CRIMINALIZING THE POSSESSION OF FOREIGN EXCHANGE

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1. INTRODUCTION

In situations when a business venture imports merchandise from different nations, trades its items to them or makes speculations abroad, the transaction is made in foreign exchange. Foreign exchange signifies 'foreign money' and incorporates: - (i) deposits, credits and balances payable in any foreign currency; (ii) drafts, travellers' cheques, letters of credit or bills of trade, expressed or drawn in Indian rupees yet payable in any foreign currency; and (iii) drafts, travellers' cheques, letters of credit or bills of trade drawn by banks, organizations or people outside India, yet payable in Indian rupees.[1]

In India, all exchanges that incorporate foreign exchange were managed and regulated by Foreign Exchange Regulations Act (FERA), 1973[2]. The fundamental objective of FERA was preservation and appropriate use of the foreign exchange assets of the nation. It likewise looked to control certain parts of the behaviour of business outside the nation by Indian organizations and in India by remote organizations. It was a criminal enactment which implied that its infringement would prompt to imprisonment and payment of heavy fine. It had numerous prohibitive provisos which hindered foreign ventures.

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[1] 'Legal Aspects: Foreign Exchange Management Act (FEMA)',Business.gov.in; Available at: http://www.archive.india.gov.in/business/doing_business/fema.php [last visited: 30th January, 2017]
[2] Foreign Exchange Regulation Act (FERA), 1973

Foreign Exchange Regulation Act (FERA) has been replaced by Foreign Exchange Management Act 1999 (FEMA)[3] which has been passed in the winter session of the parliament. FEMA has now finished 17 years of its existence. The replacement of FEMA with FERA has resulted in decriminalization of the offences mentioned and hence FEMA has become unnecessarily lenient and at the same time made it futile as the offences mentioned there under are now classified as civil and not criminal offences. FEMA is a civil law which implies that in case of its violation, it will call for payment of only monetary penalties and fines. It is the main statute which deals with transactions of foreign exchange. This paper limits the scope of foreign exchange to foreign currency. This paper focuses on the idea that Possession of foreign exchange is a crime and should be criminalized. Hence, the decision to do away with FERA and implement FEMA hereunder classifying it as a civil offence was a miscalculated judgment. The paper will provide arguments in favour of criminalizing possession of foreign exchange.

1.1 INDIAN JURISDICTION

Indian law regarding the dealing and punishment of trade in foreign exchanges is dealt under FEMA (herein 'the Act'). Section 3 of the Act states guidelines to deal with Foreign Exchange, etc permitting only authorized person to deal in foreign Exchange and prohibiting receiving payment by or on behalf of any resident outside India except authorized dealers and to make any payment to or for the credit of any person resident outside India.[4] Section 9 deals with exemption from realization and repatriation in certain cases.[5] These cases have been specifically mentioned by the Central Government and RBI in its notifications. They are:

1. It has been mentioned that Residents are allowed to hold foreign currency up to US$2,000 or its equivalent provided the foreign exchange was –

[3] Foreign Exchange Management Act (FEMA), 1999
[4] Foreign Exchange Management Act, 1999, Section 3
[5] Foreign Exchange Management Act, 1999, Section 9

a. Acquired by a person by him while on a visit to a place outside India by way of payment of services not arising out of any business or anything done in India;
b. Acquired by a person from another person as honorarium or gift;
c. Acquired by a person by way of honorarium or gift.[6]

2. An individual when coming to India from abroad can bring along with him foreign exchange without any limit provided that if foreign currency notes or travelers cheques exceed US$10,000/- or its equivalent and/or the value of foreign currency exceed US$5,000/- or its equivalent, it should be declared to the Customs Authorities at the Airport in the Currency Declaration Form (CDF), on arrival in India.[7]

