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SAARC

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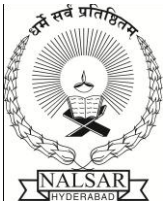

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Regional integration is taking on different forms and trans-continental contours in the current world of economic uncertainties. It may not be an overstatement in saying that the classical theory of regional integration and its functional competence is under stress. Newly Industrialised States (NIS), New Emerging Markets (NEMs), changes in manufacturing strategies, production technologies, growing service sector, shifts in labour mobility and faster and intermodal transportation systems, etc. are revised regional economic integration strategies. Disillusionment with the WTO system and the poor prospect of the Doha Round offering an alternative global trade regime in near future is no less a factor in regrouping regional economies into new trading and economic arrangements.

Countries across regions as also within regions have already started venturing into new forms of economic integration. At the same time few of the established regional groups – of whatever the form and depth – are either extinct or on the brink of collapse. Those who are aware of the politico-economic factors that push countries into a regional economic arrangement well agree that economic integration is a function of global and regional dynamics, economic dynamics in particular.

European Economic Community (EEC) created by the Treaty of Rome (1957), which steadily evolved into the current European

Union (EU), was born out of the cold war politico-economic dynamics. Non-European and third world regional groups of different formations and composition (LAFTA, ECOWAS, ASEAN) too were responses to a cold war and neo-colonial era of western domination. Economic dynamics of the 21 century, in their own way, are catalysts of regional groups of the current era. What one sees today is a rather unique convergence of developed-developing countries – economically and also politically – converging into cross-regional combinations.

Similarly, in contrast of the cold war logic of like-minded countries of similar political hues and following forming groups, countries politically competitive and strategically at cross-purposes are integrating their economies today into common grouping. Thus, we see India and China, strategically at logger-heads, are economic partners in the BRICS, AIIB (Asian Infrastructure Investment Bank). At the same time one also sees, rather conversely, US-led Trans Pacific Partnership (TPP) initiative to counter the China-led regional and trans-continental projects like the OBOR (One Belt One Road). A more serious as also rather unexpected development is the exit of Britain (Brexit) from the European Union in 2016.

For keen observers of third world groups like the SAARC the above mentioned mutations and permutations in the contemporary process of regional arrangements pose questions as to how to

reconcile the old ones with the new and trans-continental groups. More specifically how should SAARC, not known for deepened economic integration and political consolidation, respond to these processes at work. In a way, SAARC countries have already mooted alternative strategies of synergizing their individual economies with the recently introduced economic groups. Most of the South Asian countries, disillusioned any way with the SAARC as also with India's limited interest in regional multilateralism, have sought association with extra-regional groups like BIMSTEC, EAS, SCO, TPP, OBOR and AIIB. Smaller SAARC members have demonstrated visibly greater enthusiasm to outreach their economic association with one or more of the groups mentioned above. In so doing these countries have sent the inescapable message that their destiny lies with the emerging powers of the Asian Century, less with SAARC. SAARC is betwixt between regional compulsions and extra-regional pulls, preferably more toward the latter. This is the challenge that SAARC should address collectively. But the moot question is: Is SAARC ready for such task!

Prof. (Dr.) P.V. Rao
Editor-in-chief

Coordinator

Over the years, there has been a growing interest among many countries and organizations to be associated with SAARC as Observers and to engage with SAARC in collaborative endeavours. The issue of extending membership of the SAARC has been one of the important questions. The recent trends in globalisation have increased the scope for the extension of rights and obligations of the countries that seek observer status in SAARC. The coming in of the Observers may help remove some of the apprehensions of the smaller states and overcome many of the obstacles to regionalism.

Today, cooperation between the SAARC and its neighbouring countries/regions is both essential and inevitable. This would firm up connectivity and enable its member countries to leverage the opportunities provided by the current Asian dynamism. This expanding horizon could bring about unprecedented benefits to the South Asia region in areas like economic integration, social dynamism, politico strategic clouts and people-to-people contacts. This is likely to trigger a range of cross-border infrastructural projects including highways, gas pipelines, electricity grid, inter-port linkages, etc. This inter-regional connectivity could mainstreamise the South Asia region in the current Asian dynamism. For this the SAARC needs to strategise and concretise actions. The SAARC has the both the potential and the wherewithal to become a driving force for promoting wider Asian cooperation incorporating all the four sub-regions of Asia. The time is ripe for the SAARC politicians, businesses, policy-makers and civil society actors to seriously deliberate on these issues and

steadily engage in policy dialogues with their counterparts in the neighbouring regions. This strand of thinking is already reflected in the decisions at the Dhaka SAARC Summit and the two East Asia Summits.

In this backdrop the M .K. Nambyar SAARCLaw Centre has persistently worked towards the achievement of its objectives of bringing together the legal communities within the region for closer co-operation, development of understanding, promotion of exchange of ideas and dissemination of information, and to use and develop law as a source and an instrument towards social change for development as well as for building co-operation among the peoples of the region.

I am grateful to Shri K.K. Venugopal, the Patron for his continuous encouragement and generous financial support to the Centre for enabling us to conduct legal research and activities. I am also thankful to the Vice Chancellor of the University for his Immense Support and guidance to the centre. Mt special thanks to Prof. P. V. Rao, Senior Colleague and Visiting Faculty, NALSAR under whose assistance we are able to come up successfully with the publication of this issue of the Journal. Last but not the least, my thanks to the faculty members for their support.

Prof. (Dr.) V. Balakista Reddy
Professor & Registrar
Coordinator
M K Nambyar SAARCLaw Centre
NALSAR University of Law

M K NAMBYAR SAARCLAW CENTRE PROFILE

The M. K. Nambyar SAARCLaw Centre at the NALSAR University of Law established in 2003 by Mr K. K. Venugopal in memory of his father continues to be one of its kinds in the entire country, in terms of its mission, vision and facilities. The Centre is unique in its aim to study legal issues peculiar to SAARC countries and create networks and spaces for engagement amongst the peoples of these countries. The foremost objective of the Centre is to inspire and augment legal research in the field of regionalism particularly SAARC studies. The Centre follows legal developments relevant to SAARC countries keenly and strives to spread awareness regarding the same by publishing legal journals and newsletters. The Centre also focuses on conducting conferences, seminars, workshops and national and international conferences. These conferences not only seek to address various key contemporary legal studies in SAARC studies as recognised by experts who are up to date with the latest developments. They create learning communities that bring together delegates from like-minded solutions. The learning environment encourages delegates to exchange experiences, ideas and practises from their own learning. The proceedings of the conferences will be compiled and published as monographs.

The Centre has persistently worked towards the achievement of its objectives of bringing together the legal communities within the region for closer co-operation, development of understanding,

promotion of exchange of ideas and dissemination of information, and to use and develop law as a source and an instrument towards social change for development as well as for building co-operation among the peoples of the region.

Since its inception, the Centre continued its research activities and also brought out its inaugural issue of the bi-annual journal. The activities of the Centre included:

Publications

M K Nambyar SAARCLaw Journal:

The Centre has upgraded its in-house SAARCLAW Research Review to a full-fledged bi-annual Journal, M K NAMBYAR SAARCLAW JOURNAL (MKNSLJ) (ISSN No.2346-8646). The inaugural issue was released on August 16, 2015 at the Thirteenth Annual Convocation of the University by Hon'ble Shri Justice Dilip Baba Saheb Bhosale, Acting Chief Justice of High Court of Judicature at Hyderabad and Chancellor, NALSAR. The Journal has adopted an inclusive approach by encouraging well researched articles from budding graduate and post-graduate law students and academicians with proven research aptitude and creativity.

Newsletters:

- Inaugural Vol. 1, Issue No. 1, January, 2010 (July-December, 2009)
- Vol. 1, Issue No. 2, July, 2010 (January-June, 2010)

- Vol. 2, Issue No. 1 January, 2011 (January-June 2011)
- Vol.2, Issue No. 2, July, 2011 (July-December, 2011)
- Vol. 3, Issue No. 1 & 2, 2012

Training Programmes Conducted by the Centre

- Fourteenth South Asian Teaching Session on International Humanitarian Law (April 22-29, 2009):
- Twelfth South Asian Teaching Session on International Humanitarian Law (April 16-23, 2008)
- Tenth South Asian Teaching Session on International Humanitarian Law (April 11-18, 2007)

Conferences/Seminars/Workshops/Guest Lectures

Conferences:

- A Two-Day International Conference on Regional Economic Co-operation SAARC: Problems and Prospects for Investments (April 5-6, 2013)
- Two Day International Conference on "Promoting Intra-regional Trade in South Asia - Role of SAARC (March 26-27, 2011).

Workshops:

- One Day National Workshop on "SAARC Trade Relations: Legal Issues and Challenges", February 20, 2010.

Monthly Seminars

- Monthly Seminar on Regional Trade Agreements: A focus on SAFTA by Dr. Pyla Narayana Rao, Research Associate, M.K. Nambyar SAARCLAW Centre (September 2013).
- Monthly Seminar on "Negotiating Foreign Investments: Indian Approach" by Amb A.N.Ram, IFS (Retd.) Former Secretary, Ministry of External Affairs, Government of India and Adjunct Professor, M.K. Nambyar SAARCLAW Center (August 2013).
- Monthly Seminar on "India's Economic Diplomacy in the 21st Century" by Amb. Sudhir Devare, IFS (Retd.) (July 2013).
- Monthly Seminar on Prospects for legal Services in the SAARC Domain by Prof. V.Balakista Reddy, Coordinator, M.K. NAMBYAR SAARCLaw Centre (April 2013).
- Monthly Seminar on the Problems of Trade and Trade Barriers Intra-SAARC Trade by Prof. P.V. Rao, Visiting Faculty, NALSAR (March 2013).
- Monthly Seminar on Comparing South Asian Regionalism with the ASIAN experience by Prof. GVK Naidu, Professor JNU New Delhi, (February 2013).
- Mr. Owais Hasan Khan, LL.M Scholar, NALSAR University of Law, "Politics of Indo-Pak Trade"(March 16, 2012)

- Ms. Neema Sheikh, LL.M Scholar, NALSAR University of Law, "Trade facilitation measures in SAARC"(March 16, 2012)
- Ms. Juneli Simick, LL.M Scholar, NALSAR University of Law, "India and SAARC: Critical Perspectives"(February 17, 2012)
- Ipsita Ray, LL.M Scholar, NALSAR University of Law, "Economic Integration: Multilateralism vs Regionalism"(February 17, 2012)
- Amb A. N. Ram, IFS, Former Secretary Ministry of External Affairs, Government of India on: "Indo-Pak Relations: Trade and Politics."(January 27, 2012)
- Prof B.S.Chimni, Professor of Law, Jawaharlal Nehru University, New Delhi on " Third World approaches to International Law" (January 28, 2012)
- Ms. Rejitha N Nair, LL.M Scholar, NALSAR University of Law, "Cooperation in Service sector – Prospects in South Asian region" (October 15, 2011)
- Mr. Arun Krishnan, LL.M Scholar, NALSAR University of Law, "Rules of Origin in South Asia" (October 15, 2011)
- Ms. Shruti Kakkar, LL.M Scholar, NALSAR University of Law, ""India-Pakistan Trade Relations: Issues and Challenges"(September 29, 2011)

- Ms. Deepti Susan Thomas, LL.M Scholar, NALSAR University of Law, "Role of Amicus Curiae in Dispute Settlement Understanding"(September 29, 2011)
- Padma Bhushan K. Padmanabiah, IAS (Retd) Forner Home Secretary, Government of India, Guest Lecture on "Kashmir: Track II Diplomacy (July 29, 2011)
- Prof. Veer Singh, Vice Chancellor, NALSAR University of Law, "India-China: Search for Supremacy"(March 22, 2011)
- Prof. Veer Singh, Vice Chancellor, NALSAR University of Law, "Legal Dimensions of the Kashmir Issue: A Critical Perspective"(February 28, 2011)
- Amb A. N. Ram, Special Lecture on: "SAARC Democracy Charter" (January 18, 2011)
- Ms. Ann Thania Alex, LL.M Scholar, NALSAR University of Law, "India-China Trade Relations"(October 14, 2010)
- Mr. Y.V.V.J Rajsekhar, LL.M Scholar, NALSAR University of Law, "HRD and International Trade: An Analysis"(October 14, 2010)
- Mr. Prem Shankar, LL.M Scholar, NALSAR University of Law, "Regional Economic Integration: Legal Aspects" (September 17, 2010)
- Ms Ankana Bal, LL.M Scholar, NALSAR University of Law, "Indo-Bangladesh Trade Relations"(September 17, 2010)

- Prof P.V. Rao, Former Director, Indian Ocean Studies, Osmania University, "Background and Legal Character of SAARC Charter".(August 20, 2010)
- Prof (Dr.) V. Balakista Reddy, Coordinator, M.K.Nambyar SAARCLAW Centre "SAARC: Legal Issues and Challenges"(August 20, 2010)

Guest /Special Lectures Organised

- In January, 2013 Special Lectures started by Mr. A.N.Ram, IFS (Retd.) Former Ambassador & Former Secretary, Ministry of External Affairs, Government of India and Adjunct Professor, M.K. Nambyar SAARC Law on the following Topics, i.e.,
  - India in the 21st Century: Images and Perspectives;
  - India's Regional role in South Asia;
  - Multilateral Trade Negotiations: India's Policy and Approaches;
  - India and the UNO; and
  - SAARC Trade: Issues and Concerns.
- Lecture on "The Nuances of Foreign Investment with special focus on Developing Countries" by Dr P.S.Rao, Former Chairman, International Law Commission (April 20, 2012).
- Lecture on "International Economic Law" by Prof. Mary Footer, Professor of International Economic Law, Faculty

of Social Sciences, University of Nottingham (February 4, 2012).

- Lecture on "Third World Approaches to International Law" by Prof. B. S. Chimni, (January 28, 2012).
- Lecture on "Indo-Pak Relations with special reference to Trade" by Ambassador A. N. Ram on (January 27, 2012).
- Lecture on "Kashmir: Track II Diplomacy" delivered by Padma Bhushan K. Padmanabiah, IAS (retd.), Former Home Secretary, Government of India (July 29, 2011).
- Lecture on "India and China: Search for Supremacy" delivered by Prof. Veer Singh, Vice-Chancellor, NALSAR University of Law (March 22, 2011).
- Lecture on "Legal Dimensions of the Kashmir Issue: A Critical Perspective" delivered by Prof. Veer Singh, Vice-Chancellor, NALSAR University of Law (February 28, 2011).
- Lecture on "SAARC Democracy Charter" delivered by Ambassador A.N. Ram (January 18, 2011).
- Ambassador Mr. Amar Nath Ram, IFS (Retired Ambassador to France, New York and European Countries), founder member of SAARC, delivered lecture on "India's pivotal role in SAARC in the context of Globalization" (2010).
- Professor P V Rao, Head, Centre for Indian Ocean Studies, Osmania University, delivered lecture on "Emerging Legal Issues in the SAARC Region" (2010).

Research Activities & Courses Offered

Research Activities:

SINO - Indian Trade Relations: Analysis of Trade Prospects & Problems Between the Growing Asian Economies –Phd in continuation

Mr. M. Ramesh was awarded the Doctoral Degree at the Thirteenth Annual Convocation for his research work on 'India's regional trade agreements, its implementation, efficacy and challenges: A critical analysis.

Courses Offered:

- BA LLB(Hons): Seminar Courses
- SAARC and Maritime Security Issues;
- SAARC and Emerging Legal Issues.
- LLM: Specialisation Paper - Regional Trade Regulation a focus on SAARC

Compendium on SAARC: Legal Issues & Perspectives:

The Centre has received contributions from eminent academicians and research scholars on legal issues relating to SAARC and is in the process of bringing out a book. The publication aims to bring the experts within the region together for closure co-operation, development of understanding, promotion of exchange of ideas and dissemination of information and to use and develop law as a

source and instrument of social change for development as well as for building co-operation among the people.

M.K. Nambyar SAARCLAW Chair in Comparative Constitutional Law Studies

Since 2010, the M. K. Nambyar SAARCLAW Chair in Comparative Constitutional Law Studies is held by Hon'ble Justice M Jagannadha Rao, former judge, Supreme Court of India and former chairperson, Law Commission of India.

Research and Publication Activities

Research Activities Undertaken:

- Working on Bangladesh Constitution with special reference to V and XV Amendments and its impact on Judiciary
- Working on Role of Judiciary and Executive in Constitutional matters with special reference to SAARC.
- Drafted syllabus for LL.M. course on Comparative Constitutions of SAARC Countries.

Publications:

- The Chair Professor has published an article on “Law of Contracts: Liquidated Damages and Penalties” in SCC (January, 2012).
- M.K. Nambyar SAARCLAW Centre Newsletter on Constitutional Updates.

- Documentation of texts of SAARC Countries Constitutions with an up-to-date amendments

Programmes organised

- Organized the Constituent Assembly debates and Lectures on Comparative Constitutional Law with special focus on SAARC.
- The Students of NALSAR organised the Constituent Assembly Debates & talks on Comparative Constitutional Law with Special reference to SAARC Countries under the auspices of M.K.Nambyar SAARCLAW Centre.

SAARC NATIONS SATELLITE: OPENING AVENUES FOR SAARC NATIONS

Moiz K. Rafique[*]

Article

This article is basically answers the question as to how beneficial would be a common space satellite for SAARC Nations, to answer the said question the author draws a comparative analysis of space organizations and their respective developments of SAARC Nations, the author fairly draws his analysis on the basis of their current space technology, and their futuristic needs. The author also draws a comparison between the proposal made by India for a common space satellite at SAARC Submit and Russia's proposal for having a common space station at BRICS submit, and there is a very thin line of difference between both the proposals as India makes the proposal at SAARC submit to demonstrate its strength and later make the same as a tool of confidence building amongst SAARC Nations members whereas Russia made the proposal to have new emerging players as its partner to it new space station as the international space station would be decommissioned in coming

[*] Advocate at the High Court of Gujarat.

> *years where Russia jointly operates with other sets of nations. After looking into space organizations and their development of SAARC Nations it can be construed that India can play a pivotal role in establishing space infrastructure in SAARC Nations and common space satellite may open different avenues for SAARC nations.*

SAARC Nations after its commencement have fairly reached regional consensus to promote cooperation on industrial sectors like energy, education and media and environment. SAARC also more recently agreed on cooperation in space technology, resulting thereby to establish a Meteorological Research Centre (hereinafter "SMRC"). SMRC was established in the year 1995 and since then has been sharing its advanced observations using its modern technology and applications timely and so far has been reliable source of information to all the SAARC Nations which indeed makes it the first successful space technology set up for SAARC Nations[1]. Taking this success ahead with a proposal of a common space satellite for SAARC Nations was taken up at the latest SAARC Summit at Khatmandu.

Developed and developing nations across globe have started seeking regional communication satellites as also other satellite

[1] Ajay Lele, "India's SAARC satellite proposal: a boost to a multilateral space agenda", In Association with Space News, August 18, 2014, http://www.thespacereview.com/article/2579/1 (accessed January 4, 2016).

and space applications which can facilitate digital, financial and overall economic development of the region concerned. Comparative study of space organizations and their respective developments of all the SAARC Nations can be the best way to asses as to how useful a common space satellite for SAARC Nations would be.

The Afghan satellite Eutelsat launched in the year December 2008 is expected to serve its operations in 2020. Afghanistan pays a premium of 4 million dollars each year to have the application based services of this acquired satellite. Yet Afghanistan is far behind from many nations in the space technology race and is yet to discover, innovate and develop its indigenous space applications. Being a member nation of the SAARC Nations, common space satellite for SAARC Nations shall definitely benefit Afghanistan not only in its space technology endeavors, but shall also help to boost it economic strength.

Bangladesh:

Bangladesh along with National Aeronautics and Space Administration (hereinafter "NASA") conducted and developed its Earth Resource Technology Satellite (hereinafter "ERTS"). ERTS space mission was later renamed as Bangladesh Landsat Programme (hereinafter "BLP"). Nearly two decades down its initiation of space exploration missions and establishment of space

infrastructure and after merging the two space exploration activities SARC and BLP Bangladesh established Space Research and Space Remote Sensing Organization (hereinafter "SPARRSO") in the year 1980, after establishing this organization the National Assembly of Bangladesh passed an Act in the year 1991 and made it an autonomous organization which is an exclusive subject of Bangladesh Ministry of Defense.

Currently Bangladesh is involved in space activities like algorithm development, data sharing platform and high resolution satellite projects considering the space activities of Bangladesh it can be construed that Bangladesh will not only gain benefit out of common space satellite of SAARC Nations but it will also support and gain more knowledge for its ongoing and future space exploration endeavors.[2]

Bhutan:

Bhutan with its limited resources on hand is assisted by more than 50 countries with which it maintains its international diplomatic relationships besides Peoples Republic of China (hereinafter "PRC"). Bhutan is yet to enter the space technology race and India is surely more than willing to assist. Bhutan shares international border with India on the North – Eastern Indian Corner and hence gains its priority, India maintains fair international relationships

[2] SPARRSO, http://www.sparrso.gov.bd/x/organization.htm (accessed January 6, 2016).

with Bhutan and has assisted Bhutan on many occasions in different sectors which primarily include defense and tourism. Prime Minister of India Shri Narendra Modi in his recent visit to Bhutan immediately after being elected as the Prime Minister of India not only promised support but assistance which included sharing of Indian space technology, and satellites with Bhutan the said promise and offer surely strengthened India's relationship with Bhutan.[3]

Considering the Bhutan's current status and international relationship that it maintains with other developed and developing nations, common satellite for SAARC Nations shall definitely help to sustain this friendly neighborhood with Bhutan but will surely open doors for Bhutan to avail India's assistance in its future space endeavors.

India:

India had decided in the year 1962 to enter in the space race by establishing Indian National Committee for Space Research (hereinafter "INCOSPAR") and with India set to roll on the vision foreseen by Dr. Vikram Sarabhai, INCOSPAR led by him the Thumba Equatorial Rocket Launching Station (hereinafter

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[3] Sanjeev Miglani, India's Modi Secures Support From Bhutan In Neighborhood Push, REUTERS, June 16, 2014, http://www.reuters.com/article/us-india-bhutan-idUSKBN0ER1FW20140616 (accessed January 10, 2016).

"TERLS") was established for space research and rocket launching technology research, and in no time Indian Space Research Organization (hereinafter "ISRO") was established in the year 1969.[4] Later the Department of Space (hereinafter "DSO") was established and put to operation to achieve its vision which is:

> *"Harness space technology for national development, while pursuing space science research and planetary exploration*[5]*"*

Amongst all other SAARC Nations India is the only country with the best established space infrastructure and utilizing its infrastructural strength has achieved its technological soundness over many successful space exploration missions and frequent space application experiments, such brave and intellectual undertakings of the ISRO alongside its regulatory and administrative government body the DSO has attained desirous strength of a developed nation in space sector of indigenously constructing space application, satellites, launching technology and ground station technology.

India is the only SAARC nation that possesses indigenously developed launch vehicle technology and holds strength to launch

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4 Genesis, Indian Space Research Organization, http://www.isro.gov.in/about-isro/genesis (accessed on January 9, 2016).

5 Vision and Mission, Department of Space, http://dos.gov.in/node/106 (accessed on January 9, 2016).

its own satellite. All other SAARC Nations have mainly launched their satellites using launching technology of others like US and China. India has achieved success in all the launching contracts it has undertaken so far, India has launched satellites for countries like Germany, Great Britain, Singapore and other developed and developing nations by which it can be ascertained that India after successfully launches SAARC Nations common space satellite will achieve more respect in the space and technologies industry.

India is a member nation of United Nation's Committee on Peaceful Uses of Outer Space (hereinafter "UNCOPUS") since 1959.[6] India is also a signatory to all the five major international space law conventions and other important space policies. India has synchronized its space exploration activities and space infrastructure by formulating policies like Policy Framework on Satellite Communication in India, The Norms, Guidelines and Procedures for Implementation of the Policy – Framework for Satellite Communication in India, INSAT Co –ordination Committee, and Remote Sensing Data Policy 2011 which makes the Indian space exploration activities regularized[7].

India so far has conducted 73 space missions, 44 launch missions

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6 United Nations Office for Outer Space Affairs, http://www.unoosa.org/oosa/en/members/index.html (accessed on January 8, 2016).

7 Space Policy Framework, Department of Space, http://dos.gov.in/node/83113 (accessed on January 8, 2016).

and has a human resource of more than 18, 000 employees put in action for its space sector which again showcases strength of the Indian space sector amongst all SAARC Nations with which India holds formal and cordial relationship to the best possible extent.

India has become the most favorable satellite launching contractor for many developed nations; with many successful launches Indian space scientists have marked their presence in the space technology fraternity. Supporting such activities of DSO and ISRO the government of India has spent far minimal in comparison to many developed nations to achieve this success. Indian Space technology and applications are considered to be the most economically convenient and sustainable resources. Government of India in the financial year 2015 – 2016 allocated 1.2 Billion Dollars to its space sector which is sufficient enough for execution of its space endeavors and build international relationships by sharing and trading through its space infrastructure[8], this definitely would help India to execute its promise of a common space satellite for SAARC Nations.

Maldives:

Maldives government has not yet initiated in establishment of any kind of organizational space technology research or space

[8] K. S. Jayaraman, India Allocates 1. 2 Billion for Space Activities, Space News, March 9, 2015, http://spacenews.com/india-allocates-1-2-billion-for-space-activities/ (accessed on January 11, 2016).

infrastructure, but Maldives on various instances in the year 2013 and 2014 had approached India as well as the PRC space agencies to help launch its maiden satellite for communication. Indian press reported that China showed a lot of interest in the constructing and launching Maldives maiden satellite.[9]

Going by the efforts of SAARC countries to promote their space programmes, idea of a common satellite for SAARC Nations fits well and it will help India to gain confidence of SAARC Nations.

Nepal:

Nepal has taken its first step and has commenced to establish its space infrastructure to facilitate its space exploration activities by establishing Nepal Scientific Activities and Research Center (hereinafter "NESARC"). Nepal is soon going to launch its first satellite using and availing PRC's space services and infrastructure. Considering Nepal being at a very initial stage common space satellite shall definitely help Nepal chalk out its requirement for its future space exploration and would also help India regain some confidence and help rebuild relationship with Nepal.

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9 Shishir Gupta, Space Fix to End Ties with Maldives, April 5, 2013, http://www.hindustantimes.com/delhi/space-fix-to-mend-ties-with-maldives/story-MH4ziRq7U9ew0CKxPpWX0M.html (accessed on January 9, 2016).

Pakistan:

Briefly almost after 15 years after separating from India, Pakistan Space and Upper Atmosphere Research Commission (hereinafter "SUPARCO") was established in the year 1961, it was officially given the status of a National Commission in the year 1981. This National commission is closely functional and also jointly operates with space sciences wing of Pakistan Atomic Energy Commission (hereinafter "PAEC"). SUPARCO and PAEC were both established in the same here and have jointly researched on developing many indigenous space applications. The rocket technology was developed by PAEC, members of PAEC along with members from Pakistan Meteorological Department were sent to NASA for Rocket Launching Training for SUPARCO. Pakistan is also a member to UNCOPUS since 1973[10].

Pakistan went ahead testing sequential launches of Rehbar I and Rehbar II in the year 1962 went ahead and realized its space technology potential and growth and almost after 19 years of this development Pakistan went ahead and established its Space Research Committee (hereinafter "SRC") and Executive Committee of Space Research Committee (hereinafter "ECSRC") in the year 1981. After successful establishment of the internal agencies, regulatory, executive and administrative bodies Pakistan went ahead and launched its first experimental satellite named

[10] *Supra* note 7.

BADR 1 using the PRC's Launching technology named Long March 2E in the year 1990, after which almost after 11 years Pakistan launched its second satellite BADR 2 from Kazakistan's Baikonour Cosmodrome. Pakistan in almost 6 and a half decade of its space exploration and experiments has fairly reached to set up its space infrastructure, whereas many other South Asian countries have achieved more advancement in space infrastructure and space technologies.

Currently Pakistan has only one operational communication satellite which is Pasksat 1 R which is a communication satellite and was launched by PRC in the year 2011. Pakistan also faces several financial constraints and hence there is very less budgetary allocation which makes it more difficult for SUPARCO to perform and develop space applications and satellites. Hence it can be concluded that Pakistan will surely be benefited with a common space satellite of SAARC Nations.[11]

Sri Lanka:

Sri Lanka in the year 1994 had first mooted its space programme by formulating its own space infrastructure after closely monitoring the Ministerial Conference on Space Technology Applications for Sustainable Development held I Beijing PRC.

[11] History, Pakistan Space & Upper Atmosphere Research Commission, http://suparco.gov.pk/webroot/pages/history.asp (accessed on January 15, 2016).

After which Sri Lanka has marched ahead and has established its Space Application Center which was formerly a part regulated and directed by Arthur C. Clarke Institute, the same center went ahead and established a Sri Lanka's National Committee on Space Technology which has a very pivotal role to play for Sri Lanka in coming years. This National Committee is a subject of the Minister of Science and Technology.[12] Sri Lanka is also a member to UNCOPUS since 2015[13].

Sri Lanka is amongst those SAARC Nations which has launched its own space satellite; Sri Lanka launched its satellite using PRC's Launching Technology. Considering Sri Lanka's space development, common space satellite shall also help Sri Lanka to enjoy additional space applications and help evolve its space exploration studies.

A SAARC Satellite:

Prime Minister of India was the first to share his proposal of having a common satellite for SAARC Nations in the year 2014. The common space satellite suggested by the Indian Prime Minister is proposed to be constructed by ISRO at a cost 250 Crore

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12 Hon. Batty Weerakoon, Minister of Science and Technology of Sri Lanka, Statement made at Third United Nations Conference On The Exploration And Peaceful Uses Of Outer Space, http://www.un.org/events/unispace3/speeches/20lka.htm (accessed on January 15, 2016).

13 *Supra* note 6.

INR. This cost is proposed to be funded by the Indian Government which indeed is a very significant diplomatic achievement.

