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DIVORCE CONCILIATION:

Without the intervention of the Court and Built-in Conciliation in Family Court Proceedings

Dr. Naima Huq

Divorce is the most detestable thing in Islam, nevertheless these do happen and Chairmen of Union *Parishad* often receive notice of divorce. The provisions of sections 7 and 8 of the Muslim Family Laws Ordinance, 1961 enable the Chairmen to make conciliation between the disputant parties without the intervention of the court. The Family Courts Ordinance, 1985 also provides for conciliation between the disputants in the midst of the court proceedings but these statutory provisions have not heen so far properly understood and practiced. The intention of these statutory provisions is to maintain harmony with the spirit of *Quranic* sanctions relating to divorce. This article focuses on conciliation facilities and the process of its propor utilization through the creation of right-awareness among the disputants, the Chairmen of Union *Parishad* and Family Court Judges.

Conciliation or medation (the terms are interchangeable) is a process of joint decision making by the disputants themselves with the help of a third party. In conciliation or mediation, there is no surrender by the disputing parties to the third party intervener of the power to make any decision (unilateral or otherwise) which is intended to have a binding effect. Conciliation/mediation is the key componert in arrangement for the dissolution of families. It is argued in favour of mediation/conciliation that other forms of dispute resolution share the objective of agreement rather than judgement. However in conciliation it is the parties who are deemed to be in control[1]. It is seen as a space which allows the parties to work

1 Bottomley, Anne, 1984, "Resolving Family Dispute: A Critical View", Freeman, M. D. (ed.) The State, The Law and The Family: Critical Perpectivcs, Tranistock, London pp. 293-301

out their own problems in their own way[2].

Conciliation to resolve marital conflicts can be traced back to *Quran* and Sunna (tradition of Prophet). When the husband and wife cannot live together in peace and harmony, they are given the option to separate,[3] but before such a separat.ion it is recommended that there is an attempt at reconciliation. The *Quran* (IV:35) counsels arbitration between spouses:

> If ye fear a breach between them twain, appoint (two) arbiters. one from his family and the other from hers; If they wish for peace God hath full knowledge and is acquainted with all things[4] (Ali 1979:191).

Ali, commenting on the verses, states that it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure.The impression given is that a capricious use of *talaq* is a grave distortion of the Islamic institution of divorce[5].

It can be argued thal Islam condemns the husband giving *talaq* to his wife unreasonably and encourages reconciliation between the couple before a hasty decision is made by the hushand. Ali has pointed out that the Prophet restrained the husbands' power of *talaq* he gave to women the right of obtaining a separation on reasonable grounds; and towards the end of his life he went so far as practically to forbid its exercise by men without intervention by arbiters or a judge[6].

The Muslim Family Laws Ordinance, 1961 was enacted with

2 Dingwall, Robert & David Greatbatch, 195 4, "Divorce Mediation the Virtues of Formality", in Eekelaar, J & Maclean, Mavis (ed.) Reader in Family Law, Oxford University Press, New York, pp 391-399.

3 Ahmed K.N, 1978, Muslim Law of Divorce, Kitabe Bhavan. New Delhi p. 184.

4 Ali, Abdulla Yusuf, 1979, The Holy Quran. 5th edition Vol. I & II, Kutale Khana Ishaast, New Delhi, p 191.

5 Mahmood, Tahir 1982, The Muslim Law of India 2nd edition, Law Book Co., Allahabad.p.47-48

6 Ali Ameer, 1965, *Mohammedan Law,* Vol II, 6th edibon, All Pakistan Legal Decision Lahore, p 432

the object to give effect to the sanction of the *Quranic* verse cited. The Ordinance incorporated provisions for conciliation to resolve marital disputes without the intervention of the court. The provisions are equally applicable to both husband and wife exercising their right to divorce. Apart from the Muslim Family Laws Ordinance, 1961, the Family Courts Ordinance, 1985 went a step further in resolving marital disputes through conciliation. during the progress of the family suits.

Women and Divorce:

Of all religions, Islam was the first to recognize the right of women to seek the dissolution of marriage on various grounds, including incompatibility of temperament rendering it impossible for the husband and wife to live within the limits ordained by *Allah*. Islam emphasises the importance of the happiness of both spouses. It ordains that every attempt should be made to maintain the marriage tie, but once it is established that the marriage has broken down, the *Quranic* law allows the parties to dissolve the marriage in order to avoid a greater evil. Despite the freedom of the parties to divorce, Islam warns both parties against the unscrupulous use of this right. It says that divorce is the most detestable thing even when lawfully allowed or permitted.

The modernists proclaim that the nature of divorce under the *Quranic* law is based on the so-called 'breakdown theory'.[7] According to this theory divorce is available to both the spouses without the need to establish any specific grounds for the divorce. It allows for the dissolution of the marriage at the instance of husband (*by talaq*) or the wife (*by khula*) and by mutual consent (*by mubara'at*). The modernists reject the orthodox view that a husband enjoys under the *Quranic* law, unlimited authority to dissolve the marriage whereas a wife has

7 Malhmood. T, 1992, "No More Talaq, Talaq, Talaq-Juristic Restoration of the True Islamic Law of Divorce", in Islamic Comparative Law Review, Vol. XII, pp 1-2. See Ahmad, Furqan, 1991, 'Notes and

a limited or no right to do so and argue that the orthodox view is against the spirit of the *Quran and Sunna.*

Under the *Quran* and *Sunna* (i.e. non-statutory law of divorce) a wife can exercise her right to divorce, either by *talaq-e-tafweez* or *khula*, without the interention of Court. A Muslim wife can at the time of marriage or subsequent to marriage, reserve in the *kabinnama* (marriage contract deed) a right to dissolve the marriage in specified circumstances. This is called *talaq-e-tafweez* (the right to divorce delegated by the husband to the wife), which can be effected without the intervention of the court. Irrespective of the inclusion of conditions in the *kabinnama*, the wife has a right of *khula* (divorcing her husband by forgoing dower). In the *khula* form of divorce, the wife has to compensate the husband or forgo her dower [marriage consideration I for her release from the marital bond. If the husband consents to the compensation the *khula* takes effect extra-judicially, but if the hushand tries to maintain the marriage the wife can ask for a judicial *khula*. Despitc these *Quranic* rights, women's rights have continued to be undermined due to the conservatism of the orthodox jurists[8]. The scholarly debates on the orthodox law have led to modern legislative reforms in many Muslim countries, including Bangladesh.

The reforms have had two main objectives. First, they have tried to prevent the husband from abusing his power to effect a unilateral *talaq* (as popularly understood by the orthodox jurists). Secondly, they have tried to enhance women's rights to divorce.

The first step towards legislative reform of the Muslim Family Laws of British India came with the enactment of the Muslim Personal Law Application *(Shariat)* Act. 1937, followed by the

Comments: Muslim Women's Right to Divorce-An Apparently Misunderstood Aspect of Islamic Law in India, in Delhi Law Review Vol. 13, pp 85-94 at 8s6.

8. Hussain, Justice Altaf. 1987, Status of Women in Islam, Law Publishing Company, Lahore.

Dissolution of Muslim Marriages Act of 1939. The Act of 1939 was considered one of the most important enactment of the British Indian legislature for safeguarding the rights of Muslim women in the Sub-continent. This Act allowed women to obtain a decree for the dissolution of marriage from a court on certain grounds which they could not ordinarily do without a right delegated to them by the husbands or without their husbands' consent.

Although the Act gave more options to women exercising their right to judicial divorce, it did not protect women from the threat or abuse of *talaq* by their husband. This led the reformers to pass a procedural law; the Muslim Family Laws Ordinance, 1961. This Ordinance aimed to minimize the practical complexities of a court hearing, viz, the lengthy procedure and cost. Since most women are barely in a position to support themselves the cost and time of court proceedings the same acted as a strong deterrent against making use of their rights.

The Muslim Family Laws Ordinance, 1961:

The Muslim Family Laws Ordinance, 1961 provided equal opportunity to women to dissolve marriages extra-judicially (without the intervention of the court). It sponsored the idea of reconciliation in the case of divorce by either spouse in accordance with the spirit of the *Quran and Sunna*. The Chairmen (elected member) of the City Corporation or Union *Parishads* (Administrative council at local level) are empowered to effect the procedure of reconciliation before the disputants after its process is initiated by service of notice. The purpose of notice of *talaq* to be served upon the Chairman of Union *Parisad* and the wife is to prevent hasty dissolution of marriage or offer a second chance to the disputants, which is beneficial to both the parties in the event reconciliation is effected. When the due service of notice is satisfactorily established the *talaq* in the event of failure of reconciliation

becomes effective after the expiry of 90 days from the date of service of notice under section 7 of the Muslim Family Laws Ordinance, 1961[9] Section 7 introduced a single method of dissolving marriages and considered all *talaq* by the husband as single revocable *talaq*. Section 8 provided that the wife, who wished to dissolve her marriage, could follow the procedural law in the same way as the husband[10] This was affirmed in the judgement in Hefzur Rhaman's case in which the judgement of the court was given by Mr. Justice Mustafa Kamal:

> When a divorce proceeds from the husband, it is called *talaq*, when effected by mutual consent, it is called Khula or Mubara'at, according as the terms are. The Muslim Family Laws Ordinance, 1961 has given statutory recognition to a wife's right of divorce (Talaq-i-taufiz) in exercise of her delegated power to divorce, as also to dissolution of marriage otherwise than by talaq. There are different modes of *talaq* according as

9 Parveen Sultana (Mosammat) vs Md Enamul Haque, 7 MLR 2002 (HC) Vol-VII, 451.

10 Section 7 of the Muslim Family Laws Ordinance, 1961 provides:

(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which tnay extend to ten thousand taka or with both.

(3) Save as provided in sub-section (5), a *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under sub-section (1), the Chairman shall constitute an Arbitration Council for the purposes of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in sub-section (3) or pregnancy, whichever be later, end.

(6) Nothing shall debar a wife who marriage has been terminated by *talaq* effective under this section from remarry the same husband without an intervening marriage with a third person, unless such termination is for the third time so effective.·

Section 8,

Where the right to divorce has been duly delegated to the wife and she wishes to exercise the right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of section 7 shall, *mutatis mutandis* (as near as possible), and so far as applicable, apply.

the pronouncement of *talaq* is by husband. In the case of *Talaq Ahsan* (most proper), a single pronouncement is made during a *tuhr* (period between menstruation) followed by abstinence from the sexual intercourse up to three following menstruations, at the end of which *talaq* becomes absolute. In the case of *Talaq tasan* (proper), three pronouncements are made during successive tuhrs, there being no sexual intercourse during any of the following three *tuhrs*. In the case of *Talak-ul-bidaat* or *Talak-i-badai* (which is popularly called *Bain talaq* in Bangladesh), either three pronouncements are made during a single *tuhr* in one sentence or three separate sentences or a single pronouncement is made during a *tuhr* clearly indicating an intention to dissolve the marriage irrevocably. This from of *talaq* is not rccognised by the *Shafi* and *Shia* Schools of thought, but the Muslim Family Laws Ordinance, 1961 recognises "pronouncement of *talaq* in any form whatsoever" section 7(1)[11]

The procedure makes it incumbent upon the husband to send notice of *talaq* to the Chairman of the Union *Parishad.*[12] The Chairman must take all steps necessary to bring about a reconciliation between the spouses. The divorce will, if not revoked earlier expressly or by conduct (as a result of reconciliation brought about by the Union *Parishad* or otherwise) be effective only after the expiry of ninety days from the date of the notice, or if the wife is pregnant after the pregnancy ends, whichever period is longer. If and when a divorce becomes effective, the parties may remarry each other without intervening marriage, ie, *hila'* except in the case of a third divorce.

Section 7(3) if the Ordinance provides that *talaq* will not be effective until the expiry of 90 days from the receipt of notice

11 Helzur Rahman (Md) vs Shamsun Nahar Begum and another 4 BLC(AD) 14
12 Section 7 of the Muslim Family Laws Ordinance, 1961

by the Chairman. Failure on the part of the husband to give notice or his abstention from giving notice to Chairman connected should perhaps be deemed, in view of section 7, as if he has revoked the pronouncement of *talaq*.[13] In Abdul Aziz vs Rezia Khatoon,[14] it was held the non-compliance with the provisions of section 7(1) makes *talaq* legally ineffective. However, very recently the Appellate Division of the Supreme Court of Bangladesh in apparent contradiction to section 7 of the Ordinance held:

> The petitioner husband divorced his wife by swearing an affidavit before Magistrate and accordingly sent the copy thereof to the *Nikah* Register in whose office the divorce was registered as required under section 6 of the Act, 1974 and the marriage tie is in consequence stands dissolved and as such he wife is entitled to the payment of entire, dower, both prompt and deferred. He cannot take the advantage of his own wrong in respect of nonservice of notice to the Chairman as required under section 7 (l) of the Ordinance 1961.[15]

The apparent contradiction can be explained by Court's desire to prevent the husband from using the statutory requirements of service of notice of *talaq* to the Chairman of Union *Parishad* as devise to defeat the claim of dower of the divorced wife following the *talaq*. The Court probably relied on the following well known principle "Equity will not allow a statute to be used as an instrument of fraud."

Section 7 of the Muslim Family Laws Ordinance, 1961 also applies to the wife who wishes to dissolve the marriage.[16] Section 8 of the said Ordinance has made it incumbent upon the wife who wishes to dissolve the marriage to follow the procedure laid down in section 7 of the Ordinance with

13 Syed Ali Newaz Gardezi vs Lt Col Md Yusuf (1963) 15 DLR SC.
14 21 DLR (1969) 733
15 Serajul Islam (Md) vs Most Helana Begum and others 4 MLR (1999) (AD) 250
16 Section 8 of Muslim Family Laws Ordinance 1961

necessary changes. Where the wife wishes to exercise her delegated right, that is. *talaq-e-tafwez*, she must send notice to the Chainman of Union *Parisad* after actually exercising the right of divorcing herself.

The High Court Division of the Supreme Court of Bangladesh in Shirin Akhter and another vs Md Ismail held:

> When the husband admittedly received the notice of exercise of right of *talaq-tafeeq* and the notice thereof was served upon the Chairman concerned, there was compliance with the requirement of law and the *talaq* became effective.
>
> Direction for restitution of conjugal rights as a consequence relief is wrong in law and is opposed to the principle embodied in article 27 and 31 of the Constitution.[17]

Section 8 says "where any of the parties to marriage wishes to dissolve the marriage otherwise than by *talaq*", which apparently means dissolution of marriage through court, *khula* and *mubara'at* equally falls within the section. These forms of dissolution of marriage, particularly judicial dissolution, need careful examination in the light of section 23(2) of the Family Courts Ordinance, 1985.

Section 23(2) of the Family Courts Ordinance 1985 has made it incumbent upon the court to send a certified copy of the decree[18] within 7 days of the passing of the decree. The Chairman after receipt shall consider the certified copy as intimation of *talaq* and section 7 of the Muslim Family Laws

17 Shirin Akhter and another vs Ms Ismail, 5 MLR (2000) (HC) 81

18 In Pockon Rikssi Das vs Khuka Rani Das and others{50 DLR (HC) 47}, it was held that section 23 of the Family Laws Ordinance, 1961 if read with section 5 will make it clear that the provision of the said Ordinance shall have to be followed in case of decree passed by th Family Court for the dissolution of a marriage as enumerated in section 5(a) of the Ordinance if it elates to Muslim only. The rights and liabilities that have been given to the citizen professing Islam under Muslim Family Laws Ordinance, it appears, have been fully protected under section 5 of the Family Courts Ordinance when the words "subject to the provisions of Muslim Family Laws Ordinance" has been used.

Ordinance 1961 will come into operation. A question may be raised in view of section 23 of Family Courts Ordinance 1985 and sections 7 and 8 of the Muslim Family Laws Ordinance 1961 concerning the time when the dissolution of marriage will be effective, is it after the expiry of 90 days from the receipt of the notice from the wife when she initially filed the suit or action; or is it after the expiry of 90 days from the receipt of the certified copy from the court?

In one case it was held that it is not necessary to inform the Chairman Union Parisad after the court has granted a decree under section 2(ii) of the Act of 1939 on the basis of the option of puberty[19]. But in another case the Lahore Court of Pakistan had dealt with the question extensively and held that after the decree for dissolution has been made by the family court, that court must send a copy of the decree to the Chairman. At the same time it is necessary for the wife, in whose favour the decree is passed, to independently inform the Chairman about the decree, and also to send a notice thereof to the husband. An issue raised before the honourable learned court was the effectiveness of the decree of the dissolution of the marriage after a successful reconciliation. The honourable court held that in an instance of total successful conciliation, the decree shall be deemed to have been abandoned by the wife. The conciliation will have the effect of compromise and thus avoidance of the decree. In other words the decree shall have no effect if within the specified period the reconciliation has been effected between the parties in accordance with the provisions of the Family Laws Ordinance and rules made thereunder.[20]

In the *khula* form of divorce there is no problem when the husband gives consent to the divorce and the wife may then obtain the divorce extra-judicially by serving the notice upon the Chairman. If when he refuses to give his consent the wife has to seek *khula* through family court and then the same

19 Muhammad Amin vs Surraya Begum 1969 21 DLR 253
20 Muhammad Ishaque vs Ahsan Ahmed 1975 PLD LAh 1118

question arises with regard to the applicability of sections 7 and 8 of the Ordinance. The Pakistan Court of Baghdad-ul-Jahid held that as a result of the promulgation of the Muslim Family Laws Ordinance of 1961 reference to an Arbitration Council has become a pre-condition for applying to a family court for dissolution of marriage by *khula.* It further held that *khula* is operative in cases where the wife has as 'fixed aversion' for the husband, in which case any amount of reconciliation would be of no use[21]. The court in this case only gave the probable consequences of 'reconciliation'. It was very practical from the point of view of *khula* sought through court because the wife after going though the trauma of court procedure the wife would not wish to be reconciled the marriage. Nonetheless, whatever the least chances of successful reconciliation the court did not specifically provide that sections 7 and 8 are not applicable to *khula.*

In *mahara'at* form of divorce which is based on the mutual aversion of the parties there is no occasion of going to the court. The marriage can be dissolved by serving the notice by either party upon the Chairman of Union *Parishad..* The prospect of reconciliation is of no effect as the parties have mutually consented to the divorce. It can be contended that Muslim Family Laws Ordinance, 1961 is more appropriate in the cases of divorce without intervention of the court.

The Family Courts Ordinance, 1985:

The Family Court Ordinance, 1985 (No. XVIII of 1985) has been enacted to resolve disputes arising out of marriage, restitution of conjugal rights, dower, maintenance dissolulion of marriage, guardianship and custody of children.[22] The object of the Ordinance is to provide a cheaper and more expeditious remedy and render the court accessible to all sections of society. The Family Court (Amendment Act, 1989) made explicit

21 Mustaz Mai vs Ghulam Nabi 1969 PLD Baghad-ul-Jahid 5
22 Section 5 of the Family Court Ordinance, 1985

provision for expeditious judgments. emphasising the intention and aim of passing the original Ordinance.

The Family Court has no jurisdiction to entertain other issues of family law as for instance inheritance, partition, gift or *wakf.* Further, the jurisdiction of the Family Courts includes only the civil jurisdiction regarding these issues. The Family Court Ordinance applies to all citizens irrespective of religion. This Ordinance has not taken away any person right of any litigant of any faith. It has just provided forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance.[23]

The Family Courts Ordinance, 1985 has built-in conciliation mechanism enabling disputant parties to resolve the outstanding issue informally, discreetly and with a sense of accommodation in which the Family Courts play the role of a well-wisher and friends rather than an adjudicator.

After the filing of the plaint, written statement and service of summon, the Family Courts proceeds with the pre-trail hearing of the suit.[24] According to section 10 of the Family Courts Ordinance, 1985 the Court shall fix a date ordinarily of not more than thirty days for a pre trial hearing of the suits. Subsection 3 states that at the pre trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if that is possible. If no compromise or reconciliation is possible at the stage, the court shall frame the issues to be tried in the suit and fix a date ordinarily of not more than 30 days for recording of evidence. At the conclusion of the trial[25] but before the pronouncement of the judgment the Family Court Judge makes another effort to effect a compromise or reconciliation between the parties.

