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## President's Message

The Institute of Regional Studies (IRS) is known for its publications, roundtables, conferences, and documentation. Its publications are on topics of current interest. They are highly readable and are academically rigorous. To coordinate IRS publications, we have consolidated the quarterly *Regional Studies* and monthly *Spotlight* articles lists. The list on pages i to xxvii of this issue of *Regional Studies* is comprehensive. This is because *Regional Studies* published all *Spotlight* articles up till now, but not every *Regional Studies* article was reproduced in *Spotlight*.

The Institute has also updated its website. The complete list of *Regional Studies* articles from 1982 onwards is easily downloadable. Interesting information on our region is also continuously added alongside our robust documentation process. Our team has uploaded relevant information, including current documents once painstakingly collated and pasted together by hand. So do visit [www.irs.org.pk](http://www.irs.org.pk).

**Rukhsana Qamber, Ph.D**

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## CONTENTS

- Climate Change And Institutional  
Capacity in the Indus Basin 3-32  
— *Asma Yaqoob*
- 10<sup>th</sup> Parliamentary Election and Destruction  
of Electoral Governance In Bangladesh 33-53  
— *Md. Abdul Alim*
- British-Kashmiris: From Marginalised Immigrants  
to a Transnational Diaspora 54-78  
— *Shams Rehman,*  
*Faiz Ur Rehman,*  
*and Amna Aziz*
- International Human Rights Law: The Real Improver  
of Human Rights Situation or Faithless Paradoxes? 79-104  
— *Muhammad Imran Khan*

# CLIMATE CHANGE AND INSTITUTIONAL CAPACITY IN THE INDUS BASIN

ASMA YAQOOB\*

## Abstract

*In the past, India and Pakistan have successfully used the Indus Waters Treaty (IWT) to resolve water disputes that arose out of partition of the Subcontinent. Changes in seasonal flow of the Indus Basin because of climate change could, however, ignite water discords in a readily volatile region. One of the most pressing questions in the field is whether climate change is the primary reason for resource scarcity and bilateral water disputes between India and Pakistan. This study analyses the causes of the rise in the number of water disputes between India and Pakistan. In doing so, it essentially focuses on socio-political factors and reveals that it is not resource scarcity induced by climate change that causes water disputes but the lack of institutional capacity in the region to absorb this change. Since the IWT divides trans-boundary waters without managing them, there is no institutional response to cover all variability in the basin in physical terms.*

## Introduction

Climate change in South Asia is projected to aggravate water disputes between India and Pakistan. As per statistics, changes in the seasonal flow of the Indus Basin, divided between the two countries through a treaty, are more than enough to ignite water discords in a readily volatile region. Contemporary literature on climate change in the Indus Basin is progressively more focused on water resource scarcity and resultant bilateral conflicts in the region. Thus one of the most

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pressing questions in the field is whether climate change is the primary reason for resource scarcity and bilateral water disputes between India and Pakistan.

India and Pakistan have concluded the Indus Waters Treaty (IWT) in 1960 to resolve water disputes arising out of the partition of the subcontinent. The treaty has served well in terms of resolving water disputes during the post-partition period. This study analyses the causes of the rise in the number of water disputes between India and Pakistan. In doing so, it essentially focuses on socio-political factors in analysing the water regime of the Indus Basin. These socio-political factors reveal that it is not resource scarcity induced by climate change that causes water disputes but the lack of institutional capacity in the region to absorb this change.<sup>1</sup> It is the institutional lack of adaptability to climate change that is hindering bilateral resilience in the Indus Basin.

The IWT divides trans-boundary waters without managing them. There is no institutional response to climate change in the region because the IWT does not cover all variability in the basin in physical terms. As the only existing bilateral institution on the subject, it rigidly focuses on water property rights for conflict resolution and ignores environmental aspects of water development across boundaries. Independent water policies indifferent to physical variations in the shared river basin are only deteriorating the aggrieved bilateral relationship. The interaction of trans-boundary water development (such as the development of national hydropower) with long-term climate change impacts on political relationships in the Indus Basin is a serious threat to regional peace.

### **Current debates on climate change trends**

Experts have projected huge seasonal river variations<sup>2</sup> supplemented by reports<sup>3</sup> of significant retreat and depletion<sup>4</sup> of glacier volume in the Himalayas,<sup>5</sup> a major source of water flow in the Indus Basin. Other climate reports<sup>6</sup> provide a contrasting evidence of glacier expansion mainly in high-level glaciers in the central Karakoram.<sup>7</sup> Both glacial surge or retreat could have serious implications for the hydrological cycle of the Indus Basin, which is dependent on monsoon precipitation and glacial melt for its flow. Half of the total annual average flow in the basin is contributed by snow and glacial melt.<sup>8</sup>

Hence any significant change in climate together with a reduced or high rainfall will produce serious consequences for the ecological system and socio-economic sectors of the society in the Indus Basin region. This could also worsen an already weak political relationship between India and Pakistan. Pakistan being the lower riparian has long been complaining of 'water stealing' by India as a violation of the IWT, which the latter has declined on grounds of changes in river flow patterns due to climate variations.

### Facts about the Indus Basin

Arising from the Tibetan Plateau, the Indus Basin travels through the Hindu Kush, Karakoram, and Himalayan mountains to enter the surrounding territories of Afghanistan, China, India, and Pakistan (see Table 1). Nearly 3,000 km long and with 970,000 square kilometres drainage basin, the Indus River is the 12<sup>th</sup> largest drainage basin in the world.<sup>9</sup> As one-third of the upper Indus Basin is glaciated,<sup>10</sup> snow and glacial melt contribute approximately 85 percent to the annual flow of the River Indus.<sup>11</sup>

**Table 1: Country areas in the Indus River Basin**

Basin	Area		Countries	Area of country in basin (km <sup>2</sup> )	As % of total area of the basin	As % of total area of the country
	Km <sup>2</sup>	% of South Asia				
Indus	1,120,000	5.4	Pakistan	520,000	47	65
			India	440,000	39	14
			China	88,000	8	1
			Afghanistan	72,0006	11	

**Source:** Food and Agriculture Organization (FAO), 2011<sup>12</sup>

The Indus Basin has varying climate patterns. In Punjab and Sindh provinces of Pakistan, arid and semi-arid temperature varies with the sub-humid weather.<sup>13</sup> In the north-western Himalayas of India and northern Pakistan, temperatures range from average summers in valleys to freezing weathers at higher altitudes.<sup>14</sup> Annual rainfall also differs between lower and upper Indus regions. More than 80 percent of the

flow in the Indus, as it emerges onto the Punjab plains, is derived from seasonal and permanent snowfields and glaciers. Monsoon rainfall makes an important contribution to the inflows of Chenab, Jhelum, Ravi, and Sutlej tributaries. This also affects glacier mass balance and ultimately the hydrological cycle.<sup>15</sup>

### **Climate change in the Indus Basin**

The Indian subcontinent has shown an enhanced warming trend during the winter and spring seasons. A variety of factors are responsible for this warming trend, but it is widely attributed to environmental pollution resulting in rapid depletion of the western Himalayan glaciers.<sup>16</sup> The same temperature changes have resulted in glacial surges in the basin source elsewhere. According to Hewitt, "31 glaciers have expanded in the Karakoram in the past 150 years not because of lower temperatures, but because higher temperatures have caused the existing ice to move faster down slope."<sup>17</sup> The changes in rainfall are unreliable with both increasing and decreasing trends in different parts of the region. According to a report by the International Centre for Integrated Mountain Development (ICIMOD), "The most serious changes are probably related to the frequency and magnitude of extreme weather events, such as high intense rainfalls leading to flash floods, landslides and debris flows."<sup>18</sup>

It would suffice to note here that the Indus Basin region lacks reliable data sets to assess the region-specific reasons for climate change. The reasons for climate change in the Indus Basin are not yet clearly investigated; further research is needed in this regard.

### **Scientific trends in climate change**

Scientific investigations find a close link between increasing temperatures and flow variations at different stations of the Indus Basin seasonally. Arora and others, studying the climate-induced flow variations in Chenab, conclude that changes in stream flow during the four seasons are linearly related to the increase in temperature. The peak flow occurs in the pre-monsoon period due to high snow/ice melt runoff under a warmer climate.<sup>19</sup> For Scally, there is a strong relationship between winter snowpack and summer runoff in the River Kunhar, a headwater tributary of the River Jhelum in northern Pakistan. Indus and



other snow-fed rivers are also likely to cause flooding due to a heat wave in early summer.<sup>20</sup>

Hydrological studies carried out for the Sutlej River have found that flow variations are related to seasonal climatic changes.<sup>21</sup> Specific inflow changes have also been investigated in the upstream areas of Indus, Jhelum, and Chenab rivers in Pakistan, which are largely attributed to land use changes, deforestation, and Indian construction of dams on the other side of the watersheds. Flow variations have also been reported in the downstream areas of the Indus Basin due to massive water divergence within the upstream areas, depleting water availability downstream. According to the findings, enormous amounts of water of the Indus and its tributary rivers have been diverted in the upstream areas of India and Pakistan during the last century. The continuous shrinking of the lower Indus Basin is projected to affect the monsoon system.<sup>22</sup>

### **Future projections about regional climate change**

ICIMOD statistics project that some 40-80 percent of the glaciers in the Hindu Kush and the Himalayas would be lost by the end of the century, with the exception of the Karakoram, where the glaciers have been more stable.<sup>23</sup> Another study by the ICIMOD found that out of the 2,420 glacial lakes in the Indus Basin, 52 are potentially dangerous and can result in glacial lake outburst floods (GLOFs) with serious consequences.<sup>24</sup>

The regional climate model used by Rees and Collins has found that some areas might experience increased water availability whereas others could face a significant reduction in water flows (for details see 'seasonal changes' below).<sup>25</sup>

### **History of water conflicts in the Indus Basin**

India and Pakistan were partitioned in 1947 as two independent nation states after a three-decade-long struggle against their British colonial masters. The hurried withdrawal of the British from the subcontinent left several partition legacies between India and Pakistan, most important of which are the territorial dispute over Kashmir and sharing of transnational waters. While the former has caused three wars

between the two countries, the latter was resolved with the division of international waters.

The immediate post-partition water dispute between India and Pakistan was regarding the supply of water from the Ferozpur Headworks (Indian Punjab) to the Bari Doab Canal in Pakistan's Punjab province, a major source of irrigation for vast lands in Pakistani areas. The two countries tried to settle the issue through an arbitration tribunal, which was supposed to manage the assets division between the two parts of divided Punjab. The tribunal ceased to function on 30 March 1948, which allowed India to stop the supply of water to Pakistan, contending that "the property rights in the waters of East Punjab's rivers were vested in itself, and that West Punjab could not claim any share in those waters as of right."<sup>26</sup> Bilateral efforts to settle the water issues included a series of inter-dominion conferences and interim agreements without much success.<sup>27</sup>

It was only after the involvement of the World Bank that the two countries were able to reach an agreement in 1960 over the shared waters. Known as the Indus Waters Treaty, it gave full control of the three eastern rivers: Beas, Ravi, and Sutlej to India; and of the three western rivers: Chenab, Indus, and Jhelum to Pakistan. The treaty obliges both India and Pakistan to not interfere in the waters of the rivers allocated to the other side except for the limit specified for agricultural, domestic, and non-consumptive use. India was also given the right to generate hydroelectricity on waters of the western rivers through run-of-the-river projects, i.e., without altering the flow of water. The same right, however, was not given to Pakistan on the eastern rivers.<sup>28</sup> A Permanent Indus Commission (PIC) was created with representatives from each side for the "implementation of the Treaty and to promote cooperation between the parties in the development of the waters of the Rivers."<sup>29</sup> The treaty also provides for the appointment of a neutral expert to settle bilateral water disputes as well as referral to the court of arbitration for the resolution of intractable disputes.<sup>30</sup> In the post-treaty period, India and Pakistan have been involved in bitter water disputes, all of which were related to Indian construction of dams and hydropower plants on the western rivers of the Indus Basin. The western tributaries of the Indus River—Chenab and Jhelum—flowing through India before entering

Pakistan are an important source of hydropower generation in the Indian-Held Kashmir (IHK).

India has planned a network of dams and hydropower plants across the major river basins including the Indus Basin tributaries. India is currently running more than 23 micro and macro hydropower stations on the western rivers of the Indus Basin with 12 new projects under study in the IHK.<sup>31</sup> The Indian haste to tap the hydropower potential of the eastern rivers of the Indus Basin has awakened the policy-making circles in Pakistan. In 2001, the Water and Power Development Authority (WAPDA) of Pakistan announced more than 33 schemes of irrigation dams and hydropower plants to be constructed and upgraded under the Water Vision 2025.<sup>32</sup> India and Pakistan have entered in a dam-building race on the Indus Basin, a lead factor for water tensions in the region. The post-IWT disputes between India and Pakistan revolve around general riparian politics in which the lower riparian inherits a sense of insecurity.

## **Disputes over Indian hydropower projects**

### **Salal Dam project**

In the post-IWT period, the first ever water dispute between India and Pakistan was regarding the Indian construction of the 690 MW Salal hydroelectric project on the River Chenab. The project involved the construction of a dam across the Chenab near Riasi (in the IHK), a diversion canal, and a power station. Pakistan's contention was that the dam would enable India either to interrupt the flow of the water or to flood its Punjab province, whereas India maintained that it would be impossible to cause flooding without causing much greater damage to its own territory.<sup>33</sup> The Salal Dam project remained the subject of bilateral negotiations from 1970 to 1978. India was able to suggest modifications in the design of the project to the satisfaction of Pakistan, which became the basis of settlement between the two countries. It was on 14 April 1978 that the two countries signed an agreement on the design of the Salal project providing that "in order not to prevent the flow of water to Pakistan the height of the dam would be a little less than 10 meters instead of 12 meters as originally proposed."<sup>34</sup>

### **Tulbul Navigation/Wullar Barrage project**

This Indian project has been a long-standing contentious issue between India and Pakistan since 1984. The Tulbul project is a 'navigation lock-cum-control structure' on the River Jhelum in the IHK. Work on the project was stopped in 1987 after Pakistan raised objections over the design of the barrage. For Pakistan, the project is a clear violation of the IWT as the proposed barrage "envisaged 32 times more storage capacity against 0.1 million acre-feet storage permitted to India under the Treaty."<sup>35</sup> The Indian position is that the Tulbul Navigation project does not intend to store water to the detriment of Pakistan. According to the Indian reports, controlled release of waters from this project will equally benefit the downstream power projects of Uri and Mangla in the IHK and Azad Jammu and Kashmir (AJK) respectively.<sup>36</sup> To date, the two countries have held 13 rounds of secretary-level talks, including four under the 'composite dialogue', on the subject without any final solution to the problem.

Any final settlement of the issue will need to satisfy Pakistan regarding due safety against any possible water manipulation by India. The belligerent relationship between the two countries is one of the main reasons behind Pakistan's resistance to Indian projects that alter the flow of water beyond the limit provided in the IWT irrespective of their perceived technical benefits to Pakistan. In order to maximise the mutual benefits of a unilateral project, the atmosphere of distrust and hostility needs to be transformed.

### **Baglihar hydroelectric project**

After remaining a source of dispute between India and Pakistan for 8 years (1999-2007), the Baglihar hydropower project of India was finally settled through the legal opinion of a World Bank-appointed neutral expert<sup>37</sup> Professor Raymond Lafitte, a Swiss professor. The Baglihar project located on the Chenab River in IHK (about 120 km upstream of the Pakistan territory) is a run-of-the-river plant with a capacity of 900 MW. Its first stage (450 MW) was completed and commissioned in 2008.<sup>38</sup> Pakistan's opposition to the said project was based on the point that "the design of the Baglihar Plant on Chenab Main does not conform to the IWT provisions and that the Plant design is not based on correct, rational and realistic estimates of maximum flood discharge at the site."<sup>39</sup>

The Indian side did not agree with Pakistan's point of difference. Determinations given by the neutral expert pertain to technical analysis of the design of the dam and powerhouse. While the expert agreed with the Indian position of gating the spillways on engineering grounds, he also agreed with Pakistan's position relating to reduction in the dam height, an increase in the level of intakes for turbines, and modifications in the storage volume.<sup>40</sup> Both India and Pakistan raised objections to the neutral expert's legal determinations. The legal opinion of the expert can be termed as a win-win situation for India and Pakistan as some of its points favour India while others favour Pakistan.

Differences between India and Pakistan over Baglihar hydroelectric project represent a test case for both the countries to foresee inherent problems in the management of their respective water bodies. It is particularly important for Pakistan to put in place a proper system of water governance and infrastructure development. Given the dependence of the Indus River on seasonal rains and glacial melt, Indian haste in building controlled infrastructures on upstream tributaries of the Indus Basin is going to increasingly affect downstream water flow resulting in subsequent riparian rivalries. Pakistan needs to discuss the viability of numerous Indian projects on the western rivers. As in the case of Baglihar, the plant needs 860 cumecs (30,371 cusecs) of water whereas the flow of water in Chenab varies seasonally as much as reducing to 50 cumecs (1,766 cusecs) during winter.<sup>41</sup>

### **Nimoo Bazgo Dam**

This 45 MW under-construction project is located on the River Indus in Leh district of J&K. With a 57 metres high dam, it is designed as a run-of-the-river scheme and was scheduled to be completed by December 2010.<sup>42</sup> According to the website of the National Hydroelectric Power Corporation (NHPC) of India, three units of the power station started operating by 2013. However, the commercial production of power only began by the end of 2013.<sup>43</sup>

For Pakistan, the design of the Nimoo Bazgo project, like many other run-of-the-river schemes of India, could alter the seasonal flow requirements in Pakistani areas. The grant of carbon credits by the UN Framework Convention on Climate Change to India on the Nimoo Bazgo hydropower project was also opposed by Pakistan on grounds of cross-border environmental impacts.<sup>44</sup> From 2010 to 2012, Pakistan officially

raised these objections over the then-ongoing construction of the said power project through mass media. The concerned authorities in the country also aimed at taking the case to the International Court of Arbitration (ICA). However, the results of technical rulings of the ICA in the earlier filed disputes of Baglihar and Kishanganga stopped Pakistan from pursuing any new dispute legally. Since the ICA prevented India from having permanent constructions on western rivers with ungated run-of-the-river schemes, the rulings became modus operandi for Pakistan as well as India in future disputes. Therefore, in Nimoo Bazgo project, Pakistan did not take the case to the ICA.

### **Uri-II and Chutak hydropower projects**

This is for the first time in the history of the IWT that bilateral differences regarding the design of these two projects were resolved at the level of PIC. Both of these hydropower plants are in the process of construction in IHK. With regard to Uri-II hydropower plant on River Jhelum, Pakistan had objections on the level of the gates and sedimentation issue. Both were addressed by India to the satisfaction of Pakistan. For Chutak hydropower plant on River Indus, Pakistan had conveyed its concerns to India about the design parameters of the project. India conceded to Pakistan's suggestion of providing openings in the design of the project to prevent over-storage to the detriment of Pakistan.<sup>45</sup>

In these two cases, resolution of technical differences by the design engineers of PIC can be taken as a precedent for the existing and future water conflicts. According to Pakistan's former Indus Commissioner Syed Jamaat Ali Shah, "The Commission should have the power or mandate with the help of technical advisors to resolve issues [at its level] and deliver results to the respective governments instead of looking up to non-technical people."<sup>46</sup> Empowering the PIC with technical experts besides ensuring transparency in information sharing will help avoid serious conflicts over cross-border water-sharing between India and Pakistan.