This proposed common satellite for SAARC Nations is identified as ASTROSAT type of satellite which would have space astronomy application, the said satellite is also heard to be named as SAARC ASTROSAT. This satellite may or may not suit the requirement of SAARC Nations but surely wouldn't be the last SAARC Nations satellite. There is a high probability of having more SAARC Satellites with different applications in coming future. India already being involved with a few SAARC Nations, India also proposes to develop a space port for Sri Lanka in coming future and with such ties coming up on frequent intervals this common satellite after its launch announced in December 2016 will set up different platforms for interaction in sectors like space policy, space application based trading and may also eventually also lead for a joint space mission. This may also attract Myanmar which is observer member to SAARC Nations have its first satellite built with Indian assistance or contractually developed in India.

Bonafide usage of a common satellite can help conquer many scientific research and developments for SAARC Nations. It shall not only help those countries which are still trying to place their space infrastructure but shall primarily help a lot in terms of scientific capacity building for SAARC Nations. The vision of the

Prime Minister of India is to see that ISRO can render the best help and play a vital role in helping the SAARC Nation develop their space infrastructure and gain the best possible socio – economic confidence in their respective governance and administration which in return shall help India have much better and more friendlier relationships with all SAARC member Nations, which was also reflected in his speech delivered at ISRO Control Room;

> *"Such a satellite will be helpful in SAARC nations' fight against poverty and illiteracy, the challenge to progress in scientific field, and will open up avenues to provide opportunities to the youth of SAARC countries."*[14]

Such a collective spirit will also help to SAARC Nations to jointly develop more SAARC Satellites which shall be more beneficial as there would be more expertise involved and the burden of such heavy losses could also be shared in accordance to usage of respective country. There is another very silent question of liability attached to this common space satellite but with due consideration that India made this proposal to benefit all the SAARC Nations this question shall also be amicably settled before the launch. This kind of practice shall also be very helpful to reduce the number of

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[14] Business Insider, 'Narendra Modi Asks ISRO to Develop a Satellite for SAARC Nations', June 30, 2014, http://www.businessinsider.in/Narendra-Modi-Asks-ISRO-To-Develop-Satellite-For-SAARC-Nations/articleshow/37522640.cms, (accessed on January 15, 2016).

launches if countries agree to share satellite application resources as it would help to reduce environmental damage, lesser the number of satellites being launched lesser the space debris and it would help to achieve optimum utilization of the geo –earth orbit.

The idea of common space applications and joint space exploration belongs to the European Space Agency (hereinafter "ESA"). ESA has a total of 22 member countries jointly working in cooperation with each other to achieve sounder and better results with common space explorations and experiments. ESA was formed by merging ELDO and ESRO in the year 1975 and CANADA is the Cooperating state to ESA and has been functional and operational in jointly developing space applications since its establishment and is a bench mark and source for inspiration for other countries to jointly develop space applications for common space exploration[15]. Subsequently many regionally close countries formulated their own corporations and association for sociological, political and economic profits with pre – decided terms and conditions.

Besides SAARC Nations having their common space satellite, there are other organizations where several other nations have agreed to undertake common space satellites and applications. For instance Brazil, Russia, India, China, South Africa (hereinafter "BRICS") regional group was offered by Russia to build a joint

[15] History of Europe in Space, ESA, http://www.esa.int/About_Us/Welcome_to_ESA/ESA_history/History_of_Europe_in_space (accessed on January 17, 2016).

space station. BRICS Nations constitute 40 percent of the world population and almost one fifth of global trade. With almost identical proposals placed by India at SAARC Nations submit and Russia at BRICS submit, the Indian proposal was made to gain confidence of the SAARC Nations in its space industry by providing them a common space satellite and to assure future assistance and support with ease and soft negotiations whereas the Russian proposal was made to partner with two new emerging space industry competitors for development of a new space station where Russia is looking forward to explore the space with new partners and strengthen its lobby in space technology race.

Such joint space application developments, explorations and experiments have helped several other countries in past, for example the international space station is not a corporation but a group of nations possessing sound space technology working together to share a common platform for better and required results and to reduce the burden of heavy costs.

Such previously undertaken joint space exploration exercises can also be taken up as an example to reduce the discrepancies amongst SAARC Nations so that there can be more capacity building to achieve more success in achieving a sound collaboration for outer space activities.

Conclusion:

SAARC Nations are not only territorially bound together in neighborhood but are closely tied with closely associated culture, traditions and familiar languages, SAARC Nations does face some internal differences but it surely is worked upon and resolved by diplomatic and skillful negotiations, with such an offer made by the Indian Government of a common satellite for SAARC Nations it will be the biggest and the first to build collaboration for outer space activities, and in this technologically advancing society there is much room for everyone and such a attempt will not only grab attention but this common satellite may be the symbol of SAARC Nations identity.

Considering that this satellite is going to be a common satellite for all the SAARC Nations it will also become very important to look into what are the advantages that a country usually gains from a satellite are like Telecommunication platform and usage enhancement, Education, Broadcasting, Mapping Population Density to Carbon Emission and many other sectors can be supported and improvised which already are under those commonly shared and practiced sector for SAARC Nations like hydrology, oceanography, seismology, atmospheric sciences and now space sciences using a common satellite, since SAARC Nations will be having its common satellite shortly like many other known group of nations which have already launched and like

those who have planned like SAARC Nations, such a common satellite after being launch is surely going to bring up more manifestation and instrumentation in terms of relationship building amongst SAARC Nations as this multi-lateral agreement is proposed and financed wholly by India it will definitely have to face questions but its success shall be the desirous answer, it will also help India to negotiate in its future deals and agreements with SAARC Nation.

Hence, it can be concluded that all the eight SAARC Nations to some or the other extent will gain some benefit out of common space satellite, this may also help SAARC Nations to come forward with more joint space missions and programme and will also boost the space industry in the South – Asian space industry.

ENERGY TRADE IN SOUTH ASIA AND BEYOND: FOSTERING ENERGY SECURITY IN A WIN-WIN OPPORTUNITY

Akash Kumar[*]

Abstract

The position of South Asia is very critical today in terms of energy security. As the different nations in the region prioritize development, energy crisis has proved to be a persistent constraint for the region. The three major problems that the region faces today are energy security, access to clean and sustainable energy and high dependency on energy imports. A remarkable achievement of the SAARC summit in 2014 was the signing of the regional cooperation agreement by the members in Kathmandu. The agreement allows India, Pakistan, Sri Lanka and Bangladesh to import electricity from hydropower rich nations of Bhutan and Nepal. However going by the past experiences, mere signing of an agreement is not sufficient as it is seen that many of the SAARC projects have failed to take off for the political differences between its members. An example is Nepal which in spite of having a huge

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hydropower potential has not been able to create infrastructure and environment for energy security and development. This paper seeks to analyze the importance and means for energy security in the region, exploring prospects for trade in energy with regions beyond SAARC, and understanding the barriers to such trade. The author would also propose some potential measures for achieving a win-win opportunity for the SAARC members and adjoining countries or regions.

In terms of its energy requirements the region of South Asia is energy deficient as it depends heavily on the imports of oil, natural gas and other forms of energy. There is however availability of the renewable sources of energy like solar, wind and hydal, in the region, but most of the nations lack in the technology and infrastructure to harness the same. As the demands for energy in the region are projected to escalate from 582.1 MTOE (million tons of oil equivalent) in 2005 to 1,264.3 MTOE by 2030, there is a need for development of resourceful conventional and renewable sources of energy available in the form of solar, wind, hydropower energy and work for the harmonization of legal and regulatory framework, enhance financial mechanisms and institutional mechanisms.[1]

[1] Energy Trade In South Asia - Opportunities And Challenges, Asian development Bank report, December 2011.

Advantages of energy co-operation:

The foremost advantage that is anticipated out of a possible cooperation in the energy sector with the SAARC countries and including the countries neighboring the region would be the diversity in supply in the wake of a narrow comparative advantage that might be there with the small economies in the region. A regional cooperation in this field would allow the countries to make a balance between the rising needs of fuel import demands and supply of their own energy sources in which they have a unique comparative advantage. Next to it is the opportunity of sustainable growth for the smaller energy exporting economies more particularly in energy trade and services sector. For example in the SARRC region the countries of Maldives and Sri Lanka have very restricted resources to meet their domestic energy needs in terms of the rapid economic development that they are going through. Nepal is yet another example of such a nation which still falls in this category of nations because of its inability to tap its available resources. The nations in and around the region with such a potential can get a relief from such an energy constrains to their economic growth that they might be facing now. The energy demands and supply can be rebalanced with the help of an effort of cooperation and the stark energy shortages can be met, especially the most visible electricity shortages that the region faces today. The electricity shortages are known to discourage investments and

cripple the growth of an economy. This results in enormous costs which are often unnoticed or underestimated. Building such a network for energy trade in the region would help in reducing the costs involved in the cross border supply costs. The investment needs can be eased and would allow the bigger economies to play a major role in investing into regional energy infrastructure building thereby reducing the burden on smaller less developed economies.

One of the central benefits in energy trade cooperation is towards fostering energy security in the region. Making of such energy policies can ensure some security to the region in terms of the projected rise in the world oil prices in the coming years. This would also reduce our dependence on the single energy source reducing the consumption and it's over exploitation. Another benefit would be reduced greenhouse gas emissions and mitigate climate change in the region by way of improving energy resources and development of renewable and clean energy sources.

Energy security has therefore emerged as a major concern in the agenda of the SAARC member nations, especially in the backdrop of their recent efforts to attain regional economic integration. It has been felt by the member nations that there is an utter need for them to co-operate in energy sector in the spirit of mutual trust, sharing of benefits, and interdependence for ensuring energy security and regular supply of energy to the population in the region, either at bilateral, region, intra-regional or sub; regional basis. It was for

this reason that a need for establishment of SAARC Energy Center was decided upon by the member countries in the thirteenth SAARC Summit. The Center was established in Islamabad in 2006 and has been fully operational since then. The main objectives of the center are to work for the promotion of energy trade, efficiency, conservation and development of the energy resources including renewable and alternate sources of energy. However the recent studies suggest that the potential for an effective energy trade can be multiplied if the neighboring nations of the region with a surplus of energy source can be brought into the ambit of energy trade in the region to gain a level of strength and security in the region. This would provide the region and the other nations with a win-win opportunity as there can be an increased exchange of technology and resources to achieve energy efficiency.

The SAARC Energy Trade Study (SRETS) was also completed with this view with the support of Asian Development Bank (ADB). The four issues identified in this study which would need to be worked upon for to make a plan of action for implementation were energy access, energy security, energy efficiency and energy demand in the wake of rapid urbanization. Additionally a study on Regional Power Exchange was specially made in SAARC to be completed in 2012 with a view to explore the potential for interconnections for power sharing and transfers by examining both economic and technical requirements for the purpose of

instituting a plan for regional power exchange aimed at maximizing the potential for exchange and transfer of power in SAARC region.

The demand for electricity in the region of South Asia is estimated to more than triple from 43.2 MTOE in 2005 to 165.7 MTOE by 2030, projecting an annual growth rate of 5.5%.[2]It is also projected that the share of nuclear power may triple to 8.5% by 2030 from a figure of 2.4% in 2005 as a result of India's projected increase in nuclear power generation plans by 2030 at an annual rate of 3.2%.[3] It has to be noted here that India and Pakistan are the only two countries to construct nuclear power plants in 2011 even when plants in many nations are being shut down and nuclear power generation being discouraged after Fukushima nuclear disaster in Japan due to a major earthquake. Therefore the strategies should be aimed at being less dependent on these conventional and other non-renewable sources of energy This, in turn, will also prevent adverse impacts on environmental and health.

Currently the intra regional trade between the SAARC member states is limited to electricity trade between India and Bhutan, and India and Nepal, and in terms of trade in petroleum products

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2 Energy Outlook for Asia and the Pacific, Asian Development Bank report, 2009, p 41.

3 *Ibid.*

between India and Bangladesh, Bhutan, Nepal, and Sri Lanka.[4]The electricity trade in the region is mainly based on domestic hydropower resources, and trade in petroleum products is based on India importing and refining crude oil and then exporting petroleum products to Bhutan, Nepal, and Sri Lanka.[5] India is also exporting diesel to Bangladesh. The current energy trade between the SAARC region and outside includes limited trade in petroleum, coal, and electricity. The larger three of the seven nations in the region account for more than 98% of the total energy that is supplied in the region which amounts to 507.9 MMTOE (Million Metric Tons of Oil Equivalent). The supply of energy in the region is clearly headed by India with coal (237.7 MMTOE) and oil (120.3 MMTOE) leading the country's 423.2 MMTOE equivalent of the total energy commercially supplied in the region in the year 2006.[6] The energy trade outside the region is restricted to Afghanistan importing electricity from Central Asian Republics (CARs) and also Pakistan importing power from Iran. However the value of the trade which is being done currently is far below the potential in the region and is restricted by political, economic and infrastructure factors. Though for the time being, the progress on building the Central Asia–South Asia (CASA) power link, Turkmenistan–Afghanistan–Pakistan–India (TAPI) natural gas

4 South Asia Regional Initiative For Energy Cooperation And Development, SAARC Energy Center: Strategic And Operational Plans, USAID, August 2006

5 *Ibid.*

6 *Id*. at 1.

pipeline and the Iran–Pakistan–India (IPI) natural gas pipeline has been considerable. India is also engaged in the development of Tamanti hydropower project with a capacity of generating 1200 MW electricity in Myanmar for exporting the same to India.[7] India has also sought a mutually beneficial agreement from Bangladesh based on the use of right of way, for the construction of a natural gas pipeline passing through Bangladesh to Myanmar to fetch natural gas from Myanmar.[8]

The regional co-operation in energy could make significant effect in securing energy supply and economic growth. In particular the energy security issue has to be tackled at both national and regional level owing to a soaring projected energy demand in future. Besides the potential sources of energy within the region, there exist rich sources of energy resources with its immediate neighbors too, in the west (Central Asia and Iran) and in the east (Myanmar). A huge share of resources lies untapped in the region and with the neighboring countries in the form of hydropower and natural gas; these are considered some of the environmentally cleanest forms of energy. The physical distribution of the resources for energy is distributed unevenly and the pattern of their location is quite different from the demand in the various regions. A close look at the region reveals that the nations like Nepal, Bhutan,

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7 Energy Trade In South Asia - Opportunities And Challenges, Asian development Bank report, December 2011, P xx.

8 *Ibid.*

Myanmar and some economies of the Central Asian such as Tajikistan and Kyrgyz Republic have energy resources which exceed their domestic need and have them in excess.[9] If a focused plan is developed towards the export of these resources, this would enable these smaller economies to develop their economy through export led growth. In the region, India and Pakistan are the two economies which are the main markets for the energy imports from these countries which have them in surplus. In addition, the supplies of energy from Iran and Turkmenistan would give an added security to the energy supplies in the region to dismiss the shortages and would help in the sustainable economic growth.

Energy resources and trade opportunities - scope of cross-regional and sub-regional trade projects:

There lies an abundant natural resource in the region which has remained untapped. A large part of these is in the form of hydropower and natural gas which are known as some of the environmentally cleanest forms of energy. However their distribution in the region is quite uneven and different from the distribution of their demand. The opportunity for trade co-operation in energy sector in South Asia promises a win-win opportunity for both the countries in the region and beyond. There are energy resource-surplus countries like Nepal, Bhutan in the

[9] Regional Energy Security for South Asia, Regional Report, USAID, available at http://pdf.usaid.gov/pdf_docs/Pnads866.pdf

region and countries like Iran, Myanmar in the neighborhood together with countries having significant energy import needs like India, Pakistan, Sri Lanka and Afghanistan. This provides an opportunity to enhance energy security and co-operation as all the nations involved would benefit from consistent support, reserve sharing, cleaner fuels, improved investment opportunities thereby reducing risks for potential investors, and the related sharing of knowledge and experience. However, so far such regional trade has been far below the potential and held back historically by a number of factors; political and security concerns; inward-oriented energy security policies.

The possible growth of regional trade within the SAARC region and between the SAARC region and its neighboring countries will be one step forward in integrating possibly the largest market in the world. The SAARC and neighboring countries can be broadly divided into two clusters with India and Pakistan serving as the central pillar of regional integration in the eastern and western SAARC. With an aim to further integrate the two regions into one[10] the eastern cluster may consist of India, Bhutan, Bangladesh, Nepal and Sri Lanka, in that India may act as a center for integrating electricity trade from Nepal and Bhutan and natural gas and petroleum from Bangladesh. This would create a good link to

[10] Vladislav Vucetic and Venkataraman Krishnswamy, How Can South Asia Promote Energy Trade, World Bank Publications, available at http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171488994713/3455847-1175098932819/ICRch10.pdf

integrate trade in electricity and petroleum among the four countries which can further be linked to Myanmar. Likewise, the western cluster may consist of Pakistan, Afghanistan, Tajikistan and Kirgizstan which will integrate the electricity and gas imports from Afghanistan and beyond into Pakistan and further, to India.[11] India would eventually bridge the two clusters into a unified energy market, with integrated electricity and gas networks. The market, serving a population of about $1.5 billion, would be one of the largest in the world, whose sheer size would make it easier to mitigate the various risks, bear external shocks, reduce cost, create additional and more profitable trading opportunities, and attract investments.

The fault line between Central Asia and South Asia has incurred significant economic and political costs for the countries on either side of the line and even globally. It has isolated Afghanistan for decades and suppressed its economic development. It has provided a fertile ground for illegal drug production and fermentation of extremist political ideologies and movements, at the expense of both the Afghani population and the world at large. It has deprived the region from the benefits of integration and movement of people, goods, and ideas. The lack of energy trade across the region is one illustration of these costs.

In case of trade in electricity, the promotion of the measures like

[11] *Ibid.*

Afghanistan's bilateral electricity trade and Central Asia-South Asia multi country electricity trade initiatives are likely to benefit all the stakeholders in multiple ways.[12] The central Asian power utilities would be able to utilize their power assets in a better way, as in medium term it will enable countries like Tajikistan and Kyrgyz Republic to earn electricity export revenues so as to pay for the fossil fuel and thermal power imports that they need in winters from their neighbors. This in turn would help countries like Pakistan and Afghanistan in closing the supply gap and stabilizing there power systems to ensure greater access to energy to their population and upgrade their power systems for regional transits. [13]

Barriers and Risks to Energy Trade:

The barriers to this type of trade also exist in many forms. For example in the case of electricity, it can only be traded through a physical network of electricity grids across the region. In the case of trade in natural gas and its derivatives, trading is found to be more viable and economical when traded through gas pipelines when traded through a long distance. It is this absence of physical infrastructure and investment on gas and electricity supply and distribution network in the Central and South Asia that act as a

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[12] SARI/EI Project Secretariat, IRADe, Background paper on Cross-Border Electricity Trade in South Asia: Key Policy, Regulatory Issues/Challenges and the Way Forward, Workshop on the Sustainable Development of Power Sector and Enhancement of Electricity Trade in the South Asian Region January 15, 2016, New Delhi, India

[13] *Ibid.*

restraint to trade. It also gives an indication of the problem that have been there and prevented trade development in the past. Apart from these the other main problem is the political and security fault line that has existed in the region of South and Central Asia with Afghanistan being the major problem part of it. Thus the fragile political and security condition that exists between many of the border states of the region is a major check on the potential energy trade in and beyond the region. Other political, economic, and cross border differences between the nations coupled with an absence of a serious effort to develop mutual trust have complicated energy trade in the region. However the common interest involved in this form of trade in a win-win situation for all the nations in the region may contribute to overcoming the conflicts.

The other barriers that exist are in the form of poor or insufficient performance of the national utilities in the region. This results from a number of factors like the high tariff regimes, non-tariff barriers, poor transit and communication facilities, lack of banking and financial support often leading to distortion in price signals. Additionally there are instances of operational inefficiencies and tolerance of non-payments which is often from the side of the governments etc. Moreover, barriers also exist in the forms of bottlenecks in transmission networks in electricity or natural gas. This needs to be removed urgently from the Central Asian

countries to enable smooth transmission of electricity or natural gas to South Asian Region. The lack of cross-regional infrastructure may hamper the transit or export-import of energy especially in the countries like Afghanistan, Tajikistan, and Kirgizstan as they lack the national systems to coordinate the dispatch of energy, maintain frequency and voltages, keep international flows within contractual limits prescribed and maintain stability of supply.[14]

In terms of trade in electricity there are doubts raised on the reliability and quality of domestic electricity supply which is another potential constraint. It has been experienced in the region that it is difficult to sustain exports when many of the nations are facing domestic shortages. In the same way, there is a need for the export prices to be consistent with the pricing in the domestic markets for it to be economically non-distorting and at the same time politically sustainable. If exports are priced lower than the domestic pricing, it may be restricted by the domestic consumers. The national policies adopted by the various nations in the region towards energy security have a substantial impact as well. It will be very critical for the trade development in energy in the region, to understand that whether regional energy trade will be seen as contributing to the energy security in the region or is seen as creating disruption risks and dependencies. The countries would

[14] World Energy Outlook, International Energy Agency, 2013, available at https://www.iea.org/publications/freepublications/publication/WEO2013.pdf

however have to come out of their inclination for achieving self-sufficiency and create an environment for investment and trade in energy as there are countries with different forms of natural resources which are unevenly spread, no one country can be entirely self-sufficient.

The trade in energy which happens in existing format in the region (within South Asia, Central Asia, or between Central Asian countries and Afghanistan, between Iran and Afghanistan or Iran and Pakistan) are usually in the form of short term contracts. They are also typically influenced by politics and commercial elements. This has resulted in countries avoiding long term and medium term contracts which makes the entire South Asian region highly susceptible to political pressure and unjust bargains in energy trade. Regulating energy trade through an independent institution with independent regulations may be a new concept in this region, and has to go a long way to become an accepted and established practice. But with the missing long term contracts and political differences between the members in the region, the countries are at a greater risk which needs to be mitigated immediately.

Working towards energy security in South Asia:

It emerges from the above discussion that there exists huge opportunities for the private sector investors in pursuing energy security in the region through intra-regional and inter regional

trade. Specifically in intra-regional trade in energy, the private investors could be encouraged to develop hydropower energy and related transmissions. Likewise, in interregional trade across different nations beyond SAARC, there exists many opportunities for the private investors for developing the transportation system for long distance bulk natural gas and electric power transmission.

Another proposed way the investments can be structured is by public private partnerships which may include equity shares for local partners and the host governments including a neutral third party for minimizing the range of investment risks involved. The nations importing energy should also aim at sector reforms aimed at developing creditworthy trading partners and providing buyers with a range of choices. Here the countries exporting energy should maintain an economic environment in the country which is very attractive and conducive for foreign investors and should also ensure stability in supply by ensuring that their productions are not diverted for domestic consumptions if they are not intended to. This could be achieved by establishing just, fair, transparent, stable sector regulations non discriminations between domestic and export markets and between different investors from different nations.[15]

[15] L. Srivastava. and N. Misra 'Promoting regional energy cooperation in South Asia.' Energy Policy, 35, (2007), pp. 3360-3368.

Towards a regional approach to energy security in the region, it has been found that coordination, planning and mitigation of investment risks would yield significant benefits to each nation in the region as it has been found that the risks and security of energy supply issues faced by different nations in the region happens to be same. This could thus help in the formation of a common energy security policy and investment protection policies in the region. The following measures could be a possible action plan for energy security in the region:

Strengthening of the SAARC Energy Centre: The Center established in Islamabad should be strengthened as it represents all member countries in the region. There should be more research, planning, training and trade from the Centre. For strengthening it, the countries should pool their research for trade policy planning, assessment of a viable master plan for power interconnection, formation of a central information system for energy trade, and training for the development of database for relevant information.[16]

Establish a SAARC infrastructure Development Fund Institution: such an institution with the key objectives for promoting cross border investment, security, private players, entrepreneurs and industrial associations must be developed for a coordinated approach towards energy security. The institution may be a linkage

[16] South Asian Association for Regional Cooperation (2005). Report of the First Meeting of the SAARC Energy Ministers, held at Islamabad, 1 October 2005. Document No. SAARC/EMM01/3.

for identification and promotion of mutually beneficial investments schemes and opportunities for entrepreneurs in the region. It should also work towards promote regional economic diplomacy and should work for understanding of the energy need of different countries in the region.

Building a petroleum reserve to act as buffer for times of high prices: an approach for securing oil reserves in times of crisis such as during high prices can be, that certain discovered oil and petroleum reserves can be used as a strategic stockpile and can be escalated to their full production potential in the times of crisis or when the price is too high for the economy of different nations to absorb.[17] Additionally to counter short spans of price hike in oil, formation of an oil price contingency fund may be considered.

Establishment of a regional electricity grid: the establishment of such a regional grid is a prerequisite for any rational energy development plan in the region. The different advantages of a regional electricity grid has already been appreciated by almost all countries in the region and finds a mention in the energy security plans of Nepal, Bhutan, and Bangladesh.[18] Proposal is that the feasibility of establishment of such a regional grid can be studied by different working groups and technical consultancy organizations in the region.

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17 Regional Energy Security for South Asia, Regional Report, USAID, p – ES 8-ES 9 available at http://pdf.usaid.gov/pdf_docs/Pnads866.pdf

18 *Ibid.*

Establishing of a regional gas grid: though the proposal may sound ambitious, but if major pipelines connection India, Pakistan and Cebtral Asia or the Middle East materializes, the feasibility of extending the natural gas grid to Bangladesh, Nepal, Bhutan can be considered. Therefore a study group of a working group may be constituted to analyze the techno economic feasibility of such a regional gas grid as suitable time.[19]

Conclusion:

For a sustained cooperation and achievement of these trading initiatives in energy sector, there is a need for strong political and economic commitments by the nations of the region to involve the neighboring nations and tap the trading potential of the region and around. There is a need for high level of political commitments and support in order to succeed in these trading initiatives. SAARC can play a leading role in helping the member countries foster economic relationships, build trusts, developing regional institutions for the same, building physical infrastructure arrangement with an action plan. For the purpose of achieving these objectives, the energy policies of the member countries should focus on first, developing an action plan for providing a sustainable, reliable, continuous and balanced supply of energy in the region. Secondly it should aim at improving management in

[19] Regional Cooperation For Energy Access And Energy Security In South And South-West-Asia Prospects and Challenges, United Nations Social and Economic Commission for Asia and the Pacific, February, 2013

various energy sectors and their performance. Next to it, the member countries should also focus on increasing investments by private sectors and increased participation from them in developing infrastructure. The other most important focus should be on reducing the regional disparity that exists in terms of energy resources and supply. This can be overcome by reducing the dependency on conventional fuels and creating regional energy markets.

THE LEGITIMACY OF LEX MERCATORIA IN INTERNATIONAL ARBITRATION

Harshit Singh Jadoun[*] *& Akshay Choudhary*[**]

Abstract

The historical roots of Lex Mercatoria can be found in Law Merchants of Middle Ages which were applied to settle cross border disputes by European trade centres. The concept states that a International Contract may be governed by a transnational law which would not be biased towards any of the countries in the dispute, later if any issue arises linked to the arbitral award or anything else then the national law may come into picture for resolving it. The question of debate is that whether this model of Lex Mercatoria can be accepted as a law or not along with whether it is legally binding or not? These are disputes which currently are matter of discussions among the jurists and scholars dealing with international trade and commerce. The concept not being constitutionalised raises various questions on its legitimacy as it is not recognized by any state. The

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question arises that whether Lex Mercatoria affords Justice to parties as the laws put in are sometimes evolved by the arbitrators itself but the ambiguity is would it be erroneous to accept these laws even if they bring two parties to a solution. Lex Mercatoria though being a unusual topic is an area of discussion and has been argued by various jurists, scholars and researchers in this field. The several sources of Lex Mercatoria and its legitimacy has been elucidated in the research paper The True Lex Mercatoria: law beyond the state by Ralf Michaels. The research methodology followed is meta-analysis and theoretical in nature. Books and Magazines related to International arbitration are referred; various websites associated with the title are also visited. All the sources referred for this thesis are consistent. Case Laws those have established a trend towards the application of Lex Mercatoria and which are discussed in this paper are "Norsolar", "Fougerolle" and one of the recent ones are the Libyan Oil nationalization cases in which the "Texaco" award was the major one.

The Lex Mercatoria or the "Law of Merchant" came into existence due to desire of the jurists for third order legal system which can

scrutinize disputes between two countries that arise due to International Commercial covenant. The law has chiefly found its existence in last few decades when International Contracts and Treaties have proliferated all across the world, but it has been into existence since 11th and 12th century when the Empire of Roman used it for regulating and administrating relations between the Roman citizens and other countries. The origin of the Lex Mercatoria is asserted to be from several countries like Egypt, Greek and Phoenician from numerous authors but principally it started in the Middle Ages and went on to develop in the Western Europe as an when the trade business outstretched amongst the states. The law of Lex Mercatoria can said to be the law of "State of Nature" where there is no common power or authority and no one can exercise coercive power on anyone.

Initially the Merchants at the fairs of St Ives who were known to be the creator of merchant laws were governed by the local official law and later on the Dutch and the Belgian merchants used mixture of public and private legal institutions to avoid arbitrary and temporary private tribunals. The merchants pronounced that this Lex Mercatoria was a mixture of state and non-state laws with several privileges, public statutes and private customs protected under the model of merchant law.

As the European traders expanded their business internationally the local laws turned out to be of no use rather they were causing

obstacle in the organization therefore an International system of commercial law began to evolve which was known as Lex Mercatoria.

Sources of Lex Mercatoria:

Lex Mercatoria in a general term is the set of Generally Accepted Principles which the parties entering into international commercial contract may choose over national law to resolve their dispute which may arise out in the course of the enforcement of contract. There is no fixed information as from where or what is the source of Lex Mercatoria. Different people interpret it in different way. Professor Lando has listed several elements instead of sources of lex mercatoria which are as follows:- (a) public international law, (b) uniform laws, (c) the general principles of law, (d) the rule of international organization, (e) customs and usages, (f) standard form contracts, (g) reporting of arbitral awards.[1] Going by its very basis or source of its foundation we can say that it has gained its status mainly through generally accepted commercial rule and principles. These rules and principles are mostly binding in nature i.e. the merchants or the contracting parties are bound by the clauses of the contract though it does not have any statutory status and breach of which would be actionable and redressal could be claimed via international arbitration. Other sources may also

[1] Abul F.M. Maniruzzaman, The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration? American University International Law Review, Volume 14 | Issue 3.

include mercantile customs formulated by international bodies such as International Chamber of Commerce (ICC) and UNIDROIT. Having an autonomous character it has its own autonomist concepts irrespective of any national law of a particular country.