3. Without prejudice to clause (iv) of Regulation 3, a person resident in India but not permanently resident therein may possess without limit foreign currency in the form of currency notes, bank notes and travelers cheques, if such foreign currency was acquired, held or owned by him when he was resident outside India and, has been brought into India in accordance with the regulations made under the Act.[8]
4. On return from a trip to abroad individuals are required to surrender unspent foreign exchange held in the form of currency notes within 90 days and travelers' cheques within 180 days from their arrival.; however, they are free to retain foreign exchange up to US$2,000, in the form of foreign currency notes or TCs for use.[9]
5. Travelers are permitted to buy foreign currency notes/coins only up to US$2,000. Balancing amount if any can be accommodated in the form of traveler's cheques or banker's draft. Certain exceptions to this are:

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[6] Frequently asked questions, *Foreign Exchange Facilities for Residents*, Reserve bank of India, June 30 2004; Available at: https://www.rbi.org.in/scripts/FAQView.aspx?Id=11 [last visited: 30th January, 2017]
[7] *ibid*
[8]*Foreign exchange department, Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015*, Reserve Bank of India, Notification No. FEMA 11(R)/2015-RB, December 29 2015; Available at: https://rbi.org.in/Scripts/BS_FemaNotifications.aspx?Id=10262 [last visited: 30th January, 2017]
[9] *Supra* note 6

(a) persons travelling to Iraq and Libya can purchase foreign exchange in the form of foreign currency notes and coins not exceeding US$5,000 or its equivalent; (b) persons travelling to Islamic Republic of Iran, Russian Federation and other Republics of Commonwealth of Independent States in the form of foreign currency notes and coins.[10]

6. In case, the foreign exchange has been acquired for a purpose and has not been exhausted after 60 days from purchase, it is required from them to surrender it to an authorized dealer.[11]

Section 5 of the Act talks about Current Account transactions which include transactions that are the ones which facilitate people to sell or draw foreign exchange to or from an unauthorized person provided that such sale or draw.[12]

Section 6 of the Act talks about Capital account transactions which means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person's resident outside India, and includes transactions referred to in sub-section (3) of section 6. [13] In terms of sub-section 4, of Section 6 of the Foreign Exchange Management Act, 1999, a person resident in India is free to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. [14]

Punishment: The punishment for contraventions committed under this act is mentioned in Chapter IV titled Contravention and Penalties. Section 13 talks about Penalties and states that

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[10] *ibid*
[11] *ibid*
[12] Foreign Exchange Management Act, 1999, Section 5
[13] Foreign Exchange Management Act, 1999, Section 6
[14] *Supra* note 6

"13(1) If any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization s issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues. (2) Any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or she l be retained outside India in accordance with the directions made in this behalf." [15]

2. FOREIGN EXCHANGE REGULATIONS IN FOREIGN COUNTRIES

2.1 CHINA'S JURISDICTION

Government of the People's Republic of China has implemented Regulations of the People's Republic of China on Foreign Exchange Control, 1997[16]. Under Article 13 of the regulation, individual holders of foreign exchanges can keep the current foreign exchanges on their own or deposit them or sell them to the respective designated banks of foreign exchange. [17]

Under Article 14, in China, the purchase of foreign exchange by persons for private reasons is permitted as long as it does not exceed the specific limit; however people may

[15] Foreign Exchange Management Act, 1999, Section 13
[16] Regulations of the People's Republic of China on Foreign Exchange Control, 1997
[17] Regulations of the People's Republic of China on Foreign Exchange Control, 1997, Article 13

seek permission from foreign exchange control authority if they wish to buy over the specified limit and then the application will be approved if the foreign exchange control authority deems it to be true.[18]

Punishment: Under Article 39 if one commits the act of foreign exchange evasion (without authorization, depositing the foreign exchanges in abroad in violating the State provisions; failing to sell foreign exchanges to designated banks of foreign exchange, as required by State provisions; remitting or carrying foreign exchanges out of the country in violating the State provisions; carrying or mailing foreign exchange deposit certificates and foreign exchange negotiable securities out of the country without permission of foreign exchange control authority; other actions of foreign exchange evasion) he/she will be fined and if a crime is constituted the criminal liabilities will be assumed. [19]

