BIISS JOURNAL, VOL. 20, NO. 1, 1999

*Liaquat Ali Siddiqui*

# PARLIAMENTARY PARTICIPATION IN TREATY-MAKING PROCESS : IMPLICATIONS FOR BANGLADESH.

## Abstract

Although treaties are binding on member states on the international plane, state parties are free to adopt different methods of treaty-making at the domestic level. Drawing on the constitutional developments in different jurisdictions, this article develops three principal models of treaty-making in which parliament plays either active, passive or insignificant role. While in the first and second models parliament has effective control over the treaty-making power of the executive, in the third model, it is virtually absent. The study can discern a growing trend towards strengthening the role of parliament in treaty-making process. The arguments for the development of a democratic treaty-making process at the domestic level are many. It suggests that the countries belonging to the third model should amend their constitutional provisions to strengthen the role of parliament in treaty-making process and to impose constitutional check on the possible executive autocracy. Particularly it examines the legal implications of this democratic trend of treaty-making for Bangladesh and works out a reformatory plan in the light of recent constitutional developments of the country.

**Liaquat Ali Siddiqui** is Assistant Professor, Faculty of Law, University of Dhaka & Member, IUCN Law Commission.

Treaties primarily create rights and obligations for the members of international community.[1] In modern times they have increasingly addressed issues normally considered as falling within the domestic sphere of a state.[2] In many ways they contribute to the development of domestic legal systems and their importance cannot be undermined in the development of an international legal order.[3]

---

1 Article 38 (1) of the Statutes of the International Court of Justice provides that the Court shall apply international conventions, whether general or particular, and established rules expressly recognised by the contesting states. Article 2(1)(a), of the Vienna Convention on the Law of the Treaties, 1969 defines a treaty as 'an international agreement concluded between states in written form and governed by international law. The Vienna Convention on the Law of the Treaties, 1969 applies to agreements between and among states. The Vienna Convention of 1986 on the Law of the Treaties between States and International Organisations or between International Organisations, applies to agreements between international organisations inter se, or between an international organisation on the one hand, and a state or states on the other. A treaty is technically different from convention or protocol. A treaty can be adopted bilaterally, regionally or globally. The term Convention is used for multilateral agreements. It also includes the instruments adopted by the organs of international institutions such as International Labour Conference and the Assembly of the International Civil Aviation Organisation. A Protocol is a subsidiary instrument to a convention. It is often adopted to deal with ancillary matters or to create more detailed rules of obligations usually of an independent nature requiring independent ratification. However, in this article we have used the term 'treaty' in its wide sense to include conventions, protocols etc. See, I.A. Shearer, *Starke's International Law.* 11th edition, Sydney. 1994, pp.398,401,402

2 C., Schreuer, The Waning of the Sovereign State :Towards a New Paradigm for International Law? in 4 *EJIL*,1993,p.465.

3 See, Paul C. Szasz, "General Law-Making Process," in Oscar Schachter, and Christopher C. Joyner,(eds), *United Nations Legal Order*, Vol. 1, Cambridge University Press, 1995, pp. 58-59.

Bangladesh is a party to more than 70 international and regional treaties, conventions and protocols.[4] In addition, it has concluded many bilateral treaties. These treaties, conventions and protocols create obligations and commitments for Bangladesh which are binding on the international plane.[5] Bangladesh's increasing

---

4 An unpublished paper of the Ministry of Foreign Affairs, Government of the People's Republic of Bangladesh, enumerates 71 treaties, conventions and protocols to which Bangladesh has become a party as of September 1997. See, Ministry of Foreign Affairs, People's Republic of Bangladesh. *Status of Treaty Adherence as of September 1997.* Also see for a list of environmental treaties to which Bangladesh is a party, M. Anwarul Islam, *An Inventory on International Conventions, Treaties and Protocols related to Environment and the Bangladesh Context.* IUCN Bangladesh,1996.

5 There are many precedents and state practice to support the rule that a treaty is binding on its member states and a state cannot rely upon its municipal law to avoid its international law obligations. Article 13 of the Draft Declaration on Rights and Duties of States,1949 reads, 'Every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.' The Draft Declaration was prepared by the International Law Commission and the United Nations General Assembly noted it and commended it to members and jurists as a notable and substantial contribution towards the progressive development of international law and its codification' (G.A.Resn.375(IV),G.A.O.R, 4th Session, Resolutions, p.66(1949). In the Alabama Claims Arbitration (U.S. v. G.B., Moore,1872,1 Int.Arb.495), the Tribunal rejected the British argument that it did not violate its obligation as a neutral state in the United States Civil War by allowing the construction and sailing of the ships concerned, as its constitutional law did not allow it to interfere with such private construction and sailing. The Tribunal declared : ' The government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed.'( Moore, Int. Arb. 4109). In its advisory opinion, the

involvement in the treaty regime not only submits the country to extra-national supervision and monitoring programmes, but also requires a good faith commitment to abide by those treaty obligations.[6] While functional theories of international law can

---

P.C.I.J. in Exchange of Greek and Turkish Populations case (Advisory Opinion. P.C.I.J. Reports, Series B, No.10, p.20,1925), observed, 'This clause....merely lays stress on a principle which is self evident, according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken'. In the case concerning the Factory at Chorzow (Merits), the Court found it 'impossible' to attribute 'to a judgement of a municipal court power indirectly to invalidate a judgement of an international court' (PCIJ, Ser. A, No. 17,1928,33). The Court in the Advisory Opinion on the Jurisdiction of the Courts of Danzig, observed that, 'Poland could not avail herself of an objection which ...would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement'(PCIJ,Ser.B, No.15,1928,26-27). In the case of the Free Zones of Upper Savoy and District of Gex, the Court emphasised, 'that France cannot rely on her own legislation to limit the scope of her international obligations' (PCIJ, Ser. A,No.24,1930,12). Similarly in the Greco-Bulgarian 'Communities' Case it observed, 'it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty (PCIJ, Ser.B, No.17,1930,32). In its Advisory Opinion on the Treatment of Polish Nationals in Danzig, it observed that , 'A State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force' (PCIJ, Ser.A/B,No.44,1932,24). McNair, former Judge of ICJ, observed in the Fisheries Case, 'It is a well-established rule that a State can never plead a provision of, or lack of a provision in, its internal law or an act or omission of its executive power as a defense to a charge that it has violated international law.'(1951. ICJ Rep.181).