Lex Mercatoria is apparently based on one of the foundational principles of contract i.e. Party's autonomy which says that every party entering into the contract can decide their own terms and condition of the contract. It is true that parties to a contract are generally at a liberty to express a preference of law in their contract, and this is to be appreciated, so long as this preference is not fraudulent for the purposes of evasion of aspects of the law that would otherwise be applicable, and does not disregard obligatory public law rules. Lex Mercatoria acts as a guiding principle for conflict avoidance and for showing the contracting party without being biased towards a particular national law the correct path to get the job done and keep a healthy relation between the parties to the contract and helps in keeping up the spirit of International Commercial Transaction.

Theory of Lex Mercatoria:

The hypothesis of Lex Mercatoria could said to be a sought of a bamboozled one because of its ambiguous nature and the accepted fact that it lacks simplification in its principle makes it more

nebulous and incomplete. Albeit the law of Lex Mercatoria is a very different concept and it is many a times used interchangeably with the "Transnational Law" which is also a part of third legal system. Transnational law is a broader concept which includes all law regulating cross border actions encompassing all public and private International law. On other hand Lex Mercatoria is a specific concept that mainly deals with international commercial law which is uncodified. Lex Mercatoria serves the uniform need of International business and economic cooperation, which makes it autonomous in character. Professor Goldman defines Lex Mercatoria as a set of general principles and customary rule spontaneously referred to or elaborated in the framework of International trade without reference to a particular national system of law. The relation of Lex Mercatoria or Transnational Law to "State Contract" is still sceptical and different writer interpret it in a different way. Writers like professor "Weil" consider "International Law of Contracts" simply to be a new branch of public International law specific to state Contract whereas Professor Goldman consider it to be a self-governing third legal order which is suitable for State Contracts as well as Contracts between parties. He is not in favour of a very wide interpretation of Lex Mercatoria rather he believes that laws which relate to Inter State or State origin that relate to International trade cannot be part of Lex Mercatoria but does accepts that those rule that are important to customary law and point towards international custom

can said to be part of Lex Mercatoria. Several numbers of Scholars and professor have tried to distinguish Lex Mercatoria from transnational commercial law by stating Lex Mercatoria to be a part of latter which is un-codified but consisting of customary rules and procedures including international public policy.

According to "MUTSELL" there are two concept of Lex Mercatoria. Firstly it is a body of rules and norms which are applied "*ipso jure*" to any transaction within its ambit until and unless expressly excluded. Secondly it is a rule available to parties who on their own will entered into the contract and choose to be subject to International Law. It is believed that the theories that led to development of Lex Mercatoria should be of transnational in nature and character therefore it would be easier to recognize the different members of Lex Mercatoria family such as *Lex petrolea, Lex electronic, Lex constructions* etc. Despite the assistance that mechanism of Lex Mercatoria provides in resolving the International arbitration, there are serious drawbacks that have been identified in this format which even its proponents agree to. Due to lack of unfussiness and existing multiplicity in standard contracts of trade at international level it becomes very arduous to determine what should be the law that needs to be applied in any given circumstance. Even the arbitrators reach at a consensus or solution to a particular problem it is not generalised which makes it ineligible to be applied in future cases and not being codifies it

fails to set up any kind of precedent that could be taken as a guideline for future settlement. The very contentious issue raised against it is regarding its authenticity

Apllication of Lex Mercatoria in International Arbitration:

The Law of Lex Mercatoria is referred to as *Law beyond the state*therefore has limited application in the National legal system and it is deemed to have greater relation with the International Arbitration. To start with the application of Lex Mercatoria it should be made clear that the appointment of the arbitrators id done by the ICC where National Committee of ICC recommends the name of the arbitrators which does not belong to any of the party and even the place of the arbitration is decided by the ICC itself[2].

A lot even depends on the clauses of the contract to which he parties should agree as to which law they want to be applied if any dispute arises in future. An international contract is governed by global commercial laws but nevertheless if any of the parties want their national laws to come into picture, they can absolutely approach their national courts which can play their role in implementing the contract or the award that is declared to the winning party if the party resist obeying the order, this shows that

[2] Ole Lando, The Lex Mercatoria in International Commercial Arbitration,m The International and Comparative Law Quarterly, Vol. 34, No. 4 (Oct., 1985), British Institute of International and Comparative Law.

le Mercatoria does not have autonomously any authority or the arbitrators applying these general principles of law can be easily challenged by the national legal system of any of the parties. This Law can be referred *implicitly* as well as *explicitly* in case of disputes. In case of explicit reference of Lex Mercatoria the arbitrators really need to work hard in order to find out what laws should be applied to a particular facts and circumstances, resembling to the procedure in national laws even in the international arbitration the parties can decide what laws should be applied, according to Section VII of European Convention on International Commercial Arbitration 'the parties shall be free to decide the law that would be applied by the arbitrators to resolve the dispute'.

On other hand the implied reference is the situation that is currently existence with regard to Lex Mercatoria where the terms and conditions of the contract determines the law need to be applied, here the parties allows the arbitrators to act *amiable compositeur* and apply the bona fide principle and rule to settle the dispute.[3]

The development in the use of Lex Mercatoria was seen in the cases of Texaco[4] and Revere[5] the theory of Internalization of

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[3] Dr. Sülün Güçer, Attorney at Law, Member of Ankara Bar, PhD Ankara University, Faculty of Law, Lex Mercatoria in International Arbitration.

[4] Texaco v. Libya, 53 I.L.R. 389, 441 (1979).

contract was developed as a tool for the internalization of the law of contract. In the above mentioned case a Iran – United States Claim tribunal frequently used the reference of citation of Article V of the *"Claim Settlement Declaration to principle of Commercial and International Law"* to evolve the use and justify the use of general principles of law thereby promoting Lex Mercatoria.[6] There has been a trend which is evolving in the usage and applying of this law and internationally there have been cases such as the *Norsolor*[7], *Fougerolle,*[8] *and Deutsche Schachtbau*[9]where Lex Mercatoria has been brought into the picture and its application has been recognized by the parties where there was leniency in its practice but it cannot be the case everywhere. Derains and Schwartz observed in the ICC arbitral practice that the actual stand of these general principles of law stands disagreed in many places therefore is uncommon which leads parties to adopt the national laws of any one countries and sort out disputes according to that.[10]

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5 *Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp*. (OPIC),56 I.L.R. 258 (1980) (Award of August 24, 1978).

6 Abul F.M. Maniruzzaman, The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?, American University International Law Review, Volume 14 | Issue 3

7 *Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A.* (Turkey v. France), I I Y.B. Com. Arb. 484 (1986), as reprinted in, W. Michael Reisman, et. al., INTERNATIONAL COMMERCIAL ARBITRATION203 (1997).

8 *Societe Fougerolle v. Banque de Proche Orient* (France v. Lebanon), 1982 Rev. Arb. 183, et seq. (decision of the French Cour de Cassation).

9 Deutsche Schachtbau-und *Tiefbohrgesellschaft m.b.H. v. Ras al Khaimah National Oil* Co., 2 LLOYDS L. REP. 246 (1987)

10 Supra note 4

Recent developments in the field of Lex Mercatoria:

With the increasing advent of International Commercial Transaction the need for implementing a common universal binding mechanism throughout the world is required so that no particular nation has control over the transaction. Lex Mercatoria is one such mechanism because of which cross border transaction has gained pace and the contracting parties are at a safer position to transact if terms and conditions are pre decided between the two parties. With the rise in globalization all the nations in the entire world is now interconnected through trade and commerce.

Prior to nineteenth century although the aim of formulating Lex Mercatoria was to develop a self-binding mechanism irrespective of any biasness towards any particular national law but due to the socio-political demands of the transacting nation it somehow merged with national laws of the country. But in the twentieth century with the advent of Globalization there was a rise of a new modern Lex Mercatoria which is mostly found in International Conventions. Lex mercatoria is also found in model laws, and other documents of various forms, drafted by international organisations. Firstly, International Chamber of Commerce (ICC) was founded in 1919 with the vision of promoting free trade and commerce and for the free functioning of the economy and it has been great success in becoming true world business economy. Secondly, there is also one institution called International Institute

for the Unification of Private Law (UNIDROIT) whose purpose is "to study the needs and the methods for modernising, harmonising and co-ordinating private and in particular commercial law as between states and groups of states."[11] Its function is mainly to compile uniform rules concerning substantive laws, draft model laws which can be taken into consideration by the state while domestic legislation and framing general principle which can be taken into consideration by the contracting parties, etc,. The general principle i.e. the UNIDROIT principle of International Commercial Contracts sets forth general rules for international commercial contracts. These rules can be applied to the contract when parties decide a fixed governing principle of law which can be said as a part of Lex Mercatoria and these principles are flexible enough to change according to the demand of the contract and the contracting parties. The UNIDROIT principle clearly shows that there is some development in acceptance of Lex Mercatoria in twentieth century as lagre part of it were included in conventions and models. Recently, there have been some well-known international arbitration cases that have attempted to develop the lex mercatoria. Among them is the Libyan oil nationalization cases, Norsolor,'69 Fougerolle," and Deutsche Schachtbau"'

[11] Marlene Wethmar-Lemmer, THE DEVELOPMENT OF THE MODERN LEX MERCATORIA: A HISTORICAL PERSPECTIVE.

cases,[12] for their claim that the case law has established a trend towards the recognition of the lex mercatoria as a distinct body of rules or a legal order independent of national legal orders and courts in different jurisdictions have upheld the arbitrators' application of the lex Mercatoria which shows or proves that it is constantly being practised over and over again although not being a recognised enforceable law.

Countries to Which Lex Mercatoria has been Applied:

European Countries

Eight European countries (Belgium, Austria, Denmark, The Federal republic of Germany, Finland, France, Italy and Spain) have agreed to the terms of the European Convention of 21st April 1961. There are two major Articles of this Conventions, firstly the Article VII (I) which states that parties will be free to decide the law that would be applicable on the contract and if they could not come to a consensus regarding the law then the arbitrators would be free to apply the law that they would deem to be fit according to the terms and conditions of the contract. Secondly, the Article VII (II) which allows the arbitrators to act as an *amiable compositeur*, here the arbitratorsmay decide to apply Lex Mercatoria as it is a more authoritative source.

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[12] Abul F.M. Maniruzzaman, The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration? American University International Law Review, Volume 14 | Issue 3.

France

An order of 12 May 1981 has added new provision on international arbitration to the Code of Civil Procedure, where Article 1496 states that the arbitrators may decide according to parties as to which law to apply and when no choice has been made the law applied would be as per them that means *celles qu'il estime appropriees*.

Austria

Austrian Supreme Court on 18 November 1982 maintained the award between Turkish and French as determined by ICC on the basis of Lex Mercatoria, the parties were not able to choose law for their contract and there was no appropriate law that could be made functional for the contract to be enforced therefore the arbitrators decided the case on the basis of fair dealing and good faith by using International Lex Mercatoria moreover the Supreme court upheld this judgment stating it did not violated any of the national laws of any of the countries.

Authenticity of Lex Mercatoria:

The debate on the legitimacy of the Lex Mercatoria and on its autonomous nature amongst various authors and intellectuals has been since nineteen sixties when it was just on its naissance. There have been avid discussions on the spirit and utility of Lex

Mercatoria but almost every contribution lead to figuring out the disadvantages of the structure and some academician even denied its existence. The mere fact that the existence of Lex Mercatoria remains unknown to many businessmen even after so much debate on it makes it a matter of reconsideration. After the increase in enormity of The International Contract and adoption of the notion of The UNIDROIT Principles of International Commercial Contract and Principles of European Contract Law a revamp or some kind of amendment is required in the law which has a binding force to ensure proper functioning of International commercial contracts.

The validity of any law can only be determined by the theory of its legal system; an isolated rule cannot be termed as a "law" until and unless we know the authority of law to which it belongs. Professor Goldman support Lex Mercatoria as a legal system because it is a set of specific rules which is applied by the establishment that come into existence due to activities of "*societas mercatoram*"[13] that means a "specific social group" and to elaborate further he refers to the International trade community as a specific social group. According to John Austin a rule should be called as a Law if it passes three important features namely normative, institutionalized and coercive. The Lex Mercatoria can said to be

[13] Abul F.M. Maniruzzaman, The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?, American University International Law Review, Volume 14, Issue 3.

normative as it serves what it is meant to serve that is to come to a conclusion or a solution to dispute but falls short of being institutionalized and coercive. In the positivist theory of Law the society or the institution that is making the law should be a sovereign and that it could exercise control and authority over the others which in the case of Lex Mercatoria is not up to scratch. In general people believe that there are two type of legal systems first one being the International Law and other one being the State national laws, where former one is formed, applied and enforced by collective efforts of state whereas the later one is individual implemented by each states. In the *Kuwait-Aminoil*[14] arbitration, where Aminoil laid the argument that general principles of law are the principles and the only constituents of the transnational legal system, to this Professor Rigaux stated that general principles of law are a subsidiary source of law which can be made applicable only in absence of specific rules and that too with the conjunction of normative sources.[15] Any rule or statute merely cannot said to be a law just because it is open for its theoretical legal interpretation it needs to have a backing of legal system and in case of Lex Mercatoria it is not even backed by any sovereign authority[16] which raises doubts regarding its authencity and

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14 Ibid 1.

15 Aminoil Pleadings, Kuwait v. Aminoil, 21 I.L.M. 976, 1000-01 (1982) (discussing the law applicable to the substantive issues in the dispute).

16 MICHAEL J. MUSTILL& STEWART C. BOYD,COMMERCIALARBITRATION 81 (2d ed. 1989) (doubting the existence of ***lex mercatoria***and its ability to resolve commercial disputes).

making it more vulnerable as a subject of criticism. In *Amin Rashid Case*[17] the English House of Lords reiterated that a *contract can only be enforced when it is governed by any specific system.* A contract cannot be brought into actions until and unless it obliges both the parties to do their duties and on failure to perform those duties they can get it enforced by the court of law, but disagreeing with this statement Professor Sauser-Hall scrutinized in the judgment of *Aramco* that 'it is true that no contract can exist in *vacuo* that is without a proper legal system because it cannot be left on the discretion of the party to decide the fate of the contract unless it is related with some positive law. The parties can only enter into a contract if it is priorly recognized by the legal structure and specified the powers to do so.

Therefore this paper would not be able to reach at a conclusion as to determining legitimacy of Lex Mercatoria but definitely contributes in portraying views and opinion of different scholars and academicians which to an extent shows that there is a controversial debate concerning its existence and in this era where thousands of transaction that takes place internationally, a well – premeditated law is required to put into order the administration of law and justice.

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[17] Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., 2 All. E.R. 884 (1983).

Conclusion:

In today's world where every day number of countries come into contract with each other relating to some or the other transaction it has become a requisite to frame a strict and a effective law that could govern nations once they come into contract and lay a obligation on them to perform their duties without any failure.

Lex Mercatoria does up to an extent proves to be valuable but due to lack of handy institutionalization and coercive power it fails to make the parties binding to the agreement, and if practiced by the arbitrators then the country against which it function challenge it in their national legal system which destroy it certainty. Moreover the amount of ambiguity that is present in this law makes it more vulnerable to criticism amongst jurists. For the development of Lex Mercatoria it should be more standardized and have legal jurisprudence to support its existence, in addition to it the ICC should declare the decree binding on the parties whoever comes into contract. In conclusion the authors would like to suggest that the philosophy should be to accept the "rule of law" that is capable to solve disputes rather than questioning its legal system or the structure from where it has been derived.

CHILD LABOUR LAWS IN SAARC NATIONS

Muna Basheer[*]

Abstract

Child Labour is one of the most important perils that civilized nations face all over the world. It is a hurdle to development as well as a violation of child's right to education and free choice. The greatest regional association of the world SAARC has played an instrumental role in combating the menace. However, it is not that there are no challenges before these nations. The SAARC Decade of the Rights of the Child and the Rawalpindi Declarations are clearly the standing testimony to the intentions of the SAARC nations in finding a solution to this problem. Apart from these, the initiatives of the International Community have also been taken into consideration by the SAARC nations. The International Labour Organization (ILO) launched the International Programme for Elimination of Child Labour (IPEC) in the year 1991 with the objective to end child labour globally. India was the first nation to sign this Programme. This article seeks to examine what are the key

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challenges the SAARC nations have to face on the road to a total ban on child labour. The first part would deal the various measures introduced by the SAARC Countries followed by a thorough critical analysis of these. It is not only the SAARC nations but also the International Community that has come forward with regulations regarding child labour. To what extent they were successful would be also be examined. The paper also would highlight what are the limitations of the various legislations and how state specific as well as a universal action can combat the dreadful problem.

Child labour in any form violates the right of children to basic education and a carefree childhood. Every SAARC Country has had legislations banning child labour, its extreme form that is the bonded child labour and related perils such as trafficking. The elimination of child labour was one of the most important goals of the SAARC Decade of the Rights of the child (2001-2010) whereas all countries address child labour as a national challenge and substantial progress has been recorded, intimidating challenges still stay. Factors including poverty, overall high unemployment rates, and weak rule of law, restricted Government resources, and security problems represent key constraints to progress on eliminating child labour.

Legal Framework to combat Child Labour in SAARC nations:

Every nation addresses its social issues taking into account a variety of factors. Where universal problems such as poverty, unemployment, terrorism etc. share similar characteristics, it cannot be denied that certain factors specific to the nation might have had an equal share in the same. In some countries, the feeling of losing one's unique identity, rebel feelings and political subjugation might be the cause of terrorism whereas in some others, poverty and related feelings might be the reason. Any problem needs to be addressed by the nation taking into account the specific need of the state.

The South Asian Association of Regional Cooperation (SAARC) formed in the year 1985 with the objective of promoting the welfare of the people of South Asia has its member nations as Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Child Labour has been at the helm of the social issues that the SAARC is trying to solve having dedicated a decade to the rights of the child (2001-10) as well as many conventions towards prohibition of child labour. A country wise analysis of the legislative materials and international instruments along with a causal exploration would show that each SAARC nation has some material history to produce with regard to the issue of child labour.

Afghanistan

In Afghanistan, which has a population of 32 million and is one of the easy spot of terrorism, estimates suggest that between 21 and 25 percent of Afghan children is part of the labour force. Besides these, 7.5% of the children in the age group of 5 to 14 years are engaged in one or the other modes of child labour.[1] Even though it is illegal for children under 14 years to work, poverty which is so rampant in the nation forces families in Afghanistan to send their children to work. A relation between terrorism, poverty and child labour can be gathered here, though there are research suggesting that poverty and terrorism do not share a linear relationship and that political conditions and feelings of frustration are the primary causes of terrorism.[2] Afghanistan which has been in a state of almost unending war since 1979 when the Soviet Union invaded, followed by the Taliban rule and the post 9/11 American invasion coupled with Taliban guerrilla warfare, cannot be let go by this theory. Thus, the prevalence of terrorism does have an impact on the economy[3] that in turn leads to menaces such as child labour even though the quality of the impact is always debatable.

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1 Understanding Children's Work Project's analysis of statistics from Multiple Indicator Cluster Survey 4, 2010 — 2011 UCW. Analysis of Child Economic Activity and School Attendance Statistics from National Household or Child Labor Surveys

2 Education, Poverty and Terrorism: Is There a Causal Connection? Alan B. Krueger; Jitka Maleková The Journal of Economic Perspectives, Vol. 17, No. 4. (Autumn, 2003), pp. 119-144

3 IDEAS: Times Inc. Network "Don't Dismiss Poverty's Role in Terrorism Yet"http://time.com/3694305/poverty-terrorism

Besides agriculture and services which is the common fields of child labour, Afghan children are also made to work in brick making, domestic work, street work and even in the worst forms of child labour such as drug trafficking, sexual exploitation, forced labor and armed conflict.[4] Afghanistan has a well-established legal framework addressing the issues of child labour. Article 13 of the Labor Law has set the minimum age for work to be 15 years whereas Articles 13 and 120 of the Labor Law has set the minimum age for hazardous work to be 18 years of age. It was only in 2014 that Afghanistan made a moderate advancement in efforts to eliminate the worst forms of child labor. The Government of Afghanistan announced the adoption of a list of 29 occupations and working conditions prohibited for children. Article 4 of the Labor Law and Article 49 of the Constitution prohibited forced labour of children whereas the Decree of the President of the Islamic Republic of Afghanistan Concerning the Enforcement of the Law on Combating Abduction and Human Trafficking/Smuggling and Article 516 of the Penal Code prohibits child trafficking. Presidential Decree of 2003 has set the minimum age for voluntary military service to be 18 years. While Article 43

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[4] Nissenbaum, D. "Teenager Films Afghan Child Labor- School Documentary Project Seeks to Illuminate Open Secret: Young Boys at Work in Remote Coal Mines." Wall Street Journal- Eastern Edition, New York, July 14, 2012; World News.http://online.wsj.com/article/SB10001424052702303640804577491511393159548.html.

of the Afghan Constitution considers all children under 15 years of age to be given compulsory education, the same article also provides with free education.

In 2014, the Government also took steps to combat child trafficking by acceding to the Palermo Protocol on Trafficking in Persons and issuing a directive to improve enforcement of the current law on human trafficking. In addition, the Government passed a law criminalizing the recruitment of children under age eighteen into state security institutions and the Inter-Ministerial Steering Committee on Children and Armed Conflict approved a new roadmap to support efforts to end underage recruitment.

However, children in Afghanistan are engaged in child labor, including in agriculture, and in the worst forms of child labor, including in the forced production of bricks. Children also continued to be recruited and used for military purposes by non-state groups, and were in limited instances used by some members of state groups to carry out specific tasks. Afghanistan's labor inspectorate lacks the legal authority to enforce laws relating to child labor, the list of hazardous occupations prohibited to children, as well as the minimum age provisions of the law, cannot be enforced.[5] Afghanistan has ratified all the key international

[5] Government of Afghanistan, *Labour Law*, enacted February 4, 2007. http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=AFG&p_classification=01.02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY

conventions concerning child labour such as the ILO Convention 138 which set s the minimum age of child labour to be 18 , the ILO Convention on worst forms of child labour, the UN CRC, the Palermo Protocol on Trafficking in Persons, UN CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Bangladesh

Bangladesh the 8th most populated country in the world has been estimated to be housing about 141 million child labourers[6]. The country known for its innovative legislation in the field of child labour such as taking special protection of children in the readymade garment industry[7], considers the age of children to work to be 14 years of age[8].The age for working in hazardous work is set at 18 according to the Bangladesh Labour Act. The country has also banned child trafficking, forced labour as well as illicit activities. However, there has been no considerable reduction in the workforce of children as the enforcement of these laws has always been a considerable question. The country has not yet ratified the Palermo Protocol. Research shows that the minimum age to work as set in the Labour Law of the country is against the

6 International Labour Organization (ILO), Baseline Survey on Child Domestic Labour in Bangladesh, 2006

7 UNICEF ROSA, South Asia Data Pocketbook 2011. Figures cited are from 2009

8 Labour Act of 2006

international standards and is not incorporated into the informal sector as well. The working children, particularly those in hidden jobs such as domestic labour, are at risk of abuse and exploitation. One-quarter of all working children reported that they had been physically punished at their workplaces, according to a 2008 children's opinion poll[9]

Bhutan

The Himalayan kingdom of Bhutan with a total population of 742,737 has about 3.8% of children in the age group of 5 to 14 working[10]. The child protection issues of Bhutan are a compilation of the Penal Code (2004) and the Civil and Criminal Procedure. The Labour and Employment Act of Bhutan allows children aged 13-15 years to work for a maximum of eight hours per week at tasks like baby sitting or running errands. In 2014, Bhutan Government and UNODC launched the Enhance Government and Civil Society Responses to Counter Trafficking in Persons program to eliminate the worst forms of child labor.However, children in Bhutan are engaged in child labor, including in agriculture, and in the worst forms of child labor, including in

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9 UNICEF, Opinions of Children of Bangladesh on Corporal Punishment, November 2008

10 UNESCO Institute for Statistics. *Gross intake ratio to the last grade of primary. Total*. [accessed January 4,2016];http://www.uis.unesco.org/Pages/default.aspx?SPSLanguage=EN.

forced domestic work. [11] Bhutan has ratified the UN CRC and the UN CRC Optional Protocol on Armed Conflict. However, the minimum age for work under Bhutanese law is 13 which are inconsistent with international standards and there is no scope for compulsory education.[12] The laws of the country belong to an archaic era and are short of enforcement. Wherein data on child labour is particularly lacking, there are reports of young girls subject to forced labour and those living in third party residences are not allowed to return home.[13]

The startling ignorance of the Bhutan Government's to ratify the Palermo Protocol on Trafficking in persons as well as allowing children of 13 years to work and the lack of primary education could affect the credibility of the nation.

India

India, the second most populated country in the world is home to 12.6 million according to the latest census. In the year 2004, the right to a free and compulsory education was recognised as

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11. U.S. Department of State. "Bhutan," in *Country Reports on Human Rights Practices- 2013*. Washington, DC; February 27, 2014;http://www.state.gov/documents/organization/220601.pdf.

12 Government of Bhutan. *Labour and Employment Act of Bhutan 2007*, enacted 2007. http://www.molhr.gov.bt/labouract.pdf [source on file].

13 U.S. Department of State."Bhutan," in *Trafficking in Persons Report- 2013*. Washington, DC; June 19, 2013;http://www.state.gov/j/tip/rls/tiprpt/countries/2013/215402.htm.

fundamental to children below 14 years. To recognize this right and to achieve the objective of a total ban on child labour, the Indian Parliament has introduced the Child Labour Prohibition and Regulation Bill 2012 which has received the assent of the Cabinet on May 13 2015. The Act modifies the parent Child Labour Prohibition Act 1986 and seeks to amend the Child Labour Prohibition Act of 1986 by prohibiting the employment of children below 14 years in certain occupations such as automobile workshops, bidi-making, carpet weaving, handloom and power loom industry, mines and domestic work. Thus, the Bill is proclaimed to be a result of the government's initiative to make the Child labour Act of 1986 in consonance with the Right of Children to Free and Compulsory Education Act, 2009. The Bill adds a new category of persons called "adolescent". An adolescent means a person between 14 and 18 years of age. The Bill prohibits employment of adolescents in hazardous occupations as specified (mines, inflammable substance and hazardous processes). Besides statutes, the Government has also formulated

The National Policy on Child Labour which is a landmark endeavor formulated in conjunction with the legal measures to address the socio-economic issues having a bearing on child labour and to provide a framework for a concrete programme of action. It deals with the situation where the children work or are compelled to work on a regular or a continuous basis to earn wages for their

families or for themselves, and where the conditions of work result in their being severely disadvantaged and exploited and where abuses connected with such factors impacted on wage employed children needed to be given close attention by the state for rectification, amelioration and regulation through specific legal and administrative instruments and measures.

The biggest critique of the largest democracy's initiatives in prohibiting child labour are the lack of proper enforcement machinery, the lowering of age through the Child Labour Bill 2012, lack of awareness among the children and their parents. Even today, there are families in India which do not understand the difference in sending their children to work and to schools. The punishment to offenders is merely monetary which can be a great way for corrupt officials to gain wealth.

Maldives

Maldives is a small island nation in the tropics having a population of 393,500. Official data suggests that 3.9% of children in Maldives are prey to child labour[14]. The various sources of research are limited in Maldives, though there is evidence suggesting that children in Maldives are engaged in the worst

[14] UNESCO Institute for Statistics. *Gross intake ratio to the last grade of primary. Total.* [accessed January 16, 2016]http://www.uis.unesco.org/Pages/default.aspx?SPSLanguage=EN.

forms of child labor in commercial sexual exploitation sometimes as a result of human trafficking[15]. The 2011 Drug Act aimed in criminalizing the use of children in drug trafficking is a novel initiative to check trafficking of children. The island nation ahs ratified all the important international conventions on child labour including the ILO Convention on Minimum Age. Accordingly 16 years has been set as the minimum age for work[16]. However, the Government has not established a list of hazardous work activities for children, and there is no compulsory education requirement. There is no coordination mechanism on other child labor issues as well.

Nepal

Evidence suggests that 33.7% of Nepal's population in the age group of 5-14 years is engaged in labour. About 90% of the children work in the agriculture sector followed by other industries and household sector.[17]Having set a minimum age of 14 years for children to enter into labour and ratifying all the international

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15 Human Rights Commission Maldives. *Submission to the Universal Periodic Review of the Maldives, April-May 2015*;September 2014. http://www.asiapacificforum.net/members/associate-members/republic-of-the-maldives/downloads/reports-to-un-committees/submission-to-upr-september-2014.

16 Government of the Maldives. *Employment Act (unofficial translation)*, enacted October 13, 2008. http://agoffice.gov.mv/pdf/employmentAct.pdf

17 UNESCO Institute for Statistics. *Gross intake ratio to the last grade of primary. Total*. [accessed January 16, 2016];http://www.uis.unesco.org/Pages/default.aspx?SPSLanguage=EN.

instruments on child labour, Nepal has a well-established legal framework to combat child labour. However setting up of the age of children to be 16 would invariably affect their health and education and is grossly against international standards.

Pakistan

Very few research works are available to collect evidence on child labour form Pakistan particularly due to the extremist activities and widespread poverty in the area. The National Policy and Plan of Action on Child Labour is a comprehensive policy plan that calls for the progressive elimination of child labour; for the immediate eradication of the worst forms of child labour; for the monitoring needed to implement the National Plan of Action; for the prevention of child labour by offering alternative education; and for ensuring that target children receive primary education and skills training. The Ministry of Labour enhanced the scope of the Employment of Children Act in 2005, following the ratification of ILO Convention 182 in 2001, and significantly expanded the number of occupations/processes identified as hazardous for children but has not set a minimum age for work. Besides the National Policy, the ILO assisted National Time Bound Project on Worst Forms of Child Labour focuses on eliminating the worst forms of child labour. The minimum age requirement for hazardous industries is grossly inconsistent with the international

agreements and there is no provision for minimum age in other forms of labour. Pakistan's labor laws do not extend to workers in domestic service, a sector in which many children work. Domestic work is also not covered by the list of hazardous occupations or processes prohibited for children. [18]Pakistan's labor laws do not extend to workplaces with fewer than 10 persons employed and in agricultural work.[19]

Sri Lanka

Sri Lanka which has seen a considerable amount of turmoil in the past decade is home to at least 926,037 child labourers.[20]The minimum age of work is set at 14 years of age according to the Employment of Women, Young Persons, and Children Act. The compulsory education age is also set at 14 years whereas Sri Lanka has ratified all the important international Conventions including the ILO Convention No 138.

