. TD/B/C: 6/7, p. 2.

Therefore, from the developing countries prospective the adverse socio-economic effects of brain drain are undesirable, and therefore arises the importance of viewing legal enactments or international norms whereby brain drain can be controlled or regulated.

The brain drain phenomenon as experienced after the second world war is of such dimensions and complexities, that the extant literature on it still leaves one overwhelmed with the feeling that we have been merely chipping away when in actuality there is a boulder to move.

However, the problem has been realised by nations, and also by the United Nations and urged by its resolutions the United Nations Institute for Training and Research conducted two studies. "The Emigration of Highly Skilled Manpower from the Developing Countries",⁶ by Gregory Henderson and "The Brain Drain - Emigration and Return"⁷ by William Glaser. Both these studies give some data to measure the magnitude and also present the socio-economic causes and fall out of the phenomenon, with some reference to the policy issue.

UNCTAD has also produced some literature, such as "The Reverse Transfer of Technology; Economic Effects of the Outflow of Trained Personnel from Developing countries"⁸

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6. Gregor Henderson, The Emigration of Highly Skilled Manpower from the Developing Countries UNITAR Report No. 3, 1970.
 7. William Glaser, The Brain Drain. Emigration and Return UNITAK Report No. 22, 1978.
 8. The Reverse Transfer of Technology: Economic Effects of the Outflow of Trained Personnel from the Developing Countries. UNDoc. TD/B/AC.11/25/Rev.1.

"The Reverse Transfer of Technology : Its dimensions economic effects and policy implications".⁹ Here too, the magnitude is illustrated, through the second study does mention the limitations of the available data. Moreover a similar socio-economic approach is adopted, with the first study laying more emphasis on the economic effects.

Two studies conducted by UNCTAD, "Policy Issues for Developing Countries"¹⁰ a case study of Sri Lanka and "Consideration of Policy Issue at the International level"¹¹ adopt a more legal approach.

Another important study has been done by K.N. Kabra in his "Political Economy of Brain Drain"¹² and he does a historical survey of the phenomenon and as the title hints, adopts a value premise as to how the interests of the third world can be protected.

As it is self evident most of the studies conducted so far are from the socio-economic viewpoints. They have two areas of dissatisfaction. First the conceptual understanding and definition of the problem, and second, the legal issues involved as to how we can best tackle it both

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9. The Reverse Transfer of Technology : Its Dimensions, Economic Effects and Policy Implications. UNDOC TD/B/C. 6/7.
 10. Policy Issues for Developing Countries. UNDOC TD/B/C 6/AC. 4/4.
 11. Consideration of Policy Issues at the International Level: The Reverse Transfer of Technology : Braindrain. Source flow accounting, compensation, taxation and related policy proposals. UNDOC. TD/B/C. 6/AC.4/2.
 12. K.N. Kabra, Political Economy of Brain Drain (Annold-Hienemann 1976).

at the national and international levels.

The present study is designed to address these two aspects of the problem. Not many attempts have been made to probe into the legal aspects of this problem. The vague conception of brain drain is a part of this problem and unless one answers at a working definition of the term one will not be able to seek sensible solutions. In fact Johannes van Aggelen says, "... it is doubtful whether the brain drain phenomenon as such can be formulated in legal term".¹³ However, he does concede that there has been international acknowledgement of "the urgent need to formulate national and international policies to avoid brain drain and obviate its adverse effects".¹⁴ It seems therefore that this problem will persist and a greater conceptual clarification is needed of the term brain drain, before one can ever consider its regulation or control.

When regulations or controls are mentioned one notices immediately the "conflict between brain drain control and effective realization of the right to live"¹⁵ Given the universal right of everyone to leave any country including his own and to return to his country, the

13. Johannes van Aggelen, "The Consequences of Brain Drain for an Effective Realization of Everyone's Right to Live". Indian Journal of International Law (Delhi) vol. 26(1986) nos. 3&4, p. 341.

14. *ibid.*, p. 341.

15. *ibid.*, p. 360.

question of barring doesnot even arise. Therefore, the legal issue that is increasingly going to occupy our minds is how and upto what extent can one resort to legislative or administrative controls of the brain drain.

Therefore in the foremost chapter of the present study "The Nature and Defination of the Brain Drain" will be stated.

In the second chapter the causes shall be examined i.e. the pushes and pulls that cause such migrations.

The third chapter deals with the international and national norms regarding emigration. Related to the preceeding chapter, is the following chapter which deals with formulation of emerging norms at the United Nations level.

The following two chapters take a look at some proposed solutions. Chapter five deals with proposals made by UNITAR and UNCTAD, while the sixth chapter contains other proposals made under the Colombo and the OECD reintegration scheme.

Finally, the seventh chapter will be an over all assessment and conclusions. Suggestions as to what measure the developing countries including India can adopt legally or administratively to stem the tide of the brain drain will be stated, while at the same time bearing in mind, the universal right to emigrate¹⁶ the duty owed to the

16. Universal Declaration of Human Rights.

home country by its nationals and the home country's predicament.¹⁷

This research is based on both primary and secondary sources. The primary source materials consist of the resolutions, declarations and the studies of the United Nations and its constituent bodies, especially UNCTAD and UNITAR. The documents of other organizations and countries are also cited. Regarding India, the relevant Act and case laws are also cited.

The secondary source materials consist of publications pertaining to the subject, and also include articles from journals and digests.

17. Universal Declaration of Human Rights.

CHAPTER - I

NATURE AND DEFINITION OF THE BRAIN DRAIN

William Glaser states that there "... is much ferment in the United Nations system that has a direct or indirect bearing on the problem of brain drain. The current emphasis within and outside the United Nations system on the necessity of meeting basic human needs and on the ongoing dialogue concerning the establishment of a new international economic order will undoubtedly have implications for the brain drain".¹ This is especially true in view of the emphasis laid on the problem by the United Nations General Assembly at its seventh special session.² What is the brain drain? The term itself is loaded, suggestive of a loss of vital resources, without compensation. This interpretation is supported by illustrations that show that human capital, as a strategic resource, is flowing out of economies where it can make the greatest contribution to human welfare, and into economies already well supplied with trained, capable, scientific and administrative personnel".³ "One should be cautious in using the term

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1. William Glaser, The Brain Drain - Emigration and Return. UNITAR Report No. 22. 1978, p. xxi.
 2. UNGA Res. 3362 (S-VIII)
 3. Walter Adams, "The Problem" in the Brain Drain. Walter Adams (ed.) Macmillan, 1968, p. 1.

indiscriminately. In fact, all brain drain constitutes brain migration, but all brain migration does not necessarily constitute brain drain".⁴ Therefore he divides brain migration into four types; brain export, brain exchange, brain over flow and brain drain, of which the last two are of more importance and relevance.

Brain Export

"Brain migration may take the form of brain export by the sending country. The brain export country receives in exchange for brain, remittances continuously over a number of years".⁵ The payment may be spread over a number of years in tax or it may be once for ever lump sum exit tax. A consolidated price for the export of the commodity brain power may also be realised from the importing country. However the importational method that can be applied to price fixation has obvious limitations.⁶ It is not necessary that the market price of brain reflects its public costs. "In the case of brain export, the exchange price must be equal to the public and private costs of brain. Since the outgoing human capital... receives only the private cost, such an outflow cannot be considered to

4. Ghosh & Ghosh, Economics of Brain Migration, Deep and Deep Publications, 1982. p. 23.

5. Ibid., p. 25

6. Ibid., p. 25.

constitute brain export".⁷ It is very difficult to calculate the social cost, and shadow price keep on changing along with the time horizon. However, it is not difficult to judge by means of opportunity costs as to whether the returns from the traded brain power is sufficient to cover the domestic opportunity cost of the transferred brains, and it may be looked upon as a case of brain export.⁸

Some compensation for human capital migration by the countries of inflow to the countries of overflow has been suggested by Boulding⁹ and Watanbe.¹⁰ As payment for human capital import, the government of the recipient country could refund a fixed percentage of immigrants income tax to the country of origin.¹¹ There is no doubt that a large number of countries sending brain power abroad receive remittances¹² for instance, Pakistan immigrants working abroad constitute the second biggest source of Pakistan's foreign exchange earnings, but unless the remittances cover the private and public costs or opportunity costs of the migrants the brain migration cannot be said to be of pure brain drain category.¹³

7. Ibid., p. p. 25.

8. Ibid., p. 25.

9. K.E. Boulding "The National Importance to Human Capital" in The Brain Drain Walter Adams (ed.) Macmillan 1968, pp. 116-117.

10. S. Watanbe, "The Brain Drain From Developing to Developed Countries" International Labour Review, vol. 99(1969), p. 401-34.

11. Ghosh & Ghosh, n. 8, p. 26.

12. Gregory Henderson, The Emigration of Highly skilled Labour from Developing Countries UNITAR Report No. 3 1970. p. 125.

13. Ghosh & Ghosh, n. 11, p. 26.

Brain Exchange

According to Ghosh & Ghosh: "Brain migration may be in the form of exchange of scholars, researchers and students between less developed countries, and developed countries or between less developed countries themselves for the purpose of mutual benefit in terms of knowledge, expertise and training".¹⁴ Such a type of brain migration can more appropriately be called brain exchange. Brain exchange is a temporary phenomenon whereas brain loss is compensated by corresponding brain gain. However, the issue of net gain or net loss inherent in international exchange of scholars and researchers is an emotional one and needs further investigation for the purpose of policy formulations. "International exchange of brain power is not a new phenomenon and happens to be an important means of international co-operation, spread of ideas and transformation of private knowledge into a public good. It is obvious that brain exchange programmes enhance global welfare and as such, it should be encouraged by different acts, policies and action programmes. However in abnormal situation, brain exchange may get converted into brain drain".¹⁵

14. Man Singh Das, Brain Drain Controversy and International Students, Lucknow Publishing House, 1975 p. 45.

15. Ghosh & Ghosh, n. 13, p. 26.

Brain Overflow

Ghosh and Ghosh say that : "As a result of over production or slow rate utilisation of brain, some of the brain may remain wholly unabsorbed or surplus in a static sense. Due to lack of effective demand or excess supply at home, such brain may spill over and get absorbed in a foreign market. Brain migration of this kind may be called brain overflow".¹⁶ In fact Man Singh Das in his work says, that no evidence has been found where high level manpower is in shortage in the developing countries, including in his study or that their developmental programme have been negatively affected due to emigration. On the contrary these countries have a surplus of human resources in certain categories which cannot be absorbed in their sluggish economies.¹⁷ George Baldwin also in his "Brain Drain or Overflow"¹⁸ mainly depends on this type of migration. This is also implicit in the analysis of the internationalist model.¹⁹ In many low developed countries,

16. ibid., p. 24.

17. Man Singh Das, Brain Drain Controversy and International Students, Lucknow Publishing House, 1975, p. 81.

18. George Baldwin, "Brain Drain or Overflow, Foreign Affairs vol. 48, n. 2, (1979).p.

19. K.N. Kabra, "Political Economy of the Brain Drain" Arnold-Heinemann, 1976. pp. 79-83.

unplanned and comparatively cheap education coupled with limited employment opportunities have produced a reserve army of unemployed skilled labour. For instance, in January 1965, there were 75,000 unemployed engineers in India.²⁰ Earlier it was found that approximately 12,000 students went to the United States alone for higher studies of which many did not return.²¹ In Latin America out of 60,000 professionals having University qualifications only 25 per cent were employed productively.²² In Nigeria 63 per cent of the students qualified in social sciences when the country needed only 40 per cent.²³ In fact educated unemployment problem which is the genesis of brain overflow is to be witnessed in many less developed countries, more particularly in Colombia, China, India, Iran, Nigeria, Pakistan, Philippines and South Korea.²⁴ The surplus brain power arises due to (i) overproduction; (ii) low employment generation capacity; (iii) non-availability of an appropriate job where brain may be optimally utilised; and

20. Ghosh & Ghosh, n. 16, p. 24.

21. Man Singh Das, n. 17, p. 71.

22. Gregory Henderson, n. 12. pp. 52-53.

23. On problem of world wide brain drain. UNITAR, New York, 1970, p. 101.

24. Ghosh & Ghosh, n. 20, p. 14. See also The Reverse Transfer of Technology. UN Doc. TD/B/C. 6/47, p.7.

(iv) existing brain power lacking in experience or competence for the available jobs requiring a fairly high standard of efficiency, excellence and training.²⁵ Surplus brain power may be interpreted in absolute or relative senses. In qualitative terms, there may be an over-production of brains, and qualitatively the jobs may be too good for the brains or conversely the brains may be too good for the jobs, leading to non-utilisation of brain power in a given economy. "Surplus brain power ex definitione has zero opportunity cost. The migration of this surplus brain constitutes an overflow and is not at all harmful, rather it is considered very helpful for the solution at general unemployment problem. It is neither desirable nor very practicable to check the emigration of such non-utilised brain power".²⁶

Brain Drain

Brain drain is the main species of the entire genus of brain migration from less developed countries. It is a loaded journalistic term and it is unfortunate that it was ever used in scientific discussion. "It is a one way migration of skilled people mostly from less developed countries to developed countries. The literature on the

25. Ghosh & Ghosh, n. 24, p. 24.

26. *ibid.*, p. 24.

problem of brain drain either makes no attempt to precisely define the concept or blurs the concept between brain drain and other kind of brain migration".²⁷ The manpower involved in brain drain is under utilised or over utilised and is from the employed category in the home country.

It has been observed in many countries, however, that emigrated brain power comes back after a few years. This then requires a re-estimation of the magnitude of the brain drain by deducting from the prior calculations the brain power that returns home.²⁸ Moreover students failing to return home do not necessarily constitute brain drain unless it is shown that the economy is in a position to absorb them fully.²⁹ An example will help to illustrate this. Take the case of a bacteriologist from a developing country who received his training in his home country prior, to his coming to the United States or did his advanced studies in the United States, in which case the United States incurred educational costs. This young man now returns to his country of origin out of a sense of duty with uncertainty and at a high risk. After all his training and education, he may be hired as a clerk for

27. Ibid., p. 27.

28. Ibid., p. 27

29. Man Singh Das, n. 21, pp. 79-80.

the next five years. Here is the case where a developing country is unable to utilize a qualified professional. It is clear in this case that the country is not gaining from his service. Now if he were to migrate it does not necessarily constitute brain drain.³⁰ In the event of his being required by the country, if he fails to come back then it constitutes a brain drain.

In the case of brain drain the export of human capital does not cover the private and public costs or the shadow price of human capital exported, but represents only element of cost, mostly the private cost. Such a type of brain migration is also not from the category of surplus or unemployed manpower, but from the employed or under employed pool of highly skilled personnel who can positively contribute to the present and future development of the country.³¹ Thus brain drain has development retarding and welfare reducing effects. This type of brain migration has implicitly been made the basis of the nationalist model.³² An excellent exposition of this model is found in K.N. Kabra's "Political Economy of the Brain Drain". He concludes that the "hewers of wood and drawers of water of the days gone by are transformed into a

30. Ibid., pp. 79-80

31. Ghosh & Ghosh, n. 28, p. 27.

32. Don Patirkin, "A Nationalist Model" in The Brain Drain, Walter Adams (ed.) Macmillian 1968, pp. 92-109.

steadily growing stream of graduates and Ph.Ds trooping out to man the laboratories and research institutions of the development market economies".³³

Man Singh Das defines brain drain as : "A flow of skilled and talented people from countries where they can make the greatest contribution to human welfare, to the highly industrialized countries which are well supplied with trained, skilled and talented people".³⁴ Herbert Grubel and Anthony Scott adopt the following definition: "A person is a brain drain immigrant if he has the intention of holding permanent employment in a country other than the one in which he was educated upto a specified level".³⁵ The OECD for purposes of special study "... has arbitrarily defined the population of the brain drain to be such persons as have undertaken higher education and obtained a university degree".³⁶ UNCTAD however states that the "most appropriate definition of those skilled migrants from the developing to the developed countries who constitute the (brain drain) is derived from the classification adopted by the United States Immigration

33. K.N. Kabra, Political Economy of Brain Drain, Arnold- Henemann. 1976, p. 127.

34. Man Singh Das, n. 29, p. 5.

35. Herbert G. Grubel & Anthony Scott, The Brain Drain Wilfred Lavier University Press, 1977, p. 49

36. Ibid., p. 49.

and Naturalization Service: professional, technical and kindred (the PTK) workers".³⁷ The PTK classification is broadly similar to that used in other developed countries although in terms of statistical comparability there may be some difficulties. In the same study it also adopts the "voluntary or socio-economically motivated migration"³⁸ UNCTAD itself has not come forth with a definition because of the following reasons:

a) "The definition and categories used for classifying immigrants are not yet standardized across the developed countries of immigration, which makes inter country comparisons of flows rather difficult".³⁹

b) "The data, even when systematically available, almost always relate to gross rather than net flows. Ideally, figures on reverse of flows and to and fro migration should be deducted from gross figures. But because of deficient data, measurement has been very difficult except on a rough basis".⁴⁰

c) "Inconsistencies may also arise from the general practice of recording immigration data on the basis of country of last permanent residence as opposed to nationality, particularly as it is known that much indirect

37. The Reverse Transfer of Technology, UNDoc. TD/B/C. 6/47, p. 3.

38. Ibid., p. 3.

39. Ibid., p. 6. See also TD/B/C. 6/7 para 23.

40. Ibid., p. 6.

routing of developing country professionals via more than one developed country to other developed countries takes place".⁴¹

d) "The problem of incompleteness may also arise from the practice of excluding from P.T.K. statistics all those coming under the category of 'dependents', some of whom may be highly qualified and would therefore add to the stock of skilled manpower in host countries".⁴²

Therefore one sees that UNCTAD has not adopted a definition of its own for the above mentioned reasons. Perhaps after an addressal of these reasons a legal definition more agreeable to all can be adopted. However for working purposes it finds the United States I.N.S. definition appropriate. Moreover this definition is similar to definitions adopted by some other developed countries.