6 Article 26 of the Vienna Convention on the Law of the Treaties, 1969 reads, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' Article 27 of the same

justify the participation in extra-national treaty regimes, modern trends suggest that the decision to participate in such activities should be taken under a democratic treaty making framework.[7]

This paper examines the legal aspect of the treaty-making process of some selected countries including Bangladesh in order to explain and compare the role of Parliament in the treaty-making process of each of these countries. The paper observes that in many leading countries, the domestic legal framework ensures a democratic treaty-making process in which Parliament plays an important role in treaty-making process. It argues that Bangladesh's constitutional mechanism for treaty-making is neither democratic nor conform does it to the progressive views of the modern world. It reveals that at the functional level the treaty-making process is absolutely controlled by the executive and virtually leaves no role for Parliament to play at any stage of the treaty-making process of Bangladesh. This paper also argues that Parliament should be given a meaningful role in the treaty-making process of Bangladesh. It suggests some measures in the line of recent constitutional

---

Convention reads, 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' Article 46 reads, 'A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

7 We can discern this trend in the treaty-making practice of many leading countries including U.S.A, Germany and also in the recent changes of Australia. See generally, Stefan. A. Riesenfeld and Frederick. M. Abbott, (eds), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, Martinus Nijhoff Publishers,1994; Wildhaber, Luzius, *Treaty-Making Power and Constitution : An International and Comparative Study*, Helbing &Lichtenhahn, 1971.

developments of this country for ensuring a democratic treaty-making process.

**Democratic Framework : Importance of Parliamentary Participation in Treaty-making Process**

A democratic process of treaty-making that ensures the participation of Parliament can be justified on many grounds.

It is argued that the concept of mixed treaty-making process is beneficial because it serves to preclude the exercise of concentrated, unchecked and arbitrary power at the hands of the executive.[8] The notion that a democratic treaty-making process can best safeguard a country's interest has already been adopted by the framers of many leading constitutions. Thus the constitutions of America, Germany, Switzerland, Netherlands, France, Japan, Greece etc, all adopted the democratic process of treaty-making long before. The more the scope of international undertakings expands, the more important is legislative participation in agreement–making.[9]

Treaty-making involves negotiation and bargaining with government counterparts. It is argued that the more a government is able to rely on the backing of its parliament and people, the stronger

---

8 The American Constitution and the Federalist papers conceived of treaty-making power as an 'intermixture of powers'. Hamilton observed, 'The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance to the trust, and the operation of treaties as law, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.' (A. Hamilton, Federalist No.75 ); quoted from, W., Luzius, ibid, p.245.

9 *Ibid,* p.247.

can it afford to speak in the bargaining table. From this point of view, legislative participation in treaty-making is acceptable in modern democracy.[10]

Law-making is essentially a job of the legislature in a modern government system. Therefore when any treaty concluded by an executive branch creates legal rights and obligations for a state or individuals, it can not take effect in the municipal legal system without the consent or approval of such legislature. From this point of view, the participation of legislature in the treaty making process from the outset is essential.

Treaty-making involves far-reaching decisions. Legislatures are often deprived of an opportunity to make such decisions. When a government determines that an international commitment shall take the form of treaty or agreement, this in turn raises the issue whether the commitment is to be submitted to the legislature for approval. It is observed that important treaties that involve significant national interests should be approved by Parliament.[11]

Parliament is a place for discussion and debate. Anything discussed and debated in Parliament comes to the attention of the whole nation, particularly to the interested groups. This is an additional advantage of parliamentary consultation. Exclusion of Parliament from the treaty-making process, particularly in Bangladesh, has rendered the treaty-making as well as treaty-implementation process an administrative job of the executive. Had Parliament participated in the treaty-making process, it could have contributed more in the treaty-implementation process by enacting timely legislation, establishing necessary institutions and also by allocating required funds.

---

10 *Ibid,* p.72

11 *Ibid,* p.73

The notion that only executive should have the power to make treaties derives from the middle age concept that it is the King's prerogative to make alliance, and as such does not conform to the modern democratic notion of responsible government. Many modern constitutions have adopted the doctrine of 'Separation of Power' which requires not only a separation of power among the government branches, but also sufficient checks on each other so as to restrain the abuse of power by any branch of a government.

**Treaty-making Models**

This paper undertakes a study of the treaty-making practice of various countries in order to identify the nature of parliamentary participation in the treaty-making process of each of these countries. Accordingly, this paper has drawn on the provisions of constitutions, relevant legislation and decisions of the highest courts in order to ascertain the current treaty-making practices of the countries selected for this study.

Different countries adopt different methods of treaty-making and treaty-implementation in each of which the executive, legislature and judiciary play different roles. The relative merits and demerits of each of these methods have always been an issue of interest and research for both national and international legal scholars.[12] In the light of current treaty-making practices of different countries, the present paper develops three principal models depending on the nature of parliamentary participation in the treaty-making process. The first model ensures an active role for Parliament in treaty-making process, the second model ensures a passive role for

12 A group of experts on the relationship between the national constitution and international law met in Geneva, Switzerland, in Novermber 1991 to discuss the national treaty-making process of various countries. The papers presented there were published in S.A.Riesenfeld and F.M.Abbott, (eds), *op. cit.*

Parliament in treaty-making process and the third model allocates little or no role for Parliament in treaty-making process. This paper also examines the treaty-making practice of different jurisdictions in order to explain these models. Although in all the countries studied here, the executive can enter into 'executive agreements' without the concurrence of Parliament, this paper focuses on the role of Parliament in the conclusion of other important treaties.

**Model 1 : Active role of Parliament in Treaty-making process**

In this model, Parliament actively participates in treaty-making process with the executive branch of a government. Although the power to negotiate and enter into treaties is vested in the executive, the approval or consent of Parliament is required for the ratification of treaties. Treaties are submitted to Parliament for consent and consideration. Parliament can not only withhold its consent but also regulate the domestic effects of treaties by inserting declarations, conditions and reservations to the resolutions of ratification submitted by the executive for its consent. The framers of the constitutions that adopted this model argued that there should be a legitimate check on the executive power of treaty-making. They viewed that only a democratic process of treaty-making could effectively safeguard a country from executive autocracy.[13] In the countries that have adopted this model, treaty provisions can be used directly as a source of legal rights in the municipal courts, if Parliament determines that a particular treaty is self-executing. Many scholars have argued that this model is conducive to the development

---

13 James Wilson, 'Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people,' in Jonathan Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, p.507, 2nd edition,1863.

of international treaty practice, particularly in view of the fact that modern treaties increasingly create rights and privileges for individual citizens.[14] The countries that have adopted this model are Federal Republic of Germany, United States of America, Switzerland, Netherlands, France, Spain, Austria, Greece, Japan, Belgium, Turkey etc. The following paragraphs will examine the treaty-making law and practice of a few of these countries.

Under the German federal system, although the federal President is empowered to enter into treaties,[15] Parliament actively participates in the treaty-making process in two ways:

First, for the conclusion of treaties, on subjects that fall within the legislative power of the Lander (the German states), the Federation must take consent of the Permanent Treaty Commission before ratification procedure begins.[16]

---

14 Lori Fisler Damrosch, "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties," in S.A.Riesenfeld and F.M.Abbott (ed.), *op.cit.*, p.207.

15 Germany is a federal republic with a bicameral parliament. The upper house, called the Bundesrat is comprised of members of the government of the Lander (the German States). Each of the Landers is allocated a number of representatives according to its population. The lower house, called Bundestag, is directly elected by the people. It elects the Chancellor, who is the head of government. The head of state is the President. The federal executive consists of the President, the Chancellor and the ministers. Article 59 of the Basic Law (the German Constitution) empowers the President to represent the Federation in its international relations and enter into treaties. Executive-agreements are entered into by the President for which there is no need to consult either of the two houses i.e., Bundesrat and Bundestag.