### **Kishanganga hydropower project**

The said Indian project, located near Bandipore in Baramulla district of IHK, has been categorised as a 'dispute' under the IWT<sup>47</sup> (a term more serious than 'differences' as referred to in the case of Baglihar

Dam) as Pakistan has moved the Permanent Court of Arbitration (PCA) on the subject. The reason for Pakistan's opposition to the said Indian project is the possible adverse effects for Pakistan's own Neelum-Jhelum hydroelectric project (NJHP) on a tributary of the same river. The Indian project is destined to divert water from Kishanganga—a tributary of River Jhelum known as Neelum River in Pakistan—to Bonar Madmati Nallah, another tributary of Jhelum, which falls in Wullar Lake and joins Jhelum River thereafter.<sup>48</sup> For Pakistan, the most serious concern had been the diversion of water from Neelum/Jhelum River, an act threatening the ecology and hydrology of the surrounding region. According to Ata-ur-Rehman Tariq, an engineer and professor at the Lahore University of Engineering and Technology,

“The KHP [Kishanganga hydropower project] will seriously manipulate the water of Jhelum River by transferring water to the Wullar Lake in IHK. And although all the flow of KHP (with some system water losses) will reach Mangla Dam in Pakistan via Jhelum River, its time distribution will be altered by the KHP to an unknown extent, and it will certainly be not available to the NJHP thereby affecting the latter's power generation.”<sup>49</sup>

In its final award, the PCA allowed India to go ahead with the construction of KHP with changes in design to save Pakistan downstream from any detrimental effects. The ruling of the court says, “The Court of Arbitration unanimously decided . . . that India shall release a minimum flow of 9 cumecs [318 cusecs] into the Kishanganga/Neelum River below the KHP at all times.”<sup>50</sup> The award is binding on both the parties without any right of appeal and could be reconsidered at the level of PIC only after seven years from the first diversion of water from the KHP.

The IWT provides India limited storage capacity on western rivers of the Indus Basin and Pakistan full control of the rivers. But the upper catchment area of the western rivers lies on the Indian side. This makes it impossible for both the countries to unilaterally enjoy full benefits of the divided resource. The treaty provides ample scope for future development of the rivers on the basis of joint efforts, an area still unexplored by the two countries.

**Table 2: Status of hydroelectric development in the Indus Basin**

Identified capacity as per assessment	Capacity developed			Capacity under construction		Capacity developed + under construction		Balance potential	
	MW	MW	%	MW	%	MW	%	MW	%
Indus* (India)	33,832	9,929.3	29.34	5,431.0	16.5	15,360.3	46.51	18,471.7	54.60
Indus** (Pakistan)	59,796	6,720	11.23	30,039	50.23	36,759	61.47	23,037	38.53

**Sources:** \*Central Electricity Authority, Government of India<sup>51</sup>

\*\*Private Power and Infrastructure Board, Government of Pakistan<sup>52</sup>

### The Indus Waters Treaty and institutional capacity

The existing Indus Basin system as designed by the IWT suffers from growing physical and structural changes in water bodies of the region. Water scarcity exists at a wider scale in spite of revelations by tree-ring chronologies based research from the main upper Indus Basin in northern Pakistan that “the river flow has considerably increased over the last 21 years, possibly the highest sustained flow period of the past 500 years.”<sup>53</sup>

It is not clear whether an increased flow in the upper Indus Basin is due to climate change induced glacial melt or high rainfall led runoff, but it does indicate a lack of effective policy concerning utilisation of surplus water resources in the northern half of the subcontinent. There are many other areas which suffer from frequent droughts and a shortage of rainfall such as southern and central parts of India and Pakistan (e.g., Ravi and Sutlej in Punjab). Domestic water crises in both India and Pakistan have placed an additional burden on Indus Basin tributaries where seasonal flow changes are not handled on a basin-wide scale. The treaty specifically deals with waters divided in terms of riparian usages and conflicts arising thereby. Lack of a basin-wise approach in dealing with seasonal changes and climate variability inhibits dispute resolution apparatuses of the IWT. A number of factors reveal a lack of institutional resilience in the IWT, which are discussed below.

#### Fixation of water rights

The IWT is not a water-sharing treaty but a water apportionment accord. On the one hand, its focus on allocating water rights with a



mechanism governing individual uses of water and settlement of bilateral water disputes has won credibility for the institutionalisation of dispute resolution in South Asia over a period of five decades.<sup>54</sup> On the other hand, however, it is this fixation of water uses which has given rise to disputes in a climatically vulnerable river basin. According to the Intergovernmental Panel on Climate Change (IPCC):

“One major implication of climate change for agreements between competing users (within a region or upstream versus downstream) is that allocating rights in absolute terms may lead to further disputes in years to come when the total absolute amount of water available may be different.”<sup>55</sup>

Under the treaty, India and Pakistan are authorised to utilise 100 percent of their respectively allocated eastern and western tributaries of the Indus Basin system. Treaty’s fixation of use on each other’s tributaries could be regarded as a rigid attempt in water allocation. For example, Pakistan is allowed non-consumptive domestic and limited agricultural uses of waters on eastern tributaries of India flowing into Pakistan under Article II of the treaty. India has similarly been given non-consumptive domestic, agricultural, and hydropower generation (with some storage) rights on western tributaries of Pakistan as per Article III of the IWT.<sup>56</sup>

To compensate Pakistan for the waters of eastern rivers allocated to India, the treaty allowed a transition period of 10 years for unrestricted water availability from the eastern rivers and infrastructure development, combined with financial replacements as per Article II and Annexure H of the IWT.<sup>57</sup> These allocations were mutually agreed upon by taking into consideration the ‘historical uses’ of India and Pakistan at the time of the drafting of the treaty. Such a division based on historical uses and property rights tends to ignore probable changes in demands and values necessitated by either economic growth or climate variability. The rising number of discords between India and Pakistan on hydropower development and interruption in regional flow requirements are challenging the institutional resilience of the IWT. For example, the fixed allocation of water storage and hydropower generation rights to India on western rivers has led to massive Indian planning of hydropower projects with a cumulative effect on drying up of river beds in the lower

catchments of these rivers ravaging crops and water storage capacity on Pakistan side. The IUCN 2013 report is fair to ask that when flows are variable, how the water entitlements could be fixed for India<sup>58</sup> or Pakistan. The fixation of water rights by the treaty also does not take into account seasonal changes in the basin.

### **Seasonal changes**

The temperature of the Indus Basin varies spatially and seasonally. Low winter runoff and high summer runoff is a common phenomenon for tropical basins like the Indus. Hydrological studies carried out for the Sutlej River have found that the flow variations are related to seasonal climatic changes.<sup>59</sup> Several scientific studies reveal that rainfall patterns in different river catchment areas of the Indus Basin show flow variations seasonally.<sup>60</sup> The regional climate model used by Rees and Collins<sup>61</sup> to assess the impacts of deglaciation on the water resources of the Himalayas has found that some areas might experience increased water availability for the future whereas others such as the upper Indus Basin could face a significant reduction in water flows due to low rainfall and small runoff from the non-glaciated part. The study has indicated an initial increase of 14 percent in the flows of the upper Indus Basin for a few decades over a one-century scenario followed by a decline of 30 percent.

The Indus Basin, like any other heavily regulated river basin in the world, is prone to flooding. Daanish Mustafa, a London-based expert on water issues in South Asia, identifies one particular feature that makes the Indus Basin vulnerable to flooding. It is that the Indus River's drain, the western Himalayas, is one of the youngest mountain ranges in the world thus carrying high silt loads. In his words:

"The extensive diversion and storage of water means that the Indus Rivers do not have enough flow to carry the silt, which gets deposited in the channels, thereby reducing the channel capacity to carry even minor floods. The river engineering has created a situation where an otherwise moderate flood flow can become a high flood and eventually a catastrophic flood."<sup>62</sup>

The Federal Flood Commission Islamabad also recognises it:

“The inadequate existing discharge capacity of some of the important structures (Barrages and Rail or Road Bridges) on Rivers Indus, Chenab and Ravi is one of the major reasons of flooding.”<sup>63</sup>

Although the IWT obliges parties to exchange daily data of river inflows, water discharges, withdrawals, escapages from canals, and reservoir releases on a monthly basis (Article VI)<sup>64</sup> and has established permanent posts for Indus Commissioners from both countries, the whole mechanism rests on the principle of good faith. During the past few years, patterns of river inflows and discharges in all eastern and western rivers of the Indus Basin have changed profoundly due to changes in land use, groundwater extraction, rainfall variations, and glacial melt in the Himalayas. The phenomenon of quick glacial melt means reduced water supply over longer periods, after heavy flooding.

It is beyond the scope of the treaty to adjust flow variations to the rising demands and pressures for socio-economic growth in India and Pakistan (see Table 3). Division of basin waters with fixed quantities fails the treaty to address flow variations climatically and spatially which in turn have become a major source of potential disputes over water rights in the subcontinent. For instance, given the high seasonal variability of the Indus Basin, the engineering adaptations in water infrastructures have recently become the focus of a neutral expert in the case of Baglihar hydropower dispute between India and Pakistan. As mentioned above, the neutral expert in his determination agreed to the Indian position of gating the spillways on engineering grounds and conceded to Pakistan's position about reducing the dam height<sup>65</sup> to reduce the effects of water flow downstream.

**Table 3: Cumulative impacts of seasonal variations on water resources in the Indus Basin**

<b>Change</b>	<b>Results</b>	<b>Socio-economic Impacts</b>
High runoff – flooding	Land sliding/glacial outbursts/artificial dam formation	Road, rail infrastructure damages, loss of human and animal lives
	Increased sedimentation and reduced groundwater recharge	Temporary or permanent losses to hydropower dams
	Increased soil erosion	Loss of irrigation
Increased variability in rainfall patterns	Reduced reliability on canal networks for irrigation, industrial and domestic supply	Increased pressure for alternative water supplies
	High use of groundwater resources	Increased costs of crop yields resulting in food inflation
Low runoff – water shortages/droughts	Increased gaps in demand and supply	Loss of irrigation, hydropower generation, inter-sector conflicts for water allocations, increased frequency of domestic and cross-border conflicts over water-sharing

**Environmental inflows**

The concept refers to maintaining adequate river flows for ecological system.<sup>66</sup> The integrity of a river basin has recently been highlighted as an important environmental concern to create a balance between river flows and its regulation. Both regional inflows and water abstraction relate to consideration of all aspects of river basin including environmental, social, economic, and cultural uses in a given regime.<sup>67</sup> Analysing by virtue of these essentials, the IWT significantly lags behind in addressing environmental flow assessments as part of basin-wide planning or implementation. The reduced flow of fresh water in the Indus delta is threatening flora and fishery resources besides destroying the rich mangroves.<sup>68</sup>

For excess waters and flood discharge, the treaty leaves the matter to the use of natural waterways of the rivers with the provision of the 'no material damage' principle by either party. Communicating advance information is also a prerequisite in the case of extraordinary discharges. The practical application of the no damage principle has become difficult in the past years with Indian releases of excess water in Ravi and Sutlej rivers almost every monsoon creating flood or flood-like situation in bordering Pakistani villages. During heavy rainfalls in the upper catchment areas of rivers Beas, Chenab, Ravi, and Sutlej, India cannot save itself without flooding Pakistan.

Then there is water pollution in the Indus Basin due to industrial and municipal discharges affecting livelihoods and agricultural production throughout the region. In both India and Pakistan, groundwater extraction is extremely high, an important source of saline lands and reduced crop yields, again left unaddressed by the IWT. With competing interests and uses of each nation, pressure is mounting on the Indus system affecting environmental flows and ecological balance.

Article IV (10) of the IWT prohibits water pollution but does not provide a mechanism to control such an environmental problem. There is another important provision of the 'no harm principle' in the IWT (Annexure D) corresponding to the international environmental law,<sup>69</sup> which prevents the riparian states from getting into a zero-sum game. Pakistan has invoked this provision to the Permanent Court of Arbitration (PCA) in the case of the Kishanganga hydropower project (KHP) of India. The court gave a partial award on 18 February 2013 restricting India "to maintain a minimum flow of water in the Kishanganga/Neelum River" in an attempt to ensure Pakistan's agricultural and hydroelectric uses downstream.<sup>70</sup> The PCA decision gave due regard to the environmental provisions of the international law and the IWT, which call for reconciliation between water resource development and environmental protection.

Many of the international environmental provisions have begun to affect the IWT. For instance, in the case of the KHP, India was asked by the PCA to submit environmental impact assessment (EIA) for ecological impacts. Such a provision does not exist in the IWT for sharing between the riparian states.<sup>71</sup>

### **Sharing of benefits**

Comparing it with the international trans-border water laws, it becomes clear that instead of focusing on water cooperation and equitable sharing, the IWT is more of a dispute resolution mechanism. Although Article VII of the treaty allows future cooperation for optimal utilisation of shared resources, the scope of the treaty for benefit-sharing remains limited in near future given the history of enmity between India and Pakistan on Kashmir.

The benefit-sharing approach shifts the focus from resource utilisation as per individual needs to the distribution of benefits from the mutual development of resources such as hydropower generation, substitutive crop production, or flood embankments.<sup>72</sup> One good example of benefit-sharing as part of institutional resilience is the Columbia River Treaty between Canada and the US. Under the agreement, Canada is being paid by the US for flood control upstream. Canada also diverts water in the Columbia River for hydropower development by the US, which either delivers half of the generated electricity to Canada or pays the value in amount.<sup>73</sup> Brazil-Paraguay is another example of benefit-sharing. The two countries signed a treaty in 1973 to construct a joint hydropower plant called Itaipu on the Paraná River. Out of the several provisions of the treaty, some govern equal share of electricity and royalties, without any taxes on the new joint entity and on electric services produced.<sup>74</sup>

In the case of the IWT, allocation of water rights becoming incompatible with changing socio-economic pressures in India and Pakistan are resulting in a surge of unilateral water management either through diversion of surface flows by the construction of reservoirs or by groundwater over-extraction for improvident irrigation and industrial uses. The over-ambitious plans of both countries to enhance hydropower generation capacity have started off a race, in which one nation's project has increasingly proved detrimental to the other's development. For example, India and Pakistan developed a dispute over Indian construction of the KHP because of Pakistan's objection to the project's planned diversion of waters resulting in reduced flows downstream for its own hydropower plant (Neelum-Jhelum hydropower project) and irrigation needs. Upon differences remaining unsettled by the Permanent Indus Commissioners for more than eight years, the dispute was referred

to the PCA in 2010 for arbitration by Pakistan. What came up as a final legal settlement by the PCA could be categorised as the best example of international diplomacy and dispute resolution both under the IWT and international environmental law. But PCA's fixation of minimum water release quantity by India at 318 cusecs in Jhelum River has reduced electricity generation capacity for both KHP and Neelum-Jhelum hydropower projects. For the KHP, maintaining a minimum flow means a reduction in annual power generation by 5.7 percent<sup>75</sup> and for Neelum-Jhelum in AJK, the construction of KHP itself means a possible loss of energy generation capacity by 10 percent after India meeting the minimum flow requirement.<sup>76</sup>

It is also significant to note here that the IWT preserves the 'priority' clause in deciding about water development rights. Thus referring to the IWT, the PCA award allowed India to go ahead with the KHP (with minimum flow requirement) because it was started well ahead of Pakistan's own hydropower project on the same river. Such a settlement of difference makes the IWT vulnerable to only loss-sharing instead of benefit-sharing in a changing water regime.

Almost every Indian project on the western rivers in the Valley of IHK was opposed by Pakistan on grounds of treaty violations by India. From Salal and Baglihar on Chenab to Wullar and Kishanganga on Jhelum, Pakistan's contention has been regarding the possible obstruction to the timely required flow of water downstream. Any high storage capacity could put India in a position to alter the timing of flow and subsequently affect the irrigation needs in the northern areas of Pakistan. As a lower riparian, Pakistan has increasingly become concerned about cumulative impacts of Indian dams and hydropower projects on river flows during dry and wet seasons for anticipated droughts and flooding. In comparison to the Columbia River Treaty or the Itaipu Treaty, the IWT's lack of focus on benefit-sharing is itself a potential recipe for frequent dispute eruption in future over climate-induced changes in the apportioned water regime.

### **Changing nature of disputes**

Since the conclusion of the IWT, disputes arising out of water apportionment procedures have gone from bilateral institutional mechanism and third party consultation to

judicial arbitration. In spite of the fact that all the disputes concerning water rights between India and Pakistan were resolved within the institutional framework of the IWT, the changing nature of disputes (see Table 4) is itself a cause of concern, and questions the institutional resilience of the IWT for future climatic variability in the apportioned waters.

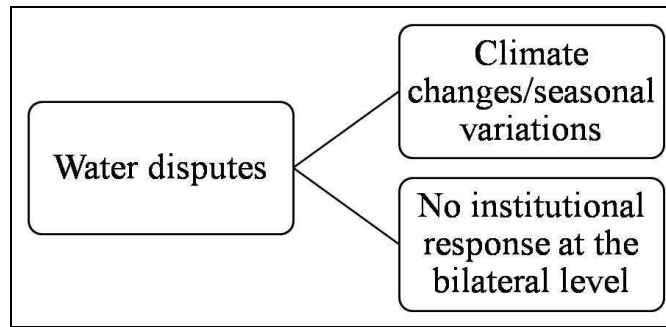
**Table 4: Indus Waters Treaty and changing nature of disputes**

Dispute avoidance and resolution process	Bilateral negotiations	Third party settlement	International adjudication
	Permanent Indus Commission (Article VIII)	Neutral expert (Article IX Annexure F)	Permanent Court of Arbitration (Article IX Annexure G)
From bilateral to international resolution	Salal and Chutak hydropower projects	Baglihar hydro-electric power project	Kishanganga hydro-electric power project
Years in change	1978/2010	2007	2010
Indicators of change	Decline in farmland, energy insecurity, multi-sectoral pressures	Hydropower generation, rise in groundwater extraction, water recycling, soil salinity	Multi-purpose dams, Freshwater scarcity, Low crop yields and growing food insecurity, loss of ecosystem

## Conclusion

The IWT does not cover all variability in the Indus Basin. Conflicting national interests and changing the climate in the Indus Basin are becoming a source of conflict due to low institutional resilience in the region (see Figure 1). There are regions in the world which are threatened by freshwater scarcity. But resource scarcity leads to cooperation rather than conflict only in cases where institutionalisation of water regime integrates socioeconomic variability.



**Figure 1: Water insecurity in the Indus Basin**

The Indus Basin region suffers from a lack of regional environmental laws, which, if present, can bind the governments to adopt environment-friendly water resource development policies. Analysing the dam-building haste in the Himalayan region, a report by the International Rivers identifies that there is no cumulative impact evaluation of the construction of so many dams in one river basin or region. This will lead to disastrous consequences for the people and ecology of the region.<sup>77</sup>

With regard to the Tarbela Dam, Pakistan's largest and economically acclaimed reservoir, the negative ecological impacts include increased salinization of drinking water, the intrusion of sea water due to reduced river flows, and long-time displaced population without being adequately compensated.<sup>78</sup> The recently sanctioned 272 metres high mega project of Diamer-Bhasha on the Indus River has also raised a number of environmental concerns in the project area—the Gilgit-Baltistan region. The proposed location is the epicentre of catastrophic rockslides.<sup>79</sup> Moreover, the region is prone to glacial lake outburst floods which can cause unprecedented damage by overflowing large dams. On the Indian side, the Sutlej is suffering from widespread water pollution.

In the past as well, water insecurities induced by seasonal changes have resulted in water conflicts between the two nations. The limited capacity of the IWT to address growing water insecurities in the region could result in raising the number and changing the nature of water disputes, though, without affecting its dispute resolution procedures.

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# 10<sup>TH</sup> PARLIAMENTARY ELECTION AND DESTRUCTION OF ELECTORAL GOVERNANCE IN BANGLADESH

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## Abstract

*The 10<sup>th</sup> parliamentary election of Bangladesh, held on 5 January 2014 under a strange 'all-party government', failed to express the will of the people as it was boycotted by 18 opposition political parties in protest against the abolishment of the caretaker government provision. As a result, a total of 154 seats were uncontested, mostly going to the ruling Awami League. Voter turnout was low, due to both the boycott and violence. Although 'constitutionally correct', this election's credibility has been seriously questioned due to its lack of inclusiveness. Several unacceptable reforms were made ahead of the 10<sup>th</sup> parliamentary election, which have destroyed the credibility of the electoral process. The overall objective of this paper is to analyse those initiatives taken by the government as well as the Election Commission, which have destroyed the electoral governance of Bangladesh.*

## Introduction

Since its independence in 1971, ten general elections have been held in Bangladesh (between 1973 and 2014). Not all of them are considered free, fair, and credible, though. Out of these ten general elections, four were conducted under non-partisan caretaker governments, while the rest were held under outgoing political

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governments. The first parliamentary election held in 1973 under a political government “was marred by violence and accusations of voter intimidation, although the voting day was relatively quiet.”<sup>1</sup> The second parliamentary election held once again under a political government in 1979 “was rigged in favour of BNP [Bangladesh Nationalist Party] candidates: corrupt and irregular practices had been perpetrated by BNP candidates, their supporters and polling agents and assigned government officials when things turned difficult for the ruling party candidates. The electoral voice was turned by manipulation in favour of BNP candidates.”<sup>2</sup>

The third and fourth parliamentary elections were also held under political governments. The third one, held in 1986, was marred by widespread violence. According to *The New York Times*, “Voter intimidation and fraud appeared to favour the political party supported by a martial-law government. There were no reliable counts of the casualties.”<sup>3</sup> Journalists in different parts of the country found widespread evidence that gangs, most of them working for the government-backed party, stole ballots or prevented people from voting, often by force. The 1988 parliamentary election, the fourth, “proved instrumental in destroying the acceptability of election to obtain people’s mandate. At every stage, [Hussain Muhammad] Ershad<sup>4</sup> implemented the blueprint of farcical election.”<sup>5</sup>

In these circumstances, after the collapse of Ershad’s government amidst a united opposition movement in 1991, a caretaker government<sup>6</sup> was established to do routine work as well as to hold free and fair elections through the 12<sup>th</sup> amendment to the constitution. The fifth parliamentary election held under this temporary caretaker government in 1991 is considered free and fair.<sup>7</sup> In 1996—following the failure of the two main political parties BNP and Awami League to reach agreement on the form of the caretaker administration—the BNP-led government proceeded with the scheduled February 1996 parliamentary election.