Nearly 60 per cent of all working children are reported to be working as agricultural workers. Among the Poverty at the household level is considered as one of the primary reasons for the prevalence of child labour in Sri Lanka. Lack of basic necessities

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18. U.S. Embassy- Islamabad. *reporting, February 8, 2013*.
19 Government of Pakistan. *The Factories Act*, enacted January 1, 1935. http://www.pakistanlaw.net/pakistan-law/Factories-Act-1934.pdf
20 Department of Census and Statistics, Ministry of Finance and Planning: *Child Activity Survey* (Sri Lanka, 1999), survey undertaken with the support of the ILO

such as food, clothing, school stationery, and bus fare; lack of support and guidance from parents; parents' attitude towards education, and the relevance of the formal education system are all common reasons for children leaving school at an early age. Furthermore, many of these children, particularly girls, are forced to stay home caring for their younger siblings at the expense of their schooling. Those who drop out from school find their way into the child labour market.

The new Constitution of Sri Lanka is expected to set a new policy to confront the issue of child labour. With a fresh Government and a new Constitution in its roll, it is expected that the problem of child labour arising due to poverty will be tackled with.

The SAARC Initiatives:

Thus, every state in South Asia has come up with one or the other legislation banning child labour or regulating the menace in one or the other form. Apart from the regional efforts, the SAARC being the largest regional body had celebrated 2001-10 to be the SAARC Decade of the Rights of the child. The factors that promote child labour are poverty, unemployment rates, terrorist and extremist influence, limited Government resources etc. In the light of the 1996 SAARC Rawalpindi Resolution on Children in South Asia, whereby the SAARC Ministers declared 2001-2010 as the Decade

of the Rights of the Child and, *inter alia*, agreed to eliminate child labour, initiate and strengthen community-based social support systems, reduce the Under-5 Mortality Rate, lessen severe and moderate malnutrition, and enable all children of primary school age to complete school, Concrete efforts have been undertaken at the sub regional level to promote child welfare and combat the trafficking of children in south Asia. During the 11th SAARC (South Asian Association for Regional Cooperation) Summit, which was held in January 2002 in Kathmandu, the seven SAARC member States (Nepal, India, Pakistan, Bangladesh, Sri Lanka, Bhutan and the Maldives) signed the following two Conventions related to the protection of children:

The SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution: The scope of this Convention is 'to promote cooperation amongst member States to effectively deal with various aspects of prevention, interdiction and suppression of trafficking in women and children; repatriation and rehabilitation of victims of trafficking, and preventing the use of women and children in international prostitution networks, particularly where the SAARC member countries are the countries of origin, transit and destination'

The SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia: The purposes and objectives of the Convention are to 'unite the SAARC member

countries in their determination of redeeming the promises made by them to the south Asian child at the World Summit for Children and various other national, regional and international conferences and successive SAARC summits; to facilitate and help in the development and protection of the full potential of the south Asian child, promote understanding and awareness of the rights, duties and responsibilities of the children and others, and to set up appropriate regional arrangements to assist the member States in fulfilling the rights of the child, taking into account the changing needs of the child'. The signing of these two Conventions is seen as a milestone on the path to coordinated interventions against trafficking at the sub regional level. The countries have committed themselves to develop a Regional Plan of Action and to establish a Regional Task Force against Trafficking.

Conclusion:

The need of the hour is a co-ordinated action to combat the problem. Every nation has its own specific problems that have led to enactment of various legislations. The substance of the legislation may be addressing the basic issue but in different formats. However, the minimum age as well as universal education should have a uniform basis as these are likely to be affecting all children equally. A well-educated child is a blessing to every nation irrespective of how poor the nation is. Further, trafficking

and commercial sex exploitation is another issue which needs to be given adequate attention because of the vulnerability associated with it. The SAARC nations have made a considerable progress in combating child labour and concerted efforts at every level will only make more positive changes.

ROLE OF LEAST DEVELOPED COUNTRIES IN SAARC

Jyoti[*]

Abstract

The region of South Asia is considered as the world's poorest region entailing around forty percent of the people who are surviving on less than one dollar a day. Taking into consideration the identification criteria by UN there are a total of five LDCs (Least Developed Countries) in the region of South Asia i.e. Afghanistan, Bhutan, Bangladesh, Maldives and Nepal. Out of these, till now only Maldives has managed to graduate out of the low level economic category. Although all SAARC members are developing countries having low income, five of them belong to group of LDCs reason being there are various factors and barriers constraining their economic advancement and expansion. LDCs being an important part in SAARC region Since the LDCs share an important part in SAARC, the development of LDCs are very important for the overall development of the South Asian region. Since India is surrounded by all the LDCs, hence, their development

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is a must for our own stability also. South Asian Association for Regional Cooperation (SAARC) has introduced several measures to raise the socio-economic standards of its LDCs. It provides for special and differential treatment to LDCs under its RTAs. Researcher has focused on the debate whether the preferences given to the LDCs have been able to benefit them in their overall development process? Whether LDCs have gained so far from the trade concessions given by the Non- LDCs? Has the preferential trade been able to increase the trade between the SAARC countries? This paper focuses on the common economic weaknesses shared by the South Asian LDCs, their nature of resources, their development requirements; SAARC provisions related to LDCs, focus on LDCs and SAARC.

United Nations created a new category of member states called Least Developing Countries (LDCs) in 1971. There were 25 of them at that time and forty years later, the number has reached to 48.[1] LDC means the economically weakest and poorest countries with the most formidable structural problem. In accordance with the data available with to the United Nations Economic and Social Council (ECOSOC) there are three criterions to considered as

[1] India's tryst with LDCs: Is it working?, The Hindu, Editorial column,5 April, 2011, page-8.

relevant to identify the status of a country as LDC[2], they are, first, the criterion of low income which should be based upon the average estimate of GDP per capita for three years. they are a having a threshold of $750 for cases of addition to the list and $900 for cases of upgradation from the status of LDC[3]; secondly, the criterion of human assets which involves a composite index also known as the Human Assets Index basis of which are several factors involving nutrition, education, health and adult literacy. Thirdly, the criterion of economic vulnerability which comprises of a composite economic vulnerability index (EVI) and basis for which are several indicators such as the instability in the production of agriculture, the instability of exports involving goods as well as services and so on.

Apart from the fulfillment of the three criteria mentioned above, it also required that the population of the country should not in any circumstances exceed seventy five million. A country in order to upgrade from the status of LDC to developing of developed countries are required to meet the graduation threshold by at least fulfilling any two of the three criteria in at least two consecutive reviews of the list. The list of LDC is reviewed by the ECOSOC in the light of the recommendations by the Committee for

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2 Committee For Development Policy, Report on sixth session (29 March to 2 April,2004), ECOSOC, United Nations, New York, 2004, at page – 15.

3 Supra n. 2.

Development Policy (CDP). The LDCs contribute only one per cent to global trade, despite their 12 per cent share of world population.[4] The reason behind this failure is mainly their predominance on subsistence farming, unsuitable and rudimentary infrastructure, acute scarcity of skilled personnel, weak and inappropriate public administration and governmental organizations, rudimentary sanitary services high cost of transportation, etc. It is because of these reasons that they are also not able to develop their productive capacity[5] which is the key to achieve the sustained economic growth in the LDCs.

SAARC under its Regional Trade Agreements arrange for a number of measures to raise the level of standard for the LDCs thereby making them stand on the equal footing with that of the developing and developed countries. It also makes available technical assistance of varied nature for them in order to held hem expand their market in trade with other contracting parties and are also enabling them to take full advantage of the potential benefits provided to them under SAFTA. It is, however, a matter of great disappointment that the SAFTA process have not been able to generate the enthusiasm among the members in a satisfactory manner. The agreement suffers various shortcomings, specifically

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4 Supra n. 1.

5 Productive capacity has been defined under "The Least Developed Countries Report, 2006" as the productive resources, entrepreneurial capabilities and production linkages which together determine the capacity to produce goods and services and enable it to grow and develop.

on the matter of their cautious approach towards the achievement of its ultimate objective towards the establishment of a fair and free trade regime under the region of South Asia.

Keeping aside these uninviting assessments, the possibility of dynamic achievements rising from SAFTA can be considerable. In order to achieve maximum amount of benefits form SAFTA there is need to have a serious consideration towards greater cooperation among the members involving trade in goods and services, transit trade, investment and development of regional infrastructure. There is need for a strong political will on the part of the developing countries having advanced status to ensure that the countries having weak economies are able to earn sufficient benefit from the regional integration system. This political will requires the a lot factors to be taken into consideration involving flexibility in treating goods belonging to LDC immediately inclusive of the one enlisted in the category of sensitive products. The weaker economies who are members of SAFTA should be allowed to continue with their concentrated efforts, with respect to reforms as well as addressing supply-side bottlenecks in order to enable them take benefit from a bigger regional market. It is pertinent for the weaker sections to realize the fact that regional cooperation is not only depended upon trade preferences alone. Irrespective of the trade preferences exchanged there is need for mutual and extended cooperation as well for the purposes of enhancing trade.

South Asian LDCs:

There are total five LDCs in region South Asia out of which, three of them i.e. Bhutan, Bangladesh and Nepal are situated on the eastern seaboard of the region to comprise what is now known as the South Asian Growth Quadrangle (SAGQ). It includes the Indian North East to create a quadrangular economic growth hub in the Bay of Bengal sub region. The rest of the two, Afghanistan and Maldives which could, potentially, be part of the western seaboard growth hub centered on Gowdar, Karachi and Mumbai sub region. Among the group of LDCs that we have it is easy to identify their characteristics of diverse nature. Out of all the LDCs, Bangladesh, till date has the largest economy. However, the per capita gross national income (GNI) of Bangladesh is only one-third of Bhutan and one-sixth of Maldives. Nepal, in the region is found to have the lowest per capita income. On one hand, Bhutan and Maldives have their major dependency upon the primary goods and on the other hand, the merchandise exports from Nepal and Bangladesh are conquered by manufactured items majorly because of the textile as well as clothing products.[6]

Inspite of the diverse characteristics shared by the LDCs in SAARC region there is unanimity among the members to acknowledge the said countries as LDC. LDCs in the region of

[6] Mohammad A. Razzaque, Weaker Economies in SAFTA: Issues and Concerns, Sadiq Ahmed (et.al)(ed.), Promoting Economic Cooperation in South Asia, 1st ed. 2010, page-377.

South Asian are continuing to suffer from several socio-economic weaknesses.[7] This is considered to be the chief reason towards their incapability to get benefited from the collaboration into a system of global trading. There is a requirement of an economic environment at global level where it is convenient for the least developed countries to involve in competition at equal level with the developing and developed countries. It has been observed that all the LDC members are comparatively disadvantaged at a relatively high level in terms of capacities involving resources and human capacities. It is because of this reason that it becomes difficult for them to fulfill several relevant international obligations such as the obligations observed under the WTO. [8]

All LDCs aspire to graduate out of their LDC status before 2015 but, surprisingly, Sri Lanka has been, off and on, clamoring for LDC status. That being said, South Asia is the least developed sub-continent caused mainly by the consequences of partitioning of British India in 1947, and the failure of its political leadership to raise it from mass deprivation, hunger and under employment even after 63 years of Independence. LDCs are having that status because of their landlocked and sea locked geography; and a

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7 *Ibid.*
8 *Ibid.*

demography of overpopulation given the land availability.[9]

Looking into the economic profile of South Asian LDCs, they are predominantly agrarian society and the level of industrialization is very poor. They also suffer from high illiteracy rate excluding Maldives which has its literacy rate more than 95%.[10] One of the major weakness shared by them are the lack of linkages between productions, services and infrastructure facilities in the South Asia LDCs have limited their potential to specialize in productive sectors and reap the benefits of productivity gains.[11] Poorly developed human capital has created barrier in the improvement of managerial, entrepreneurial and technical skills.[12] Moreover poor transport and communication infrastructure, hindrances in the seamless movement of cargo trucks across the borders (with the exemption of Nepal), regulatory constraints at gateways and border crossing, costly and poor domestic transport facilities, etc. create major challenges in the development of LDCs.

One more characteristics that the LDCs of South Asian are having is that their dependence is only on few products for the purposes of their exports, for instance, in case of Nepal and Bangladesh their

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9 Harnessing LDCs' Potential for South Asian Integration,by MadhukarShumshere J.B. Rana, available at http://www.telegraphnepal.com/national/2010-11-20/harnessing-ldcs-potential-for-south-asian-integration, accessed on 4/24/2011, at 2:15 AM.

10 Iqbal Ahmed Saradgi (et.al) (ed.), SAARC - The Road Ahead, published by Foundation For Peace and Sustainable Development, at page 332.

11 *Ibid.*

12 *Ibid.*

export is heavenly dependent RMG.[13] In case of Bhutan their dependence is more towards the export of electricity in India. LDCs because of their lack of diversification of in their domestic products structure, they remain to be extremely vulnerable to the Bhutan depends on the export of electricity in India. Since the LDCs have not been able to diversify their domestic production structures, they remain extremely vulnerable towards the volatility of the international market. They also suffer from a very pitiable physical infrastructure. It acts as a principle barrier on the faster growth of the economy, substantial reduction of poverty as well as advancement of the productive capacity in the LDCs. Physical infrastructure has a significant role to play in the advancement of economy as it comprises of a varied range structures equipment as well as facilities such as low or poor quality of stock of transport, sufficient infrastructure, and telecommunications.

With the advent of globalization and development in the area of competition, it is not sufficient for LDC companies in South Asia to limit their competitiveness to domestic level. It is imperative for them to hold competitive advantages like economies of scale, marketing strengths, cutting-edge technology, effective production as well as system of distribution, and/or cheap labour in order to be competitive in the system of international trade. The LDCs in

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[13] RatanakarAdhikari&NavinDahal, Positive Trade Agenda for South Asian LDCs: Discussion Paper, SAWTEE, Kathmandu, 2004, at page 20.

South Asia lacks comparative advantage all the above mentioned areas except their availability of cheap labour. Nevertheless, they are not able to exploit this comparative advantage as well because of the reason of having a low productivity of labour which results chiefly from the factors including lack of education, skills, poor health, etc.

Besides all these weakness which are common among them countries like Bangladesh and Nepal have serious issues relating to politics and governance. Bangladesh is suffering from acute political instability and the country of Nepal is continuously facing the problem of violent Maoist insurgency as well as constitutional-political crisis since a decade. Moreover, issues of bribery and corruption in the high offices are some of the recurrent phenomenon in the LDCs of South Asia which has therefore made a significant contribution towards creating a barrier in the prospects of development in the economies of these countries.

Nature of Economic Resources in the South Asian LDCs:

Taking a look into the goods which LDCs have marketed or exported within the region or outside the region, it is found that 90% of them are primary products (*e.g.* raw products, jute, wheat, rice, etc.) and semi manufactured commodities.[14] The south Asian LDCs have abundance of natural resources but because of their

[14] Supra n. 8

poor physical infrastructure and lack of facilities they are unable to make proper use of it.

One of the key features Bhutan's economies is its hydro-power projects which have developed significantly and it has developed considerably with the commission of Tala Hydroelectric Power Project in March 2007.[15] Bhutan is having the potential towards the development of a capacity of 23,760 MW and only 5% out of that has been tapped till date.[16] Besides this Bhutan's major export commodities are gypsum, timber, cardamom, cement, handicrafts, fruit, spices and precious stones.[17]

Although, exports in merchandise form the Bangladesh and Nepal are conquered by manufactured items, significantly because of the products involving textile and clothing. Nepal has significant scope towards exploitation of its potential in hydropower because of the products like textile and clothing. The total potential of hydropower generation in Nepal is around 83,000 Megawatt (MW), which is greater than the installed capacities of the United States of America, and Canada when combined together (almost 43,000 MW is economically feasible). The country so far has been capable to generate only 600 MW of the hydropower till date.

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15 *Ibid.*

16 World Bank Annual Report, 2010, available at http://siteresources.worldbank.org/EXTANNREP2010/Resources/WorldBank-AnnualReport2010.pdf, accessed on 20 April,2016, at 2.00 PM.

17 *Ibid.*

Bangladesh on the other side has been fortunate enough to make a discovery of the first offshore Sangugas field in in the month of January during 1996 with reserves worth 50 trillion cubic feet thereby making Bangladesh richest in terms of gas resources among the group of LDCs. It is expected that the country can produce around 800 million cubic feet of gas in one day.

In case of Maldives, the country is highly dependent upon exports from commercial services, especially tourism which is relatively high in an unusual manner when compared with its total trade including exports as well as imports of goods and services other country of South Asia. Tourism in Maldives embraces largest economic activity which accounts for twenty eight percent of GDP and more than sixty percent of foreign exchange receipts. Around ninety percent of the government tax revenue generates import duties and taxes relating to tourism.[18] The trade of fishing is another leading sector in the country; however, the act of catching fish has fallen down in a sever manner in recent years. In the economy of Maldives agriculture and manufacturing has a very lessor role to play because of the reason of its limitation of availability of cultivated land as well the shortage of labour domestically. Afghanistan which joined later in 2007 as a member of SAARC has opium as major natural resource. However its chief exports other than opium is hand woven rugs, wool, cotton,

[18] The world factbook, Central Intelligence Agency, U.S., available at https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html.

precious and semi-precious gems etc. Thus it is clear from the above discussion that south Asian LDCs are very poor in resources and they almost grow identical resources. Hence, they have hardly anything to give and share. This reason has also made them to depend heavily on imports for basic materials and foreign market. They are also very much dependent on economic foreign aid and foreign services for food and essential commodities for the overall development of the country.

Development Requirements for LDCs in SAARC:

Since the south Asian LDCs lack in trade complementarity they have very limited resources to share among each other. Even if some countries have abundance in natural resources, they are not able to exploit it because of its poor physical infrastructure, lack of skilled labour, lack of technologies, etc. Hence for their overall economic development they need food, oil, electricity, essential commodities, foreign economic aid, foreign services, foreign technology and modern know how, etc. the south Asian LDCs are very much dependent on these factors on the foreign market.

Bhutan's economy is closely associated with India through robust trade and monetary connections. The country also has a very dependence on India for financial assistance. Bhutan's industrial sector is backward in terms of technology; with major production

in the area of cottage industry. Majority of the projects relating to development of the state for example, the construction of road are dependent upon the migrant workers from India. The export of hydropower to India has led to the enhancement in the overall growth of Bhutan. The introduction of neww projects relating to hydropower are likely to act as driving force towards the ability of Bhutan to create the options of employment and sustaining growth in the new future. The country of Nepal also has the same situation like Bhutan. Both the countries have signed Free Trade Agreements with India.

The trade of Bangladesh is also highly fragmented without equal distribution. One more reality is that the total volume of trade of Bangladesh with countries like Bhutan, Nepal and Sri Lanka is in marginal quantity. In South Asian region, India's chief trading partner in Bangladesh followed by the country of Pakistan. However, trade with India is essentially one-sided, reason being the import volume from India to Bangladesh is significantly high but the same is not the case with export volume from Bangladesh to India which is very low. It is can be therefore seen that Bangladesh has having bilateral trade deficit with India. Afghanistan, because of the reason of the fall of Taliban regime in the year 2001 faced infusion of international assistance for the agricultural sector recovery and the growth of service sector. The international community continued to be committed towards the

development of Afghanistan thereby lending around $67 billion at four donors' conferences ever since 2002. The country of Afghanistan also has high dependence on foreign aid for the development of its economy. In the last, Maldives major dependence is on tourism from its GDP.

Thus, regarding the source of dependence it has been observed that the share of intra-regional trade of the three smaller countries — Bhutan, Maldives, and Nepal — has been quite significant. Even Afghanistan which joined lately does significant percentage of intra-regional trade with other SAARC partners. With the exception of small economies like Bhutan, Nepal, Maldives and Afghanistan, the direction of trade of four major countries — India, Pakistan, Bangladesh and Sri Lanka — is outward rather than inward. Thus, if we look into the overall SAARC intra-regional trade it is still below 5%.

An overview of inter-regional trade among SAARC countries		
Countries	Import (in %)	Export (in %)
Afghanistan	-----	------
Bhutan	7.2	1.7
Nepal	22.5	9.4
Bangladesh	37.4	1.3
India	15.1	77.6
Pakistan	3.0	6.5
Maldives	4.2	0.2
Sri Lanka	10.6	3.4

Source: Data given in the table is based on the result of gravity model stimulation presented in Rodríguez-Delgado 2007.[19]

One of the chief reasons for the low level of trade between SAARC countries is their reluctance towards indulging goods under the level of tariff. It has also been made a point of argument that the economic cases for the SAFTA were reasonably weak.[20] From an economic point of view, both qualitative argument as well as quantitative assessment was not available to give a single point of reason towards enthusiastic feeling about the arrangement.[21] Furthermore, in comparison with the rest of the world SAARC region is small in terms of the size of economy as measured by the Gross Domestic Product per capita income and also in terms of their share in the world trade. Consequently, trade preferences towards the partners of the SAARC region are likely to cause trade diversion instead of trade creation.

SAARC and LDCs:

SAARC introduced several measures to raise the socio-economic standards of its LDCs. In 1995 the agreement of SAPTA was launched where LDC member countries were offered large

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19 Mohammad A. Razzaque, Weaker Economies in SAFTA: Issues and Concerns, Sadiq Ahmed (et.al)(ed.), Promoting Economic Cooperation in South Asia, 1st ed. 2010, at page 386

20 *Ibid.*

21 Ali, E. &Talukder D. K. " Preferential Trade among the SAARC Countries: Prospects and Challenges of Regional Integration in South Asia", JOAAG, Vol. 4. No. 1, 2009

concessions in comparison to the non- LDC countries.[22] This agreement is considered to be the major stepping stone towards the higher level of intra-regional trade liberalization and economic co-operation among the member countries. SAPTA was the first experiment in pioneering a RTA under the SAARC framework. SAPTA, however, was not able to make proper liberalization in trade and certainly, was not effective towards building a block for the integration of trade among the member countries Nonetheless, it has to be given credit for initiating the system of promotion of intra-regional trade with the help of preferential trade regime. SAFTA has led to the increase in the scope of regional trade but in a very limited manner resulting is some amount of tariff cuts and registered a modest increase intra-regional trade. The agreement provides special and differential treatment to LDCs in a number of ways.[23] The agreement's Article 3 provides for the objectives for the promotion and enhancement of mutual trade and cooperation in economy among the states that are contracting any trade agreement. The article under its sub clause also states that special consideration shall be given to the Least Developed Contracting States thereby adopting concrete preferential measures on a non-

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22 *Ibid.*

23 Integration of Least Developed Countries into South Asian Free Trade Agreement: A Human Development Perspective, United Nations Development Programme, Poverty Reduction, available at: http://www19.iadb.org/intal/intalcdi/PE/2012/10669.pdf, accessed on 8 May, 2016 at 22.00 AM.

reciprocal basis in their favour.

According to the agreement all the countries are required to maintain with them sensitive lists comprising of items not covered under the subject of tariff reduction. An exception, however, has been provided for the LDCs wherein they can derogate from the obligation mentioned above thereby removing the items of their trade interest from the sensitive list.[24] This result in the maintenance of two different kinds of list one containing a large list for the non-LDC members and the other one comprising of a shorter list for the LDC members. Till date, only four members i.e. India, Bangladesh, Nepal and Sri Lanka are maintain this kind of different sensitive lists for both LDC as well as Non-LDC members.[25] Apart from this the sensitive list is reviewable after every four years with the objective to reduce the number of items from the sensitive list in order to enhance free trade among SAARC members. The list however, has been revised once and further reduction in the products has also been proposed especially those which are actively being traded or have the potential to be traded under SAFTA.

The agreement of SAFTA has also allowed for the extension of time frame for reduction or elimination of tariffs of the LDCs in

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[24] *Ibid.*
[25] *Ibid.*

SAARC.[26] The Working Group there is an establishment of working Group under the agreement making reductions in the Sensitive Lists provided under SAFTA and the group is continuously functioning towards fulfilling its task to reduce the sensitive list. It can be observed from the table given below that there has been remarkable increase in the achievement of these targets. The SAARC Leaders, SAFTA Ministerial Council and Meetings of SAARC Finance Ministers have been commending further increase in the reduction of products which have been covered in the Sensitive Lists provided under SAFTA particularly elimination of those products which are actively traded or have the potential of being traded under SAFTA.

Member States	**Number of Products in the earlier Sensitive Lists**	**Number of Products in the Revised Sensitive Lists (Phase-II) w.e.f. 1 January 2012**
(1)	(2)	(3)
Afghanistan	1072	850
Bangladesh	1233 (LDCs) 1241 (NLDCs)	987 (LDCs) 993 (NLDCs)
Bhutan	150	150
India	480 (LDCs) 868 (NLDCs)	25 (LDCs) 695 (NLDCs)
Maldives	681	152

[26] Article 7 of the SAFTA Agreement provides for a phased tariff liberalization programme (TLP) under which, in two years, Non-LDCS would bring down tariffs to 20%, while LDCs will bring them down to 30%. Non-LDCS will then bring down tariffs from 20% to 0-5% in 5 years (Sri Lanka 6 years), while LDCS will do so in 8 years. NLDCs will reduce their tariffs for LDC products to 0-5% in 3 years. This TLP would cover all tariff lines except those kept in the sensitive list (negative list) by the member states.

Nepal	1257 (LDCs) 1295 (NLDCs)	998 (LDCs) 1036 (NLDCs)
Pakistan	1169	936
Sri Lanka	1042	845 (LDCs) 906 (NLDCs)

Source: saarc-sec.org[27]

The member states are required to be flexible towards the provisional use of restrictions on quantity or other restrictions with respect to Least Developed Countries. The agreement also provides for lending of technical assistance and cooperation towards the assistance of the LDCs in the expansion of their trade with other members. The act has provided a mechanism to compensate LDCs for their loss of custom revenues.

Focus on LDCs and India:

India stands as the largest country on the region of South Asia in varied terms including land area, population size, and size of the economy. The country being the advanced in nature and in consideration to the industrial base has the capacity to play a significant role towards regional integration. India however, is reluctant to play the lead role mainly because of the reason that such lead or role may create any kind of suspicion in the minds of

[27] Available at: http://saarc-sec.org/areaofcooperation/detail.php?activity_id=35, accessed on 5 May, 2016 at 3.00 PM.

other members the country is acting as hegemony.[28] There are several other reasons for reluctance as well such as India' s ongoing relationship with Pakistan which at times create a big hurdle towards the overall progress and advancement of the region.

Inspite of these presumptions, India seems to have changes its stand recently and is willing to play a wider role. Once such instance of it can be India's acceptance of the Mechanism for Compensation for Revenue Loss (MCRL) under SAFTA agreement. India is very well aware of its positions and responsibility towards SAARC. The country is the most developed economy among all other members of the SAARC and therefore, it is understandable that the country has to bear a larger share of responsibility towards the cost in paying compensation. India has given its acceptance on various issues such as it has agreed to offer TRQ of 8 million pieces of garments at zero duty to the country of Bangladesh.[29] It has also given acceptance to the proposal to providing technical assistance to LDCs in t hares such as capacity building, training of human resources, product certification, and advancement of legal system as well the administration system, customs procedures and facilitation of trade. Recently, India

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[28] Rajiv Kumar and Manjeeta Singh, India's Role in South Asia Trade and Investment, ADB Working Paper Series on Regional Economic Integration, No. 32, July 2009, available at: http://www.adb.org/sites/default/files/publication/28506/wp32-india-role-south-asia-trade.pdf, accessed on 5 May, 2016 at 3.00 PM.

[29] Ibid.

allowed Bangladesh transit through its territory for trade with the landlocked Nepal and Bhutan. Bangladesh also has allowed India to use its Ashuganj river port for transport of heavy equipment to construct a power plant in remote Tripura. India reciprocated by offering 1 billion dollar to upgrade the road and railways infrastructure in Bangladesh.[30]

In order to encourage intra SAARC trade among members and to inspire LDCs to engage in trade activities, India unilaterally decided to make reduction in its sensitive list of the trade products in favour of LDCs in SAARC. The list contained 744 items earlier in the negative list for LDCs and now the list have been reduced to 480 items.[31] In order to provide greater market access to the members belonging to the LDC group, India unilaterally made reduction of tariffs to the level of zero percent for the LDCs under SAFTA which is with effect from January 1, 2008 thereby making a commitment one year ahead (December 31, 2008 is the stipulated time frame provided under SAFTA) towards the principle of trade liberalization stipulated in the agreement of SAFTA.[32] India taking into consideration the huge energy shortages experienced by the country of Bangladesh has agreed to supply to Bangladesh 2%) MW electricity form its grid.[33]

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30 Supra n. 8

31 See Table 1.

32 Agreement on South Asia Free Trade Area (SAFTA), available at http://commerce.nic.in/trade/safta.pdf , accessed on 22 April, 2016

33 Dr. Saurabh,Issue Brief: Indo-Bangladesh Relations: Opening New Vistas,

In the year 2010, a US $ 1 billion line of credit offer was made by India to Bangladesh which by far now is considered as India's largest ever one-time bilateral financial assistance by to any country. It emphasized India's resolve to spur the economic development of Bangladesh. The credit line is planned to be used for the railway bridges construction and lines, supply of locomotive coaches and buses.[34] Other than Bangladesh if we look into the position of Bhutan and Nepal, their major trade is with India. It is only because of India that Bhutan's GDP was highest among all the south Asian countries in the year 2007. Since India is surrounded by all the LDCs of south Asia and it also dominates the economy in south Asia, it important for both of them to work with cooperation and unanimity and India being the largest economy should further continue to show her lenient attitude and hence maintain her stability thereby contributing to the overall development of the region.

Conclusion:

SAFTA although, committed towards providing special and differential treatment to the LDCs has failed to address various concerns. It is identified that SAFTA continues to include a long negative list and comprises very limited number of products for

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Indian Council for World Affairs, New Delhi, 12 February, 2010.