16 Paragraph 3 of article 32 of the German Basic Law states that the Lander may, with the consent of the Federation, enter into treaties with countries concerning matters which are within their legislative powers. These powers cover little more than cultural agreements. Under the

Second, for the treaties which regulate the political relations of the Federation or relate to matters of federal legislation, approval of Parliament is required.[17] In cases where legislative approval is necessary, the treaty is laid before both Houses of Parliament. The consent of the Bundestag (the Lower House) is necessary in all such cases. However, the Bundesrat (the Upper House) has a right to veto a treaty where the treaty falls within the legislative jurisdiction of the Lander or affects the administrative procedures of the Lander. In other cases, the Bundesrat may state its opinion, but this may be overridden by the Bundestag.[18] In giving its consent to the ratification of a treaty, the Parliament can determine whether the treaty should be self-executing or whether further legislation is

---

Lindau agreement, concluded between the Lander and the Federation on 14 November 1957, the Lindau agreed that the Federation would negotiate agreements on subjects within the legislative power of the Lander, on condition that it obtained the consent of the Lander before the parliamentary procedure begins. This agreement resulted in the creation of a Permanent Treaty Commission, comprised of representatives of the Lander which must give its consent before the ratification procedure may proceed. See, for details, J. Williamson, *A Comparison of Treaty Making Practices in Australia, the United States, the United Kingdom and Germany*, A Report for the Law Internship Program at Australian National University, October 1994,p.13.

17 Treaties that regulate the political relations of the Federation include peace treaties, military pacts, non-aggression pacts, and treaties concerning such issues as disarmament, neutrality and political co-operation. This category also includes treaties that deal with the political relations between the Federation and other countries. Treaties that relate to matters of Federal legislation include all those treaties where legislation would otherwise be required to change the law in the manner required by the treaty. Hence, if the executive could implement a treaty without legislation, then it is not bound to seek the consent of the legislature to enter into a treaty. Parliament has to enact legislation if a treaty requires an amendment of existing law.

18 J.Williamson, *ibid*, p.14.

necessary before the treaty could be implemented.[19] In cases where legislation would be within the exclusive power of the Lander, then only the Lander can implement the treaty.[20] Although the Basic Law is silent about the reservation-making power of Parliament, the Legal Committee of the Bundesrat adopted guidelines that empower Parliament to make reservation to a treaty.[21]

In the U.S. federal system, Parliament also plays an important role in the treaty-making process in two ways:[22]

---

19 J.A. Frowein and M.J.Hahn, "The Treaty Process in the Federal Republic of Germany" in S.A.Riesenfeld and F.M.Abbott, (eds), *op.cit.*, p.68.

20 *Ibid,* p.68.

21 The 1971 guidelines read, "If, as a matter of public international law, the Federal Republic is entitled to declare a reservation upon ratification, the legislative organs may give their consent only on condition that a specific reservation is made. Equally, consent may be linked to the Federal Republic's ratification of a treaty without reservation. If the text of a treaty explicitly mentions certain reservations and the legislative organs do not take a position in that regard, the government is free to deposit a reservation as it deems proper." See, for details, *ibid,* p.67.

22 The United States of America is a federal republic with a bicameral parliament. The Congress consists of an upper house, the Senate, which comprises two members elected from each State, and a House of Representatives, which is directly elected according to population. The Executive is made up of the President and the Cabinet, which is appointed by the President. The President in the exercise of his or her own constitutional power, may enter into executive agreements without the consent of the Senate or the Congress as a whole. These treaties usually relate to foreign relations or military matters and do not tend to affect the rights and obligations of citizens directly. Executive agreements may also take place under general or specific statutory authority or under authority established by a treaty. As sole executive

First, Treaties requiring the consent of the Senate:

Under Clause 2 of Article II, Section 2 of the United States Constitution, the President can enter into treaties with the advice and consent of the Senate, provided two-thirds of the Senators present concur. In this process a treaty is first negotiated by the Executive branch, it is then transmitted to the Senate for its advice and consent.[23] Under this category, treaties are concluded on a wide

---

agreements, these treaties are not subject to the interpretation and condition of the Senate. However, pursuant to the Case Act, the President must transmit these agreements to the Congress after their entry into force. The executive power of the President is constitutionally constrained by the role of the Congress in two ways: First, as the Congress has control over the expenditure of public funds, a denial of such a fund for the execution of a treaty can be a check on President's execution authority. Second, only Congress has the authority to make law. Therefore, a denial by the Congress to pass a law necessary to implement a treaty can be a check on the President's such authority.

23 The U.S Department of State maintains as a part of its Foreign Affairs Manual Instructions to the Foreign Service with regard to the negotiation and conclusion of treaties and other international agreements. These instructions are referred to as the Circular 175 Procedure. The Procedure insures that the Senate is consulted with respect to impending, ongoing and concluded treaty negotiations. Members of the Senate are often personally consulted during the negotiation stage, and sometimes they act as advisers to the negotiation delegations of the Government. Once a treaty is sent to the Senate for consideration, it is usually referred to the Foreign Relations Committee. The Committee conducts an inquiry, holds public hearings, send a report on the treaty and votes whether or not to recommend a resolution of ratification to the full Senate. It can recommend for unconditional approval, or conditional approval or even for rejection. Upon the receipt of the report the Senate proceeds to consider the Treaty. It may consider article by article. Votes are taken on the treaty and on any proposed amendments or conditions to ratification. With a final vote on the treaty

range of topics that have both internal and external importance. These treaties generally tend to affect the rights and obligations of U.S. citizens. The Senate often qualifies its consent to the resolution of ratification of such a treaty with declaration or other conditions to the effect that a particular treaty shall be non-self-executing, or in other words, the Senate expresses its intention that such a treaty shall not be used as a direct source of law in U.S. courts.[24] It has been

---

which requires two-thirds majority, the President is allowed to proceed to ratify a treaty and to proclaim it.

24 The decisions whether a treaty is self-executing is ordinarily made by the courts on the basis of criteria elaborated in court decisions. While making this decision the courts take into consideration 'the intent of the parties'. Thus the Senate's declarations, as a treaty-making body, is ordinarily honoured by the courts. The court would be reluctant to apply as a direct source of law any treaty covered by non-self-executing declaration. Treaties may expressly provide for a self-executing character or such character may be implied from the terms and context. Treaties may be self-executing in some part and non-self-executing in others. Treaties which require municipal legislative action before private rights may be enforced are generally referred to as 'executory or non-self-executing treaties'. In Wnre v Hylton (3 Dall.) 199 (1796), the U.S. Supreme Court decided that a provision in the Treaty of Peace with Great Britain nullified an inconsistent law in the state of Virginia without the further requirement of action by the Virginian legislature. In Foster v. Neilson (27 U.S.2 Pet.,253,1829) Justice Marshall held that the treaty was not self-executing because its terms appeared to call for a legislative act by Congress. However, in United States v. Percheman, (32 U.S. 7 Pet.,51,1833), he relying on the express language of the treaty by which Spain ceded the Florida territories to the United States, decided that it was self-executing and did not require any further action by the U.S. Congress. In Comm. of United States Citizens Living in Nicaragua v. Reagan, (859 F. 2d 848, 851, D.C.Cir.,1976), the Court of Appeal for the District of Columbia Circuit observed, 'This court has noted that, in determining whether a treaty is self-executing in the sense of its creating private enforcement rights, courts look to the intent of the signatory parties as manifested

traditionally assumed that the Senate has the power to consent with conditions.[25] Over the years such conditions have taken at least four forms such as reservation, understanding, declaration, and proviso.[26]