The next question that may be asked is, what are the specific labour groups that qualify within brain drain. "Data collection in this respect has shown a lot of latitude, any one claiming to be a professional or a scientist has been counted as such. It is possible to adopt an elitist approach and include in brains only highly educated and trained personnel. This view excludes the exodus

41. Ibid., p. 6.

42. Ibid., p. 6.

of many middle level personnel like teachers, technicians, nurses, mechanics, foremen etc., mainly involving skill drain".⁴³

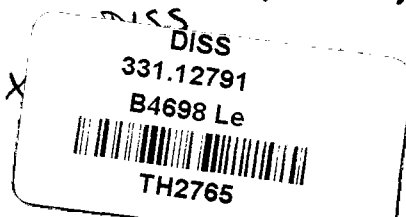
The United States I.N.S. defines 'profession' as "an occupation which requires specialized knowledge to do the occupation fully. It includes fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law theology and economics. A profession requires completion of a specific course of education at a United States accredited college or university, resulting in a baccalaureate or higher degree or foreign equivalent of such a degree, in a specific occupation."⁴⁴



The International Labour Organisation (ILO) has tried to standardize qualified manpower and uses the term 'professional, technical and related workers' (PTR). This phrasing with some variety is widely used and is defined by the ILO as "workers in this group conduct research and apply in a professional capacity scientific knowledge and methods to a variety of technological, economic, social industrial and governmental problems, carry out technical tasks ancillary to scientific research, development and practice, and perform religious, educational, legal, artistic

43. K.N. Kabra, n. 33, pp. 88-89.

44. The Immigration of Permanent Foreign Workers, United States INS. M-272, 1986. p. 9.



and literary functions. Those classified in the major groups perform tasks which usually require training in a specific scientific or other professional field, at a university, technical institute or similar establishment or which require creative ability in literature or out or talent in entertaining".⁴⁵

In sum, the definition of brain drain drawn adopted by UNCTAD could make a good starting point. The ILO has made a rather exhaustive attempts to do this, and through this study does not contain the definitive break up, the ILO's work in this area is worth recommending. The break up of labour type also becomes more apparent, in the light of Ghosh and Ghosh's different groupings of brain migration. Their study is important because each of the respective phenomenon is worth researching. However given the paucity of material regarding brain drain itself, the other forms of migrations surely have not been as researched. Their study is important, because of the developing countries intent to either make the emigrants or the developed countries compensate the loss. Now it is much more difficult to include less skilled labour in brain drain and ask it to pay, rather than the more higher earning brains. Moreover, the developed countries will find it economically and even politically embarrassing if lower income groups are included in brain drain. Further, they are groups

45. International Standards Classification of Occupation, Geneva, ILO, 1958.

like exchange students, who definitely do not fall within brain drain, and therefore given the many reasons, a more narrow and specialised definition of brain drain is feasible. This will also be more manageable.

CHAPTER - II

CAUSES OF BRAIN DRAIN

An attempt will now be made to summarize the main arguments that frequently occur in casual studies. Migration is not a random phenomenon. This fact indicates that "for the most part, 'push' forces in the donor countries have their counterparts in the 'pull' forces of the recipient countries. All these factors would seem to be interdependent, with none of them acting on their own in any significant way".¹

Economic Factors

Income differentials between the developed and developing countries and other related economic considerations have been most often cited as the main cause of the brain drain.² Even where the professional from a developing country has a salary level as good or better, relative to the price wage structure of his own country, then he might receive in a developed country, there usually is a greater absolute difference between his salary at home and that abroad in a developed country, particularly the United States.³ Often the later is a high multiplier of the former.

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1. The Reverse Transfer of Technology, UN Doc. TD/B/C 6/47, p. 9.
 2. Ibid., p. 9.
 3. Gregory Henderson, Emigration of Highly Skilled Manpower from the Developing Countries UNITAR Report no. 3, 1790, p. 88.

In India, for example, the Medical and engineering graduates were the highest paid scientists at Rs 677 (\$ 90) and Rs 540 (\$ 72) respectively a month while those trained in geology, mathematics, statistics and zoology were paid Rs 420 (\$ 56) a month, with chemists and other scientists in between".⁴ In the United States, the median annual salary for chemists and mathematician was just over \$ 900 per month, for physicists, economists and statisticians, \$ 1000 a month and for professional medical people \$ 1250 a month".⁵ Though these figures are rather old, the differences in salaries still remain large.

Grubel and Scott illustrate the predominating influence of the absolute income differential by the following example. The first difference between a migrating labourer and an engineer is the existence of a wider absolute gap in earnings. Thus if an unskilled worker earns \$1000 and \$ 4000 in countries A and B respectively, he will increase his earnings by \$ 3000 by migrating from A to B. Now if in both countries the salaries of engineers are three times those

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4. A Rahman, in a paper submitted to International Conference on Comparative Research and Social Change and Social Disparity, quoted in UNITAR Report No. 3 1970, p. 88.
 5. Gregory Henderson, n. 3, p. 88.
 6. Herbert G. Grubel & Anthony Scott, The Brain Drain Willford Cournor University Press, 1973, p. 21.

of labourers, then an engineer increases his earnings by \$ 9000 through migration.⁶

If therefore the proportional income differentials in various countries tends to be approximately the same, the greatest absolute gain on migrating will go to those who are already well paid, so that migration among such groups should, when a possibility of migration is open, be greater than among labourers.⁷

From the above example, it can easily be seen that given the unequal economic relationships that exist among developed and developing nations the economic factor can indeed be a decisive one. Such differentials are too great not to encourage substantial emigration. In addition to the higher material life which salary differentials can bring, salary not infrequently becomes a status symbol in itself.⁸

Krugman and Bhagwati in econometric studies of 'internal migration' conclude that "the evidence that migration is influenced by economic incentives is so uniform and secure, that if any one should argue for any particular case that economic gain has no effect, one should be sceptical, particularly where migrants do in fact gain economically from their move. Furthermore, such evidences as there is suggests that education makes people more responsive to the

7. Ibid., p. 21.

8. W. Adams & J.B. Derlam, "An Agenda for Action" in the Brain Drain, Walter Adams (ed.) Macmillan, 1968 p. 248-50.

possibilities of gain from migration".⁹ However, Krugman and Bhagwati also acknowledge the importance of some non-economic motives. "Income variables rarely explain even as much as half of the variance in these studies, and social factors such as race or education, seem to affect responsiveness to economic incentives. For the individual migrant, income considerations may be relatively minor but the effect of income is nearly always significant and never perverse".¹⁰

Studies based on questionnaire as opposed to econometric methods tend to support the general conclusions, although they also refer to certain non-economic factors which appear to have received limited attention in econometric studies. Thus Glaser in his UNITAR studies suggests that a number of variables such as working conditions, professional needs, migrants ability and cultural and social considerations typically entered into a persons decision to migrate. "But he concluded after carrying out a more sophisticated analysis, that the strongest influence on migration plans at all stages were adequacy of income, quality of jobs and family interests while income and job opportunities according to the study, were cited by respondents as reasons for migration, family interests generally

9. P. Krugman & J.N. Bhagwati "The Decision to Migrate"
Quoted in TD/B/L. 6/47, p. 10.

10. Ibid., p. 10.

appeared as reasons for staying home".¹¹

Unemployment or lack of professional employment possibilities plus lack of job-content requisite for advanced training are frequent major characteristics of underdeveloped countries, deeply affecting talent migration".¹²

"The London Times found, for example that 40 per cent of the engineers trained in Burma in 1961 had not found engineering employment eighteen months later; that a household survey in the Philippines disclosed that 35,000 college graduates without jobs, that in Thailand over 1000 candidates, including University graduates may appear for these clerical posts in government".¹³ Indian engineer graduates, unemployed reportedly in the tens of thousands had held riots.¹⁴

"The crisis is not only confined to engineers. Employment opportunities for all groups of educated professional and technical personnel have grown at a much slower rate than the growth in numbers of persons on the register of employment agencies. The registered number in 1966 was 917,487 and the number of placements was 171,326 in 1967, the educated job-seekers totalled 1,087,271 against 151,442 placements".¹⁵ The 1961 census revealed that 10.4% of

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11. UNDOC TD/B/C. 6/47, pp. 10-11.
 12. Gregory Henderson, n. 5, p. 90.
 13. Adams & Dirlam, n. 8, p. 251.
 14. Gregory Henderson, n. 12, p. 90.
 15. Man Singh Das, Brain Drain Controversy and International Student. Lucknow Publishing House, 1972, p. 7.

all scientific and technical personnel were unemployed and 18.6% were employed outside the occupation for which they had been trained.¹⁶ This trend has continued to vex the country and its planners. This could be said to be true of most developing countries.

Some developing countries such as China, South Korea, the Philippines and India educate more people, and more high level specialists, than they can employ. In some countries, educational systems have been more hesitant to change than have economies, and graduate experts far in excess of demand.¹⁷

Miscalculations in supply can produce unemployment and among large populations, relatively small miscalculations can produce numerically impressive unemployment as in India, "where between 1951 and 1965, facilities for engineering education increased at the degree level from 4,188 to 24,695 and at the diploma level from 6,216 to 48,048".¹⁸ Merely increasing statistical indicators at a fast rate is not enough. Even if over all growth rate accurs certain fields may lag. For these specialisties and for the entire economy, the number of professionals may outstrip the number of jobs. Therefore many observers have recommended better planning, so that numbers in particular fields correspond

16. Gregory Henderson, n. 14, p. 90.

17. UN Doc. TD/B/C. 6/47, p. 10. See also Gregory Henderson, n. 16, p. 90.

18. Gregory Henderson, n. 17, p- 92.

more closely to the country's current absorptive capacities and future needs.¹⁹ The above mentioned degree of expansion had proved at least temporarily excessive not in relation to developmental tasker in India, but in Indian capacity to employ these engineers. In relation to employment, and oversupply of engineers, calculated then at some 50,000 official pleas were made to Indian student engineers to find employment overseas and attempts by the Indian government to limit engineering enrollment.²⁰

Professional Factors

Working conditions may also have some effect on migration decisions. Lack of infrastructure in the form of instruments, equipments, libraries etc. in home countries is one of the reasons why developing country professionals have wanted to pursue their research interests in developed countries institutions. "Proximity to new developments in professional fields may be an added attraction. Another reason may be sharp contrasts between large amounts of government support for research and development in developed countries and the lack of government sponsorship of research and development in developing countries".²¹

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19. William Glaser, The Brain Drain - Emigration and Return. UNITAR Report No. 22, 1978, p. 127.
20. Gregory Henderson, n. 18, p. 92.
21. UNDOC. TD/B/C. 6/47 pp. 10-11.

Separation and isolation from the 'State of art' which the specialist practices has been an important reason for movement both inside and outside national borders towards large centres of practice and learning of the speciality. The tremendous growth of technology, science and professions has greatly increased the weight and importance of these countries. The sense of isolation felt by the specialists when away from them and the increasing expense, and complexity of the equipment needed by many kinds of modern research is an obvious factors, the breaking of constant ties with the specialists growing important peer group is an equally important one.²²

Moreover, many scientists have other crushing burdens on them apart from their academic work. A distinguished Arab physicist has pointed out that "a physicist may never need to know anything about his University or institute. He certainly need not be concerned with co-ordinating University, scientific and technological groups with productive structure and government".²³ And yet, it is exactly with such burdens that he is weighed down with.

In the last 25 years and especially since 1950, the rise of research expenditure has been precipitous, especially

22. Gregory Henderson, n. 20, p. 95

23. Enrique Oteiza "A Differential Push-Pull Approach" in The Brain Drain, Walter Adams (ed.) Macmillan, 1968. p. 126.

in the United States. Total research and development expenditure in the United States rose from \$ 74.1 million in 1940 to over \$ 14 billion in 1964-65.²⁴ The period 1950-60 witnessed an unprecedented growth in the nation's manpower engaged in scientific and engineering activities. The number of scientists and engineers in reseafch/development and industry rose from 234,800 in January 1958 to 358,900 in January 1960 or by 47%. In the same period, the expansion of employment of research and development scientists and engineers in electrical equipment and communication was 90% and it was 72% in aircraft and missiles, responsive in large part to increased defense and space programmes.²⁵

In comparison to this, only a small number of developing countries are able to conduct research and devote funds to it. Stevan Dedijer observed that "between 15 to 39 countries of the world with less than one third of its population possesses practically all its science, spending 95 per cent of the world's research and development funds and reaping most of the benefits thereform. The hundren or more other nations with two thirds of the world's population have virtually no scienfific research at all".²⁶ Even

24. Gregory Henderson, n. 22, p. 97.

25. Brinely Thomas, "The Modern Migration" in The Brain Drain", Walter Adams (ed.) Macmillan, 1968, pp. 40-42.

26. Gregory Henderson, n. 24, p. 98.

within the possessing nations who do research and among the developed nations in that group, different levels of expenditure, plant. equipment and professional opportunity causes both brain drain and concern relating to the accentuation of inequalities of wealth and power. In many sense developing countries are rich in possibilities for research, but unless the researcher is armed with funds, he has little to support his research plans in most developing countries. Therefore, he is increasingly likely to be reluctant to return home or to decline attractive offers from abroad. "The migration of the serious scientific researcher is symptomatic of one of the world's problem least presently accessible to solution. Research is a classic example of a pull which developed countries possess and an attraction which most developing countries are far from being able to exert on their scientific citizens."²⁷

Even William Glaser in his UNITAR study concluded that several "...groups have numerous complaints about conditions at home and large proportions believe the situation for superior abroad".²⁸ He further added that the "specialists with the greatest numbers of frustrations are bacteriologists, botanists, physiologists, zoologists and journalists".²⁹

27. Ibid., p. 98.

28. William Glaser, The Brain Drain, Emigration and Return UNITAR Report, no. 22, 1978, p. 84.

29. Ibid., p. 84.

Even the earlier work of Man Singh Das supports the argument of the lack of scientific and supportive infrastructure and stated as early as then, that about 2,000 scientific and technical personnel are migrating to Britain from India every year. The report also revealed that there had been a steady increase in the number of doctors and nurses going to Britain.³⁰

Social scientists are also not immune from isolationist feelings and this is indicated so by V.M. Dandekar in his work.³¹

Therefore it is apparent that working conditions and professional factors can induce the migration of 'brains' abroad.