[34] *Ibid.*

tariff concessions. More than ninety percent of the tradable goods are the one where the agreement fails to apply. The goods covered under the agreement are mostly non tradable or least tradable in nature. Apart from this there are various tariff and non-tariff barriers followed by the non LDCs which creates a major hindrance in the potentials of market access of the products from the LDCs. India enjoys the most dominant position in SAARC and is the greatest user of the non-tariff barriers in the materialization of SAFTA. It is because of these factors that LDCs are incapable of enhancing their trade in spite making reductions in the sensitive list in the year 2006. SAFTA still is following the restrictive Rules of Origin.

With the advent of globalization it has become a common practice for the countries to attain membership in more than one RTA. The membership involves more involvement from the side of the developing countries. A serious apprehension has therefore risen with regard to the resulting of loss of preference for some countries specially the weaker economies irrespective of them being a part of any regional arrangement. Trade diversion is the principal cause of this adverse implication for the poorer countries. Weaker economies under SAFTA may also be confronted by other developments connected with the development of trading blocs comprising members of South Asia as well as countries outside the region. This may lead to creation of a loss of trade preferences not

only in the regional market but also in other major global markets.

Inspite of these grim assessments, the scope of benefit from SAFTA can still prove beneficial for the SAARC members. However, supportive policies from the side of the developing countries advanced in terms of their economy is required in order to stop the new sectors from becoming a subject to restrictive trade measures. This is important in the sense that LDCs produces very limited items for export. To harness the maximum benefits from the agreement of SAFTA greater cooperation is required on the part of the countries in terms of investment, services, transit trade, etc. The said sectors cover mutual interests of SAARC countries long term growth and development perspectives thereby creating a win-win situation for all the members. A strong political will is another factor required on the part of more developing countries essentially for the benefit of the weaker sections from the regional integration system. This requires generous treatment of the LDCs goods including the one included in the sensitive list. There is need for concerted efforts to be continued on the part of LDC members to make them gain benefit from the bigger regional market. The south Asian countries are required to be involved in extended level of cooperation in order to make the poorest countries make use of the SAFTA for trade, development and economic growth. It may be pertinent for the weaker economies to realize the fact that regional cooperation may not depend on trade preferences solely.

Mutual and extended cooperation are likely to augment trade irrespective of preferences exchanged.

HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS IN INDIA: A CRITICAL OVERVIEW IN THE CONTEXT OF GLOBLIZATION

Sanu Rani Paul[*]

In the era of globalization when the power is given to private bodies within the state the enforcement of Constitutional Rights is a matter of concern. Political theories underlying globalization is based on the contention that reduction of law to state law is unsustainable and therefore it posited multitude sources of law by non-state actors and private actors. In a sharp contrast to this, the classical model of constitutional rights saw the state as the only power Centre. With the emergence of liberalization, globalization and privatization the massive public/private divide is diminishing. All most all traditional functions of the State are now performed by private actors accorded through disinvestment, contracting out, public private participation, privatization etc. This often leads to denial of fundamental rights to a large number of people.

In the wake of globalization the most fundamental issues in Constitutional law is the applicability of the rights against private actors.[1] In recent years the horizontal application of fundamental

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[1] Stephen Gardabaum, "The Horizontal Effect of Fundamental Rights,"Michigan Law Review, vol. 10, no. 03-14 (2003): 388.

rights i.e. enforcement of constitutionally guaranteed rights against private actors, has been adopted in varying degrees in Ireland, Canada, Germany, South Africa and the European Union. The horizontal position ejects the public/private division in constitutional law and the justification for this is that in the modern context the constitutional rights and values may be threatened by extremely powerful private actors and institutions and the vertical application of rights privileges the autonomy and privacy of such citizen theatres over that of their victims.[2] Thus it is the degree of commitment to social democratic norms which is a compelling factor to adopt horizontality in the application of fundamental rights.

If we analyze Part III of the Constitution of India, it can be seen that certain fundamental rights can be directly claimed even against private actors. For example, Article 15 (2) (5), 17, 23 24, besides, there are provisions which are ambivalent as to its enforceability like Article 19, this highlights the futuristic view of our constitution makers and the importance they have given for the enforcement of fundamental rights. But despite this there is less activism shown by judiciary in declaring private actors as 'State' under Article 12. In this context, the article critically analyses the position of horizontal application of fundamental rights in India and makes a comparative analysis of the position with other

[2] Erwin Chemerinky, "Rethinking State Action," Northwestern University Law Review,vol. 80, no. 3, (1985):503.

countries.

Concept of Horizontality of Fundamental Rights:

Horizontal application of fundamental rights which is dire opposite to vertical application lay against the principles of classical liberalism.[3]There is 'direct horizontal' and 'indirect horizontal effect.' Under 'direct horizontal effect' fundamental rights will be directly enforceable against private actors through express Constitutional provisions. 'Indirect Horizontal effect' is an intermediate or hybrid position according to which although constitutional rights apply directly only to the state actors, they are nonetheless permitted to have some degree of indirect application to private actors.[4]Indirect horizontal effect expands the reach of fundamental rights into the private legal sphere and reduces the public/private division in their scope, although not as much as direct horizontal effect.[5]South Africa and Ireland are the best example for 'direct horizontal effect whereas Canada and Germany are examples for 'indirect horizontal effect' of fundamental

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3 According to Classical Liberalist, the society's ultimate goal is to maximise private space in which individuals will be free to pursue their own conceptions of good. Murray Hunt, "The Horizontal Effect of the Human Rights Act," Public Law (1998)423-443.

4 Supra note 1 at 387-459.

5 Stephen Gardbaum, "The Indian Constitution and Horizontal Effect" in Oxford Handbook of the Indian Constitution, ed. SudipChaudhary, MadhavKhosla&Pratap Mehta (Oxford University Press, 2016), 15-13.

Rights.[6]

The Concept of Vertical Application of Fundamental Rights - US Position:

The US Constitution envisages a strict vertical application of fundamental rights[7]and except the Amendment prohibiting slavery none other Amendment is applicable against private actors.[8] But despite this, fundamental rights were held applicable against the private actors through the application of State Action doctrine.[9]The main reason for this was growing privatization in the US economy which had imbibed individualism or *'laissez-faire'* during the first

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6 Mark Tushnet, "The Issue of State Action/horizontal Effect in Comparative Constitutional Law," International Journal of Constitutional Law, vol. 1, no. 1 (2003):79-98.

7 US have weak social democratic commitments because of the laissez faire tradition but it was inducted into it through the establishment of Welfare institutions in the New Deal Era and in order to tackle the situation the judiciary has evolved the doctrine of state action to face the challenge posed by social democratic norms against liberal autonomyor private actors against the constitutional safeguards. Mark Tushnet, "Shelly v. Kraemar and Theories of Equality," New York Law School Law Review, vol. 33, no. 3(1998); 383, 396-397.

8 For example the Fourteenth Amendment to the Constitution of United States commands that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny…equal protection of the law."

9 Marsh v. Alabama 326 U.S. 501 (1946); Jackson v. Metropolitan Edison Co. 419 U.S. 345 (1974); Flagg Bros. Inc. v. Brooks 436 U.S. 149 (1978); Nixon v. Condon273 U.S. 536 (1927); Smith v. Allwright321 U.S. 649 (1994); Terry v. Adams345 U.S. 461 (1953); Shelley v. Kraemer 334 U.S. 1 (1648);

half of 19th century.[10] In United States, more than half of all government spending on goods and services were publicly financed but privately produced.[11] Distinctions between the public and private sectors were blurred as the organizations for accomplishing public purposes were more and more frequently a deliberate blend of public and private characteristics.[12]

In US the pure vertical application of Bill of Rights through State Action doctrine is also because of the judicial enunciations of the doctrine by Chief Justice Rehnquist.[13] Rehnquist Model strictly limited the application of the state action theories to ensure that the

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10 Joel Handler, "Down From Bureaucracy: The Ambiguity of Privatization And Empowerment," (Princeton University Press, 1996), 78.

11 Michele Estrin Gilman, Legal Accountability in an Era of Privatized Welfare," California Law Review, vol. 89, no. 3 (2001); 594, 569-642.

12 Ronald C. Moe, "Exploring the Limits of Privatization," Public Administration Review, vol. 47, no. 6 (1987); 453, 453-460; Robert S. Gilmour & Laura S. Jensen, "Reinventing Government Accountability: Public Functions, Privatization and the Meaning of State Action," Public Administration Law Review, vol. 58, no. 3, (1998); 248, 249, 247-258.

13 If we examine the evolution of state action doctrine in USA, it can be found that the doctrine was purely founded on the distinction between public and private actions as is evidenced by the Court in Civil Rights case, but by 20th century this distinction gradually dwindled down with the development of legal realist ideologies through the decisions in White Primary Cases, Marsh v. Alabama, Burton v. Wilmington Parking Authority etc. But subsequently Chief Justice Rehnquist reversed back the doctrine to its original position as in the Civil Rights cases which were actually founded on the basis of classical legal thought. "Developments in the Law: State Action and Public/Private Distinction," vol.123, no. 5(2010) 1251, 1252 1248-1314; Duncan Kennedy, "Three Globalization of Law and Legal Thought: 1850-2000" in The New Law and Economic Development, ed. David M. Trubek& Alvaro Santos (Cambridge University Press,2006), 19-73.

Courts will use 14th amendment to control governmental action only, thereby leaving the political branches to regulate the private activities and relationships as the constitution intended, thus upholding the principles of separation of powers.[14] As a result of these, the comparatives almost universally view United States as the paradigm of the polar vertical application of constitutional rights.[15]

The Public/Private Divide in India:

In India,barring a few exceptions,[16]it is a widely accepted rule that fundamental rights are enforceable only against the State.[17]Unlike US there had not been much real debate over Public/Private divide in India because our Constitutional provisionsare clear regarding against what authoritiesfundamental rights are enforceable. It was in *P.D. Shamsadani v. Union Bank of India*[18] the question as to the enforceability of fundamental rights against private actor came for the first time and the Court drew a line between private and state

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14 The exclusive focus on the 14th Amendments state action requirement as the source for determining the scope of constitutional rights has obscured the more basic and fundamental proposition which derived not from the 14th Amendment at all but is a straight forward implementation of the Supremacy Clause.

15 Supra note 1.

16 Articles 15 (2), 17, 23, 25(2) (b) 28(3) and 29(2).

17 CONSTITUTION OF INDIA Article 12 "In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

18 AIR 1952 SC 59

action and held that fundamental rights are not enforceable against private actor.

The same situation follows even today with few exceptions as to the enforceability of right to life and personal liberty guaranteed under Article 21.[19] In *Binny v. Sadasivan*[20]Court held that "it is difficult to draw a line between public functions and private functions when it is being discharged by a purely private authority. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of public and is accepted by the public or that section of the public as having authority to do so."[21]But despite these holding private authorities performing public functions have never been held as State and it is evident from the decisions in *Zee Telefilms ltd &anr. v. Union of India & Ors.,*[22]*Jaya Pal Singh v. Union of India*[23]etc. and it shows

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19 M.C. Mehta v. Union of India, (1987).1 SCC 395 at 419, Indian Council for Enviro-Legal Action v. Union of India (1996).3 SCC at 238; M.C. Mehta v. Kamal Nath 2000 (6).SCC 213; Bharat Kumar K. Palicha and Anr.v. State of Kerala &Ors. AIR 1997 Ker 291.

20 2005 (6) SCJ 156.

21 Ibid; para. 11.

22 (2005) 4 SCC 649 (SanthoshHeggde J. and Sinha J. who were the authors of Netaji case split over the status of BCCI and majority in the words of SanthoshHeggde J. held BCCI as not a "State" under Article 12).

23 2013 (4) SCJ 26 (In this case the government of India established a department Overseas Communications Services and later converted it into a Public Sector Corporation known as VSNL. It handled international telecommunication services of the country and in the year 2002 the government handed over VSNL to TATA Communications Ltd. In this scenario ten writ petitions were filed by the former employees of VSNL before the Delhi High Court and two at the Bombay High Court. Writ

the unwillingness of the Court to consider private actors either as guarantor of fundamental rights or as violators of fundamental rights.

Horizontal Applications of Fundamental Rights in India - A Critique:

The concept of Horizontal application of fundamental rights is not yet touched by the Indian judiciary in its proper sense and form. There are instances wherein writ was filed against private actors under Article 32 and the Court declared the matter as a fit case to be decided under Article 226, due to the reason that violation of fundamental right is a condition precedent for invoking Article 226 of the Constitution, thus restricting the scope of Article 32.[24] But the phraseology of Article 32 does not cast any express prohibition

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petition have been also filed against wrongful termination of services by VSNL in breach of the assurances given by Union government as per the share holding agreement. The main issue was the maintainability of the petitions.).

[24] Constitution of India Article 32. Remedies for enforcement of rights conferred by this Part (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

on private actors from invoking the article for the protection of their fundamental rights.[25]If Article 32 (1) (2) are read in conjunction with Article 12, it can be concluded that horizontal application is not unwarranted by the makers of the constitution deliberately or otherwise. The cases narrated below helps to understand the pattern adopted by the Indian judiciary in applying fundamental rights horizontally.

P.D. Shamdasani v. Central Bank of India[26] was one of the earlier cases wherein Supreme Court ruled out the applicability of fundamental rights under Article 19 (1)(f) and 31 against private individuals.[27] The reasoning behind ruling out applicability of

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[25] Article 32 clause 1 envisages only the right to move the Supreme Court for the enforcement of the right. It can be interpreted to mean that the framers had in their mind the rights which can be violated by the private individuals in which case a writ under Article 32 could be moved by the private individual. Clause 2 of the Article envisages that Supreme Court has power to issue directions, writ or orders for the enforcement of 'any of the rights' conferred under Part III.

[26] AIR 1952 SC 59 (In this case the petitioner was aggrieved by the Banks' sale of his shares to recover a debt due to him. He petitioned the Court by a writ action to enforce his fundamental right to acquire, hold and dispose of his property under Article 31 (1) against the Central Bank of India, and then a private bank incorporated under the Companies Act, 1882).The reasoning on behalf of the petitioner that as there is no express legislative power pertaining to the 'deprivation of property' under Schedule VII of the Constitution and so it must be regarded that the provision conferred a right against private action. However this contention was dismissed as it was held that the State had the legislative power either under Entry no. 1 of List II or Entry no. 1 of List III of Schedule VII.

[27] (Prior to Shamsadani, in ShrimatiVidyaVerma v. Shiv NarainVerma AIR 1956 SC 108, the Supreme Court refused to find an Article 21 violation in the case of one individual being detained by another. Quoting

Article 19 against the Bank was that the restrictions under Article 19 could be placed exclusively by the state in the succeeding clauses of the same Article i.e. Article 19 (2) which envisaged infringement only against state action. Besides, as per the Court, the omission of the word state in Article 31 (1) does not imply that it is enforceable against private persons. For substantiating this view Court read Article 31 (1) along with Article 21 which has resulted in concluding that rights can be curbed only by way of an authorized governmental action involving 'procedure established by law' and 'express authority of law.'[28]

a) Direct Horizontal Effect

In *PUDR v. Union of India*[29]Bhagwati J. Courts' took view the in *Maneka Gandhi v. Union of India*[30] towards an expansive view of the scope and reach of fundamental rights.[31] He also identified

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PatanjaliShastri J.'s opinion in A.K. Gopalan, the Court held in that "as a rule, constitutional safeguards are against the State and the protection against violation of rights by individuals must be sought in the ordinary law.").

28 CONSTITUTION OF INDIA art. 21 ("No person shall be deprived of his life or personal liberty except according to procedure established by law.").

29 (1982) 3 SCC 235. In this case thegovernment contractors in Asiad Games project were engaged in pernicious forms of labour practices which violated right to live with dignity and equality of the labourers and the constitutional prohibitions against forced and child labour. Petitioners alleged violations of all these rights by private contractors in their employment contracts as well as by the state which had failed to enforce labour statutes.

30 1978 AIR 597

31 He found it inconceivable and unreasonable that the 'constitution makers' would have sought to exclude forms of labour were minimum wages were paid. By ignoring the fundamental distinctions between feudal modes of

rights which can be applied horizontally.[32] He pointed out that whenever any fundamental right is made enforceable against private individuals it is the constitutional obligation of the state to take necessary steps for the purpose of interdicting such violation and ensuring the observance of the fundamental right by the private individual who is transgressing the same.[33] Though he proposed a significant horizontal aspect to Articles 23 and 24[34] he did not extend the reach of traditional writ remedies to private actors.[35]

Further, regarding the procedural formalities of the case, Bhagwati J. exalted public interest litigation and he vehemently denied the purpose of the writ petition as a tool to find fault with any particular authority for not observing the labour laws in relation to workmen employed in the projects which are being executed by it,

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extraction of labour and services and the unequal bargaining positions in an unregulated market economy, Bhagwati concluded that the expression 'forced labour' would apply irrespective of the payment and non-payment of remuneration.

32 *Ibid*; p. 462

33 *Ibid*; p. 466

34 CONSTITUTION OF INDIA art.24 ("Prohibition of employment of children in factories, etc. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.").

35 He continued by saying that the horizontal application of Article 24 prohibition may give rise to two corresponding duties: the constitutional duty on the contractors not to employ any child below the age of 14 years and a corresponding obligation on the state to ensure that this obligation is obeyed by the contractors. He also emphasised on the constitutional duties with respect to payment of minimum wages and equal remuneration by linking it with Article 14.

but to ensure that in future the labour laws are implemented and the rights of the workers under the labour laws are not violated. While fixing the liability the Court had applied principal agent relationship and made the principal employer i.e. state liable for statutory violations. As per the decision the application of fundamental rights to dispute between private citizens relies more on the doctrine of state action than the idea of a horizontally applicable right.[36]Thus in this case though the concept of direct horizontal application was not specifically applied by the Court under Article 23 and 24, a wider range of constitutional duties was imposed on the state actor by accommodating private actors as respondents to a writ petition under Article 32.[37]

In *M.C. Mehta v. State of Tamil Nadu*[38]though Justice Hasaria effectively directed a ten-point action plan against child labour, he did not distinguish between obligations under Article 24 which can

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36 SudhirKrishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India" in Human Rights, Justice and Constitutional Empowerment, ed. C. Raj Kumar, K. Chokalingam, (Oxford University Press, 2010),53-55.

37 The contractors were directed to pay the workers minimum wages and the Delhi Development authority was asked to take action against contractors who failed to do so. DDA was also recommended to insert a clause in their contracts to ensure that their contractors complied with all labour laws. The Court appointed three independent ombudsman to make periodical inspections to ensure that the labour laws are implemented and wages and benefits accrued to the workmen.

38 (1991) 1 SCC 283. In this case the petitioners claimed that child labour violated the constitutional prohibition under Article 24 of the Constitution and Directive Principles under Article 45. The respondents were State of Tamil Nadu and private parties who employed the children.

be applied even against private actors and obligations of the state to provide childhood care and education for children under Article 45.[39] Without referring that the Court has turned the action into public law action by giving emphasis to the positive obligation on the state where fundamental rights are violated by non-state actors and to liberal rules of standing and secondly by adopting liberal procedure to allow public interest petitioners to name both state and private actors as respondent.

b) Indirect Horizontal Effect

Though in India Court applies fundamental rights to private actors, especially through Article 21 in none of the cases there had been a declaration to the effect that private actors shall be held responsible for the violation of fundamental rights of the individual. In most of the cases either state was pleaded as a party or the court decline to take an action under the writ and may advise the parties to approach High Court under Article 226.

In *Bharat Kumar M. Palicha v. State of Kerala & Ors.*,[40] a writ was filed against the Communist Party of India against calling for and holding of a '*Bundh*' by a political party as it violates Article 19 and 21 of the Constitution. It was argued by the respondents that

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[39] CONSTITUTION OF INDIA art. 45 ("The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.").

[40] AIR 1997 Ker. 291.

the petition is not maintainable for non-joinder since the government is not pleaded as a party to the petition. This objection was taken into account and the Court like in the case of *M.C. Mehta* declined give any opinion regarding enforcement of fundamental right against private citizen or a political organization.[41] As per the Court it is suffice if the fundamental rights of the citizen are infringed in one way or the other.[42]The reason for the exercise of jurisdiction towards private organization was justified by the court by saying that in the absence of any regulatory action on the part of the State Court has the ample jurisdiction to give a declaratory relief to the petitioners since the petition is based on violation of fundamental rights.[43]

In *Vishaka v. State of Rajasthan*[44] writ petition was filed on the ground that failure of the state to establish a legal framework to

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41 Id at para 8 A (But what was argued was that a challenge on the basis of violation of the fundamental rights under Articles 19 and 21 of the Constitution could be raised only against State action and not to prevent a political organisation or a private citizen from allegedly interfering with that right. Necessarily we will consider that argument at the appropriate stage. But at the moment what is called for is only to notice that the rights put forward by the petitioners in these Original Petitions to earn on their profession or business or to attend to their offices is certainly part of the fundamental rights guaranteed to them by the Constitution. How far such rights air infringed and even if they are infringed by the action of the political parties and their calls for bundhs how far the same could he redressed in this proceeding under Article 226 of the Constitution are aspects that will have to be considered at the appropriate stage).

42 *Ibid*; para. 18.

43 *Ibid*.

44 AIR 1997 SC 3011 (The petitioners complained about the brutal gang-rape of a social worker at the work premises).

tackle sexual harassment resulted in the violation of constitutional obligations.[45] By putting forth state as the opposite party, Court was absolved from the procedural difficulties in initiating a writ against the private party and thereby supplied justification in enforcing the writ against the individual offender.[46]This case has brought into effect the idea that though Article 14 and 15 or for that matter any article which casts obligation on the state need not be disabled from having any horizontal effect on fundamental rights due to private action.[47] Further,in *BodhisatwaGowtham v. SubhraChakraborthy*[48] Court held that "fundamental rights can be enforced even against private bodies and individuals" under Article 32 but without elucidating any reasoning for the same either through Article 12 or by giving horizontal application to fundamental rights.

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45 There were three pointers in the case which indicated that sexual harassment in workplace amounted to constitutional wrong. Firstly, as per the positive obligation on various organs of the state to protect woman under Article 14 and 15,under right to life under Article 21 and her right to practice any profession under Article 19 (1) (g) and this sense of responsibility from the part of state is clear when the state was included as a party in the writ petition, Secondly, as per the Fundamental Duty under Article 51-A. Thirdly, under the obligations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

46 Subsequently in MedhaKotwalLele v. Union of India (2013) 1 SCC 297, in spite of keeping silence on the violation of fundamental right by private actors in the judgment, Court gave a direction to follow the mandate of the Court in Visakha wherein in both cases the issue pertained to both public and private discrimination.

47 *Supra* note 36

48 AIR 1996 SC 1992.

In *Indian Medical Association v. Union of India*[49]the petitioners challenged *inter alia* Article 15(5) of the Constitution which was inserted into the Constitution by the 93rd Amendment Act, 2005.[50] Court overruled the objection by holding that "it (the Act) clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense what it does is that it enlarges as opposed to truncating an essential and indeed a primordial feature of the equality code."[51] Court has also vehemently criticized private educational institutions which under the veil of charity are denying social justice principles under the Constitution.[52] By

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49 (2011) 7 SCC 179 The case related to the applicability of reservations in private non- minority unaided medical college.

50 CONSTITUTION OF INDIA art. 15 (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.").

51 Ibid; at para 109.The Court also referred to the Constitutional Assembly Debates to hold that the word "shops" under Article 15 (2) is of a wide import so as to include in its ambit any arms-length provision of goods or services on the market. Id. at para 112 and 113.

52 Id at para 148, 149 (further it was mentioned that "the power of the State to allow such participation of the private sector could only have existed if the State had the power to devise policies based on circumstances to promote general welfare of the country, and the larger public interest. The same cannot be taken to mean that a constitutional amendment has occurred, in a manner that fundamental alteration has occurred in the basic structure itself, whereby the State is now denuded of its obligations to pursue social justice and egalitarian ideals, inscribed as an essential part of our constitutional identity, in those areas which the State feels that even resources in the private sector would need to be used to achieve those goals. The argument that the policies of liberalization, privatization and globalization (LPG)

analysing this judgement we can see that the Court has made the private actor liable for breach of Constitutional provisions.

At the same time Court analysed the exact meaning of the word 'access' in 15 (2),[53] posing the question whether access is limited to situations where private parties refuse to transact on the basis of a constitutionally prohibited maker or does it extend to all kinds of economic interactions between the parties, including hiring firing decisions?

Subsequently in *Society for Unaided Schools v. State of Rajasthan*[54]two interveners for the respondent had embarked on the concept of horizontal application of fundamental right. It was contended that Articles 15(3) and 21A provide the State with Constitutional instruments to realize the object of the fundamental right to free and compulsory education even

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have now cut off that power of the State are both specious, and fallacious. Such policies are only instances of the broader powers of the State to craft policies that it deems to serve broader public interests. One cannot, and ought not to deem that the ideologies of LPG have now stained the entire Constitutional fabric itself, thereby altering its very identity.").

53 Constitution of India art. 15 (2) ("No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.").

54 (2012) 6 SCC 1.the main question was whether Right to Education (Free and Compulsory) Act, 2009 (RTE Act, 2009) violated Article 19(1) (g) of the Constitution.

through non-state actors such as private schools.[55] But the Court gave importance to the rule that in the enjoyment of those socio-economic rights, the beneficiaries should not make an inroad into the rights guaranteed to other citizens.[56] Finally Court held that no distinction or difference can be drawn between unaided minority and non-minority schools with regard to appropriation of quota by the State or its reservation policy under Section 12(1) (c) of the RTE Act, 2009[57] and thus Article 21A and RTE Act, 2009 does not cast any obligation on minority and unaided non-minority educational institutions not receiving any aid or grant from

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55 *Ibid*; at para 38, (On the other hand, learned senior counsel for the petitioners submitted that since no constitutional obligation is cast on the private educational institutions under Article 21A, the State cannot through a legislation transfer its constitutional obligation on the private educational institutions. According to him socio-economic rights is always subject to the rights guaranteed to other non-state actors under Articles 19(1)(g), 30(1), 15(1), 16(1) etc.).

56 *Ibid*; para. 94, 95

57 Right to Information Act § 12 ("Extent of school's responsibility for free and compulsory education: (1) For the purposes of this Act, a school,- (a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein; (b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.; (c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion: Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.").

respective government or local authorities.[58]

In *Pramati Educational & Cultural Trust v. Union of India*[59]it was submitted by the petitioner's that the Constitutional obligation under Article 21A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions.[60]As per the Court a new power is vested in the State to enable the State to discharge the Constitutional obligation of providing right to education by making a law, however, Article 21A has to be harmoniously construed with Article 19(1) (g) and Article 30(1) of the Constitution.[61] So Article 21A of the Constitution and the 2009Act does not violate Article 19(1) (g) of the Constitution.While discussing the validity of clause (5) of Article 15 of the Constitution, it was held that if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be

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58 Such an appropriation of seats cannot be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction under Article 19(6) of the Constitution.

59 (2012) 6 SCC 1.The question was whether by inserting clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2009, Parliament has altered the basic structure or framework of the Constitution and secondly, whether the word 'State' in Article 21A can only mean the 'State' which can make the law.

60 CONSTITUTION OF INDIA Article 21A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation under Article 21A.

61 *Ibid*; para. 40.

abrogated.[62]

Through indirect horizontal application, fundamental rights can be said to have an effect on non-state actors *via* their impact on private law.[63]In *Zoroastrian Cooperative Housing Society v. District Registrar*[64]Supreme Court sustained the constitutional validity of a racially restrictive covenant under the bye –law of a co-operative society run by Zoroastrians andthereby upheld their fundamental right to form associations.[65] The Society was not considered to be a 'State' under Article 12 by the Apex Court since it had not satisfied the criteria mentioned under *Ajay Hasiav. Khalid Mujib.*[66] The Court further held that the fundamental rights

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62 Therefore, the 2009Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution.

63 Stephen Gardbaum, supra; 3.

64 (2005) 5 SCC 632 (In this case, the members of the Parsi community established a co-operative housing society by a local Act. A bye-law of the co-operative society confined its membership to the Parsi community. A question arose whether a subsequent non-Parsi purchaser could be excluded from membership because of the bye-law. The High Court held that the restriction is unfair. But the Supreme Court held that the bye-law is not contrary to 'public policy' mentioned in Section 4 of the Local Act under which the co-operative society is formed).

65 (Supreme Court held that 'public policy' with regard to a cooperative society has to be judged in the light of four corners of the Act and thus it upheld the 'freedom of Contract" and accordingly the freedom to contract cannot be curbed or curtailed relying on fundamental rights.")Ibid; para 18 & 27; (Therefore as per the Court even though it may seem retrograde in Secular India, the enactment did not bar cooperative societies from discriminating on the ground of religion only.) Ibid; 659.

66 Id at para 26. In Ajay Hasia, Bhagwati J. specified the following six considerations to be taken into account in order to determine whether an 'authority' is an instrumentality or agency of State.(a) whether the entire share capital of the corporation is owned by the Government (b) whether

under Part III are enforceable against State action or other authorities who may come within the purview of Article 12 of the Constitution.[67]

In *CharuKhurana&Ors. v. Union of India & Ors.,*[68] a writ was filed under Article 32 alleging violation of equality clause under the bye-law of Cine Costume Artist and Hair Dressers Association. Though there was a clear violation of fundamental rights in the case the Court denied positing the Make-up artist association either as a 'State' under Article 12 or as amenable to Article 226 rather, Court followed the*Vishaka*precedent by emphasising that "violation of gender equality "right to Life and Personal Liberty" and "Right to Practice Profession' attract remedy under Article 32

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the financial assistance given by the State is enough to cover the entire expenditure of the entity; (c) whether the Corporation enjoys a monopoly status which is either Government conferred or Government protected; (d) whether there is existence of deep and pervasive State control from the part of the Governmental; (e) whether the functions of the entity are of public importance or closely related to Governmental functions; (f) whether a Government department is transferred to a corporation.