23 See note.18
24 Section 10 of the Family Courts Ordinance, 1985.
25 section 13 of the Family Courts Ordinance, 1985.

The Family Court Judge here acts as a mediator or a conciliator between the disputant parties. The intention of Legislature is to uphold the spirit of the *Quran* and *Sunna*- "With Allah, the most detestable of all things permitted is divorce."[26]

Conclusion:

The Chairman of Union *Parishad* and the Family Court Judge are expected to play the role of a conciliator or mediator in real terms in the marital disputes. However, this object of the Ordinance is to some extent frustrated because of the Chairman's lack of initiative to arrange for reconciliation or the parties reluctance to reconcile. The Muslim Family Laws Ordinance, 1961 does not provide any consequences provision if the Chairman of Union *Parishad* does not arrange conciliation between the disputants and does not take any steps to facilitate a reconciliation between the parties. In practice the Chairman either does it mechanically without commitment or it is forgotten totally in the absence of any initiations by the disputant parties.

The Family Courts set up to adjudicate on family matters were supposed to be specialist and exclusive courts to ensure effectiveness and at the same time privacy, where mediation or conciliation as well as other informal procedure in aid of resolution of family disputes were expected to be utilised frequently to make those regular practice of the court which could encourage the disputants to opt for these procedures to their advantage. In practice the Family Courts also has ordinary civil and even criminal jurisdiction which tax upon the working hours of the presiding judge, who either does not feel encouraged to insist or prevail upon the disputant parties to opt for mediation or conciliation or does it mechanically due to pressure of other non-family matters. The desired specialisation in disposing of family matters and the practice of mediation or

26 Ali Maulana undated A Manual of Hadith, The Ahmadiyya Anjuman Ishaat Islam, Lahore, p. 284

conciliation during family court proceedings are waiting and the atmosphere or tradition of it is virtually non-existent. Probably social movement is necessary to motivate the disputant parties to invoke mediation or conciliation as a means to resolve family disputes either when occasion arises outside the court proceedings as well as during the court proceedings. Social movement in this regard becomes all more the important in view of the illiteracy, ignorance and superstitious, culture and traditions of the disputant parties. Family Courts could be restricted to disposing of family matters only. Family Court Judges could be selected from comparatively more experienced Assistant Judges, they could be trained to motivate them to become specialise in adjudicating family disputes, they could be encouraged to urge upon the disputants to go for mediation or conciliation as the occasion arises.

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RECENT DEVELOPMENTS IN THE EUROPEAN SYSTEM OF HUMAN RIGHTS

Liaquat A. Siddiqui

1. Introduction

The European system of human rights is one of the highly structured mechanisms to pursue human rights at the regional level. The Council of Europe, established principally to realise 'democracy', 'human rights' and 'rule of law' among the member states, provides the major legal framework for the protection of human rights in Europe. The Council has adopted two major treaties on human rights, one is the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and the other one is the European Social Charter 1961[1]. The former ensures civil and political rights and the latter provides for social and economic rights. However, fundamental changes have taken place in the human rights mechanism established under the 1950 European Convention with the entry into force of the Eleventh Protocol in 1998. A revised Charter of Social Rights, adopted by the Council in 1996 came into force in 1999. This will strengthen the supervision mechanism already established under the European Social Charter 1961.

The European Union (EU), another significant player in the region, proclaimed a Charter of Fundamental Rights in 2000 in order to internalise human rights norms in its regime established principally to harmonise trade policies within the member states of the West. The two powerful organisations, the Council and the Union, are vying with each other for the promotion of human rights observance in the countries, many

1 See, for the European Convention of Human Rights and Fundamental Freedoms, 1950 and the Eleventh Protocol, Malcolm D. Evans, 'Blackstone's International Law Documents', Third Edition, 1996, Blackstone Press, London, pp.43-54, 64-73. For the European Social Charter, 1961 see, Brownlie, Ian (ed), Basic Documents on Human Rights, Second Edition, Oxford University Press, 1981, pp. 301-319.

of which are members of both the organisations.

The recent developments in these two organisations, therefore, provide interesting insights into the nature and trends of human rights practices in Europe. One of the major objectives of this article is to examine the recent reformations in the human rights practices of these two organisations, even though attempts will be made to highlight the institutional and constitutional problems that may emerge from the existence of two systems with overlapping jurisdictions. This article does not deal with all the relevant aspects of human rights in Europe. In particular, this article examines the changes brought about by the Eleventh Protocol and compares the relative effectiveness of the new system with the abolished one. It explores the changes brought about by the 1996 revised Social Charter that came into force in 1999. Especial attention has also been given to the Charter of Fundamental Rights 2000, adopted by the European Union. This article examines the implications of this Charter in the light of the already existing compliance mechanism under the European Union.

2. The European Convention of Human Rights, 1950

The European Convention of Human Rights, adopted in 1950 provides the basic legal framework for the protection of human rights in Europe. Almost eleven Protocols have so far been adopted to extend the number of rights guaranteed by the regime and to develop a more effective compliance system within the regime.

The original Convention guarantees a good number of civil and political rights. These are: the right to life (Article 2), prohibition from torture and inhumane or degrading treatment or punishment (Article 3), freedom from slavery or forced or compulsory labour (Article 4), right to liberty and security of person (Article 5), right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6), prohibition of retroactive

criminal legislation (Article 7), right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of peaceful assembly and association (Article 11), the right to marry and found a family (Article 12).

If one of the rights set forth in the Convention is violated, the injured person shall have an effective remedy before a national authority (Article 13). The Convention also contains a non-discrimination clause providing that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as, sex, race, colour, language, religion etc, (Article 14).

A number of subsequent Protocols have extended the horizon of rights by adding new rights to the already existing catalogue of rights. The First Protocol (1952) has added a right to property (Article 1), the right to education (Article 2), and the undertaking by the State Parties to hold free and secret elections at reasonable intervals (Article 3). The Fourth Protocol (1963) prohibits depravation of liberty for failure to comply with contractual obligations (Article 1). It guarantees the right to free movement (Article 2) and bars forced exile of nationals (Article 3) and the collective expulsion of aliens (Article 4). The Sixth Protocol (1983) abolishes the death penalty. The Seventh Protocol (1984) guarantees that an alien must not be expelled from the place of resident without the due process of law (Article 1). It also provides for a right of appeal in criminal proceedings (Article 2), for compensation in cases of miscarriage of justice (Article 3). It ensures the right not to be subjected to double jeopardy (Article 4). It also provides for the equality of rights and responsibilities between spouses, between them and their relations with children (Article 5).

In order to ensure the observance of the human rights guaranteed under the Convention, the High Contracting Parties established two mechanisms. First, a European Commission of

Human Rights and Second, a European Court of Human Rights (ECHR) (Article 19). The Eleventh Protocol has abolished these two institutions and a Court of Human Rights on permanent basis with compulsory jurisdiction has replaced these institutions. We will however, examine the role and functions of these two previous institutions in order to compare the impacts of recent changes brought about by the Eleventh Protocol.

Of the two mechanisms, the Commission provided 'institutional mechanism' for the correction of violations of human rights while the 'Court' provided 'formal legal mechanism' for the resolution of disputes arising out of the violation of human rights guaranteed by the Convention. As it appears from the Convention, the framers of the Convention put primary emphasis on the 'Commission' in resolving the human rights violations, failing which, the 'Court' was given a secondary role in the matter. This is probably because the framers had thought that most of the violation cases could be resolved by friendly settlement between the parties without having recourse to any formal method of dispute resolution. The doors of the Court were closed to the individuals, groups and NGOs. Only member states and the Commission had access to the Court under the previous system (Article 44, original Convention). Individual's petition could reach before the Court only if the Commission or a State Party had so wished. Therefore, the abolished mechanism was mostly institutional in nature in the sense that it provided individual petitioners an institutional forum for the resolution of their grievances.

The Commission consisted of a number of members equal to that of the High Contracting Parties (Article 20). The members were elected by the Committee of Ministers for a period of six years (Articles 21, 22). The Commission was empowered to receive (1) inter-state complaint and (2) individual petition[2]. Under Article 24, High Contacting Parties could refer to the

Commission, through the Secretary General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party. Under Article 25, the Commission could receive petition from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties. However, an individual had to prove three things. First, that the State Party concerned had recognised the competence of the Commission in receiving such petition (Article 25.1). Second, that the petitioner had exhausted all domestic remedies (Article 26) and third, that the petition had been submitted within six months from the date of the final decision by the domestic authority (Article 26). Under Article 27 (3) the Commission could reject a petition filed in contravention of these requirements.

Even after the acceptance of a petition, the Commission could reject it under Article 29 if in the course of examination, it found that one of the grounds of non-acceptance provided for in Article 27 had been established. These grounds were: (a) anonymous petition (b) a matter which had already been examined (c) a petition incompatible with the provisions of the Convention, manifestly ill-founded or an abuse of the right of petition. The Commission under Article 30 could strike a petition out of its list of cases where (a) the applicant did not pursue his petition (b) the matter had been resolved or (c) for any other reason established by the Commission, it was no longer justified to continue the examination of the petition.

Had the Commission accepted a petition, it could proceed in a number of ways. Under Article 28 (1) (a), in order to ascertain facts, it could undertake an examination of the petition, and if needed could carry out an investigation with the assistance of the parties. In the investigation, the states concerned had the

2 See, for further details: Steiner, J. Henry and Alston, Philip, International Human Rights in Context: Law, Politics and Morals, Oxford University Press, 1996, pp. 583-598.

obligation to furnish all necessary facilities to the Commission. At the same time, under Article 28 (1)(b), the Commission could place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matters on the basis of respect for human rights defined in the Convention. If the Commission could succeed in affecting a friendly settlement, the matter would be reported to the States concerned, Committee of Ministers and to the Secretary General.

If the examination of the petition had not been completed in accordance with Article 28, 29 or 30, the Commission would send a report to the Committee of Ministers stating its opinion on the alleged violation together with any proposals it thought fit (Article 31). If the question was not referred to the Court under Article 48, within a period of three months from the date of the transmission of the report to the Commitee of Ministers, the Committee of Ministers could decide whether there had been a violation of the Convention. In affirmative cases, the Committee of Ministers could prescribe measures that the state concerned was required to undertake within a given period of time. If the state concerned failed to take satisfactory measures within the prescribed period, the Committee of Ministers would decide what effect should be given to its original decision (Article 32).

The European Court of Human Rights consisted of a number of judges equal to that of the members of the Council of Europe for a period of nine years (Article 38). The member of the Court would be elected by the Consultative Assembly (Article 39) from candidates with high moral character having qualifications for appointment to high judicial office or were jurisconsults of recognised competence (Article 39). However, the Court suffered from a number of drawbacks. As we have already noticed, the doors of the Court were open only to the High Contracting Parties and the Commission (Article 441. A

major criticism was that while a state could take a matter before the Court against an individual, the injured individual had no such remedy against the alleged state. The Court's jurisdiction was not automatic. The concerned party had to either recognise the competence of the court in the matter or consent to it (Articles 46, 48). The court could only deal with a case that the Commission had failed to resolve by friendly settlement (Article 47). In addition, such cases had to be brought before the Court within three months from the date of the transmission of the report by the Commission to the Committee of Ministers (Articles 31, 48). Although the concerned parties were under an obligation to abide by the decisions of the Court, the Committee of Ministers had the responsibility to supervise the execution of the Court's decision (Articles 53, 54).

3. Developments in the European Convention of Human Rights: 1998 Eleventh Protocol

A number of significant changes have been brought about by the 1998 Eleventh Protocol in the compliance mechanism established by the original European Convention of Human Rights. Major features of the new mechanism have been discussed below.

Permanent Court

The newly established Court functions on a permanent basis (Article 19, the Eleventh Protocol). The judges work full time (Article 21, Eleventh Protocol). Under the original Convention judges would be appointed for nine years. But under the Eleventh Protocol the judges are appointed for a period of six years (Article 40, original Convention; Article 23, Eleventh Protocol). The members of the Court under the original Convention, would be elected by the Consultative Assembly (Article 39, original Convention). But under the Eleventh Protocol, the judges are appointed by the Parliamentary

Assembly.

Three-Tier Court

The abolished Court consisted of a Chamber composed of nine judges. A judge who was a national of the State Party concerned could sit as an ex officio member of the Chamber (Article 43, original Convention). But the new system establishes a three tier Court consisting of a 'Committee of three judges', a 'Chamber of seven judges' and a 'Grand Chamber of seventeen judges' (Article 27 Eleventh Protocol). A Committee of three judges may, by a unanimous vote, decide inadmissible or strike out an individual application submitted under Article 34 of the Eleventh Protocol, where such a decision can be taken without further examination (Article 28, Eleventh Protocol). If no such decision is taken by the Committee, a Chamber decides on the admissibility and merits of individual applications submitted under Article 24 of the Eleventh Protocol. A Chamber decides on the admissibility and merits of inter-state applications submitted under Article 33 of the Eleventh Protocol.

A Chamber may at any time refer to the Grand Chamber a pending case that raises a serious question affecting the interpretation of the Convention or the Protocols thereto (Articles 30, 31, Eleventh Protocol). A Chamber may also refer a case to the Grand Chamber, if the resolution of such a case by the Chamber may have a result inconsistent with the judgement previously delivered by the Court (Article 30, Eleventh Protocol).

Friendly Settlement by the Court

The abolished Court had no power to try for the friendly settlement of cases. Indeed, the Commission which was also abolished by the Eleventh Protocol, had the power to try to settle violation cases by friendly negotiations among the parties concerned (Article 28, original Convention). However, the Court established by the Eleventh Protocol has got the power to resolve a violation case by friendly settlement (Article 38 (b),

Eleventh Protocol).

The Door of the New Court is open to Individuals, NGOs and Groups

Under the original Convention, the High Contracting Parties and the Commission had the right to bring a case before the Court (Article 44, original Convention). Individuals had no right to go to the Court directly. Individual petitions were sent directly to the Commission which, if thought appropriate, would send the petitions to the Court.

Although Article 5 of the Ninth Protocol (1990) which entered into force in 1994, allowed individual's to refer a case to the Court, the scope was limited. A person could refer a case to the Court only after 'having lodged the complaint with the Commission'. Moreover, such cases were subject to a screening process. A panel of three judges together with judges of the concerned parties would allow an individual petition in rare cases, i.e., a case raising serious question affecting the interpretation or application of the Convention (Article 5.2, Ninth Protocol). However, under the new arrangement, any person, non-governmental organisations or group of individuals, claiming to be the victims of a violation, by one of the High Contracting Parties, of the rights set forth in the Convention or the Protocols thereto, may file an application with the Court.

The Jurisdiction of the New Court is Compulsory

Under the previous system, the Court had jurisdiction only if the parties concerned recognised by declaration its compulsory jurisdiction ipso facto or gave consent (Articles 46, 48). Under the new arrangement, court's jurisdiction is automatic as the High Contracting Parties undertake not to hinder in any way the effective exercise of the right of individuals to approach the Court (Article 34, Eleventh Protocol). However, one still has to prove two things: First, that he has exhausted the domestic remedies and second, the petition has been filed within six

months from the date of final decision (Article 35).

Third Party Intervention

In the previous arrangement, a third party could intervene only as a matter of procedural requirement, and in rare cases[3]. But under the new arrangement, 'third party intervention' is a feature of the Convention. The new arrangement allows a High Contracting Party, one of whose nationals is an applicant, the right to submit written comments, and to take part in hearings. In the interest of the proper administration of justice, the Court may invite any High Contracting Party, which is not a Party to the proceedings or any person concerned who is not the applicant, to submit written comments or take part in hearings (Article 36, Eleventh Protocol).

4. The Role of the European Court of Human Rights (ECHR) As a Supranational Body.

The European Court of Human Rights, as a supranational body, has played significant role in reshaping the behaviour of the organs of the member states. The decision of the Court often requires the member states to annul their administrative decisions, to reform their domestic laws, or even to declare void the judgements given by the higher courts of the member states for being inconsistent with the provisions of the Convention or the Protocols.

In the Sunday Times V. The United Kingdom 1979[4], the European Court of Human Rights reversed the decision of the House of Lords of the United Kingdom. A distillers company, between 1958-1961, manufactured drugs containing thalidomide. The drug was used as sedatives for expectant mothers many of whom gave birth to children suffering severe deformities. The parents went to court, on behalf of their deformed children for compensation claiming negligence of the

3 Rules of the Court were revised in 1983. According to the Rules 30 and 33 of the Revised Rules individual applicants have the right to participate and be represented in proceedings before the Court.

4 The Sunday Times V. The United Kingdom, (no. 1), judgement of 26 April, 1979 (Series A no. 30). This case has been discussed in length in Brownlie, Ian, supra, pp. 266-300.

company. A number of newspapers published articles regarding the suffering of hundreds of people including the negligence of the company. On the request of the Attorney-General, the Queen's Bench Division of the High Court granted injunction restraining the Sunday Times from publishing a draft article which touched upon the negligence of the company including the legal remedies available to the injured parties. The Court of Appeal later vacated the injunction. However, on appeal, the House of Lords restored the injunction again. The House of Lords relied on the 'pressure principle' and on the 'prejudgement principle'. Lord Reid argued, inter alia, that publication of the draft article by the Sunday Times would amount to 'contempt of court' as the matter was pending before the court. The publication would allow a prejudgement by the public. It would also create pressure on one of the parties to negotiate the case unfavourably[5].

When the matter was brought to the European Commission on Human Rights, it found that the decision of the House of Lords amounted to a violation of the right to freedom of expression granted in Article 10 of the 1950 Convention. The European Court of Human Rights, agreed with the Commission, and concluded that there was a violation of Article 10. The European Court emphasised that the restraint was not proportionate to the legitimate aim pursued, neither was it necessary in a democratic society for maintaining the authority of the judiciary. More importantly, the Court emphasised the right of the public to receive information and the obligation of the media to impart information on matters of public importance in the light of Article 10 of the Convention. Thus, the decision of the House of Lords was reversed by the European Court of Human Rights.

In Ireland V. United Kingdom. 1978[6] the British government

5 Borwnlie, Ian, ibid, pp.277-278.

6 Ireland V. The United Kingdom, Judgement of 18 January 1978 (Series A no. 25)

detained some suspects without trial for a long period of time and during interrogation used inhumane techniques. The British government relied on the derogative provision under Article 1S of the Convention. The European Court of Human Rights concluded that internment without trial did not amount to a violation of the right to liberty under Article 5 of the Convention but the interrogation techniques used amounted to 'inhumane and degrading treatment' under Article 3 of the Convention. However, in the course of the proceeding the then British Prime Minister declared in the Parliament that the relevant interrogation techniques would not be used further[7]. Thus, the administrative decision of the member-state was changed due to the intervention of the European Court of Human Rights.

In Golder V. The United kingdom, 1975[8] the European Court of Human Rights required the British government to reform its penal law. Mr. Golder, a prisoner in a British Jail, wanted to consult a solicitor and institute a civil proceeding. But the authority refused his prayers as no such provisions had been available in the Prisoner's Rules 1964. The European Court of Human Rights decided that a violation of Article 6 of the Convention guaranteeing the right to a fair trial took place. As a result of the decision of the European Court of Human Rights, the government had to reform the Prisoner's Rules to provide the right to consult a solicitor and a right to institute civil proceeding.

These cases illustrate how the European Court of Human Rights regulates the behaviour of state parties in human rights matters. Indeed, the workload of the Court has increased since its inception in 1959. The Court receives around 136 international phone calls and 757 letters a day. As of December 2000, about 15,858 registered applications have resulted in

7 Following the announcement by the Prime Minister, the practice of the government was abandoned.

8 Golder V. The Unite Kingdom, Judgement of 21 February 1975 (Series A no. 18)

judgements on merits. Other applications are completed at an earlier stage, by being declared inadmissible, being otherwise struck out or following a friendly settlement. Between January 1, 2000 and December 31, 2000 the Court delivered 695 judgements overall, 6769 applications were either struck out or declared inadmissible and 1082 were declared admissible. In the cases decided by the Court in 2000, it found that delayed administrative[9], civil[10] and criminal[11] proceedings violated Article 6.1 of the Convention, lengthy detention on remand caused violation of Article 5.3 of the Convention[12], ill-treatment in police custody amounted to a violation of Article 3 of the Convention[13], death in police custody amounted to a violation of Article 2 of the Convention[14], award of damages against newspaper for defamation resulted in the violation of Article 10 of the Convention[15], conviction for refusal to answer police questions resulted in the violation of Articles 6.1 and 2 of the Convention[16].