Social Factors

"The effect of social conditions could include anything from the stability of the political and social environment to the availability of consumer goods".³² One of the major findings of the UNITAR study as noted in the Secretary General's report was that "professionals belonging to minority groups in some societies that had adopted policies favouring the majorities ... tended to be apprehensive about their futures and emigrate. The linguistic and cultural links of some developing countries with their former metro-

30. Man Singh Das. Brain Drain Controversy and International Students. Lucknow Publishing House, 1972, p.71.

31. V.M. Dandekar, "India", in The Brain Drain, Walter Adams (ed.) 1968, pp. 203-32.

32. TD/B/C. 6/47, p. 11.

politan countries with their former metropolitan countries may also contribute to migration among professionals who study abroad".³³

William Glaser says that among "those from developing countries who study abroad, membership in minority groups is strongly associated with the brain drain. Internal conflict among ethnic, linguistic, racial and religious groups is common in the world, and the lives of professionals are affected."³⁴ For example the "brain drain consists partly of French speaking minorities moving out of Africa, the Middle East and Asia, towards North-America. In addition it includes members of Greeks, Italians, Eastern European, and German families from Latin America, Greeks and Armenians from the Middle East, and Western minorities from Asia."³⁵

According to Gregory Henderson the "...rapid urbanization of developing countries as well as developed countries appears to be associated with brain drain. Migration to national centres usually precedes emigration to world centres and it is in the former that initial culturization to supranational professional values takes place".³⁶

"Typically, cultural and professional patterns so closely equate education with the capital city or other major

33. Ibid., p. 11 See also UNDoc. E/1978/92 para 43.

34. William Glaser, n. 28, pp. 39-40.

35. Ibid., p. 45.

36. Gregory Henderson, n. 26. p. 92.

cities that when urban centres become saturated, the professional would prefer to migrate to centres abroad rather than to a more rural environment at home where some demand exists. In some extreme instances, this factor is compounded by wide linguistic and cultural differences (like in India and Nigeria)".³⁷ Thus for instance thousands of Indian physicians prefer to practice in the United Kingdom, Canada and the United States, rather than accepting medical positions which lie vacant at home.

The complexities of modern professional preparation gives rise also to strong feelings of career attachments with the possibilities of advances within the career sufficient for a satisfying life time. "There (is) in other words ... some tendency for professional values and objectives to erode devotion to social service as the societies of professionals become increasingly large and absorbing. These career expectations brings to younger specialists concomitant impulses to associate themselves with societies which can encourage careers with convictions of their worth".³⁸

Therefore one notices that there are quite a few causes that lead to brain drain. It is clear that the 'push' forces in the donor countries have their counterparts in the

37. Ibid., p. 93.

38. Ibid., p. 33.

'pull' forces of the recipient countries, and all of them are interdependent. However, out of the professional factors, unemployment, urbanization, social setting and the economic factors, its easily seen that the later is the predominating influence. Nevertheless, its not always so. One noticeable aspect during the research of the causes of brain drain, was that the causes of the other types of migrations have not been studied. Given the fact that the other types are minor in nature and not as important, it still would be interesting to research their causes and patterns.

CHAPTER - III

INTERNATIONAL AND NATIONAL NORMS REGARDING MOVEMENT

The magnitude of the brain drain that is being witnessed today is quite a recent phenomenon and there is not much literature, legal or otherwise on its control or regulation. However since brain drain is a sub-form of emigration, it necessarily follows that it should be governed by the emigration laws of a country and also the international standards set concerning the same. Now legal controls are necessitated because of the grave problem brain drain is posing to many developing or underdeveloped countries. The question then is of striking a balance between international norms and national norms, or more specifically looking at the problem from the individuals point of view and of the society that reared him and perhaps has a stake on him.

Before proceeding further, it is necessary to clarify certain terms that are often interchangeably used. These are the right to freedom of movement, right to travel, right to passport, right to emigrate and right to visit. Since brain drain entails movement of some sort it is necessary to analyse the phenomenon in relation to such terms.

Freedom of Movement

They are some grounds for thinking of the right to freedom of movement as one of the fundamentals of man's

liberties:¹ "When Epictetus for example speaks of his freedom, he describes it in this way: "I go wherever I wish: I come from where I wish. The Greeks most commonly contrasted their freedom to being bound or tied and being for this reason unable to move. Being free in this most primitive sense is the opposite to bondage. To be free is to be unimpeded in the exercise of the natural desire to move".² One of the meanings attributed to the saying that men have a natural right to freedom of movement is to assert that the desire to move is a natural, universal and reasonable one, and hence it is not so much a man's desire to move that needs to be justified as any attempts to frustrate the satisfaction of that desire."³

In Anglo-Saxon law that right emerged at least as early as the Magna Carta, "which is in its 42nd Chapter grants that it shall be lawful to any person, for the future, to go out of our kingdom and to return safely and securely, saving allegiance to itself".⁴ When it is remembered that many of the 'civil liberties' as we now know them today the 'freedom' of speech, worship and assembly are not mentioned in the Magna Carta, it is curious that it contains a chapter on freedom of movement.⁵

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1. Maurice Cranston, What are Human Rights, The Bodley Head p. 31.
 2. Ibid., p. 31.
 3. Ibid. , p. 31.
 4. Louis L. Jaffe, "The Right to Travel : The Passport Problem", Foreign Affairs, vol. 35(1956-57), p. 19.
 5. Ibid., p. 19.

Even Blackstone said that "personal liberty consists in the power of promotion of changing situation, or moving one's person to whatsoever place one's own indication may direct".⁶ Therefore one sees that freedom of movement in the west and particularly in the United Kingdom had "that powerful yet ambiguous confirmation which comes from a custom which is taken for granted and upon which so many of the 'rights' and 'freedoms' ... rest".⁷ Chafee showed how deeply enjoined in the American history this freedom of movement is. Freedom of movement across frontiers in outer direction and inside frontiers as well, is a part of the heritage. Travel abroad, like travel in the country may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in the scheme of values".⁸ Our Nation "wrote Chafee" "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases".⁹

On the Universal plain, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10th December 1948. Article 13(2) of the decla-

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6. Fleming James, "Passport Refusals for Political Reasons..." Yale Law Journal, vol. 61 (1952), p. 190.
7. Louis L. Jaffe, n. 4., p. 20.
8. B.R. Agarwala, The Law Relating to Entry Into and Exit from India, Delhi, 1970, p. xx.
9. Ibid., p. xx.

ration prescribes that¹⁰ "everyone has the right to leave any country, including his own and to return to his country".¹¹ Therefore, the right of freedom of movement is traced to antiquity and is still alive and upheld in many countries of the world even today.

Right to Travel

Right to travel is another term that pertains to movement. In fact it is synonymously used by most authors and concerns both entrance and exit. Dennis Lloyd in his book, "The Idea of Law" places the freedom to travel under 'personal freedom'. He observes that freedom to travel both within and outside the confines of the territory of the state, raises important issues of personal freedom. This type of freedom has largely been regarded as the rule in modern times in Western Europe.¹³ Similar views have also been expressed by another learned author, Harry Street in his book, "Freedom, the individual and the Law". He says, "if the freedom to travel is of course an important freedom: men want to travel abroad on business, for family visits, to consult with experts in their profession, for education and recreational purpose."¹⁴ "Freedom to leave

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10. Daniel C. Turack. The Passport in International Law Lexington Books, 1972, p. 1.
 11. Article 13. Universal Declaration of Human Rights.
 12. B.R. Agarwala, n. 8, p. xx.
 13. Ibid., p. xx.
 14. Ibid., p. xx.

one's country temporarily for travel abroad is important to individual, national and international well being".¹⁵ Daniel C. Turack in a section entitled "The Right to Travel as a Human Right" invokes article 13(2) of the Human Rights Declaration as containing the right to travel.¹⁶ Hence it is seen that the right to travel as proposed by these authors have a similar, if not the same meaning as right to freedom of movement.

Right to Emigrate & Right to Passport

These two rights are related and interdependent you can't have one without the other. First we will deal with the right to emigrate and then the technical requirement of a passport. Emigration is associated with going out or an exit. The right to emigrate is presumed to exist in the right to freedom of movement and the right to travel.

If movement is expressed as 'coming and going', it can be said that while some limitation on 'coming' may be justified on the basis of right to property and its derivations, there is no corresponding justification to be found for laws forbidding men's going out'. "Yet it is just such laws which have affected increasing numbers of persons in twentieth century. In the past, it was the particular fate of slaves, bondsmen and serfs to be forbidden to leave their

15. Heming James, n. 6, p. 171.

16. Daniel C. Turack, n. 10., p. 1.

place of domicile. Today millions and millions of nominal 'citizens' suffer under this interdiction. Slavery has been abolished, but when a government ordains that its people may not leave their own country without some special exit visa issued as an act of grace, that government is in effect imprisoning the entire people within the boundaries of its territory".¹⁷ Clearly the only sound justification for the imprisonment of any one is that the person concerned has committed a crime; but the millions of people who are confined within their frontiers today are certainly not guilty, nor are they even accused of any crime.¹⁸

As against such practice of preventing emigration the Universal Declaration of Human Rights prescribes "everyone has the right to leave any country, including his own ..."¹⁹ The Principles of the International Bill of the Rights of Man prescribes "The right of emigration and expatriation shall not be denied".²⁰

The right of emigration the practical benefits of which are rigidly circumscribed by the absence of a corresponding right of immigration- is of great significance. "There seems to be no compelling reason militating against its recognition. Even the duty of military service need not stand in its way so long as the state is free to

17. Maurine Cranston, n. 3, p. 33-39.

18. Ibid., p. 34.

19. Article 13 Universal Declaration of Human Rights.

20. The Principles of an International Bill of the Rights of Man.

prescribe that a person thus withdrawing himself from that duty shall forfeit the right of returning to his country. The refusal to allow emigration on the ground of nonfulfilment of financial obligations is no more justifiable than imprisonment for debt".²¹ Hence we see that the right to exit or emigrate is recognised.

Now how is this related to the right of passport? A passport is related to the right to emigrate because in most countries the possession of a passport is the only means by which a person can leave the country, moreover, countries also admit persons into its territory on presentation of a passport.

According to Moore's work a passport is the accepted international evidence of nationality. In its usual form, it certifies that the person described in it is a citizen or subject of the country by whose authority it is issued, and requests for him permission to come and go as well as lawful protection.²² Louis L. Jaffe says that the term passport in its earliest usage "was applied to a permission given, it might be, to an enemy alien or a departing foreign ambassador to pass safely through the territory of the issuing power. But in its later and now current usage the passport is a document issued by a country to its nationals, its chief function to identify the bearer when passing into

21. Herach Lauterpacht, International Law and Human Right Archon Books,,1968, p. 349.

22. B. Moore, "Nature and Function", Digest of International Law, vol. iii(1906), p. 856.

and out of foreign countries, and to insure his safe conduct".²³ Hackworth commenting on the American passport says that its nature and purpose is that it is a document of nationality issued to persons owing allegiance to the United States and intending to travel or sojourn in foreign countries. Passports are intended for use in travel abroad by the persons to whom they are issued.²⁴ In India too the passport fulfills a similar purpose. In fact, section 3 of the Passports Act - 1967 reads "Passport or travel document for departure from India. No person shall depart from or attempt to depart from India unless he holds in their behalf a valid passport or travel document".²⁵ In modern times the importance of the passport in exercising the rights of freedom of movement, travel, or emigration has become more and more dependent on the passport. This is more so because most domicile countries insist on it, as well as the host nations. Therefore in the case of denial of a passport without just cause and reason it goes against the established norms of freedom of movement, travel and emigration. Therefore the right to passport generally is also a well established norm.

23. Louis L. Jaffe, n. 7., p. 17.

24. Hackworth, Digest of International Law, vol. iii, pp. 435-36.

25. The Passport Act (India), 1967, Section 3.

International Norms and Practices

Much of the norms and practices prevalent in international relations benefits the individual. As David Bell has written, it is a fundamental tenet of classical liberalism that the individual and not the family, the community or the state, is the basic unit of society, and that the purpose of societal arrangement is to allow the individual the freedom to fulfil his own purpose.²⁶ According to this tenet all nations should recognize the claims of individuals to freedom of movement, including their requests (i) to leave the country of their nationality, or in which they lawfully and habitually reside; either to visit or settle in some other country; (ii) not to be forced to return to their country; (iii) not to be exiled, that is not to be forced to leave their country or prevented from returning to it; (iv) to move freely from one part of their country to another; (v) not to be banished, that is not to be forced to move from one part of the country to another part; (vi) to enter any country of their choice or to settle there; and (vii) to be treated while aliens, equally with the citizens of the country in which they seek to settle.²⁷

The right to emigrate, since it involves the freedom to change one's society, is a first and most fundamental

26. Carl A. Amerbach, "Freedom of Movement in International Law and United States Policy" in Human Migration, W.H. McNeill & R.S. Adams Ed. 1978, pp. 317-18.

27. Ibid., p. 317-18.

of man's liberties. "It is the right of personal self determination"²⁸ because, as the United Nations Economic and Social Council has recognized "it is essential for the protection of the full enjoyment by all of other civil, political, economic, social and cultural rights"²⁹ If these other rights including, the right to life, liberty and the security of the persons are not safeguarded in the country of one's nationality or habitual residence, emigration affords the only practical possibility of enjoying them.³⁰

Article 1 of the Charter of the United Nations declares that it is one of the purposes of the United Nations to achieve international co-operation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".³¹ Article 55 of the Charter requires the United Nations to promote "universal respect for, and observance of human rights and fundamental freedoms for all".³² By Article 56 all members "pledge themselves to take joint action in co-operation"³³ to achieve

28. Study of the Discrimination in respect of the Right of everyone to leave any country. UNDoc. E/CN/9/778.

29. "Study of the Discrimination in Respect of the Right of Everyone to leave any Country, including his own and to return to his country, and Draft Principles on Freedom and Non-Discrimination in Respect of that Right", UN EGOSOC Res. 1788 (LIV) in ECOSOC E/5367 Supplement 1, p. 25.

30. Carl. A. Auerbach, n. 26, p. 318.

31. Article 1 Charter of the United Nations

32. Ibid., Article 55

33. Article 56. Ibid.

Article 55's purposes. To supplement Article 55 the United Nations's General Assembly on 10 December adopted the Universal Declaration of Human Rights which provides in Article 13: "Everyone has the right to freedom of movement and residence within the borders of each state"³⁴ and "Everyone has the right to leave any country including his own, and to return to his country".³⁵

Article 9 recognizes everyone's right not to be subjected to arbitrary exile.³⁶

Subsequently followed the International Covenant on Political and Civil Rights which stated in Article 12 that everyone within the territory of a state shall, within that territory have the right of liberty of movement and freedom to choose his residence. Everyone shall be free to leave his own country.³⁷

These rights shall not be subject to any restriction except those which are provided by the law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other recognised rights. Further, no one shall be arbitrarily deprived of the right to enter his own country.³⁸

34. Article 13. Universal Declaration of Human Rights.

35. Ibid.

36. Ibid., Article 9.

37. Article 12, 1,2 International Covenant on Civil and Political Rights.

38. Ibid.

Therefore, there is considerable formulation of norms on the general right to emigrate, in the United Nations Charter itself, the Declaration, the covenant and others. These are of great solemnity and significance. They may be considered to impart, on behalf of the organ adopting them a strong expectation that numbers of the international community will abide by them. Gradually, a declaration may by custom become recognized as laying down rules binding upon states.³⁹ For instance, there are now a great number of resolutions of the General Assembly that treat the Universal Declaration of Human Rights as Creating legal obligations.⁴⁰ Professor Louis Sohn describes the Declaration as a part of the constitutional law of the world community which has achieved the character of a world law superior to all other international instruments and the domestic law.⁴¹

The general right to emigrate or travel is well established at the international normative level. It also finds support in the domestic laws of the following countries.

United States

From a very early date in the history of the United States, the right of emigration and expatriation was recog-

39. Carl. A. Auerbach, n. 30, p. 322.

40. Ibid., p. 322.

41. Sohn & Buemgenthal, International Protection of Human Rights, Boffs-Merill, 1973, pp. 516-22.

nized and protected. In 1779, Jefferson drafted the Virginia Code which, Jefferson wrote, recognized the right expressly and prescribed the mode of exercising it.⁴² All men, Jefferson said, "have the natural right of relinquishing the country in which birth or other accidents may have thrown them, and seek subsistence and happiness wheresoever they may be able, or may hope to find them".⁴³ Though the right of emigration is not mentioned in the Bill of Rights, it has been accepted as a constitutional rights. So has been the right to travel generally.