Although the ruling BNP decisively won the election, the credibility of the electoral process was undermined by non-participation of Awami League and other opposition parties. Moreover, there were “allegations of unfairness in election administration, and public perception that in the highly polarised political environment that existed,

fair elections could not be held under regular governmental processes.”<sup>8</sup> After this election, continued opposition boycotts and strikes finally combined with a strike of civil servants, bringing the civil administration to a halt. This forced the ruling BNP government to agree to the adoption of the 13<sup>th</sup> amendment to the constitution in 1996, which required the formation of a caretaker government after the end of the mandate of a parliament and during the election period. Through the 13<sup>th</sup> amendment, the caretaker government system was established as a permanent mechanism to do routine work as well as to ensure the neutrality of the government and the Election Commission (EC) during elections.

According to international and most of the domestic observers, all the four parliamentary elections held under caretaker governments were reasonably free, fair, and peaceful. A pre-election assessment conducted in 1996 stated, “Till 1991 no general election in Bangladesh has been universally considered or acclaimed to be free and fair. All the general elections held between 1973 and 1988 had been more or less characterised with large-scale manipulation, rigging, massive exercise of coercion and muscle power, bribery, expenditure of unusually high amount of money by the governments, political parties, groups and individuals.”<sup>9</sup> But the “caretaker government is a unique institution in the development of democracy. Bangladeshis have reason to take pride in this innovation. The caretaker government arose out of the specific conditions of the 1991 and 1995/96 elections. Its purpose is to ensure [that] no one party has access to state resources, physical and human, in such a way as to influence the outcome of the election. The caretaker government model in the past has succeeded in instilling public confidence in the electoral process and results.”<sup>10</sup>

The 9<sup>th</sup> parliamentary election was also held under an army-backed caretaker government. This election was originally scheduled for 22 January 2007, but due to a variety of reasons the first attempt to hold a vote “fell victim to a growing political crisis, spawned by an array of systemic problems with roots extending back many years.”<sup>11</sup> After completing the full five-year term, the four-party alliance government led by BNP left office constitutionally and a caretaker government was formed rather dramatically, led by the president<sup>12</sup> himself. The administration under this government proved “nakedly partisan to a certain quarter.”<sup>13</sup> The government and its activities were severely

criticised by the opposition and civil society of Bangladesh. It, nevertheless, firmly moved towards a 'fraudulent' election, which was scheduled for 22 January 2007. Several protests were staged by the opposition led by Awami League, which had announced that it would not only boycott the upcoming election but would also try to stop the holding of them altogether through street agitations. There was political chaos, unrest, and disorder in the society. More than 40 people were killed and hundreds injured in political violence after the president-led caretaker government assumed power at the end of October 2007.<sup>14</sup>

The country was thus thrown into a deep abyss of political chaos and confrontation. Large-scale unease with the status quo led to political violence, which in turn disrupted public life and shattered people's confidence in the election. Political analysts feared that the election might not be accepted nationally and internationally, and the country would plunge into anarchy. So fears grew that the future of the country and its 150 million people was at stake. In this situation, a state of emergency was imposed according to the constitution.<sup>15</sup> President resigned from the chief adviser's position and dismissed the self-led caretaker government. A new government led by Dr Fakhruddin Ahmed<sup>16</sup> took over the responsibility of the government, which reconstituted the EC. The new Commission led by Dr A.T.M. Shamsul Huda undertook huge reforms to ensure propriety in the electoral process. Therefore, the 9<sup>th</sup> parliamentary election held on 29 December 2008 is known as the 'best election in the history of Bangladesh'.<sup>17</sup>

However, the 10<sup>th</sup> parliamentary election held on 5 January 2014, under a strange 'all-party government' 'failed to express the will'<sup>18</sup> of the people. Perceptions of Electoral Integrity (PEI) Index put it in the red zone and termed it a 'failed election' as it was "boycotted by 18 opposition parties, led by the BNP, in protest against the abolishment of the CG [caretaker government] provision. As a result, a total of 154 seats were uncontested, mostly going to the government led by AL [Awami League]. Voter turnout was low, due to both the boycott and violence. At least 21 people were killed, over 100 polling centres were set on fire, and the Electoral Commission suspended voting at over 300 polling stations due to the conflict."<sup>19</sup> Although 'constitutionally correct', this election's credibility has been seriously questioned due to its lack of inclusiveness.<sup>20</sup> Moreover, electoral governance of the country has, on

the lines practised during elections under partisan governments, got back on track.

Through the establishment of the caretaker government, an effort was undertaken to make the electoral process in Bangladesh free, fair, and credible. The most important reforms were made in 2007-08 before the 9<sup>th</sup> parliamentary election. A number of post-election reforms were also carried out during 2008-12 to institutionalise the EC and build confidence in the electoral process. But several unacceptable reforms were made ahead of the 10<sup>th</sup> parliamentary election, which have destroyed the credibility of the electoral process. The overall objective of this paper is to analyse those initiatives taken by the government as well as the EC, which have destroyed the electoral governance of Bangladesh.

### **How electoral governance was shattered before the 10<sup>th</sup> parliamentary election**

Before the 10<sup>th</sup> parliamentary election, the government, as well as the EC, took the following initiatives to destroy electoral governance:

1. Surgery of the constitution against the will of the people;
2. Abolition of critical electoral reforms before the 9<sup>th</sup> parliamentary election;
3. Establishment of control over the administration through abuse of state facilities;
4. Constitution of a weak EC through a more controlled recruitment process; and
5. Establishment of government's authority over the EC.

### **Surgery of the constitution against the will of the people**

#### *Abolition of the caretaker government*

In January 2000, a lawyer of the Supreme Court challenged the 13<sup>th</sup> amendment to the constitution saying that the revision distorted the principle regarding governance of the republic by an elected government only.<sup>21</sup> After hearing the petition, on 4 August 2004, the High Court issued a ruling in favour of the amendment. In June 2005, another lawyer of the Supreme Court filed another appeal in the Supreme Court against the verdict of the High Court.<sup>22</sup> In May 2011, the Supreme Court declared

caretaker government system unconstitutional. At the same time, the apex court said that the next two parliamentary elections might be held under caretaker governments for the sake of 'safety of the state and its people'. The court also suggested to the parliament to amend the constitution to ensure that former chief justices or any other judges of the Supreme Court were not chosen as heads of caretaker governments if the next two elections would be held under this system.<sup>23</sup> In order to implement this judgment, under prime minister's directive, a 15-member parliamentary committee was formed to amend the constitution.

Over a period of eight months, the committee, consisting of all top-ranking leaders of the ruling alliance, consulted former chief justices, lawyers, members of the civil society, and representatives of political parties. The committee came to a unanimous decision to keep the caretaker system intact for two terms. Moreover, during the hearing, the Supreme Court also took the opinions of 11 Emirates Curie, 10 of them advised for the continuation of caretaker government system.<sup>24</sup> But unfortunately, in June 2011, the parliament amended the constitution and abolished the caretaker government system ignoring the judgment of the apex court, decision of the parliamentary committee, as well as opinions of the Emirates Curie, and made provisions to conduct elections under a political government. This constitutional amendment was also made against the will of the people, as 77 percent people demanded to hold the 10<sup>th</sup> parliamentary elections under a caretaker government as surveyed jointly by The Asia Foundation and *The Daily Star*.<sup>25</sup> A similar result was found by another survey, which stated, "The country appears to have a united opinion about the election time government as a staggering majority of 90% respondents voicing support for caretaker/neutral government for holding the next [10<sup>th</sup> parliamentary] national election."<sup>26</sup>

#### *Abolition of the provision for referendum*

The original constitution of Bangladesh (promulgated in 1972) did not have any provision for referendums. In 1978, however, through the Second Proclamation Order No. IV of 1978, such provision was added. From 1977 to 2011, three referendums—Bangladesh Presidential Confidence Referendum 1977, Bangladesh Military Rule Referendum 1985, and Bangladesh Constitutional Referendum 1991—were held in Bangladesh. It was evident that the provision of the referendum was



abused in 1977 and 1985 by the military rulers. Through the 15<sup>th</sup> amendment to the constitution, which was made before the 10<sup>th</sup> parliamentary election, the provision of the referendum was repealed. It thus snatched the right of direct participation from the people. One of the motives of the amendment was that the people would have opted for the caretaker government overwhelmingly if a referendum had been held over it. This amendment thus undermined the spirit of direct democracy.

*Formation of a one-sided all-party political government to oversee elections*

In late 2013, an 'all-party' poll-time government was formed with the incumbent Prime Minister and the President of Awami League Sheikh Hasina as its head. Most of the members (69 percent) of the 29-member cabinet were recruited from its predecessor cabinet and consisted of leaders from the 14-party alliance led by Awami League. BNP was asked to join this poll-time government, but it declined by stating that "the all-party cabinet was nothing but a reconstitution of immediate past cabinet."<sup>27</sup>

*Gonotrantrik Bam Morcha*, one of the eight left-leaning parties, said that the Awami League-led election-time government was just reconstituted in the name of formation of an all-party government.<sup>28</sup> *The Economist*, in its 20 November 2013 issue, wrote, "It is merely a slimmed down version of the existing government of Sheikh Hasina, made up of the AL [Awami League] and assorted smaller allies, including Jatiya Party of a former dictator, Mohammad Ershad."<sup>29</sup> Civil society criticised the argument that the interim cabinet would break the then political impasse, whilst others said that the poll-time government could not be called an all-party government since the main opposition party BNP did not join it.

Formation of the poll-time cabinet was thus a strategy of Awami League to make the grand alliance more organised as well as to ensure prime minister's unlimited power to override any decisions by any minister.

*Parliament was not dissolved during elections*

The 15<sup>th</sup> amendment to the constitution made a provision that general elections would be held "within 90 days preceding the expiry of

the tenure of parliament."<sup>30</sup> This provision created the following mal-governances in the electoral process:

1. Members of parliament (MPs) contesting in the election got a scope to interfere in the electoral process as they were still MPs;
2. It created inequality among the contestants, which is in contravention of Article 19<sup>31</sup> of the constitution, read with Article 27,<sup>32</sup> which affirms equality of all citizens as one of the fundamental rights;
3. As per Article 66 of the constitution, an MP is disqualified from contesting the election if he or she holds an office of profit. Although the provision exempted the president, prime minister, the speaker and deputy speaker of the house, ministers, ministers of state, or deputy ministers from holding the office of profit, but not an MP;
4. A disgruntled existing MP who had not been nominated as the candidate of the party had three options in such a situation:
  - a. Support the party's candidate;
  - b. Contest as an independent candidate; or
  - c. Work discreetly against the party's candidate for his/her defeat.

In Australia, Canada, Great Britain, and New Zealand, the parliament is dissolved before the new parliamentary election. The governments assume a caretaker role and no policy decisions are taken by them.<sup>33</sup> In India, the same practice is followed.<sup>34</sup> This provision in Bangladesh created anarchy in the campaign. On the polling day, MPs were found influencing the electoral process, which resulted in an unlevelled playing field.

#### **Abolition of critical electoral reforms brought before the 9<sup>th</sup> parliamentary election**

*Provision of 'no votes' was wiped out*

Before the 9<sup>th</sup> parliamentary election, through revision of the Representation of People Order (RPO),<sup>35</sup> a provision was made that if a

voter “does not wish to vote any of the contesting candidates, shall put the prescribed mark on the ballot paper at the place within the space containing the symbol of ‘none of the above candidates’.”<sup>36</sup> Although only 0.55 percent vote was cast for this option in the 9<sup>th</sup> parliamentary election,<sup>37</sup> it was highly praised by voters, international and domestic observers, and civil society organisations. But it is unfortunate that this provision was wiped out in 2009, just after the 9<sup>th</sup> parliamentary election and no initiative was taken by the EC or the government to reinstate this, even though it was demanded by various stakeholders. This discouraged the voters who wanted to go to the polling stations to cast a ‘no vote’ in the 10<sup>th</sup> parliamentary election.

*Mandatory provision of grassroots involvement  
in candidate nomination was abolished*

Article 90B(b)(iv) of the 2008 version of the RPO<sup>38</sup> provided for the political parties to make a provision in their constitutions to finalize nomination of candidates by central parliamentary boards of the parties from the panels prepared by the Ward, Union, *Thana*, *Upazila*, or District Committees of the concerned constituencies. This initiative not only aimed at bringing internal party democracy but also at ensuring that real politicians got nominated. “The aim of the EC was to get better people to be nominated by the political parties. The political culture of Bangladesh was corrupt by the investment of a lot of money, particularly the business people find politics as the best investment. The Commission tried to stop corruption in the nomination process through the direct involvement of the grass-roots.”<sup>39</sup> So it was clear that the objective of this provision was to do the following:

1. Ensure intra-party democracy in candidate selection;
2. Stop selling of nominations by the parties or party leaders;
3. Prevent non-politicians such as civil servants and army officials from becoming candidates just after retirement;
4. Prevent non-political businessmen from becoming candidates from a political party; and
5. Stop nominations of politicians switching from other parties.

Unfortunately, this provision was also discarded by the Awami League-led government.

*Provision of three years' party membership  
dropped for being a candidate*

The 2008-09 version of the RPO provided that a person could only be a candidate from a registered political party if he or she had been its member for at least three years.<sup>40</sup> In 2013, this provision was dropped to allow anyone joining a party any time to be nominated as a candidate. This revision created scope for business people to buy party nominations, which was a common practice before the 2008 parliamentary election.

*Provisions made for unlimited spending by  
party chief for the election campaign*

In 2013, the electoral legal framework included that “the expenditure incurred by a party chief for travelling to various constituencies for the purposes of election campaign shall be excluded”<sup>41</sup> from the election expenditure reported by the political parties. This provision has allowed party chiefs to spend unlimited amounts of money during their travel to various constituencies for campaigning. Additionally, this expenditure no longer needs to be disclosed to the EC. This non-transparent provision allowed the parties, especially the major ones to impact election results through the spending of unlimited money by their party chiefs.

*Proper initiatives were not taken  
for levelling the field*

As the parliament was not dissolved before the election, all 300 MPs remained so during the process, and many of them participated as candidates. This means that all lawmakers were holding office and seeking re-election when the nation went to polls in 2014. The campaign code of conduct did not have any strong provisions against the use of official power by the MPs participating in the 10<sup>th</sup> parliamentary election. This resulted in a non-level playing field for all candidates during the election campaign.

**Establishment of control over administration through abuse of state facilities***Creation of the post of senior secretary*

In mid-2013, the government took an initiative to promote eight secretaries to the posts of 'senior secretary', equivalent to the rank of lieutenant-general in the army, by amending the organisational structure of the Ministry of Public Administration. The government insisted that the new post in the civil bureaucracy was created to reward secretaries who had shown outstanding performance in their respective ministries and divisions.<sup>42</sup> It obviously was, however, a political decision by the government to control the top bureaucrats to avoid their defiance during the election, as this decision was taken just six months ahead of it. Moreover, this initiative was highly criticised by the opposition, civil society organisations (CSOs), and the media. It was termed as an award to civil servants with a view to controlling the civil administration during the election.

*Mass promotions of government officials*

At the end of the term of the outgoing government, the whole or a portion of civil administration has usually always tried to show its dissatisfaction through some kind of agitation. But in 2013, just before the end of the term of the Awami League-led government, several mass promotions to the government officials were initiated. Several rounds of promotions just before the election not only set a rare precedent—as it destroyed the ideal pyramid structure of the administration and made it top-heavy—but also came across as an initiative by the outgoing government to stop them from rising against it ahead of and during the election.

**Constitution of a weak election commission through a better recruitment process**

Although there is no law in Bangladesh describing the recruitment process of the election commissioners, the president initiated a dialogue with the political parties and sought their suggestions to form the EC with a political consensus as the tenure of the then commission was going to end in late 2011. A total of 24 political parties were invited out of the 38 registered ones.<sup>43</sup> Most of the parties suggested to the

president to form a 'search committee' to appoint the election commissioners. On 22 January 2012, the president formed a four-member 'search committee' headed by a judge of the Bangladesh Supreme Court.<sup>44</sup> The other three members were a judge of the High Court, the chairman of the Public Service Commission, and the Comptroller and Auditor General of Bangladesh. Without any consultation with the political parties, the search committee, on 7 February 2012, recommended two names for each of the five posts including the post of the Chief Election Commissioner (CEC) to the president. The following day, the president formed the EC led by Kazi Rakib Uddin Ahmad from the list of 10 persons recommended by the search committee.<sup>45</sup> BNP, however, rejected the new commission by terming it illegal.<sup>46</sup>

Although the EC was recruited following a better process,<sup>47</sup> the commissioners proved weak, demotivated, and biased towards the party in power while taking actions or decisions. In mid-2013, at the time of an ongoing discussion over its reinvigoration, the EC suddenly decided not to retain its authority to cancel one's candidature in parliamentary polls for violation of the electoral code of conduct. In line with the decision, the EC asked its secretariat to send a proposal to the Law Ministry for taking steps to scrap the authority by amending the RPO.<sup>48</sup> This provision was incorporated in the law in 2008 with a view to bringing discipline to the polls, which ensured a better environment during campaign period with less violence and violation of the electoral code of conduct by the candidates. Moreover, the previous EC led by Dr A.T.M. Shamsul Huda drafted a proposal aiming to make it mandatory for the Cabinet Division and Ministries of Home, Public Administration Affairs, and Local Government, Rural Development and Cooperatives (LGRD) to consult the EC before taking any decision related to elections during the parliamentary polls period. The rationale behind this proposal was to allow the EC to have more clout in government administration during the polls. But the EC led by Kazi Rakib Uddin Ahmad dropped this proposal when it sent back the amendment proposals to the Law Ministry in late July 2013.<sup>49</sup>

The EC was also found silent on many critical actions undertaken by the government. The amended RPO dropped a significant provision that a person must spend at least three years as a member of

a political party to qualify for contesting in the national election, which was incorporated in 2008. People hoped that it would be fully effective from the 10<sup>th</sup> parliamentary polls.<sup>50</sup> The EC was also found silent when the government incorporated the provision related to unlimited spending by the party chief for the election campaign. Furthermore, the EC, in 2013, also rejected some crucial electoral reform proposals, including restoration of the armed forces' authority to arrest anybody without a warrant for maintaining peaceful atmosphere at the parliamentary polls, which was drafted by the Huda-led commission.