Under Article 40, it is stated that the ones who commit the act of illegal foreign exchange arbitrage (payment for imports that ought to be paid with foreign exchanges in Renminbi or in barter, or in other similar means in breaking the State provisions; payment for the expenditures of a third party in Renminbi, who spent in China, for repayment from this party in foreign exchanges; investment in China in Renminbi or with materials bought in China by overseas investors without approval of the foreign exchange control authority; Purchase of foreign exchanges with faked, invalid certificates, contracts, bills or other deceptive means from designated banks of foreign exchange; other actions of illegal foreign exchange arbitrage) will be fined and a crime if constituted criminal liabilities shall be assumed. [20]

Under Article 41[21], illegal incomes arising out of Foreign Exchange business running without the permission of foreign exchange control authority will be confiscated and the business will be outlawed or criminal liabilities will be put in case crimes are constituted.

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[18] Regulations of the People's Republic of China on Foreign Exchange Control, 1997, Article 14
[19] Regulations of the People's Republic of China on Foreign Exchange Control, 1997, Article 39
[20] Regulations of the People's Republic of China on Foreign Exchange Control, 1997, Article 40
[21] Regulations of the People's Republic of China on Foreign Exchange Control, 1997, Article 41

2.2 BANGLADESH'S JURISDICTION

Bangladesh has exceptionally strict external trade control laws. Despite the fact that Taka, the Bangladeshi coin of exchange is uninhibitedly convertible, exchange of foreign trade is profoundly directed. Settlement of cash outside Bangladesh is permitted just for particular circumstances and is required to be bolstered by proper documentation. Foreign Exchange Regulation Act, 1947[22] ("FERA") is the essential law in such manner and gives the lawful premise to directing certain transactions, dealings in foreign exchange and in addition, securities. Bangladesh Bank, the national bank of Bangladesh is in charge of regulating foreign exchange dealings in Bangladesh.[23]

Punishment: Under Section 23 of FERA, 1947, it is stated that

> "whoever contravenes, attempts to contravene or abets the contravention of any of the provisions of this Act or of any rule, direction or order made there under, shall notwithstanding anything contained in the Code of Criminal Procedure, 1898, be tried by a Tribunal constituted by section 23A, and shall be punishable with imprisonment for a term which may extend to Seven years or with fine or with both, and any such Tribunal trying any such contravention may, if it thinks fit, and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated."[24]

2.3 SOUTH AFRICA'S JURISDICTION

For South African residents, foreign exchange restrictions have been liberalized for the purpose of minimizing the administrative burden for individuals engaging in foreign exchange transactions. Individuals are allowed to maintain a foreign currency account with an Authorized Dealer and/or a foreign bank account for purposes such as[25] :

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[22] Foreign Exchange Regulation Act, 1947

[23] *ibid*

[24] Foreign Exchange Regulation Act, 1947, Section 23

[25] *ibid*

a. Travel

b. Legitimate foreign earned income

c. Foreign Investment

d. Foreign inheritance

Punishment: The consequence of a failure by a South African resident to comply with exchange control is that such resident commits a criminal offence punishable by fine or imprisonment or in certain instances both.[26]

3. SOCIO-ECONOMIC ASPECT

With tremendous expansion of globalization and internationalization of global market, risk of foreign exchange has been one of the persistent problems that our economy is dealing with. Economic reforms brought by Indian financial sector has generated and promoted enormous opportunities for Indian economy which has helped in expanding horizon for Indian companies to deal in international trade with global companies but this was possible at the cost of extensive variation of Indian rupee with respect to other foreign currencies.

Indian economy is in exigent of the strictly regulated and followed regime related to foreign exchange. With advent of economic reforms which introduced a less regulated regime through liberalization of the finance market, black market, stocks of foreign exchange and imports flourished Indian markets.

Demand-supply functions are the factors that hegemonize the rates in the International trade market. India being an evolving economy needs to adapt profuse changes, going from individual and institutional inclinations to changes in innovation, monetary strategies, controls, and so on. In addition, there are modifications emerging from foreign trade and capital accounts. These create an assortment of dangers, which is required to be governed. There has also been a sharp increment in foreign Investment in India.