In *Kent V. Dulles*, the United States supreme court declared, "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Freedom of travel is indeed an important aspect of the citizen's liberty".⁴⁴

India

The position in India has been stated by B.R. Agarwala as follows. If one looks at the past history of India, one finds that religious missionaries have gone to various parts of the world to preach religion. Indian merchants have been carrying on their trade with various

42. Virginia Code quoted in W.H. Mcneille & R.S. Adams (ed.) Human Migration, 1978, p. 325.

43. Ibid., p. 325.

44. *Kent V. Dulles* quoted in AIR 1967, S.C. 136.

parts of the world to develop economic and commercial relations. We also observe that large number of merchants and travellers have come to India from various parts of the world. There appears to be no prohibition for individuals from moving from place to place and country to country in ancient days. He could go at his own risk as travel was full of dangers. Such travellers usually received official patronage and were welcomed in foreign countries.⁴⁵

The current Indian position on emigration however has to be analysed by taking its passport laws into account.

In India there was no compulsion of law that a passport had to be obtained before one left India. Compulsion arose because no travel line would take an Indian out of India unless he possessed a passport. If an Indian wished to leave India without a passport he could do so, if he could. There was nothing to prevent an Indian from getting into a jolly boat and attempting to cross the Arabian Sea, but a foreign country would have refused to receive him unless he possessed a passport and on his return he would not have been able to enter India unless he produced the passport as required by the Indian Passport Act. The need for passport is indirect. Passport is necessary because it requests the concerned foreign governments to let the holder pass and it vouches for the respectability and nationality of the holder.⁴⁶

45. B.R. Agarwala, n. 14, p. xvii.

46. Ibid., p. xvii

The question as per the provisions of the Indian Constitution in relation to the issue of a passport was first raised in V.G. Row V State of Madras. There the contention was that the refusal of an endorsement of the passport to any country "was a violation of the fundamental right guaranteed under the constitution and it was urged that everybody had a right to obtain a passport. The Court after reviewing the law relating to the passport held that there was no legal right to demand a passport. In this case, the High Court of Madras considered the question in the context of an application filed for the issue of a writ of mandamus, directing the State of Madras to endorse the passport of the petitioner..."⁴⁷ The petitioner complained that the refusal of an endorsement of the passport to any country was contrary under Article 19(1)(d) and Article 14 of the Constitution. "The learned judges considered the functions of a passport and its place in foreign travel and came to the conclusion that as the law stood, the state could not prevent the petitioners from leaving for the Union of the Socialist Soviet Republic, merely on the ground that he did not hold a passport endorsement to that country and that there was no provision of law under which the citizen could be prevented from reentering India after travel to foreign countries except with the passport".⁴⁸

47. V.G. Row V State of Madras, AIR 1954, Madras 240.

48. Ibid.,

On the basis of that, the Court held on the assumption that Article 19(1)(d) would apply to foreign travel, there is no restriction in that Act. It may be noticed that no argument was advanced before the Court on the basis of Article 21 of the Constitution of India.

As regarding Article 21, the question was systematically and forcefully first fought in C.V. Jethwani V A.F. KAZI AND OTHERS, where the questions were thus raised "Does the Government of India have an absolute an unfettered discretion to grant or refuse a passport to a citizen of India. Alternatively does a citizen of India have no right to get a passport from the Government of India".⁴⁹

Further it was contended that the refusal to issue the passport... amounted to a contravention of petitioners fundamental rights guaranteed under Article 21 of the Constitution of India, secondly the refusal to grant a passport to the petitioner amounted to an infringement of his right to enter, reside, settle and move freely in any part of India and is, therefore violation of his fundamental rights declared under Article 19(1)(d) of the Constitution and thirdly the refusal of a passport without assigning any reasons and without giving the petitioner any opportunity of being heard or showing cause was arbitrary and finally, the refusal of a passport to the petitioner where it has been granted to the others was in

49. C.V. Jethwani V. A.F. Kazi, AIR 1966, Bombay, 54.

contravention of Article 14 of the Constitution and amounted to discrimination against the petitioner.⁵⁰

In a very elaborate judgement Mr. Justice Tarkunde held that "Article 14 of the Constitution has expressly directed to the states, which includes Government of India, and its effect is that in the absence of any regulations in regard to the issue of passports, the Government..., must issue passport to all citizens who ask for them, or none at all".⁵¹ Secondly "Article 21, recognises and protects the right of every person to 'personal liberty' of which he can not be deprived 'except according to the procedure established by law'. An Indian citizen has therefore a right to, in the absence of any law to the contrary, to obtain a passport, which is necessary for the exercise of his rights to go abroad, which right is clearly a part of the 'personal liberty.'⁵²

It was also observed by the learned judges that the expression 'personal liberty', used in Article 21 includes in its ambit, the right to go abroad and that a person can not be deprived of this right, except according to the procedures established by law.⁵³

Further a Division Bench of the Bombay High Court

50. Ibid.

51. Ibid.

52. Ibid.

53. Ibid.

in appeal in A.F. Kazi V. C.V. Jethwani held the "right that has been dealt within Article 19 and Article 21 is a right of free movement within the territory of India and the right has been excluded from the expression 'personal liberty'. That does not mean that the right to travel abroad was not meant to form a part of the contents of Article 19(1)(d)"⁵⁴ On the other hand the term 'personal liberty' includes within itself all varieties which go to make up 'personal liberty' of man other than those dealt with in the clauses of Article 19(1). This clearly indicated that the right to travel abroad, an attribute of 'personal liberty' of man is not excluded from the expression personal liberty.⁵⁵

That the expression 'personal liberty' under Article 21 includes right to travel abroad and that every person had a right to receive a passport was finally and fully established by the Supreme Court in S.S. Sawhney V D. Ramanathan.

Mr. S.J. Sorabjee, the learned advocate for the petitioner contended that :

(1) the right to leave India and travel outside and return to India is part of the 'personal liberty' guaranteed under Article 21 of the Constitution;⁵⁶

54. A.F. Kazi V. C.V. Jethwani, AIR 1967, SC 236.

55. Ibid.

56. S.S. Sawhney V. Ramanathan, AIR 1967 SC 1836.

(2) refusal to give a passport or withdrawal of one given amounts to deprivation of personal liberty in as much as (a) it is not practically possible for a citizen to leave India or travel abroad or to return to India without a passport, (b) instructions are issued to shipping and air travel companies not to take passengers on board without passports; (c) under Indian Passport Act reentering India without a passport is penalized.⁵⁷

(3) the deprivation of 'personal liberty' is not in accordance with the procedure established by law within the meaning of Article 21, as admittedly, there is no law placing any restrictions on the citizens of the country to travel abroad.⁵⁸

(4) The unfettered decision given to the government authorities to issue or not to issue a passport to a person affends Article 14 of the Constitution as much as (a) it enables the state to discriminate between persons similarly situated and also because it affends the doctrine of the rule of law. (b) the rule of law requires that an executive action which prejudicially affects the rights of a citizen must be pursuant the law and,⁵⁹

(5) the said orders affended the principle of fair play.⁶⁰

57. Ibid.

58. Ibid.

59. Ibid.

60. Ibid.

This case established the constitutional right to obtain a passport fully and it necessitated the passing of the Passport Act, 1967.

In Menaka Gandhi V Union of India the right to passport was upheld "It was held by the Supreme Court that it could not be said that a good enough reason had been shown to exist for impounding the passport of the petitioner. Furthermore, the petitioner had no opportunity of showing that the grounds for impounding it,.... either did not exist or had no hearing on public interest".⁶¹

Therefore, it is apparent that there is a general right to emigrate in Indian Law, however it is not absolute. In section 6 of the Indian Passport Act 1967 are given reasons when departure may be prevented. Section 6. Refusal of Passports and Travel Documents (1) Subject to the other provisions of this Act, the passport authority shall refuse to make an endorsement for visiting any foreign country under Clause (c) of subsection (2) of section 5. On any one or more of the following grounds and on no other grounds, namely,

- (a) that the applicant is not a citizen of India.⁶²
- (b) that the applicant may or is likely to engage outside India in activities prejudicial to the sovereignty and integrity of India.⁶³

61. M. Gandhi V Union of India, AIR 1978, SC 597.

62. Indian Passport Act 1967, Section 6.

63. Ibid.

(c) that the departure of the applicant from India, may, or is likely to be detrimental to the security of India.⁶⁴

(d) that the presence of the applicant outside India, may, or is likely to prejudice the friendly relations of India with any foreign country.⁶⁵

(e) that the applicant has at any time during the period of five years immediately preceding the date of his application, been convicted by a Court of India for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than two years.⁶⁶

(f) that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India.⁶⁷

(g) that a warrant or summons for the appearance, or a warrant for arrest, of the applicant has been issued by the Court under any law for the time being in force or that any order prohibiting the departure from India of the applicant has been made by any such Court.⁶⁸

(h) that the applicant has been repatriated and has not

64. Ibid

65. Ibid

66. Ibid

67. Ibid

68. Ibid.

reimbursed the expenditure incurred in connection with such repatriation.⁶⁹

(i) that in the opinion of the central government, the issue of a passport or travel document to the applicant will not be in the public interest.⁷⁰

Therefore one sees that in international law and practice, there is a general right to emigrate, so is it there in the laws for instance United States and India. However, even in the laws of United States and India, this right is not absolute. The limitations are "sovereignty and integrity", "detrimental to the security of India", "public interest" and "prejudicial to the friendly relations of India*." It will be of interest to see the developing literature and norms under the qualified conditions of 'brain drain' and the already existing practices or measures adopted and whether they can be covered by the wide or ambiguous phrases given. It is the contention here that brain drain is an adverse phenomenon that needs rectification. There has been thinking regarding brain drain at the international level and it will be good to look at some of the developments.

69. Ibid.

70. Ibid.

CHAPTER - IV

EMERGING INTERNATIONAL NORMS

"It has been the main emphasis of the UNCTAD's studies that the brain drain involves not only the migration of human beings; it entails a transfer of productive resources from developing to developed countries - a reverse transfer of technology. A study prepared for the United States House of Representatives Committee on Foreign Affairs similarly equated the brain drain phenomenon with what it called a reverse form of foreign aid."¹

The issue of brain drain has been on the international agenda for some time. A number of major resolutions have been adopted by the international community calling for concerted efforts at the national, regional and international levels^{to} mitigate the adverse consequences associated with the phenomenon. Among these, mention must be made of the Conference Resolution 39(III), General Assembly Resolution 3362(S-VII), Conference Resolution 39(III) and General Assembly Resolution 32/172 on reverse transfer of technology adopted in December 1977, followed by another General Assembly Resolution, namely 83/151 on the same subject adopted in December 1978. A resolution on development aspects of the reverse transfer of technology was also adopted by the Committee on Transfer of Technology at

1. Technology: Development Aspect of Reverse Transfer of Technology UNDoc. TD/239, p. 13.

its second session in December 1978. The subject has furthermore received in-depth consideration by UNCTAD's group of governmental Experts on Reverse Transfer of Technology, which met in Geneva in February/March 1978 and adopted a set of agreed conclusions and recommendations.

General Assembly Resolution

In fact, one of the first important resolution 3017 (XXVII) was passed with 111 in favour, none against, with 13 absentions. It considered how decisively important it is for the developing countries to possess technically and scientifically trained local personnel, in order to:

- "a) Take advantage of the facilities offered by access to the technology of the developed countries;
- b) Use that technology and adapt it to the national conditions;
- c) Develop techniques suited to their production structures; and
- d) create their own technologies".²

Therefore, in "assessing the negative consequences of this phenomenon in the developing countries, special attention should be given to the way in which this outflow hinders the creation of suitable technical infrastructures and prejudices the capacity to utilize imported technology and the creation of national technologies and to the policy

2. G.A. Resolution 3017(XXVII) Outflow of Trained Personal from Developing to Developed Countries.

measures which the developing countries themselves may have to take to tame this outflow".³

Moreover, it is necessary to indicate "viable measures that can be taken to deal with the problem and, above all, practical and effective guidance to be followed, mainly by the Governments of industrialized countries, to put an end to reverse that process without prejudice to the existing international agreements and in conformity with the Universal Declaration of Human Rights".⁴

The Secretary General was also requested "to take urgent measures to make widely known to the appropriate authorities in developing countries the proposals contained in the World Plan of Action for the Application of Science and Technology to Development, as one of the means to counter-balance the outflow of trained personnel from developing to developed countries".⁵

Group of Governmental Experts

Soon after in March 1978 was adopted the agreed conclusions and Recommendations of the Group of Governmental Experts on Reverse Transfer of Technology, which concluded inter-alia that the problem of brain drain "is a multifaceted one encompassing social, economic and development issues,

3. Ibid.

4. Ibid.

5. Ibid.

as well as political, civil and human aspects...".⁶ and that there "is a need for concerted efforts, at the national, regional, and international levels, in order to assist developing countries in finding solutions to this problem..."⁷

It also stated that the "... developing countries could monitor the changing characteristics of the brain drain problem and take appropriate remedial measures to mitigate the adverse consequences associated with the phenomenon"⁸ and further concluded that "(d)eveloped countries should support measures designed to encourage the absorption of trained personnel in the developing countries and to support the activities of the international organizations aimed at finding solutions to this problem, without prejudice to the existing international agreements..."⁹

Committee on Transfer of Technology

Then on 5th December 1978 was adopted the Text of Resolution 7(II) of the Committee on Transfer of Technology. It dealt with the development aspects of the reverse transfer of technology and endorsed the agreed conclusions and recommendations of the group of Governmental Experts. Moreover, it also noted the proposal of the Crown Prince

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6. Agreed Conclusions and Recommendations of the Group of Governmental Experts. Annex. 1 in UNDoc. TD/B/C/6/47, p. 29.
 7. Ibid.
 8. Ibid.
 9. Ibid.

Hassan-bin-Talal of Jordan, which consisted of the establishment of an International Labour Compensatory facility which in his opinion, could be elaborated along the lines of the International Monetary Fund.¹⁰

General Assembly Resolution

Five days later was adopted the text of the General Assembly Resolution 33/151 on Reverse Transfer of Technology which inter-alia emphasized that the migration of skilled manpower from developing countries constitutes an exchange in which the interests of all countries negatively affected by reverse transfer of technology are adequately protected. ..."¹¹ It noted further the need to "examine national and international measures, including the possibility and feasibility of the proposals made by his Royal Highness Crown Prince Hassan bin Talal of Jordan concerning the establishment of an international labour compensatory facility..."¹²

UNCTAD Resolution

The following year on 30th May 1979 was adopted Resolution 102(V) by the United Nations Conference on Trade

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10. Text of Resolution 7(11) of the Committee on Transfer of Technology. Annex 1 in UNDOC TD/239
 11. Text of General Assembly Resolution 33/151 in 33/151 Annex 11 p. 1 in UNDOC TD/239.
 12. Ibid.

and Development at its 169th Meeting. It also contained development aspects of the reverse transfer of technology and included inter-alia the following points that "the problem of reverse transfer of technology is a multifaceted one, encompassing social, economic and development issues as well as political, civil and human aspects..."¹³ It also emphasized "...that the establishment of a new international economic order should ensure that the migration of skilled manpower from developing countries constitutes an exchange in which the interests of all countries negatively affected by reverse transfer of technology are adequately protected".¹⁴ It further stated that in pursuance of paragraph 5 of General Assembly Resolution 33/151 the following measures on development aspects of the reverse transfer of technology should be taken:

"a) All the developed countries should (1) support measures designed to encourage the absorption of trained personnel within developing countries and support the activities of international organizations aimed at finding solutions".¹⁵

It further instructs the developed countries to "(c)onsider, in the light of indepth study by the Secretary General of the United Nations, and his discussions referred

13. Resolution 102(V) adopted by the United Nations Conference on Trade and Development at its 169th Meeting on 30th May 1979 in Annex 11. UNDOC TD/B/C 6/47, p. 30.

14. Ibid.

15. Ibid.

to in paragraph 5 and 6 above, measures related to social security, pension rights, currency control, tax policies and remittances with a view to encouraging contributions to the economic development of the developing countries, recognizing that the issues mentioned above involve more than the problems of development and the reverse transfer of technology and recognizing also existing national competences in these matters..."¹⁶ Finally, the developing countries were also instructed to "(m)onitor the changing characteristics of the problem of skill outflow and take appropriate remedial measures to mitigate the adverse consequences associated with the phenomenon..."¹⁷

More recently two draft resolutions on the development aspects of the reverse transfer of technology and General Assembly Resolution¹⁸ has also been adopted which largely endorse and further develop the already extant literature on the brain drain. Therefore one sees that as mentioned earlier the right to emigrate is not, or need not be an absolute right, but perhaps can be curtailed legally or by administrative means. Moreover with the developing scenario in international law scene one notices that there is an overwhelming endorsement for regulation, control or restrictions of brain drain.