67 Ibid; para 26.

68 2014 SCC Online SC 900. In this case CharuKhurana, a Bollywood Make Up artist filed a writ petition under Article 32 of the Constitution on the ground that she was discriminated by the Cine Costume Artist and Hair Dressers Association since she was not issued a Make Up Artist membership and was denied membership in that regard. The Association took the stand that for women they issue only one membership that is as Hair dresser and make-up artist membership card are given for only men and not for women. CharuKhurana questioned the respective provision of Cine Costume Artist and Hair Dressers Association bye-law which permitted this discrimination

for the enforcement of these fundamental rights against women"[69]

Horizontal Application of Constitutional Rights in other countries:

Unlike India, there are countries which have adopted horizontal application of fundamental rights, mainly, indirect horizontality as a means of applying fundamental rights against private actors. It has been observed by the Courts in those countries that the government as well as corporation's can threaten the human rights. Corporations or people exercising 'private power' are actually exercising power conferred on them by law regulating and controlling market behaviour. Thus government is somehow implicated in private decisions.[70]Horizontal application of fundamental rights is a means to implicate private parties' directly responsible for the vices done by them in its decision making or exercising of private power when it violates the fundamental rights of the individual.

(a) Ireland

Ireland is a perfect example for horizontal application of fundamental rights. In Ireland direct horizontality is achieved

69 *Ibid*; para 38.
70 *Supra 6*; 83, 79-98.

through the concept of Constitutional torts.[71] If a person has suffered damage by virtue of a breach of constitutional rights that person is entitled to seek as a matter of right redress against the person or persons who infringed that right. This right is expressly guaranteed under the Constitution which says that the State guarantees in its laws to respect and as far as practicable by its laws to defend and vindicate the personal rights of the individual.[72] Through judicial interpretation the Court has enforced this right against state actors, private actors and the judiciary. Constitutional rights which are given horizontal effects include freedom of association,[73] freedom from sex discrimination,[74] right to earn a

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71 Sibo Banda, "Taking Indirect Horizontal Rights Seriously in Ireland: A Time to Magnify the Nuance," Dublin University Law Journal, vol. 31 (2009); 265, 263-297.

72 Meskell v. CorasIompairEireann (1973) IR 121 Per Walsh J. In this case the plaintiff's contract of employment was terminated by the defendant employers and he was not reemployed due to his refusal to accept a special condition in reemployment contract that he has to be a member of a trade union which he denied since it affected his freedom of choice which is a fundamental right. Though the defendant was a semi-nationalised corporation in this case, in subsequent cases Irish Courts have held that constitutional rights can apply horizontally to purely private entity. Aoife Nolan, "Holding non-state actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland,"International Constitutions, vol. 70, no. 1 (2014); 61-93.

73 To this effect in one of the cases it was held that a trade union violated the freedom of association of the individual by enforcing a closed shop agreement on existing employees).

74 Murtagh Props. Ltd v. Cleary (1972) IR 330 (In this case Court ordered an injunction against a trade union for violating constitutional rights of equality to a woman by objecting employment of women).

livelihood[75] and the right to due process.[76]

(b) South Africa

Horizontal effect of fundamental rights is also given in the Constitution of South Africa, 1996.[77] In South Africa given the limited resources of the State and the grossly enormous and unequal wealth which resides in the private sector, horizontal application of private sector breaths new hope into the possibility of creating a more equal and just socirty in the medium term.[78] The decision in *Du Plessis*[79] presented a middle way between indirect horizontality and direct horizontality.[80] According to the Court,

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75 Lovett v. Gogan (1995) 1 LRM 12(In this case injunction was granted against a defendants unlicensed transport company which was found to be interfering with the plaintiffs transport company's right to livelihood).

76 Glover v. B.L.N. Ltd. (1973) 1 I.R. 388 (In this case damages was awarded to a plaintiff whose right to fair procedures which was implied in the contract of employment permitting to dismiss for a just cause).

77 The Constitution of the Republic of South Africa Chapter III, § 7 (1): This Chapter shall bind all legislative and executive organs of state at all levels of government.
The Constitution of the Republic of South Africa Chapter III, § 8 (2): (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

78 Supra; 76, at 76

79 Du Plessis v. De Clerk 1996 (3) SA 850 (CC) The case arose out of a defamation action under the Interim Constitution wherein a defamation suit was filed by the plaintiff for the alleged defamation by a newspaper Pretoria News.

80 Majority of the Courts concluded that rights under the interim Constitution could not be directly invoked by one private litigant against the other, embracing instead the notion of "indirect horizontal effect' of fundamental rights. But simultaneously Court held that the Bill of Rights could apply

"invocation" of any law by one private individual in a suit against another initiate the application of constitutional rights to that law. This is because all law whether regulating relations between the individual and the state or relations among individuals, whether statute or common law is directly subject to the Constitution. Constitutional rights do not impose duties on private actors, who are free to order their relationships as they will but does apply to all law including that regulating relationships."[81]

(c) Canada

In Canada the challenge against private action on the basis of constitutional/charter rights was first put forth before the Supreme Court of Canada in *Dolphin Delivery case.*[82]In the instant case an injunction was sought by a private company under the strength of a common law inducing breach of contract to restrain the secondary picketing of its premises by a trade union. Picketing was a protected right under the Charters' guarantee of freedom of speech

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indirectly to proceedings between private individuals as the principles of common law would have to be applied and developed by Courts "with due regard to the spirit, purport and objects" of the Bill of Rights in the light of § 35 (3) of the Interim Constitution.

81 *Id.* (It was held that although the Constitution's Bill of Rights neither had "general direct horizontal application" nor applied in private litigation based on the common law, it nevertheless may and should have an influence on the development of the common law governing relations between individuals).

82 Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery ltd (1986) 2 SCR 573.

and expression. But that was held not to be applicable in common law litigation. The Court decided its opinion on two grounds under Supremacy clause[83] and application clause[84] in the Charter. But at the same time Court did not completely ruled out the relevance of Charter obligation to a private litigation. It was opined that though the Charter rights impose obligations on the government, charter values influence the entire legal system.[85]

Subsequently, in *Hill v. Church of Scientology of Toronto*[86] Court further elaborated the difference between Charter rights and values.[87] It was held that it is up to the party challenging the common law to bear the burden of proving not only that the

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83 Constitution of Canada Act, 1982 § 52 (1) ("The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution, is to the extent of inconsistency, of no force or effect.").

84 Constitution of Canada Act, 1982 § 32 (1) ("The Charter applies (a) to the Parliament and government of Canada in respect of all maters within the authority of the Parliament and (b) to the legislature and government of each province in respect of all matters within the authority of legislatures of each province.").

85 *Supra* note 225, at 605 (According to the Court the answer to the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution must be answered in the affirmative. The Charter is far from irrelevant to the private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one party owes a constitutional duty to another, which proposition underlines the purported assertion of Charter causes action or charter defences between individuals).

86 (1995) 2 SCR 1130 (In this case Morris, a lawyer working with the Church held a press conference and wearing the barrister gown he made false imputations against Hill a judge relating to a judgment delivered by him. The main question was the validity of common law of defamation in the light of Canadian Charter of Rights and Freedoms).

87 *Ibid.*

common law is inconsistent with charter values but also that its provisions cannot be justified. Thus the Supreme Court has recognized the concept of 'indirect horizontality.' But it is a difficult task to enforce charter values in a private litigation. The challenge was succeeded in *Ryans case*[88] wherein the Court held that the common law rules of psychiatrist-patient privilege must be modified in the light of Charter values.

(d) Germany

In Germany also just as in Canada, Constitutional rights have indirect horizontal effect but they do not directly control or govern private law disputes between individuals. But there are differences in the position of law in both countries. For instance all private laws in Germany are directly subject to the Constitutional rights contained in Basic Law. There was also some initial confusion in Germany as to the vertical and horizontal effect because of the language of the Constitution which is declaratory at some part and universal in some other part.[89]

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88 M (A) v. Ryan (1997) 1 SCR 157.

89 The Basic Law states that everyone has the right to the free development of his or her personality" and that everyone has the right to life and to (physical integrity). The Basic Law declares that "men and women shall have equal rights." (Article 2) Freedom of faith and of conscience and freedom of creed, religious or ideological shall be inviolable. (Art.3). Everyone has the right freely to express and disseminate his or her opinion in speech, writing and pictures. (Art.4)" And art and science research and teaching shall be free. (Art. 5).

Through a series of decisions the Federal Constitutional Court (FCC) has developed the doctrine of applicability of third party effect of constitutional rights, came to be known as *'Drittwirkung'* and it still remains the same.[90] According to the doctrine, although Constitutional rights bind only governmental organs they apply to all private law and so have indirect effect on private actors whose legal relationships are regulated by that law. This was also affirmed in the *Luth case*[91] wherein the FCC held that the primary purpose of basic law is protection from public officials in private law. But the Basic Law establishes 'an objective order of values'[92] that must be looked as a fundamental constitutional decision affecting all spheres of law and in that case the private law such as that invoked by the plaintiff should be interpreted in the spirit of the Basic Law and a responsibility was imposed on the judges at

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90 Ralf Brinktrine, "The Horizontal Effect of Human Rights in German Constitutional Law," European Human Rights Law Review, vol. 6, no. 4(2001); 421, 423.

91 The instant case related to the free speech rights of a public official against whom an injunction was passed by the civil court for preventing him from attempting to boycott a film made by the director who had earlier made anti-Semitic film under the Nazi regime. He claimed that the injunction violated his right to free speech which is a constitutional right.

92 BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 5 ("Freedom of expression, arts and sciences] (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour. (3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.").

the lower echelons to correctly understand the constitutional principle in the area of law under review.[93] The Court by applying the doctrine held that the constitutional value of freedom of conscience contained in Article 4 of the Basic Law[94] exerts a substantial influence on the interpretation and application of the relevant private employment law, which requires terminations to be 'socially justified.' [95]

Luth employs both direct and indirect means of subjecting private laws to constitutional rights. Since the institutions are bound by the Basic Law, the civil courts have a duty to take constitutional values into account while interpreting and applying private law when adjudicating disputes between the parties. This is same approaches in Canada wherein Constitutional values bind the Common law.[96] In Germany a private law not in conformity with the Basic Law is invalid since it is the directly applicable higher law norm. Thus the

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93 *Supra* note 222, at 79.

94 BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 4 ("Freedom of faith and conscience (1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable (2) The undisturbed practice of religion shall be guaranteed. (3) No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.").

95 *Ibid*; at 407 (The relevant public law was Unfair Dismissal Protection Act, 1969 which renders termination with notice legally effective only if it is 'socially justified.' i.e. based on reasons relating to the employees person, conduct, or compelling business requirements that rule out the possibility of continuing to employ the person).

96 *Ibid*.

application of constitutional law is directed against the law in question and indirect when it is applied in constitutional interpretations.

(e) United Kingdom

In the United Kingdom Human Rights Act, 1998 (HRA) was enacted to incorporate the European Convention on Human Rights into domestic law. After the passing of the Act any Act of Parliament can be called into question if it violates any of the rights mentioned in the Convention. The Courts do not have the power to invalidate or misapply the statute instead the remedy is that the Court will adopt a 'fast track' parliamentary procedure to amend or repeal it. It emerges from the text of the Act that it does not have direct horizontal effect since the provision in the Act is addressed only to 'public authorities' and not private individuals.[97]The applicability of 'indirect horizontality' is also at doubt because HRA does not make any reference to Convention rights which applies to private litigation or to the common law. In particular the duty placed on the courts by Section 3(1) to employ Convention rights as an interpretative guide applies only to legislation and not to common law rights.[98] On the other hand, the

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97 U.K. Human Rights Act, 1998 § 6 (1) ("It is unlawful for a public authority to act in a way which is incompatible with a Convention Right.").

98 U.K. Human Rights Act, 1996 § 3 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights).

argument in favour of indirect horizontal effect is that the Courts are expressly included in the list of 'public authorities' obligated to act in accordance with Convention Rights under Section 6 (1) together with Ministerial statements supporting this position in course of parliamentary debate on the Act.

Theory of Horizontal Application of Fundamental Rights - Reasons and Justifications:

The Horizontal application of Fundamental Rights can be understood through the lens of Political Liberalism and Social Democracy.[99] The political theory of liberalism see public organized into political association as a threat to liberty whereas social democracy came as a response to exercise of social power by market in exercising their control over opportunity of employment and property. In the above countries where horizontal effect of fundamental rights are widely acknowledged and it can be seen at the same time that their Constitutions are embodiment of social welfare and social democratic principles.[100] There can also be drawn a connection between state action and social democracy also on the basis of two premises first, that a social democratic

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[99] Mark Tushnet, supra note 222, at 88-90.

[100] Ibid. For instance, in Canada social democratic institutions are stronger. In Germany Basic Law incorporate Sozialstaat principle in describing federal republic as a "democratic and social federal state.' South African Constitution contains an extensive enumeration of constitutionally guaranteed social welfare rights.

state is an activist state and second premise is based on the notion that 'if liberty supplemented by equality is the guiding political norm of the liberal state, solidarity or fraternity is the guiding norm of the social democratic state.[101] Horizontal application of fundamental rights requires each private actor to take those into account in its private actions.[102]

Another important feature of political liberalism is 'pluralism' since the political institutions allow reasonably free thought and liberal discussion, over time; citizens will come to affirm different world view religious, moral codes and ways of life, which can be referred as 'comprehensive doctrines.'[103]According to John Rawls, the basic question then is how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines? It is made possible through 'political conception of justice' which is based on political institutions of a constitutional regime and the public traditions of their interpretation, as well as historic texts and documents that are common knowledge, but arguments used to defend and justify them must belong to the domain of public reason.[104]

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101 Ibid; at 90 (Solidarity means that each member of the society has the duty to take the interest of others' into account).

102 *Ibid.*

103 John Rawls, Political Liberalism, (Columbia University Press, 1993), 4.

104 *Ibid*; at 11, 39.

In the above context coercive power is legitimately exercisable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.[105] Thus the basis of political liberalism is the refusal to impose the majority's idea of the good upon all of society, and allow everyone to pursue their own conceptions of the good, as opposed to a situation where the State chooses one vision of the good and enforce it through law.[106] Thus the idea of justice in Pluralism is opposite to the ideas of justice in a social democracy.

When the above idea is imported to the idea of legal pluralism it poses a challenge to the concept of rights constitutionalism which posits state as the centre of enforcement of fundamental rights. According to legal pluralist ideology state is no longer determinative of the existence of or character of law rather it is the private non-state actors which determines it and rights constitutionalism does not deliver what it promises as an instrument of social engineering, casting significant doubts on its effectiveness to restrain private power.[107] The horizontal application of fundamental rights thus permeates fundamental

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105 *Ibid*; at 217.
106 *Ibid.*
107 Gavin W. Anderson, Constitutional Rights after Globalization, (Oxford: Hart Publishing, 2005), 10.

rights to the actions of non-state actors and comes to the rescue of social democratic ideals in a welfare society.

Conclusion:

The Courts in India can devise the concept of direct horizontality to apply fundamental rights against private actors too in the wake of globalization and privatization. At present what can be seen is that even in the cases of enforcement of fundamental rights like Article 17, 23, 24 etc. which can be enforced even against private parties no theoretical foundation had been laid out so as to give a justification in applying these rights against private actors. Regarding the applicability of Article 12 as against private actors it can be seen that whenever the Article was applied it was done under the pretext of safeguarding Article 21 and in most of the cases state was pleaded as a party to the petitions along with the state actor. For instance in *Vishaka* and in *Asiad Workers case* though the Court has accepted the duty of the state to protect the women from sexual harassment of women at the workplace it never accepted the doctrine of 'State Action.'

Thus Judiciary must give effect to horizontal application of fundamental rights against private bodies in the light of the changes happened due to privatisation. The theory of horizontal application of fundamental rights should be adopted and developed by the Courts in cases involving private actors and violation of

fundamental rights by them. Even in case of violation of fundamental rights mentioned under Article 15(2), 19, 23, 24 which can be applied even against private actors there must be a declaration to that effect by the judiciary that private actors are 'State' falling under the expression other authorities by applying 'horizontal application' theory of fundamental rights.

MARITAL RAPE: A FEMINIST VIEW

Rushali Srivastava[*]

Abstract

Marital Rape abuses the privilege of pride of a wedded lady. It ruptures the trust of wife. Indeed at that point, it is not criminalized as assault in India. This paper focuses out whether this privilege can be combined with power or right to engage in sexual relations is just combined with will or assent of wife. Today, we discuss ladies strengthening. Numerous rights have been given to the ladies in India. Several feminists have pointed out that sex is a tool with which men oppress women. And this is largely seen in the current legal scenario in India though the Justice Verma Committee Report spoke against this culture. The fundamental reason for this paper is to discover how the feminists view whether sex without the assent of wife ought to be considered as assault. In 1987, Andrea Dworkin published Intercourse, she contends that all hetero sex in our patriarchal society is coercive and debasing to ladies, and sexual penetration might by it's extremely nature fate ladies to inadequacy and

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> *submission, and "may be invulnerable to change". Despite the fact that initial two essentials of Rape as characterized under Section 375 of Indian Penal Code, 1860 i.e. without the assent and against the will of a lady and still not remembering it as a wrongdoing is obviously unlawful and shameless.*

At the point when one specifies the word Rape, the inclination is to consider somebody who is a more peculiar, a malevolent individual. Normally one does not consider rape in the setting of marriage. Ladies themselves think that it's hard to trust that her husband can forcefully have sexual intercourse with his wife. All things considered, by what means can a man be blamed for raping in the event that he is profiting his marital rights. It is characteristic that a lady has marital rape assault is the most widely recognized and hostile type of masochism in the Indian culture, it is well taken cover behind the iron drapery of marriage. While the legitimate definition changes, marital rape can be characterized as any undesirable intercourse or entrance (vaginal, anal, or oral) acquired by force, threat of force, or when the wife is not able to assent. Regardless of the pervasiveness of marital rape, this issue has gotten moderately little consideration from social researchers, experts, the criminal equity framework, and bigger society all in all.

"Rape" has been derived from the term 'rapio', which signifies 'to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, nonconsensual sexual intercourse with a woman. [1]

Marital Rape is a definitive infringement of the self of a lady. The Supreme Court of India has aptly described it as 'deathless shame and the gravest crime against human dignity'.[2]Rape is not merely a physical assault, but is destructive of the whole persona of the victim.[3] It is also seen from the famous *Mathura case*[4]that law still continues to believe that a way through which a man can identify with the lack of consent is by way of resistance on the part of the woman.

The law did not conceptualize it as an offense against the individual of the lady, one that pulverizes her flexibility; rather, it considered rape as an instrument for shielding a man's property from the sexual hostilities of other men. In this manner the demonstration of rape inside of marriage was not perceived as an offense as lady was viewed as the property of the spouse, and a

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1 Dr. Bhavish Gupta & Dr. Meenu Gupta, *Marital Rape:- Current Legal Framework in India and the Need for Change*, 1GALGOTIAS JOURNAL OF LEGAL STUDIES(2013)

2 BodhisattwaGautam v. SubhraChakraborty, AIR 1996 SC 922 (Supreme Court of India)

3 *Supra note* 1

4 Tukaram v State of Maharashtra, AIR1979 SC 185 (Supreme Court of India)

man couldn't be seen to damage his own property.

Marital Rape is especially confounded in light of the fact that the unpredictable, individual nature of conjugal connections makes it hard for the casualty to try and see herself as a casualty, not to mention reporting the culpable demonstration to the powers, which is the reason Marital Rape, is one of the profoundly under-reported vicious unlawful acts. Indeed, even the ladies who do see themselves as casualties are reluctant to approach the powers in light of the fact that they are monetarily subordinate upon their spouses, and reporting the matter could exceptionally well result in withdrawal of money related bolster abandoning them and their youngsters without sustenance and safe house.

Sex as an Instrument for Cruelty - How do the Femnisits view it:

A few women's activists have pointed out that sex is a device with which men abuse ladies. Also, this is to a great extent found in the current lawful situation in India, however just recently the Justice Verma Committee Report has talked against this practice.

In 1987, Andrea Dworkin has published her book “Intercourse”, in which she extended her examination from pornography to sex itself, and contended that the kind of sexual subordination portrayed in pornography was integral to men's and ladies' encounters of heterosexual intercourse in a male supremacist

society. In the book, she argues that all heterosexual sex in our *patriarchal* society is coercive and degrading to women, and sexual penetration may by its very nature doom women to inferiority and submission, and "may be immune to reform".[5]

Referring to from both literature and pornography—comprising *The Kreutzer Sonata*, *Madame Bovary*, and *Dracula*—Dworkin contended that descriptions of intercourse in mainstream art and culture constantly highlighted heterosexual intercourses the main sort of "real" sex, depicted intercourse in brutal or obtrusive terms, highlighted the violence as fundamental to its sensuality, and frequently united it with the male contempt for, revulsion towards, or considerably murder of, the "carnal" lady[6]. She contended that this sort of explanation upheld a male-driven and coercive perspective of sexuality, and that, when the societal conducts gets along with the material states of ladies' lives in a *sexist* society, the experience of heterosexual intercourse itself turns into a focal part of men's subordination of ladies, experienced as a type of "occupation" that is all things considered anticipated that would be pleasurable for ladies and to characterize their exceptionally status as a woman.

These explanations and descriptions by Dworkin are often

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5 TaannaKhosla, "Marital Rape InIndia: A radical feminist perspective", *Women's world (mainstream)* VOL LII S (September 13, 2014**).**

6 *Ibid.*

criticized by many, claiming that the book interprets "all" heterosexual intercourse as rape, whether it is with consent or not. When, for example, Cathy Young states that, "inter-course is the pure, sterile, formal expression of men's contempt for women", can be reasonably shortened as "all sex is rape"[7].

Dworkin rejected that interpretation of her argument, in a later interview that:

> *"I think the social explanation of the "all sex is rape" slander is different and probably simple. Most men and a good number of women experience sexual pleasure in inequality. Since the paradigm for sex has been one of conquest, possession, and violation, I think many men believe they need an unfair advantage, which at its extreme would be called rape. I don't think they need it. I think both intercourse and sexual pleasure can and will survive equality."*[8]

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7 Cathy Young, *The Dworkin whitewash* (April 17, 2005),*Hit And Run Blog, available at*https://reason.com/blog/2005/04/17/the-dworkin-whitewash (Last visited on September 7 2015)

8 Michael Moorcock,interview with Dworkin,Author(London, England, April 21 1995)*Fighting Talk,available at* http://www.nostatusquo.com/ACLU/dworkin/MoorcockInterview.html (Last visited on September 7 2015)

The Statistics:

The United States statistics show that out of every seven or eight married woman has been subjected to rape or attempted rape by her husband. Also, approximately 10% to 14% of the married woman experience rape within the marriage.[9]

Today numerous nations have either established marital rape laws, canceled marital rape exemptions or have laws that don't recognize marital rape and normal rape. These nations include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and as of late, Indonesia. Turkey criminalized it in 2005, Mauritius and Thailand did as such in 2007.

The criminalization of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights.[10].It was assessed in 2006 that marital rape is an offense declined under the criminal law in no less than 100 nations and India is not one of them. Despite the fact that marital rape is common in India, it is holed up behind the consecrated shades of marriage.

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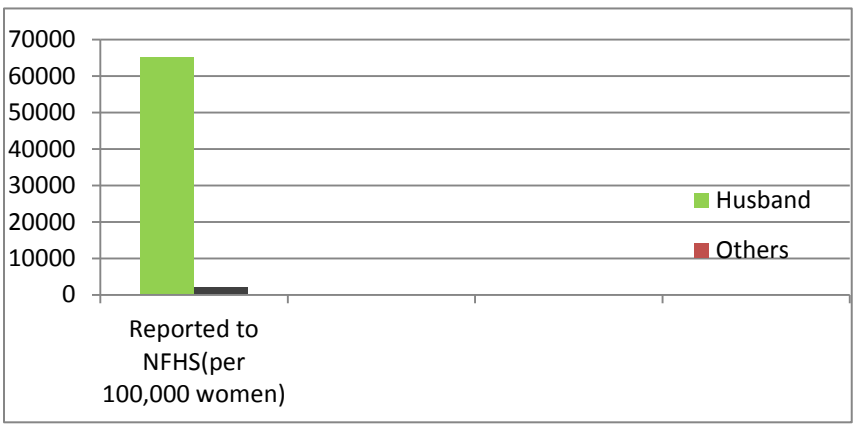
9 *Supra note* 1

10 *Supra note* 1

In India, a study was conducted by The International Centre for Women (ICRW) and United Nations PopulationFund's (UNFPA) to study the impact on violence against women. The last NFHS report shows that vast majority of sexual violence reported by women was within the marriage. Only 2.3% of rape that women reported was by men other than the husbands.[11]

Graph 1[12]: Sexual Violence in India



There have been a lot of enactments and authorizations went in India concerning savagery against lady in her own home like laws against share, mercilessness, aggressive behavior at home and female child murder. However the greatest and the most

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[11] Rukmini S., "Marital Rape: Don't lie", *The Hindu*(Novemeber 11,2014) *available at*http://www.thehindu.com/data/statistics-on-marital-rape/article6586829.ece (Last visited on September 9 2015)

[12] Statistics (2014), *Sexual Violence in India,* (Graph 1) *available at*http://www.thehindu.com/data/statistics-on-marital-rape/article6586829.ece (Last visited on September 9 2015)

dishonorable wrong inside of a marriage, where a spouse compels himself upon his wife believing that it is his matrimonial right to engage in sexual relations with his wife (with or without her assent), 'marital rape', has neglected to pick up acknowledgment as a wrongdoing according to law creators.

Why Marital Rape Happens-A Power Play?

Tracking back to history, the usually cited commentary regarding the issue comes from Sir Matthew Hale, Chief Justice (England 17th Century), who wrote that: *'the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract'*[13]

Since the "subsequent marriage doctrine"[14] allowed a rapist to escape prosecution by marrying his victim, it could be argued as a corollary that rape within the marriage would result in the same immunity.[15]

Sir Hale also argued that women could easily fabricate rape charges, a concern which has evolved today into the "cry-rape"

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13 Hale Matthew, *History Of The Pleas Of The Crown* 1,629 (1736)

14 After being abducted and ravished, an affluent woman who was a virgin could save her rapist by marrying him.

15 Warren v.The State,255 Ga. 151 (1985), Para7 , *available at*http://law.justia.com/cases/georgia/supreme-court/1985/42545-1.html (Last visited on September 9 2015)

syndrome.[16] He did not cite any legal case, argument for supporting such proposition even.[17] His notion of 'contractual implied consent' was interpreted and stated that this theory says much about contemporary society and the role of ideology in it.[18]

It clearly shows that there is always a presumption of a woman's consent, as it has been already constructed that sex is woman's duty within a marriage.

In 1888, the issue was debated in *Regina* v. *Clarence*[19], where J.Willsargued:

> *"If intercourse under the circumstances now n question constitute an assault on that part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority…I cannot understand why, as a*

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16 Sandra L. Ryder and Sheryl A.Kuzmenka,*Legal Rape: The Marital Rape Exemption*,(1991),pg 395;The "Cry rape argument" alleges that if women are allowed to criminally charge their husbands with rape, they will fabricate charges.

17 *Ibid*, see also Comment,*The Common Law Does Not support a Marital Exception for forcible Rape*,5 WOMEN's RTS. L. REP. 181,182-183 (1979) which discusses *State v. Smith*.; *Supra note* 1,p.4

18 MDAFreeman,' *But if you can't Rape Your Wife, Who (m) Can You Rape": The Marital Rape Exemption Re –examined*, 15 FAM. L. Q. 1,8(1981).

19 Regina v. Clarence,22 Q.B. 23 (1888)*available at* https://www.judiciary.gov.uk/wp-content/uploads/2014/11/r-v-clarence-sentencing-remarks.pdf ,(Last visited on September 9 2015).

> *general rule, if intercourse be an assault, it should not be rape."*

Further, John Stuart Mill[20] observed that "…though it may be his daily pleasure to torture her, and though she may feel it impossible not to loath him-he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations."

Hence, the beliefs of exempting marital rape were basically based on 'irrevocable implied consent', where if a woman gets married to a man, it is believed that she has an implied consent to all the sexual intercourses by her husband, which cannot be revoked by her. Also another reasoning coming from past is that a woman was the property of her husband and that the legal existence of the woman was 'incorporated and consolidated into that of a husband'.[21]

Feminists view

- Marital occurs mainly due to the *exploitation* of woman. The concept of exploitation has been used by various feminists,

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[20] John Stuart Mill, *The Subjection of Women* ,Handbook Of Family Violence,207 (1869)

[21] *Harward Law Review*, *USA*, "*To* Have and to Hold- The Marital Rape Exemption and the Fourteenth Amendment*"*99Harv. L. Rev. 1255, 1256 (1986) p. 442; Also see *Supra Note* 1,pg 5

where exploitation not happens because of class division on the basis of wealth and income, but oppression occurs through a " steady process of the transfer of the results of the labour of the one social group to benefit another"[22]

- "Young uses Marxist feminist Christine Delphy's work to explain how in marriage women's labour benefits men without comp-arable remuneration. She makes it clear that exploitation consists not in the sort of work that women do at home but in the fact that these tasks are performed for those on whom they are dependent."[23]

- Furthermore, Young further explains her hypothesis by taking a gander at the work of another Marxist women's activist, Ann Ferguson, as per whom, ladies give another type of the transference of ladies' energies to men. Women furnish men and kids with passionate care and give men sexual fulfillment and as a gathering get moderately little of either from men.[24]

- Thirdly, she quotes David Alexander to argue that typically feminine jobs involve gender-based tasks requiring sexual labour, nurturing, caring for other's bodies or smoothing over

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[22]: Brenda Cossman, Shannon Bell, LiseGotell,Beckl L. Ross;"Bad Attitude's on Trial;Pornography, Feminism, and the Buttler Decision", *University Of Toronto Press*.p. 107*available at* (http://www.jstor.org/stable/10.3138/9781442671157)

[23] *Supra note* 5,*pg* 4.