Moreover, the 2014 electoral process lacked meaningful consultation with stakeholders as the EC did not conduct any consultation with political parties, media, CSOs, and others. Initiatives such as revision of legal framework, constituency delimitation, use of 'candidate management system' (CMS) and 'result management system' (RMS)<sup>51</sup> etc. were not consulted with any stakeholders, despite the fact that one of the prime responsibilities of the election management body is to establish trust of all stakeholders in the electoral process. Additionally, the EC was not found supportive in ensuring participation of all registered political parties in the elections even though it was urged by the governments of the US and the UK, and international organisations like the EU and UN, as well as the CSOs of Bangladesh. Due to the silence of the EC as well as its failure to take proper initiatives to control electoral administration, questions were asked about its performance by the opposition as well as members of the ruling coalition. Rashed Khan Menon, chief of Workers Party, which was part of the Awami League-led alliance, said that the EC lacked efficiency and guts. "They should work independently," he said.<sup>52</sup> Anisul Islam Mahmud, praesidium member of Jatiya Party, another component of the ruling alliance, said that people would lose confidence in the EC over its 'controversial' move of not retaining the authority to cancel one's candidacy in the parliamentary polls for electoral law violation.<sup>53</sup> "The commission could not perform its duties the way it was supposed to. It could not properly demonstrate its neutrality and efficiency in its work," said Noor-Ul-Alam Lenin, praesidium member of Awami League.<sup>54</sup>

### **Establishment of government's authority over the EC**

After the 15<sup>th</sup> amendment to the constitution, the government started exercising its power to interfere in and/or control the activities of the EC. There was both direct and indirect interference by the government. As per existing provisions, the prime minister is the head of the government, the leader of the parliament, and the chairperson of her own party. She is also the head of the parliamentary party. By virtue of being the head of the cabinet, the executive power of the Republic is "exercised by or on the authority of the Prime Minister."<sup>55</sup> The Cabinet Division is responsible for the appointment, resignation, and determination of conditions of service of the CEC and other election commissioners as well as their removal. The Cabinet Division is also responsible for making available to the EC on its request, such staff as may be necessary.<sup>56</sup> These legal provisions established the authority of the prime minister on the EC.

A lot of indirect interference by the party in power was also observed in 2013, the year before the 10<sup>th</sup> parliamentary elections. In July 2013, Sayed Ashraful Islam, Awami League Secretary General and LGRD Minister said, "Free and fair elections are possible without deployment of army."<sup>57</sup> He also ordered the deputy commissioners (DCs) to make "preparations for the next parliamentary polls"<sup>58</sup> even though the issue of deployment of the army and recruitment of DCs as returning officers is the decision of the EC. Prime Minister Sheikh Hasina was also found saying, "Polls would be held on schedule, whether anyone participates or not."<sup>59</sup> She never urged for an inclusive election. During the election, the EC was found biased towards Awami League, the party in power. During the campaign period, the co-chairman of Awami League Central Election Management Committee met the CEC and asked the EC to stop publishing the wealth statements on its website. The EC did so for about a week although it was denied both by Awami League and the EC when journalists asked about it.<sup>60</sup>

### **The January 2014 election**

In late 2013, the number of registered political parties was 40, but only 12 took part in the 2014 election. Although about 1,000 candidates submitted nomination papers, only 390 ultimately competed



in the 10<sup>th</sup> parliamentary election, which is the lowest number in the history of Bangladesh. The number of candidates decreased as the EC paved the way for the 'withdrawal' of nomination papers of certain candidates by putting an earlier date on the nomination withdrawal papers than the actual one so that the ruling party's preferred candidates could win 'uncontested'. On the other hand, in order to ensure participation of Jatiya Party candidates, the EC rejected withdrawal applications of its candidates on lame grounds such as 'absence of the candidate in person while withdrawing', even though the same candidates' nominations were accepted without their physical presence when the papers were originally submitted. Jatiya Party officially and publicly confirmed that they were boycotting the election. The ruling party, which was scared of not having a formal opposition in the parliament—as all the contestants and winners would belong to the government—detained the chief of Jatiya Party General Ershad in the Combined Military Hospital in Dhaka cantonment and created a faction out of Ershad's party to contest the election. The ruling party used the intelligence agencies, law-enforcement agencies, and armed forces to keep Ershad 'hospitalised', even though he claimed that he was not sick at all.

The election was held on 5 January 2014 amidst *hartal* (strike) and blockade by the opposition. Out of the 300 parliamentary seats, 153 were uncontested and had thus already been won by ruling alliance candidates. There were violent clashes between opposition activists and police amidst a boycott by the opposition. At least 18 people were killed on election day and more than 200 polling stations were torched or trashed by the opposition.<sup>61</sup> More than 180 people were killed between the day the election schedule was announced and the election day. Due to opposition boycott and violence, the election day experienced a very low turnout with no votes cast in 41 polling stations of 11 districts. Among those polling stations, 27 were in Lalmonirhat, four in Jhenidah, two in Satkhira, and one each in Feni, Sylhet, Cox's Bazar, Chuadanga, Dinajpur, Naogaon, Rajshahi, and Sirajganj.<sup>62</sup> *The Economist* wrote that over 500 people were killed in political violence in 2013, making it "one of the most violent years since independence."<sup>63</sup>

Although all the international observers' missions withdrew their observers, the media found the election suffering from suppressed voter

turnout and violence against civilians, activists, and electoral officials. *The New York Times* characterised the election as ‘bizarre’ and noted that “at least 19 people were reported to have been killed in political violence, and 440 polling places were closed early because of security concerns.” The newspaper further noted on the day following the election, “Official counts from Dhaka suggested that the turnout here averaged about 22 percent—a steep decline from the last general elections, when more than 87 percent voted.”<sup>64</sup> The UN secretary-general was “saddened by the loss of life and incidents of violence that marred [the] parliamentary elections in Bangladesh, which were characterised by polarisation and low participation.”<sup>65</sup> The United States was also disappointed by the parliamentary elections. “With more than half of the seats uncontested and most of the remainder offering only token opposition, the results of the just-concluded elections do not appear to credibly express the will of the Bangladeshi people,” said a statement released by the US Department of State in January 2014.<sup>66</sup> Unsurprisingly, Awami League and its alliance won a landslide victory—a predictable and hollow one. In this election, the party won, but electoral governance and democracy lost.

### **Credibility of local bodies elections 2014-16**

After the 10<sup>th</sup> parliamentary election, the EC conducted four major rounds of election:

1. Upazila election 2014;
2. City Corporation election 2015;
3. Municipal election 2015;
4. Union Parishad (UP) election 2016.

The Upazila election experienced significant incidences of violence, low voter participation, a significant level of electoral violations, and ballot stuffing, as observed by Election Working Group (EWG).<sup>67</sup> The city corporation election held on 28 April 2015 was marred by a significant level of electoral fraud and violence, as was stated in a report of the EWG:

“Numerous incidents of ballot stuffing, intimidation, booth capture and violence were reported. Despite adequate polling operations in many of the stations observed, the integrity of the overall process was undermined by the scale of violations observed. The transparency of the process was damaged by the significant hurdles observation groups faced in receiving accreditation and deploying observers. Based on the extent of malpractice and irregularities observed, EWG evaluates these elections to be not credible.”<sup>68</sup>

The municipal election was also marred by a “significant number of electoral incidences,”<sup>69</sup> while the UP election, held between 22 March and 4 June 2016, left 126 people dead<sup>70</sup> and more than five thousand injured.<sup>71</sup> The election resulted in the unopposed election of more than 200 persons from the party in power. This election was marred by “widespread irregularities—like capturing of polling centres and stuffing ballot boxes and violence”<sup>72</sup> along with new types of election irregularities. For instance, “ballots of chairmen candidates were not given to the voters”<sup>73</sup> in many polling stations. A CSO by the name Citizens for Good Governance (SHUJAN) termed the UP election “a ghostly democratic election because many people did not go to cast their votes due to fear, but the dead people cast votes becoming demons.”<sup>74</sup> In conducting these elections the EC did “not move, or budge.”<sup>75</sup> Its role became only to provide logistic support instead of taking policy decisions, which caused the failure to establish EC’s authority over the election administration. In reality, elections were conducted by the government on the ground.

## Conclusion

The 10<sup>th</sup> parliamentary election in Bangladesh might be ‘constitutionally correct’<sup>76</sup> but it was ‘managed systematically’<sup>77</sup> by Awami League as it “had a clear and well laid out strategy to retain the state power.”<sup>78</sup> This election is described as the ‘biggest rigged’, non-inclusive, meaningless, and the most violence-prone election in the history of Bangladesh. It failed to express the will of the people, who did not have trust in the electoral process because its credibility was diminished by government control. All the elections held in Bangladesh between 2014 and 2016 could not be called free and fair either, and the 10<sup>th</sup>

parliamentary election was the foundation of all these non-credible elections. The 10<sup>th</sup> parliamentary election not only destroyed the electoral governance of the country but also brought back bad electoral governance in Bangladesh, which was practised in the elections during political as well as military governments.

### Notes and References

- 1 See the Parline database available at: <[http://www.ipu.org/parline-e/reports/arc/BANGLADESH\\_1973.PDF](http://www.ipu.org/parline-e/reports/arc/BANGLADESH_1973.PDF)>.
- 2 Weekly *Bichitra*, 7-30, 2 March 1979.
- 3 *The New York Times*, 8 May 1986.
- 4 Former chief martial law administrator and president of Bangladesh. Currently he is the chairman of Jatiya Party.
- 5 See the Parline database, op.cit.
- 6 This caretaker government was established before the 5<sup>th</sup> parliamentary election as an ad hoc arrangement and it was applicable to run the 5<sup>th</sup> parliamentary election only; it was not incorporated in the constitution as a permanent mechanism.
- 7 IFES, 2000, *Issues and Priorities for Bangladesh: The 2000 IFES National Survey*, p.11.
- 8 Ibid, p.8.
- 9 Quoted in *Democracy Report for Bangladesh*, prepared for International IDEA, 1996.
- 10 NDI's pre-election delegation to Bangladesh's 2006/2007 parliamentary elections, 11 September 2006.
- 11 UNDP, 2010, *Turning Failure into Success*, Dhaka, p.9.
- 12 lazuddin Ahmed was the president and he was elected when BNP was in power.
- 13 UNDP, 2010, op.cit.
- 14 Ibid, p.12.
- 15 Article 141A of the Constitution of Bangladesh has the provision to proclaim state of emergency.

- 16 Fakhruddin Ahmad was selected as the chief advisor of the caretaker government by the army in early 2007.
- 17 IRI: *Election Observation Mission Final Report*, <[http://www.iri.org/sites/default/files/fields/field\\_files\\_attached/resource/bangladeshs\\_2008\\_parliamentary\\_elections.pdf](http://www.iri.org/sites/default/files/fields/field_files_attached/resource/bangladeshs_2008_parliamentary_elections.pdf)>.
- 18 See *The Daily Star*, 6 January 2014.
- 19 Pippa Norris, Ferran Martínezi Coma and Max Grömping, 2014, *The Year in Elections*, 2014, p.3, The Electoral Integrity Project, <[https://www.dropbox.com/s/lkskwf9h6ahmbmu/The%20Year%20in%20Elections%2C%202014%20Final%2011\\_02\\_2015.pdf?dl=0](https://www.dropbox.com/s/lkskwf9h6ahmbmu/The%20Year%20in%20Elections%2C%202014%20Final%2011_02_2015.pdf?dl=0)>.
- 20 Election Working Group. 2014. *Tenth Parliamentary Election Observation Report*, Dhaka, p.50.
- 21 See *The Daily Star*, 11 May 2011
- 22 Ibid.
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- 25 The Daily Star-The Asia Foundation Survey: The National Perception Study, September 2013, Dhaka, p.2, <<http://asiafoundation.org/publication/national-public-perception-study/>>.
- 26 See Opinion Survey on Current National Issues conducted by *Daily ProthomAlo*, April 2013.
- 27 See *The Daily Star*, 25 November 2013.
- 28 See *The Daily Star*, 26 November 2013.
- 29 *The Economist*, 20 November 2013.
- 30 Article 123(3)(a) of the Constitution of Bangladesh.
- 31 Article 19(1) of the Constitution tells that the 'State shall endeavour to ensure equality of opportunities to all citizens'.
- 32 Article 27 states that "all citizens are equal before law and are entitled to equal protection of law".
- 33 Dr. Md. Abdul Alim, "Credible Elections and Caretaker Government," *The Daily Star*, 18 August 2015.

- 34 “Credible Elections and Caretaker Government,” article in *The Daily Star*, 18 August 2015.
- 35 Representation of People Order (the main electoral legal framework).
- 36 Article 31(5)(bb) of the Representation of People Order (RPO), 1972.
- 37 “Bangladesh Election Commission, 2009,” Statistical Report on the Ninth Parliamentary Elections, Dhaka, p.8.
- 38 The revision of RPO was done as ordinance as no parliament was existed in 2008.
- 39 UNDP, 2010, op.cit p.37.
- 40 Article 12(1)(j) of the 2009 version of the RPO.
- 41 Article 44(CC)(d) of the RPO.
- 42 See *The Daily Star*, 12 May 2013.
- 43 No explanation was given from the President’s Office on the criteria to select 24 parties.
- 44 Election Working Group, 2014, “Tenth Parliamentary Election Observation Report,” Dhaka, p.33.
- 45 See *The Daily Star*, 9 February 2012.
- 46 Ibid.
- 47 The selection committee was formed for the first time in Bangladesh to recruit the election commissioners.
- 48 See *The Daily Star*, 29 July 2013.
- 49 See *The Daily Star*, 30 July 2013.
- 50 See *The Daily Star*, 30 July 2013.
- 51 CMS= Candidate Monitoring System, and RMS=Result Monitoring System.
- 52 See *The Daily Star*, 30 July 2013.
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- 55 Article 55 of the Constitution of Bangladesh.
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- 61 See *Dhaka Tribune*, 6 January 2014.
- 62 See *The Daily Star*, 6 January 2014.
- 63 “Bangladesh’s Elections – Another Beating,” *The Economist*, 11 January 2014.
- 64 Barry, Ellen, “Low Turnout in Bangladesh Elections Amid Boycott and Violence,” *The New York Times*, 5 January 2014.
- 65 See *The Daily Star*, 7 January 2014.
- 66 See <<http://www.state.gov/r/pa/prs/ps/2014/01/219331.htm>>, accessed 13 October 2016.
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# BRITISH-KASHMIRIS: FROM MARGINALISED IMMIGRANTS TO A TRANSNATIONAL DIASPORA

SHAMS REHMAN,\* FAIZ UR REHMAN,\*\*  
AND AMNA AZIZ\*\*\*

## Abstract

*British Kashmiris are those dwellers of Britain who or their parents originally migrated from Kashmir. The earliest presence of Kashmiris in Britain can be traced as back as the earlier decades of the 19<sup>th</sup> century, where unemployment was the main cause of forcing people to step out of their homes. Tracing the earliest links between Britain and Kashmir through the colonial structures, there has been a process of Kashmiri migration to Britain where British Kashmiris have evolved into a transnational diaspora community through various socio-economic, political, and cultural links. There have been numerous means and routes of migration and settlement along with the development of various community institutions that to an extent empowered the community and enhanced their transnational links, creating a transnational social space where interaction between some public institutions of Britain and 'Azad' Kashmir can be sketched. This paper explores the background of Kashmiri migration to Britain and how over the past century Kashmiris in Britain have developed into a transnational diaspora community and have advanced their role in the socio-economic development of the state.*

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## **Introduction**

The British population of Kashmiri origin is estimated between half a million to one million.<sup>1</sup> The earliest presence of Kashmiris in Britain can be traced as back as the earlier decades of the 19<sup>th</sup> century. The process of labour migration to Britain was initiated somewhere towards the end of the 19<sup>th</sup> century, which by the 1950s developed into chain migration. Today, four, and in certain cases, five, generations of Kashmiris are settled in various regions across Britain. Numerous means and routes of migration and settlement, along with the development of various community institutions, have to an extent empowered the community. They have enhanced the community's transnational links creating a transnational social space where interaction between some public institutions of Britain and Azad Jammu and Kashmir (AJK) can also be noted. This paper explores the background of Kashmiri migration to Britain and how over the past century Kashmiris in Britain have developed into a transnational diaspora community. The study is divided into two sections: The first section looks into the initiation of British links with Kashmir through colonisation of the sub-continent that then led to the earliest links of Kashmiris with Britain and provided channels for migration of Kashmiris to Britain, gradually growing into 'chain migration'. The next section discusses the settlement of Kashmiris in Britain and the emergence of various socio-economic, political, and cultural networks and institutions that created a transnational space. These networks not only linked the British-Kashmiris with AJK and to an extent with the Kashmir Valley, Jammu, and Gilgit-Baltistan but also initiated interaction between some public institutions of the United Kingdom (UK) and AJK.

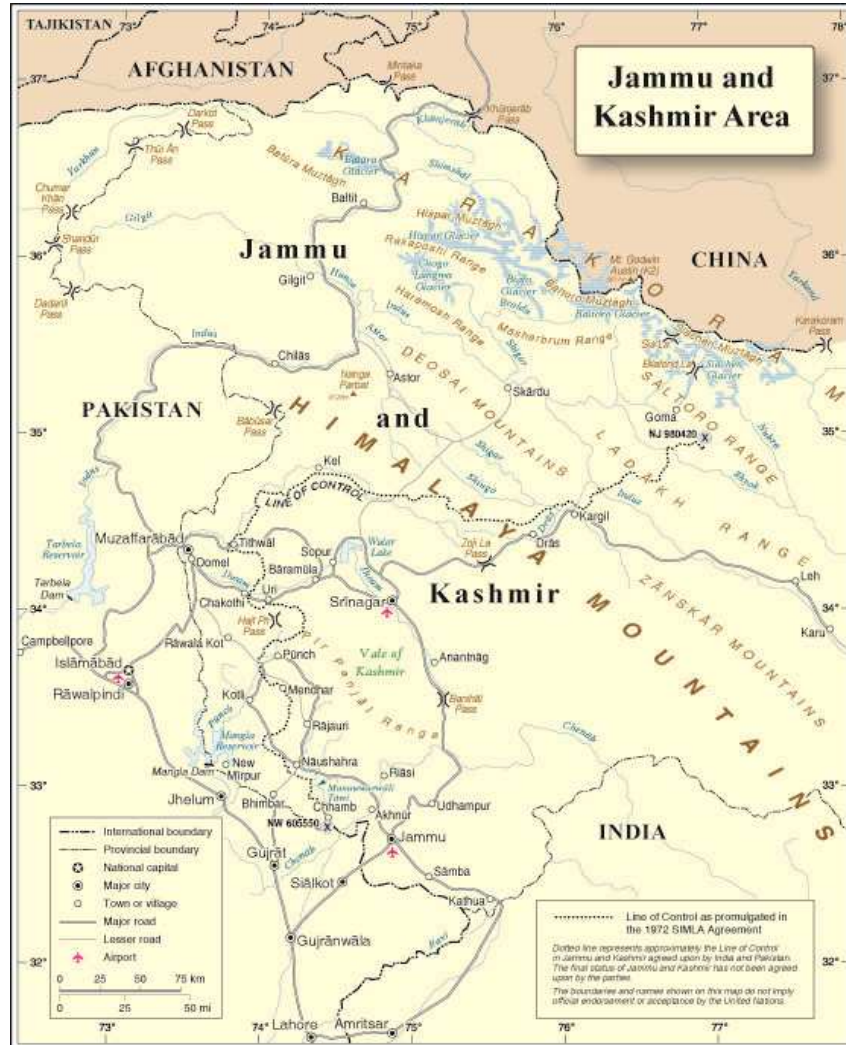
Qualitative methodology has been used in this study to collect primary data by directly approaching diverse sections and generations of Kashmiri population both in Britain and in AJK, including those who migrated in the late 1950s and 1960s. In addition to the familiar and widely cited literature on the history of migration and settlement of Kashmiris in Britain, certain Urdu and Pahari language writings by local writers have also been used as a secondary source of information.

## **Kashmir and Kashmiris**

Kashmir<sup>2</sup> is the commonly evolved name for the former state of Jammu and Kashmir, which spread across 84,258 square miles.<sup>3</sup> It is

now squeezed between three nuclear powers: China, India, and Pakistan. It also shares a border with Afghanistan, while Wakhan<sup>4</sup> separates it from Tajikistan.

**Map 1: The state of Jammu and Kashmir**



**Source:** <<http://www.un.org/Depts/Cartographic/map/profile/kashmir.pdf>>.

Kashmir is not an independent state but a homeland<sup>5</sup> of approximately 18 million Kashmiris scattered across the world with an estimate of up to a million in Britain, about three million in the Middle

East, and a significant number in different European countries, Canada, and the US in addition to at least a million in India and Pakistan.<sup>6</sup>

The colonial era princely state of Kashmir was established as a result of an agreement between the British East India Company and the then ruler of Kashmir Raja Gulab Singh on 16 March 1846.<sup>7</sup> Today, the Line of Control (LoC) divides this state into two main parts: AJK and Gilgit-Baltistan under Pakistan's administration and Jammu and Kashmir under Indian occupation.