However, the new arrangement introduced by the Eleventh Protocol has made little progress in two respects. Firstly, as before, the execution of a judgement of the Court has still been left under the supervision of a political body i.e., the Committee of the Ministers (Article 46(2), Eleventh Protocol, Article 54, Original Convention). Secondly, when a case is referred from a Chamber to the Grand Chamber, the president of the trial Chamber and the judge who sat in respect of the State Party

9 Thery V. France, No. 33989/96, 1 February 2000 [Section III], Fernandes Magro V. Portugal, No. 36997/99, 29 February 2000 [section III]

10 Capoccia V. Italy, No. 41802/98, 8 February 2000 [section III]; Rodrigues Carolino V. Portugal No. 36666/97, 11 January 2000 [section IV]

11 Palmigiano V. Italy No. 37507/97, 11 January 2000 [section II], Majaia, V. Slovene, No. 28400/95, 8 February 2000 [section I]

12Punzelt V. Czech Republic, No.31315/96, 25 April 2000 (section III)

13 Buyukdag V. Turkey, No. 28340/95, 21 December 2000 [section IV], Egmez V. Cyprus, No. 30873/96, 21, December 2000 [section IV]

14 Velikova V Bulgaria, No. 41488/98, 18 May 2000 [section IV]

15 Bergens Tidende and Others V. Norway, No. 26132/95, 2 May 2000 [section III]

16 Quinn V. Ireland, No. 36887/97, 21 December 2000 [section IV]

concerned are entitled to sit in the Grand Chamber again (Articles 27, 43 Eleventh Protocol). One of the reasons for these measures may be that the negotiating parties were not ready to minimize the political role of the Council in resolving human rights violation cases. The decision of the European Court of Human Rights, if not voluntarily obeyed by the state party concerned, depends ultimately on the Committee of Ministers for its enforcement. Such a situation explains the limitation of the European system of human rights established under the 1950 Convention. In the Greek Crisis, 1967[17] a *coup detat* took place in April, 1967 in Greece. The military government suspended major human rights relying on the derogative provision of Article 15 of the Convention claiming that the 'public emergency threatening the life of the nation' existed. On the application submitted by the Denmark, Sweden, Norway and Netherlands, the Commission found that gross violation of human rights took place and no situation of public emergency existed. The Committee of Ministers suspended the membership of Greece in April, 1970. Before such a decision could take effect, the military government of Greece defected from the Convention. The human rights violation could not be improved by the Convention mechanism until the military government left the power some few years later. Thus, the Greek case explains that in the absence of political willingness of the member-states, the mechanism can not effectively function.

5. The Revised European Social Charter, 1996

The Council of Europe adopted a Social Charter in 1961 which came into force in 1965. The Charter contains a catalogue of 19 social and economic rights and principles. These are: right to earn one's living (Article 1), workers right to just conditions of work (Article 2), right to safe and healthy working conditions

17 This case was initiated by four petitions, No. 3321, 3322, 3323, 3344/67 by the Governments of Denmark, Sweden, Norway, and the Netherlands, on 20 September 1967. For details, See, Delmas-Marty, Mireille (ed), The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions, Nijhoff Publishers, London, pp. 154-156.

(Article 3), right to fair remuneration (Article 4), right to freedom of association (Article 5), right to collective bargain (Article 6), children's right to special protection against the physical and moral hazards to which they are exposed (Article 7), employed women's right to special protection in the work during maternity (Article 8), right to facilities for vocational guidance (Article 9), right to facilities for vocational training (Article 10), right to benefit from measures entailing highest possible standard of health (Article 11), worker's right to social security (Article 12), right to social and medical assistance (Article 13), right to benefit from social welfare services (Article 14), disabled person's right to vocational training, rehabilitation, and resettlement (Article 15), family's right to social, legal and economic protection (Article 16), mother's and children's right to appropriate social and economic protection (Article 17), national of one state party has the right to engage in a gainful occupation in the territory of other member states on equal footing (Article 18), and migrant worker's right to protection and assistance in the territory of another contracting party (Article 19).

Three Protocols have been added to the 1961 European Social Charter respectively in 1988, 1991 and 1995. The 1988 Protocol has added four more social and economic rights[18]. These are: worker's right to equal opportunities and equal treatment in matters of employment (Article 1), worker's right to be informed (Article 2), worker's right to take part in the determination and improvement of working conditions (Article 3) and elderly person's right to social protection (Article 4).

The 1991 Protocol has introduced certain changes to strengthen the supervisory role of the 'Committee of Experts'[19]. These are: First, the Committee has been renamed as the 'Committee of Independent Experts' (Article 24, 1961 Charter; Article 2, 1991 Protocol). Second, their number has been increased from seven

18 European Treaty Series-No. 128. European Social Charter (Additional Protocol), 5. V. 1988
19 European Treaty Series - No. 142. European Social Charter (Protocol Amending) 21. X. 1991.

to nine (Article 25, 1961 Charter; Article 3, 1991 Protocol). Third, instead of being appointed by the Consultative Assembly, they are now elected by the Parliamentary Assembly (Article 25, 1961 Charter; Article 3, 1991 Protocol). Fourth, the Committee can review comments submitted by the international non-governmental organisations on the national reports of the state parties and may consult with the representatives of such organisations (Articles 1, and 4, 1991 Protocol). Fifth, the Cornmittee of Independent Experts may seek additional information and clarification directly from the state parties (Article 2, 1991 Protocol). The 1995 Protocol has introduced a 'collective complaints system' allowing the national and international employers and trade unions as well as the international non-governmental organisation to submit complaints alleging unsatisfactory application of the Charter by the member states (Article 1, 1995 Protocol)[20].

However, in 1996 the European Council adopted a revised Social Charter, which came into force in 1999[21]. The revised Charter includes broadly all the changes brought about by the three earlier Protocols to the 1961 Charter[22]. Almost thirty-one social and economic rights and principles have been guaranteed by the revised Charter. The revised Charter has also strengthened the undertakings of the state parties in two ways. First, under the 1961 Charter, state parties are required to choose five Articles out of seven Articles[23]. Now, under the 1996 revised Charter state parties are to choose six Articles out of nine given Articles[24]. Second, under the 1961 Charter state parties are to choose in total ten Articles or forty-five numbered paragraphs[25]. But under the 1996 revised Charter they are to

20 European Treaty Series-No. 158, European Social Charter (Additional Protocol), 9. XI. 1995.
21 European Treaty Series No. 163, European Social Charter (Revised), 1996, Strasbourg, 3. V.
22 Protocols of 1988, 1991 and 1995, discussed above.
23 See, Article 20 of the 1961 Charter. The seven Articles are: 1, 5, 6, 12, 13, 16 and 19
24 Article A, Part III of the Revised Charter, 1996, The nine given Articles are 1, 5, 6, 7, 12, 13, 13, 16, 19 and 20
25 Article 20 of the European Social Charter, 1961
26 Article A, Part III of the Revised Charter, 1996

choose sixteen Articles or sixty-three numbered paragraphs[26].

Although both the Charters are in force for the time being, it is intended that the revised Charter will gradually replace the original 1961 Charter. The supervisory mechanisms established under both the Charters require state parties to submit periodical reports on the implementation of their obligations under the selected Articles or paragraphs of the respective Charters. Parties are allowed to implement their obligations by enacting laws, or by undertaking agreements or in any other suitable manner. Indeed, because of the pressure exerted by the supervisory mechanisms, state parties are required to reform their relevant laws i.e., workers and trade union related laws, health sector related laws, housing laws. The enactment of laws or reformation of old laws contribute to the improvement of the observance of social and economic rights within the member states.

6. Human Rights and the European Union (EU)

The Treaty of Rome, 1957 created the European Economic Community (EEC) with a view to establishing a common market based on the four freedoms of movement--- of goods, people, services and capital. The Single European Act, 1986 and the Treaty on European Union, 1992 contributed further in the harmonisation of trade policies among the member states and in the creation of the European Union. The Community or the Union has never been indifferent to the development of human rights norms and principles under the European Human Rights Convention, 1950 and under the constitutions of the member states of the Community or the Union. Although the Community legal instruments do not contain a catalogue of human rights and fundamental freedoms, they express the commitment of the community toward the observance of the human rights in general[27]. The Preamble to the Single Act states

27 For the aims of the European Union, See Articles 2 and 3. The Treaty of European Union, 1992.

that the Contracting Parties are:

> 'Determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the European Social Charter, notably freedom, equality and justice'[28].

The first paragraph of Article 6 of the 1992 Treaty provides that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law principles which are common to the Member States'[29]. Paragraph 2 of the same Article asserts,

> 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'[30].

In 1997 the European Parliament, the Council and the Commission adopted the following Join Declaration:

1. The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of Member States and the European Convention on Human Rights and Fundamental Freedoms.

2. In the exercise of their powers and in pursuance of the aims of the European Comrnunities they respect and will continue to respect these rights[31].

The European Court of Justice (ECJ) also expressed its commitments toward the observance of human rights in the

28 See, Preamble, The Single European Act, 1986.
29 See, Article 6(1), The Treaty of European Union, 1992 (Ex Article F).
30 Article 6(2), the Treaty of European Union, 1992
31 O.J. 1977, No. C. 103/1.

following way:

> 'Fundamental rights form an integral part of the general principles, the observance of which, the Court of Justice ensures in accordance with constitutional traditions common to the Member States and international treaties on which the Member States have collaborated or of which they are signatories'[32]

A number of attempts were made for the accession of the EU to the European Convention of the Protection of Human Rights and Fundamental Freedoms, 1950. However, these attempts did not succeed[33]. In December 2000 the Union rather adopted a Charter of Fundamental Rights[34].

7. Developments in the European Union: Charter of Fundamental Rights, 2000.

The Preamble to the Charter of Fundamental Rights 2000 notes that the Union is 'conscious of its spiritual and moral heritage' and the 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'. The Charter of Fundamental Rights contains a catalogue of civil, political, social and economic rights many of which have been drafted in the light of the European convention of Human Rights and Fundamental Freedoms, 1950 and the European Social Charter, 1961.

The major civil and political rights include: right to human dignity (Article 1), right to life (Article 2), right to the integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), prohibition of

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32 Court of Justice Case 4/73,[1974] E.C.R. [1974] 2 C.M.I.R 338, Case 136/79 [1980] E.C.R 2057 Judgement of May 26, 1980.

33 The European Convention was conceived and drafted with a view to accession by sovereign states. An accession by the Union would require an amendment of the Convemion, which would further require the ratification by the signatory states. See, Dr. Ludwing Kramer, Focus on European Environmental Law, Sweet & Maxwell, 1992 London, pp. 3-4.

34 Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European Communities, 18.12.2000, C 364/1.

slavery and forced labour (Article 5), right to liberty and security (Article 6), respect for private and family life (Article 7), protection of personal data (Article 8), right to marry and right to found a family (Article 9), freedom of thought, conscience and religion (Article 10), right to property (Article 17), equality before the law (Article 20) and non-discrimination (Article 21).

The major social and economic rights include: freedom to conduct a business (Article 16), workers right to information and consultation within the undertaking (Article 27), right of collective bargaining and action (Article 28), right of access to placement services (Articles 29), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of young people at work (Article 32), legal, economic and social protection of family and professional life (Article 33), social security and social assistance (Article 34), health care (Article 35) and access to services of general economic interests (Article 36). The charter also includes third generation rights such as, right to environmental protection (Article 37), and consumer protection (Article 38).

Article 51 of the Charter requires the member states, institutions and bodies of the Union, to 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'. Therefore, the Commission and the European Court of Justice (ECJ) will play significant role in the future development of human rights Jurisprudence in Europe. Under the 1992 Treaty, the Commission has an obligation to investigate matters reported by the individuals, non-government organisation especially with regard to the member states. The Commission can deal with non-compliance matters under Article 226 (ex Article 169) of the Treaty of European Union, and is empowered to deliver a 'reasoned opinion' on the matter. If the state concerned fails to

comply with the 'reasoned opinion' within the period laid down by the Commission, the latter may bring the matter before the European Court of Justice. Even if the Commission, the Council or the European Parliament fail to act in infringement of the 1992 Treaty, member states and the individuals are entitled to bring a suit against such institutions or bodies (Article 232, ex Article 175).

The European Court of Justice can also review the legality of acts committed by the institutions in cases brought by the individuals or member states (Article 230, ex Article 173). In judicial review cases, member states and the organs of the EC are treated as 'privileged applicants and have direct access to justice. But the individuals and no-governmental organisations are considered as 'non-privileged' applicants and in order to have a 'legal standing' before the ECJ, they have to satisfy 'direct and individual concern test', which is generally very difficult to satisfy. However, in personal human rights violation cases, it may not be, that much difficult to prove one's direct and individual concern' compared to other matters.

With the adoption of the Charter, a number of developments are likely to take place that may fundamentally change or reshape the future human Rights practice in Europe. First, citizens of state parties, which are members of both the Council and the Union, may prefer the European Court of Human Rights for access to this court is more liberal. One has to prove 'right of standing' before the European Court of Justice which is not required in the European Court of Human Rights. Second, states with overlapping jurisdiction may experience contradictory judgements in similar human rights violation cases.

8. Conclusion

In the recent past significant developments have taken place in the European System of Human Rights. As we have already observed, the Eleventh Protocol has brought about fundamental

changes in the compliance mechanism established under the European Convention on Human Rights and Fundamental Freedoms, 1950. While the original convention laid primary emphasis on the institutional model of dispute resolution, the Eleventh protocol has shifted the entire focus from the 'institutional model' to a 'contentious model' of dispute resolution. On the other hand, EU without being a party to the already existing system of human rights under the 1950 Convention, has proclaimed a Charter of Fundamental Rights in 2000. This Charter, if effectively enforced by the powerful mechanisms of the European Union, could bring significant developments in the human rights jurisprudence of Europe. Should the European Court of Justice decide to give effect to the provisions of Charter of Fundamental Rights, this could result in contradictory judgements on similar issues in states having overlapping jurisdictions of both the Council and the Europe. In most cases, civil and political rights are violated by state authorities. Therefore, determination by a superior court can help restore the civil and political rights violated in particular instances.

Although the civil and political rights are enforced under a court system, the social and economic rights are pursued under a 'supervisory system' based on the reporting of the state parties. The revised Social Charter, 1996 has, strengthened the supervisory mechanism by introducing a 'collective complaints system' which allows the national and international non-governmental organisations as well as the employers and trade union organisations to lodge complaints against the unsatisfactory implementation of the obligations of the Charter by the state parties. Social Charters of 1961 and 1996 have not established any court for the determination of violations by the state parties. This is because realisation of social and economic rights depends mostly on the social and economic development of a state party. The Charters have required the state parties to declare the social and economic rights as their 'policy

objectives' to be achieved progressively by the state parties. In addition, state parties undertake to consider themselves bound by a certain number of provisions of the Charters. This provides flexibility to the state parties to undertake legal obligations corresponding to their level of economic achievements. A supervisory body of independent experts makes suggestions on the reports submitted by the state parties. However, these reports, together with the comments of the non-governmental organisations, generate huge public pressure on the member states to conform their legal and administrative measures with the provisions of the social charters. Therefore, extra-legal forces such as public opinion, non-governmental organisations play strong role in the compliance mechanisms of the European social charters.

The fact that regional organisation, based on common socio-economic and political ideals, can develop strong regulation is aptly demonstrated by the recent developments in the European system of human rights. However, such a system is not free from weaknesses. The Greek crisis, as discussed in this article, shows that whatever may be the strength of a regional organisation, without the political willingness of a state party, the system can not effectively contribute to the improvement of human rights conditions.

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GENDER IN LAW: FIVE DECADES OF STRUGGLE FOR EMPOWERMENT

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Empowerment of women means the act of giving power or authority to women to use and enjoy their social, cultural, political and civil rights, realise the remedies available under the different laws for the violation of these rights and enable them to take equal parts and contribute equally along with men in nation building activities. In this article some modest efforts will be made to portray the rights of women as provided under general, personal, national and international laws, their implementation and adequacy to advance the efforts for gender equalization in present day state and society, the role of the state organs in the implementation of rights and protection of women against patriarchal behaviour of men, and present some suggestions for effective empowerment of women in Bangladesh against the backdrop of national and international laws, conventions and actual state of affairs obtaining in urban and remote rural areas of Bangladesh.

Empowerment of women includes to a large extent women's legal empowerment, i.e., where their rights and remedies are guaranteed. Women's participation in the social, economic, political and cultural perspectives is now considered from the viewpoint of women's rights. This concept of women's rights was further developed to establish women's rights as human rights in the Vienna Declaration of 1993. Thus, women's rights and responsibilities have to be measured against accepted human rights values. In the past two decades UN has taken a number of steps in order to enhance the position of women globally. The Charter of the United Nations referred to equal rights of men and women and forbids discrimination on the basis of sex, race, language or religion.

The Universal Declaration of Human Rights also equally proclaimed under article[1] that all human beings are born free and is equal in dignity and rights. The declaration that 1975 is the International women's year started a new era for the improvement of the women's status in every sphere of their life. The Nairobi Forward Looking Strategies (NFLS) for the advancement of women was adopted by the third World Conference on women. The Conference was held in Nairobi after the UN decade for women. The Conference on women reviewed the achievements for women with regard to equality, development and peace in this decade.

Despite enactment of various International Instruments and Documents extensive discrimination against women, the half of the world population, continued to exist. This encouraged the UN to adopt the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 18th December 1979, which came into force from 3rd September 1981. The Convention purports to guarantee equal rights to women and prohibit discrimination against women.[2]

The discrimination against women is defined under article 1 as follows:

> 'For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of

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1See details for International Instruments prohibiting discrimination on the ground of sex, Zamir, Muhammad: 'Measures for advancement of women'. In Human Rights and the Intemational Law. Dhaka 1994, pp.127-131; Morsink, Johannes:'Women's right in the Universal Declaration'. In Human Rights Quarterly. Vol.13, 1991, pp.229-256.

2 On this Convention see Tinker, Catherine: 'Human rights for women: The UN Convention on the Elimination of All Forms of Discrimination Against Women'. In Human Rights Quarterly. Vol.3, No.2, Spring 1991, pp.32-43; Meron, Theodor: 'The Convention on the Elimination of All Forms of Discrimination Against Women'. in Human Rights Law-Making in the United Nations: A critique of Instruments and process. Oxford 1986, pp.53-82.

> equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field'.

This definition and other articles of the Convention, as for instance article 16, obligate the state parties to take all appropriate measures to ensure equality of men and women in all matters relating to marriage and family relations. This explicitly shows that the Convention extends to private life also. This part of the Convention, which regulates the interpersonal conduct, is controversial as it aims to promote change in the cultural attitude of men and women within the family. Conflicts arose for its interference in the privacy of the individual life. While analysing the critical features of the Convention first of all it can be said that it did not dichotomies public and private life and did not even limit the parameters of public and private life. Hence it did not open the controversies which prevail in the patriarchal societies of the world. The ratification of the Convention means to accept international norms for equality between men and women, but it might not coincide with national norms. Thus, the Convention would have been much more adaptable if it would have considered the major systems or concepts of the world.

The position of women in law in Bangladesh today is the product of tireless efforts of women of the Indian sub-continent from its inception. Women in South-Asia are claiming just and fair laws for themselves. The positive outcome of this struggle has been law reforms starting with Family Law, the Child Marriage Restraint Act, 1929 (CMR Act), The Dissolution of Muslim Marriages Act, 1939 (DMMA), the Muslim Family Laws Ordinance (MFLO) 1961, the Dowry Prohibition Act, 1980, the Cruelty to Women Deterrent Punishment Ordinance, 1983 (now repealed), the Family Courts Ordinance, 1985 and the Repression against Women and Children Act, 1995. However, there are discrepancies in those Acts and Ordinances,

which need to be amended to make the law more effective.

