Is the Frontier Crimes Regulation still an appropriate and effective method of governance in modern-day Pakistan?

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Abstract

The aim of this dissertation is to examine and determine whether the Frontier Crimes Regulation has been effective as a means of governance in the Federally Administered Tribal Areas of Pakistan. To this end, we will draw a historical narrative charting the law from the early days after the annexation of the area to British India, to the law's implementation under the new constitutional framework of the Pakistani state, and then towards reform efforts that have been undertaken in harmonizing those differences for the betterment of the tribal populace.

Contents

Introduction

The Federally Administered Tribal Areas (and the area it comprised, before it gained that title) have historically had an extremely fractious relationship with the state, with control over the area by any formal authority being almost continuously on shaky grounds, with constant battles between the rulers and the ruled almost a forgone conclusion, it was Lord Salisbury who stated, *They (Frontier Wars) are but the surf that marks the edge and advance of the wave of civilisation.*[1] The Pakistani state, the latest of such civilisations, following the draconian template laid down by their predecessors, established the Frontier Crimes Regulation (FCR) in order to control it.

In this dissertation, I will attempt to shed light on the intricacies of governance on this *outpost line of civilisation.*[2] In order to truly gain an understanding of the FCR and the legacy it has left, the first chapter attempts to chart the evolution of the law, from its beginnings as a piece of legislation used in British India to quell dissent and rebellion, to its co-opting by the Pakistani state in a similar pursuit. This is done through an analysis of the Murderous Outrages Act, how it functioned in practice, what were the aims and motivations of those who had a role in its crafting, and whether it effectively served those needs.

In the second chapter, I examine the law as it stood after Pakistan gained independence, with a particular view of how this was reconciled with the post-World War 2 recognition of inalienable fundamental rights amongst the wider people of the world. This will be done through an analysis of the Constitution of Pakistan, with particular reference to Article 247, and the role that it played in hampering the ability of the Judicial and Legislative branch of the government from playing an active role in the governance of FATA and

[1] David B Edwards, Heroes Of The Age: Moral Fault Lines On The Afghan Frontier (1st edn, University of California Press 1996).

[2] Winston Churchill, The Story Of The Malakand Field Force (1st edn, Bloomsbury 2015).

the dispensation of justice. I will also examine the text of the Frontier Crimes Regulation, specifically those sections concerning vesting of judicial, political and administrative powers. I attempt to establish what effect these laws have had on the actual administrative framework that governs FATA, and how it affected the development of governance and human rights in the tribal areas. I also attempt to determine if the government has acted in accordance with its constitutional and treaty obligations to protect the rights of its citizens.

The third chapter deals primarily with major reform efforts that have taken place, starting from the 2005 reform attempts held under the government of Pervez Musharraf, to the 2008 reforms under the Pakistan Peoples Party (PPP), the subsequent amendments to the FCR by the same government in 2011, and finally to the reform efforts of 2015 under the 'Pakistan Muslim League (Nawaz)' (PML(N)). I attempt to examine if any of these reform efforts have brought forth any major changes in the way that FATA is governed, and if so, has it led us closer to our final aim of integrating FATA into the mainstream of Pakistani political life.

Chapter 1

Historical Background

1.1 Introduction

In this chapter, we will attempt to examine the various legal doctrines that were implemented in the governance of the tribal fringes of British India. This will be done through an exploration of historical events, as well as through an analysis of the writings of prominent colonial authorities and personalities of the time.

1.2 An Origin Story

The North-West Frontier became a part of the British Empire with the collapse of the Sikh Empire.[3] This area on the fringes of the empire was wild in both geography and disposition of the native population, the civilizational forces that had tamed India many centuries ago into cohesive, controllable polities had not reached it yet. It was a young Winston Churchill, ever a man of his times, who said:

> *A single step has led from peace to war; from civilisation to savagery; from India to the mountains. On all sides the landscape is wild and rugged. Ridge succeeds ridge. Valley opens into valley. As far as the eye can reach in every direction are ragged peaks and spurs. The country of the plains is left, and we have entered a strange land, as tangled as the maze at Hampton Court, with mountains instead of hedges. So broken and so confused is the ground, that I despair of conveying a clear impression of it.*[4]

Churchill was just as unforgiving in his estimation of the people as he was of the geography, stating:

> *At a thousand yards the traveller falls wounded by the well-aimed bullet of a breech-loading rifle. His assailant, approaching, hacks him to death with the ferocity of a South-Sea Islander. The weapons of the nineteenth century are in the hands of the savages of the Stone Age.*[5]

Pashtuns, the native inhabitants of the area, lived in tribal family units, not governed by any formal laws in their interactions with other tribes and outside forces, but instead through an unwritten code of honor known as the

[3] Angel Rabasa, Ungoverned Territories (Rand 2007).

[4] Winston Churchill, The Story Of The Malakand Field Force (1st edn, Bloomsbury 2015).

[5] Ibid.