16. Ibid.

17. Ibid.

18. UNDOC TD/B/C.6/C.SS, UNDOC TD/B/C.6/C.S.8 and G.A. Res. 37/207

Draft International Code of Conduct

Finally, mention needs to be made of the Draft International Codes of Conduct on the Transfer of Technology of which many preliminary drafts have been made.¹⁹ These codes have an important Preamble, objectives, Principles and a section on "special Treatment for Developing Countries" that cannot be omitted. References here are made from the last code TD/CODE TOT/41 issued in 1983.

A. Preamble

(i) "Believing that technology is the key to the progress of mankind and that all peoples have the right to benefit from the advances and developments in science and technology in order to improve their standard of living".²⁰

(ii) "Recognizing the need to facilitate an adequate transfer and development of technology so as to strengthen the scientific and technological capabilities of all countries, particularly the developing countries, and to co-operate with the developing countries in their own efforts in this field as a decisive step in the progress towards the establishment of a new international economic order".²¹

19. UNDOC TD/CODE/TOT/14, UNDOC TD/CODE/TOT/23, UNDOC TD/CODE/TOT/33, UNDOC TD/CODE/TOT/41.

20. "Preamble" Draft International Code of Conduct on the Transfer of Technology UNDOC TD/CODE/TOT/41.

21. Ibid.

(iii) Recognising the need for developed countries to grant special treatment to the developing countries in the field of the transfer of technology.²²

(iv) "Believing that the Code of Conduct will help to create conditions conducive to the promotion of the international transfer of technology, under mutually agreed and advantageous terms to all partner".²³

B. Objectives

(i) "To establish general and equitable standards on which to base the relationships among parties to transfer of technology transactions and governments concerned, taking into consideration their legitimate interests, and giving due recognition to special needs of developing countries for the fulfillment of their economic and social development objectives".²⁴

(ii) "To encourage transfer of technology transactions, particularly those involving developing countries, under conditions where bargaining positions of the parties to the transactions are balanced in such a way as to avoid abuses of a stronger position and thereby to achieve mutually satisfactory agreements".²⁵

22. Ibid.

23. Ibid.

24. "Objectives", Draft International Code of Conduct on the Transfer of Technology" UNDOC TD/CODE/TOT/41.

25. Ibid.

(iii) "To increase the contributions of technology to the identification and solution of social and economic problems of all countries, particularly the developing countries, including the development of basic sectors of their national economies".²⁶

C. Principles

(i) "States have the right to adopt all appropriate measures for facilitating and regulating the transfer of technology in a manner consistent with their international obligations, taking into consideration the legitimate interests of all parties concerned, and encouraging transfers of technology under mutually agreed, fair and reasonable terms and conditions".²⁷

(ii) "Facilitating and increasing the access to technology, particularly for developing countries, under mutually agreed fair and reasonable terms and conditions are fundamental elements in the process of technology transfer and developments".²⁸

D. Special Treatment for Developing Countries

Taking into consideration the needs and problems of developing countries, particularly the least developed

26. Ibid.

27. "Principles". Draft International Code of Conduct on the Transfer of Technology. TD/CODE/TDT/41.

28. Ibid.

countries, directly or through appropriate international organisations, in order to facilitate and encourage the initiation and strengthening of the scientific and technological capabilities of developing countries so as to assist and co-operate with them in their efforts to fulfill their economic and social objectives, should take adequate and specific measures inter-alia,

- (i) "Co-operate in the development of scientific and technological resources in developing countries, including the creation and growth of innovative capacities".²⁹
- (ii) "Assist developing countries in strengthening their technological capacity, especially in the basic sectors of their national economy, through creation and support for laboratories, experimental facilities and institutes for training and research".³⁰
- (iii) "Co-operate in the establishment of strengthening of national, regional and/or international institutions, including technology transfer centres, to help developing countries to develop and obtain the technology and skills required for the establishment, development and enhancement of their technological capabilities including the design, construction and co-operation of plants".
- (iv) "Encourage the adaptation of research and development, engineering and design to conditions and factors

29. "Special Treatment for Developing Countries", Draft International Code of Conduct on Transfer of Technology TD/CODE/TOT/41.

30. Ibid.

endowments prevailing in developing countries".³¹

(v) "Provide support for projects in developing countries for the development and adaptation of new and existing technologies suitable to the particular needs of developing countries".³²

(vi) "Undertake Research and Development activities in developing countries of interest to such countries as well as improve co-operation between enterprises and scientific and technological institutions of developed and developing countries".³³

It is therefore seen that ever since the problem of brain drain became of immense magnitude it has agitated many of the developing countries, and this has been reflected in the various declarations and recommendations of the United Nations and its various constituent bodies.

This reflection only goes to show that law is not stagnant but develops according to the necessity of the times. In more recent times, one does stop short of adopting measures that are harmful to the individual in a harsh manner, otherwise however, a more flexible attitude towards policy can be adopted.

The policies adopted can be more restrictive or less restrictive depending on necessity. This is however

31. Ibid.

32. Ibid.

33. Ibid.

only possible if there is a consensus emerging regarding norms, and then one acts on those norms.

The contention here is that emerging norms do exist to a reasonable extent and measures of brain drain prevention or regulation can be experimented with. The next chapter deals with those measures.

CHAPTER - V

PROPOSALS BY UNITED NATIONS BODIES

In the last chapter was discussed some of the terms, norms and emerging norms that have bearing on the problem of brain drain. Brain drain by its very nature consists of movement and therefore the concept of right to freedom of movement was discussed. Related to it are the concepts of right to travel, right to emigrate and right to passport. According to international norms and practices, these concepts are in favour of the individual.

In the international law also the rights of the individuals is generally protected, and in the domestic law also, for instance United States and India, there is a right to emigrate, however it is of vital importance to note that it is not absolute.

Finally we have the emerging norms as formulated by UNCTAD and one notices that there are many protective clauses for developing nations. Therefore due to historical and present existing conditions in developing nations, the possibility of the social good being given precedence over the individual is clearly reflected.

Much work has been done and continues to be done at the United Nations and its various organisations on the problem of brain drain. Two important works accomplished by the United Nations Institute for Training and Research

are : UNITAR Resolution Report No. 5 "The Brain Drain from Five Developing Countries" 1971 and UNITAR Resolution Report No. 22, "The Brain Drain : Emigration and Return" 1978. The latter work has been singled out for special treatment because its one of the most authoritative works done, with a detailed analysis of the motivations of migration. Bearing in mind these motivations it then suggests policy implications.

UNITAR Policy Proposals

The UNITAR Policy Proposals came into being because of a special need. It was noticed that previous studies of the brain drain have been, in general, based on aggregate emigration and immigration statistics, motivations were not usually investigated. It was necessary to conduct a study which would provide information and insights on which policy could be based. Therefore, under the auspices of UNITAR a study was conducted which aimed to discover the motivation and the factors that influence the specific choices of individuals. The study took into account a number of variables such as social origins, class, talent, ability to adjust to social conditions abroad, working conditions, and income differences between developing and developed countries. Following the study the policy proposals were suggested:.

A. Attachment to home

Is the loss from brain drain recoverable? The

existing literature and policy debates usually assume that migrants are gone forever. However, this does not necessarily have to be true. Many persons staying abroad expect to return home. Moreover changing circumstances at home or abroad can cause more changes of plans than is generally assumed stronger pulls from home and stronger pusher from developed countries can result in greater return than is generally assumed. Home governments can recover many apparent stay out at later stages after study, by keeping in touch with them.

Currently the favourite place for temporary work experience is the United States. Perhaps societies more nearly resembling developing countries might be better work sites, to facilitate the adaptation of skills learned in European and North American universities. Even if 'Third Country' training does not replace education in developed societies, 'third country' post-graduate work experience is more relevant for employment at home than in staying on temporarily in the United States and Europe. "Investigations should examine the feasibility of organised post-graduate work programmes in countries constituting good 'half way houses' i.e. effectively, developing societies that combine technology and organisation derived from more developed countries with the problems and resources of developing countries".¹

1. "Attachment to home and implications for Policy" in The Brain Drain - Emigration and Return, UNITAR Report No. 22, William Glaser, 1978, p. 23.

B. Characteristics of Developing Countries

"Developing countries differ widely in their losses of professionals and in their ability to attract back students after completion of study abroad. Therefore brain drain is not a universal problem requiring universal policies applying to all developing countries. Rather the situation must be examined in each country, and remedial action must be attuned to each".²

Certain characteristics of the social structure, economy, government, and culture determine whether a developing country loses few or many of its professionals educated abroad.³ Policy makers for a particular country need to assess both the strengths and weaknesses of that society. Simple assumptions about causes for the brain drain should be revised; "Wealth, level of development, and rate of growth do not automatically govern brain drain. Merely increasing wealth is no panacea. Rather it is the structure of the society which govern the motives of professionals. For example, imbalances between the educational system and the economy, so that the number of professionals outstrips opportunities, will result in many departures".⁴

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2. "The Characteristics of Developing Countries and the Implications for Policy" in The Brain Drain - Emigration and Return, UNITAR Report No. 22, William Glaser 1978, p. 50.
 3. Ibid. p. 50.
 4. Ibid., p. 50.

C. Characteristics of Developed Countries

"Developed countries differ widely in acceptance of migrants from developing countries and in their attractiveness to persons from developing countries. Just as developing countries vary in their losses developed countries vary in their gains".⁵ The flows of students and even more clearly the flows of migrants are from particular developing countries to particular developed countries. "Where the situation requires planning and amelioration, universal policies applying to all developed countries are not as efficacious as policies applying to the particular situation in each one. Bilateral agreements about educational exchanges and migration will be more attuned to each situation than universal policies are".⁶

The question whether the immigration of professionals into a developed country is high or low depends on many characteristics of its social structure, employment market and government regulations. "Any policy decisions about educational exchange and immigration must be made in the light of how all the pertinent characteristics of that particular developed country attract or deter persons from developing countries".⁷

5. "Characteristics of developed countries and implications for policy" in *The Brain Drain - Emigration and Return*, UNITAR Report No. 22, William Glaser, 1978, pp. 71-72.

6. *Ibid.*, pp. 71-72.

7. *Ibid.*, pp. 71-72.

Regulated educational exchange attracts persons who intend to return home and discourages change of plans. Some developed countries have more strict systems of sponsorship and visas than others, and more of their foreign students return home. Some developed countries administer visas more permissively, and foreign students can arrange changes that allow temporary work or permanent immigration. "The system of entry visas in developed countries at present is designed for tourists, students or permanent immigrants. If practical experience at work after the conclusion of formal study is to become part of educational exchange, a new category of visas should be devised".⁸

D. Selecting Those Most Likely to Return

"If an educational exchange programme tries to maximize returns, certain types of persons would be preferred. Those most likely to return grew up in the majority groups of the society spoke the vernacular languages at home, are married to members of the majority groups, have strong family ties, and have tastes in reading and recreation closely associated with their own countries, cultural traditions".⁹

"But, of course, any such narrow selection method has serious disadvantages. Talented members of minority

8. Ibid., p. 72.

9. "Selecting those most likely to return" in The Brain Drain - Emigration and Return, UNITAR Report No. 22, William Glaser, 1978, p. 171.

groups will resent being shut off from foreign study and will resent being shut off from foreign study and will be even more likely to emigrate. Excluding them from foreign study is too crude even for purposes of maximizing return, many return at present".¹⁰

The idea is that some interview, screening or system should be devised so that the ones most likely to return are selected for studies abroad.

E. Controls by the Home Country

A more recent trend among developing countries is to increase controls on students going abroad. "More students are sponsored, more have obligations to return, and more have jobs waiting upon return. These traits are strongly associated with return, in part because the persons who obtain these arrangements have other motives and characteristics of returnees, and in part because any organized program reduces the uncertainties that lead to emigration".¹¹

Some government place considerable faith in the efficacy of bonds and develop apparatus to administer them. Financial bonds and simple pledges may be equally effective in ensuring return, and both are associated with higher

10. Ibid., p. 171.

11. "Controls by the home country" in the Brain Drain - Emigration and Return, UNITAR Report No. 22, William Glaser, 1978, p. 172.

return than no obligation at all. One reason for this is probably self selection : Persons contemplating emigration do not get involved in such arrangements. Bonds and pledges may reinforce the effects of an organized programme. In addition to obligations, persons can be screened for overseas study and even have jobs waiting for them.¹² "Of course, even if the net effect due to bonds is statistically small i.e. if only few persons are compelled to return, who otherwise would have emigrated..... the result is still profitable to a country that can afford no losses at all. But the small gains are profitable only if the entire bonding system is cheap to administer and only if involuntary returns are productive. The best method is the motivate people to return enthusiastically".¹³

The UNITAR policy proposals are complementary to other works. The study on which the proposals are based are authoritative because it had been an 'international endeavour'. First, based on the finding that many brains are willing to come back, it advises governments to keep in touch with its emigrants, moreover, its recommendations of institutional frameworks for 'half way houses' are an important contribution. Secondly, the finding that the characteristics of each developing country and developed countries are different is suggestive of the possibility

12. Ibid., p. 172.

13. Ibid., p. 172

that as we evolve macro-norms and policies at the international level, we could also enter into bilateral agreements that suit each country's needs and interests. Further, its suggestion that if any criteria is to be adopted for selecting those most likely to return, it should not be narrow but broad based is instructive. When the developed countries have such selective immigration policies, it would not be too harmful if we also adopt some appropriate selective measures. Finally, it mentions the trend among developing countries to increase controls, thereby indicating that regulations and controls in this area is not too strange an idea. It recommends control by way of financial bonds and simple pledges on students, only if they are cheap to administer and there is a prospect of the returnees being productive.

The recommendations are not too strange, abnormal or harsh. Some have already been experimented with. The idea is to get practical about it and gradually implement some measures, instead of crying horse, after its bolted, and displaying our lack of will. One can have no doubt of the deterring effects and also the overwhelming psychological ones.

UNCTAD Compensatory Financing Proposals

The compensatory financial proposals deal with 'adjustment problems' associated with fluctuations in migrants' remittances, or they involve schemes to be financed by the developed country of immigration to compensate for

the losses inflicted on the developing countries by the brain drain, or schemes to be financed by the emigrants themselves for these developing countries losses.

The concept of compensation for emigration dates back to the turn of the century when Italy raised the question of receiving compensation for its nationals emigrating to the United States of America. Since the early 1970's the issues relating to the compensation for emigrants have been more extensively defined and articulated resulting in the serious consideration of the suggested proposals in various forms .¹⁴

A. International Labour Compensatory Facility (ILCF)

Jordanian Crown Prince Hassan, addressing the 1977 session of the International Labour Conference, stated that it was becoming "increasingly clear to the planners around the world that man is the primary development factor and capital occupies a secondary position".¹⁵ Nevertheless, he continued, "the world at large still discriminates between labour and capital export, but now the time has come to give labour exports attention and consideration traditionally accorded to capital transfers".¹⁶ In this connec-

14. Establishment of an International Labour Compensatory Facility UNDOC. A/35/198, p. 4.

15. Address by Crown Prince Hassan Ben Talal of Jordan, Record of Proceedings, International Labour Conference, 63 Session, Geneva, 1977, pp. 279. See also Johannes van Aggeler, "The Consequences of Brain Drain..." IJIL vol. 26, (1986) nos. 324, p. 346.

16. International Labour Conference, 63 session, Geneva 1977, pp. 279-83.

tion Prince Hassan proposed the establishment of an International Labour Compensation Facility which in his opinion could be elaborated along the lines of the Trust Fund for compensatory facilities of the International Monetary Fund.¹⁷

The implementation of such a proposal presupposes an international agreement on the movement of labour whereby proper remuneration and treatment are ensured. The scope of such an agreement should cover all types of labour migration in the sense that all economically active people embody investments in human capital.¹⁸

Possible contributions to the International Labour Compensatory Facility should be first and foremost labour importing countries and the funds could be used as soft loans to participating developing countries for the purpose of promoting and financing social projects. Since its formulation in 1977, the proposal has been considered in different forms. Despite the fact that final institutional modalities still have to be worked out, agreement has been reached on the following points. The General Assembly's endorsement of the proposal indicated that the conceptual, institutional and financial feasibilities should be considered at the government expert level.¹⁹

17. Revenue Transfer of Technology, General Assembly Resolution 32/192.

18. UNDoc. A/35/198, p. 10. See also Johannes van Aggalen, "The Consequences of the Brain Drain..." IJIL, vol. 26 (1986), nos. 3&4, p. 346-47.