### **British in Kashmir**

'We are here because you were there', is a slogan of the anti-racist movement in Britain. This makes reference to the fact that migration from ex-colonies to the UK has taken place because these countries were colonised by the British. This is also true for Kashmir and Kashmiris. The very first link between Britain and Kashmir was the Cashmere shawl, a product of the Ladakhi goat, and skills and labour of Kashiri (Kashmiri) men and women. This beautiful garment made its way to the UK within a few decades of the East India Company's off-shoring to India. British women loved this soft and delicate garment that soon became a status symbol for the middle- and upper-class ladies in London and across the UK.<sup>8</sup> The earliest interests that led the British to Kashmir, according to Bamzai, were political and commercial. The first British in what is recognised today as Kashmir was Bogle who was sent to Tibet by the first governor general of India Warren Hastings (1773-1785) in 1774 to explore political and commercial relations between Kashmir Valley and Tibet.<sup>9</sup> A few years later, in 1783, an officer of the Bangla Army George Forster entered Kashmir on his way to St. Petersburg (Russia). His observations on Jammu provide interesting insights into the policies for promoting peaceful coexistence or what one would call today 'diversity and multi-culturalism' by the then ruler of Jammu Raja Ranjit Dev (1750-1771).<sup>10</sup> Later, Vigne visited Kashmir in 1835 and produced a detailed account of the shawl industry.<sup>11</sup>

### **The first Kashmiri in Britain**

The British military officers and civil servants who either did not want or could not afford trips back home during summer holidays were also regular visitors to Kashmir. For such officers, Kashmir became an

ideal place to escape the scorching heat of the Indian plains during summer. Tosha Maidan near Srinagar was one such popular summer resorts that attracted large numbers of such tourists. According to Yousaf Saraf, in the summer of 1833, a British army officer Colonel Thorpe went there on holidays. While socialising with local elites, he caught sight of a girl, which turned into 'love at first sight'. According to Saraf, she was a daughter of Dayim Rathore, the then ruler of Kishtwar principality. All we know about this 'Daughter of Kishtwar' is that her name was Jani and that she was exceptionally beautiful. Col. Thorpe fell in love with her and could not leave Kashmir without her. As a pre-condition for marrying Jani, he converted to Islam and brought her with him first to India and then to Britain in 1830s.<sup>12</sup>

Zaheer-ud-Din, however, claims that Jani was actually Jana and that she was from Sugan Yarinar village in Budgam district.<sup>13</sup> From this record, the first ever known Kashmiri to Britain was Jani of Kishtwar or Budgam. She had two sons and a daughter. Nothing specific is told about the arrival of the first 'British-Kashmiri' couple to Britain or their life and whereabouts. It can be traced from the available literature that the story of this 'transnational' marriage did not end here but grew into what can be called 'transnational intellectual activism' when one of their sons Robert Thorpe Junior also joined the army and went on to visit what was literally his motherland or, at least, 'mother's land', in the 1860s.<sup>14</sup> The ruler of Kashmir at the time was Maharaja Ranbir Singh, the son of Gulab Singh. While in Kashmir, Lieutenant Robert Thorpe, like his father, also became involved with Kashmiris. His involvement, however, was not with the beauty but the misery and sufferings of Kashmiris.

During his stay in Kashmir, he travelled around in the state and collected significant primary and secondary data on taxation, shawl industry, judiciary, police system, and the harsh execution of several laws and policies. He wrote several articles accusing British government of selling Kashmiri Muslim majority population to a Hindu ruler whose rule he claimed was characterised by suppression and exploitation. His articles were published in Britain as well as in the Indian press and were unsurprisingly not appreciated by the people in power.

According to Father Biscoe, who visited Kashmir in 1890, trouble came to Thorpe who was ordered by the Maharaja government to leave Kashmir. Upon refusal, he was tied to his bed and soldiers carried him

out of Kashmir's boundaries.<sup>15</sup> He somehow managed to sneak back into Srinagar but to no avail, as the next morning, he was found dead after his breakfast.<sup>16</sup> Zaheer-ud-Din offers some additional information, which could perhaps lead to the reason for the deportation of Thorpe Junior. He maintains that foreigners were allowed to stay in Kashmir for a maximum of two months, and Thorpe stayed longer to study the horrendous conditions of the people in the birthplace of his mother. He was found dead on the next morning on Suleman Taing Hill after sneaking back into Kashmir on 21 November 1868.<sup>17</sup>

Saraf and Din claim that he was poisoned, whereas Tasim Zahid claims that he was strangled.<sup>18</sup> He was buried in the British cemetery at Sheikh Bagh in Srinagar. The epitaph on his ignored grave without any cross in this Christian cemetery reads "Obit [Obituary]—Robert Thorpe-Veritas [means truth in Latin]—He gave his life for Kashmir."<sup>19</sup> Robert Thorpe is believed to be the first person to be recorded in history who raised his voice against the oppressive Dogra regime in Kashmir.<sup>20</sup>

His articles were published after his death under the title of *Cashmere Misgovernment* by Longmans, Green and Company, London, in 1870. The book that can possibly be described as the first social study of Kashmir provides useful information on the taxation system, shawl industry, forced unpaid labour, the 1846 treaty between Gulab Singh and the British government, and migration of shawl workers from Kashmir Valley.<sup>21</sup> In terms of its approach, Thorpe's informative study presents racial and religious prejudices as reasons for Maharaja's incapability to rule appropriately, which, for Thorpe, lay in Maharaja's Asiatic origins and being a Hindu ruling Muslims. Another mention of a British-Kashmiri marriage that led the bride to Britain appeared in an account of the history of Asian migration to Britain by Rozina Visram titled *Asians in Britain*, which identifies various museums with collections from South Asia during the colonial rule. Visram mentions New Bridge House Museum, Dublin County, in Ireland where belongings of Thomas Alexander Cobb (1788-1836) are kept "who married to Nazir Begum, the daughter of Aziz Jehan of Kashmir."<sup>22</sup>

## Labour migration

The 'discovery' of Britain as a place for better-paid work opportunities was made by men from Dadyal and surrounding villages in

Mirpur somewhere in the closing years of the 19<sup>th</sup> century and opening years of the 20<sup>th</sup> century.<sup>23</sup> Roger Ballard, one of the most senior researchers on Mirpuris, offers a detailed story of the beginning of the migration of Kashmiri workers from Mirpur to Britain. According to Ballard, it was the centuries-old tradition of boat-building and water trade that linked Mirpuris with the British merchant navy ships on which Mirpuris arrived in Britain.<sup>24</sup> The way it happened was that many Mirpuris were involved in boat-building and also crewed boats up to Lahori Bandhar.<sup>25</sup> In the late 1860s, British colonial government introduced the rail, which obviously provided a lot faster, safer, and cheaper system of moving goods from one place to the other. So water trade quickly diminished and people engaged with it—majority belonging to Mirpur—were rendered out of work.<sup>26</sup>

Like it happens in such situations, some of these Mirpuris used the new opportunity to go farther in search of work. They got onto the rail and went to Bombay (Mumbai) and Karachi. This was also the time when British replaced sailing with steam for ships, and somehow the Mirpuris and Chachis from Attock area of Pakistan managed to find out about the high demand for workers in the coal rooms of ships.<sup>27</sup> Once it started, they informed their brothers, relatives, village fellows, and friends of the opportunities, and facilitated them to find employment. Chaudhary Yousaf was one of such workers who had to increase his age on the papers to be employed on a ship in 1939 by his uncles who were working there as *Sirangs*.<sup>28</sup> From there he went to the United States and then to Britain.<sup>29</sup>

Working in temperature of over 70 degrees did not sound very attractive, but cash payments made it worthwhile because of the harsh conditions in Mirpur and especially the debts, which enslaved most of the peasant population to money-lenders under the system established by the Maharaja.<sup>30</sup> Another channel through which some Kashmiris from Mirpur migrated to Britain was that of the army. During the First World War (1914-19) and the Second World War (1939-45), soldiers of Kashmiri origin from Mirpur ended up in Britain either as wounded combatants or released prisoners of war from Germany or Japan. During the Second World War, 71,667 soldiers of Jammu and Kashmir served in the British Indian Force.<sup>31</sup> While no research is available on how many of them stayed back in Britain, there is a general perception that a

significant number did. By the end of the Second World War, the news of work and opportunities in Britain travelled to all sides of Dadyal. People from areas closer to Mirpur town including Chaksawari and Akalgarh (Islamgarh) started to migrate to Britain as well. By the 1950s, the population of Asians in the UK grew into thousands, including a large number of Mirpuri Kashmiris among them, as mentioned by academics such as Desai.<sup>32</sup>

As a result of the United Nations resolution, a ceasefire between India and Pakistan became effective on the New Year day of 1949, which divided Kashmir into three parts: Jammu and Kashmir (Indian-held Kashmir or IHK), Gilgit-Baltistan, and Azad Kashmir (under Pakistani control). By the end of the 1950s, people began to learn that Pakistan government was going to build a dam on River Jhelum (Vitasta) at Mangla in Mirpur. It appears from long conversations with elders of Mirpur that initially common people with no exposure to the wider world of dam building shrugged the news as a mere rumour. They could not comprehend that those mighty rivers of Poonch and Jhelum could be blocked. However, when the measurement and demarcation of land acquired by Pakistan's Water and Power Development Authority (WAPDA), along with the arrival of construction machinery, started to appear, the people of Mirpur and surrounding villages realised that something big was going to happen. The resistance movement by the smaller and marginalised pro-independence Kashmiri groups and the lower cadre of the ruling Muslim Conference against the dam was suppressed, and Mangla Dam was completed in 1967. This resulted in the sinking of the ancient city of Mirpur and about 1,700 acres of most fertile land including about 250 villages. Some sources claim that over 100,000 people were displaced, while others mention the figure of 40,000.<sup>33</sup> A large number of those who received compensation migrated to Britain rather than moving to remote areas of Punjab and Sindh provinces where they were offered barren and uncultivable lands.<sup>34</sup> That was the big push factor for the people to migrate from Mirpur and its surrounding areas.

Another major factor that contributed significantly to the rise of migration from Mirpur to Britain in the late 1950s and the early 1960s was the introduction of the 1962 Immigration Act to restrict migration from ex-colonies by the British government.<sup>35</sup> Migration researchers

agree that a large number of men from Mirpur, like their fellows from other migrant areas such as Sylhet and Attock, migrated to beat the 1962 Immigration Act.<sup>36</sup> Together, the beating of restrictions and construction of Mangla Dam accelerated the migration of Kashmiris from Mirpur in the mid-20<sup>th</sup> century. By that time, migration from Mirpur to Britain had also become a chain process, which means that migration was taking place through kinship and friendship links.

### **New approach**

Till the mid-1960s, migration from Mirpur was mainly of working age men. Almost all of them came with the intention of staying in the UK for a few years to earn enough money to build a house and set up some business back in Mirpur and live comfortably with the families there. However, when the construction of Mangla Dam shattered the dream of immediate return, migrants stopped dreaming of spending retirement in Mirpur. This also changed the previous strategy of Mirpuris not to bring wives and children over to the UK. So migration of Kashmiri women from Mirpur started in the later years of the 1960s, with some exceptions.<sup>37</sup> Most men brought their families over when it was certain that Mirpur was going to be submerged. Opportunities for alternative work and business in the region also submerged with the 'Old Mirpur' and surrounding villages. It was also around this period that migration from Kotli and at a relatively smaller scale from Bhimber districts (initially sub-districts of Mirpur) also started.

The 1970s can be seen as the decade of families as far as the labour migration of Kashmiris from Mirpur is concerned. It is usually referred to as family reunion, but in fact, it was the union only of a component of the extended family. Children came with mothers to join fathers but ageing grandparents were left in Mirpur alone or with those relatives who stayed back for a range of reasons. The closing years of this decade also saw the earliest 'transnational British-Kashmiri marriages' amongst the labour migrants. Boys who were brought over in the later years of the 1960s were taken back to Mirpur and got married mostly with first or second cousins.<sup>38</sup> The closing years of the 1970s also witnessed the beginning of the arrival of spouses from Mirpur, mainly women.



The 1980s proved to be the decade of girls going from the UK to marry off in Mirpur and bringing over of their grandparents and male spouses. This phenomenon has now significantly weakened but continues to this day. Additional aspects of migration from Azad Kashmir included political migration mainly of nationalist Kashmiris, followed by high-skilled migrants and students, some from Mirpur but more from Muzaffarabad and Poonch districts (now Divisions). Today, four, and in some cases, five, generations of Kashmiris are settled in Britain, not in the same household but increasingly in the same street or vicinity. In addition to Kashmiris from Azad Kashmir, there are also about three hundred families of Kashmiris from the Kashmir Valley in Britain who are predominantly professionals, mainly doctors and businessmen.<sup>39</sup>

### **Settlement and the making of a British-Kashmiri diaspora**

Work was the main factor that pushed people out of their homes in Mirpur. Availability of work also determined their settlement in Britain. While most of the earliest migrants from Mirpur who left their jobs on ships settled in the coastal towns of Britain, the later immigrants worked primarily in textile mills in the north-west, steel factories in Sheffield, foundries in midland, southern towns such as Peterborough, and transport industry in Newcastle. Until the arrival of families and the emergence of a 'British-Kashmiri household', the primary focus of most Kashmiri workers was to work as long hours as available. They actually introduced night shifts in mills and factories, especially the textile mills.<sup>40</sup>

All migrants were not lucky enough to find work straight away, though. Some had to wait weeks and in some cases months before they could get any paid work. They were supported by those who were in work through a support system, which was an internal welfare system of the Kashmiri workers in Britain. In terms of work, initially, those from landed *biraderies*<sup>41</sup> background preferred working in mills, factories, foundries, and transport industry rather than setting up any business that some of the early Kashmiri migrants mainly from non-landed *biraderies* ventured into, including door-to-door businesses, and setting up small cafés and clothing shops.

Initial priorities for most workers were to pay off their debts that included travelling expenses to and from Karachi, travel agents' fees,

paperwork expenses, and fare to Britain including the five pounds that the travel agent was to give every migrant for taxi fare from Heathrow Airport to their destination in the UK. The next priority was to buy land or build a house, marry off brothers and sisters, or in rare cases sons and daughters, in Kashmir. By the 1980s, the economic situation of Kashmiri workers changed significantly when textile industry—whose demise these workers delayed by some decades—eventually died down and one-by-one almost all mills closed down.<sup>42</sup> This was followed by closure of factories and foundries across Britain, and unemployment amongst Kashmiri as well as other British workers soared to all times high. Kalra explored this phenomenon in detail in *From Textile Mills to Taxi Ranks*. Focusing on Azad Kashmiri textile workers, Kalra offers a comprehensive analysis of the Azad Kashmiri labour migration and the impacts of the demise of textile industry on Kashmiri workers in Oldham.<sup>43</sup>

The majority of the redundant workers went on to work for private hire or taxis, catering or take away, and manufacturing industry in Manchester that is largely owned by Pakistani migrant businessmen mainly from Faisalabad. A large number of former textile workers also went on to open up corner shops. A significant number of British-Kashmiris set up off-licence shops (selling alcohol), which was previously seen as a prohibited business because under the Islamic code of life Muslims are not allowed to handle (drink, buy, or sell) alcohol. By the 1980s, small business ventures of some Kashmiris grew into big outlets of clothes, confectioneries, and restaurants. Kashmir Bakery, Mumtaz Paan House, and Kashmir restaurants are some of several such examples.

### **Social life**

In the early days, the social life of Kashmiris was confined mainly to in-house gatherings on Sundays, and sharing of information about the availability of work and experiences at work, along with reading and writing letters from and to 'back home'. Going to the cinema and watching two and sometimes three Indian and Pakistani films in one go with each film up to three hours duration was also a common way to spend Sunday for some. Some more adventurous ones discovered the world of pubs, and an odd one managed to develop a relationship with a

non-working class white woman. Interaction with working class white women and living with them was not uncommon, though. A very interesting narration of this aspect of the social life of early Kashmiri workers is offered by Mehmood Hashmi<sup>44</sup> in the latest edition of his classic analysis *Kashmir Udas Hai* (Kashmir is Sad). Mehmood Hashmi, one of the best Urdu reportage writers, narrated that white women at this stage were of great help in many ways, especially with paperwork for many migrant workers because almost all of them were single and with little English. One such exceptionally helpful lady was Margaret who lived with Zaman Ali, also known as Bava Zaman from Dadyal, who later became very famous amongst British-Kashmiris for his community work and links with Pakistan's Embassy in London and through that with the Government of Pakistan. He was awarded *Tamgha-e-Imtiaz* (Distinction Award) by the Government of Pakistan for his services to the community and Pakistan's government.<sup>45</sup>

Margaret did most of the paperwork for many of the workers in the neighbourhood where Bava Zaman lived in Birmingham. With the arrival of families in the UK, many workers then left their white ladies, as living with more than one woman particularly without marriage was not acceptable in Muslim culture. Some of the ladies left their boyfriends when they found out that they were actually married or when they found someone better. The pressure on Bava Zaman also mounted to leave Margaret. According to some, even Margaret asked him that he could bring his wife over to the UK and that she would leave, but Bava Zaman refused to accept the community's mounting pressure and never left Margaret. According to some sources, Margaret did all the paperwork to invite Bava Zaman's wife from Dadyal and both women lived together.<sup>46</sup>

It seems that in addition to the practice of 'basic contribution', the earliest community welfare institution amongst the British-Kashmiri workers was the funeral committees formed to pay for sending dead bodies back to Kashmir. Initially, these committees consisted mainly of a few villages from the areas of migration joined together and contributed a few shillings per person to meet the funeral expenses and airfare. Gradually, with the growth of population, the membership of the committees reduced in some cases to one village. More recently the committees are formed on the basis of relatives in the same town or settlement in Britain.

The earliest religious institution of migrants was the mosque, which initiated with the need of Friday and Eid prayers, where a relatively large number of people tended to pray together. Initially, it was done in someone's house, then renting a house, and later purchasing the house through contributions by the community. More recently, purpose-built mosques worth millions of pounds are being built. With the establishment of mosques and mosque committees, migration of specialist *moulvis* (clerics) and *ulema* (religious scholars) also emerged. Today, approximately a dozen mosques exist in each town with a significant Muslim population, of which Kashmiris constitute at least two-thirds in over two dozen towns across Britain. Kashmiri population is approaching one hundred thousand in Birmingham followed by over 60,000 in Bradford, and over 20,000 in Luton, Leeds, and several other towns.<sup>47</sup>

The publication of *Satanic Verses* by Salman Rushdie in 1988 and issuance of a *fatwa*<sup>48</sup> against this controversial novel politicised the Muslim population of Britain, including British-Kashmiris, and enhanced the sense of being Muslim among them as a political identity. To an extent, Muslim was a new umbrella identity that replaced the previous wider identities of ethnic minorities—Black and Asian. However, a closer look would reveal that this Muslim identity is not coherent and homogenous, but fractured along sectarian identities of Wahhabis, Barelvis, and Deobandis etc. The Islamisation has also given birth to several political networks and organisations including Muslim Council of Britain (MCB) and Muslim Association of Britain (MAB) as the leading ones. Madrassas or religious schools are another product of the growing interest in religious education. Scores of schools and education centres of different sects have sprung up across Britain with a significant contribution by Kashmiri Muslims along with other Muslim communities. The growth of mosques and growing engagement with religious lifestyle also fed into the mushrooming of apparently spiritual institutions of *peers* (spiritual leaders) and Sufi *silsilahs* or schools.<sup>49</sup> *Peers* attract mainly the first and second generation Kashmiris, while the Sufi *silsilahs* engage the third and fourth generations. There is, however, a great deal of overlap. Moreover, almost all expressions of religion are increasingly opening up to women as well.