Bangladesh has ratified different International Conventions and treaties. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 18th December 1979 which purports to guarantee equal rights to women[3] has been ratified by Bangladesh in 1984 with reservations in Article 2, 13(a), 16(c) and (f). In 1997 Article 13(a), 16 (f) has been withdrawn, but not 16(c) and 2. The Focal point of the problem lies with the implementation and enforcement of the law which is a necessary pre-requisite for the advancement of women. But even after this Convention the situation has not improved notably and there exists considerable discrimination against women even in this world order. Thus, protection of women's right is much more difficult than either defining them or adopting Conventions. The mechanisms for the enforcement of women's rights are very weak. The primary question is how far these Conventions are protecting women's rights. Unless these Declarations or Conventions are made part of our domestic law there cannot be legal enforcement of the body of rights in the Convention. It can be acclaimed as part of the domestic law if it is within the periphery of the Constitution.

Bangladesh has its legal system consisting to two types of laws, the general and the personal law. The general law as we can see is based on egalitarian principles of sexual equality but the personal or family law, based on religion, does not operate on the basis of absolute equality of men and women, but on sexual equity. But the personal law is protected by the Constitution itself.

The Present Situation and Special Considerations

Women in Bangladesh are apparently guaranteed sexual equality by the Constitution of Bangladesh[4] and the general law.

3 On this Convention see for example Tinker, Catherine: 'Human rights for women: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women'. In *Human Rights Quarterly*. Vol. 3, No. 2, Spring 1991, pp. 32-43.

4 For a discussion on the supremacy of the Constitution of Bangladesh see, Monsoor, Taslima: 'Supremacy of the Constitution;. *In The Dhaka University Studies-Part-F.* Vol. ii, No. 1, June 1991, pp. 123-135.

But patriarchal interpretation of the law continues the dominance of patriarchal attitudes[5]. However, there are internal contradictions within the Constitution between granting sexual equality and making special laws for women. The fundamental rights granted under part three of the Constitution specifically deal with women. Article 28 states:

28. (1) The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.

(4) Nothing in this article shall prevent the state from making special provisions in favour of women or children or for the advancement of any backward section of citizens.

Thus, while providing equal rights for women in several respects, although only in the public sphere and not in the private sphere, the legislature could not pull them out of the typical stereotyped image depicting women as the weaker sex in need of protection. They categorised women with children and the backward sections of the population, reserving the rights of the state to make any special provision for the advancement of such backward sections of the population. This paternalistic attitude of the legislature can also be found in other provisions of the Constitution. Article 29 states:

29. (1) There shall be equality of opportunity for all citizens in respect of employment or in the service of the Republic.

5 On this see in detail *Bangladesh: Strategies for the enhancing the role of women in economic development*. Washington DC 1990, (World Bank); Jahan, Roushan: 'Hidden wounds, visible scars: Violence against women in Bangladesh'. In Agarwal, B.: (ed.): *Structures of patriarchy: State, community and household in modernising Asia*: New Delhi 1988, pp. 216-226.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against, in respect of any employment or office in the service of the Republic

(3) Nothing in this article shall prevent the state from -

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

While providing for equality of opportunity to women, the Constitution under article 29(3) (c) has explicitly given the right to the state to reserve certain employment and offices to men alone, if they are seen as unsuited to women. This urge of the legislature can also be gathered in other provisions of the Constitution. These articles of the Constitution perpetuated the conventional view that women are inferior and therefore need protection[6]. Thus, although generally the Constitution promises equality of the sexes, there are disparities of the sexes within it[7]. This paternalistic-attitude towards protecting women as the weaker sex is common in Bangladesh. It is apparent from this that the legislature recognises the unequal status of women in Bangladesh, although they outwardly claim that the

6 For India see Sarkar, Lotika: 'Status of women: Law as an instrument of social change.' In *Journal of the Indian Law Institute.* 1983, Vol. 25, No. 2, pp. 262-269 at p. 267.

7 See for details Sobhan, Salma: *Legal status of women in Bangladesh.* Dhaka 1978, pp. 4-6; Bangladesh: *Strategies for enhancing the role of women in economic development.* Washington DC 1990, pp. 18-20;
Chaudhury, Rafiqul Huda and Nilufar Raihan Ahmed: 'Women and the law in Bangladesh: Theory and practice.' In *Islamic and Comparative Law Quarterly.* Vol. viii, No. 4, Dec. 1988, pp. 275-287, at p. 275; Chaudhury and Ahmed (1980) pp. 18-33.

Constitution ensures sexual equality. Salma Sobhan rightly observed that,

> The tenor of all these provisions read as a whole makes it obvious that the drafters of the Constitution could not fail to acknowledge tacitly the fact of the inequality present in the status of women[8].

A brief attempt is made here to understand the problem in the context of the situation of Bangladesh. First of all, the Constitution of Bangladesh states under article 149 that all existing laws shall continue to have effect but may be amended or repealed by laws made under the Constitution. Thus, the personal laws as existing laws continue to have effect and it is doubtful whether the Constitution can override the personal laws. Secondly, the constitutional clause of sexual equality [under article 28(2)] only applies to the public sphere and is not applicable to the private sphere. Thirdly, personal laws cannot be considered inconsistent with the Constitution when one of the fundamental rights [under article 28(1)] provided by the Constitution is that the state shall not discriminate against any citizen on the ground of religion. This provision ensures freedom of religion and also safeguards the personal laws based on religion. Finally, the directive principles of state policy, fundamental for the governance of the country although not judicially enforceable or justiceable, do give preference to the religion of the majority of the population.

Protective Legislation and the General Law

In the legislation there is a clear trend of 'paternalism' which shows women as in need of protection because they are weaker, and not as a "privileged class", so that women's identity becomes submerged with the stronger identity of men[9]. Below, we are giving some instances of protective legislation in the general law.

8 Sobhan (1978), p. 5.
9 Ibid., pp. 6-9.

In the *Payment of Wages* Act of 1937, it is laid down in section 16(1) that no deduction should be made from the wages of a person under fifteen years or of a woman for breach of contract. In the *Workmen's Compensation Act* of 1923, it is provided in section 8(1) that where compensation has to be distributed, no payment of a lump sum as compensation to a women or a person under legal disability shall be made otherwise than by deposit with the Commissioner. One may question the presumption that the law makers consider women as minors or as persons of legal disability. This paternalisitc attitude is not doing women any good, rather making them feel weak and fragile.

There are many provisions in different Acts which tend to show the influence of social attitudes and prejudices on the legislature. For example, section 23 of the *Bangladesh Shops and Establishments Act* 1965, section 22 of the *Tea Plantation Labour Ordinance*, 1962 and the *Factories Act* 1965, all lay down that women are not to be employed between the hours of 8 p.m. to 6 a.m. or 7 a.m. Does this not imply that women who work in those hours are only housewives or prostitutes? Or does it imply that women workers are to be protected from the clutches of male workers who cannot control their emotions if women work besides them in a night shift? What these Acts could not hide was that the legislature could not avoid adherence to social bondage and myths, though outwardly they show that they are favouring women.

There are some Acts, however, which provide privileges to women, although they are rarely enforced. For example, section 47 of the *Factories Act* of 1965 provides that where there are more than fifty women workers ordinarily employed, there shall be provided and maintained a suitable room or rooms for the use of children (under the age of 6) of such women. The *Plantation of Labour Ordinance* of 1962 similarly provides, in section 12, that the government may make rules that in every

tea plantation where forty or more workers are employed; the employer shall provide and maintain rooms for the use of children of women workers under the age of six years. Other Acts providing maternity leave and benefits are also highly regarded, for example, the *Bengal Maternity Benefit Act* of 1939 provides under sections 3(1) and 3(2) that no employer shall knowingly employ a woman during the six weeks immediately following her date of delivery and also provides that no woman shall work during the six weeks immediately following her date of delivery. However, the reality is that, knowing their rights of maternity, women may ignore them because of their need for survival. This shows the wide gap between the legal provisions and their implications in Bangladesh. It also shows that the legislature, too, is subordinating women as a class.

Family Law and Women

All of this protective legislation in the general law influences the position of women in family law but the religious and official family laws of Bangladesh clearly aim for gender equity rather than absolute sexual equality. Problems arise over abuses of this relative status system. The crux of the problem is that many women in Bangladesh today are deprived even of the rights granted by the religious and state-sponsored family laws[10]. Prominently, women are deprived of their rights of maintenance, dower, dissolution of marriage, custody, guardianship, and other forms of property. Thus, it was found in a study of the metropolitan city of Dhaka that 88% of Muslim wives did not receive any dower[11]. A study of two villages in Bangladesh revealed that 77% of women from families with land did not intend to claim their legal share in their parental

10 See for details Taslima Monsoor : *From patriarchy to gender equity: Family Law and its impact on women in Bangladesh.* Dhaka 1999 (published by UPL, University Press Limited).
11 Akhter, Shaheena: *How far Muslim Laws are protecting the rights of the women in Bangladesh.* Dhaka 1992, p. 35.
12Westergard, Kirsten: *Pauperization and rural women in Bangladesh-a case study.* Comilla 1983 p. 71.

property to retain better links with their natal family[12]. A recent study of child marriage conducted by me and my students in Dhaka University found that in the Motijheel A.G.B. colony 53% and in Mirpur Kazipara 92% child marriages prevail[13].

Another novel study showed that women are being deprived economically by the customs and conventions of the society that put an embargo to secure their inheritable entitlements. In the study it was found that 95% of the women think it is wrong to ask for their rightful share, 80% of women erroneously believes that their property shall be destroyed if taken from their brothers. A woman narrated that she took her share from her paternal property and bought three cows, which died within a year. 20% of women in the village thinks that if we partition our property the divine will be unpleased with us, they say *'Allah'r gojob porbo' i.e.* God's curse will fall or *'Dunia gojob hoiya jaibo'* or the world will become hell[14].

These are instances of the patriarchal arbitrariness of Bangladeshi society which regards women's claims to their rights as challenging the existence of the patriarchal system itself, despite the fact that these claims are based on an Islamic obligation or official law. Thus, women has to come out of these conventions.

Some recent reforms in the field of family law and some favourable judicial decisions exist in Bangladesh, purporting to ameliorate the status of women. But such vague references to 'amelioration of a depressed class' are not readily usable for legal analysis. To analyse how far relevant laws or decisions are enforced to protect or safeguard women's interest, or whether they are merely rhetoric, we have to go into details of the family law judgements of Bangladesh. Although achieving of

13 Monsoor, Taslima: Prevention of child marriage by the Child Marriage Restraint Act, 1929: Legal implications and social reality. In the Law Journal of Rajshahi University, 1998, pp 87-108.

14 See for details Monsoor, Taslima: In search for security and poverty alleviation: Women's inheritable entitlements to land, the untapped resources. In the Journal of International Affairs, Vol. 4, No. 2, July-December 1998, pp. 42-57.

favourable legislation or decisions by itself does not modify prevailing attitudes and change the patriarchal system of a male-dominated society.

Much controversy surrounds the question whether there is judicial bias towards men. It may be expected that the effects of a male-dominated patriarchal society have an impact on the courts. But some judicial decisions are remarkably enlightened and can be seen as a departure from the patriarchal mould these decisions signify concern of the higher courts not only about giving general emphasis on women's rights but also about the need to protect women from cruel treatment and deliberate economic deprivation. There are also many judgements, however, in which the courts are interpreting the legislation only on the basis of orthodox concepts and fail to give effect to the underlying social purpose of the Convention or legislation. We are discussing below a few issues where reported decisions would comprehend the matter.

Restitution of conjugal rights

The early law on restitution of conjugal rights is that although this remedy is allowed to both husband and wife, its Anglo-Indian development has strengthened the already strong position of a Muslim husband. However, there are grounds of defence which can be used by the wife to refuse the forced restoration of her conjugal life. Payment of prompt dower is one such defence, which acts as a condition precedent to the husband's claim for restitution of conjugal rights[15]. The courts, before the independence of Bangladesh, seemed to be not very appreciative of these defences. The shift in the attitude of the judiciary can be gathered if we consider the cases reported after the emergence of Bangladesh. After independence in cases on restitution of conjugal rights, judges have forcefully advanced social welfare arguments against orthodox canonical precepts.

15 Shabbir, Mohammad: Muslim personal law and judiciary. Allahabad 1988, pp. 104-110; Haq, Mohammed Nurul: 'The effects of legislation and judicial decision on the Muslim law of dower. In Dhaka University Studies Part A. Vo. 45, No. 1, June 1988, pp 93-111.

The leading example here is Justice S.M. Hussain's potent pronouncement in *Nelly Zaman v. Giasuddin Khan*[16]. He commented:

> A reference to article 28(ii) of the constitution of Bangladesh guaranteeing equal rights of women and men in all spheres of the state and public life would clearly indicate that any unilateral plea of a husband for forcible restitution of conjugal rights as against a wife unwilling to live with her husband is violative of the accepted state and public principle and policy[17].

This shows that the judges are beginning to use the constitutional provisions of equality to give women more rights in the arena of personal law. In his unprecedented judgement Justice S.M. Hussain has elucidated dicta of restitution of conjugal rights as not being physically enforceable and executable through any process of law. He stated:

> It may be specially mentioned that by lapse of time and social development the very concept of husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband has become outmoded and does not fit in with the accepted state and public principle and policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law as guaranteed in Article 27 and 31 of the Constitution of Bangladesh[18].

This appeared to be the first step to burying the stereotyped conceptions of the wife as property of the husband, beginning to look upon women as human beings having their own rights in marital relationships. This was in consonance with the equality clauses of the Constitution. However, briging sexual

16 34 DLR (1982) 221.
17 Ibid, p. 225
18 Ibid., p. 224-225

equality into family law as many argues has been creating some confusion. Moreover, the constitutional clause of sexual equality under article 28(2) only applies to the public sphere and is not applicable to the private sphere. The judges of the Family Courts are only applying Article 27 and 31, i.e. that all citizens are equal before the law and are entitled to equal protection of law. The judge further stated, while comparing the equality of men and women, as that :

> In the husband's unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband, there is no mutuality and reciprocity between the respective rights of the husband and wife, since such plea for restitution of conjugal rights is not available to a wife as against her husband apart from claiming maintenance and alimony[19].

The prayer for the restitution of conjugal rights was not allowed by the court, in the above case, on the ground that the marriage had already been dissolved by the exercise of the right of delegated divorce by the wife.

Custody

The cases of custody show that the judiciary in Bangladesh is deciding the issue on the paramount consideration of the welfare of the minor. In *Md. Abu Baker Siddique v. S.M.A.* Bakar and others[20], on the strength of precedents in the Pakistani period, the Appellate Division ruled.

> It is true that, according to Hanafi school, father is entitled to the hizanat or custody of the son over 7 years of age. Indisputably, this rule is the recognition of the prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor Sunnah would not seem

19 Ibid., p. 225
20 38 DLR (1986) AD 106.
21 Ibid.,p.114

> to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure[21].

It was further held in the above case that the welfare of the minor was assumed to be the determining factor which the court regards as 'paramount consideration', even though the opinion of well-known jurists may not be followed. Thus, the rules of custody propounded in Hanafi law may be departed from in permissible circumstances, in consideration of the minor's welfare. In the above case, the mother was preferred to be the guardian of the minor. The facts of the case were that the mother, being a doctor, was considered better suited to look after the minor than the father, especially in view of the illness of the minor. The Appellate Division conclusively determined that,

> Facts as mentioned above clearly point out that the welfare of the boy requires that his custody should be given to the mother or that she should be appointed as his guardian[22].

But this is only a rare case where a woman as a specific individual was recognised as having the right to custody when her own ability and interest to help the child was greater than that of her husband. This was probably, not a plan of the father to get rid of a handicapped child, using the convenient fact that the mother was a doctor; actually, the mother wanted to have custody of the child. The Appellate Division in the case of *Abdur Razzaq v. Jahanara Begum*[23] held that divorced mother is entitled to custody of her minor daughter aged about 16 years in preference to the father considering the welfare of the girl and her willingness to live with the mother. In the case of *Romana Afrin v. Fakir Ashrafuddin Ahmed*[24] it has been held that Muslim mother has absolute right against the father over

22 Ibid., p 15
23 1996 BLD (AD) 163
24 1996 BLD 487

the children's guardianship till she remarries.

In South Asia the jurists had argued that the husband should provide maintenance during subsistence of marriage and during the idda period[25]. This was perhaps, because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family[26]. Moreover, according to Islamic law, the deferred dower is seen as the safeguard for divorced women. Nevertheless, women in Bangladesh are usually deprived of their deferred dower. But what happens to those women whose natal family cannot provide for them? There is no state welfare system in South Asian countries as in the West. In India it has been argued that maintenance after divorce is an obligation of the ex-husband on the basis of the arugment provided in the original sources[27]. From the women's viewpoint it is seen that the wife, who was not rewarded, should not just be turned out of her house without any subsistence. In Bangladesh these problems are not articulated yet, although the judiciary has taken encouraging steps to provide for post-divorce maintenance. In *Hefzur Rahman vs. Shamsun Nahar Begum*[28] it was held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period till she loses the status of a divorcee by remarrying another person.

The latest position of Sunni Law in the Subcontinent regarding past maintenance of Muslim wife as held by the Appellate

25 Fyzee Asaf A.A.: *Outlines of Muhammadan* Law. 4th ed. New Delhi 1974, p. 186; Diwan, Paras: *Muslim Law in modern India*. Allahabad 1985, p. 130

26 Mahamood, Tahir: *Personal laws in crisis*. New Delhi 1986, p. 87.

27 In the celebrated case of Shah Bano (Mohd. Ahmed Khan AIR 1985 SC 945), in India the court allowed post divorce maintenance. See for details, Naseem, Mohammad Farogh: The Shah Bano case: X-rayed. Karachi 1988; Ali Ashgar (ed.). The Shah Bano controversy. Bombay 1989. For the current developments under the Muslim Women (Protection of Rights on Divorce) Act of 1986 see Menski, W.F.: 'Maintenance for divorced Muslim wives'. In Kerala Law Times. Journal 1994 (1) pp. 45-52.

28 47 DLR (1995) 54.

29 16 BLD (AD) (1996) 61

Division of the Supreme Court in *Jamila Khatun vs. Rustom Ali*[29] is that the wife is entitled to past maintenance even in the absence of any specific agreement.

The Bangladeshi Judges of the highest level of judiciary have only very recently made celebrated judgments providing for post divorce maintaince in *Hefzur Rahman vs. Shamsun Nahar Bagum*[30] and past maintenance for Muslim women in *Jamila Khatun vs. Rustom Ali*[31] but how far these decisions are being implemented in reality is yet to be analysed. However, Hefzur Rahman's case has been overruled in practice the execution of maintenance decrees is very difficult as the husbands evade to pay maintenance, hide and cannot be located. Even when they are traced, they might not have any possessions or may falsely conceal them. It is recommended that the sanctions of the Family Courts could be strengthened by providing them with a criminal court's power to order for arrest of husband or attach their property to pay maintenance to the wives. It is suggested that the powers of the Family Courts should be enhanced in this regard.

The Family Courts of Bangladesh have now become the main repository of family law issues as very few cases actually come up to the higher courts. To make a full assessment of how the law is developing today, a detailed study of unreported cases from various parts of the country would be necessary. In the present article, this could not be done. However, the prevailing impression from the reported case-law that modern Bangladeshi family law has benefited from judicial activism, protecting the interests of women, may need to be revised in the light of more detailed research focusing on local litigation patterns. Our own limited research of the case studies provided many examples of insufficient protection of women and shows that there is a need for more systematic activation of the judiciary and better sensitisation of all judicial personnel for the

30 47 DLR (AD) (1995)54
31 16 BLD (AD) (1996) 61

needs of women.

If we ask how effective the judgements of the Family Courts are in practical life and whether the rights given to women in the decisions are actually achieved in social reality, we must admit that there is a dearth of information and that further research is needed. A related pertinent question is whether the enlightened judgements of the courts are actually accepted by the society. Even when liberal or pro-women judgements are pronounced in matrimonial law, it is important to recognise that the patriarchal society will not accept them unless there is a substantial change in the traditional attitudes of the people, especially among males. This can be felt mostly in relation to child marriage and dowry, as few people observe the official law in the rural areas and it is freely violated without anyone ever challenging this in a court of law.

For effective implementation of laws, revisions need to be made in judicial procedures as well. For elimination of violence against women we have to increase mass awareness on issues relating to violence, dowry and child marriage explicitly stating that they are offences for which punishments and penalties are provided.