19. *Ibid.*, p. 346-47.

The guiding principle behind making contributions to the compensatory facility and for receiving assistance would be the progressive doctrine of the adverse economic and social effects of large scale migrations of economically active persons to the developed as well as to the developing countries and to ensure an orderly regulation of migratory labour. The group of States most affected by the brain drain, the group of 77, suggested that available assets could be disbursed in the form of either direct aid or soft loans to countries suffering from the brain drain. With the membership open to all members of the United Nations, it has been proposed that each member should make an annual contribution commensurate with its gain from the brain drain.²⁰

B. Taxation

This section also focusses on what are essentially compensatory proposals. "They involve schemes either to be financed by the developed country of immigration to compensate for losses inflicted on the developing country by the brain drain, or schemes to be financed by the emigrants themselves for these developing country losses".²¹

20. Johannes van Aggelen n. 18, p. 347.

21. The Reverse Transfer of Technology (Brain Drain) International Resource Flow Accounting, Compensation, Taxation and Related Policy Proposals. UNDoc. TD/B/C.6/AC. 4/2, p. 29.

The first proposal relates to the total number of skilled persons migrating to the developed countries, the amount of their income and the relative scarcity of their skills in the developing country. The second proposal is to levy a supplementary tax on income accruing to the highly skilled migrants in the developed countries. The revenue of these supplementary taxes could be transferred back to the developing countries. The brain drain tax could involve a series of bilateral statutes and treaties negotiated between the countries of origin and the host countries.²²

The moral rationale for the two methods of compensation may be stated as follows. In the case of compensation to be paid by the developed countries the moral appeal may rest on the arguments that the co-existence of the prosperous developed countries and the poor developing countries leads to their professional, technical and kindred workers emigration and therefore it is fair to expect that the developed countries should assist the developing countries in coping with such losses,²³ that by so doing, the developed countries, would also be helping to prevent the developing countries from adopting self protecting qualitative emigration restrictions that offend against the

22. Johannes van Aggelen, n. 20, p. 347.

23. Revenue Transfer of Technology, General Assembly Resolution 32/192. See also The Revenue Transfer of Technology. UN Doc. TD/B/C. 6/47, pp. 21, 28.

kind of humane international order that the developed countries often assent to be their ideal, and that, if developed countries, in turn, are also likely to have gained from such professional, technical and kindred workers immigration, then the moral obligation to assist the poor developing countries on the other hand, is simply that their considerable improvement of income obtained by developed countries permitted emigration that inflict losses on "those left behind imposes a moral obligation on them to share their gains practically with these groups".²⁴

It should be noted in regard to the compensatory financing proposals, whether they relate to the developed countries of immigration or to the emigrants themselves as assesses, the essential problem is that they presuppose a commonly agreed methodology and procedure for defining the developing country losses which are to be compensated. It is difficult to see, given the wide differences that can sometimes obtain on these issues, how such an agreement can readily be obtained. But even, if it were, it is certain that such losses would fluctuate annually, causing equivalent fluctuations in the compensatory finance that would have to be forthcoming. Furthermore if the tax were collected on emigrants, the tax rate would also in general fluctuate.

The second rational is that even if there is no

24. UN Doc. TD/B/C. 6/AC. 4/2. p. 30.

developing country loss involved, the migration of P.T.K. manpower makes the developing country nationals significantly better off and that the developing countries should be able to tax these incremental incomes, on broadly progressive lines, for social purposes. This argument involves an extension of the progressive tax principle, normally applied to domestically based nationals, to nationals resident abroad; and it should be noted that it no way runs contrary to accepted norms of the tax behaviour.²⁵

There is also the purely economic argument that the extension of developing countries tax schedules to P.T.K. emigrants earnings in developed countries would achieve global efficiency in the sense of permitting optimal allocation of the world supply of P.T.K. manpower.²⁶

Another rationale runs in terms of the proposed tax providing the developing country with a policy instrument that would enable it to greater efficiency and/or equity in the presence of P.T.K. emigration. These arguments were considered to enable the developing countries to achieve the optimal solution in regard to the equity cum efficiency factor.²⁷

25. UN.Doc. TD/B/C.6/47 p. 23.
UNDoc. TD/B/C.6/AC.4/2, p. 36.
UNDoc. A/35/198.

26. UNDoc. TD/B/C.6/47, p. 23.

27. INDoc. TD/B/C.6/AC. 4/2, p. 37.

Finally, there is the argument that the imposition of such a tax on P.T.K. migrants for the purpose of supplementing developing country developmental spendings could have the "externality" effect of stimulating additional transfers of resources from developed to developing countries, by demonstrating that developing countries were willing to tax the incomes of their own professionals for development purposes in a self-help fashion instead of merely exhorting developed country nationals to undertake the tax burden of financing development through increasing aid flows to developing countries.²⁸

Two main types of taxes on the professional migrants might be distinguished, when the developing country losses are the rationale for the tax as an exit tax and as a surtax on post immigration incomes. An exit tax may be rationalized, for example on the assumption that the country of emigration would be reimbursing itself for the educational costs incurred on the emigrants.²⁹

The surtax on the post immigration incomes of the emigrant could also be calculated and assessed so as to equal the estimated loss to the developing country of emigration, but this would cause political difficulties in

28. Ibid., p. 37. Also see, Technology: Development aspects of the Reverse Transfer of Technology: Study by the UNCTAD Secretariat UNDoc. TD/239, p. 15.

29. UNDoc. TD/B/C.6/AC. 4/2, p. 30.

estimating the rate of surtax to be levied, so that it is best again to regard the developing country losses as providing only a general rationale, and not a tax revenue target, if the option of a surtax on post immigration income is chosen as the alternative on the basis of this rationale.³⁰

The tax proposals have been extensively explored by lawyers. It would appear that for it to be constitutionally feasible in the United States, it would have to be a tax imposed by the developing countries and collected by the developed countries, and which is enshrined in a multi-lateral treaty. This is presumably not unsurmountable. There is no constitutional barrier in the United Kingdom, but the tax "if it is to be meaningful does require that it be imposed by all developed countries of immigration so that the constitutional requirements of the United States would automatically define the requirements implementing the tax."³¹

The administrative problems of collection by developed countries need not be particularly great. The treaty would make the collection of tax legally enforceable by the courts of developed countries, whereas the cost of collection need not be large if the existing tax forms can

30. Ibid., p. 31. See also IJIL, vol. 26(1980) Nos. 384, p. 347.

31. UNDoc. TD/B/C.6/AC.4/2, p. 39. See also UNDoc. TD/239, p. 18.

be amended slightly, so as to notify the immigrants who are eligible and to allow for the supplemental contribution.³²

Other Alternative Proposals

Tax sharing arrangements, alternatively, individual developed countries could agree by bilateral or multilateral treaty, to share tax revenues to the extent that a portion of the income taxes paid by the skilled immigrants to the host country, would be shared by the host country and the country of emigration. These could take the form of tax deductions and credits and direct assessment by the host country.³³

Another suggestion made is that the United States practice of exempting from tax assessments contributions made to approved charities should be extended to contributions made by immigrants to developing countries. Thus, a considerably more lenient ruling for eligibility may apply for contributions by such immigrants to developing country based developmental and charitable organizations or to international agencies for spending in developing countries. This would seem to be considered as an alternative to the tax proposal just discussed. It does imply, of course, that some slight reduction would take place

32. UNDoc. TD/B/C. 6/AC. 4/2, p. 39.

33. Johannes van Agglen n. 30, p. 348.

in developed country revenues by the granting of such exemptions, therefore this would appear to be a proposal that combines both private initiative and tax revenue contributions by developed countries.³⁴

Finally, following recent United States practice of allowing tax payment to earmark a part of their taxes to finance Presidential elections, it might be suggested that immigrants in developed countries should be allowed in the same way, to earmark, taxes for routing to a designated international agency for developmental spending.³⁵

C. Proposal on the Establishment of an International Fund for Vocational Training

At the sixty-ninth session of the International Labour Conference, held in 1983, Egyptian President Mibarak made the following statement:

"Mention must also be made of the rising migration of labour from developing countries and the brain drain and the exploitation of skills in the service of developed countries. This problem poses a dilemma to developing countries, a difficult option between respecting the human right to choose the place and type of job and the need to give priority to over-all Socio-economic development in societies which cannot offer living standards and working conditions to match those prevailing in developed countries. We believe that the best way to deal with this problem is

34. Legal and Administrative Aspects of Compensation, Taxation and Related Policy Measures. UNDoc. TD/B/C.6/AC.4/7, para 33. See also UNDoc. TD/B/C.6/47, p. 22.

35. UNDoc. TD/B/C.6/AC.4/7 para 40. See also UNDoc. TD/B/C.6/47, p. 22.

to focus on exchanging expertise between developing countries themselves".(36)

He then added, I propose that the International Labour Conference adopt the idea of establishing an International Fund for Vocational Training to enable those countries which suffer manpower outflows to implement programmes for training substitute elements, thus filling the gap left behind by migration".³⁷

D. Proposal on the Establishment of an International Fund for Manpower Resources

The Prime Minister of Jamaica, Mr. Edward Seaga, in his address to the governing Council of the United Nations Development Programme in 1984, stated that the magnitude in which the phenomenon of brain drain represents itself nowadays represents not just a movement of persons, but a real transfer of productive resources from the poor to the rich countries. Faced with the improper balance, for the time being of human capital and need for development skills, Mr. Seaga proposed the establishment of an International Fund for Manpower Resources. He envisaged a three pronged mechanism for financing such a fund, consisting of tax deductible contributions from major corporations with interests in the third world,

36. International Labour Conference, Provisional Records, 69 Session, Geneva, 1983, p. 13.

37. Ibid., p. 13.

contributions in kind and special appropriations from multilateral institutions such as the World Bank and regional development banks. In his opinion the Manpower Fund could be administered by UNDP.³⁸

In the proposals mentioned, the main motivation is compensation, so that an existing imbalance which will continue to be so unless paid is rectified. The main two proposals are the ones regarding the international labour compensatory facility and the taxation measures. The other minor ones have been mentioned because of mere references made to them in some works, however, they have not been studied in detail as yet.

The labour proposal was more innovative than the tax proposals, if only because taxation as a measure is used widely to raise income. The I.L.C.F. proposal, though borrowing some ideas from the I.M.F. is much more bolder an approach.

The main problem with the I.L.C.F. proposal is getting the backing and endorsement of many countries, chiefly the developed countries to sign an agreement. On a widely respected agreement will the success of the scheme depend. An agreement is also a problem in the sphere of taxation.

As regards taxation, a global tax system is observed by a few countries. The proposal is not radically or at

38. Johannes van Aggelen. n. 33, p. 347.

all an innovative. It is acceptable under international norms, it will allow tax-jurisdiction over emigrants, and on grounds of equity also should be pursued.

United States, Mexico and Philippines successfully observe global taxation schemes. Brain drained countries not willing to pursue taxation measures are bound to loose in many ways in the long run, not just monetarily.

CHAPTER - VI

OTHER PROPOSALS

Return Migration and Reintegration Services

This section is based on the proposals and already existing prescriptions which the 'receiving' and giving countries in the Organisation for Economic Co-operation and Development are carrying out with regard to their labour migration problems. For them it became an issue because of the socio-economic recession of 1967, the energy crisis of 1972, followed by a slow down of economic growth on a world wide basis and the restrictive policies immigration countries adopted. Soon after a joint Project on Emigrant Workers was alunched not as a response to a current and urgent problem but rather because a proactive attitude is better than a reactive attitude. Though the O.E.C.D. scheme deals with labour in general and not necessarily 'brain' labour,, it is the belief that valuable lessons can also be learnt by developing countries. Incidentally the idea of reintegration has also been expressed by some developing countries such as Pakistan, Sri Lanka, Philippines and Thailand.¹

The scheme attempts to tackle their migrant labour problems by handling the following areas : utilization

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1. Asian Regional Programme on International Labour Migration, International Labour Organization, ARTEP, 1987, pp. 28-32.

of savings, training needs and structures, need for an integrated approach and provision of information. The first five are dealt with here. All these areas will require the formation of special legislation and provisions.

A Utilization of Savings

Concerted economic activities combining the employment of returning migrants and the utilization of their savings seem to be an interesting combination from a development point of view. When the owner of a savings account spends his money in a productive direction, in exchange he does not only receive a rate of return in his capital, but he also may be employed and become actively engaged in the productive activities of his country.²

There are many advantages related to the provision of jobs to shareholders; (a) the workers share responsibilities for the outcome of their own investments; (b) the flow of workers to the tertiary sector may be slaved down; (c) capital may be easier to obtain from the migrant workers when they themselves receive, apart from a rate of return, some other benefits like a job and vocational training; and (d) such projects may help in avoiding savings going to the richest regions and only to the industries with the highest rate of return instead of

2. Rien van Gendt, Return Migration and Reintegration Services, Organization for Economic Co-operation and Development, p. 55.

contributing to the development of an emigration country as a whole.

Some countries have tried implementing the first proposal. For instance, Finnish migrants are allowed to open special currency accounts, the establishment of subsidiaries of Greek banks in immigration countries, the existence of convertible bank accounts for migrants and the provision for a higher interest rate on these accounts. Moreover, Greek workers abroad who dispose of a convertible bank account are entitled to a loan for the construction or purchase of a house. Italy also allows convertible bank accounts with higher interest rates and even tax exemption of the interest. The account can be used as a basis to acquire a loan on favourable conditions. In Sri Lanka a special Ministry of labour and Merchant Bank Orientation Plan has been experimented with to utilize savings.³

B. Employment Services

Emigration countries may need manpower for different sectors of their economy, for different regions and with different qualifications, while simultaneously migrant workers may not find a job on their return. Although this is not altogether incompatible, it still poses the

3. P. Athukorda, International Migration for Employment, International Labour Organisation, MIG WP 26, 1986.

question whether the functioning of demand for work will come from the migrant workers ideally when they are still abroad and want to return, or after when they are already back in their home countries.

A closer co-operation between the employment services in emigration countries, like in Sweden and Finland, where there is even an exchange of officials could also improve the acquisition of information about potential returnees.⁴

Finland has also taken some other steps in the direction of employment services. It concluded an agreement with Sweden in 1973 to channel the migration through employment services. The migrants are allowed the same mobility allowance as the residents which include cost of travel to place of work, installation allowance, family allowance and removal costs. Moreover emigrants are also given long term state loans at a low rate of interest, a form of relief during the first year after they return.