Second, Congressional-Executive Agreements:

Under the Congressional-Executive agreement making process, both Houses of Congress pass a joint resolution or legislation authorising or approving the conclusion of an international agreement by the President.[27] In some cases such measures are accompanied by the enactment of domestic implementing legislation.[28] The basis of such authorisation by the Congress is that

---

by the language of the instrument'. Kirggis suggests that certain rules of customary international law may be self-executing, stating that, ''The most obvious and most important of the potentially self-executing rules are many of those protecting basic human rights. They benefit individuals directly, and they are specific enough to be enforced judicially.'' Frederick L. Kirggis, ''Agora: May the President Violate Customary International Law ? (con'd): Federal Statutes, Executive Orders and Self-Executing Custom'', 81 *American Journal of International faw.* 371,372,1987.

25 Restatement (Third) of Foreign Relations Law. This practice has grown out of constitutional custom. The Senate's power to condition its consent to treaties dates from Senate approval of the Jay Treaty, with reservations, in 1798. This power, the Senate Foreign Relations Committee notes, is part of customary constitutional law in the United States. See, Senate Committee on Foreign Relations, Report on Exec.N,S.Rep.No.12, 95th Cong., 1st Sess,, 11 (1978).

26 A Report of the Senate Foreign Relations Committee on the Salt II Treaty, which was not ratified, explained three of these conditions: S. Exec. Rep.No.14,96th Cong., 1st Sess,1979, p.34.

27 For a detailed discussion of the constitutionality of this process, see, B. Ackerman and D. Golove, 'Is NAFTA Constitutional?', 108 *Harvard Law Review*,1995,p. 801.

28 Restatement (Third) of the Law of Foreign Relations, 303.

the Congress, with simple majority in each House, can make law for the U.S.A. Thus the main difference with Article II procedure is that there is no need for an approval by the two-thirds Senators present. Only an approval by a simple majority in each House can authorise the ratification of a treaty. This process of treaty making is often used for trade agreements, as the Congress has express constitutional authority to regulate commerce with foreign nations under Article I of the Constitution.[29] Congress, while authorising the ratification of a treaty by legislation, can declare it self-executing.[30]

The U.S. Senate plays a vital role in the conclusion of many important treaties. By appreciating the Senate's treaty-making role it is observed that, 'The Senate's power to withhold consent to treaties is part of the Framer's carefully designed system of check and balances; the Senate acts as the surrogate for the American people in determining the acceptability of Presidential proposals to incur international obligations. Senatorial conditions aimed at curtailing the risks to the nation of a proposed international agreement or curbing Presidential self-aggrandisement are consistent with this constitutional design.'[31] Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people.[32]

However, Senate's declaration purporting to negate the legal effect of otherwise self-executing treaty provisions has been widely

---

29 S.A. Riesenfeld and F.M. Abbott, "The Scope of U.S.Senate Control Over the Conclusion and Operation of Treaties" in S.A.Riesenfeld and F.M. Abbott, (eds), *op.cit.*, p.302.

30 *Ibid*, p.305.

31 L.F., Damrosch, "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties", in S.A. Riesenfeld and F.M. Abbott (eds), *op.cit.*, p.214.

32 Jonathan Elliot (ed.), *op.cit.*, p.507.

criticised by many scholars. Thus it is observed that non-self-executing declarations represent 'a neo-isolationist preferences for shielding U.S. institutions from international trends.'[33] It is also observed that in certain instances, 'the Senate has acted out of an explicit or implicit motivation to preclude the courts from using the treaty as a source of law, even though the treaty by its nature or its terms would otherwise lend itself to direct judicial application.'[34]

Although these criticisms are directed toward a need for reformation or reorganisation of the Senate's role in the treaty-making process, they do not in any way undermine the importance of a democratic process of treaty-making. A more democratic view demands that the House of Representatives should also be involved in the treaty-making process.[35] The US Senate, in the exercise of its power, often adds conditions, interpretations, declarations with the treaties that have internal law-making effects. It is argued that under the Constitution, the law-making power is given to the Congress not

---

33 Damrosch, L.F., in S.A.Riesenfeld and F.M. Abbott (edso) *op.cit.*, p.205.

34 *Ibid*, p.206.

35 In the treaty-making scheme established by Article II of the U.S. Constitution, only Senate participates with President in the international treaty making process. The framers of the constitution decided to exclude the House of Representatives from a share of the treaty power on the grounds that a large body would not be conducive to the secrecy and dispatch required of the treaty process. However it is argued that there are several areas in which the House of Representatives must or should participate with the President and Senate in the law-making mode. These are: 1) raising of revenue, 2) appropriation of funds, 3) enactment of criminal penalties and 4) declaration of war. See, Congressional Research Service, Treaties and Other International Agreements : The Role of the United States Senate, A study prepared for the Committee on Foreign Relations by the Congressional Research Service, S. Rpt. No.98-205, 98th Cong., 2nd Sess.,1984, pp. 25-30.

to the Senate. This kind of arguments, demand for the development of a more democratic process of treaty-making that involves the Congress.[36]

**Model 2 : Passive role of Parliament in Treaty-making Process**

In this model, Parliament plays a passive role in the treaty-making process in the sense that an executive branch is required to submit a treaty to Parliament before its ratification, even though the consent or approval of Parliament is not a pre-requisite for the ratification of a treaty. In this model, Parliament plays a supervisory role. Treaties are discussed and debated in Parliament. Treaties are non-self-executing. Parliament has to pass an implementing legislation in order to transform the treaty provisions into domestic law. However, Parliament cannot impose any condition, declaration or reservation to a treaty. It is argued that in this model, the collective responsibility of a Cabinet to Parliament operates as a check on the treaty-making power of an executive branch. In this model, a Parliament can intervene if necessary by a motion in the Parliament. The requirement that a treaty has to be placed before Parliament prior to its ratification substantially reduces the possibility of the abuse of treaty-making power by the executive. The countries that have adopted this model are United Kingdom, Australia, Canada, New Zealand etc. The following paragraphs examine the treaty-making laws and practices of a few of these countries.