Substantial improvement of women's access to legal justice is essential. Rehabilitation through focus on both quantity and quality of services available, including legal aid services relating to women is a primary requirement. The different target groups at central and local levels of the legal system and the judiciary can also be used for promoting gender sensitisation.

Empowerment of women of their legal rights can be achieved by developing and strengthening institutional and non-institutional mechanism to address issues related to women's rights and thus provide them with their granted rights. While the potential impact of enlightened judgements on society should not be underestimated, it is too simple to assume that court decisions by themselves can change the social realities for

most women. Court activity and the involvement of sensitised judges may help to establish that institutions like the Family Courts as the right platform to protect women from economic deprivation and violence. But, it is not only the obligation of the courts or the judiciary but the leaders of political parties, social reformers, academicians and NGO's and persons in all services to step forward to reform the conventional attitude of our society so that women get equal treatment and acceptance in every sphere of their lives. Then there will not be any child marriages, no dowry deaths, no violence against women and women will not be deprived of their granted rights of having equal treatment from not only their father, brothers but also from their fellow colleagues. It seems appropriate to conclude that a better sensitised society with enlightened attitude can only empower and protect women and children and that will bring some meaningful achievement of the last five decade's struggle for empowerment of women of Bangladesh.

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EQUITABLE SHARING OF THE GANGES UNDER THE AGREEMENTS BETWEEN BANGLADESH AND INDIA

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1.Introduction

The Ganges case represents a classic example of how contentious the question of equitable sharing of the waters of an international river can be, especially when the available waters of that river fall far short of the requirement of basin states. The problem was seriously charged with the Farakka barrage project, construction of which was completed by India in 1972. The project was undertaken to divert major portion of the dry season flow of the Ganges to the Bhagirathi-Hoogly tributary in order to rejuvenate Calcutta port, situated in the West Bengal state of India[1]. Bangladesh, the downstream country, objected the project apprehending drastic reduction in the dry season water flow needed for her irrigation and other economic uses and environmental protection.[2] The legality of the project of diversion was challenged long before in 1954, ever since it came to the knowledge of Pakistan, of which Bangladesh was a part before her liberation in 1971.[3]

The contending countries took many years to accept each other in 1974 as co-users of the dry season flow of the Ganges.[4] Their primary acceptance of the applicability of the principle of

1For a factual account of earlier stages of the dispute, see Crow, B., 1980, The politics and Technology of Sharing Ganges, PhD thesis, University of Edinburgh. Abbas, B.M., The Ganges water Dispute, Dhaka, UPL. Sarma, S.S.(ed), 1986, Farakka- A Gordion Knot, Calcutta, Ishika. Zaman, M. (ed), 1983, River Basin Development, Dublin, Tycooly International.

2White Paper on the Ganges Water Dispute, 1976, Goverment of Bangladesh, pp. 6-10. See also, Deadlock on the Ganges, 1976, Government of Bangladesh, p.p.2-4.

3Statement of the Delegate of Pakistan, GAOR, 23rd Session, 1681 Mtg.,4 October, 1968, p. 11.

4 Text of Joint Declaration of Prime Ministers of India and Bangladesh, New Delhi, 16th May, 1974, in 'Documents', 1990, Government of Bangladesh, Ministry of Irrigation, Water Development and Flood Control, The Indo-Bangladesh Joint Rivers Commission, Dhaka, pp. 1-4.

equitable utilization led to the conclusion of some temporary arrangements for sharing the Ganges dry season flow for 11 years between 1977-88. However, they underscored that a permanent solution lies in augmenting the dry season flow of the Ganges and assigned a Joint River Commission (JRC) to study that question. After many years of consultation, the Commission, being handicapped with institutional weakness and subordination to political will of two Governments, failed to reach accord on the most sustainable method of augmentation.[5] Bangladesh's experts in the JRC proposed a regional arrangement involving Nepal for building reservoirs in the Ganges's headwater.[6] India experts singled out bi-laterism and suggested to meet the shortage in the Ganges by transferring water from the lower part of the Brahmaputra by a link canal through Bangladesh.[7]

The disagreement on method of augmentation jeopardised the future of sharing when after 1988 India continually refused Bangladesh any ensured amount of water, unless Bangladesh accepts her proposal on augmentation of the Ganges.[8] This uncertainty in water supply placed significant constraints upon existing uses as well as large scale water resource planning and development in Bangladesh. Being free of any such constraint, India undertook increasing number of large scale irrigation and hydroelectric projects in the upstream of the Ganges basin, some in co-operation with Nepal.[9] These were alleged to have worsened downstream effect and seized river development options in Bangladesh. The acute urgency of the question of

5For detail, Crow, B. And Lindquist, A, 1990, Development of the River Ganges and Brahmaputra, Development Policy and Practice Research group, DPP working paper no. 19, British Open University.
6Proposal for Augmentation of the dry season flow of the Ganges, 1978, Government of Bangladesh, Ministry of Water resources and Flood control. Updated Augmentation proposals for augmentation of the Ganges, 1983, Government of Bangladesh, Ministry of Water resources and Flood control.
7Proposal for Augmenting the Dry Season's flow of the Ganges, 1978, Government of India, Ministry of Agriculture and Irrigation. Updated proposals for Augmenting the dry season flows of the Ganges, 1985, Government of India, Ministry of Irrigation.
8N. 5 p.32.
9 Ibid, p.6. See also, The Impact of Farakka Barrage on Bangladesh, 1994, Government of Bangladesh.

sharing overshadowed other issues like regulation of pollution or sustainable development, which formed major parts of the developing principles of International River Law.

Against this backdrop, the conclusion of the treaty on the river Ganges between Bangladesh and India on December 12, 1996 merits to be considered with added importance.[10] This treaty is basically concerned with the sharing issue, aiming at ensuring both countries an 'equitable' quantum of dry season flow of the Ganges for thirty years. Given that the prospect of sustainable or even optimal utilisation through augmentation is largely ignored in the treaty, its success has predominantly been confined to the efficiency of its sharing formula for a allegedly diminishing flow. This is why despite the euphoria following the conclusion of this treaty, concerns over the workability of treaty had also been aired in both of the countries. It was even submitted that the treaty, comparing to previous temporary arrangements, lacks some in-built provisions to ensure equitable sharing particularly for the downstream country.[11]

This article focuses on the sharing arrangement of the 1996 treaty along with the previous ones between Bangladesh and India to assess their experience of equitable sharing. The primary purpose of this study is to examine the efficiency of the present sharing arrangement, claimed to be an equitable one by the contracting parties.[12] The examination is particularly important considering that the contending countries have, for a long period, disputed not on the applicability of the principle of equitable utilization but on how the vague standards of the

[10]The treaty is entitled, 'Treaty between the Government the republic of India and the Government of the People's Republic of Bangladesh on sharing of the Ganga/Ganges water at Farakka'. For text of the treaty, see, The Daily Star, 14 December, 1996.

11 Infra, n.56, 60 .

12 While negotiating the treaty, concerned Ministers of both of the states submitted that they were looking for a solution m line with 'fair and equitable' distribution. See, The Hinduistan Times, 12-11-96. In a joint press conference, after conclusion of the Treaty Prime Ministers of both of the states addressed the treaty as 'fair and just' to both of them. See, The Times of India, 13-12-96. For Indian Prime Minister's similar comment made in the Lok Shava, Lower House of the Parliament of India, see, The Hinduistan Times, 13-12-96.

principle be applied in sharing limited water resources of an international river. It addresses the constraints a weaker downstream country faces or might face in negotiating a flexible principle like equitable sharing.

2. The concept of accommodation

The preamble of the 1977 agreement addressed the sharing arrangement, enshrined therein, as being concluded in a spirit of 'mutual accommodation', - an expression. which reflects the essence of the principle of equitable utilisation[13] The agreement represented the accommodating attitude of two states on the question of augmentation issue also. The process of accomodation can be discerned by comparing some of their claims put forward during the period of India's unilateral withdrawal and relevant agreed provisions in the 1977 agreement, as shown in the following table.

Claims based on convenient factors		adjustment in 1977 agreement
India	**Bangladesh**	
For allocation of water, lean season was a period of two months extending form mid-March to mid-May	water should be allocated for a period of seven months extending from November to May	allocation of water was made for a period of five months extending from January to May, Which were defined as lean months

13The report of the International Law Comission on the law of Non-navigational Uses of the International Watercourses explained that in cases of conflict of uses, the principle of equitable utilization requires an adjustment or accomodation of the uses on the basis of equality of rights of the concerned basin states. See, para 9 of the Commentary on Article 5, Doc. A/49/10 reproduced in Environmental Policy and Law, 24/6, p.341.

India, in the driest periods required at least 40,000 cusecs, leaving approximately 15,000 cusecs for Bangladesh	Bangladesh was entitled to the whole dry season flow which was at least 55,000 cusecs in the driest period	India's share in the driest period of ten days of April was fixed at 20,500 cusecs and Bangladesh's 34,500 cusecs.
Nepal could not be included in any Planning of augmentation	Planning of Augmentation must include Nepal	Study on augmentation would not exclude scheme/schemes for builing strage in Nepal

1977 agreement was, therefore, formed of two major components-first: sharing of existing flows and second: studying the augmentation proposals. The accord on augmentation issue, however, fall far short of comprising any positive obligation and merely recorded an understanding that the JRC would investigate and study the augmentation proposals of two countries in order to facilitate future agreement on this question. The legal regime actually established was a mere 'interim' sharing arrangement enshrined in the 1977 agreement.

2.1. Sharing arrangement in 1977 agreement

While negotiating the sharing of the dry season flow of the Ganges, the primary point to be settled between India and Bangladesh was the amount of water availability at 'Farakka', a place agreed to be the point of apportionment back in 1968. Settlement of that question was particularly important because water availability at Farakka had already been threatened by some projects completed or undertaken by Uttar Pradesh (UP) and Bihar, two states of India situated upstream of Ganges or by India and Nepal jointly. In an official 'Statement' published by the Ministry of Agriculture and Irrigation of the Government of India, and circulated to the members of Lok Shava, the lower

House of the Indian Parliament in 1972, it was clearly suggested that the lean season flow of the Ganges from mid-March to mid May had not yet been affected only because the upstream projects on three major tributaries of the Ganges 'have not yet come into full use'. The three projects, as addressed in the 'Statement', were Sarda Assist Project of 1968, a project concerning Sarda, (tributary of Gangara), Gandaka project of 1958, undertaken with Nepal and Kosi project of 1956 of which western Kosi canal was undertaken with Nepal.[14] Though India refused to include issues concering projects of upstream withdrawal in negotiations leading to the 1977 agreement she conceded to Bangladesh's proposals for a sharing arrangement which aimed at protecting the downstream country from arbitrary upstream diversion. The arrangement was worked out by agreeing a fixed water availability, specified amount of share and a guarantee clause for protection of a substantial part of the downstream state's share.

A) water availability: water availability was fixed, as Bangladesh proposed, for three ten-days periods of specified months on the basis of historic flows at Farakka from 1948-73.[15] The historic flow was agreed to be based on 75% availability calculated from the recorded flow of the Ganges at Farakka from 1948-73, so that the possibility of lower flow can be assumed by statistical range of variation. B.M Abbas, an eminent water expert and one of the key negotiator for Bangladesh Government, explained the significance of this provision by arguing that "unless India agreed to this basis, the agreement would be rendered negatory as India would gradually change the pattern of flow at Farakka through

14 During Lok Shava debate, the Union Agricultur and Irrigation Minister, however, denied that other projects-described by one member of Lok Shava as -'34 major and 170 minor irrigation projects sanctioned even in the teeth of the opposition of West Bengal'-would have any affect on Farakka. He explained, 'save Gangara GandakaKoshi, other rivers have little discharge during the lean months'. For detail, see, Lok Shava Debate, 5th session, 5th series, Vol. XVIII, No. II col. 321,322. 334, 335.

15Art. II of the 1977 agreement

16Abbas, n.I, p.80

upstream use of the river flow".[16]

B) Sharing : the sharing formula had been worked out on the basis of fixing Bangladesh's minimum share at 34,500 cusecs out of 55,000 cusecs, tne expected availability in the driest 10-days period of 21-30 April and sharing the excess in other ten-days periods proportionately.[17] This corresponded with the final requirement of Bangladesh's GK project, submitted by her predecessor Pakistan in 1968 and thereby appeared to reflect the weight, two states might place on the principle of not causing harm in determining equitable shares.[18] It also protected Calcutta Port's interest, by ensuring at least 20,000 cusecs of water in the driest period of Mid March to Mid-May, which was addressed as her actual requirement in the original plan of diversion.[19]

C) Guarantee for a minimum share: the most significant provision of the agreement was the guarantee clause whereby an effective obligation was imposed on India to protect a substantive portion of Bangladesh's stipulated share. The clause provided that if the actual availability of the Ganges flows at Farakka was lower than the figures calculated on the basis of historic flows, there would be a pro-rata adjustment of the sharing, but that release to Bangladesh would never be reduced below 80 percent of her stipulated share.[20] This in one hand imposed an understandable sacrifice on Bangladesh to waive

17Schedule annexed to the 1977 agreement

18The Ganges- Kobadak Irrigation Project Known as G.K. project was undertaken to irrigate the south western region of Bangladesh by lifting water through an intake channel from the Ganges. phase I of the project became operational in 1962 and its construction was completed during the period 1955-70. Construction of phase II was initiated in 1960 and completed in 1984. For detail, see, Bangladesh Water Development Board; Consultency Service for Feasibility Study of Floating Pump Station in Ganges-Kobadak Project, Draft Final Report, Bureau of Research, Testing and Consultation, BUET, Dhaka' July, 1996.

19'The Ganga Barrage project' prepared in 1959, sanctioned by the Government of India in April 1960, made provision for running the feeder canal, for two months- mid-March to mid-May, with lesser discharge upto 20,000 cusecs.' Lok shava debate, n.14, col. 320

20Analysing the Guarantee Clause, Tariq Hassan commented that, 'Bangladesh's share uader the Ganges Water treaty has been adequately protected'. Hassan, T. 1978, 'Ganges Waters Treaty', 19 Harv. ILJ, p.715.

her 20% in cases of lower flow and on the other hand protected her from absolute uncertainty which might be caused by excessive upstream diversion. Like the sharing formula, the guarantee clause reflected India's admitted obligation of protecting existing uses in accordance with the principle of equitable utilisation.[21]

From the above points, it can be argued that the underlying principle of the sharing arrangement was defining and protecting a substantial part of Bangladesh's existing use of Ganges water. While doing so, India and Bangladesh did not feel it relevant to protect the share of Calcutta port from the expansion of upstream irrigation, which in essence, was a question of distribution of the waters between different states of India.

2.2. Redistribution of the burden of less now

As explained in the above discussion, the success of the 1977 agreement was dependent mainly on two issues- in case of sharing, on the expected water availability at Farakka and in case of augmentation, on the joint study of the proposals of two states. The experience in its implementation can be summarised as follows:

First: in the absence of any provision for addressing the issue of upstream diversion in the 1977 agreement, it was proven during the tenure of the agreement that the historic flow calculated on the basis of flows from 1948- 1977 did not represent the actual situation. Water availability at Farakka was found to be significantly less especially from the 1980 dry season. Consequently, Calcutta suffered from receiving a substantial less amount of water while due to guarantee clause Bangladesh's share was almost protected.[22] India's new

21The Farakka Barrage, n.13, col. 22.

22 As for example, as The Hinduistan Times reported, Calcutta port received 11,166 cusecs between March 21-31 1980. The shortfall is believed to be lesser water availability than the estimated one. The actual value was 40,036 cusecs against an estimated value of 61,000 cusecs. The Hinduistan Times, July 14, 1980.

Government in 1980 appeared to ignore the impact of upstream diversion while maintaining that Calcutta's suffering had resulted from the provision of guranteed share for Bangladesh.[23] In this circumstances, as expressed in the review meeting, India insisted on redefining the sharing arrangement arguing that Bangladesh and India (more correctly Calcutta) had to redistribute the burden of less water availability at Farakka. On the other hand, Bangladesh, while requesting an extension of the 1977 agreement in accordance with article XV of the agreement, appeared to be more interested to avoid the uncertainty posed by upstream diversion. But as India strongly objected to the extension of 1977 agreement, Bangladesh had been propelled to prepare herself for a different sharing arrangement.[24]

Second: in the context of diminishing flow at Farakka, the necessity of augmentation took a new dimension. It was no more only to increase water flow at Farakka, which in 1974 was addressed to be insufficient for Bangladesh and Calcutta, but also to make good the loss caused by the upstream diversion In this context India's proposal of Ganges- Brahmaputra link canal was viewed by Bangladesh as a devise to transfer Brahmaputra water to compensate the water deficiency caused by upstream diversion. This together with India's refusal to include Nepal to study Bangladesh's proposal jeopardised progress in studying augmentation proposals.[25]

The influence of these experiences was very much visible in the subsequent 1982 and 1985 Memorandum of understandings (MOU), concluded for the short term sharing of the Ganges. The MOUs defined the principle of equitable sharing as

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23How strongly India defended the upstream diversion projects is well manifested in her pledge that 'the interest of the upstream projects would be fully safeguarded' irrespective of their probable effect on Farakka. See, n. 22, Col 321,322, 324

24The impact of Farakka Barrage on Bangladesh, 1994, Government of Bangladesh, p. 10. see also Sing, K., 1990, India and Bangladesh, New Delhi, Anmol, 160-161

25For detail, see, Begum, K., n. 20, P. 191-219.

redistributing the sacrifices imposed by inadequate water availability at Farakka. The MOUs, therefore, substituted the guarantee clause of the 1977 agreement with a provision which stated that in case of exceptionally low flow, two countries would hold immediate consultation to decide 'how to minimise the burden to either country'.[26]

In situations other than that of exceptional low flow, the MOUs, however followed an identical sharing arrangement based on the same water availability as it was in the 1977 agreement. But due to substantial decline in the water availability at Farakka, this sharing arrangement lost its workibility in the following dry seasons, for which two countries had to conclude agreements in accordance with the MOUs to share 'exceptional low flow'. The agreements defined 'exceptional low flow' as a flow which is less than 75% of the expected flow, calculated on the basis of 75% dependability of the historic flows from 1948-1973. The agreements granted Bangladesh a pro-rata release of the Ganges flow at Farakka when the available flow is upto and above 75% of the expected flow. In case of less than 75% of the expected flow for the corresponding ten day period, the agreements provided for calculating the 'burden' by deducting the pro-rata release for Bangladesh at the actual flow from the pro-rata release at 75% of the expected flow and then sharing that burden by both states on 50:50 basis.[27] So, by deleting the guarantee clause, these agreements, in effect, provided for redistributing the burden of residual flow of the Ganges reaching at Farakka after upstream withdrawal. Calcutta's share was more protected in the new arrangements comparing to the 1977 agreement. Bangladesh, on the other hand, conceded to

261ndo-Bangladesh Memorandum of Understanding, New Delhi, October 7, 1982 and Indo-Bangladesh Memorandum of Understanding, New Delhi, November 22, 1985 in 'Documents' n. 4, pp, 28- 33.

27Agreement on Sharing of Exceptional Low Flow at Farakka for 1983-84. Agreement on Sharing of Exceptional Low Flow at Farakka for 1985-88, n.4, pp.30, 35.