C. Training Needs and Structures

The need to organize training courses for returning migrants is evident. Normally the qualification structure of returnees is worse than the qualification structure of departing workers. Even if some skills and training are acquired abroad, this may often turn out to be not

4. Ræen van Gendt, n.2., p. 56.

very useful to emigration countries.⁵ Firstly, the division of labour makes migrant workers to be specialized, secondly, production process are normally capital - intensive and the participation of migrant workers in this process hardly serves as an apprenticeship for employment in their home countries. Generally speaking, the type of development in emigration countries is too remote from the development and therefore from the nature of manpower needs in immigration countries to guarantee an appropriate use of the skills and training acquired abroad. Hence the need for courses geared towards the reintegration of migrant workers is felt to be of great importance. It is likely that courses to improve the management capability will in any case be among the ones provided. Courses can be organized by the public and private sectors. In both cases this can take the form of formal courses or on the job training. If the public sector assumes responsibility a horizontal co-operation between ministries of Labour and education becomes apparent. "However, it is not only seen as the responsibility of emigration countries, to provide courses, and immigration countries, especially in this area, could perform a very important role. Bilateral agreements may be negotiated whereby immigration countries provide or contribute to courses

5. Ibid., p. 58.

aiming at an effective reintegration of migrant workers. Courses could be provided either in immigration countries in both countries. Agreement of this kind already exist between Turkey and Germany and between Greece and Germany".⁶

At the national level Greece has taken a minor but important administrative and legal measure and that is for certain training it provides preferential treatment for migrants by relaxing the age limitation criteria. Sri Lanka has embarked on entrepreneurship training courses for return migrants.⁷

D. Social Service

Special educational provisions will be needed in emigration countries to facilitate the readjustment of of the children of returning migrants. The main problem seems to be related to the mastering of their native language, although other problems caused by their stay abroad should not be neglected. Children returning may not only be torn between two languages, but also more generally between two cultures without being thoroughly versed in either. This entails the problem of what a Yugoslov paper calls "a bilingual, semi-literacy and may demand, on a temporary basis, special efforts, e.g. in the form of remedial education. The severity of this problem depends

6. Ibid., p. 58.

7. P. Atherkorda, n. 3, p. See also ILO, ARTEP, 1987.

among others on the type of education they have received in immigration countries in terms of curriculum, pedagogy, and examination and the time span during which they stayed abroad".⁸

An important aspect with respect to the special educational provisions is that both national and regional/local authorities should play a role. "A decentralization or deconcentration from the centre apparently has been realized in Finland, Italy and Yugoslavia. In the regional/local level the particular needs for special provisions can best be defined. It is on this level that the authorities should do the utmost to avoid that children coming back from abroad be downgraded, they should have enough discretion to arrange for special services as a transition to regular courses. The central authorities should formulate general rules concerning entrance qualifications and the valuation of certificates obtained abroad. At present emigration countries dispose of such rules that range from very strict ones in Portugal to rather loose ones in Greece".⁹

Another important aspect is the availability of housing facilities for the nature and intensity of migratory movements. In Finland, for instance the lack of

8. Råen van Gendt, n. 4, p. 59.

9. Ibid., p. 60.

housing facilities in certain regions contribute to emigration while the availability of housing facilities is one of the requirements for return migration. Housing is also important as returnees in most emigration countries are a considerable part of their savings for the construction of houses and as it is a labour-intensive activity contributing to the employment situation".¹⁰

In Italy, for instance special housing priorities have been provided for returning migrants.

E. Need For an Integrated Approach

For various reasons, the reintegration services should be seen in the broader framework of a national developmental strategy, comprising a variety of policies, like employment, wages, education and housing policies.¹¹

The dual function of reintegration service has already been stressed, i.e. actual support to returning migrants, and relating this support to the more general development of emigration countries especially on regional level. To establish an appropriate relationship means that the reintegration services should be set up so that their objectives relate to the more general developmental strategy. Closely linked to the dual function is the fact that reintegration services should not provide a

10. Ibid., p. 60.

11. Ibid., p. 60.

permanent preferential treatment to returnees, but a positive discrimination, during a limited period of time in order to facilitate their adjustment. The final objective is to achieve an equality between returnees and other members of the community which implies that general employment and social services from that moment on will apply to them. The transition from general to special services would be facilitated if the reintegration services right from the beginning were co-ordinated with the national development strategy. At present most of the emigration countries do not have a coherent policy which establishes a relationship between the problem of migration, especially return migration, and those of national development. If they exist, policies are fragmentary and they leave serious gaps. Only Finland may have a set of measures oriented towards some future objectives as they consider explicitly the migration policies as an integral part of the general social policy.

Another important aspect of reintegration to the more wider migration policies and embedding the reintegration service is a more general development strategy, is the possibility to make use of support from immigration countries.

All the above mentioned proposals are of importance to us because of the legal nature of their implementation. In the utilization of savings, the opening of special

currency accounts, the establishment of subsidiary banks in immigrant countries, the existence of convertible bank accounts and the provision for a higher interest rates on these accounts and the entitlement of loan for the construction and purchase of houses all require special legal regulations or enactments to implement. In case of cooperation between neighbouring countries in the area of employment services, agreements will have to be entered into. In the case of training needs and structures as mentioned earlier bilateral agreements may be negotiated whereby immigration countries could provide or contribute to courses aiming at an effective reintegration. Finally, even in social services like education and housing, laws will have to be passed, such as the passing of the Italian housing priorities for returning migrants. Hence for the reintegration of brains special measures will have to be taken at the unilateral or bilateral level, and since the phenomenon also commonly affects a number of countries, at the multilateral level. Since the number of persons involved in brain drain is presumably less than unskilled labour, there will definitely be more scope for success if the principles of reintegration are applied in the context of brain drain.

The Colombo Plan

A major multilateral attempt to deal with the problem of brain drain was made in 1972 at the Colombo

Conference in which 22 countries participated. The countries were extracted from the advanced western industrial nations, such as the United States, United Kingdom, Australia, Japan etc., and many countries from Africa and Asia including India. Consequently a brief summary of the contribution of each country towards the conference was made. Regarding the regulation of brain drain there was a general consensus that developing countries face a definite problem and it should be mitigated in a spirit of co-operation or according to the aims of the Colombo plan. Most of the submissions regarding regulations and control were very brief and of a general nature. However, Australia, Japan and the Philippines already had more mechanisms by which they regulated brain drain, and the following portion is devoted to their regulatory submissions. India's submission is also given to make a comparison.

A. Submission of Australia

The immigration laws of Australia neither encourage nor discourage permanent settlement by qualified people from developing countries. However, where needed skills are concerned no specific discouragements are made against residents of developing countries. The situation is however kept under constant examination. The Australian government after a review of its policy had announced

"Where the governments of other countries may be concerned over the loss of qualified people there will be appropriate consultation, as Australian must not contradict the aim of the Colombo Plan and other efforts to help such countries development".¹²

Even private students enquiring about entry into Australia are told that they are expected to return home upon completion of their studies.¹³

Moreover when "... a private student applies to enter Australia for a particular course of study, this course is assessed in relation to the needs of his country Private students are not allowed to enter Australia to undertake courses which are not recognized or which do not lead to qualifications in demand in their home countries. The governments of some developing countries scrutinize applications by private students for entry to Australia, so as to ensure that the students proposed meet with their approval".¹⁴

The education progress made by the private student is supervised by the Department of Education and science, to ensure that they continue to follow the courses for

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12. Australia, Country Paper, "The loss of skilled Personnel from Developing Countries : its Incidence, Effects and measures for control" in The Colombo Plans Delhi, 1972, pp. 11-20.
13. Ibid., p. 16.
14. Ibid., p. 16.

which they were originally admitted. If a student proves incapable of completing his course, he is recommended for transfer to a lower level course leading to qualifications which are also in demand in his home country.¹⁵

When a student successfully completes his studies, he is asked to make arrangements to return to his own country. If it is evident that there is a demand for his qualification at home, applications to engage in employment or in further studies in Australia, are normally not approved. If he disputes the existence of a demand for his qualification, exhaustive enquiries are made to establish whether such a demand exists".¹⁶

B Submission of Japan

As a general principle, foreigners are not permitted to stay in Japan for a long period of time to conduct business activities. Only doctors who have acquired a licence to practice medicine in accordance with the medical practitioners law of Japan are admitted to stay but this is an exceptional case.¹⁷

Below is stated the categories of brains and skilled personnel who are permitted to stay in Japan the period

15. Ibid., p. 16.

16. Ibid., p. 17.

17. Japan, Country Paper, "The Loss of skilled personnel from Developing Countries: its incidence, Effects and Measures for Control" in The Colombo Plan, Delhi, 1972, pp. 71-72.

of stay is prescribed by law for each category and this cannot be a factor to induce the drain of foreigners into Japan.

(i) Those foreigners who engage in foreign trade, business activities or investment activities (the period of stay three years).

(ii) Those who engage in specific research or receive education at an academic research or educational institution in Japan (the period of stay - three years).

(iii) Those who are invited by public or private organizations in Japan for the purpose of providing highly industrial or special services and skills (the period of stay - three years).

(iv) Those who are engaged in skilled labour in Japan (the period of stay - one year)¹⁸ When a foreign student wishes to stay in Japan further to engage in business or other activities after graduating from a University, his application for the extension of his stay in Japan will not be approved, unless he has a special reason, such as being married to a Japanese.¹⁹

Visiting Foreign Research Staff Under the Scholastic Interchange Programme

Japan's scholastic interchange or educational exchange programme is carried on by the Japan society for

18. Ibid., p. 71

19. Ibid., p. 72.

the Promotion of Science, a special judicial person, in accordance ^{with} the Law on the Japan Society for the Promotion of Science. The following two categories come under this scholastic programme.

(1) Visiting Professor and (2) Foreign research staff. According to the programme, the expenses, food and lodging, travel requirements and duration of stay are all provided for.

Foreigners in Japan Under Technical Co-operation Programmes

Trainees under Japanese government Technical co-operation programme are received into Japan by the Overseas Technical Co-operation Agency. Acceptance of such foreign personnel is carried out, in principle and in accordance with the requests from the beneficiary countries. The period of technical training in Japan runs from three to six months, on the average there "... has not been a single case of foreign trainee drained in Japan under these programmes".²⁰

C. Submission of Philippines

The Philippines made a major contribution to the Colombo Plan. Apart from recommendations in investment in education, regional centres of study, salaries, and in manpower resources planning it had the following important points to make.

20. Ibid., p. 72.

Selective Training Abroad

Sending only those for training whose specialisation will be directly applicable on return. "Criteria for selection of fields of training" of the guiding Principles and Procedures covering Participants under the Joint NEC USAID programme provides that selection of training abroad be made in accordance with the following guidelines:

- a) Highest priorities will be given participant programmes in support of established project.
- b) The training proposed must be clearly associated with economic development activities. Proposed fields of training in cultural or academic areas, social amelioration, relief, defence and pure research, while all of tremendous importance to the Phillipines social structure are not eligible for financing under the USAID programme as authorized by the United States Congress.
- c) Evidence must be shown that the training proposed will result in constructive improvement in the conduct of specific agency or company operations. The participant will be expected to utilise his experience upon his return through the training of additional Filipinos and not just gain a personal benefit from his training.

Moreover section 1(a) under title of Executive Order No. 129, series of 1968, provides as follows:

- a) To accept in the interest of public service and in the fields of study or work allied to their official duties:

- (i) Scholarships, fellowships and training or study grants for secured, arranged, appeared or sponsored by the Philippine Government or any of its instrumentalities.
 - (ii) Scholarship, fellowship, and training or study grants from outstanding foreign universities or institutions upon recommendations of the department head concerned.
 - (iii) Scholarship, fellowship, training or study grants and such other appers from outstanding foundations and scholarship programmes as the Rockefeller Foundation, the Ford Foundation, the Asia Foundation and the Russel-Sage Foundation.
- (b) To attend and/or undertake student seminars and workshops, on the job training, ad-hoc studies, or observation trips in connection with scholarships, fellowships, trainings or study grants abroad.²¹

Adoption of a System of Incentives for the Return of Migrants Professionals

- a) Encouraging the establishment of scientific and research foundations by private sector by making donation to these foundations exempt from payment of taxes.
- b) Enactment of legislation that will require the services of professionals, technical and skilled technicians. For instance, the Medicare Law which provides for

21. Philippines, Country Paper, "The Loss of Skilled Personnel from Developing Countries : Its Incidence, Effects and Measures for Control", on The Colombo Plan, Delhi, 1972, pp. 132-162.

national insurance schemes and will require the services of a considerable number of doctors and other health personnel. Another important piece of legislation is a special science and technology research and development bill. The funds provided will pave the way towards the establishment of a milieu of scientific research in various fields, and the employment of scientists and other skilled technicians;

c) Financial incentives, such as the adoption of high wages as a national policy. A start has been made in Republic Act 4656, which standardises salaries of nurses and other health personnel in government institutions. The National Science Development Board is presently a project designed to provide research grants to and facilitate the reentry of returning scientists.

Reappraisal of Philippine Participation in the United States Exchange Visitors Programme

Initiated as a vehicles for educational and cultural purposes and for the training abroad of technical personnel, including doctors and nurses, the exchange visitors programmes in reality has become a recruitment device which has served to draw from the Philippines shores these valuable manpower. Such an appraisal may precede bilateral talks between the Philippines and the United States with a view to improving present arrangements. The view of

the Philippines missions abroad on this matter are public records, and should be considered as basis for such re-appraisal.²²

Measures for Facilitating the Placement of Professionals

The Philippines should maintain a register of Professionals working at home and abroad as a national resource. Multi-agency co-operation on data and information collection should be undertaken involving the Bureau of Census and Statistics, Department of Labour, Department of Foreign Affairs, and Bureau of Immigration and Foreign Governments. For while there is adequate information on internal and external flow of goods and commodities, there is little data on emigration.

Assistance in the placement of returnees should be the concern of either the government or the private sector. Emigrants are virtually cut off when they leave with nothing to look forward to on their return to the Philippines. Other countries have workable placement systems for their professionals, e.g. Israel and South Korea.

To ensure the return of exchange visitors programme participants, the Consulate General in San Francisco recommended the following measures:

22. Ibid., p. 153-62.

(a) The period of validity of their passports should be conterminus with the duration of their training i.e. for nurses, two years, doctors, five years etc., thereby limiting United States immigration authorities the power to extend their visas.

(b) In the selection of exchange visitors, married people with children should be preferred as there would be greater inducement for them to return to the Philippines.

(c) A suitable placement offer from either the Philippines government or a private company to make the exchange visitors feel that he or she, at least has something to look forward to, to compensate for the probable cut in salary he will invariably suffer in his home country.²³

Measures of Control by the Reviewing Country

(a) Immigration laws and regulations governing student and visitor entry which do not encourage permanent settlement. For instance the United Kingdom in 1971 introduced the Immigration Act-1971. The main change was that for Commonwealth immigrants, employment vouchers were no longer issued, but were replaced by work permits. Employment vouchers formerly issued; permitted immigrants to come for an unlimited period. Potential immigrants in certain professions were not necessarily required to have an

23. Ibid., pp. 153-62.

offer of suitable employment. Under the new arrangement work permits were to be issued only to those who have an offer of suitable employment and admission will not be for more than twelve months in the first instance.

(b) Education and Training

The United Kingdom provides a number of specialised courses for students from developing countries. It also endeavours to ensure the return of all students financed under the technical assistance programmes. The return of the student is built into any training programme and nearly all students come from the public sector and will have jobs to which they will return. The United Kingdom training programme is aimed at graduate rather than undergraduate students.

(c) Removing monopolistic restrictions which limit entry into certain professions by nationals or nationals of other developed countries and prevent domestic production of skilled manpower to meet demands.

(d) Manpower training projects. Training may be done to meet manpower needs on a larger scale or to meet personnel shortages in important sectors. A country suffering from a lack of qualified teachers for its educational programme can formulate a training programme to produce these teachers abroad, perhaps two or three hundred persons over a three or four years span of time. Or if a country is short of developmental economists,

young graduates and persons already holding developmental planning jobs can be progressively sent to development study centres for training until the gap is closed.

In the 1960's Nigeria had a need for people trained in agriculture. Three hundred people were sent to the United States over a three years period for agricultural degrees. Fields of study on basis of projected requirements and plans for utilizing the participants on their return were observed. It was considered by the United States AID mission a very successful project.²⁴

D. Submission of India

The most effective way of stemming brain drain is to accelerate the programme of socio-economic development, resulting in optimum utilisation of skilled manpower. It is now widely recognized that the growth rate of the economy is not necessarily accompanied by a corresponding growth of employment, particularly for high level professional manpower. It is not necessarily the target and the investment in the plan, but the detailed working strategy at the project level that determines employment potential. The developing countries would do better if the socio-economic plans are executed in a more self reliant manner, involve maximum local participation, and utilises the available scientific and technical manpower,

24. Ibid., pp. 153-62.

to the fullest extent. This calls for simultaneous attack on a number of fronts ranging from restructuring the system of education, expansion of scope of scientific research, larger allocation of outlay in the Research & Development sector and strengthening of research and science divisions in public/private sector undertakings to revision of pay scales of scientific and technical personnel where necessary and better placement services. Schemes like the scientists pool and the creation of supernumerary posts are also useful in so far as they facilitate return and adoption of Indian scientists.

Mature students can get more out of foreign education. In fact it would be desirable to arrange visits for mature persons like university teachers, research workers, and industrial workers.