[26]*ibid*

Export specific Indian organizations are additionally captivating in a much more extensive scope of foreign exchanges with various nations. These organizations have additionally been more dynamic in raising monetary assets from abroad. Every one of these improvements consolidates to give a support to flow of foreign exchange, including distinctive monetary forms and diverse nations. These organizations are progressively becoming the reason behind the requirement for management of foreign exchange fluctuations. The worldwide monetary emergency has increased the instability in assets and foreign exchange market is no exception.

Fluctuation of INR has additionally been exceptionally hasty and erratic. Wild fluctuation of INR value with respect to international currencies like USD, Euro, Pound and Yen have profoundly affected foreign as well as domestic trade market and overall revenue generation of Indian organizations.

Foreign exchange risks emerge fundamentally because of exchange variation in an organization's assets and liabilities and income differences. This risk proceeds till the foreign exchange position is settled. This danger emerges in light of foreign currency cash transactions, foreign trading, and investment in foreign currencies or in foreign organisations.

Indian enterprise and foreign direct investment is the essential link to India's developmental story in current position of globalized market. India is one of the favoured hubs for foreign investment, maximum utility of which is being bit by bit unleashed with growing institutions, topographical benefit and growing optimistic working class. This is fostering the urge amongst the multinational dealers, foreign traders, foreign investors, and shareholders investing in foreign stocks to preserve and possess foreign exchange. Controlled foreign exchange regulations and management is necessary for stable macro economy and political administration.

Possession of Foreign exchange control is essentially required to be utilized by nations like India with relatively weaker currency where there is an exponential demand for foreign possession amongst the foreign investors. This has a devastating effect of decline of exports and stimulation of imports. By limiting the amount of foreign exchange an individual can possess, the control authority can limit imports and thus prevent a decline in its total gold reserves and foreign balances.[27]

In order to accelerate the economic growth and development by supplementing household capital, innovation and skills; the government of India objectifies and intents to attract and promote foreign investment which is turn misused by the process of hoarding of foreign possession and giving birth to smugglers.

Possession of foreign currency leads to creation of black market to exchange the weaker currency for stronger currency. This leads to a situation where the exchange rate for the foreign currency is much higher than the rate set by the government and in this manner establishes a shadow currency exchange market.[28]

India should control foreign possession in order to curtail capital flight.[29] The possessors of weaker currency (for instance INR) desire to exchange the currency for more stable and less prone to undetermined fluctuations in the value. This creates a situation of the country's currency rate in the market to become volatile. Volatile currency position of any country is a threat to the residents of the country as residents normally crave and demand for a stable economy and society to live in.

4. CONSTITUTIONAL ASPECT

The Article 246 of the Constitution of India grants exclusive power to the Parliament to make laws in respect of all the matters mentioned in the List 1 in the Seventh Schedule

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[27] The Editors of Encyclopædia Britannica, '*Exchange control GOVERNMENT* RESTRICTIONS', Encyclopaedia Britannica, 1998; Available at: https://www.britannica.com/topic/exchange-control [last visited: 30th January, 2017]

[28] '*The Use of Foreign Exchange Controls to Promote Economical Stability*',EarnForex; Available at: http://www.earnforex.com/articles/use-of-fx-controls-promote-economical-stability/#_edn2 [last visited: 30th January, 2017]

[29] *ibid*

also known as the Union List. [30] FEMA can also be traced to various entries in the Union List. Entry 16 of the Union List deals with foreign jurisdiction. Entry 36 of the Union List deals with Currency, coinage and legal tender, foreign exchange. Entry 37 of the Union List deals with Foreign loans and Entry 41 of the Union List deals with Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.[31] In FEMA, under Section 41 power has been given to the Central Government to give directions to the Reserve Bank with which the Reserve Bank has to comply with it. [32] Section 47 also gives power to the Reserve Bank to make regulations to carry out the provisions of this Act.[33] It can be seen that the above two sections are in line with the power given by Article 246 to the Central Government in matters of making laws on the topics mentioned in the Union List.