28An illustration of the impact of the new arrangement was provided by B.M Abbas. This illustration says that 'the Ganges at Farakka recorded an all time low flow on April S,1983 against an expected availability at 75% of 59,000 cusecs. Out of its scheduled share on this day of 35,000 cusecs, Bangladesh received only 24,425 cusecs. Under 1977 agreement Bangladesh would have got 80% of that 35,000 cusecs that is 28,000 cusecs. Abbas, n l, p. 115

share the burden of lower flow, which Calcutta had to shoulder previously.[28]

The MOUs also aimed at speeding up the study of augmentation proposals by evading the question of political implications of the link canal proposal of India. The JRC had been "directed --- to ensure that a full and final agreement is arrived at" by focusing on economic and technical aspects.[29] After JRC's failure, the 1985 MOU established a new body called Joint Committee of Experts(JCE) consisting of secretaries concerned of the two Government and two engineer member of the JRC from each side, to work out a long term scheme or schemes for the augmentation of the Ganges at Farakka. It was agreed that after completion of the JCE's study within 12 months, a summit level meeting would take a decision on the scheme of augmentation and also the long term sharing of not only the Ganges but also all the rivers common to both states.[30]

Implementation of the MOUs and corresponding agreements, however failed to generate any optimism in regard to sharing or augmentation. As the actual availability of water was found to be less than 75% of the expected flow in the driest ten-days periods, both Bangladesh and Calcutta port had to suffer by receiving less water. As regards augmentation, inspite of the new directives and institutional framework, the stalemate on studying augmentation proposals continued due to the disagreements on Nepal's participation in the study of augmentation proposal of Bangladesh.[31]

29Para 12 of the Joint Communiqué of 7 October, 1982 mentioned in Crow. B., 'Appraprìating the Brahmaputra, Onward March of India's Rich Peasants, the economic and political weekly, Dec 25, 1982, 2097-98

30The 1985 MOU, n.26, pp 31,32

31 Circumstantial evidences suggest that steps had already been taken or seriously considered by 1985 to decline Bangladesh's involvement in any tri-lateral project of additional storage in headwaters of Ganges. In her updated augmentation proposal submitted to Bangladesh, India advocated the policy of undertaking bi-lateral projects with Nepal by arguing that additional storage in Nepal [which precisely was proposed by Bangladesh] would not be sufficient to meet her own need for Ganges water which 'are so urgent and so large'. See Updated Augmentation Proposal, n. 7, p. 47, 54, 56

India later reached understandings with Nepal during the official visit of Nepal's Prime Minister to India from 5-10 December, 1991 and subsequent visit of the Indian prime Minister to Nepal from 19-21

2.3. Limitations of short term arrangements

The series of sharing arrangements, addressed or appeared to be concluded for equitable sharing of the Ganges, failed to bring about any genuine solution and after the expiration of the last MOU in 1988, India, until 1996, refused to enter into any more sharing arrangement. Some fundamental flaws of the short term arrangements, as experienced during their operation, can be traced before discussing the efficiency of the sharing formula of the 1996 treaty.

In regard to sharing, it was proved that the short-term sharing arrangements, by evading the reality of upstream diversion, had made only partial accommodation or adjustment of the competing uses. These arrangements even failed to make provision for exchanging data concerning upstream diversion, although this diversion was very likely to affect water availability at Farakka and thus any sharing based on water flow at Farakka. In such situation, as experienced through the operation of the guarantee clause of the 1977 agreement, the interest of downstream country could be effectively protected only by giving due regard to the principle of not causing serious harm. When that guarantee clause was deleted in the subsequent arrangements, an efficient system for providing data in regard to upstream diversion became more imperative. The existing monitoring machinery stationed at or below Farakka was hardly equipped to answer how the projects of upstream withdrawal were affecting water availability at Farakka. Consequently it became very difficult for the downstream state to plan even her immediate water-uses.[32] The situation turned worse for Bangladesh, when after the expiration of the 1985 MOU in 1988, India refused to conclude any more sharing arrangement, claming that water flow at Farakka could not be shared unless Bangladesh acceded to her augmentation

October, 1992, in regard to a number of multipurpose projects which were earlier proposed by Bangladesh. See, the Impact of Farakka Barrage on Bangladesh n.9, p.22

32The Impact of Farakka Barrage on Bangladesh n.9, pp. 10,12.

proposal. This experience revealed the vulnerability of a downstream state unless her interest was protected against unlimited upstream diversion and she was afforded a scope of having information as to that diversion.

In regard to augmentation issue, the decade old stalemate over the study of augmentation proposals exposed the necessity of an efficient dispute settlement procedure incorporating provision for third-party involvement' which was proved to be decisively successful in case of another hot spot of water dispute between India and Pakistan regarding the Indus river.[33] Agreements on Ganges between Bangladesh and India failed to incorporate provisions for third party involvement in dispute resolution even to the extent it had been done in water treaties where India is party as a downstream state, with Nepal and Pakistan.[34] Her agreements with Bangladesh merely provided for bi-lateral efforts, which were found to be insufficient to settle many disputed questions concerning water utilization particularly augmentation proposals. In the 1977 agreement the responsibility of dispute settlement was assigned to the JRC and in case of its failure, to the states themselves. But the JRC had hardly been intended to be established as an independent body with any decision making freedom.[35] The establishment of JCE under the 1985 MOU also failed to make any substantial advancement on this issue. Along with the efforts of technical

33For detail see, Baxter, RR, The Indus Basin, in Garretson R.R. and others (ed), The Law of International Drainage Basin 1967, New work, Oceana, pp.444-478.

34As for Example, Art. IX regarding Arbitration in Indus Waters Treaty, 419 UNTS p. 127, Art 12 of the Agreement on the Gandaka project, Art. 14 of the agreement on Kosi project. UN Doc. ST/LEG/SER.B/12, 1963, pp.290-295.

In Art 11 of a recently concluded treaty between India and Nepal regarding projects on Mahakali river, provision is made for recoursing to the Parmanent Court of Arbitration in cases where two states fail to agree on nomination of a third arbitrator.

35 One obvious proof of political influence on the JRC can be traced from an earlier Indian plan where link canal was assessed as an inevitable part of a strategy designed for overall development of the water resources of India. K.L. Rao, India's Irrigation Minister during early 70s, revealed that "Actually it [the Ganga-Brahmaputra canal] is one of the projects which we think is all very vital, but so far we have not come out with execution, because we have to clear the problem of the Bangladesh region through which the canal passes'. --- In fact it is in the interest of the Ganga-Cauvery link that the Brahmaputra link must come". Lok Shava debate, n.14, col. 342,343.

bodies, several political meetings of two states even at the highest political level was also convened with no progress and in the beginning of 90s, the contending states appeared to abandoned the study on augmentation proposals. All these, taken together, suggested the need for a procedure of third party involvement, which could have been invoked after failure of bi-lateral efforts.

Finally it has to be noted here that all these sharing arrangements discussed above were temporary in nature and contained a common pledge that a final sharing would be negotiated basing on an agreement on the method of augmentation of the Ganges. Their great importance lies in their demonstration of the practical constraints the states faced in actual sharing of the waters. These constraints are very important to be noted, given that the later treaty of 1996 is basically a sharing arrangement of the existing water for thirty years. Unlike previous arrangements, the treaty ventured to demonstrate how existing water can be shared barring the possibility of augmentation.

3. 1996 treaty and its implementation

The text of the 1996 treaty makes provision for sharing only, although the need for augmenting the Ganges flows is recognised in the preamble. The preamble, like that of 1977 agreement, addresses the sharing arrangement as one concluded in a spirit of mutual accommodation. In the case of 1977 agreement that accommodation was meant to be an adjustment of the competing claims made for a water flow, which had so far been largely undisturbed by upstream diversion. In latter case the accommodation, as the preceding discussion reveals, ought to have been of the competing interests (of Calcutta port and Bangladesh) in a diminishing flow. The uncertainty of that accommodation is reflected in a unique sharing arrangement which is based on hypothetical availability of water.

The sharing formula in the 1996 treaty is based on the possible

availability of average flow of the period from 1949 to 1988. Accordingly, when water availability is more than 75,000 cusecs, which, as Annexure II of the treaty shows, is expected to be during January, February and last 10 days of May, India is granted her full requirement of 40,000 cusecs water and Bangladesh the rest. In case of water availability between 70,000-75,000 cusecs, expected during 1st 10-days of March and 2nd ten days period of May, Bangladesh's share is 35,000 cusecs and India's the rest. In the crucial period of 10 March to 10th May when even the expected water is less then 70,000 cusecs, the flow at Farakka is agreed to be shared on 50:50 basis.[36] This has been worked out by making provision for guaranteed 35,000 cusecs water for each country and the rest for other in alternative three ten-days periods during 10 March to 10 May. This provision, however, would not apply in cases of below 50,000 cusecs water availability, where, as the treaty provides, India and Bangladesh 'will enter into immediate consultations to make adjustment on an emergency basis, in accordance with the principle of equity, fair play and no harm to either party'.[37] On analysing these provisions some important features of the sharing arrangement can be noted.

First: the treaty has redistributed the share of Calcutta and Bangladesh in the dry season flow of the Ganges water. As a whole the agreement has changed the proportion of distribution in favour of India. Comparing to 40.94 percent share of India in the 1977 agreement, the 1946 Treaty has allocated 47.46 per cent share to India.[38] The new arrangement becomes more onerous for Bangladesh in drier periods during 10 March to 10 May when two states had to share the lower water on 50:50 basis whereas in all other previous arrangements, in case of

36Para (i) and (ii) of Art II, Annexure I and II of the 1996 treaty
37Para (iii) of Art. 11 of the 1996 Treaty
38 See infra.
39 Under 1977 agreement, Bangladesh was granted at least 11,000 cusecs more water than India for each ten-days period during 10 March to 10 May. Same figures of allocation was retained in the 1982 and 1985 MOUs.

expected availability Bangladesh's share was considerably more than that of Calcutta.[39]

Second: though the proportion of Bangladesh's share was reduced, Annexure II, addressed as an indicative schedule in the treaty, looks to be allocating both of the states more water comparing to previous arrangements. This allocation, however, essentially depends on the expected water availability calculated on the basis of average flow from 1948-88. If actual availability corresponds to the average flows of the period 1949-1988 then only both of the states would receive their allocated share, shown in the Annexure II.

Third: the applicability of the treaty has been made limited by providing that in case of availability of below 50,000 cusecs water, the treaty would have no relevance except in providing for consultation.

It can be suggested from the above points that the edifice of the treaty as well as its application largely depend on the availability of expected water. Annexure-II however, screens that reality by ensuring both state more water than whatever was agreed in the previous arrangements. It appears to accommodate almost fully the requirements of Calcutta port and that of the Bangladesh. This might inspired both of the Governments to make a controversial claim that comparing to the previous arrangements, the 1996 treaty is more beneficial for them.[40] But a careful examination would show that the treaty itself has limitations in some of its provisions, which could jeopardise its implementation.

First, water availability has been calculated on an uncertain basis; Second, allocation of water has hardly been protected in the treaty and Third: the dispute settlement procedure makes no

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40In West Bengal's parliamentary debate, leader of the opposition called into question the West Bengal Finance Minister's "arithmetic and wondered how both India and Bangladesh could benefit in a situation when the flow of the water in the river had gone down in the recent years". *Govt grilled on Ganga water treaty*, The Hindustan times, 2-97.

provision for third party settlement.

Water availability: Calculation of water availability in the 1996 treaty is remarkably different from that one of the 1977 agreement, which was retained even in the 1982 and 1885 MOUs. The real danger of this calculation lies in two aspects, first, unlike previous arrangements, the 1996 treaty is based on controversial figures of average historic flow and second it has excluded the most recent data on water availability from 1988-96.

a) Average availability: Water availability in 1996 treaty, as the Annexure II suggests, has been calculated on the basis of 40 years (1948-88) average flow for each ten ten-days periods of the specified months. While doing so, this treaty has, as shown in the following table, calculated a quantum of dry season flow which is 12% higher than figures accepted in the previous arrangements[41].

Water flow at / Farakka	Average flow of all periods	India / withdrawal	percent	Bangladesh share	percent
1977(calculated on 75% availability)	68966.67	28233.33	40.94	40733.34	59.06
1996(average flow calculated)	77,416.60	36,740.80	47.46	40,675.80	52.54
Difference	+8,449.93	+8,507.47	+6.52	-57.54	-6.52

This reported increase of 8,449 cusecs of water, on average, in every ten days period contradicts previous experience of both India and Bangladesh during operation of the temporary sharing arrangements[42].

We have mentioned already that one official publication of 1972 of the India Government itself suggested that the three

41 This table is prepared by averaging the water availability of all ten days periods during 1 January to 30 May. The average availability agreed in 1982 and 1985 MOUs is very negligibly less than that of 1977 agreement.

42During operation of tbe 1977 treaty, in 1980 dry season India complaint receiving less water than that agreed in the agreement. See, Hunduistan Times, 14-7-80. During the period of subsequent MOUs, the flow at Farakka went down so law that India and Bangladesh had to invoke provisions of the MOUs to enter into agreement to share 'exception Low flow'.

major irrigation projects in the upstream of Ganges would affect water availability at Farakka[43]. Furthermore, as reported in India's Newspapers and Journals, in post Farakka periods, a substantial amount of water is being withdrawn, through nearly 400 lift irrigation projects in the upstream of Ganges, before the river reaches Farakka[44]. Only three months before the conclusion of the 1996 treaty, as reported by the India correspondent of BBC world Service, West Bengal Chief Minister made it clear to the Central Foreign Secretary that due to arbitrary withdrawal by UP and Bihar, two upstream states of India, the interests of Bangladesh and WB was being frustrated. As BBC reported, one member of the West Bengal State Government who participated in the meeting with Central foreign secretary revealed that at present not more than 40,000 cusecs are available at Farakka in the dry period[45]. JKC, as quoted in a recent article, also revealed that the Jan- March discharge of the Ganges at Farakka were less by 8,10 and 12 per cent, respectively, in the post Farakka periods(75-88) compared with the pre- Farakka period(49-73) flow[46].

It can be suggested from the above discussion that the estimation of water availability in the 1996 treaty failed to take account of the impact of upstream diversion. Given the past experience where even 75% availability was not found, this

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43 n.22

In an article Published in 1982, Crow quoted a senior Indian negotiator of the 1977 agreement who provided that at current rate of irrigation expansion in the upstream of Ganges, there will be no water at Farakka in fifteen years time. See, Crow, B., 'Apportioning the Brahmaputra, Onward March of India's Rich Peasants', The Economic and Political weekly, December 25, 1982, 2097

44'The main reason' for 'steady decline in the water level in the last five years' at Farakka was pointed out in an analysis in 'India Today' as 'with as many as 400 lift irrigation points along the Ganges, UP and Bihar now siphon off anything between 25,000 and 40,000 cusecs before the river reaches Farakka'. Banerjee, R. 'Indo-Bangla Accord Defying the Current', India Today,15-1-97,p.110-111.

Increased upstream diversion was alleged also in Indian Express, 15-12-96, Aananda bazar, 10-12-96 The pioneer, 17-12-96.

45 Reported by Subhir Voumik, BBC correspondent in India, broadcasted in 30 8-96, BBC world service, Bengali Section. The BBC report is reproduced in, Aajker Kaghaz, 2-9-96

46 A. Dixit and M.Q. Mirza, Who is afraid of Farakka accord, *Himal South Asia*, January, /February, 1997 61

estimation on average flow appears to be wrongly calculated and to some extent misleading also. This, in all probability, is destined to result in affording less water to both of the states.

b) Exclusion of recent data: Exclusion of data on actual flow of the Ganges from 1988-1996 is another factor to cast a reasonable doubt over the reliability of the figures of water availability in 1996 treaty[47]. As since 1988, India and Bangladesh stopped joint monitoring of the flow at Farakka, there had been no agreed figure as to the quantum of water at Farakka during 1988-96. Bangladeshi members in the JRC could only have recorded the flow Bangladesh was receiving during that period. If these figures are added with maximum possible diversion by India, the total amount of the flow at Farakka, as shown in the following table, is found to be much less than the average flow of 1948-88.

Discharge of the Ganges at Farakka

Periods	1989-1996 (maximum flow)	1948-88 (average flow)	Difference
1-10 January	95605 cusecs	107,516 cusecs	-11911 cusecs
11-20 January	89737 cusecs	97673 cusecs	-7936 cusecs
21-31 January	84034 cusecs	90154 cusecs	-6120 cusecs
1-10 February	77137 cusecs	86323 cusecs	-9186 cusecs
11-20 February	70111 cusecs	82859 cusecs	-12748 cusecs
21-28 February	67559 cusecs	79106 cusecs	-11547 cusecs
1-10 March	65175 cusecs	74419 cusecs	-9244 cusecs
11-20 March	59572 cusecs	68931 cusecs	-9359 cusecs
21-31 March	58803 cusecs	64688 cusecs	-5885 cusecs
1-10 April	57421 cusecs	63180 cusecs	-5759 cusecs
10-20 April	59109 cusecs	62633 cusecs	-3524 cusecs
20-30 April	61030 cusecs	60992 cusecs	+38 cusecs

47 The reason of that exclusion, as had been explained by the Finance Minister of the State Government of West Bengal, was Bangladesh's refusal to accept the post- agreement data on the water level recorded unilaterally by India after 1988 when two states stopped jointly monitoring the water level at Farakka.

1-10 May	58732 cusecs	67351 cusecs	-8619 cusecs
11-20 May	72526 cusecs	73590 cusecs	-1064 cusecs
21-31 May	81997 cusecs	81854 cusecs	+143 cusecs

Source: JRC, Bangladesh, (untitled publication)

This table shows that whatever might be the reason for the exclusion of 1988-96 data, this exclusion certainly negated the possibility of a more reliable account of the water availability. Furthermore, given that India herself does not need to divert full 40,000 cusecs for all ten-days period, the actual availability during 1989-96, in its all probability must have less than what is shown in the above table[48].

The uncertainty of the water availability is evident also in some of the important provisions of the agreement. Annexure II which contain the table of water availability has merely been addressed in Article II (ii) as an indicative schedule. Without having undertaking any stringent obligation, India only makes a promise to protect the water flow shown in the mentioned annexure. The fragility of that promise can be well assumed from the provision in article II (iii) where both of the states recognise the possibility of water availability below 50,000 cusecs.

The experience of the implementation of the 1996 treaty in the dry season of 1997 justifies all apprehensions regarding less water availability. Because of lower flow at Farakka, both states received less water particularly in the driest period of mid-March to mid-May. Compared to Calcutta, Bangladesh suffered

48 As 'India Today' revealed, between April 1 and 10, average for the past five years at Farakka has been just 51,000 cusecs. It quoted Debesh Mukherjee, a retired General Manager of the Farakka barrage project who after noting that water level is consistently declining after 1988 observed that the calculation of water availability at Farakka is based on poor arithmetic. n. 44.

more, in one occasion, even to the extent of receiving a futile 6245 cusecs of water[49]. Though India had attempted to explain the situation as being resulted from natural causes like less rainfall, it was never accepted by Bangladesh[50]. India herself showed no interest to refute Bangladesh's argument that water availability is bound to be less because of indiscriminate upstream diversion[51]. Commentating on the situation, it is suggested by some experts that the treaty would have no practical value, unless some steps be taken to ensure steady or increased water supply at Farakka[52].

Protection of the agreed share: Another important thing to examine is how the sharing arrangement of 1996 treaty has addressed the principle of not causing serious harm to a co-user of an international river. We have seen that the 1977 agreement effectively reflected that principle by making the provision for 80% guarantee clause. Comparing to that, the 1996 treaty has hardly guaranteed protection of stipulated share. The provision attached with the annexure I, which says that each state 'shall receive guaranteed 35,000 cusecs in alternative three 10 days periods during 10 March to 10 May, was not intended to be applicable in a situation when the water is below 50,000 cusecs. Art II(iii) rather says that in case of below 50,000 cusecs availability 'the two Government will enter into immediate

49 As 'India Today' reports, 'Between Mach 11-21, India was to get 33,931 cusecs under the treaty but ended up getting only 19,000 cusecs on an average. And on March 17, it got only 18,000 cusecs, an all time low. In the same period Bangladesh received only 21,000 cusecs against the agreed share of 35,000 cusecs. And during the 10 days cycle of March 21-30 its share further dipped. The flow measured at Hardinge bridge was 6,457 cusecs on March 27. Two days later, it was marginally improved by another 2,000 cusecs, still far short of the 29,688 cusecs, it was supposed to get". Indian Today, April 30, 1997.

50In an expert level meeting Bangladesh refused to accept that less rainfall is liable for low flow at Farakka. Bangladesh argued that less rainfall in March is common in every year and water availability in 1996 treaty is fixed taking account of less rainfall in dry seasons in last 40 years. Janomot, 18-24 April 1997. See also, Janakandha, 9/4/97, 24/4/97.

51 Janakandha, 11/4/97, 24/4/97.

52 Miah, M.M, 'Panibihin pani chukti', Khoborer Kagaz, 24-6-97. Khan, A.H., 'Ganges Water Treaty- An Analysis of First Year Implementation', The Daily Star, 26-5-97

Explaining the reason why the treaty 'is in danger of being reduced to a meaningless document' the Indian today asserted that the water flow has declined drastically since 1988, 'especially after UP and Bihar began drawing 25,00-45,000 cusecs through lift irrigation projects before the water reached Farakka barrage'. See, India Today, 30-4-97.

consultation to make adjustment on an emergency basis, in accordance with the principle of equity, fair play and no harm to either party'.