The existing restrictions in respect of naturalization in the recipient countries and the foreign exchange situation of the home country also exercise some influence on the extent of the brain drain. The immigration policies of developed member countries of the Colombo Plan should be so oriented so that trainees, students, exchange visitors and professionals from the Colombo Plan developing countries who go to developed countries, return to their home countries for a specified time before they are eligible to seek immigration visas. As regards foreign exchange releases the present policy of the Reserve Bank of India is

not to be too liberal with its releases. There may be wisdom in these practices being applied with greater selectivity and with due allowance for the specialisation that the student proposes to take up.²⁵

In conclusion one can group Australia and Japan together, and the Philippines and India on the other side, and see how the mechanisms of the developed as well as the developing countries can be complementary to each other.

The laws of both Australia and Japan are restrictive and do not encourage migration to these countries. Many advanced countries do not seek too many people coming into their territories, and this is only in the better interest of developing countries who cannot afford to lose the best of their brains. Therefore, the administrative and legal clauses in Australia help to control brain drain. The time bound measure in Japan also prevents brain drain, and this is suggestive of the earlier mentioned scheme of co-terminating passports at the completion of the courses of students, so that developed countries cannot and need not extend their visas.

The measures adopted by the Philippines are more instructive for similarly placed developing countries,

25. India, Country Paper, "The Loss of Skilled Personnel from Developing Countries : its Incidence, Effects and Measures for Control" in The Colombo Plan. Delhi, 1972, pp. 36-44.

including India, for it reminds us that not only should we air our grievances but also adopt measures to counter them.

The Philippines' has definite legislation, orders and guides enacted for selective training abroad, such as Executive Order 129, Series of 1968 and the Funding Principles and Procedure covering Participants under the government NEC USAID Programme. It encourages tax exemptions for foundations that will encourage research, and the enactment of the Medicare Law which will require the services of 'brain'. Financial incentives are also provided as indicated by Republic Act 4657. Furthermore it endorses more restrictive immigration laws and regulation which do not encourage permanent settlement, and endeavours to ensure the return of students by advocating training programmes that have their returns built into them. Therefore one can see how Philippines, has really put teeth into the matter and means business about it. India on the other hand it seems makes much ado about it, but the only positive suggestion it made was the endorsement of restrictive immigration laws.

CHAPTER - VII

CONCLUSIONS

The preceding chapters have indicated that in terms of quantity, quality and even cost the brain drain is a loss to developing countries. In the introductory chapter it was doubted whether the brain drain problem can be formulated legally. In the discussions of nations and even at the United Nations one sees that the measures proposed to combat brain drain have intricate legalities involved. In fact lawyers have deeply studied some of the measures to mitigate brain drain, and the necessity of national, bilateral and multilateral treaties have been noticed. A universal code of conduct at the United Nations level will be most appropriate.

Two important legal issues are the adoption of a legal definition and the nature of regulations to be adopted. Regarding regulations one has to be careful because here one has the conflict of laws which support the individual liberties and the laws of nations which seek to curtail these liberties.


As regards the question of definition, the ones given by Man Singh Das, Scott & Grubel and the OECD are not very detailed. UNCTAD has not come forward with its own definition but adopts the one used by the Immigration and Naturalization Service of the United States : Profe-

ssional, Technical and Kindred Workers (PTK). This is akin to the ILO's : Professional, Technical and Related Workers (PTR). In fact the ILO's, PTR term includes a useful categorization of the different types of labour and this also can be a useful adoption if countries agree.

UNCTAD itself has not come forth with a definition because of lack of standardizations of various definitions, the data available deal largely with gross rather than net flows, the practice of recording immigration data on the basis of the country of last permanent residence as opposed to nationality and the exclusion of all dependents.

If one is to go by the spirit of the Colombo Plan, then even the advanced Western nations in principle affirmed the existence of brain drain and their co-operation in mitigating it. The world at large also agrees that there is a problem and it needs addressal. Though there may be differences in how it can be solved, and there will have to be give and takes.

Migration is not a random phenomenon and for the most part, 'push' forces in the donor countries have counterparts in the 'pull' forces of the recipient countries. These factors are inter-dependent, with none of them acting on their own in any significant manner. Income differentials between the developed and developing countries and other related economic considerations have been cited as the most important cause of brain drain.



Professional factors, which include working conditions, infrastructure, instruments, equipments, libraries, research facilities and the amount of funds allocated to it are also determinants of brain drain. Unemployment or lack of gainful employment can be another major cause. It is interesting to note how urbanization and the consequent culturization to supranational professional values have also contributed towards brain drain. Finally, social setting which as said could include anything from the stability of the political and social environmental to the availability of consumer goods can also contribute towards brain drain. It is important to note that these causes are complex and involve conditions in both 'receiving' and 'giving' countries and therefore the necessity of efforts not only at the national level, but also at the transnational level.

When the question of control or regulation arises, one immediately is made aware of the conflict of the individuals right to migrate and his duty towards the state. Moreover the state concerned may have invested money in him.

Banning of migration is simply out of the question since this is against international norms and civilized practice. The alternative then, is regulation, or certain administrative and legal checks whereby brain drain can be lessened.

Since the concept of freedom of movement cannot be impinged upon, what are the circumstances when it can be curtailed. One can easily see that in international law and in the laws of most nations, freedom of movement can be curtailed in case of criminal conduct. For instance, it is not safe for the well being of a society to have a murderer on the loose. Now brain drainees definitely cannot be equated with criminals.

However, one sees that in practice, freedom of movement is not an absolute. It can be curtailed by concepts such as the 'sovereignty and integrity', 'detrimental to the security', 'public interests' and 'prejudicial to the friendly relations' of nations. There is the danger of such phrases being misused, but the law of the most nations as they currently exist contain such clauses.

Now again the question arises, can brain drain be regulated under such phrases. That it has not been done so, is clear, whether it can be done is another question. One thing is definite, and that is that the just mentioned concepts were existent before the phenomenon of brain drain in the magnitudes as we now know it came into being.

Under such qualifying conditions what is one to do? There is great ferment in the United Nations that has a direct or indirect bearing on the problem. The current emphasis within and outside the United Nations on the

necessity of meeting basic human needs and on the ongoing dialogue concerning the establishment of a new international economic order will undoubtedly have implications for the brain drain.

Many important resolutions regarding the reverse transfer of technology have been passed by the United Nations and its bodies. One of the most important was resolution 3017(XXVII) of the General Assembly which was passed with 111 in favour, none against and 13 abstentions. Other resolutions like the 'Agreed Conclusions and Recommendations of the Group of Governmental Experts on the Reverse Transfer of Technology, the text of Resolution 7(II) of the Committee on Transfer of Technology, General Assembly Resolution 33/151 on Reverse Transfer of Technology and many others indicate the emerging thinking and norms on brain drain and the compelling reasons why it has to be rectified.

More importantly is the draft developments on the International Code of conduct on the Transfer of Technology. A careful reading of the preamble, the principles and objectives will show that a continuation of the brain drain will go against the substance of what they contain. In fact there is also a chapter in the drafts entitled 'Special Treatment for Developing Countries' and a continuation of the brain drain will make a mockery of the safeguards that are being proposed for the transfer of technology.

Therefore one sees that brain drain in the magnitude as we now know it is a very recent phenomenon, such as never encountered before. This has led to the need of norms that safeguard the interests of the developing countries. In practice this may also be in the mutual interests of the developed countries also.

Finally, the proposals that have been considered by the UNITAR, UNCTAD, the OECD and the Colombo Plan should be taken into account. Many of the proposals therein, can be tackled nationally, some bilaterally or regionally and some at the universal level. There may be overlapping of some of the measures suggested.

The strategy proposed here is national measures, that is both by the home country and host country, bilateral or regional measures (based on OECD scheme), and finally the measures taken at the international level.

National Measures

These can be divided into host country measures and home country measures.

A. Host Country

First in the UNITAR policy proposals it was mentioned that countries differ widely in the acceptance of migrants and in their attractiveness to migrants, and therefore policies can differ. However one of the common methods advocated by the participants in the Colombo Plan was the

need for more restrictive immigration laws by the host country. India and the Philippines both advocated it, and Japan and Australia are two nations which already have stringent laws. Now brain drain is not necessarily a permanent phenomenon, and the restrictive immigration laws need not be permanent but rather till the unequal imbalance is rectified, or temporary.

Further, both Australia and Japan have strict clauses for students in their laws and regulations. Students are expected to return home, sign an acknowledgement that they return on the completion of their studies, his course is assessed in relation to the needs of his country, the students progress is supervised, and on completion he is asked to make arrangement for his departure. On such strict regulations it is not conducive to brain drain.

In Japan, the visas are very strictly given. In fact there is a co-terminus time allocation for the specific purpose of the visit.

Now considering the mutual desires of both developed and developing countries in stemming brain drain, such measures can be encouraged.

Home country

Many home countries make a lot of noise, but few take ameliorating steps. The Philippines is an example of a country that has meant business about brain drain.

The UNITAR study had mentioned that selecting those most likely to return after studies was not too remote an idea. In fact the Philippines has already been giving expression to this by adopting measures such as the criteria for selection of fields of training of the funding principles and procedures covering participants under the Joint NEC USAID programme, and also under section 1(a) under Title of Executive Order No. 120, Series of 1968. Here priorities are given in support of established projects, training associated with economic development, training in the fields of study or work allied to official duties or on the job training and the like. Under such criteria the return is more likely to be higher. Other developing countries should also adopt selection measures.

There can also be the adoption of a system of incentives for the returnees. Here some of the Colombo Plan proposals and the ideas in the OECD plan may overlap. There can be some monetary measures like encouraging the establishment of scientific and research foundations by private sector, by making donations to these foundations ~~exempted~~ from the payment of taxes.

A correct utilization of the savings of migrants can also encourage returns, for instance, the provision of jobs to shareholders, or the existence of convertible bank accounts for migrants and the provision of a higher interest on these accounts. Financial incentives, such

as adoption of high wages or supernumerary parts as a national policy will also help return.

Measures will also be necessary in the area of social services. Special educational provisions will be needed in emigration countries to facilitate the re-adjustment of both the migrants and their children. Children may not only be torn between two languages but also two cultures. The Central authorities should formulate general rules concerning entrance qualifications and the valuation of certificates received abroad. For the adult returnee there may be a need to organize training courses. The division of labour abroad makes migrants to be specialized, and production processes are normally capital intensive, and the migrant may be unsuited for the home country. Special training or concessions will have to be made, for instance, Greece has adopted an important administrative-legal measure by providing preferential treatment by relaxing age limitation for a particular training. Another important area in social service is housing. Returns after do not have accommodation or have to spend substantial amount of their savings for construction. To lessen the burden, some measures have to be taken, for instance, like the provision of special housing priorities for migrants in Italy.

Finally, another method of regulating the brain drain is to do with controls. Controls are not looked

upon favourably, however it is not too strange or remote a method. One way of checking its misuse is to make controls time-bound. What are the forms of controls advocated. N.M. Dandelkar for instance says that stricter emigration laws are a parallel to strict immigration laws, and advocates them.¹ The UNITAR proposals however advise a judicious use of bonds and pledges to ensure return of draineés.

Bilateral, Multilateral or Regional Measures

As mentioned earlier by UNITAR, developing and developed countries each have their own unique features and characteristics. "Where the situation requires planning and amelioration, universal policies applying to all developed countries are not as efficacious as policies applying to the particular situation in each one. Bilateral agreements about educational exchanges and migrations will be more attuned to each situation than universal policies are."²

Here bilaterally or multilaterally does not necessarily mean regionally located, but rather in agree-

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1. N.M. Dandelkar, "India", in The Brain Drain - Walter Adams (ed.) New York 1968, pp. 203-32.
 2. William Glaser, "Characteristics of Developed Countries and Implications for Policy" in the Brain Drain - Emigration and Return. UNITAR Report No. 22, 1978, pp. 71-72.

ments because the developed host countries are any way geographically located at a distance.

In the area of taxation, agreements will have to be entered into by the countries concerned. In the area of employment services, again agreements will have to be entered into to channalize migrants as is done in the UECDA countries.

Universal Measures

These measures are largely to deal with the UNCTAD proposals, and they are being developed with the awareness of both developed and developing countries. If adopted, it is thought to be done so by most nations or universally.

Under these proposals, there are two that could be considered seriously namely, the proposed International Labour Compensatory facility and Taxation measures. Both these schemes are compensatory in character and they need to be introduced because there is existent discrimination between capital, commodity and labour export.

The effective implementation of the first scheme will necessitate an international agreement on the movement of labour. The funding should mostly come from labour importing countries and its proposed that contribution should be commensurate with gain from brain drain.

The difficulties lie in arriving at the agreement, what labour types should be included in the scheme, what

should the remuneration to these types be, can it be standardized, are the developed countries going to be willing and generous contributions, and how is the fund collected to be distributed.

In spite of the above mentioned difficulties, the General Assembly's endorsement indicated that the conceptual, institutional and financial feasibilities should be considered at the government experts level.

The taxation schemes are meant to be financed by the developed countries or the drainee himself. The arguments for one that the co-existence of developed and less developed countries lead to this brain drain, and therefore it is fair that the former should help the later to cope with the losses. Secondly, even if there is no loss, emigration profits the national and therefore he should be incrementally taxed. Thirdly, the proposed tax would provide the developing country with a policy instrument to achieve greater efficiency and equity. The last reason was the externality effect of additional transfers.

Two types of taxes have been proposed : a lumpsum exit tax and a surtax. The exit tax is for costs incurred. The exit tax would not be too difficult, provided one knew that the person was going to become a drainee, if not the methodology to be adopted would be

that commonly used in case of defaulting borrowers, i.e charge on property. The surtax however is more complicated, because it requires the co-operation of the developed country concerned.

As mentioned before, the tax proposals have been extensively explored by lawyers. Some of the problems are deciding on whom the tax burdens should fall, the developed countries or the nationals themselves. Depending on that there can be the question of what are the specific labour types, and the frequency and rates of taxation. In the second case the question of transfer of amounts to the developing country is also involved. Who is the tax to be imposed by, will the tax returns be substantial and meaningful, who and how will the collection be carried out. These questions might be answered differently by different countries, depending upon their constitutional framework. However, most of the problems can be overcome if there is a multilateral treaty which guarantees enforceability.

Sometimes, as for instance in the United States, the tax would have to be imposed by the developing countries while collected by the developed countries. For the tax to be meaningful, most or all developed countries should participate. Finally, the administrative problems of collection need not be too great, if the multilateral treaty assures so.

The major problem, with the tax proposals or for that matter the international labour compensatory scheme, in the existence of a multilateral treaty, and unless this comes into being the brain drain issue wont be tackled at the universal level. That is not to say, therefore one does nothing. As mentioned earlier, the unilateral national measures can be adopted. Since in the Colombo spirit even countries like the United States and United Kingdom had endorsed regulation and along with Australia and Japan, their immigration laws can be made preventive and student schemes can also be time bound. The developing countries on the other hand like the Philippines must adopt some of the financial measures mentioned, selective measures, utilization of savings, social service measures and also the regulation by controls such as bonds and pledges.

In the second proposal, universal measures will take time to develop, it will however be aided, if bilateral or multilateral or regional arrangements are entered into. This will take into consideration more of the characteristics of the concerned countries. The co-operative measures here can be mainly under taxation and employment services.

As mentioned, more universal measures will take more time, and the idea has to be propogated. However, it is hoped that the preceeding two sets of measures

will prepare the ground for multilateral agreements.

Finally, a few words about how the brain drain is crucial for development, and therefore all the more reasons for its regulation. Brain drain implies that persons on whom the society spent a considerable amount of money, ultimately gives the benefit of their education to other countries. It is not only a matter of the society not getting the return it has a right to expect, but also that a society that can less afford the loss, actually helps more developed economies. More important is the fact that precisely such persons go who have the maximum initiative, the enterprise and the technical qualifications to make the maximum contribution to society.

The brain drain has resulted in the nonavailability of a very substantial percentage of the most talented among the products of the educational institutions, to our very own institutions and organizations. The fact that they are not available has led to the loss of continuity of research in the post independence tradition, and its difficult to find successors. This had led to a significant mediocrity in intellectual productivity. Such consequences are obvious, further competent personnel's influence go far beyond the direct and specific product of their employment.

Financial loss are immense, for instance the training of an engineer at times can cost two lakhs rupees and he leaves with this incurred and no benefit to the society left behind.

Therefore whenever a society loses a productive person through emigration, the total value of the national output in various fields is reduced. Hence it is in our national developmental interests to expressly regulate and control our brain drain.

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