Under English law, although the executive branch has the

---

36 See, S.A. Riesenfeld and F.M. Abbott, *op.cit.*, 'We are concerned with whether a minority of the Senate will be enabled to effect an influence on the international and domestic legal process greatly in excess of the constituency it represents,' p.261; 'it is therefore of the utmost urgency to consider who will determine the scope of these rights and under what rules,' p.262.

exclusive power to negotiate and conclude all treaties, British Parliament still plays a passive role in the treaty-making process.[37]

The Ponsonby Rule allows Parliament to exercise supervision on the treaty-making activities of the executive.[38] According to this rule, the government has to lay on the Table of both Houses of Parliament every Treaty, when signed, for a period of 21 days, after which the Treaty will be ratified and published and circulated in the Treaty Series. In the case of important Treaties, the Government will find an opportunity of submitting them to the House for discussion within this period. If the opposition party or any other party formally demands for discussion, time will be found for the discussion of the Treaty in question. However, this Rule does not apply to agreements not subject to ratification or to treaties conferring no new obligations on the United Kingdom or to cases where ratification is urgent and Parliament is not sitting.[39]

It is observed that from a practical point of view, Parliament can interfere in the following cases[40] :

---

37 William Blackstone, *Commentaries on the Law of England*, 1765, p. 257: in England the sovereign power, ..is vested in the person of the King. Whatever contracts therefore he engages in , no other power in the kingdom can legally delay, resist or annul. It is the King's prerogative to make treaties and determine foreign policies. This power is exercised by the government or a government department on behalf of the Crown.

38 In 1929 Mr. Ponsonby, Under-Secretary of State for Foreign Affairs of the Labour Government then in power, announced a new constitutional practice to the House of Commons which is known as the 'Ponsonby Rule'.

39 See for further details, S. A. Riesenfeld and F.M. Abbott, *op.cit.*, pp. 261,-327; W., Luzius, *op.cit.*, pp. 29-30.

40 Lord Templeman, "Treaty-Making and the British Parliament", in S.A. Riesenfeld, and F.M. Abbott, (ed), *ibid*, pp.153-154.

1) Parliament may refuse to approve a treaty, where the treaty itself stipulates that it will only take effect subject to the approval of Parliament,

2) Where the government submits a treaty to Parliament before its ratification for the approval of the treaty, in such a case Parliament may refuse to approve the conclusion of the treaty,

3) Where a treaty requires an amendment to the existing statutes or the creation of new rights and duties, Parliament by refusing to pass such necessary statutes may also interfere in the treaty-implementation process.

In all these three cases, a refusal by Parliament may lead to the fall of the government. This threat of defeat will always compel the government to undertake a consultation process with the opposition, interested groups and other pressure groups, so that the text of the treaty becomes acceptable to the majority party in the legislature and to the electorate. Once the executive decides the treaty terms finally, Parliament has no scope to introduce a reservation or to bring about a change in the provisions of the treaty.[41]

Generally, Parliamentary approval is needed in important cases. These are where a treaty requires an imposition of taxation or allocation of public funds for the implementation of a treaty, or a change in the domestic law or where territories are ceded.[42] Normally' treaties of war and peace, the cession of territory, or

---

41 *Ibid*, p.154.

42 Thus statutory assent was obtained by passing the Anglo-German Agreement Act, 1890, for the agreement of the cession of the island of Heligoland to the German empire in 1890. Similarly the treaty of Commerce and Navigation with Portugal, concluded in 1914, stipulated that the treaty was not to come into force until the British Parliament had approved article 6 which imposed some criminal penalties in relation to some treaty activities.

concluding alliances with foreign powers are conceded to be binding upon the nation without Parliamentary sanction. However, it is deemed safer to obtain Parliamentary sanction in such cases. Similarly, treaties of commerce and extradition treaties require parliamentary approval.[43]

In the treaty-making process of U.K. Parliament plays a supervisory role. Treaties are laid on the Table of both Houses for long 21 days. It thus provides Parliament with an ample opportunity to examine whether a particular treaty is against national interest in which case it can intervene within 21 days. Treaty provisions are non-self-executing. Parliament has to pass an implementing legislation in order to transform the treaty provisions into the domestic law.[44]

---

43 Thus where a commercial convention requires a change in the character or the amount of duties charged on exported or imported items as well as an extradition treaty which confers on the executive the power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here, cannot be made operative without legislation.

44 In Parlement Belge,( 4 P.D.129 (1879), Sir Robert Phillimore held that it was not competent for the Crown to place the Parlement Belge, while in British ports, in the category of a public ship of war and exempt her from the process of an English court. The Convention effected private rights and could not be enforced without parliamentary sanction. The attempt to place a Belgian steamship in the category of a ship of war while in a British port was 'a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of constitution.'(p.154); In Blackburn v. The Attorney-General,( (1971, 1 W.L.R. 1037) a case concerning British membership of E.E.C., Lord Denning M.R., observed, 'Mr Blackburn points out that many regulations made by the European Economic Community will become automatically binding on the people of this country: and that all the courts of this country, including the House of Lords, will have to follow the decisions of the European court in certain

Although section 61 of the Constitution of Australia empowers the executive to enter into treaties, Parliament plays an important role in the treaty-making process in two ways :

First, the government in important cases takes an initiative to pass an implementing legislation prior to ratification of a treaty. This practice allows Parliament to debate and discuss about the proposed treaty and to intervene, if necessary, at the outset. Thus the Racial Discrimination Act, 1975 authorises the government to ratify the Convention on the Elimination of All Forms of Racial Discrimination, 1966.

Second, in response to the recent decision of Australian High Court in Minister for Immigration and Ethnic Affairs v Teoh,[45] the government has adopted a number of reformative measures in order to strengthen the role of Parliament in the treaty-making process. All

---

defined respects, such as the construction of the treaty...nevertheless, I do not think these courts can entertain these actions. Negotiations are still in progress for us to join the Common Market. No agreement has been reached. No treaty had been signed. Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.'(p.1039).

45 (1995) 128 ALR 353. The High Court held by a majority of 4:1 that ratification of an international convention by the executive can create a legitimate expectation that the executive will act in accordance with the convention. It observes, 'Ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-maker will act in conformity with the Convention...' (1995) 128 ALR 353, per CJ Mason and J Deane at 365; and pe J Toohey at 374.

treaties are now tabled in Parliament for at least fifteen sitting days prior to their ratification, with exceptions for urgent or sensitive treaties such as the Bougainville Peace-keeping Force Agreement of 28 September,1994. Treaties are generally tabled after they have been signed for Australia, but before action is taken which would bind Australia under international law. Treaties are tabled in the Parliament with a national interest analysis. A Joint Parliamentary Committee on Treaties was established in June,1996 to consider tabled treaties and the national interest analyses. A list of multilateral treaties that are currently under negotiation or review is also tabled twice a year.

Under section 51 (XXIX) of the Constitution, a separate legislation by the Parliament is required to transform the treaty provisions into domestic law.[46] Thus in Dietrich v. The Queen, the court while considering the effect of the International Covenant on Civil and Political Rights (ICCPR) on the domestic law observed, "Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision."[47]

**Model 3 : Insignificant role or no role of Parliament in Treaty-making Process**

In this model, Parliament plays a little or no role in the treaty-making process. The executive is required neither to submit a treaty

---

46 South Wales v. Commonwealth (1975) 135 CLR 337. At 450-51; Simsek v. MacPhee (1982) 148 CLR 636, at 641; Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, at 192-193;211-212;225-5; and 253; Kioa v. West (1985) 159 CLR 550 at 570-571; Dietrich v. The Queen (1992) 177 CLR 292, at 305; and Minister for Foreign Affairs and Trade v Mangno (1992) 37 FCR 298, at p 303.