Art II(iii) regarding consultation actually reproduced the provision of the 1982 and 1985 MOU. The inherent flaw of that arrangement was noted in 1983 when the exceptional low flow occurred in April 1983, but India and Bangladesh failed to hold consultation until July 1983. Abbas criticised the provision that the states would consult when the exceptionally low flow occurred by saying that, 'This is not a workable proposition as water would not wait for such consultation and would be lost by the time any consultation could be held'[53]. The 1985 agreement, being concluded on the same date of 1985 MOU appeared to mitigate that uncertainty. Instead of holding consultation on any later date, the states signed that agreement on the same date of the MOU of 1985 in anticipation of exceptionally low flow in any of the three dry seasons.

Compared to that, in case of below 50,000 cusecs water availability, The 1996 treaty merely provides for making immediate adjustment on the basis of the principle of equity, fair play and no harm to either party. Further to its inability to address the urgency of the situation, this provision hardly looks to be efficient to protect the interest of particularly the downstream state. In the first place, if two states fail to reach agreement on how the below 50,000 cusecs would be shared, the downstream state, having no control on the water flow, would be thrown in absolute uncertainty. Even if agreement can be reached, her share in the residual flow after unrestricted upstream diversion could fall far short of her agricultural and other life saving uses. The extent of injury Calcutta is supposed to suffer in that case, appears to be less because of the available alternatives of 'capital' dredging and the proposed plan of diverting the water of Sankosh[54]. But the uncertainty

53Abbas, n. 1, 115

surrounding water availability, could hardly avoid harm to the downstream state having no plausable alternatives for water supply from Ganges[55].

As experienced in 1997, due to below 50,000 cusecs water availability, the guarantee clause for 35,000 cusecs could hardly been enforced in some driest periods[56]. In that situation, India failed to respond timely to Bangladesh request for immediate consultation when during March and April water came down to less than 50,000 cusecs. The urgency of the situation was lost by the time the states could have agreed how to address this situation[57].

Limitations of the implementation mechanism: The 1996 treaty has followed the previous short-term arrangements to retain a joint committee, consisting of equal number of representatives of two states for implementation of the sharing arrangement. The committee is assigned to set up teams to observe and record the daily flow and is entrusted with the primary responsibility of dealing with any difference or dispute in regard to implementing sharing arrangement. If the committee fails to resolve any dispute it has to be referred to JRC and then to the two Governments for urgent discussion.[58]

54While negotiating the 1996 treaty India's Central Government assured to take up, 'capital dredging, i.e. full scale dredging, of which, as the West Bengal Finance Minister revealed, in the past 20 years only one-third was carried out. This capital dredging was promised to be undertaken in addition to regular dredging, to remove the long-clogged sand and to protect the Calcutta port in case of lower flow of Ganges. For detail, see, Asian Age, 13-12-96, Bangalok, 14-12-96, Anadabazar, 14-12-96
The Sankosh project, on which negotiation with Bhutan is underway, is planned to divert 13,000 cusecs water by a 143 KM canal from the Sankosh river of Bhutan for West Bengal's exclusive use Indian Express, 15-12-96, The pioneer, 17-12- 96, India Today, 15-1-97, The statesman, 6-2-97
Indian press also reported that West Bengal gave green signal for a treaty with Bangladesh because she was assured of 13,000 cusecs more water from the Sankosh project. It is concluded that because of the Sankosh project West Bengal would be less worried about the reduction of the Ganges flow at Farakka, which is estimated to be upto 5,000 cusecs in coming five years. Aananda Bazar Patrica,13-12-96, Indian Express, 10-2-97

55White Paper, n. 13.

56India Today,30-4-97, Indian Express, 6-4-97, Janakandha, 27-4-97, 16-5-97.

57Khan, A.H, n. 52

58Art IV-Art VII, 1996 Treaty

The insufficiency of this arrangement was severely felt in the dry season of 1997 when a wide difference of water released at Farakka and received at Hardinge Bridge of Bangladesh was noticed, which deprived the downstream state a lion portion of her share[59]. The entrusted bodies for dispute resolution failed to deliver any agreed opinion on this discrepancy. On other occasion, even when JRC succeeded to recommend a solution, compliance with that recommendation could not have been secured. On I April, though JRC recommended 11,842 cusecs to India and 33,000 cusecs to Bangladesh, India diverted 26,300 cusecs on that day.[60]

In a joint press briefing in 20 July, following two days meetings of the JRC, the Indian Water Resource Minister admitted that Bangladesh got less water than she was supposed to get under the Ganges water treaty. He made assurance to investigate the matter in order to ensure that 'the Ganges treaty would be fully implemented and Bangladesh would receive her due share as per the treaty'.[61] Bangladesh water resources Minister revealed that a joint scientific study would be launched to investigate the reasons of the discrepancies of the water released at Farakka and received at Hardinge bridge.[62] The synthesis of their statement points out to the limitation of the existing machinery,

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59Khan, A.H. (n.52) compiled the figures of discrepancies in the following table::

Period	agreed release for Bangladesh	release at Farakka	actual receipt at Hardinge bridge
1-10 Mar	33,085 cusecs	33,489 cusecs	23,291 cusecs
11-20 Mar	35,000 cusecs	35,028 cusecs	19,930 cusecs
21-31 Mar	--------	17,857 cusecs	13,823 cusecs
1-10 Apr	35,000 cusecs	30,137 cusecs	17,857 cusecs
11-20 Apr	19,526 cusecs	25,613 cusecs	24,559 cusecs
211 -30 Apr	35,000 cusecs	35,065 cusecs	27,695 cusecs

60 The 'Indian Express' accused India Government for 'making a mockery of the terms of the accord which was hailed as historic and trend setting'. Its report found that 'the real arm twisting began on April I. The water availability had dropped further by then. Whereas the JRC recommended 11,842 cusecs to India and 33,000 cusecs to Bangladesh on that day, the Technical Advisory Committee really turned the tap on for India-giving itself 26,300 cusecs cusecs and Bangladesh only 21,000 cusecs'. Indian Express, 6-4-97

61 'Kom pani payechey Bangladesh, aata aar hobe na/bharat ganga badh shagataa zanay//Sis Ram Ola'. Janakandha, 2 1-7-97

62Ibid,

entrusted for the implementation of the 1996 treaty. Though the ministers of two countries agreed to take some steps including undertaking of scientific study, the past record suggests that both states very rarely could agree on issues concerning questions of fact.[63] Given that, unless they could review the flaws of the treaty regarding water availability, success of bi-lateral efforts to secure implementation of the treaty in driest days would always be doubtful.

4. Future of the treaty

The 1996 treaty provides two windows for reconsidering or reshaping the existing arrangement for sharing, first, by augmenting the existing flow and second, by making adjustment during review of the agreement.

As regards augmentation, though the preamble mentioned the 'the need for a solution to the long term problem of augmenting the flow of the Ganges' the text of the treaty has not mentioned anything regarding study of the augmentation proposals.[64] 'The optimal utilisation' mentioned in the preamble rather was sought by separate plans- for India the Sankosh project and for Bangladesh, the Ganges barrage project.[65] These projects would take many years to be operative to lessen dependency on the dry season flow at Farakka. So irrespective of the outcome of the augmentation projects, the success of the 1997 treaty depends, at least for many years, on ensuring equitable utilisation of existing flow.

The provision regarding reviews is potentially promising for reconsideration of the sharing arrangement. During a review of the agreement, the first of which can be claimed after two years, adjustment is promised to be based on principles of equity,

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63 n. 1

64Ainuun Nishat (n. 55) provided that the 1996 treaty fails to refer anything on augmentation proposals because India was interested only in her Link Canal proposals.

65 The Ganges barrage project would be constructed at Pangs- within 60 miles of the Farakka barrage to irrigate 3.33 million acres land of the south-west of Bangladesh. Feasibility study of the barrage was done in 1969 and also in 1984, which now is being modified. Water resource minister told the parliament that the Ganges barrage project would take 10 years for completion. Sanbad, 20-12-96, Janokandho, 5-2-97

fairness, and no harm to either party. If no agreement on such adjustment can be arrived at, Bangladesh is guaranteed, until the disagreement continues, at least 90% of her share according to the formula referred to in Annexure II of the treaty. But as that annexure states nothing about less than 50,000 cusecs of water, this guarantee would also becomes useless in such situations.

Experience of the implementation of the treaty in 1997 dry season suggests that the future of sharing Ganges depends much on the amount of water availability at Farakka. Unless India takes measures to comply with her pledge of keeping the water flow in line with the figures shown Annexure II of the treaty, the much-talked treaty is bound to be largely inoperative in years to come. In that case the states shall have to conclude supplementary agreement to share waters of less than 50,000 cusecs. Article III (iii) of the treaty provided that would be done in accordance with the principle of equity, fair play and no harm to either party. It is arguable how these principles could be applied in allocating a diminishing flow, unless due regard is given to protect the water flow at the Farakka point of the Ganges river. This could only be done by regulating the withdrawal of the upstream flows of the Ganges and by providing Bangladesh with all the relevant information.

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GLOBALIZATION: RHETORIC OR REALITY? A CRITICAL STUDY

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1. Introduction

The word "Globalization" is being used in multifarious ways in our modem life. It is a process by which countries can be integrated into each other's frontiers with their own interest. It may be social, cultural, economical and also political. But today the debate is going especially on the concept of economic globalization; it a long process of development of the participants where every one should exercise their equal rights and fulfill their obligations and also have the opportunity to have legal protection. Today the world is divided into different categories of economic standards- developed, developing and least developed. Under the present phenomena it seems to be most complicated in its understanding.

The fact that in the context of "laissez- faire" economy of the developed states the developing countries cannot compete them with their "most favored nation treatment" economy. There are problems for developing countries to ensure their position in the economic globalization. As time passes, the nexus of globalization at all level is being, enriched by "common heritage" notion. Economic globalization will be meaningful if "most favored nation treatment" clause is put forward along with "laissez- faire" notion of the developed states. The purpose of the paper is to investigate and specify problems of prescribing a sound and equitable economic globalization in the phase of "Laissez-faire" and "most favored nation treatment" economics of the developed and developing countries. Finally, some suggestion will be brought forth in the study toward promotion of "economic globalization" as a

"common heritage" of mankind.

2. Meaning and Definition of Globalization:

Globalization may be defines as 'the process by which a given local condition or entity succeeds in expanding its reach over the globe and by doing so, develops the capacity to designate its rival social condition or entity as local under its impact'[1] Globalization, it is said, is not a function of "a discrete set of factors but of 'chaotic' currents of change".[2] It process is so dramatic and bewildering in its impact that 'every thing fixed and frozen is 'swept away' and all that is solid melts into air.[3] It introduces unending unpredictability and uncertainty in the society.

While globalization is a broader concept, the current trend of globalization is too narrow, limited to economic globalization and accompanying cultural globalization. In this narrow sense globalization means the 'free flow of capital and the removal of trade barriers between states as well as to the accompanying cultural transformation and exchanges.[4] While capitalist economy has always been global and for most Western history capital has flowed freely[5] the high rate at which the capital is pouring in today is unprecedented in the history of mankind. Most surprising is the fact that it is 'no longer the real economy driving the financial markets, but the financial markets driving the real economy.[6] The large scale flow of commodities, capital, technology and labor, all facilitated through developments in the international finance, increasing liberalization of markets and the revolution of communication technology, leading to the integration of world market and international division of labor

1 Santos, 'Oppositional Post modernization and Globalizations', L & Society enquiry, 23 (1998), 121,135.

2 See generally, David Harvey, the condition of post Modernity: An enquiry into the Origins of Cultural Change (1998), 44

3 Josef Joff citing, the communist Manifesto, Reffered to in Barbara Stark, 'Women and Globalization: The Failure and Postmodern Possibilities of International Law, Vanderbilt Journal of Transraitional Law, 33 (2000), 503 at 510,fin.23

4 Stark, n. 7,515

5 See, Paul Hirst and Graham Thompson, Globalization in Question (1996).

6 Observation of a fund manager in Hong Kong-cited in Stark, n. 7, 511

distinguishes the free flow of capital yesteryears from what has been going on in the name of globalization for a decade.

Globalization is a protean process that may result in different outcomes and rhetorical excesses under different situations. It refers to a process of integration and/or assimilation that fosters greater interdependence and close cooperation among international actors within the world community in regulating their political, economic, social and cultural affairs. It has caused the world to steadily become a smaller place, with its effects felt in nearly every national society. The onslaught of this process in the economic sphere has sought to internationalize economic forces, integrate production process and expand the world market through liberalization, thereby, laying the foundation of globalization in international trade in goods and services, investment and finance. The main function of economic globalization is to integrate national economics into the world economy through the organization and expansion of economic activities and openness across national frontiers. The constant advancement in technology and information superhighway has but added to this globalization foregoing ahead faster.

The liberalization of trade in industrial goods, as opposed to agricultural commodities, raw materials and primary products has boosted the earnings of industrialized countries and skilled workers at the expense of the commodities producing third world countries and unskilled workers. The mobility of capital has augmented profits for capital owners, but the immobility of labours has suppressed the wages and bargaining power of labours. The unfettered control of MNCs over market forces in absence of any international regulatory Mechanism and government intervention has rendered markets more monopolistic than competitive. The whole process may be seen

7 Michel Chossudovsky, "Global Impoverishment and the IMF- World Bank Economic Medicine" at http://www.corpwatch.org/trac/feature/india/globalization/index.html

as "a form of market colonialism ... [which] subordinates people and governments through the seemingly heutral interplay of market forces."[7]

The foregoing critical analysis is not intended to undermine the process of globalization, but to stress the point that its benefits and costs are uneven and limited. It has created new opportunities and benefits for some countries, but new risks and threat for others, thereby creating its winners, mostly in the North and losers, mostly in the South. The winners are those who are technologically advanced and industrialized, having surplus capital to export and lend, strong physical and human infrastructures flexible enough to withstand the profound changes brought about by economic globalization. The losers are the capital borrowers and technology importers, possessing rudimentary physical and human infrastructures too insufficient to cope with the momentum of economic globalization. The former has not only increased their surplus capital's rate of return by availing the expanded investment opportunities in the latter, but also strengthened their capital's bargaining power over third world labours through threats of capital flight.

3. Globalization and General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO):

Under a long process of multilateral trade negotiations being held since the establishment GATT in 1947, the Uruguay Round has given birth to the World Trade Organization (WTO), with aim to enhance the world trading environment by providing more detailed and clearer rules and stronger institutional structure. These rules are following some basic principles for access of trade market, which are eventually important for the achievement of globalization. These are Most favored Nation Treatment (MFN), Non-discrimination, reduction of tariffs and non-tariff barriers etc.

The WTO includes itself four broad areas of intervention under

its scope (a) Market Access- tariff and non-tariff barriers; (b) Sectors- textiles, clothing, agriculture, natural resource -based products, tropical products; (c) GATT System- anti-dumping, subsidies and countervailing measures, dispute settlement mechanism, safeguards, functioning of GATT system, Multilateral trade negotiations arrangements and agreements and (d) New issues -Trade related investment measures (TRIMs), Trade related intellectual property rights (TRIPs), services. Besides these compulsory package programmes there are four plurilateral agreements within the WTO, which are optional in nature for the participants like agreement on government procurement, agreement on trade in civil aircraft, international dairy agreement and international bovine meat agreement.

The total arrangements of the WTO are package programme, which means either accept full or be outside. At the same time this programme gives time limitations to the participants within what they must implement their obligations taken by their membership in WTO. But it did not go into the capabilities of the participants whether it is in their capabilities to implement or not. If not, then what measures should be provided? It must be kept in mind that the active participation of all parties could achieve the globalization in fact. It may be presumed that the time for implementation should be extended under certain circumstances and conditions to the participants who could not implement due to their obvious domestic reasons.

Today, after six years of its enforcement, most of the member including developing and the least developed countries are frustrated with their implementation progress and facing lots to their further implementation. The basic reasons behind these are their weak socio economic infrastructure, financial incapability, lack of trade knowledge and skillness on negotiations and diplomacy, short of technology etc. On the other hand, the WTO multilateral trading system does not

necessarily offer to these countries what they deserve but only what they are capable to negotiate and bargain for. There is no substitute for strong actions of a state to sustain its comparative advantage and competitive edge in international trade.

Economic globalization promises prosperity only to those who join the process and indeed some states have gained substantially from it. There are certain national economic factors and forces that are indispensable to derive gains from economic globalization. The overwhelming majority of the third world states lack these economic factors and forces. As a result, economic globalization has not been to the equal benefit of them all and has created obstacles for them affording unequal, yet limited, access to the world economy. Economic interdependence created by economic globalization is therefore asymmetrical. The growing trend of deepening interdependence among the major industrialized countries is not taking place in third world economies, which shows a considerable degree of dependence on the former.

Economic globalization is perhaps the neo-liberal version of the liberal free-market economy patronized by few industrialized powers, particularly the US, who emerged as dominant economic powers following the Second World War. It involves the global adoption of market liberalism as the dominant economic model. This explains why the major beneficiaries of economic globalization are the US, Europe and Japan. Through the creation of a peripheral third world market, culturally specific liberal economic theories were engineered to intellectually justify their competitive advantage necessary for the post-war economic expansion of the US and the economic recovery of Europe. The lure of profit maximization and the threat of competition in the market propelled the idea, not by an epistemological understanding of world economic conditions. The marginalized economic plight of the third world was not in the minds of post-war economic policy-markers, who

dominated the Bretton Woods Conference in 1944. Of course, it may be mentioned that during the designing of the post war economic policy most of the third world countries were still colonized and their markets were under strict control of the colonial rulers. Today when these countries are independent the demand of trade liberalization and globalization has raised and pressurized. Subsequently, some agencies like World Bank, International Monetary Fund, Asian Development Bank etc. are being used to achieve this goal of the globalization beneficiaries.

Economic globalization is the mature, if not the ultimate, life cycle of a world market free from economic frontiers. The emergence and constant progression of hightech communication and information super-highway has pushed aside geographical barriers. This has strengthened the position of multinational corporations (MNCs), which have restructured themselves, through mergers and acquisitions, to consolidate their grip on the market. The radically altered balance or power in the post-cold war era has resulted in the triumph or capitalism and the creation of a hegemonic unipolar world dominated by the sole superpower, both unequivocally patronize economic globalization. The cumulative effect of all these events has created a fertile ground for economic globalization to advance relentlessly. This international economic environment has rendered the space for unilateral and autonomous statistic economic development exceedingly difficult for any country, let alone third world economics, which had to fall back unwittingly on the process of economic globalization.

4. The WTO Multilateral Trading Regime and its implication on the third world countries:

Today, the WTO community consists of 144 members where three-fourths members are from third world. The WTO

arrangement is portrayed for economic prosperity to all on an equal basis. To materialize its target the Most Favoured Nation (MFN) and national treatments have become the governing principles of its activities. Moreover, in the Marrakesh Ministerial Conference in 1994, in Singapore 1996, in Geneva 1998, and in Brussels the developed countries had made a number of commitments in recognition of the marginalized economic plight of LDCs, warranting special and differential provisions for them in various WTO agreements in accordance with their requirements to participate in the multilateral trading system. The WTO Action Plan also aims at improving the capacity of LDCs to respond to the challenges and opportunities offered by economic globalization through an integrated framework for trade related technical assistance and greater market access.[8] But still today, these commitments have not been fulfill by the developed countries. Even the developed countries are not always observing the WTO principles in relation with the third world countries. Building relationship in between the developed and developing countries always depend upon the strength (specially economic) of their developed country. As a result, the maximum WTO member countries are not able to fulfill their obligations taken from WTO agreements and are bound to negotiate in bilateral way to have those committed facilities for their further intergation into the WTO system.[9] On the other hand, meaning of the principle of MFN has lost almost as because the international transactions between the first and the third world countries are not built on a fair and frequent basis. As International trade as a means of economic progress of third world countries have never in the minds of the free and fair trading policy makers. The policy makers i.e. the developed partners never realize that,

8 See: Final Act of the Uruguay Round, Marrakesh, 15 April, 1994, WTO Ministerial Conference in Singapore, Geneva, III UN Conference on Least Developed Countries in Brussels July '01.