On the political front, the British-Kashmiris were originally activated, mobilised, and organised around two main traditions: First, the

Kashmir issue, and second, left-leaning working-class and anti-racist politics. While the Kashmir issue mobilised the elder generations who had some experience of and affiliation with the All Jammu and Kashmir Muslim Conference<sup>50</sup> as well as Plebiscite Front politics,<sup>51</sup> the younger generation was motivated by anti-racist politics. Some examples of Kashmiri workers joining union activism and international socialist groups can also be traced. Initially, activism around Kashmir issue remained the monopoly of Plebiscite Front with some exceptions, such as Raja Mohammed Azam of Akalgarh as the leading and pioneering activist of Muslim Conference in Britain. In later years of the 1960s, Plebiscite Front provided space for pro-independence activists as well as some left-wing activists who were engaged in student politics of the 1960s led by the renowned British-Pakistani Marxist Tariq Ali.<sup>52</sup>

Other Kashmiri political organisations included Jammu and Kashmir United Liberation Front, Kashmir Independence Movement, Kashmiri Workers Associations, and Kashmir Youth Movement. In 1976, when Amanullah Khan and Abdul Khaliq Ansari were invited to Britain and changed the Plebiscite Front into Jammu Kashmir Liberation Front (JKLF), the above organisations or most of their members also joined this new Kashmiri political movement. The JKLF grew substantially as a result of the execution of Maqbool Bhatt in 1984. It gained further strength after the eruption of the mass uprising against Indian rule in the Kashmir Valley following massive rigging in the 1987 election to keep the Muslim United Front out of Jammu and Kashmir Assembly. The 1990 mass border crossing call by the JKLF in AJK also increased support and membership of the JKLF. By 1992, the party had branches in 32 towns and cities across Britain. Till then, there was no other organised and structured Kashmiri political party in Britain except Tehreek-e-Kashmir. Following the dissolution of JKLF by its chairman Amanullah Khan, however, the party experienced a steep decline. Gradually other Azad Kashmiri parties were formed and grew across Britain—including Muslim Conference, Pakistan Peoples Party, and recently Pakistan Muslim League (N), and Pakistan Tehreek-e-Insaf.

Over the years, the branches of other pro-independence political parties have also been established in Britain including Jammu Kashmir National Awami Party, Jammu and Kashmir Freedom Movement, Jammu

Kashmir People's National Party, United Kashmir People's Party, and Jammu Kashmir National Party.

The leftist tradition of Kashmiri politics in Britain has also declined over the years. More Kashmiris are now engaged in mainstream British political parties than ever with nearly 300 councillors, six members of the British parliament, two members of the House of Lords, and many town and city mayors. The growing participation of Kashmiris in British politics indicates that in future, this strand of politics will gradually incorporate all other strands. Therefore, the role of British-Kashmiris in the British mainstream politics will grow further.

Philanthropy is another area in which British-Kashmiris have made an active contribution from the very early days of their settlement. Initially, this was confined to informal kinship and village networks to support struggling relatives or village fellows in Azad Kashmir. However, gradually several registered charities mushroomed across Britain to support various welfare projects across Azad Kashmir. Prior to the 2005 earthquake in AJK, registered trusts included Kashmir Relief Fund, Kashmir Charitable Trust, Islamgarh Welfare Trust, Sarfraz Welfare Trust, Reid Foundation, Kashmir Education Foundation etc. The latest initiative in this field is the foundation and sharp rise of Kashmir Development Foundation that has adopted a more professional approach and has made a significant contribution towards unlocking the potential of British-Kashmiri diaspora in the development of the community in Britain and back in Kashmir.<sup>53</sup>

After the 2005 earthquake, dozens of initiatives were taken in almost every town with a significant number of Kashmiris to provide relief for the earthquake affected areas. Some of the prominent ones among these include Kashmir Orphan Relief Trust, Mirpur, Kashmir International Relief Fund, Alkhidmat Welfare Trust Sehensa, Ayesha Memorial Chaksawari, Umeed Welfare Trust Mid Bainsy, Alqayum Foundation Mirpur, Kashmir National Welfare and Cultural Trust Leeds, and Burnley for Kashmir. Meanwhile, informal networks mainly run by women continue to support relatives in education and health related needs. However, with more and more relatives having migrated to Britain now, the scale of this has decreased significantly.<sup>54</sup>

Culturally, British-Kashmiri diaspora space, like that of Kashmir, is characterised by the Pakistani and Indian linguistic and cultural

influence through the Indian movies, which are now a regular feature of the British mainstream cinema, and scores of satellite TV channels as well as Pakistani songs and *mushairas* (poetry recitation). The working classes have also kept the Pothwari music and language alive, which has recently experienced a boost through initiatives such as *Chitka*,<sup>55</sup> the first ever Pahari-Pothwari magazine, Asian Literary Forum (ALF), and such media attempts as Appana Channel and KBC channel. While *Chitka* began to publish Pahari-Pothwari language in Britain and linked Pahari-Pothwari writers in Kashmir and Pakistan, the ALF provided a platform for Pahari-Pothwari poets and writers from Kashmir, Pakistan, and Britain to get connected.

Recently the culture of *Naat* (religious praises) has dominated the cultural space of British Muslim culture and has sprung into a fairly profitable industry along with religious satellite channels. British-Kashmiris are a significant part of these transnational initiatives and developments as well.

### **Diaspora and transnational dimension**

For a few decades after the bulk migration, most Kashmiris were not thinking in terms of staying in Britain. They believed that once the *Rozipani* (food and water) that had brought them over to Britain was finished, meaning once they got their share of it, they will return to their birthplace. Ballard called this, the phase of sojourn when migrants believed that in a few years' time they would return to their countries of origin. The years got prolonged, though. Once the families were called over, their *Rozipani* and stay in Britain gradually became permanent. The integration in local society also increased significantly, although the degree of integration may vary in different communities. Since British-Kashmiris are not recognised as a separate ethnic community in the ethnic monitoring system of Britain, no specific data is available on Kashmiris. But it is a common perception that they remain perhaps the least integrated community, and most excluded and marginalised.

With the growth of various political and cultural networks, Kashmiris entered into the next phase of *Jithey Basso Hoovey Kashmir* (where you live is the Kashmir). While almost all Kashmiri groups in Britain contributed to the rise of British-Kashmiri identity as well as the political situation in Kashmir, especially the uprising in the Kashmir

Valley in the late 1980s, the demand for recognition in Britain as British-Kashmiris was raised by the Kashmir National Identity Campaign in the closing years of the last millennium. At the same time, all formal and informal networks in all areas of life mentioned above have grown a transnational dimension through regular and increasingly congesting ties with Azad Kashmir and flow of information, people, capital, and skills across the transnational connections.

While individual trips to Azad Kashmir may appear to be in decline, particularly of the third generation, which needs further research, new links can be traced in the fields of investment between the UK and Azad Kashmir along with cultural and political interaction.

It seems that from the turn of the millennium, growth in transnational links of British-Kashmiris also contributed in efforts to forge transnational links by some of the British public institutions and services especially the local councils, education, health, police, judiciary, and social services. Currently, several British towns and cities are twinned with or have treaties of friendship or friendship links with Mirpur or Kotli including Bradford, Waltham Forest, Sheffield, Oldham, Birmingham, Manchester, and Luton. Attempts were made to increase interaction and cooperation between police in Bradford and Mirpur. The initiative collapsed, however, following allegations of human trafficking on the renowned police officer of AJK Chaudhry Sabir Hussain who was later reported to have committed suicide by jumping into River Jhelum from Muzaffarabad Bridge. An effort was also made to link Bradford Hospital and Mirpur Hospital by exchanging health professionals. This initiative was terminated when Dr Mohsin Shakil, the top urologist and surgeon who was in Bradford as part of the transnational health link between Mirpur and Bradford, had to go back to Kashmir to provide treatment to the victims of the 2005 Kashmir earthquake.<sup>56</sup> Similarly, several links can be traced in the fields of law and social services mainly related to various criminal cases including child abduction, and honour-related and domestic violence, where people involved lived or operated in the transnational space between AJK and Britain.<sup>57</sup>

This, of course, is only a quick overview of the aspects of the transnational space that British-Kashmiri ties have developed over the years, and are increasingly becoming dense with a range of socio-economic, political, cultural, and philanthropic practices, ties, and



connections straddling British and Azad Kashmiri geographical containers. Each of these aspects needs to be further explored and analysed to understand this phenomenon of transnationalism amongst British-Kashmiris with the intention of seeing what opportunities and threats this space offers for now and in future.

### **Opportunity**

The 21<sup>st</sup> century is the age of economic links as well as trade across regions and continents. Therefore, it is a need of the hour to provide certain incentives (including tax rebates and infrastructural development for easy access to the regional markets) to the British-Kashmiri business community to invest their capital in diverse industrial sectors in their country of origin as we have the example of fast-growing Indian industry, which is the product of Indian government's incentives for Indian business community in Europe, the US, and the Middle East. One of the most crucial provisions for this is greater autonomy for AJK government. Control over corruption, improvement of material and social infrastructure, and security and safety of investors and investment in the region would also be very helpful. A long-term policy in this direction can put the fluctuating economy of the region on the right track rather than make it dependent on charities and foreign borrowings.

### **Conclusion**

Till the mid-1960s, people from Mirpur Division migrated to the UK with the intention of staying there for a short duration just to earn sufficient money to build a house and set up some business back in Kashmir. However, the construction of Mangla Dam shattered their dream of return. This also changed the earlier plan of Mirpuris not to bring wives and children over to the UK. The next two decades also witnessed the earliest 'transnational British-Kashmiri marriages' among labour migrants. The 1980s proved to be the decade of chain migration. The economic recession of the 1980s in Britain resulted in unemployment amongst Kashmiri workers. These redundant workers went on to work for private hire or taxis, catering or take away, and manufacturing industry.

A large number of former textile workers also went on to open up corner shops, and a significant number of British-Kashmiris set up off-

licence shops selling alcohol, which was previously seen as un-Islamic. As their businesses grew, they started developing relations with white people in politics and businesses.

With the passage of time, the British-Kashmiris established community welfare institutions like funeral committees, followed by religious institutions such as mosques. Later, the campaign against publication of the *Satanic Verses* turned political. British-Kashmiris along with other Muslim populations enhanced their Muslim political identity. On the political front, British-Kashmiris were originally activated around two main traditions: First, the Kashmir issue, and second, the left-leaning working-class and anti-racist politics. Around that time, the Azad Kashmir political parties, especially the ruling parties, became active and mobilised a larger number of British-Kashmiris than the pro-independence groups.

Due to the shift in the on-going movement in Kashmir from secular to religious, the left-wing tradition of Kashmiri politics in the UK has also declined over the years. More Kashmiris are now engaged in mainstream British politics. It seems that in future their participation in the British mainstream politics will grow further. On the economic front, several registered charities across Britain have supported various welfare projects across AJK, particularly after the 2005 earthquake. A significant number of Kashmiris have provided assistance to the earthquake affected areas. Some projects are still going on. Hence, the Government of Pakistan should encourage the Kashmiri business community by giving them incentives along with security and safety to attract their investment in their country of origin.

## Notes and References

- <sup>1</sup> These are projected figures because there is no separate census for Kashmiri community in the UK. They have travelled to the UK on a Pakistani passport, where they have been counted as a part of Pakistani community since their arrival, so it is very challenging to give the exact data of Kashmiri community.
- <sup>2</sup> The term Kashmir historically referred to the Valley of Kashmir just to the south of the western end of the Himalayan mountain range. Currently, Kashmir refers to a much larger area, which includes the regions of Kashmir Valley (Kasheer), Jammu, Azad Kashmir, Gilgit-Baltistan, and Ladakh.
- <sup>3</sup> The figure 84,471 square miles has been used in many publications. The 1891 census put the area as 80,900 square miles. This figure was repeated in 1901. The 1911 census showed the area as 84,432 square miles. According to the 1921 census, the area was 84,258. In 1941, the census commissioner considered 84,258 square miles to be the correct figure.
- <sup>4</sup> Wakhan is situated in the extreme north-east of Afghanistan. Wakhan Strip separates Pakistan from Tajikistan. It was created as a buffer zone between British colonial territories and Tsarist Russia in 1893.
- <sup>5</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).
- <sup>6</sup> Since Kashmiris are not recognised in the statistical systems of the countries of their settlement, their accurate numbers are not available. The estimates are based on such academics as R. Ballard (1991) who claim that two-thirds of Pakistanis in Britain are from Azad Kashmir. The estimates for other countries are based on general information.
- <sup>7</sup> D. K. Ram, *Gulabnama: A History of Maharaja Gulab Singh of Jammu & Kashmir* (Srinagar: Sheikh Mohammed Usman & Sons, 2005).

- <sup>8</sup> Michelle Maskiell, "Consuming Kashmir: Shawls and Empires, 1500-2000," *Journal of World History Vol. 13, No.1* (2002): pp.27-65.
- <sup>9</sup> Hastings appointed George Bogle to undertake a diplomatic and fact-finding mission to chart the unknown territory beyond the northern borders of Bengal, with a view to opening up trade with Tibet and possibly establishing a back-door trade relationship with China, which strictly controlled foreign trade at Guangzhou (the 3<sup>rd</sup> largest Chinese city).
- <sup>10</sup> "Runzeid Dev, the father of the then chief of Jumbo, who deservedly acquired the character of a just and wise ruler, largely contributed to the wealth of and importance of Jumbo. Perceiving the benefits that would arise from the residence of Muhammadan merchants, he held out to them many encouragements and observed towards them a disinterested (sic) and honourable conduct. He avowedly protected and indulged his people, particularly the Muhammadans, to whom he allotted a certain quarter of the town which was thence denominated Mughalpur; a mosque was erected in the new colony. When he was riding through their quarter during the time of prayer, he never failed to stop his horse until the priest (Moazan) had concluded his ritual exclamation [Azaan]. An administration so munificent and judicious at the same time that it enforces the respect of the subjects, made Jumbo a place of extensive commercial resort, where all descriptions of men experienced, in their persons and property, a full security." G. M. D. Sufi, *Kashīr: Being a History of Kashmir from the Earliest Times to Our Own, Vol. II* (University of Punjab, 1949), p.755.
- <sup>11</sup> G. T. Vinge., *Travel in Kashmir, Ladakh, Iskardo* (London: Henry Colburn Publishers, 1844).
- <sup>12</sup> Muhammad Yusuf Saraf, *Kashmiris fight for Freedom* (Lahore: Ferozsons, 1977).
- <sup>13</sup> According to Din, Thorpe's father E. Thorpe visited Jana's village often and on one of his visits, he saw Jana and fell in

love with her. Din does not tell why E. Thorpe visited Jana's village? According to this version, Jana was not a daughter of any Royal Dayim Rathore but a buffalo herder from Teli family and when the colonel fell in love, he divulged to Habibullah Teli, an uncle of Jana, who then organised everything. The rest of the story is analogous to the one told by Saraf and Father Biscoe.

- 14 Saraf, *Kashmiris fight for Freedom*, op.cit.
- 15 C.E. Tyndale-Biscoe, *Kashmir in Sunlight and Shade* (London: Seeley Service and Co. Limited, 1922).
- 16 Ibid.
- 17 Saraf cites the date as 22<sup>nd</sup> November.
- 18 Tasim Zahid, "Kashmiris forgot Robert Thorpe, his grave," *Daily Greater Kashmir*, Srinagar, 6 March 2008, available at <<http://www.greaterkashmir.com/news/2008/Mar/6/kashmiris-forget-robert-thorpe-his-grave-46.asp>>.
- 19 Ibid.
- 20 Ibid.
- 21 Many of these shawl workers' families settled in Mirpur from where along with Mirpuri peasants and workers they were to migrate to Britain in the closing years of the 19<sup>th</sup> and early years of the 20<sup>th</sup> century.
- 22 Rozina Visram, *Asian in Britain* (London: Pluto Press, 2000).
- 23 Shahid Bhatt from Birmingham told the first author in a personal interview that his maternal grandfather Karam Elahee came to Britain somewhere around 1900, and great grandfather Mohammed Aziz aka Kalu in 1886.
- 24 Roger Ballard, "The Roots of Emigration from Mirpur," available at <<http://www.movinghere.org.uk/galleries/histories/asian/origins/local4.htm>>.
- 25 The seaport of Indus where rivers of Lahore and Multan discharge themselves in salt sea. See John Dowson, *History of India: As Told by its own Historians* (London: Trübner & Co., 1871).

- 26 Ballard, "The Roots of Emigration from Mirpur," op.cit.
- 27 Ibid.
- 28 Sirang was a coal room supervisor overlooking the stokers.
- 29 M. Yousaf, *Karvane-e-Yousaf* (Mirpur: Al-Umar, 1997).
- 30 Ibid.
- 31 Richard Symonds, "Reports on the Poonch Uprising," *The Statesman, Calcutta*, February 4, 1947.
- 32 Rashmi H. Desai, *Indian Immigrants in Britain* (Oxford: Oxford University Press, 1963).
- 33 "Mangla Dam," available at <<http://cms.waterinfo.net.pk/pdf/md.pdf>>.
- 34 No study is available on what happened to those who, due to lack of compensation or out of choice, went to Sindh and Punjab.
- 35 Prior to the 1962 Commonwealth Immigrants Bill, commonwealth citizens were allowed to enter Britain freely and usually made the journey by sea. The Act made temporary provisions for controlling immigration into the UK of commonwealth citizens. The Act received Royal Assent on 18 April 1962.
- 36 Roger Ballard, "Emigration in a wider context: Jullundur and Mirpur compared," *New Community* 11, No.1 (1983): pp.117–36.
- 37 Munir Akhtar from Dadyal was one of the few exceptions who came to Birmingham with her mum and dad in early 1960s.
- 38 Sadeeqe Baba's, personal interview with the first author, Leeds, 12 July 2008.
- 39 First author's personal conversation with some British-Kashmiris from the Valley. Also See Majid A. Siraj, *Kashmir: Desolation or Peace* (London: Minerva Press Publishers, Ltd. 1997).

- 40 Virinder S. Kalra, *From Textile Mills to Taxi Ranks: Experiences of Migration, Labour, and Social Change* (Aldershot: Ashgate Publishing, 2000).
- 41 *Biraderi* literally means brotherhood and is perceived varyingly and sometimes interchangeably as caste or tribe, or clan as well. In Azad Kashmir, it is defined around professions and within that has tribal distinctions. Broadly *biraderies* had been distinguished between landed and non-landed ones.
- 42 Angela Monaghan, "UK Recession in the 1980s: What Was It Like?," *The Telegraph*, 23 January 2009, available at <<http://www.telegraph.co.uk/finance/recession/4323064/UK-recession-in-1980-What-was-it-like.html>>.
- 43 Ibid.
- 44 One of the few educated Kashmiris from Mirpur at this stage who qualified as a school teacher from Leeds University in the early 1950s.
- 45 First author's personal interview with Mehmood Hashmi in Birmingham, 12 June 2006.
- 46 Ibid.
- 47 2011 census using Roger Ballard's 'two third of Pakistanis are actually from Azad Kashmir estimate.
- 48 In Islam, a fatwa is a legal decree made by someone who has extensive knowledge of Islamic law and authority to issue a fatwa.
- 49 Sufis emphasise and promote a mystical form of the Islamic faith that is known as Sufism. Similar trends can also be seen in other religions and even amongst people who do not have any religion.
- 50 Established in 1932 at Srinagar as a pioneer of Azad Kashmir state. It was converted to National Conference in 1939 and was re-formed in 1942.
- 51 In 1965, Azad Kashmir Plebiscite Front was established where Abdul Khaliq Ansari Advocate was elected as its president and Amanullah Khan as general secretary. While it had no

organisational link with the party of similar name announced by Sheikh Abdullah of National Conference in the mid-1950s in Kashmir Valley, both shared the slogan of the plebiscite.

- 52 Tariq Ali is a British-Pakistani historian, novelist, film-maker, campaigner, political commentator, and former president of the Oxford Union in 1965. He has been a leading figure of the Left internationally for more than 40 years. He has been long associated with the New Left Review and joined the International Marxist Group, in 1968.
- 53 Aftab, Ahmed, 'Unlocking the Potential of Kashmiri Diaspora' in Berghif Peace Support and Centre for Just Peace and Democracy (2011).
- 54 Shams Rehman and Virinder S. Kalra, "Transnationalism From Below: Initial Response by British-Kashmiris to the South Asia Earthquake of 2005," *Contemporary South Asia*, Vol.15, No.3, 2006, pp.309-323.
- 55 *Chitka* committee initiated writing Pahari-Pothwari language in the 1990s as a means to empower the Pahari and Pothwari speaking communities. Subsequently, the script of the language was developed with significant input by linguists from Azad Kashmir and Pothwar. Akhtar Imam Rizvi, the renowned Pothwari writer, broadcaster, poet, and linguist described these developments as seeds of marginalised language blossomed away from their soil.
- 56 <[http://archive-org-2014.com/org/k/2014-03-10\\_3826973\\_11/Kashmir-Record-amp-Research-Council-KRRC/](http://archive-org-2014.com/org/k/2014-03-10_3826973_11/Kashmir-Record-amp-Research-Council-KRRC/)>.
- 57 <<http://www.civitas.org.uk/pdf/CrimesOfTheCommunity.pdf>> also see <<http://www.dawn.com/news/1073966>>.