47 (1992) 177 CLR 292, at p. 305.

to Parliament nor to take its consent prior to the ratification of a treaty. However, in some jurisdictions treaties are submitted to Parliament after the ratification is over. As a result of Parliamentary non-participation in the treaty-making process in this model, executive branch enjoys an unrestricted power of treaty-making with a substantial possibility of the abuse of such power. In the implementation stage, only a law-bill is submitted to the Parliament in order to transform the treaty provisions into domestic law. The countries that have adopted this model are India, Pakistan, Bangladesh etc. The treaty-making law and practice of these countries will be examined below.

In Indian federal parliamentary democracy, the executive branch enters into treaties.[48] Parliament has no role in the treaty-making process. Whatever may be the nature of a treaty, Parliamentary approval is not needed before the ratification of a treaty. In most cases, ratification by the executive branch is sufficient to make the terms of the treaty part of India's domestic law. However, Parliamentary legislation is required for the implementation of a treaty provision that affects the rights of individuals, results in public expenditure, or requires a change in existing domestic law.[49] In Maganbhai Ishwarbhal Patel v. Union of India, Justice Shah

---

48 India is a federal parliamentary democracy with a bicameral Parliament. The Parliament consists of the Rajya Sabha (Council of States) and the Lok Sabha (House of the People). The Members of the Council of States are elected by members of the Legislative Assembly in each State, while the members of the House of the People are directly elected by the population. Both Houses also contain representatives of India's territories being appointed by the President. See, for details, S.S. Ahliwalia, "The Parliament of India: Its Role Under the Constitution", in C.K.Jain (ed), *Constitution of India: In Precept and Practice*, CBS Publishers and Distributors, New Delhi,1992, pp. 49-50.

49 H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, 3rd edition,N.M. Tripathi Private Ltd., Bombay,1983, p.172.

observed, 'The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List 1 of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the state. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.'[50]

Under the Constitution of Pakistan, the treaty-making power is vested in the executive branch of the government.[51] The executive is not bound to consult the legislature before the ratification of a

---

50 AIR 1969 SC., p.783.

51 Pakistan is a federal state with parliamentary form of government. Under article 97 of the Constitution of the Islamic Republic of Pakistan, "the executive authority of the Federation shall extend to the matters with respect to which the Majlis-e-Shoora has power to make laws, including the exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan." Thus the powers of the executive are co-extensive with the legislative power of the Federation. The federal government can act only in respect of those subjects over which the federal legislature (Majlis-e-Shoora ) has either the exclusive or preferential constitutional power to legislate. Fourth Schedule to the Constitution deals with Federal legislative list and includes 'External Affairs' as a subject over which the Majlis-e-Shoora has the exclusive authority to legislate. Article 90 Clause (1) of the Constitution of the Islamic Republic of Pakistan, provides that, "The executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers sub-ordinate to him, in accordance with the Constitution." Article 91 provides that "there shall be a Cabinet of Ministers, with the Prime Minister as its head, to aid and advice the President in the exercise of his functions." Under article 99, "all executive actions of the Federal Government shall be expressed to be taken in the name of the President." Article 48 (1) provides that, "in the exercise of his functions, the President shall act in accordance with the advice of the Cabinet (or the Prime Minister)."

treaty,[52] nor treaties are submitted to Parliament for consideration. However, treaties do not become a part of the law of land on ratification rather an implementing legislation is required to be passed by Parliament (Majlis-e-Shoora). In Messrs Najib Zarab Ltd v. The Government of Pakistan, the court observed that international rule of law can be accommodated in municipal law provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves.[53]

In an advisory opinion the Supreme Court of Pakistan observed, "though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory."[54] However, settlement of boundary disputes are not regarded as the cession of territory.[55] It is also observed that the Tashkent Declaration as well as the Simla Agreement were peace treaties and therefore did not require any legislative cover for their implementation.[56]

One of the striking features of the treaty-making process of Pakistan is that the treaty provisions, in order to become enforceable

---

52 PLD (1973) S.C.563.

53 PLD (1993) Karachi 93. See, also, 3 *Asian Yearbook of International Law* (1993),P.206.

54 PLD(1973)S.C.563.

55 Jamshed A. Hamid, Conduct of Foreign Relations, including treaty-making powers, under the Constitution of the Islamic Republic of Pakistan, *Asian Yearbook of International Law*,1993, p.15.

56 *Ibid*, p.16.

by the courts, must conform to the shariat principles enshrined in the Constitution.[57] Thus the court in M.A.Qureshi v. The USSR, refused to apply the English doctrine of 'the immunity of sovereign', observing, 'The Muslim Shariat does not embrace the concept of the British Common Law that a sovereign can do no wrong and cannot be sued in the municipal court in his own domain. On the contrary, in Shariat a sovereign can be sued in the Court of Qazi and like any other citizen is subject to his jurisdiction and bound to carry out any decree or order passed against him by the Qazi.''[58] As the provisions relating to 'Adoption' in the United Nations Convention on the Rights of the Child, adopted on 20 November 1989, were found to be repugnant to the Islamic legal concept, Pakistan became a party to the Convention subject to the reservation that ''Provision of the convention shall be interpreted in the light of the principles of Islamic laws and values.''[59]

Under article 55 of the Constitution of Bangladesh,[60] the treaty-

---

57 Jamshed A. Hamid, International Law and Pakistan's Domestic Legal Order, *Asian Yearbook of International Law*, vol.4, 1995, pp.135-136. Article 227 of the Constitution provides that ''All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah...and no law shall be enacted which is repugnant to such injunctions.'' To ensure this the Constitution by its article 203 establishes a Federal Shariat Court which ''may, [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet.''

58 PLD(1981) Supreme Court 377.

59 *Ibid*, pp.136-137.

60 Bangladesh Constitution establishes a parliamentary democracy in which the President is the titular Head of State and he is elected by the members of Parliament. Members of Parliament are directly elected

making power is vested in the executive. The Prime Minister and the Cabinet determine the treaty-making policies.[61] There is no constitutional or conventional rule that requires the executive to consult with or to take consent of the Parliament before the ratification of a treaty. Treaties are not even tabled in Parliament before their ratification.

The President is the nominal head of state and has little role in the treaty-making process or in the determination of foreign policy.[62] Although Article 145A requires the President to cause all the treaties with foreign countries to place before Parliament, this is rarely observed.[63] However the Constitution imposes certain restrictions on the exercise of his power. The President is required, under article 48, to act not only in accordance with the Constitution and other relevant laws, but also in accordance with the advice of the

---

by the people on the basis of adult franchise. The President under Article 56, appoints a member of Parliament who commands the majority support as the Prime Minister. Under article 56 read with article 48 (3), the President appoints the ministers following the advice of the Prime Minister. There is a Cabinet which is the supreme policy making body of the State. Under article 55(3), the cabinet is collectively responsible for their actions and policies to the Parliament.