Article 38of the Constitution gives emphasis on establishing a social order for general public welfare. [34] Also the whole motive of FEMA is promotion of orderly development and maintenance of Foreign Exchange Market in the Indian society.[35] Henceforth, the object of FEMA fulfils the constitutional objective as given in Article 38.

Possession of foreign exchange errs the entire economic and financial stability and flow of income in the market which affects the life of layman in a bad way as they are the ones who are not even remotely related to the issue. But this problem causes a decrease in the total financial value of the INR which would harm the import-export market as well. This is in violation of Article 38 of the Constitution of India as it affects the general economic welfare at large and hence there should be stricter implementation and amendments in FEMA to come in accordance with the constitutional provisions to fulfil the societal objective.

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[30] INDIA CONST. art. 246
[31] *Supra* note 28
[32] Foreign Exchange Management Act, 1999, Sec 41
[33] Foreign Exchange Management Act, 1999, Sec 47
[34] INDIA CONST. art. 38
[35] *Union of India and Another v. Venkateshan S.& ors*, A.I.R. 2002 S.C. 669.

5. JURISPRUDENTIAL ASPECT

Bentham said that the objective of any law should be to achieve total happiness for the society. And because, law is the will of the legislature the legislature should make such laws which would curb all the evil acts. So the current regulations of charging the accused with fine does not curb all the evil acts as there is still a chance of him committing the act again after getting away by paying the fine. Also, when there is accumulation of foreign exchange with a few people, other people suffer due to the increase in exchange rate. Bentham gave guidelines for penal laws and punishment wherein he stated that any penal law made by the legislature should be effective and humane. Bentham also talks about the 2 considerations which should be kept in mind while making laws, they are that a person while making laws should keep in mind the principle of deterrence and whenever making any law for awarding punishment, ensure that the punishment should bring moral reformation. So a law for common welfare has to be in place wherein such a punishment is provided that the offender has now learnt the consequences of committing such an act and wouldn't dare to do it again. The civil punishment of charging a fine from the accuse may not deter and bring moral reformation. Thus, the criminalization of possession of foreign exchange would fulfil all the conditions said by Bentham as it would be in line with the principle of deterrence because criminal punishments have a lasting impact on the people as compared to civil punishments. And this would simultaneously, bring moral reformation by putting up an example in front of the society.

6. POTENTIAL STAKEHOLDERS

The prevalent regulations governing possession of foreign exchange is being abused and has been abusing three essential stakeholders of the society namely the state, the victim and the accused.

Firstly, the state is the central authority governing various domestic as well as the international aspects of the economy. It is the duty of the state to maintain a competitive edge in the global market with regards to position of its own currency in comparison to other foreign currency. So the process of hoarding of foreign currency by the citizen of a country results in increased value of the foreign currency and in turn decreasing the money worth of the country's currency herein INR. The state is bound by law to sustain gold as well as foreign exchange reserve which become difficult due to expensive worth of the currency in the foreign exchange market as a result of hoarding of foreign currency. The state also comes under the obligation to deal with consequences of the same issue while administering the import-export trade market. The state comes under dilemma to deal with the inflationary rates also.

Secondly, the ordinary residents are the victims of abuse of the possession of foreign exchange by the accused to which these victims are not even remotely related to. The consequence faced by them is the threat of an instable market they are living in.

Thirdly, the accused include the foreign trader, foreign investors, MNCs etc. who are abusers of the current position of possession of foreign exchange. They are the ones misusing the regulation. They have misinterpreted the regulations to be lenient and a joke for the society by paying the minimal amount constituted under fine and hence, abusing it.

7. JUDICIAL OBSERVATIONS

In ***Union of India and Another v. Venkateshan S. and Another***[36] it was established that though FEMA does not treat violation of FEMA provisions as criminal offence, prevention detention under COFEPOSA[37] for violation of FEMA is permissible, as FEMA and COFEPOSA occupy different fields.[38] In this case it was also noted by the Court that

> *"The objective of FEMA is promotion of orderly development and maintenance of foreign exchange market in India. The objective of COFEPOSA is to prevent violation of foreign*

[36] *Supra* note 35
[37] Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974
[38] Taxmann, *FEMA ready reckoner*, Taxman Publications Ltd, Delhi, 2008.