# INTERNATIONAL HUMAN RIGHTS LAW: THE REAL IMPROVER OF HUMAN RIGHTS SITUATION OR FAITHLESS PARADOXES?

MUHAMMAD IMRAN KHAN\*

## Abstract

*Due to the feeble mandatory and meaningful but optional implementation mechanisms, international human rights laws fail to change the behaviour of the states with respect to adherence to human rights standards. This leads to questions such as why states join the international human rights law regimes, why they subject their human rights practice to the scrutiny of the world community, and why the rights-abusing states readily join international human rights treaties while the rights-respecting states are hesitant in becoming a party to them. This paper argues that the ratification of human rights treaties has been used by the states for motives other than having real intentions of improving the human rights situation. Therefore, the international human rights law can be termed as the paradox of dishonest commitments rather than a real human rights situation improver. In conjunction with this, the standing of Pakistan being a signatory to a number of human rights core treaties, the level of its honesty in implementing the provisions of the ratified treaties, and compliance is critically evaluated.*

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## Introduction

Human rights are the first casualty of an emergency or a crisis situation. When states are confronted with situations of armed conflict, economic turmoil, natural disasters, and other dangers, the ultimate result comes in the shape of suspension of human rights protections. Such response of the states to the emergency situation is fuelled and encouraged by the ineffectiveness of the international human rights treaty regimes, which, in the case of their violation, provide for no serious sanction or punishment for the concerned states.

Over the last fifty years, international protection of the human rights system in terms of growth in the number of ratifications at the global level can be considered a success of the system. The scope of the core six international human rights regimes<sup>1</sup> increased in terms of the number of ratifications over 50 percent from the year 2000 to 2011.<sup>2</sup> Although the international human rights regimes are extensive, they provide no, or very weak, legal protection. Thus, these instruments have not been as effective and result-producing as it was hoped. The prime example is the Convention Against Torture (CAT), which prohibits torture and is considered the most successful human rights treaty. Although the convention is considered a remarkable achievement in the field of international human rights law, the post-9/11 events have led to encroachment of security measures over the prohibition of torture. Several signatory states to the convention are engaging in the practice of torture, yet they are not faced with any actions or sanction for violation of their international obligation.<sup>3</sup>

If international law is unable to change the rights-violating behaviour of states, then what is the use of states actually joining the international human rights treaty regimes? This paper briefly highlights the failure of international human rights regimes in protecting human rights and preventing their abuse. It discusses some interesting facts about the types of states that ratify international human rights treaties and their motives for doing that. It also looks into why the rights abusing states ratify international human rights treaties when they are not intending to comply with its obligations while the rights-respecting countries with better human rights records refrain from joining such treaties. The features of the treaties that attract ratifications by the states are discussed as well. Finally, the reasons for ratification of core

international human rights treaties by Pakistan are evaluated in light of the arguments given, obligations created through such commitments, steps taken for implementation of those obligations, and the level of compliance to those commitments. The challenges in this respect are also analysed.

### **International human rights law: Does it really work?**

The views about the effectiveness of international human rights laws vary. According to sceptics, international law is a mere window dressing, which is unable to change the behaviour and practice of the states. Those on the other side of the debate take international law differently. According to them, once states commit to certain international legal regimes, they are obliged by their international legal commitments most of the time. With the solid enforcement mechanism, its internalisation into domestic legislation<sup>4</sup> coupled with the principle of *pacta sunt servanda*, the international law is the most effective tool for protecting human rights.<sup>5</sup>

### **The reality: domestic structure as determining factor for ratification of human rights treaties**

The main question here is whether international law has so far proved effective in changing human rights violating behaviour of the states. Oona A. Hathaway has examined the compliance of 160 nations to human rights treaties over a period of forty years, which has led to some important findings. For example, the ratification of the CAT by a state does not guarantee its better record against torture in comparison to the states that have not ratified it. More surprisingly, becoming a party to a human rights treaty does not always have the intended results. In some cases, it produces the opposite results.<sup>6</sup>

Furthermore, according to Hathaway, states with less democratic institutions and poor human rights records will not be less likely to commit themselves to human rights treaties as they have very little intention of enforcing and implementing the treaties as compared to the states with strong democratic institutions and good human rights records. The states with effective and powerful domestic institutions and poor human rights records will less likely commit themselves to human rights

treaties because such commitment may lead to changes in their behaviour. Even states with more powerful democratic institutions and good human rights protection records may not ratify human rights treaties.<sup>7</sup> This finding contradicts the claim of the proponents of the effectiveness of international law, who hold that international law is the most effective tool for the protection of human rights in terms of domestic enforcement of international law and internalisation of international law into domestic legislation.

### **Why states join human rights treaties?**

The above facts lead to further questions, such as why some states join international human rights treaties despite having some of the worst human rights records and no intention of respecting and honouring those treaty obligations. Why a state subjects its domestic human rights practices to the scrutiny of individuals, groups, courts, peers, and the rest of the world in the first place? States' motives and willingness for giving consent to be bound by a human rights treaty can be classified into the following categories.<sup>8</sup>

#### **Realist ratifiers**

The effects of international law are not binding unless the state consents to be bound by it.<sup>9</sup> A state only consents to it after weighing the costs and benefits of binding itself to a treaty. According to this theory, international law's anticipated positive and negative effects largely determine states' choices to commit to international law in the first place. States ratify the treaties when the anticipated benefits outweigh the costs. The states calculate the potential benefits and costs while binding themselves to a treaty.<sup>10</sup> Mostly, states join a treaty under the following cases: commitment leads to no change in the existing laws of the country as it is already in conformity with that treaty, noncompliance to the treaty will not be detected and even if detected there will be no sanctions for the state,<sup>11</sup> or the treaty does not impose any legal obligation in the first place.<sup>12</sup> If the treaty compliance monitoring system is effective, the rights abusing states will rarely ratify it as compared to rights-affirming states.<sup>13</sup>

**Liberalist ratifiers**

Unlike the realist ratifiers, liberalist ratifiers do not calculate the costs and benefits of treaty membership.<sup>14</sup> “Democratic nations generally have stronger internal enforcement mechanisms than nondemocratic nations,” which make them quite cautious in choosing a treaty to join and the extent of its commitment towards it. Although the democratic states are vocal supporters of human rights, they know that even minor violation of a treaty provision will be costly and embarrassing. Thus, liberal states will ratify the closely monitored treaties often after putting reservations to modify treaty commitments.<sup>15</sup>

**Constructivist ratifiers**

The determining factor of treaty ratification for constructivist ratifiers is the substance of the treaty and its conformity, accordance, and relevance with its cultural, ideological, and normative values, norms, and commitments.<sup>16</sup> Whatever commitments are made by constructivist ratifiers, either positive or negative, they are usually made sincerely and in good faith. The implementation provisions such as enforcing, coercing, or evading are not important for this type of ratifiers because true ratifiers do not need any mechanism for ascertaining their compliance.<sup>17</sup>

**Sociological institutionalism/the ratifiers that care for reputation**

Some states join human rights treaties for giving an expression of a legitimate statehood. Such states are called sociological institutionalist states. According to this view, the principles of human rights are now becoming highly important and constitutive elements of legitimate statehood. Thus, in this case, a state's concern for its reputation plays a significant role in its decision to ratify a human rights treaty. Such states join the treaties in full or parts to make themselves look good. Therefore, even the repressive regimes will demonstrate support for the human rights treaties, despite the fact that such states have very little or no intention of implementing and abiding by them. The main causal factor of this hypocrisy is weak and ineffective implementation and monitoring mechanism, which allows such states to circumvent legal obligations imposed by the treaties.<sup>18</sup>

**Ratification as a fashion: seeking political and other incentives**

If the number of ratifications of a treaty grows in a specific region, the remaining countries within that region will more likely ratify that treaty for obtaining certain benefits, such as smooth relations with other countries, engaging with them in trade and military alliances, and attracting foreign investments, donations, and other tangible gains. Thus, the more likely a treaty is ratified in a specific region, the more likely it is that the rest of the states will join that treaty as well.<sup>19</sup>

**False negatives and false positives**

The above-mentioned categories except the constructivist ratifiers demonstrate that rather than really implementing human rights reforms and improving human rights situation, states ratify human rights treaties for a number of other motives. This leads us to discuss the question raised by Hathaway as to why some states with better human rights records do not ratify human rights treaties, while states that have the worst of human rights records and no intention of implementation and compliance to a treaty actually sign human rights treaties. An attempt is made in the following lines to answer this question.

**Rights respecting states – false negative states**

When a state ratifies a treaty and makes an attempt to integrate it into the national system, it bears certain implications for the existing system of national rules and laws. In states with strong reputations for the rule of law, the treaties once ratified may actually have certain impacts on the national legislation and judicial systems. That is why the countries where the rule of law is actually strong may seriously think about the implications of international law obligations for the domestic law before giving consent to a treaty. Therefore, their process of treaty ratification is very careful. Such a category is called the 'false negatives'.

**Rights abusing states – false positive states**

Many states commit themselves to a treaty where they do not have the real intention and capacity to implement the provisions of the treaty or abide by it. According to such states, ratification of a treaty without necessarily having to implement it is a good bargain. Since they

are enticed by promoters of the human rights treaties for some benefits, such benefits are offered “for positions rather than for effects.”<sup>20</sup> For such ratifiers, the expected benefits will exceed the costs that they may incur. They take into account the collateral consequences of ratifying the treaty as they have more to gain and no or little to lose. And in this case, the ratification process is driven by potential benefits of committing to a treaty regime. Therefore, there may be widespread ratification of the treaty with very less or no real impact on human rights conditions. This type of ratifiers may be termed as gamblers or false positivists.<sup>21</sup>

There are numerous examples, but let us consider some important ones. The United States, despite having a very good record of protecting the rights of women, has not so far ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) of 1979. On the other hand, countries such as Afghanistan and India have ratified the core human rights treaties with the worst of human rights records and no intention of implementing and complying with treaty obligations.<sup>22</sup>

### **Ratification of a treaty by the level of soundness of enforcement mechanism**

As discussed above, one of the determining factors for ratification of international human rights treaties is the effectiveness of its enforcement mechanism. The worst violators of human rights protections more likely ratify human rights treaties, and the countries that have ratified human rights treaties are at times the worst abusers of human rights. This attitude among states exists mainly due to the fact that the international human rights law is strong in substance but remarkably ineffective and weak in its enforcement.<sup>23</sup> In this section, as an example, we may now examine the enforcement mechanisms of CAT<sup>24</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>25</sup> that are celebrated amongst the most successful international human rights instruments.

#### **The enforcement mechanism of the CAT**

The CAT prohibits states from intentionally inflicting “severe pain or suffering, whether physical or mental on any person to obtain information or a confession or to punish that person or to intimidate or

coerce him or a third person.”<sup>26</sup> The following lines will evaluate briefly the striking aspects of the ratification of the convention.

Three forms of ‘treaty implementation mechanisms’ exist today: First is reporting, where states describe the measures that have been taken for the implementation of the treaty; the second is the state-to-state complaints, which so far have never been used; and the third is the individual complaints mechanism, which is the strongest and most effective form of implementation.

The minimum enforcement mechanism is the state reports, which should be submitted to the treaty body, the Committee Against Torture, which is an international body created to oversee the implementation of the convention.<sup>27</sup> However, even this minimal requirement is often ignored by the states. Strong enforcement procedures in the shape of interstate and individual complaint mechanisms in articles 21 and 22, respectively, are available but such procedures are not mandatory. It is the discretion of states whether to accept the mandate of the Committee Against Torture to receive and hear complaints from individuals concerning the violation of the rights guaranteed in the convention. The ratification of such optional provisions is not necessary for joining the treaty.<sup>28</sup>

#### **Implementation mechanism of the ICCPR**

The ICCPR obliges state parties to submit periodic reports two years after entry into force of the covenant for the said state and then a report after every five years to describe all the steps for the execution and implementation of the covenant. Also, “whenever the committee so requests,” the states are obliged to submit the compliance and enforcement report. The covenant provides for interstate complaints, which is made optional only if a state consents to article 41 of the covenant.<sup>29</sup> The First Optional Protocol provides for a stronger implementation system, which is the individual complaint mechanism. In this system, an individual complains about the behaviour of the state as in violation of their rights.<sup>30</sup> However, even the minimal requirement of submitting the report is extremely ineffective, wherein reports submitted even after such a long interval and after states are given ample time to prepare statements that best represent them, are often perfunctory.<sup>31</sup>



### **Determining factors of ratification and compliance**

The ICCPR and the International Covenant on Economic Social and Cultural Rights (ICESCR) demonstrate different rights. However, similarity between the implementation mechanisms of both the treaties leads to nearly the same level of ratification and membership. On the other hand, as stated above, the ICCPR combined with its Optional Protocol, which guarantees the same rights but provides for a comparatively different and effective implementation mechanism, leads to a great variation in the membership and ratification.<sup>32</sup> Pakistan has ratified both the ICCPR and the ICESCR mainly because of the similarity in its enforcement mechanism. However, Pakistan has not signed the stronger enforcement options in the shape of First Optional Protocol.<sup>33</sup>

In the context of the strength of and compliance with a treaty regime, we can infer from the above discussion that the factor determining the strength of the human rights treaty membership is the soundness of its implementation mechanism rather than the substantive content of the treaty. Apart from the ICCPR, Pakistan has ratified a variety of international human rights protection treaties. However, where these treaties provide for binding, invasive, and effective enforcement mechanisms, Pakistan has not ratified or given consent to such international obligations. For example, although it has ratified the CAT, CEDAW, and the Convention on the Rights of Child (CRC), it does not recognise the competence of the treaty bodies of these treaties for entertaining individual complaints against Pakistan in terms of the rights guaranteed in these treaties.<sup>34</sup>

### **The human rights regimes: hollow promises**

The absence of effective and strong enforcement mechanism provides a strong incentive for states to join a treaty without making any serious commitment to its implementation and promotion of respect for human rights.<sup>35</sup> At times, these treaties may even shield the repressive behaviour of a state once it has ratified it, as after the ratification of a treaty, the state cannot be further forced to take any actions. So, once the external pressure decreases, the concerned state may start committing worst forms of human rights violation and human right regimes are unable to stop it because of the lack of effective enforcement mechanisms.<sup>36</sup> Thus, the impact of the human rights

treaties may be termed as 'hollow promises and commitments with no real effect' as the states make a formal legal commitment without any intention of complying with it.<sup>37</sup>

## **Where does Pakistan stand?**

### **Legislative dimension**

Unlike monist states, in Pakistan, international law does not prevail over the national law.<sup>38</sup> Both the national and international law are not considered to be one and the same. The mere act of ratification of an international law does not automatically incorporate it into domestic law, the national judges cannot directly apply the international law, nor can the citizens invoke it. In Pakistan, being a dualist state, there is a difference between the national and international law. The latter must first be translated and inserted into the former for it to come into force. Otherwise, international law will not exist at all. In dualist view, the national judges, apart from the provisions of international law that have been translated and incorporated into national laws, cannot apply international law.<sup>39</sup>

Having critically discussed different aspects of the international human rights treaty regimes and the legislative dimensions of Pakistan, we may now evaluate the status of Pakistan in line with the arguments furthered above, such as the type of ratification. That is, whether the ratification of Pakistan's international human rights treaties can be termed as realism, liberalism, constructivism, ratification as a fashion, or sociological institutionalism. Then it will be evaluated whether Pakistan's approach can be termed as 'false negative' or 'false positive'. The issues and the problems faced by Pakistan will be highlighted and finally, suggestions will be forwarded for a solution to those issues.

### **Pakistan's perspective**

Out of the nine core human rights treaties, Pakistan has ratified seven. The privileged Generalised System of Preferences (GSP)<sup>40</sup> plus status for trade with the EU was granted to Pakistan for encouraging the rise of the country's economy, especially in the field of exports to Europe, on the condition of ratifying and implementing the core human rights treaties without any reservations. This scheme provided Pakistan with an opportunity to improve its trade as well as laws on good governance and

human rights issues. The EU is the destination for 33 percent of Pakistan's exports, and thus a leading trade partner. Once ratification of a human rights treaty takes place, it leads to the creation of legal obligations at the international level and the states are duty bound to be in conformity with all the obligations a treaty creates, which can be called the consequences of the ratification.<sup>41</sup> However, while ratifying the treaties, Pakistan has taken the approach of 'ratify the treaties now for getting benefits, while thinking about the consequences later' because of Pakistan being a dualist state where the treaty provisions do not come into force automatically.

### **Steps taken**

For fulfilling its international legal obligations, Pakistan has taken numerous steps and measures. It has established the Ministry of Human Rights and National Commission on Human Rights. Following the 18<sup>th</sup> Amendment to the 1973 Constitution, 'treaty implementation cells' (TIC) were also established in the centre and each of the four provinces of Pakistan through the Ministry of Law and Justice. The federal-level TIC has representation from all the federating units. And at the provincial level, each province has its own TIC.<sup>42</sup> Apart from the TICs, at the provincial level, all the provincial governments have established a number of human rights institutions.<sup>43</sup> These efforts describe Pakistan's commitment towards persuasion of the EU for maintaining and continuing with its GSP plus status. However, these measures are described by critics as mere 'cosmetic arrangements' for international image building, which so far has exerted no substantial positive effect on the observation and implementation of international law obligations.

### **Level of Pakistan's compliance and its categorisation in terms of the type of ratifiers**

The minimum requirement for monitoring treaty implementation, as discussed above, is the state reports to the respective treaty body. Analysing Pakistan's compliance history with this minimum requirement reveals an unsatisfactory track record in this respect. Although Pakistan has ratified the CAT, the minimum obligatory requirement for enforcement of the CAT is the state reports. Since July 2011, report to the United Nations Convention Against Torture is overdue. For the ICCPR, the report was due in 2011, which was submitted in 2015, with

four years' delay. Similarly, the report to ICESCR was submitted in 2015 with more than five years' delay and the report for the Convention on the Rights of Persons with Disabilities is overdue since 2013. The few reports that are submitted even after such long delays are considered as insufficient and often perfunctory by the relevant treaty bodies.<sup>44</sup> The failure of Pakistan to submit the reports in a timely manner earned it a reputation of non-seriousness for its international commitments in the international community.

Furthermore, 126 recommendations have been accepted by Pakistan out of the 167 recommendations by different treaty bodies for Pakistan. Not even a single recommendation has been implemented relating to child rights, freedom of thought, religion, conscience and expression, and enforced disappearance, though.

From the aforementioned discussion, it is evident that Pakistan has ratified the international human rights treaties for economic gains in the shape of the privileged GSP plus status and image and reputation building in the international community, coupled with a poor track record of its compliance with these obligations. Therefore, the categorisation of Pakistan in terms of types of ratification discussed above can be that of the realist ratifier, and the ratification for the sake of reputation or sociological institutionalist ratifier. The realist ratifiers often ignore and escape the effective and invasive monitoring and implementation mechanism, as discussed earlier. In the same way, Pakistan has not recognised the effective implementation and monitoring mechanisms, such as the respective treaty body's individual complaint mechanisms.<sup>45</sup> The non-ratification of these invasive but effective treaty enforcement and implementation mechanisms is a causal factor for Pakistan's double-standards in ratifying human rights treaties for financial gains as well as image building at the international level rather than honestly implementing them.

### **Issues**

For Pakistan, however, the story may not be that simple. Previously, for image building and getting praise at the international level alone, Pakistan consented to a number of UN and ILO conventions and treaties, which lack the capacity to provide for any binding restrictions and punishments in case of noncompliance. Therefore, Pakistan took no pains for complying with those obligations or preparing and submitting

the compliance and implementation reports. The same is not the case with EU treaties and conventions, though, which provide for binding measures and mechanisms for ensuring compliance. Therefore, noncompliance with those UN treaties that are associated with the GSP plus status may weaken Pakistan's ties with the EU in terms of trade.

Even though the erection of the treaty implementation bodies is a positive step, there remains much work to be done for ensuring the implementation of the treaty obligations in letter and spirit. There is a lack of understanding and awareness regarding implementation and compliance to these international legal obligations, specifically with regard to the reporting procedure. In Pakistan, the public, in general, is unaware of the existence of these treaty implementation cells, the way they work, and their composition. The human rights protection mechanisms that exist and are available under international law are not, or very little, known outside the relevant academic circles. Therefore, they have not been used frequently. The public is unaware as to which international law Pakistan has signed. This situation exists mainly due to the failure on the part of the government to disseminate information regarding all these matters of public importance and benefit. Pakistan is obliged under international law to raise public awareness about the mechanisms that exist under the international law for relieving the grievances relating to human rights violations.<sup>46</sup>

Furthermore, Pakistan has general and very broad reservations with regard to the treaty regimes it has ratified, such as the ICCPR, ICESCR, CAT, and CEDAW. These reservations are such in nature that it actually undermines the very essence and effectiveness of these treaty regimes. Keeping in view these facts, it can be safely deduced that in terms of 'false positive' and 'false negative', Pakistan can be termed as a 'false positive' ratifier that has verified international law in a gambling manner.