61 Rule 4 (ii) read with rule 16 (xi), Rules of Business, 1996.

62 The government and not the Head of State determines the nation's treaty policy. He symbolises the external unity of the state, whereas the cabinet determines treaty polices under rule 16 (xi), Rules of Business, 1996.

63 Article 145A reads, 'All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament'. This article was inserted by the Second Proclamation Order No. IV of 1978. Prior to this Proclamation, there was no constitutional provision on treaty matters. However since 1978 no treaty has been laid before the Parliament except the recently concluded Ganges water-sharing treaty with India.

Prime Minister.[64] This requires the President, while acting under article 145A, to act in accordance with the advice of the Prime Minister. Therefore, even if the President is willing to cause the treaties to place before Parliament under article 145A, he cannot do so in the face of an unfavourable advice by the Prime Minister. In such a situation, the only way open before the President is to ask the Prime Minister, under article 48(5), to submit before the Cabinet for its consideration, the issue of placing the foreign treaties before Parliament.[65] However the Cabinet is not obliged to concur with the President. Thus it follows that there may be three possible reasons for the non-placement of treaties before Parliament by the President : (1) that the President has not taken initiative in accordance with article 145A, or (2) even if he has taken such initiative, he has been advised by the Prime Minister not to place the treaties before the Parliament or (3) that the treaty is one connected with national security and therefore, to be laid in a secret session of Parliament according to the proviso of article 145A.

However, it is suggested that in the following cases, Parliamentary legislation is required in order to transform the treaty provisions into the domestic law of Bangladesh :

---

64 Article 48 (3) reads, "In the exercise of all his functions, ....the President shall act in accordance with the advice of the Prime Minister".

65 Prime Minister has an obligation to keep the President informed on matters of foreign policy under article 48(5). The other feature of this article is that it also obliges the Prime Minister to submit for the consideration of the Cabinet any mater which the President may request him or her to refer to it. The significance of this article is that in the exercise of this power, the President can pursue the Prime Minister and the Cabinet to concur with the President to cause the foreign treaties to place before the Parliament or to influence the foreign policy of the country.

(1) Where a treaty affects the rights of the citizen of the country or requires for its implementation in Bangladesh, a change in or addition to the law administered in the courts in Bangladesh.[66]

(2) Where treaty imposes a tax or creates a direct or a contingent financial obligation upon Bangladesh.[67]

(3) Where a treaty involves dètermination of boundaries or requires cessation of a part of the territory of Bangladesh. In Kazi Mukhlesur Rahman v. Bangladesh,[68] the Appellate Division of

---

66 Bangladesh Constitution is based on the principle of separation of power. Under article 65 of the constitution, the legislative power of the Republic is vested in the Parliament. Therefore, any treaty concluded by the executive, if requires amendment or creation of law of the land, must not take effect domestically unless a statute is passed by the Parliament according to the article 80 of the Constitution. However, article 65 does not prevent the Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, by-laws or other instruments, having legislative effect

67 The executive cannot make any expenditure without the sanction of Parliament. According to article 90(3), no money can be withdrawn from the Consolidated Fund without an Appropriation Act passed by Parliament. In Bangladesh the Consolidated Fund is formed with all revenue receipts, all loans raised by the government and all moneys received by the government in repayment of its loans. Most of the appropriations made by Parliament are on annual basis. Article 83 of the Constitution provides that no tax shall be levied or collected except by or under the authority of an Act of Parliament. Therefore, treaties that require imposition of new tax can be implemented through parliamentary enactment.

68 26 DLR (SC)(1974), p.44. In this case the Appellate Division of the Supreme Court was concerned with legality of an agreement concluded between the Government of the People's Republic of Bangladesh and the Republic of India which was signed on the 16th May,1974 by the Prime Ministers of the two countries, and was known as Delhi Treaty. It involved cession of Bangladesh territory. Under the Noon-Nehru Pact

the Supreme Court observed,

"Though treaty-making falls within the ambit of the executive power under Article 55(2) of the Constitution, a treaty involving determination of boundary, and more so involving cession of territory, can only be concluded with the concurrence of Parliament by necessary enactment; in case of determination of boundary by an enactment under Article 143(2) and in case of cession of territory by amending Article 2(a) of the Constitution by taking recourse to Article 142".[69] It continued, "Had the Delhi Treaty (effected on 16th May,1974, following the agreement between the governments of India and Bangladesh and signed by the two Prime Ministers of both the countries) involved a mere determination of the boundaries between this country and our friendly neighbour India, it could be implemented by a simple enactment under Article 143(2) of the Constitution. In view, however, of our conclusion that it involves cession of territory by Bangladesh, we are clearly of the opinion that in order to implement this treaty, prior to ratification thereof, it will

---

of 1958 the southern half of South Berubari Union No.12 together with the adjacent enclaves already became part of the territory of Bangladesh under Article 2(a) of the Constitution. The Delhi Treaty allowed India to retain that territory. This is cession of Bangladesh territory and the Prime Minister cannot cede territory under Article 55(2) of the Constitution in exercise of an executive authority. The court held that the application before the High Court Division was premature and the appeal was liable to be dismissed on that ground alone. However, since the parties were heard on merits on the interpretation of Article 55(2) of the Constitution, the Court expressed its opinion on this question and held that the executive authority of the Prime Minister under Article 55(2) did not extend to a cession of Bangladesh territory and the treaty cannot be implemented without amending Article 2(a) of the Constitution which defines the territory of Bangladesh. Accordingly, the constitution (Third Amendment) Act,1974 was passed to give effect to the agreement.

69 *Ibid*, para 38, p.58.

be necessary to take recourse to Article 142, with a view to amending Article 2(a) which defines the territory of the People's Republic of Bangladesh.''[70]

**Implications for Bangladesh**

The present treaty-making system of Bangladesh as outlined earlier, allows the executive to undertake wide range of international treaty obligations that can bind the whole nation on the international plane at an enormous cost. There are treaties that create new rights and duties for the citizens and other subjects of Bangladesh. Many of such treaties would even require amendment in the existing laws or creation of new laws. From the strict constitutional point of view, law-making and creation of legal rights and duties are within the plenary power of Parliament. Therefore, the executive cannot validly interfere with Parliamentary matters in the name of treaty-making. Under the Constitution, the executive can only validly create certain agreements that are administrative, scientific or cultural in nature and does not relate to the law-making activities for the nation as this is within the competence of the Parliament under the Constitution. From this point of view, the role of the Parliament in the creation of certain types of treaties cannot be denied. This paper suggests that instead of placing a law Bill before the Parliament at the implementing stage, Parliament should be made a party to the treaty-making process from the outset.

Under the current constitutional arrangement of Bangladesh, the executive enjoys unrestricted power of treaty-making and treaty-implementation. In treaty-making it does not have to consult the Parliament whatever be the consequence of treaty-obligations for the country. Nor in passing a Parliamentary legislation it faces any difficulty as law-making Bills require only a simple majority in the

---

70 *Ibid*, p.45.

Parliament. Although this model provides a relatively easy method for undertaking international treaty obligations, the danger with such a model is that any government may feel tempted to conclude treaties that may undermine national interest.