> *exchange regulation or smuggling activities which have a delirious effect on the economy. This basically states that even though an offence has been classified as a civil offence under FEMA, if the concerned person is committing an offence under the provisions of COFEPOSA, he/she will be awarded Criminal Punishment of preventive detention and there will be no hindrance in doing so as both the statutes are different in their own fields but exist with the same motive. Hence, if the activity of any person is prejudicial to the conservation or augmentation of foreign exchange, the authority is empowered to make a detention order against such person and the Act does not contemplate that such activity should be an offence."*[39]

Drawing an analogy of the two acts considering the same objectives of the two, it is recommended that there should be similar punishment for violation of FEMA for possessing unauthorized foreign exchange as there is for violation of COFEPOSA which includes criminal punishment.

Further in the case of ***Dopti Devi and others v Union of India,***[40] it was stated that *"COFEPOSA empowers the competent authority to make an order of detention against any person with a view to preventing him from acting in any manner prejudicial to the conservation or augmentation of foreign exchange."*[41] In light of the same authoritative power with the objective of deterring him from acting in any manner to illegal conservation of foreign exchange in future, the order was passed to detain and keep the accused in custody in the central jail. Taking the argument further the court observed and passed that

> *"While dealing with the effect of 'FEMA' and the repeal of 'FERA' (relying upon a decision in Union of India and Anr. v. Venkateshan S. and Anr*[42]*), If the activity of any person was prejudicial to the conservation or augmentation of foreign exchange, the authorities were empowered to make a detention order against such person."*[43]

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[39] *Supra* note 35
[40] *Dopti Devi and others v Union of India,* A.I.R. 2010 S.C. WP 65.
[41] *ibid*
[42] *Supra* note 35
[43] *ibid*

Similarly in order to prevent illegal possession of foreign exchange by offender in the future it is not enough to punish him and letting him go with mere penalty but it is essentially the need of the hour to detain the person as similarly done under COFEPOSA. This is also suggested by the retributive theory of justice.

The similar objective of penalizing the offence for possession of foreign exchange can be drawn in the case of ***Harinder Pal Singh Shergill v. Commissioner of Customs***[44] it was directed that the main motive of COFEPOSA is to prevent the offender from smuggling of foreign exchange in future for which detention was necessary. It was stated that it was necessary as the indulgent of the offender in such an act with such organized plan, threw light on the fact that offender has the potential of indulging in such activities in future, so it was necessary to detain him.

8. LEGAL AMENDMENTS (SUGGESTION)

- Section 13 of FEMA classifies contravention to its provisions as a civil offence and awards civil punishments to the wrongdoer. [45] The civil punishment that is awarded is that the accused will be liable to pay thrice the sum of amount involved when the amount is quantifiable or only up to Rs. 2 lakh. The punishment awarded above does not go well in line with any theory of punishment and moreover, a person even after paying the fine can still be into or interested or can be willing to do it again as no sincere lesson has been taught to him. It can be said that, in such cases of possession of foreign exchange; the people who commit it are the ones who belong to the higher section of the society as they are the ones who have access to the resources needed for this. if they are punished only to pay triple of the amount in question, it will not have a major effect on these people as they a lot of resources and financial backing so they would without much hesitation just pay the asked which will not stop them from doing it again. This would happen as

[44] *Harinder Pal Singh Shergill v. Commissioner of Customs*, A.I.R. 2003 ELT Tri Del 358 (160).
[45] *Supra* note 15.

triple the amount misappropriated is a small amount for them to pay. So it won't have a major effect on them as they would just pay the asked amount and get away with it. Thus, it is necessary that a criminal punishment should me awarded by classifying it as a criminal offence keeping in mind the prevention theory of punishment. Prevention theory of punishment says that is founded on the idea of preventing repetition of crime by disabling the offender through measures such as imprisonment, forfeiture, death punishment and suspension of license.[46] Thus, the offender of such an offence should be awarded a criminal punishment as it would be a lesson for him and at large for the society as well. Otherwise, according to the current laws the offender is very easily encouraged from doing it again. Awarding the offender with a criminal punishment of imprisonment of or not less than 2 years which would be Non-Bailable and with fine up to 3 times the amount misappropriated. Hence, it being a serious crime, a lesson should be taught and the offender should be prevented from committing the crime again by awarding him with a punishment which would set a fear in his mind from committing it again.