9 See: LDC Trade Minister's Meeting Zanzibar, Tanzania, 22-24 July 2001 and 4th WTO Ministerial Conference at Doha 9-14 November' 01.

in an international trading community with unequal partners like the third world countries, treating unequal equally itself constitutes an act of discrimination and unfair competition. This has precisely happened and the regime has made a piece-meal effort through the Generalised System of Preferences (GSP) to address the problem.

Under the Generalized System of Preference scheme developing countries (known as preference - receiving or beneficiaries countries) receive preferential treatment from developed countries (know as preference giving or donor countries). The donor countries voluntarily grant reduced (or no duty) tariff rates on certain (eligible) products when these are imported from the GSP- recipient countries. Donor countries allow such preferential treatment without any reciprocal obligation from the recipient countries. There are several GSP schemes offered by 17 countries of Europe, America, Australia in relation to the imports from the third world countries. These GSP schemes are differing from each other, which might be considered against the MFN treatment principle.

The GSP is a discretionary and adhoc- system of tariff concessions granted to the products of third world countries by developed countries, which dictate its terms time-to-time depending on the requirement of their internal market. It is not well targeted. The newly industrialized developing countries receive its lion's share. LDCs lack the necessary infrastructure and, expertise to take its full advantage. The GSP has exacerbated the bargaining power of major trading partners, which have been creating pyramid or preferences and discriminatory selecting their beneficiaries largely on the basis

10 F Schoneveld, "The EEC and Free Trade Agreements: Stretching the Limits of GATT Exception to Non Discriminatory Trade" (1992) 26 J World Trade, 59; J Preusse, " Regional Integration in the Nineties: Stimulation or Threat to Multilateral Trading System" (1994) 28 J World Trade, 154-58; Islam, op cit, 165-66; J Chen, "Going Bananas: How the WTO can halt the Split in the Global Banana Trade Dispute"(1995) 63 Fordham L Rev. 1283.

of political and strategic considerations.[10] It is a permissible bargaining lever that excludes or threatens to exclude certain third world countries from preferential access to markets. The rule that GSP is voluntary for developed countries and cannot be claimed by the third world countries as matter of right is a clear indication yet of its self benefiting nature, which still continues unabated.

Although it was declared that the GSP scheme will enhance price competitiveness of developing country exporters to access in the market of the donor countries but in terms of reality it seems to be incomplete in its coverage and partial in its operation, militating heavily against the trading interests of third world countries as exporters of agricultural products and raw materials. Today it is clear that the GSP regime using as an instrument of control over the beneficiary countries i.e. on the third world countries. The GSP donor can change the terms of GSP scheme as per its choice and interest by unilateral way as its domestic consideration, not as the matter of their commitments towards the WTO community. In fact it is a discriminated measure to the third world countries products and also bar access into their market.

The WTO Agreement on Agriculture has for the first time addressed the issue of agricultural trade liberalization in a more than perfunctory manner. It has the potential of providing advantages to third world countries through greater market access and reduced domestic support and export subsidy commitments. They are granted an extended, ten yaers, period for implementation of the Agreement. These preferential treatments however reflect the asymmetry of bargaining powers between developed and third world countries. Whether or not the modalities of various concessions and exemptions worked in the Agreement are beneficial to third world countries was

11 J Atkinson, "GATT: What do the poor get?" Background paper no 5 of the Community Aid Abroad, Australia, September, 1994; D Clark, "Are the poor Developing Countries the targets of US Protectionist Actions?" (October 1998) Eco Dev & Cultural change 193.

neither raised nor addressed. Third world countries will be obliged to perform their obligations under the Agreement from 1st January 2005 regardless of their economic condition, improved or worsened. Most Food importing LDCs will have to pay more for their food imports.[11] On the other hand, the developed countries are very much reluctant to fulfill their obligations taken from the WTO Agreement on Agriculture especially, in relation to reduction of subsidies in agriculture. It is to be mentioned that in the 4th Ministerial Conference at Doha it has been declared that modalities for further commitments, including provisions for special and differential treatment shall be established no later than 31 March 2003[12] when only 2 years shall remain to implement the obligation on the agreement.

The WTO Agreement on TRIPs places the burden of implementation on third world countries but the benefits remain with developed countries. It provides mandatory protection to TRIPs at a level equivalent to western standards. Its provisions on the transfer of technology from developed to third world countries are only voluntary guidelines. The latter cannot gain their access to the former's technology as a matter of right. The GSP is inapplicable in TRIPs. Third world countries have received only an extended time frame for compliance, upon the expiry or which they must perform their TRIPs Obligations with no special or favourable treatment. As a matter of fact, the third world countries shall not be benefited rather than taking over burden from this agreement. Nevertheless, it a matter of hope that in the 4th Ministerial declaration a special consideration has given to the public health related TRIPs and also expressed an intention to obtain another declaration on this regard.

Trade liberalization in services received priority in the Uruguay round and an agreement was concluded on opening up the

12 See: Ministerial Declaration at Doha (4th WTO Ministerial Conference held at Doha November 9-14'01).

service sector of third world economies. General Agreement on Trade in Services (GATS) permits differential and presumably favourable, treatment and minimum commitments for LDCs in implementing GATS obligations (art-IV). But GATS deals only with skilled, semi skilled and professional services, rather than labour services in general. The cross border movement of natural persons (semi skilled and ordinary labour) from LDCs to developed countries is subject to many conditions and resections. Although the labour sector is an integral part of the production and services but this sector was totally ignored by the WTO Agreement on Services and considers that this sector is to be maintained by the ILO codes. Moreover, the third world countries are not in that position to exercise the special and differential facilities, as they are limited with their socio-economic infrastructure. In the Ministerial Declaration at Doha it was decided that within[13] 2002 the participants shall submit initial requests for specific commitments and initial offer shall be given by 2003.

5. Bangladesh and GATT/WTO: Cooperation and Reality

Though the General Agreement on tariffs and trade was reached and put into force since 1947 but Bangladesh joined this agreement after its independence in December 1972. For acceding to this agreement Bangladesh did not face any difficulty nor had to fulfill any condition thanks to its membership in the Commonwealth of Nations as Great Britain recommended Bangladesh to this treaty. Nevertheless, the matter of accession to any international organization like GATT was very liberal on accession for the newly independent countries. After the establishment of the WTO Bangladesh has become its member automatically as per agreement establishing the WTO.[14] During the existence of the GATT Bangladesh did

13 See: Service sector of the Ministerial Declaration at Doha (4th WTO Ministerial Conference held at Doha November 9-14'01).

14 See article XI (1) of the Agreement establishing the World Trade Organization.

not face any difficulty as the GATT clauses did not make any pressure which seemed to be more harder for the under developing countries like Bangladesh. As we know that WTO package programme requires its full implementation within a specific period of time. It has not considered the potentiality and different level of development of its members. It would be our great interest to see how Bangladesh implements the WTO programme and integrate herself into globalization, if not then what measures would be taken against Bangladesh by WTO.

Bangladesh is an agricultural country where most of the population is engaged directly or indirectly with this sector to earn their livelihood. Bangladesh is a country with about 113 mln. Population, scant natural resources, poor climatic conditions, regional crisis, internal political instability and low technical development etc. As a result, Bangladesh can't maintain quality standard in production and also fulfill internal demand of the country. It is one of the poorest countries in the world.

However, some of the provisions of GATT and WTO are directed to protect the interests of the under developing countries. Part IV of the GATT, which was added to the GATT agreement in 1965[15] may be an example to this. According to this part, the developed countries are not looking for same kind of trade liberalization as they do in their trade relation with the under developing countries. Though, all it was determined that the GATT will regulate both industrial and agricultural products. But soon after its activities it became clear that most of the contracting parties are not interested to give same kind of treatment in respect to agricultural products and they suppose to apply GATT provisions with certain reservations on this respect. As a result, agriculture was out of liberalization agenda till establishment of the WTO. The developed countries were not interested to import agricultural products from the

15 See Jackson World Trading System. P.38

underdeveloped countries in exchange of their industrial goods. Moreover, they subsidized their agriculture and export to capture the market of the under developed countries, as such the under developed countries become competitive in.

To protect the interest of under developed countries the Uruguay Round has formulated some provisionsi regulations to set up tariff system and reduce non-tariff barriers and subsidies in international trade by the GATT members. These regulations are mandatory for the contracting parties. But flexibility for the under developed countries which allowed them to abstain in observing these regulations for certain period of time in compliance with their hard domestic economic conditions.[16] Consequently, to these provisions Bangladesh has submitted to WTO its tariff valuation on different kinds of products. It is almost clear to us that the present condition of the country does not permit to reduce subsidies and tariffs on import for protection of its domestic industries as regulated by the WTO agreement. On the other hand, implementation of the agreement will increase price of agricultural products, especially food stuffs inside the country. So, it is quite inadequate for an agricultural country like Bangladesh to fulfill the requirements of the WTO and observe its regulations in full.

From the very beginning of Bangladesh membership in GATT it tried to implement all GATT norms in both internal and external economic relations. But practical implementation with the view to radical changes, harmonization of GATT norms with the existing rules of the country was not possible due to the subjective and objective reasons related with internal and external forces. Like most of the under developed countries Bangladesh is getting foreign aid from the developed world and also from the international organizations. But to some extent, these aids are not coming without fulfillment of conditions

16 See Part IV of the GATT. These provisions are also induced into the following protocols for agriculture and also into the agreements on Agriculture

imposed by the donors. Some times donors are keeping control over the implementation process of the beneficiary country, which seems to be threatening to its sovereignty as well. Such a situation appeared with Bangladesh in this year to get fund from the European countries at Paris conference. The donors have made a clear-cut statement to the Bangladesh delegations to submit poverty reduction strategy paper (PRSP) for their further approval. Our government is not able to give security to the foreign investors, which is also one of the reasons of its poorness of the country. As a result most of the importer started shifting their trade and investment policy related to the ready made garments from Bangladesh to some African and Arabian countries. Meanwhile a big part of the garments factories have closed. Quantity of unemployment has risen. Therefore, our integration process into the globalization at stake. We consider that each country has freedom of invest and organize its foreign economic relations in accordance to its benefit and interest. But in all case we appreciate same time a standard regulations of building and regulating inter state economic relations, which could serve the interests of world community with out any differences of their level of development. The WTO is such an effort. It is clear that the successful implementation of the WTO programme follows auto globalization. But it seeks mutual cooperation with utmost good faith between the states not depending upon their economic strength. To realize the implementation processes the developed countries are to provide all kinds of support (technology, financial, policy making, counseling etc.) to the under developed countries. This is their international obligation. In fact, the developed countries in several WTO conferences made such commitments.[17] Today, after seven years of WTO activities the scenario of interstate economic relations between the rich and poor, north and south states have not developed as it desired. On the other hand, it

17 See The Ministerial Conferences of the WTO at Singapore, Seattle, and Doha etc.
18 See Article XII (1-2) of the Agreement establishing the World Trade Organization.

was suggested for regional economic grouping among the member of the WTO for their successful integration into globalization.[18] With such a view in 1983 seven South Asian Countries like Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka have organized South Asian Association for Regional Cooperation (SAARC) in economic fiedls.[19] But till today no such successful cooperation has obtained due to political unrest among some of the member countries. It proves that we are not totally ready to fulfill our contractual obligations even with in the region. For example, bilateral trade agreement within the SAARC scope between Bangladesh and India on consumers goods achieved in 2000 where India has been agreed to give tariff free access of 25 categories consumer goods of about 191 items of Bangladeshi products into its market when India exports its products into Bangladesh market frequently. We exported only accumulator batteries into Indian market, which was not even enough to meet requirement of internal market. But an anti dumping claim was raised by India against Bangladesh. These facts prove that a big gap in balance of payments between the two countries. Now both the country have again negotiating and India has agreed to allow tariff free access of 40 items of 16 categories of Bangladeshi products into its market. May be this is a matter of good sign of regionalism and globalism as well.

According to the Multi Fibre Arrangement (MFA) 1974 we had an access to the European and American markets with ready-made garments (RMG) with certain tariff facility and quota (accordingly GSP was given to Bangladesh). This quota was a great protection for Bangladesh and relevant to its technological standards. On the basis of these we built garments manufacturing sector and subsequently other sector related to this were developing. Bangladesh was earning foreign currency. But under the influence of the WTO the quota system

19 See Agreement on South Asian Association for Regional cooperation (SAARC) 1983.

is waved by the Europe and America and Bangladesh has lost its market. This quota was waved for the sake of globalization, which follows equal treatment on the basis of most favored nation Treatment. As a result, Bangladesh has fallen into a financial crisis. To over come this crisis we must do, as the big powers want. In such way the big powers are compelling us to get into so call Globalization process. This is merely an example. In our understanding, globalization is a running economic process where the participants take part in accordance with their capacity. This does not make any pressure and totally individual matter of choice of the participants how they will play the globalization game. It is clear that he who plays successfully this game earns stronger position, in world economic integration.

Today, what is happening in the name of globalization it is an ultimate frustration. This frustration threats national sovereignty of the weaker partners. Most of the players of globalization do not agree with the process and are still trying gently to overcome globalization pressure through negotiations. If they can't negotiate then WTO will lose its acceptability and globalization will not be in the heart of the failures. Therefore, for its success WTO must understand and fulfill the essential needs of its weaker members like Bangladesh. Only then Bangladesh will not hesitate to go for globalization.

6. Dispute settlement Mechanism in WTO regime:

During establishment of the WTO, it was presumed that the dispute settlement understanding would provide security and predictability to the multilateral trading system and will be the central element to serve interest equally of its members. But soon it became clear that the dispute settlement procedure of WTO does not based on the principles of equity and onerous for the third world countries. It allows only state government legal representation to the exclusion of private legal representation. The initial stage of plaintiff starts with consultation and if it

fails to obtain any solution within the prescribed time then panel may be established by the request of any party. It is to be mentioned that the dispute settlement procedures time for the judgement and choice of judges/penalists are limited for the parties. These are regulated by the WTO secretariat. Any member state, which is a third interested party may be heared by the panel, without being party to the dispute,[20] as disgracefully, active joinder of plaintiffs is only allowed when the complaint is jointly filed. The joinder of defendants is totally disallowed. This is major short- coming of the system, because this allows for different panels to analyse related matters and possibly enacte different awards. This imperfection can be further aggravated by the fact that, in the DSU, the terms of reference[21] of a dispute are not given by plaintiff, but the secretariat of the WTO through its legal division. Therefore, it could happen that identical cases brought by different member states against single country be transformed into different matters, brought to different panels and even draw different decisions.[22]

The DSU does not permit counterclaims or cross complaints, which may result in two different panels, with the same parties and different terms of reference for the same basic issue at stake with disparate decisions. Because all panel deliberations are confidential,[23] as well as petitions and briefings filed by the parties, the system fails dramatically in terms of governance and presents formidable obstacles to dramatic controls, within the member states, of the action taken by their representatives before the WTO. Moreover, the WTO proceedings do not have

20 See article 17(4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

21 See article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

22 For a complete analysis of the procedural aspects of the DRS, see the bilingual "Essays on International Law" by Durval de Noronha Goyos Jr, Legal Observer, Sao Paul/Miami, 2000

23 See item 3 of Annex 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

24 See Article 12 (6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

a physical file of the case, as in any reliable judiciary or arbitration case anywhere in the world. Panels will establish time periods for filing of petitions and briefs on a case-by-case basis.[24] This will allow for different treatments to parties in a dispute, face each other, as well as before similar situations applicable to other parties. The awards are drafted without the presence of the parties.[25] Individual opinions of arbitrators are anonymous and, whenever dissenting, are excluded from the award.[26] This situation serves to mask the true and correct deliberations of the panel and present an unfair disadvantage for the defeated party, with respect to the merits and changes of an eventual appeal. The secretariat of the WTO maintains a roster of arbitrators[27] who shall be well-qualified governmental or non-governmental individuals.[28] The arbitrators are chosen by the legal division of the secretariat of the WTO according to criteria not subject to transparence, governance and after in contradiction with the diversity requirement of the treaty. WTO arbitrators of both first instance and appellate level function on an "adhoc" basis, therefore on a non-permanent situation. Frequently, they do not reside in Geneva, Switzerland, where the headquarters of the WTO are situated, and they do not have any independent or own infrastructure of support for their activities. Therefore, they have to rely on the technical support and assistance on the "legal, historical and procedural aspects of the matters dealt with"[29] by the secretariat of the WTO. This situation has caused serious distortions in the DRS.

The simple reality is that many WTO members specially, third world countries do not have the necessary resource to afford a full time international trade lawyer. This resource constraint is clearly borne out by statistics. In the six years since the creation

25 See Article 14 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
26 See Article 14 (3) of the Uuderstanding on Rules and Procedures Governing the Settlement of Disputes.
27 See Article 8(4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
28 See Article 8(1) of the Uunderstanding on Rules and Procedures Governing the Settlement of Disputes.
29 See Article 27 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

of the WTO on January 1, 1995, 220 complaints were notified by the member states to the secretariat, the majority of which, 116 were resolved one way or another during the phase of consultations; 51 have been object to definite decisions by the DRS; 39 have been settled by the parties or are inactive; 14 cases are presently under way on first instance or appellate level. In accordance with the WTO, s annual report for the year 2000, "Developed countries files about three quarters of the complaints under Dispute Settlement Understanding (DSU), and were respondent in the same share of complaints. Developing countries filed the remaining one-quarter of complaints, against developed countries in over 50% of the complaints and the rest against developing countries. The USA and the European Union (EU) are the most frequent complaints to the WTO. . . "[30]

It is clear that this procedural requirement of the WTO system undermines the impartiality and the due process of the panel proceeding. It can ensure only a quantitative, not qualitative, equality of opportunity at its best and can leave third world countries with a feeling of unequal treatment at its worse.

7. Globalization-WTO and their consequences

From the aforesaid it is clear, that in all these WTO arrangements developed countries are clear-cut winners, which are the "rule makers" and have the authority to set and implement the rules of world trade. Third world countries are merely the 'rule-takers' with very limited power to invoke and implement them in their favor.

It is unrealistic to expect third world countries to indefinitely accept economic arrangements that require them to make the most compromise and concessions, yet offer a limited participation in the WTO and the global market place. If the

30 See WTO FOCUS, December 2000, No.50, page 6.

globalization of trade is unable to deliver positive economic and welfare benefits for them soon, the likelihood of socio-political reaction will increase. The deep-seated dissatisfaction with the outcomes of economic globalization at the gross-root has gathered momentum in developed countries. Organized protests took place in the WTO Seattle Conference in November 1999, in the World bank and IMF joint meetings in Washington in early 2000 and in Prague on 26-28 September 2000, in London on 18 June 2000, and in the World Economic Forum's Asian Summit Meeting in Melbourne in late 2000. Economic globalization must be made beneficial to all, particularly third world countries and poor people, its institution must be accountable to the countries and the people they effect directly. No economic system can operate effectively without basic-political support. The capitalist market and its value must not take precedence over socio-political values. If it does, it will suffer from a legitimacy crisis. This message sent loud and clear through the chain of public reactions referred to.

8. **Conclusion:**

In the conclusion it may be pointed that the process "Globalization" must not be forced by any state or group of states. It is an atuometic process of the development of economic relationship. The recent trend of globalization which is propagated through the WTO arrangements by the developed countries are exclusively in their favour to take control over the third world markets, to fulfill the demand of their capitalist test. Today, the maximum liabilities of globalization lay on the developed countries. For the sake of globalization, they must not be limited with their commitments to ensure assistance to foster the economic prosperity of the third world countries. These commitments must be legally binding with in the WTO system. There should exist a legal regime that engulfs "economic globalization" as a right for each and every state

toward promotion of "common heritage" notion. If so, economic globalization will give rise to a sound and viable regime for developing and developed states. The gap between "laissez- faire" economy of developed states and "most favored nation treatment" economy of developing countries will be narrowed down. Global economy will then be a guarantee for participation of all states. The developed countries must contemplate the real socio-economic demands of the third world countries and fulfill their commitments given in different WTO Conferences on utmost good faith only then the real globalization is possible otherwise, it will remain rhetoric.