The mechanism of the responsibility of cabinet in a parliamentary democracy operates as a check against the executive autocracy. Therefore, any treaty concluded by the executive, which is objected by the opposition as contrary to the national interests, can be an issue of parliamentary debate and even an issue for bringing a motion of no-confidence against the government.

However, in a country like Bangladesh where the system of parliamentary democracy has been moulded to suit the needs of a party, rather than of the country, there is little check on the executive autocracy. By the twelfth amendment of the Constitution it has been provided that if a Member of Parliament votes in Parliament against his party or abstains from voting, his seat will be vacated.[71] This provision, therefore, in essence debars every Member of Parliament to speak out or to vote against the policies and programmes of his or her party even though he or she cannot agree. This has substantially incapacitated the policy makers and legislators and therefore, has significantly thwarted the effectiveness of Parliamentary democracy in Bangladesh. One of the serious consequences of this provision

---

71 Article 70(1) reads, 'A person elected as a member of Parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in Parliament against that party. Explanation- if a Member of Parliament (a) being present in Parliament abstains from voting, or (b) absents himself from any sitting of Parliament, ignoring the direction of the party which nominated him at the election as a candidate not to do so, he shall be deemed to have voted against that party.' This Article was substituted for the former Article 70 by the Constitution ( Twelfth Amendment) Act, 1991 (Act XXVIII of 1991), S.5.

could be that an executive body with a simple majority in Parliament may enter into a treaty which would go against the interest of the country. And due to the operation of the incapacitating rule, there is little chance of majority against such executive autocracy in the Parliament.

Therefore, this paper suggests that important treaties should be submitted to Parliament for its consent before their ratification by the executive, so that the impacts of these treaties can be monitored by Parliament at the outset. In order to ensure a meaningful role of Parliament in this direction, this paper also suggests that the present incapacitating rule should be abolished so that the Members of Parliament can be united on issues of national interests irrespective of their party affiliation to form a majority to safeguard the national interests and thus resist treaties that are against the interest of the state.

Treaty-making sometimes involves a lengthy process that may extend over several years. It is very much possible that a particular government which ratifies several treaties may not return to power at the next election to be able to transform those treaties into domestic law. Often a new government does not want to implement a treaty ratified by the previous government belonging to different political party for various reasons such as policy-differences, rivalry, lack of fund etc. Thus the change of government is one of the reasons why many treaties are ratified but a few are implemented in Bangladesh.

In view of the above discussion, this paper suggests that :

(1) Parliamentary participation in the treaty-making process of Bangladesh should be ensured for the reasons discussed earlier.

(2) However this paper in no way suggests that all the executive agreements and treaties should be submitted to Parliament for consultation and consent. It recommends that two broad categories of treaties should be outlined in the Constitution.

Category A will include agreements or treaties relating to political, scientific, technical, cultural matters unless they fall under category B. Category B will include all other treaties that have effect on the rights and duties of the subjects, or require an amendment of, or addition to, the existing law, or impose a tax or financial burden on the consolidated fund or cession of the territory etc. Category A agreements will be concluded by the executive only, and there is no need for Parliamentary approval or consultation. However, this paper insists that these agreements should be laid on the table of the House before ratification for a period of 21 days. The treaty should be accompanied by an official report to be prepared by the executive department to the effect that the particular treaty is a category A treaty and does not deal with any matters relating to Category B treaties. Unless objected by an opposition party or any Member of Parliament, a treaty belonging to Category A, should not be discussed in Parliament.

So far as Category B treaty is concerned, this paper suggests that all such treaties should be submitted to Parliament for consultation and consent prior to their ratification. For all such treaties consent means an approval by the majority of the total number of Members of Parliament. Parliament should have a right to consent on condition i.e., to insert reservation and thereby to regulate the internal effects of a particular treaty. In the opinion of the present author, this suggestion is quite in conformity with the established constitutional rule that Parliament has the plenary power of law-making. The primary responsibility for the submission of these treaties to Parliament should lie with the executive. This paper also suggests that any treaty that intends to change the basic structure of the Constitution should be approved by a national referendum i.e., any treaty that intends to make Bangladesh part of a federation or

requires participation in the regional economic system etc.[72]

In order to bring about changes in the above direction, this paper suggests that the present constitutional arrangement, undertaken by the amendment of Article 70 of the Constitution which ensures party domination in the name of party discipline and government stability, should be abolished. The ultimate effect of this constitutional provision is to undermine national interest at the cost of party interest. Members of Parliament should be left free to be united on the basis of national interest not on the basis of party interest. We suggest that the relevant amendment, although inserted following the procedure of article 142, goes against the basic spirit of the fundamental rights enshrined in chapter III of the Constitution.[73]

---

72 The doctrine of the 'Basic structure of the Constitution' was adopted in Anwar Hossain Chowdhury v. Bangladesh,1989 BLD (Spl.) 1; 41 DLR (AD) 165, in which on 9 August, 1988 Parliament passed Constitution (Eighth Amendment) Act, 1988 amending article 100 of the Constitution and thereby setting up six permanent Benches of the High Court Division outside the capital and authorising the President to fix by notification the territorial jurisdiction of the permanent Benches. Writ petitions were filed challenging the amendment on the principal ground that the basic structure of the Constitution cannot be changed by way of amendment and the amendment of article 100 altered the basic structure of the Constitution by curtailing the plenary judicial power of the original High Court Division over the entire Republic. When the writ petitions were summarily rejected by the High Court, the matter came up before the Appellate Division. The Appellate Division held that the power of amendment does not extend to alteration or destruction of the basic structure or feature of the Constitution. It observed, 'There is no dispute that the constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole constitutional edifice will fall down'(para. 376).

73 Articles 36, 37, 38 and 39 read with article 26. All these articles ensure freedom of movement, freedom of assembly, freedom of association,

## Conclusion

The above discussion on the treaty-making process of various countries under three principal models reveals certain basic features. In the first model, the submission of a treaty to a Parliament prior to its ratification as well as the consent of Parliament for ratification are both essential. In the second model, while the placement of a treaty in Parliament prior to its ratification is essential, the consent of Parliament for its ratification is not required. In the third model, neither the placement of a treaty in Parliament prior to its ratification nor the consent of Parliament for ratification is essential. In the first model, a treaty is self-executing if it is so determined by Parliament. But in the models second and third, Parliament has to pass implementing legislation in order to transform the treaty provisions into domestic law.

This paper has attempted to discern a trend in many states toward strengthening the role of Parliament in treaty-making process. The present study observes that while in the first model Parliament has effective control over the treaty-making power of the executive, in the third model it is virtually absent. It, therefore, suggests that Parliamentary role in the treaty-making process in these countries should be strengthened for the reasons discussed above. Particularly with reference to Bangladesh, it suggests that the existing constitutional provisions that favour executive autocracy should be amended in order to strengthen the role of Parliament in the treaty-making process.

---

freedom of thought and conscience and speech. However, the present author holds the view that the words used in these articles i.e., 'reasonable restrictions imposed by law', 'public interest' etc. should not be used to support an amendment that substantially and clearly undermines the national interests at the cost of party interests.