Section 13(1) of FEMA also says that if the contravention is of such nature that it is a continuing one, then the offender will be required to pay Rs.5, 000 everyday from which the contravention continues. [47] This is also not a very pleasing punishment from the point of view of teaching the criminal a lesson as this amount may not necessarily stop him from doing such acts.

- Contemplating the factor that the mere possession of foreign exchange by certain class of the society determines the fluctuating rates of the trade market of the nation, terming the offence a civil offence with penalty punishment disregards the

[46] *'Preventive Theory Law and Legal Definition'*,US Legal, Available at: http://definitions.uslegal.com/p/preventive-theory/ [last visited: 30th January, 2017].
[47] *Supra* note 15.

wider interpretation of the need of a stable economy. In lieu of current penalty punishment criteria, stricter mode of punishment is required to be executed.

According to deterrence theory, the more severe a punishment, it is thought, the more likely that a rationally calculating human being will desist from criminal acts.[48] By increasing the certainty of punishment, potential offenders may be deterred by the risk of apprehension influencing the behavior if they weigh the consequences of their actions and conclude that the risks of punishment are too severe.[49]

In order to prevent an offence affecting the economy at large, emphasis on penalties that encourage and bind the citizens to obey the law should be executed rather than law that permit the offenders to get away with trivial punishment. Mere penalty punishment is not severe enough to deter offender from committing such offence.

Considering the deterrence theory, It is suggested that punishment up to imprisonment of 5 years along with fine up to thrice the amount of contravention should be executed from the offender preventing not only the offender from doing the offence in future but also mainly setting an example for other potential offenders from committing the offence that hinders the stability of the financial economy and growth of the society.

- It is also suggested looking at the jurisdictions of foreign countries mentioned in the sub-sections of topic 1 that the commission of this act is seen as a criminal offence in other countries and criminal proceeding and punishments are awarded in these cases. This highlights the fact that the offence of possession of foreign

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[48] DiIulio, John J., Jr., *'Deterrence Theory'* ; Available at: https://marisluste.files.wordpress.com/2010/11/deterrence-theory.pdf [last visited: 30th January, 2017].

[49] Valerie Wright, *'Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment'*, The Sentencing Project Research and Advocacy for reform, November 2010; Available at: http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf [last visited: 30th January, 2017].

exchange is accepted as a serious crime and accepted as a criminal offence. Thus, FEMA should also criminalise possession of foreign exchange.

9. CONCLUSION

There are numerous strategies for money trade controls that might be utilized by governments. Nations have diverse purposes behind forcing foreign trade controls, including endeavors to stop unstable cash swapping rates, and to stem the tides of capital flight. Frequently, foreign trade controls result in the production of illicit businesses for foreign monetary forms, and at last turn out to be ineffectual in stemming capital flight. While foreign trade controls may work temporarily, they can regularly have an adverse effect on national economies in the long haul by upsetting global exchange and anticipating foreign interest in the nation formulating the controls.

Existing regulations does not support any significant public welfare. The increase in the severity of sentences by criminalizing and executing longer term of imprisonment will benefit the society and deter the offenders from committing the offence in future. Longer prison punishment along with high amount of fine severs the productive nature of the regulations. By adopting and implementing such strict and stringent regulations, the illicit foreign exchange transactions and businesses can be managed.

In India, the scope for assumption of criminal liability is altogether closed as compared to other foreign countries' jurisdiction relating to foreign exchange regulations wherein criminal liability can be assumed along with the option of fining the offender. Granting of a criminal punishment and classification of an offence of this kind as a criminal offence emanates the seriousness of such regulations and also promotes stricter implementation on the part of general public. Thus, criminal liability should be assumed for the offenders of foreign exchange regulations.