[24] *Ibid.*

workplace tensions.[25]

This is a predominant work culture and functions as an implicit unattainable rank which turns out to be approaching on unthinkable for any ladies to break. Consequently ladies are suited more as nurses (healers) than as specialists, agents, officers.[26]

- According to some feminists, the cause is also *powerlessness*. According to Young,"the life of a non-professional in contrast to a professional is powerless in the sense that it lacks orientation towards the progressive development of capacities and avenues for recognition".[27]

- The Black liberation, feminists and minority right theorists have claimed that even *cultural imperialism* is responsible for marital rape, according to which there is universalization of a dominant group's experience and culture, and it is established as a norm.

- *Violence* also gives way for oppression of women. "Members of some groups live with the knowledge that they must fear random, unprovoked attacks on their persons or property,

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25 *Ibid.*
26 *Ibid*,pg 5
27 *Ibid* pg 58

which have no motive, but to damage, humiliate, or destroy the person."[28]

The Constitution of India and Marital Rape:

The Constitution of a nation is the content that mirrors the spirit of the country. The Indian Constitution arranges and controls force, guarantees human rights, adjusts the contending cases of social and individual intrigues, reflects the way of life and encounters of the nation and works as a vehicle for national advancement and unity.

According to the Indian constitution, each law that is gone in the nation must be in compliance with the standards and thoughts revered in the Constitution of India. Any law that neglects to meet this standard is viewed as *ultra vires* and is subject to be struck around the Courts and pronounced unlawful.

Article 14: Equal Protection of Law

The two requisites of a valid classification in Article 14 were laid down by the Supreme Court, as early as in 1952: -

a. The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and

[28] *Ibid* pg 62

b. The differentia must have a rational relation to the object sought to be achieved by the Legislation.[29]

Section 375 of the IPC criminalizes the offence of rape and protects a woman against forceful sexual intercourse against her will and without her consent. In any case, incidentally, Section 375 of the IPC makes a grouping as far as an exception that does not respect a compelling sex inside of a marriage as rape. The exception pulls back the assurance of Section 375 of the IPC from a wedded lady on the premise of her conjugal status. The grouping and differential treatment of wedded ladies lays on the presumption that wedded ladies, not at all like some other persons, have no enthusiasm for accepting security from the State against vicious and rape. The supposition further originates from the way that in a marriage, the wife is dared to have given an irreversible consent to sexual associations with her spouse. It is presented that such a suspicion isn't right, nonsensical and not in view of an understandable differentia.

Article 21: Right to Life and Personal Liberty

Post the case of *Maneka Gandhi* v. *Union of India*[30] this article has become the source of all forms of right aimed at protection of

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29 *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, 80;Also *see Supra note* 1,pg 10

30 AIR 1978 SC 597

human life and liberty. The meaning of the term 'life', has thus expanded, and can be suitably summed up in the words of Field J. in the judgment of *Munn* v. *Illinois*[31] where he held that life means 'something more than mere animal existence', which was additionallyacknowledged by the Supreme Court, India in the case of *BandhuaMuktiMorcha v. Union of India.*[32].

In light of this growing statute of Article 21, the principle of marital exclusion to rape disregards a large group of rights t-hat have risen up out of the expression 'right to life and individual freedom' under Article 21. There cannot be a more evident and outright infringement of Article 21. The marital exception to such type of an assault disregards the privilege to protection, right to substantial self-determination and right.

Right to sexual privacy

Though still not recognized under Indian Constitution, the SC in *State of Maharashtra* v. *Madhkar Narayan*[33]held that each lady was qualified for sexual security and it was not open to for any and each individual to abuse her protection as a when he wished or satisfied.

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31 94 US 113 (1877)

32 *BandhuaMuktiMorcha v. UOI* ,AIR 1984 SC 802, 811 (Supreme Court of India)

33 *State of Maharashtra* v. *MadhukarNarayan*,AIR 1991 SC 207 (Supreme Court of India)

The Judiciary View:

In the celebrated case of *Saretha* v.*T. Venkata*,[34] the Andhra Pradesh High Court held: "There can be doubtlessly a restitution of conjugal rights therefore upheld affronts the sacredness of the body and soul subjected to the declaration and bothers the honesty of such a man and attacks the marital privacy and domestic affections of a man".

"If State enforced sexual intercourse between husband and wife is a violation of the right to privacy, surely a woman's right to privacy is equally violated in case of non-consensual sexual intercourse with the husband. Rights and duties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association."[35]

In *Sree Kumar*v. .*Silvery Karun*[36], the Kerala High Court watched that in light of the fact that the wife was not living separately from her spouse under a declaration of partition or under any custom or use, regardless of the possibility that she is liable to sex by her spouse without wanting to and without her assent, offense under

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34 *T. Sareetha* v. *T.Venkata* ,AIR 1983 AP 356 (Supreme Court of India)

35 *Ibid.*

36 *Sreekumar and Anr.* v. *Pearly Karun* 1999 (2) ALT Cri 77, II (1999) DMC 174.

Section 376A, IPC won't be pulled in. For this situation, there was a progressing debate on separation between the two parties. From that point, a settlement was come to between the spouse and wife consented to keep on living together. The wife stayed with the spouse for two days amid which she charged that she was subjected to sex by her spouse without wanting to and assent. Subsequently the spouse was held not liable of assaulting his wife however he was accepted blameworthy of having done as such.

Conclusion:

The exception of conjugal marital rape from the domain of criminal law manages the presumption of the wife as elite property of the spouse. As expressed by Katherine O' Donnovan:

"It's immunity from the purview of the criminal law is explained on the grounds that the female victim is a wife. This justification can be understood in the context of the dominant familial ideology and female sexuality which treats a wife as property and as having no sexual agency or decision making in sexual activity within the marital contract".[37]

It is contended that marital rape ought to be criminalized in India, as this can be accomplished by applying an individual rights way to deal with physical power against ladies. Indian women organizations have succeeded to accomplish open mindfulness and

[37] Donnovan, Katherine O., *Family Law Matters,* 1, London: Pluto Press(1993).

to pass enactment on domestic violence at home, however marital rape has not been completely criminalized by canceling the difference between marital rape and a stranger rape. Be that as it may, marital rape will not be criminalized nor be punishable, until law making bodies and the general public recognize women's individual rights inside of the marriage.

Ideas regarding ladies' sexuality, and in this manner thoughts regarding non-marital and marital rapein Indian culture, start in the concepts of gender, disgrace and family respect, as opposed to women's rights and individual self-rule. In the event that the reformers see rape as a wrongdoing against a lady and her individual and real honesty and humankind, then marital and its discipline would be a lawful probability. To bring a change in the existing policy, we may use an individual rights rhetorical approach in working towards criminalizing marital rape in India, because marital rape will not be a State concern until the society and legislators understand women to have individual rights within marriage. [38]

In western nations, activists have worked inside of the individual rights system in trying to challenge social presumptions about marital relations. The individual rights worldview may have a comparative part in India, where social suspicions forestall groups

[38] *Supra note 1*, pg 31

and even womens' associations from discussing the shrewdness of marital rape.

As aforementioned, marital rape is not completely criminalized in India. It is obviously a genuine type of brutality against women and deserving of open public and State consideration. The studies till date show that ladies who are assaulted by their spouses are more prone to experience numerous attacks and frequently endure long –term physical and passionate outcomes. In this connection, marital rape may be much more traumatic than assault by an outsider on the grounds that a wife lives with her aggressor and she may live in steady dread of another strike whether she is awake or sleeping. Given the genuine impacts, there is an obviously a pressing requirement for criminalization of the offense of marital rape. India is moving toward positive legitimate change for ladies all in all, however further steps are important to guarantee both lawful and social change, which would come full circle in criminalizing marital rape and changing the basic social suppositions about a women in marriage.

"Thus Young's concept of heterogeneous public acknowledges difference as irreducible; however communication across those differences is possible. Therefore she advocates communicative ethics, which recognizes the need for significant interdependence, a commitment to equal respect and agreement on procedural rules of fair discussion and decision-making"[39]

[39] *Supra note 5.*

SAFTA AND ITS DISPUTE SETTLEMENT MECHANISM: AN APPRAISAL

Dr. G. Mallikarjun[*]

Abstract

Through this article an attempt has been made to analyze the implications of SAFTA on the members of the SAARC, its strengths as well as weaknesses with special focus upon the system of dispute resolution system provided under the agreement in line with the recent development towards the process of integration among the SAARC members and its relevance. The author argues that SAFTA agreement's dispute settlement provisions currently appear inadequate, they could nevertheless be amended to be more detailed and comprehensive, to assist in the realization of the objectives of the Contracting States, while equally benefiting the business community engaged in cross-border trade. This article argues that without certain key modifications to the dispute settlement mechanism, the desired interests and benefits of the SAFTA agreement remain illusory.

SAFTA is an outcome of the slow and staggering effort which was after much debate signed in 2005. The original rationale for

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preferential trading agreement (PTA) among SAARC countries stems from the conviction that these countries needed to pursue a policy of rapid industrialization in order to overcome their economic backwardness in the globalising world of today. Industrial and agricultural sectors of the SAARC countries need vast technological improvements to take advantage of the global market. It is also expected that regional co-operation in South Asia will become an important means of accelerating intra- regional trade and investment. In 1993, the member countries decided to liberalise preferential tariff concessions with the objective of achieving a free trade area (FTA) to promote and sustain mutual trade and economic cooperation within the SAARC region. The first regional agreement on economic cooperation was started with the Agreement on SAARC Preferential Trading Arrangement (SAPTA) which came to effect in 1995. However, in South Asia intra-regional trade failed to pick up a pace under the SAPTA due to limited product coverage and tariff preferences. Thus SAFTA came into existence to give more serious boost to regional cooperation. SAFTA followed a positive list approach, including flexible provisions for least developed countries (LDCs). At the Ninth SAARC Summit held in Male in 1997, the Heads of Governments decided to accelerate the pace of transition of SAARC to South Asian Free Trade Agreement (SAFTA) by the year 2001. In this paper the author analyses the significance of the SAFTA, its strengths and limitations, while focusing on Dispute

settlement under the SAFTA in the light of the recent integration seen among the SAARC members and its relevance.

SAFTA - The Genesis:

The progress of cooperative efforts among the South Asian nations has been rather slow due to regional geo-political challenges. Trade liberalisation and other market reforms came to guide SAARC since 1993 when the Member countries decided to liberalise under successive rounds of preferential tariff concessions with the ultimate objective of achieving a free trade area (FTA). The launching of South Asian Preferential Trade Arrangement (SAPTA) in 1995 was the first major political breakthrough for the SAARC since it was the first regional agreement on economic cooperation. Regional integration, often preceded by free trade agreements, can result in greater regional production and resource utilisation, although depending on the policy structure existing in the member countries. Expansion in trade could be termed welfare-enhancing (in case of trade-creation) or welfare-reducing (trade-diversion). In South Asia, however, intra-regional trade failed to gather momentum under the SAPTA due to limited product coverage and tariff preferences.

At the Ninth SAARC Summit held in Male in 1997, the Heads of Governments decided to accelerate the pace of transition of

SAARC to South Asian Free Trade Agreement (SAFTA) by the year 2001. In 2004 the South Asian Free Trade Agreement (SAFTA) was signed and it came into effect in 2006, replacing the SAPTA. Though SAFTA is more ambitious than SAPTA, yet SAFTA is not to be treated as an ambitious free trade agreement, given that member nations retain sensitive lists of commodities and services trade is excluded. More particularly the implementation of SAFTA has faced political hurdles in certain situations. One of the main reasons is continuation of NTBs by signatories. Continued geo-political suspicions, fears of economic nationalism, domination by Indian goods, etc. are responsible for SAFTA non-progress. It is evident from the denial of the Most Favoured Nation (MFN) status by Pakistan to India when both are WTO members is the result of the political divide between India and Pakistan. Consequently, political issues have overshadowed economic interests in the official corridors, although cultural linkages between the nations remain strong. Thus apprehensions thrive as to how effectively the schedules of the SAFTA agreement would actually be implemented[1].

SAFTA - An Evaluation:

The South Asian Association for Regional Cooperation (SAARC) comprising Bangladesh, Bhutan, India, the Maldives, Nepal,

[1] See Aparna Sawhney and Rajiv Kumar, "Why SAFTA?' available at http://www.cuts- citee.org/pdf/RREPORT08-AP-01.pdf.

Pakistan and Sri Lanka is a dynamic institutionalized regional cooperation in South Asia, basically perceived as an economic grouping to work together for accelerating the pace of socio-economic and cultural development[2].

It is also to be noted that he liberalization in merchandise trade as envisioned in SAFTA is much less ambitious compared to the autonomous trade liberalization adopted by South Asian countries since the early 1990s. In this regard observations of Aparna Sawhney and Rajiv Kumar[3] need special mention in the following words:

> *Liberalisation can be pursued by a country either unilaterally (i.e. on a non-reciprocity basis) or multilaterally (i.e. based on reciprocity under the multilateral trading system of GATT/WTO. When unilateral liberalisation is offered on a non-discriminatory basis to all countries, it is termed autonomous. Indeed unilateral autonomous trade reforms accounted for approximately 66 percent of the tariff reductions among all developing countries between 1983 and 2003, while multilateral*

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2 Verinder Grover, ed., Encyclopaedia of SAARC (South Asian Association of Regional Cooperation) Nations, New Delhi, 1997.

3 Aparna Sawhney and Rajiv Kumar[3], 'Why SAFTA?' available at http://www.cuts-citee.org/pdf/RREPORT08-AP-01.pdf)

> *agreements and regional (discriminatory) agreements accounted for 25 and 10 percent of the tariff reductions. (World Bank 2005: page 42). Pakistan's trade reforms in the late 1990s fall in the category of autonomous liberalisation; similarly India has made dramatic reductions in average tariffs autonomously since 1991. On the other hand, the reduction of sensitive products (that have faced MFN tariffs, but will now be offered preferential treatment) announced by India in April 2007, would fall under the category of unilateral discriminatory liberalisation since it is offered only to SAARC least developed countries.*

The trade integration observed in South Asia today is the result of the Preferential Trade Agencies (PTA), i.e. SAPTA implemented in the 1990s whose limitations in the form of restrictive rules of origin (RoO), and destination (port restrictions) and product coverage effectively reduced the scope of the arrangement was inherited by the SAFTA agreement which was implemented in July 2006. Hence by taking into consideration of several quantitative and qualitative which showed SAPTA/SAFTA's potential gains, but the findings have largely remained

inconclusive. The critical empirical finding of Moinuddin[4] which differs from some earlier works is related to SAFTA's potential for generating intra-sub regional trade. The regression with country-pair panel data took into account the typical gravity variables as well as additional explanatory and dummy variables that were found to be relevant for investigating the effects of FTAs on trade flows. The relationship between the trading partners' GDP and export flows was found to be more than proportional. This phenomenon, coupled with the impressive economic performance of South Asian countries in recent years, may lead the countries of this region to further enhance their trade flows. Moreover, an additional regression with overall trade restrictiveness indices has suggested that scaling down tariff and nontariff barriers will positively impact on intra-bloc trade among South Asian economies. This calls for an effective implementation of SAFTA's trade liberalization program. There are several reasons for optimism about SAFTA becoming a cohesive and profitable regional trading bloc. South Asian economies, which typically maintain high trade restrictions, will benefit from improved

[4] ADB. 2013. Regional Cooperation and Integration in a Changing World. Manila: ADB. Moinuddin, M. 2013. Fulfilling the Promises of South Asian Integration: A Gravity Estimation. ADBI Working Paper Series.No. 415. Tokyo: Asian Development Bank Institute.

regional and global integration by reducing trade and non-trade barriers[5].

Dispute Settlement under the SAFTA – Analysis:

Following the footsteps of SAPTA, the SAFTA also provides for a dispute settlement mechanism that involves bilateral consultations, recommendations of Committee of Experts and review by the SAFTA Ministerial Council (SMC), which is known as the highest administrative decision making body of the SAFTA. Even the implementation of the Agreement in true spirit is in the hands of SAFTA Ministerial Council. Whereas Committee of Experts is established to monitor, review and facilitate implementation of the provisions of the Agreement and it also functions as a Dispute Settlement Body under the Agreement[6].

The agreement also envisages and makes provision for disputes which may arise out of interpretation or application of an agreement and its related instruments[7]. Nature of the dispute settlement provision primarily provides for consultations and review of dispute settlement procedures at regular intervals and appellate review of a decision by the SMC.

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5 Mustafa Moinuddin, Economic integration and trade liberalization in South Asia, http://www.asiapathways-adbi.org/2013/08/economic-integration-and-trade-liberalization-in-south-asia/)

6 Article 10 of SAFTA

7 Article 20 of SAFTA

It is an undisputed fact the dispute settlement mechanism of SAFTA has catered to the shortcomings of SAPTA. Nevertheless many at times even this agreement has fallen short of providing the disputing parties with an unambiguous and precise resolution of their disputes. Though the agreement is regional in nature and hence by logic should ideally understand and cater to the local and regional needs, however its effective implementation has been a matter of question mark even with as less as seven countries as its member states. Ambiguity with regards to the scope and jurisdiction has been one of the major loopholes of this agreement and has handicapped the SMC from addressing various pertinent concerns. Undefined qualification requirement for the members of the adjudicatory panel and lack of clarity with regards to the scope of appellate review has also been few of the main concerns amongst the regional partners. Another crucial provision which does not find a place in the agreement is the relationship between the WTO and the SAFTA especially with respect to dispute settlement. Questions have arisen as to whether members of both the agreements can invoke concurrent jurisdiction under both the agreement. Neither of the agreement provides for exhaustion of local or regional remedies as a prior requirement before one can approach the international dispute settlement bodies. Various procedural issues like nature of assistance that a party is entitled to or validity of unilateral actions has been left unanswered.

Discretionary powers for procedures and lack of time frame to resolve disputes.

When dispute is not settled through consultations, it could be referred to the Committee of Experts (COE). COE is a dispute settlement body under article 10(5)-(7) will investigate into the matter before making certain recommendations to the parties to dispute. However, these recommendations are not binding on the parties to the dispute. The appellate review mechanism under the SAFTA is only provides a skeletal frame work for the examination of the recommendation of COE. Parties to the dispute when not satisfied with recommendations of COE, contracting sate may prefer an appeal to the SMC. Lack of clarity on the scope of review and basis for upholding, modifying or reversing the recommendations of the COE undoubtedly generates reluctance on the parties to make an appeal.In addition to its recommendations, the COE or SMC may suggest ways in which the concerned Contracting State could implement the recommendations[8].

Therefore, for an effective implementation of the agreement and effective enforcement mechanism is very essential. The vast discretionary powers under the agreement coupled with weak enforcement mechanism SAFTA agreement leaves the Contracting States vulnerable in the early stages of a dispute thereby leaving

[8] Rojina Thapa, Dispute-Settlement-Mechanism-under-safta-agreement-a-tiger-without-teeth (http://www.aija.org/2015/04/ /)

the success of the agreement solely upon the initiatives taken by the member nations in good faith.

Conclusion:

From the above discussion it is concluded that the SAFTA has positive impacts on the socioeconomic conditions of the people of South Asia. Yet coming to the dispute settlement mechanism under SAFTA, it needs to have more detailed provisions with regard to jurisdiction, appointment and working procedures of the bodies rendering recommendations, and in its appellate review process. The major drawback with the settlement mechanism under SAFTA is not having provisions which are necessary for the meaningful enforcement recommendations. Therefore there is an urgent need to strengthen the dispute settlement under the SAFTA by prescribing detailed provisions with detailed procedure to be followed by COE and SMC. The scope of appeal and review should be clearly prescribed.

BAY OF BENGAL MARITIME BOUNDARY ARBITRATION BETWEEN BANGLADESH AND INDIA

(BANGLADESH V. INDIA)

DECIDED BY THE PERMANENT COURT OF ARBITRATION

The Hague, July 8, 2014

Introduction:

The Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (the "Convention") in the matter of the Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India issued its Award on July 7, 2014 in respect of the delimitation of the maritime boundary between the two States. The Tribunal unanimously decided that it has jurisdiction to identify the land boundary terminus and to delimit the territorial sea, the exclusive economic zone, and the continental shelf between the Parties within and beyond 200 nautical miles in the areas where the claims of the Parties overlap. The Tribunal was also unanimous in identifying the location of the land boundary terminus between Bangladesh and India and in determining the course of the maritime boundary in the territorial sea. By a majority of four votes to one, the Tribunal determined the course of the maritime boundary line between Bangladesh and India in the exclusive economic zone and the continental shelf within and beyond 200 nautical miles.

The Judgment:

The Arbitral Tribunal's Jurisdiction

The Arbitral Tribunal recalled that both Bangladesh and India are parties to the Convention. Having analysed the relevant provisions of the Convention, the Tribunal found that Bangladesh had complied with the requirements for submission of the dispute to arbitration under Annex VII. The Tribunal also noted the agreement between the Parties that the Tribunal had jurisdiction to identify the location of the land boundary terminus and to delimit the continental shelf beyond 200 nautical miles.

Location of the Land Boundary Terminus

Bangladesh and India agreed that the location of the land boundary terminus was to be determined by application of the 1947 award rendered by Sir Cyril Radcliffe, Chairman of the Bengal Boundary Commission (the "Radcliffe Award"), as well as Notification No. 964 Jur. of the Governor of Bengal of 1925. The Radcliffe Award drew the boundaries between India and the new State of Pakistan (the eastern portion of which subsequently became Bangladesh), and provided in Annexure A that the boundary line shall "run southwards along the boundary between the Districts of Khulna and 24 Parganas, to the point where that boundary meets the Bay of Bengal." Annexure B of the Radcliffe Award included a map of Bengal, indicating the boundary determined by that Award.

The boundary between the Districts of Khulna and 24 Parganas, referenced in the Radcliffe Award, had itself been set out in the 1925 Notification No. 964 Jur. in the following terms: "the western boundary of district Khulna passes along the south-western boundary of Chandanpur . . . till it meets the midstream of the main channel of the river Ichhamati, then along the midstream of the main channel for the time being of the rivers Ichhamati and Kalindi, Raimangal and Haribhanga till it meets the Bay." The Parties disagreed on the interpretation of Annexure A to the Radcliffe Award and of the 1925 Notification. They also disagreed on the relevance and the interpretation of the map in Annexure B to the Radcliffe Award.

Having considered the Parties' views, the Tribunal determined that the midstream of the main channel of the Haribhanga River must be located as it was in 1947, the date of the Radcliffe Award. It also found that the Radcliffe Award, incorporating the 1925 Notification, referred to the Haribhanga River alone and not to the combined waters of the Haribhanga and Raimangal Rivers as they meet the Bay of Bengal. The Tribunal used the map in Annexure B to the Radcliffe Award to identify the proper coordinates of the land boundary terminus, which was then transposed to a modern chart. The resulting position of the land boundary terminus is 21° 38′ 40.2″N, 89° 09′ 20.0″E (WGS-84).

Delimitation of the Territorial Sea

Both Parties agreed that article 15 of the Convention governs the delimitation of the territorial sea in this case. That provision provides for the boundary between two States with opposite or adjacent coasts to be the median, or equidistance, line unless either "historic title" or "special circumstances" apply. Neither Party claimed the existence of any agreement between them with respect to the boundary or a "historic title" within the meaning of article 15. They disagreed, however, on the interpretation of "special circumstances," whether such circumstances exist in this case, and the implication any special circumstances for the method of delimiting the boundary.

The Tribunal emphasized that article 15 of the Convention refers specifically to the median/equidistance line method for the delimitation of the territorial sea, in which the boundary takes the form of a line, every point of which is equidistant from the nearest points on the coasts of the Parties. In constructing a provisional median/equidistance line, the Tribunal decided not to rely on base points located on low tide elevations.

The Tribunal noted, however, that the land boundary terminus, determined by reference to the Radcliffe Award, is not at a point on the median/equidistance line. The Tribunal considered this to constitute a special circumstance and decided that the boundary

should take the form of a 12 nautical mile long geodetic line continuing from the land boundary terminus in a generally southerly direction to meet the median line at 21° 26′ 43.6″N; 89° 10′ 59.2″E.

Delimitation of the Exclusive Economic Zone and the Continental Shelf within 200 nautical miles

Beyond the limit of the territorial sea, the Convention entitles States to sovereign rights over an exclusive economic zone extending to 200 nautical miles from the coast and over the continental shelf. The Parties agreed that articles 74(1) and 83(1) of the Convention govern the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles. These articles provide that the delimitation "shall be effected by agreement on the basis of international law, . . . in order to achieve an equitable solution".

The Parties disagreed, however, on the method to be used pursuant to this provision. India argued for the application of the "equidistance/relevant circumstances" method in which a provisional equidistance line is identified and then adjusted if relevant circumstances so require. India considered, however, that no adjustment was necessary in the present case. In contrast, Bangladesh argued that the concavity of the Bay of Bengal and the

instability of the coast called for the application of the "angle-bisector" method. Under this approach, the overall direction of the Parties' coasts is first identified, and the angle formed by these lines is then bisected to produce the boundary line.

In the Award, the Tribunal considered that the "equidistance/relevant circumstances" method is preferable unless, as the International Court of Justice noted in another mater, there are "factors which make the application of the equidistance method inappropriate." The Tribunal held that this was not the case, noting that both Parties had been able to identify base points that would permit the construction of a provisional equidistance line, and decided that it would apply the equidistance/relevant circumstances method.

Turning to the existence of relevant circumstances, the Tribunal did not consider the instability of the coast of the Bay of Bengal to be a relevant circumstance that would justify adjustment of the provisional equidistance line. The Tribunal emphasized that what matters is the coast line at the time of delimitation and that future changes in the coast cannot alter the maritime boundary. The Tribunal concluded, however, that the concavity of the Bay of Bengal was a relevant circumstance and that, as a result of such concavity, the provisional equidistance line produced a cut-off effect on the seaward projections of the coast of Bangladesh.

The Tribunal considered that the cut-off required an adjustment to the provisional equidistance line in order to produce an equitable result.

Consistent with the concept of a singular continental shelf, the Tribunal decided on the adjustment of the provisional equidistance line within 200 nautical miles together with the delimitation beyond 200 nautical miles.

Delimitation of the Continental Shelf beyond 200 nautical miles

Beyond 200 nautical miles from the coast, the Convention provides in certain circumstances for States to exercise sovereign rights over the continental shelf. The Parties agreed that both have entitlements to the continental shelf beyond 200 nautical miles, and that neither may claim a superior entitlement based on geological or geomorphological factors in the overlapping area. The Parties disagreed, however, regarding the appropriate method for delimiting the continental shelf beyond 200 nautical miles.

The Tribunal was of the view that the appropriate method for delimiting the continental shelf remains the same, irrespective of whether the area to be delimited lies within or beyond 200 nautical miles. Having adopted the equidistance/relevant circumstances method for the delimitation of the continental shelf within 200 nautical miles, the Tribunal used the same method to delimit the

continental shelf beyond 200 nautical miles. Having decided that the concavity of the Bay of Bengal required the adjustment of the provisional equidistance line within 200 nautical miles, the Tribunal was also of the view that an adjustment was required beyond 200 nautical miles.

Adjustment of the Provisional Equidistance Line

Having found that the concavity of the Bay of Bengal required the adjustment of the provisional equidistance line both within and beyond 200 nautical miles, the Tribunal proceeded to identify the adjustment that it considered necessary to achieve an equitable result. The Tribunal noted that, in seeking to ameliorate excessive negative consequences the provisional equidistance line would have for Bangladesh, the Tribunal must not adjust the line in a way that would unreasonably encroach on India's entitlements in the area.

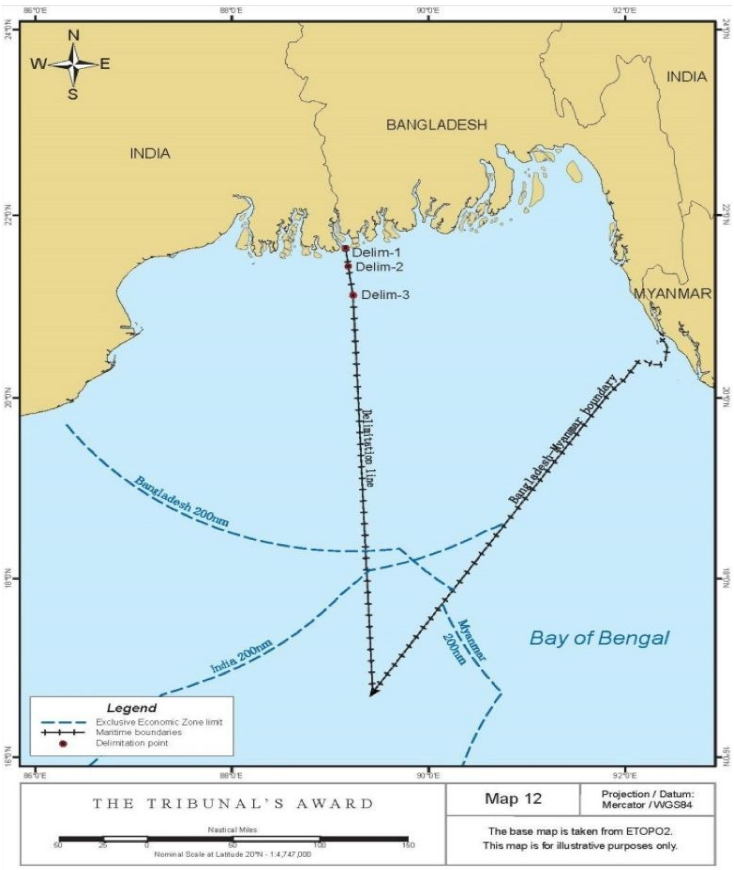
Keeping these considerations in mind, the Tribunal decided that the equidistance line should be adjusted beginning at Delimitation Point 3, which the Tribunal considered to be the point at which the cut-off effect on coast of Bangladesh began. From that point, the Tribunal decided that the boundary would be a geodetic line with an initial azimuth of 177° 30′ 00″ until this line meets with the maritime boundary between Bangladesh and Myanmar.

Disproportionality Test

The Parties agreed that the final step in the delimitation process involves a test to ensure that the delimitation line does not yield a disproportionate result. This test compares the ratio of the relevant maritime space accorded to each Party to the ratio of the length of the Parties' relevant coasts. The Tribunal evaluated the maritime areas that would be allocated to each Party by its adjusted delimitation line and concluded that, in comparison to the lengths of the Parties' coasts, the allocation was not disproportionate.