### **The level of seriousness towards its international obligations compliance**

To control the increasing militancy in the wake of the war on terror, the government responded through the 21<sup>st</sup> constitutional amendment. The 20-point National Action Plan (NAP) was also announced, by virtue of which military courts were established in

Pakistan to try suspects of terrorism and the death penalty was reinstated.

Prohibition of the death penalty can be found in a number of international treaties, conventions, and declarations to which Pakistan is a signatory.<sup>47</sup> According to the Human Rights Committee, special military tribunals often do not meet the threshold of the requirement of an independent and impartial right to fair trial.<sup>48</sup> British lawyer Lord Steyn has explained the situation in the following words, "The military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners." The situation amounts to 'monstrous failure of justice' according to him.<sup>49</sup>

Moreover, according to the ICCPR's committee, such courts are often established for the purpose of applying exceptional measures, which in normal standards of justice cannot be applied. The committee argues that even in circumstances where the military courts are established, they must not impose the death penalty. According to the second optional protocol to the ICCPR, the imposition of the death penalty is an arbitrary deprivation of the right to life and an extreme case of torture, and thus in violation of the right to fair trial, the right to life, and the prohibition of torture.<sup>50</sup>

In 2015, with respect to human rights situation in the country, Pakistan remained near the bottom of state rankings, at 146 out of 187, over a number of crucial indicators relating to human rights situation.<sup>51</sup> The legality of the establishment of the military courts was challenged by several lawyers before the Supreme Court of Pakistan. On 5 August 2015, the Supreme Court confirmed the legality of the military courts and its competency to hand down death sentences. According to the International Commission of Jurists, "This judgment squarely puts Pakistan at odds with its international obligations and weakens the Supreme Court's hard-won reputation as the last resort for protecting the rights of Pakistani people."<sup>52</sup>

On completion of one year of the establishment of military courts and reinstatement of the death penalty, more than 311 death sentences were executed, which ranked the country third amongst the top death sentence executioner countries internationally. Although the government defended such a stance with the justification of curbing the ever-

increasing threat of terrorism, out of those 311 plus executions, only 16 were linked to terrorism one way or the other.<sup>53</sup>

### **The way out**

Pakistan's failure in complying with the obligations and requirements of the GSP plus status may lead to its withdrawal and loss of such privileged position by the EU. It is the need of the hour for Pakistan to channelise and strategise human rights reforms. The country's economy could suffer because of the loss of the GSP plus status. Pakistan has toothless domestic human rights protection institutions and a poor human rights record. The toothless domestic human rights bodies need to be made effective and the reporting obligations to the respective human rights treaty bodies need to be regularised. The reporting also needs to be made in a timely and complete manner rather than late and perfunctory. All the reservation made to the treaties need to be withdrawn and the general recommendations need to be taken seriously.

Capacity-building of personnel and departments involved in the implementation of international law and compliance reporting need immediate attention. The reason for this is that even though Pakistan has ratified the core human rights treaties, there is a severe lack of understanding amongst relevant stakeholders about the kinds of national obligations thus created.<sup>54</sup> The *Compilation of Guidelines on the Form and Content of Reports to be submitted by States Parties to the International Human Rights Treaties* issued by the Secretary-General of the United Nations in 2009 may be very helpful and of great assistance in this regard. These guidelines provide general as well as specific information about the submission of initial and periodic reports, such as what type of data should be included and its categorisation etc.<sup>55</sup>

Finally, undermining the judiciary through the establishment of military courts may not be the solution to the problem, rather the capacity of the judiciary against such threats should be boosted. The misuse of the military courts may lead to a violation of human rights. A right-respecting response, respect for the rule of law, and strengthening the civilian judiciary is required to overcome the problem of terrorism.

## **Culmination**

International law lacks an effective enforcement mechanism. Even where relatively stronger enforcement mechanisms do exist, they are not mandatory. Due to the weak mandatory mechanisms and strong but fully optional mechanisms, international human rights obligations are often ignored by the state parties. The determining factor of becoming a party to human rights treaties is the effectiveness of their enforcement mechanism. The stronger the enforcement mechanism, the lesser the states will commit to it.

The reasons for states' ratification of the international human rights law regimes are quite complicated and detached from the real purpose for which human rights treaties are adopted. According to the realist approach, the 'costs and benefits' of committing to a treaty are considered determining and driving factors for ratification and becoming a party to a treaty. The liberalist states, on the other hand, take the treaty ratification and commitment seriously. Therefore, they may ratify the closely monitored treaties. However, they may relieve themselves of unwanted provision by putting certain reservations, or they may not even ratify the treaties in the first place, thus limiting the effectiveness of a treaty regime or fully abandoning it. In the constructivist approach, the determining factor for the ratification of a treaty is its substance and its congruence with certain norms of the ratifying state. Some states, in giving the impression of a legitimate statehood, may ratify certain treaties because in today's scenario human rights are considered as constitutive of legitimate statehood. Here the element of reputation plays an important role in the ratification of a treaty. Such type of ratifiers is called sociological institutionalist states.

If the ratification of a specific treaty is widespread in a region, the other states may also ratify the treaty as a fashion without any intention of implementing and complying with it. And most interestingly, the countries with strong rule of law and better human rights records may not ratify human rights treaties, while the countries with fragile domestic implementation institutions, weak rule of law, and worst human rights records may join the treaties. Both the types may be termed as false negative and false positive, respectively.

In this classification, Pakistan falls into the realist ratifiers' category, where it has ratified the core human rights treaties for getting



economic and political gains. Furthermore, Pakistan did so for image-building in the international community, which further qualifies it for the category of ratifiers that ratify for the sake of image and reputation-building in the international community. Because of ratification without a genuine intention of implementing treaty provisions or ensuring the rights guaranteed in those respective treaties, coupled with the worst of human rights records, Pakistan can be termed as a case of 'false positive', which, despite having vocal support for and ratification record of core human rights treaties, is a violator of the rights protected by those treaties: For instance, the rights to fair trial, protection against arbitrary death penalty, and prohibition of inhuman and degrading treatment.

To come up with the international human rights law obligations and the expectations of the international community as well as genuinely improve the human rights situation, the following steps and measure need to be taken on a priority basis:

- The capacity of the relevant stakeholders needs to be enhanced;
- Human rights reforms need to be channelised and strategised;
- Domestic institutions for human rights protection need to be made effective and efficient;
- Reporting obligation to the respective human rights treaty bodies needs to be regularised;
- Exceptions to human rights treaties that are general and unspecific in nature need to be withdrawn;
- General comments of the treaty bodies need to be taken into serious consideration, which may be of ample assistance and guidance in understanding treaty provisions and helpful in discharging the treaty obligations; and
- Last but not the least, the undermining of the judiciary by the establishment of a parallel judicial system in the shape of the military courts might not be the solution to the problem of the ever-increasing terrorism. The alternate could be a right-respecting response that would also be in conformity with the international human rights obligations.

## Notes and References

- 1 Core six international human rights regimes include ICCPR, ICESCR, CERD, CEDAW, CAT and CRC.
- 2 The consultation meetings and sessions that took place in Sion, Switzerland, with respect to non-formal consultation with state parties to international human rights treaties from 12 to 13 May 2011, available at <[www.ohchr.org/english/bodies/HRTD/SionConsultation.htm](http://www.ohchr.org/english/bodies/HRTD/SionConsultation.htm)>, accessed 7 June 2016.
- 3 Comparatively, India has signed the Convention on 14 October 1997. However, 19 years after signing the Convention, India is yet to ratify it. Like Pakistan, India failed to take comprehensive measures and steps for bringing its domestic legislation in conformity with the Convention. However, as India has not ratified the Convention yet, it is not binding for India as it is for Pakistan. International law only becomes binding upon a state when it ratifies the specific law. Thus, India is not in violation of international law but Pakistan is. The positive aspect of India with respect to the Convention is that India wants to incorporate the Convention's provisions into its domestic legislation in the first place and ratify the Convention later with 'Monist' style ratification. In this respect, an attempt was made when in 2008 it was decided to have a stand-alone legislation to give effect to the provisions of the Convention. Two years later, the Bill was introduced in the Lok Sabha and passed by the House on 6 May 2010. However, it remained pending in the Rajya Sabha and lapsed with the dissolution of the 15<sup>th</sup> Lok Sabha.
- 4 Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Massachusetts: Harvard University Press, 1995); Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997), pp.2599–2659.
- 5 *Pacta sunt servanda* means "agreements (and stipulations) of the parties (to a contract) must be observed." *Black's Law Dictionary*, 6<sup>th</sup> ed., (1990), p.1109.

- <sup>6</sup> Oona A Hathaway, "Why Do Countries Commit to Human Rights Treaties?" *Journal of Conflict Resolution* 51 (2007), pp.588-621; Eric Neumayer, "Do international human rights treaties improve respect for human rights?" *Journal of Conflict Resolution* 49 (2005), pp.925-953; Emilie Hafner-Burton, Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," *American Journal of Sociology* 110 (2005), pp.1373-1411. For instance, in 1982, Guatemala ratified CEDAW. In the same time period, the government was reportedly practising the executions, political murders, and imprisonment for political views. The human rights practices worsened despite the ratification of the six core human rights treaties in 1992, which protect the citizens from all forms of human rights violations. And such violations of human rights reached its peaks in 1994 and 1995. The second example is Iraq where, in 1994, the government ratified the core five human rights treaties. However, the same year, Amnesty International reported that in Iraq repression was systematic, extreme, and throughout the country. This situation demonstrates that human rights treaties have little impact on human rights practices in actual.
- <sup>7</sup> Oona A Hathaway, "Do Human Rights Treaties Make a Difference?" *Yale Law Journal* 111 (2002), pp.1935-2042.
- <sup>8</sup> This classification is based on the work of Emilie M. Hafner-Burton.
- <sup>9</sup> The view is held by the opponents of the concept of 'Erga Omnes'.
- <sup>10</sup> Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization* 65, No. 4 (2011), pp.673-707, Published by Cambridge University Press on behalf of the International Organization Foundation.
- <sup>11</sup> Burton and Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises," pp.1373-1411.
- <sup>12</sup> Oona A Hathaway, "The Cost of Commitment," *Stanford Law Review* 55 (2003), p.1856.

- 13 Eric Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties," *Journal of Legal Studies* 36 (2007), pp.397-29.
- 14 Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?", pp.925-953.
- 15 Hathaway, "The Cost of Commitment," op.cit, p.1821-1862: Neumayer, "Qualified Ratification: Explaining Reservations to International Human Rights Treaties," pp.397-29.
- 16 Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2<sup>nd</sup> ed. (New York: Cornell University Press, 2003), p.69.
- 17 Danial J. Whelan, Jack Donnelly, "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight," *Human Rights Quarterly* 29 (2007), pp.908-949.
- 18 Emilie Hafner-Burton, Kiyoteru Tsutsui, and John W. Meyer, "International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties," *International Sociology* 23 (2008), pp.115-141.
- 19 Neumayer, "Do international human rights treaties..." op.cit, pp.925-53.
- 20 Some versions of this argument even claim that the ratification of human rights treaties worsens the state's behaviour. For example, Emilie Hafner-Burton, John W. Meyer, and Kiyoteru Tsutsui in *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, have argued at page 129, "governments, armed with growing information that commitment to the regime would not lead to serious enforcement but would grant them legitimacy in the eyes of other states, were now free to hide domestic human rights practices behind the veil of international law."
- 21 Public Statement, AI Index: AFR01/002/2005(Public) News Service No.204, 29 July 2005, at <<http://web.amnesty.org/library/Index/ENGAFR010022005?open&of=ENG-375>>, accessed 11 May 2016. Countries have been praised by Human Rights Watch for their ratification of the statutes of the

- International Criminal Court; see <<http://www.hrw.org/english/docs/2000/12/11/german645.htm>>, accessed 11 May 2016.
- 22 Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (2010), pp.119-20. The compliance rate “hovers slightly above 12 percent, a low figure by any measure” and over the time, the implementation record has even further deteriorated.
- 23 Hathaway, “Why Do Countries Commit...,” op.cit., pp.588-621: Neumayer, “Do international human rights...,” op.cit., pp.925-53: Burton and Tsutsui, “Human Rights in a Globalizing World: The Paradox of Empty Promises,” pp.1373-1411: Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, p.8.
- 24 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p.85, available at <<http://www.refworld.org/docid/3ae6b3a94.html>>, accessed 21 July 2016.
- 25 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171, available at <<http://www.refworld.org/docid/3ae6b3aa0.html>>, accessed 21 July 2016.
- 26 Article 1.1 of the Convention Against Torture 1984: Neumayer, “Qualified Ratification...,” op.cit., pp.397-29.
- 27 Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reads, in part: “The State Parties shall submit to the Committee... reports on the measures they have taken to give effect to their undertakings under this Convention.”
- 28 Henry J. Steiner and Philip Alston, eds., *International Human Rights in Context: Law, Politics, Morals*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 2000), pp.592–704.
- 29 David Robertson, *A Dictionary of Human Rights* (London: Europa Publication Limited, 2005), pp.88-90.

- 30 Article 40, ICCPR.
- 31 Donnelly, “*Universal Human Rights...*,” op.cit., pp.117-123.
- 32 In 2009 the HRC estimated that the figure still amounts to roughly 30 percent; UNGA, 64th Session. Report of the Human Rights Committee, 1 January 2009, UN Doc. A/64/40, Vol. I, Supp. No. 40, paras. 230–236; Kevin E Davis, “What can the rule of law variable tell us about rule of law reforms?” *New York University Law and Economics Research Paper Series* (2005), pp.103-125; Hathaway, “The Cost of Commitment,” op.cit., pp.1821-1862.
- 33 UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p.171, available at <<http://www.refworld.org/docid/3ae6b3bf0.html>>, accessed 21 July 21, 2016), Pakistan is not signatory to this first optional protocol. Pakistan has two reservations regarding articles 3 and 25 that seem unspecific.
- 34 In the case of CAT, Pakistan has reservations to the following articles 8 (2), 20, 21, 22, 28 (1), and 30 (1). With such reservations, Pakistan does not recognise the competence of the committee against torture to receive individual complaints against Pakistan. As to CEDAW, Pakistan has a Declaration: “The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan.” And a Reservation: “The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention.” Again Pakistan does not recognise the competence of the treaty body to receive individual complaints.
- 35 Bryan S Turner, *Vulnerability and Human Rights* (University Park, PA: Pennsylvania State University Press, 2009).
- 36 Hathaway, “Do Human Rights Treaties Make a Difference?” op.cit., pp.1935-2042.

- 37 Neumayer, "Do International Human Rights..." op.cit., pp.925-953.
- 38 James Atkin and Baron Atkin, in M. Akehurst, *Modern Introduction to International Law*, 7<sup>th</sup> ed. (London: Routledge, 1997), p.45.
- 39 Akehurst, *Modern Introduction to International Law*, op.cit., p.45.
- 40 Generalised System of Preferences (GSP) Plus status was granted in December 2013, granting Pakistani products duty-free access to the European market.
- 41 See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26 ('VCLT').
- 42 The main and overall objective of the TIC's is to enable the federal, provincial, and district level functionaries to effectively use the financial and human resources for creating forums to implement, fulfil, and comply with international human rights obligations contained in the respective human rights conventions and treaties, and to guide and inform the government and relevant departments of the costs and benefits of human rights treaty regimes.
- 43 Khyber-Pakhtunkhwa is leading the way by establishing the Directorate of Human Rights and Commission on the Status of Women and Child Protection and Welfare. The Human Rights Commission has been established by the provincial government of Sindh. The Commission on the Status of Women and Bureau of Child Protection and Welfare has been established by the government of Punjab. However, the provincial government of Balochistan is yet to establish any such forum.
- 44 United Nations International Covenant on Civil and Political Rights, Human Rights Committee List of issues in relation to the initial report of Pakistan, CCPR/C/PAK/Q/1, 15 November 2016, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPAK%2fQ%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPAK%2fQ%2f1&Lang=en)>. United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, List of issues in relation to

the initial report of Pakistan, E/C.12/PAK/Q/1, 7 November 2016, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fPAK%2fQ%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fPAK%2fQ%2f1&Lang=en)>, United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of Pakistan, CERD/C/PAK/CO/21-23, 3 October 2016. <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fPAK%2fCO%2f21-23&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fPAK%2fCO%2f21-23&Lang=en)>. Follow-up letter sent to the State party by Office of The High Commissioner for Human Rights with respect to CEDAW on 10 August 2016, <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT\\_CEDAW\\_FU\\_L\\_PAK\\_24832\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PAK/INT_CEDAW_FU_L_PAK_24832_E.pdf)>, all the contents last accessed 1 January 2017. The exhaustive and complete picture with respect to reporting track-record can be accessed at the following authentic online sources: <<http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/PKIndex.aspx>>, <[http://ap.ohchr.org/documents/dpage\\_e.aspx?c=138&su=140](http://ap.ohchr.org/documents/dpage_e.aspx?c=138&su=140)>, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=131](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=131)>.

45 Muhammad Rafique, “Pakistan’s International Human Rights Commitments: Challenges Ahead,” Published on 18 January 2016, Rights and Advocacy Expert.

46 Emilie M. Hafner-Burton, Edward D. Mansfield and Jon C.W. Pevehouse, “Human Rights Institutions, Sovereignty Costs and Democratization’, *British Journal of Political Science* 45 (2015), pp.1-27: Such obligation can be found in the ICESCR’s general comment no 3. Even though the general comments are not legally binding, in the interpretations of the treaties, they hold important and authoritative value.

47 United Nations Universal Declaration of Human Rights of 1948: The Declaration proclaims the right of every individual to protection from deprivation of life. It states that no one shall be subjected to cruel or degrading punishment. The death penalty violates both of these fundamental rights. International Covenant



on Civil and Political Rights of 1966, and its second Optional Protocol of 1989: Article 6 of the Covenant states that “no one shall be arbitrarily deprived of his life” and that the death penalty shall not be imposed on pregnant women or on those who were under the age of 18 at the time of the crime. Article 7 states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The UN Economic and Social Council (ECOSOC) adopted “Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.” In the same year, the Safeguards were endorsed by consensus by the UN General Assembly. The Safeguards state that no one under the age of 18 at the time of the crime shall be put to death and that anyone sentenced to death has the right to appeal and to petition for pardon or commutation of sentence. Article 37(a) of the UN Convention on the Rights of the Child prohibits the death penalty for persons under the age of 18 at the time of the crime. The UN General Assembly (UNGA) approved Resolution 62/149 in 2007 which called for all states that still maintain the death penalty to establish a moratorium on executions with a view to abolishing the death penalty.

48 Daryl A Mundis, “The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts,” *The American Journal of International Law*, 96 (2002), pp.320-328.

49 Lord Steyn, “Guantanamo Bay: The Legal Black Hole,” (Lecture, Twenty-Seventh F. A. Mann Lecture, 25 November 2003).

50 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, Article 6 (1), United Nations, Treaty Series, Vol. 999, p.171.

51 International Commission of Jurists (ICJ), *Military Injustice in Pakistan*, June 12, 2016, online access: <<https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf>>, last accessed 1 January 2017.

52 ICJ is comprised of 60 eminent lawyers and judges which has been established in 1952. The ICJ mainly work for the promotion and protection of human rights and rule of law.

- 53 International Commission of Jurists (ICJ), *Military Injustice in Pakistan*, p.22.
- 54 Saad-ur-Rehman Khan & Imaan Mazari-Hazir, "Implementing the treaty," *The News*, 1 January 2016.
- 55 The same module was suggested by John von Doussa, "The Potential Role of National Human Rights Institutions in the Pacific," (Speech delivered at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, 15 September 2008). <[http://www.hreoc.gov.au/about/media/speeches/speeches\\_president/2008/20080915\\_pacific.html](http://www.hreoc.gov.au/about/media/speeches/speeches_president/2008/20080915_pacific.html)>, accessed 24 June 2016.