Grey Area

Finally, the Tribunal noted that the delimitation line it had adopted gives rise to an area that lies beyond 200 nautical miles from the coast of Bangladesh and within 200 miles from the coast of India, and yet lies to the east of the Tribunal's delimitation line. Within this "grey area", the Tribunal noted, Bangladesh has a potential entitlement with respect to the continental shelf, but not an exclusive economic zone, while India is potentially entitled to both zones. Accordingly, the Tribunal decided that, within the grey area, the boundary line delimits only the Parties' sovereign rights with respect to the continental shelf, and does not otherwise limit India's sovereign rights to the exclusive economic zone in the superjacent waters.



Editor's View:

The Award in the case places a high significance towards the development of International Law with respect to maritime disputes. The awards has been accepted by both the parties in a very positive manner thereby developing the friendly relations with each other taking into consideration the geo strategic or geo political significance of the Indian Ocean region as well as the South Asian sub-region. The award moreover, has also a wide

security and economic implications for India as well as Bangladesh and also the entire region of Bay of Bengal.

The award also contributes towards the establishment of strategic partnerships among the nations sharing borders in the Bay of Bengal. It is likely to also have a very positive impact on the emerging multilateral forum such as BIMSTEC.

The acceptance of award by both countries opens the platform for exploration oil as well as gas in the Bay of Bengal region. International legal experts have hailed the tribunal's encouragement to parties to exercise their sovereign rights and perform their duties under the convention with due regard to the rights of the other. Apart from this the award also has huge economic significance for the Bangladesh state. It has removed the barriers for Dhaka to open up its water for foreign firms for the purposes of exploration and exploitation of hydrocarbons in the region of Bay of Bengal. India is also pleased with the award and considers it as a diplomatic breakthrough for several reasons including India's sovereignty over New Moore Island. India's policy makers could now plan a long-term strategy for the economic development of the Bay of Bengal region.

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL

(BANGLADESH V. MYANMAR)

DECIDED BY INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Date of Judgement: 14 March 2012

Introduction:

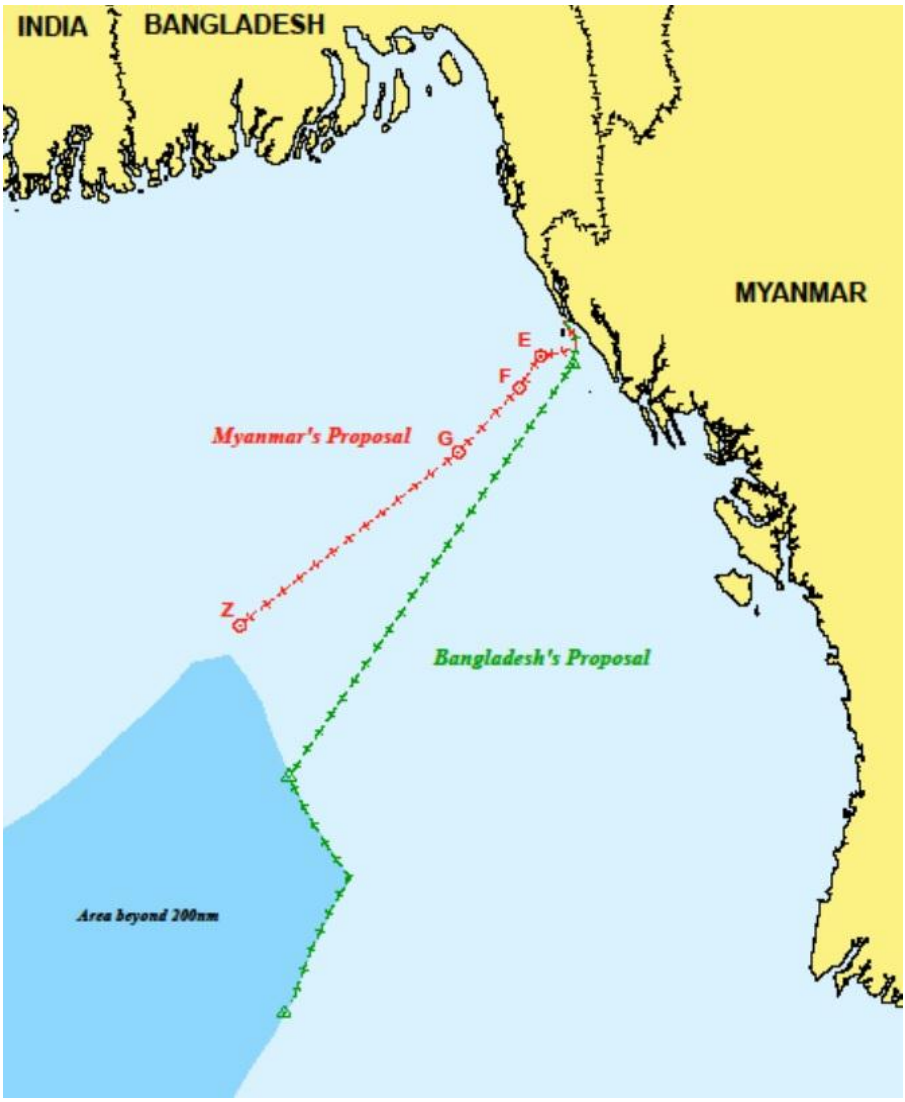
The Myanmar-Bangladesh dispute is the first maritime boundary case for International Tribunal for The Law of Sea (ITLOS). It set precedence for a peaceful and equitable resolution, allowing the countries to move forward with natural resource extraction.

On 14 March 2012, the ITLOS released its case judgement for the Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Judgement 2012). The 1982 United Nations Convention on the Law of the Sea (UNCLOS) established ITLOS as an independent judiciary to adjudicate maritime disputes and claims. The Tribunal is composed of 21 independent elected members with maritime law expertise. In this specific case, both Bangladesh and Myanmar also picked one member each to represent their respective countries as ad-hoc judges. While ITLOS had previously adjudicated in 15 cases, this was the first case involving ITLOS to

concern maritime boundaries. Before this, precedence concerning maritime boundary disputes derived from the case judgements of the International Court of Justice (ICJ) (International Boundary Research Unit 2009). The advantage that ITLOS has over ICJ in maritime claim arbitration is in the case expediency and the maritime technical expertise, both of which ICJ lacks.

Immediately after the delivery of the judgment by the ITLOS in the Bangladesh/Myanmar maritime delimitation case on March 14, there were claims by AL of a complete victory over Myanmar. These claims were complemented by casting blame on BNP for its failure to have the maritime boundary dispute resolved. BNP, on the other hand, has taken the position that the government's campaign over winning the case is a trick to deceive people and urged the government not to confuse people by telling lies.

The claims of both political parties are far from accurate. Bangladesh won on some points in the case, and lost in others. Likewise, Myanmar won on some points and lost in others. The outcome, thus, is one where neither party had a complete victory or a total defeat. ITLOS delimited maritime boundary between Bangladesh and Myanmar in three maritime zones, which are, the territorial sea, the exclusive economic zone (EEZ) and the continental shelf.



Sketch map composed by ITLOS illustrating the competing claims of Bangladesh (green) and Myanmar (red).

Relevant Provisions of United Nations Convention on Law of Sea (UNCLOS)

The law that is applied in respect of maritime delimitation is set out in the United Nations Convention on the Law of Sea of 1982 (UNCLOS). According to Articles 3, 4 and 5 of UNCLOS, territorial sea extends to 12 nautical miles (nm) from the low-water line along the coast, referred to as the baseline. The coastal state has full sovereign rights over the territorial sea, similar to rights that a state has over its land territory. According to Articles 55 and 57, exclusive economic zone is an area beyond and adjacent to the territorial sea, which extends to 200 nm from the baseline. In the EEZ, coastal state has sovereign rights for exploring, exploiting, conserving and managing natural resources.

According to Article 76, continental shelf is the seabed and the subsoil that extends from the coast throughout the natural prolongation of the land territory. The outer limit of the continental shelf is either the outer edge of the continental margin, or to a distance of 200 nm from the baseline where the outer edge does not extend up to that distance. Thus, while EEZ extends up to a maximum of 200 nm, the continental shelf can extend much further, depending on the location of the outer edge of the continental margin. According to Article 77, coastal state has sovereign rights of exploring and exploiting natural resources of the continental shelf. These rights extend to natural resources of

the seabed and the subsoil and, unlike EEZ, do not extend to the waters or to the air space above the waters. Under the applicable provisions of UNCLOS, delimitation of the territorial sea, where the coasts of two states are adjacent to each other (like the coasts of Bangladesh and Myanmar), must be made on the basis of the equidistance principle while delimitation of the EEZ and the continental shelf must be made with the aim to achieve an "equitable solution." Equidistance line being the median line, every point of which is equidistant from the nearest points on the baselines of the adjacent states, its application in delimiting the territorial sea does not pose any problems. However, equity being an abstract notion, in delimiting the EEZ and the continental shelf, this abstract notion needs to be given a more concrete meaning.

Case Law and State Practice

Over many years, the International Court of Justice and a number of international arbitration tribunals, which adjudicated disputes on maritime boundary, have sought to provide a concrete understanding to the notion of "equity" in delimiting the EEZ and the continental shelf. According to these decisions and practice, the delimitation process should begin by first establishing a provisional equidistance line, which may be adjusted in the light of "relevant circumstances" for achieving an equitable solution. In the Bangladesh/Myanmar case, ITLOS strictly followed the

UNCLOS and the aforesaid case law and state practice. Thus, ITLOS delimited the territorial sea boundary by applying the equidistance principle and the EEZ and the continental shelf boundary by applying "equidistance/relevant circumstances" principle.

Territorial Sea

Bangladesh argued that the Agreed Minutes of discussions between the parties in 1974 and 2008 constituted an agreement regarding territorial sea boundary, while Myanmar denied any such agreement. ITLOS decided that those Minutes did not constitute an agreement and accordingly proceeded to delimit the territorial sea. In the end, by 21 votes to 1, an equidistance line from the base points of Bangladesh and Myanmar was drawn by ITLOS as the territorial sea boundary. Likewise, an equidistance line formed the boundary between St. Martin's Island and Myanmar, but where the territorial sea of the St. Martin's Island no longer overlapped with the territorial sea of Myanmar, Bangladesh was allowed to extend the territorial sea of the island to 12 nm.

Delimitation of the Exclusive Economic Zone (EEZ) and the Continental Shelf

With respect to the EEZ and the continental shelf, Bangladesh argued that "equidistance" was not an appropriate method, as it did not produce an equitable result. Bangladesh argued that in view of

the configuration and concavity of its coast, ITLOS should apply the “angle-bisector method” in delimiting the EEZ and the continental shelf. "Angle-bisector method" is an alternative to the equidistance method and is used much less frequently than the equidistance method. Myanmar, on the other hand, opted for the "equidistance/relevant circumstances" method.

ITLOS decided in favour of the "equidistance/relevant circumstances" method and accordingly established a provisional equidistance line and then adjusted that line taking into account the "relevant circumstances." The first step in drawing an equidistance line is selection of base points from which the line is to be drawn. Since we opposed the equidistance method, we did not identify any base points. ITLOS, therefore, relied on the five base points identified by Myanmar and selected a sixth base point itself. A provisional equidistance line was drawn relying on those six base points. Having drawn the provisional equidistance line, the Tribunal considered the relevant circumstances. In this context, Bangladesh argued that there were three main relevant circumstances, which should be taken into account. These were the concave shape of Bangladesh's coastline, the St Martin's Island and the "Bengal depositional system," which connected the landmass of Bangladesh with the seafloor of the Bay of Bengal. Myanmar, however, argued that there did not exist any "relevant

circumstance" that might lead to an adjustment of the provisional equidistance line.

The Tribunal accepted the concavity of the coast as the only "relevant circumstance" and declined to find the St. Martin's Island or the depositional system as being relevant. Accordingly, the Tribunal decided that the provisional equidistance line should be adjusted so that, due to the concavity of the coast, the delimitation line did not cut off the seaward projection of Bangladesh's EEZ and continental shelf. The Tribunal emphasised that this adjustment had to be done in a balanced way so as to avoid drawing a line having a converse distorting effect on the seaward projection of Myanmar's maritime zones. In the end, by 21 votes to 1, the Tribunal drew an adjusted equidistance line as the boundary in the EEZ and the continental shelf.

EEZ and Continental Shelf within 200 Nautical Miles

Every state that claims a continental shelf beyond 200 nm (often referred to as "outer continental shelf"), is required to limit its outer edge in accordance with Article 76. Such a limit could be, for instance, 350 nm from the coast. Upon delimiting the outer limit, every state is required to submit information about the limit to the Commission on the Limits of the Continental Shelf ("Commission"), which is a body under the UNCLOS. The final

and binding outer limit of the shelf must be established by a coastal state on the basis of the recommendations of the Commission.

There could be an issue of delimiting the lateral boundary (as opposed to outer boundary) of the outer continental shelf between two adjacent states such as, Bangladesh and Myanmar. In addition to the delimitation of the territorial sea, the EEZ and the continental shelf, Bangladesh submitted to ITLOS the issue of the delimitation of the lateral boundary of the outer continental shelf. Myanmar, however, argued that the Tribunal either lacked jurisdiction or, if it had jurisdiction, it should decline to exercise its jurisdiction in respect of lateral boundary until the outer limits of the shelf had been established on the basis of recommendations of the Commission. The Tribunal decided that the fact that the outer limits had not been established did not preclude the Tribunal from discharging its obligation to adjudicate the matter.

Bangladesh argued that it alone was entitled to the entire continental shelf beyond 200 nm because the outer continental shelf was the natural prolongation of Bangladesh's land territory. Myanmar argued that the controlling concept was not "natural prolongation" but the "outer edge of the continental margin." The Tribunal rejected Bangladesh's claim that Myanmar was not entitled to a continental shelf beyond 200 nm.
In the end the Tribunal held that the adjusted equidistance line

delimiting the EEZ and the inner continental shelf would continue in the same direction delimiting the outer continental shelf of the two states until the line reached a point where the rights of third states might be affected.

Test of Disproportionality

Having established the maritime boundary line, the Tribunal checked whether the line had caused any significant disproportion by reference to the ratio of the length of the coastlines of the two states and the ratio of the maritime area allocated to each state. It noted that the length of the relevant coast of Bangladesh was 413 kilometres, while that of Myanmar was 587 kilometres. The ratio of the length of the coasts was 1:1.42 in favour of Myanmar. The adjusted equidistance line allocated approximately 1,11,631 square kilometres of sea area to Bangladesh and approximately 1,71,832 square kilometres to Myanmar. The ratio of the allocated maritime areas was approximately 1:1.54 in favour of Myanmar. The Tribunal concluded that this ratio did not lead to any significant disproportion in the allocation of maritime areas to Bangladesh and Myanmar relative to the respective lengths of their coasts.

Editor's View

The ITLOS judgement on this case is significant for both Myanmar and Bangladesh. The clearly demonstrates that the result of the case was a balanced approach towards maintaining the interest of

both the parties. The resolution can be considered as a peaceful one thereby allowing both the parties to start with the exploring and developing infrastructure necessary for extracting resources from the Bay of Bengal.

With regard to the implication of the case towards the maritime disputes that may arise in future, ITLOS has set a precedence thereby adjudicating its first dispute involving maritime claim. It is a great contribution towards the development of the International Law for resolving disputes of this nature. It is however, unfortunate to note that the particular case failed to further address the issue of interpreting the proper characteristics of islands as well as the requirements for respective exclusive economic zones and continental shelf. Nonetheless, the case contributed towards building on the International Court of Justice (ICJ) precedence for maritime territorial claims.

BOOK REVIEW

Muchkund Dubey,

India's Foreign Policy

Updated edition, Oriental Blackswan Private Limited,
Hyderabad, 2016, pp. 446.

Reviewer: P.V.RAO[*]

Few diplomats recount their professional reminiscences after superannuation from foreign policy profession. Mostly those interested sharing with the public pen articles or commentaries on specific foreign policy issues but only few sit down to narrate their knowledge through books. Even among those such authors, very few diplomats undertake critical assessment of the country's diplomatic record. In recent years a few Indian diplomats who held high positions in the Indian foreign policy establishment, Rajiv Sikri and Muchkund Dubey among them, have undertaken critical evaluation of Indian foreign policy domain, decision-making, and the establishment itself. Very rare and bold exercise by those who served India abroad in key positions.

The book under review was first published in 2013. This reviewer was invited to be a lead commentator in its launching ceremony at Hyderabad. Current edition (2016) is a revised and updated version of the book including, as the author Muchkund Dubey claims, a chapter on Indo-Pak relations. The chapters cover almost all vital

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areas of India's relations with neighbours, China, Bangladesh (two sections on this subject), US, Russia, Japan, UN and very deservingly one on Indian diaspora.

While it is outside the ambit of this review to analyse every major policy domain, its major focus is on India's policy toward SAARC and its member countries. Author, in contrast to mainstream accounts which blame more the neighbours than India for the retarded progress of the SAARC or hold Indo-Pak relations trapping SAARC as a hostage to their rivalry, takes an entirely different position. He instead holds India more responsible for the tardy progress of the regional association.

Dubey contends that New Delhi should exercise more restraint to sustain SAARC summits/dialogues instead of overreacting by calling for postponement whenever it had a quarrel with a neighbor, mainly Pakistan. To quote him: "At the regional level, India has been responsible on more than one occasion to the postponement of SAARC summits. This has left other SAARC countries unhappy and resentful." (p.77). Author's argument is that bilateral problems with neighbours which have of course a recurring pattern given the geo-political uniqueness of the largest of South Asian states sharing its borders with every other state in the neighbourhood, should not tempt India to invoke as a "valid excuse for abjuring or keeping in abeyance summit-level contacts and dialogues that have come to be recognized as an effective

means of removing mistrust and suspicion and laying the basis for resolving bilateral issues." Such kneejerk reactions by India did not serve any purpose except "being viewed as instances of India's arbitrary and overbearing demeanour." (p.77)

Regional economic multilateralism involves mutual economic bargain, tradeoffs as well as burden-sharing by the participating countries. In the case of SAARC, the largest economic power of the region is expected to share more and expect lesser gains from its relatively weaker partners. Atleast this is the dominant economic logic India is called upon to emulate. Given India's economic preponderance, it is generally suggested that she should be more generous and forthcoming in benefitting her weaker neighbours with lesser or no reciprocal gains. The Gujral Doctrine of 1990s did try to translate the ideal into tangible policies committing India to offer tariff cuts and positive trade baskets with least or no reciprocal demands from the SAFTA partners, the least developed countries (LDCs) of the group.

Informed analysts and regional integration theorists however conclude that Indian offers were more symbolic than substantial. India offered trade concessions on more than 3500 out of the 5000 plus goods included in the SAFTA positive basket. But these are, the argument runs, either less or non-traded items which India claims enjoy tariff cuts in entering Indian market. Muchkund

Dubey agrees with this criticism and calls for greater and substantial Indian trade concessions to her SAFTA partners. Says the author that "India has taken an exception from granting free trade treatment for those products that are in the negative list under SAFTA." Going a step further, author argues that though Pakistan failed to reciprocate granting MFN status to India, "in its enlightened self-interest India could have moved a step ahead forward and offered unilateral free trade treatment to Pakistan also without much damage to its industry." (p.81)

Such observations as the above undoubtedly convey the message that Dubey, the former foreign secretary of India, pitches for a benign policy orientation by India towards her SAARC partners in her own long-term interest. No wonder Dubey's enlightened self-interest and non-reciprocal approach to dealing with her neighbours has not gone well with all the Indian policy analysts and his former colleagues.

Last chapter on Indian diaspora is a least debated of the foreign policy discourse in India, despite the notable political and economic participation by overseas Indians. Dubey rightly appreciates this fact in observing that "there is now a growing reciprocity between the diaspora and India. India now regards them as an asset while they look upon India as a source of intellectual and cultural inspiration as well as a land of opportunities." p.(419). Author could also have added that among the economic

contributions by overseas Indians, they are ranked as the largest contributors of foreign remittances to Indian economy compared to any other global diasporic group.

The book, unfailingly, is a valuable intellectual asset to the SAARC students and scholars in learning the dynamics of Indian regional diplomacy. Penned by India's leading diplomat and policy-maker, Dubey has offered to the readers rare and very useful insights into the Indian foreign policy making process, prejudices and mistakes committed, the lost opportunities and of course recommended policy gestures particularly toward Indian neighbours at bilateral and multilateral levels. In particular, scholars engaged in South Asian regional cooperation and India's role in would not fail in drawing critical inputs and information, otherwise may be missing elsewhere in related literature on SAARC.

Covers almost the entire gamut of Indian foreign policy by Amb. Dubey former foreign secretary and of the distinguished diplomats of the country.

INDIAN PRIME MINISTER SHRI NARENDRA MODI'S ADDRESS TO THE PARLIAMENT OF SRI LANKA DATED MARCH 13, 2015

The Prime Minister, Shri Narendra Modi on his first such trip by serving Indian premier to the island nation in 28 years addressed the Sri Lanka Parliament and strongly pitched for enhanced cooperation in key areas of maritime security and counter-terrorism. The Prime Minister said that economic ties between India and Sri Lanka are key to the relationship between the two neighbours and said that agreements he had reached with the island's President Maithripala Sirisena, would simplify trade between the countries.

He said that both the countries are on the same journey: to transform the lives of our people. In order to make the path easier, journey quicker and the destination nearer both the countries need to walk step in step. Both the countries share same elements and interconnected histories.

He mentioned the country as an inspiration for our region in human development. He also said that Sri Lanka is home to enterprise and skill; and extraordinary intellectual heritage. There are businesses of global class here. Sri Lanka is a leader in advancing cooperation in South Asia. And, it is important for the future of the Indian Ocean Region.

Asserting that Sri Lanka`s progress and prosperity is a source of strength for India, the Prime Minister said for India, the unity and integrity of Sri Lanka are paramount. It is rooted in our interest. It stems from our own fundamental beliefs in this principle.

Highlighting his vision of an ideal neighbourhood which comprises of free flow of trade, investments, technology, ideas and people easily across borders and when partnerships in the region are formed with the ease of routine, the Prime Minister said the although the world sees India as the new frontier of economic opportunity, our neighbours should have the first claim on India. He also expressed his interest to happiness to see India serving as a catalyst in the progress of its neighbours including Sri Lanka. He further highlighted that Sri Lanka has the potential to be India's strongest economic partner and promised to boost trade between the countries and make it more balanced. He also proposed to conclude an ambitious Comprehensive Economic Partnership Agreement between the two countries.

The Prime Minister also said that India can also be a natural source of investments – for exports to India and elsewhere; and to build your infrastructure. A very good progress has been made by the country till date in this regard. He further proposed for both the countries to get together to harness the vast potential of the Ocean Economy. The two nations must also take the lead in increasing cooperation in the South Asian Region and the linked BIMSTEC

Region. Connecting this vast region by land and sea, the two countries can become engines of regional prosperity.

The Prime Minister, assured India`s full commitment towards development partnership with Sri Lanka. He further added that he see this as a responsibility of a friend and neighbour. India has committed 1.6 billion U.S. dollars in development assistance. Today, the country has committed further assistance of up to 318 million dollars to the railway sector. He further, promised to continue development partnership between India and Sri Lanka.

We will be guided by your Government. And, we will do so with the same level of transparency that we expect in our own country, the Prime Minister said.

Recalling the agreement on cooperation in peaceful uses of nuclear energy between the countries the Prime Minister said that he is seeing enormous potential to expand cooperation with Sri Lanka in areas like agriculture, education, health, science and technology, and space. He said that India is hoping that Sri Lanka will take full benefit of India`s satellite for the SAARC Region. This should be in Space by December 2016. With the hope to connect people and make the bond between the nations stronger, India has decided to extend the visa-on-arrival facility to Sri Lankan citizens.

We will also increase connectivity between our countries. We will strengthen ties of culture and religion. Last month we announced reduction in fees for Sri Lankan nationals visiting National Museum in Delhi to see the Kapilavastu Relics. We will bring our shared Buddhist heritage closer to you through an exhibition. Together, we will develop our Buddhist and Ramayana Trails. My birth place Varnagarh was an international centre of Buddhist learning in ancient times. Excavations have revealed a hostel for 2000 students and in plans to redevelop the centre, the Prime Minister said.

He further said, future of prosperity requires a strong foundation of security for both the countries and peace and stability in the region. The security of both countries is indivisible. Equally, the shared responsibility of each country for their maritime neighbourhood is clear. India and Sri Lanka are too close to look away from each other. Nor can both be insulated from one another. Recent histories have shown that both suffer together; and both are more effective when they work with each other. The cooperation between the countries helped them in dealing with the devastation of Tsunami in 2004. He also sheared his experience of reconstruction that India witnessed after the earthquake in Bhuj in the year 2001. He also highlighted that the cooperation between the countries has been integral towards combating terrorism and extremism.

For both of us, local threats remain. But, we see threats arising in new forms and from new sources. We are witnessing globalisation of terrorism. The need for our cooperation has never been stronger than today, the Prime Minister said.

Highlighting the statement that the Indian Ocean is critical to the security and prosperity of our two countries, the Prime minister said that there is need to expand the maritime security cooperation between India, Sri Lanka and Maldives to include others in the Indian Ocean area. The course of the 21st century would be determined by the currents of the Indian Ocean. Shaping its direction is a responsibility for the countries in the region. India and Sri Lanka are two countries at the crossroads of the Indian Ocean. Sri Lanka's leadership and India's partnership will be vital for building a peaceful, secure, stable and prosperous maritime neighbourhood.

In his own words he said 'In our deeply interconnected lives, it is natural to have differences. Sometimes, it touches the lives of ordinary people. We have the openness in our dialogue, the strength of our human values and, the goodwill in our relationship to resolve them.'

Sri Lanka and India are at a moment of a great opportunity and responsibility – for realising the dreams of our people. This is also

a time for renewal in the relationship; for a new beginning and new vigour in our partnership. Both the countries have to ensure that their proximity always translates into closeness.

Towards the end, the Prime Minister said that President Sirisena choosing India as his first destination is of great honour and he was honoured to be his first guest there. This is how it should be between neighbours.

He ended his speech recalling the lines of a famous song 'Sindu Nadiyin Misai' composed by the great nationalist poet Subramanian Bharati in the early 20th century: 'Singalatheevukkinor paalam ameippom'(we shall construct a bridge to Sri Lanka) I have come with the hope of building this bridge – a bridge that rests on strong pillars of our shared inheritance; of shared values and vision; of mutual support and solidarity; of friendly exchanges and productive cooperation; and, above all, belief in each other and our shared destiny.

GUIDELINES FOR AUTHORS

The M. K. Nambyar SAARC Law Journal was launched originally as a flagship of the M K Nambyar SAARC LAW Centre in 2010. Over its short span of publication the fledgling periodical has grown into a full-fledged Journal with ISSN (No.2346-8646) accreditation and peer reviewed journal. The Journal has not only sustained its periodicity as a bi-annual publication, but over the years it has matured in quality and readership, and commits to enrich its scholarship from issue to issue in the years ahead. A notable feature of the Journal is that it stands out as the only publication focussed on the legal issues of concern and contemporary relevance to the SAARC region and its eight member countries though there are several other journals which debate a multitude of regional issues, political, economic, cultural, inter-state and other.

The Journal has adopted an inclusive approach by encouraging well researched articles from budding graduate and post-graduate law students of NALSAR with proven research aptitude and creativity. Scholarly contributions from other sources however are not excluded.

Contributors willing to submit article to the M K Nambyar SAARC Law Journal should follow the prescribed guidelines. All contributors will be subjected to plagiarism test. Average score of

plagiarism should not exceed 25% including footnotes/bibliography.

Length of the Article: 3500- 5000 words: font size: 12; Times New Roman; Space: 1.5

Abstract for the Article: The article should be accompanied by an abstract of 250 to 300 words which should be placed at the beginning of the paper.

Book Review: Book Reviews of some of the reputed Journal of SAARC Law are also invited. The minimum word limit of the content of Book Review should not be less than 1000 words. Full details of the book/Journal under review should also be furnished. Authors should apply the reference style furnished below.

All references should be footnotes at the bottom of each corresponding page of the text.

Book, single author:

Footnote: Catherine Delafield, Women's Diaries as Narrative in the Nineteenth-Century Novel (Burlington, VT: Ashgate, 2009), 145.

Book, two or three authors:

Footnote: Steven D. Levitt and Stephen J. Dubner, Superfreakonomics: Global Cooling, Patriotic Prostitutes, and Why Suicide Bombers Should Buy Life Insurance (New York: William Morrow, 2009), 35.

Book, more than three authors:

Footnote: Andrew Gelman and others, Red State, Blue State, Rich State, Poor State: Why Americans Vote the Way They Do (Princeton: Princeton University Press , 2008), 128-9.

Book chapter/work in an anthology:

Footnote: Christine De Vinne, "Religion under Revolution in Ourika," in, Approaches to Teaching Duras's Ourika, ed. Mary Ellen Birkett and Christopher Rivers (New York, NY: Modern Language Association of America, 2009), 41.

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Carew & Co. Ltd. V. Union of India, AIR 1975 SC 2260

Article from a journal:

Footnote: Tom Buchanan, "Between Marx and Coca-Cola: Youth Cultures in Changing European Societies, 1960-1980," Journal of Contemporary History, vol. 44, no. 2 (2009): 372.

Article from a magazine/periodical:

First Note: Jon Meacham, "The Stakes? Well, Armageddon, For One," Newsweek, October 12, 2009, 5.

Article from a newspaper:

First Note: Tyler Kepner, "A Battering of Santana Saves the Yankees ' Weekend," New York Times, June 15, 2009, Section D, Final edition.

Article from an encyclopaedia:

First Note: Encyclopedia Britannica, 11th. ed., s.v. "Gilbert Keith Chesterton."

Websites (not online journals):

First Note: University of Georgia, "Points of Pride," University of Georgia, http://www.uga.edu/profile/pride.html (accessed October 21, 2009).

Immediate Reference: where a source is quoted again immediately after the first quote: Ibid; p.26

Multiple References: where a particular reference (book, article or any other sources) is quoted more than once in the text: supra note 12, p.50

Maps, tables, figures should be mentioned at appropriate places in the Text. They should be sourced at the bottom. Not at the Footnote.

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