Pashtunwali.[6] This code of honour consisted of an untold number of customs and informal regulations, some playing smaller roles in the intricacies of day-to-day intra-tribal relationships, with others playing a role of greater prominence. Principal among the various customs described in the Pashtunwali is that of a need for revenge or justice if one's tribe is wronged.[7] This justice must be carried out at all costs, either through dispute resolution through a tribal jirga and if that is not possible, then it must be resolved through the spilling of blood.[8] Whether this meant that a person had to die for the obligation to be fulfilled or merely had to be wounded depended entirely on the kind of offence that was committed against the wronged party.[9] If a murder had taken place, then the only resolution was one of taking a life from the opposing members tribe. Since each individual's honour was intertwined with that of his tribe, this meant that oftentimes the entire tribe would assist in gaining revenge.[10] This custom often lead to decades-long blood-feuds between competing tribes, as well as conflicts with the Colonial authorities. This particular understanding of Pashtun customs was widespread among British officials at the time, it was said by Herbert Edwardes that they, *were literally never at peace unless they were at war!*[11] Edwardes himself had a particularly personal reason for this view, having been subject to assassination attempts twice while he was working for the colonial authorities in Bannu.[12] The popular view thus being that these were people who were inherently criminal, and therefore the laws that applied to *civilized* India, could not apply in their interactions with the Pashtun.[13]

Thus, the British Empire enacted Act XXIII of 1867, also known as the Murderous Outrages Act (MOA).[14] It was specifically created as a response to a series of murders against Europeans that were motivated purely, in the eyes

[6]Akbar S Ahmed, Pukhtun Economy And Society (1st edn, Routledge 2012).

[7]Ibid.

[8]Ghulam Shams-Ur-Rehman, 'Pashtunwali And Islam: The Conflict Of Authority In The Traditional Pashtun Society' (2015) 35 Pakistan Journal of Social Sciences <http://www.bzu.edu.pk/PJSS/Vol35No12015/PJSS-Vol35-No1-24.pdf> accessed 29 April 2017.

[9]Ibid.

[10]Ibid.

[11]Herbert Edwardes, A Year On The Punjab Frontier In 1848-49 Volume 2 (2nd edn, 1851).

[12]Ibid.

[13]Ibid.

[14]'Punjab Murderous Outrages Act 1867' (Commonlii.org, 2017) <http://www.commonlii.org/pk/legis/pj/consol_act/pmoa1867302/> accessed 25 April 2017.

of the British, by religious fanaticism.[15] These acts were seen as so contrary to the mores of polite society, that normal laws that regulated those acts under Indian law were not considered punitive enough to dispense proper justice, instead, extraordinary powers were required. Any 'fanatic' who murdered or attempted to murder a European was subject to a summary trial by a tribunal consisting of a commissioner and two other officers.[16] There was no method through which one could appeal the judgement of the officers, and an execution was often carried out the very next day.[17]

This sort of thinking was illustrated by a series of trials and subsequent executions that took place, chief among them, was the case of an attack on the wife of Lieutenant Ashton Brandreth, the executive engineer of Kohat, who was shot and left injured near the Kohat cantonment bazaar while travelling. Her attacker, a member of the Afridi clan, named Summad, was captured soon after and confessed to the crime.[18] Under regular Indian law, the harshest punishment allowed for an attempted murder was that of transportation for life,[19] that being a practice during colonial times of shipping a prisoner to a penal colony, which was seen as a cheaper alternative than imprisoning them, since the state only had to bear the cost of transporting the prisoner. However, this having been among a series of attacks carried out against European people in the past year, it was decided by Colonel J. R. Belcher, the commissioner of Peshawar that a harsher sentence was required. To this end, he appealed to the Punjab government that Summad should be summarily executed, even though such a measure was not permitted under the Indian Penal Code. The government of Punjab granted this permission to Belcher, and Summad was executed a day after his trial.[20] The law had been violated in the granting of this permission, but the Indian authorities, never too willing to punish the 'ruling race' for crimes against the natives, retroactively indemnified the officers from any prosecution and agreed with the stand of the Punjab government, that a special set of laws were required

[15]Ibid.

[16]No.9 of 1877:A Bill to Revive and Amend Act No.XXIII of 1867,Gazette of India,1877:Pt. V, IOR, V/11/45 (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[17]Ibid.

[18]Copy of letter no. 107 from G. Shortt to the PG, 1 March 1866, NAI, Foreign/Political A/March 1866/nos. 131–33, no. 30, paras 2–3. (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[19]'Section 307 - Indian Penal Code' (2017) <https://indiankanoon.org/doc/455468/> accessed 25 April 2017.

[20]Letter no. 118–172 from the PG to the GOI, 5 March 1866, no. 131, para. 8

for dealing with these special cases.[21] D. F. McLeod, the Lieutenant-governor of Punjab wrote:

> *There can, I think, be no doubt in the mind of anyone that this class of offences wholly differs in character from ordinary outrages and should be dealt with differently from them.*[22]

The parallels between the system that the Colonial administration opposed in the form of the Pashtunwali, that of indiscriminate revenge killings, and their own system, a systematic and regularized administration of the law of the land, then became muddy, the moral high ground swept away from under their feet. Commander-in Chief Charles Mansfield acknowledged as much in his defense of the MOA:

> *. . . (they) could not conceive what it was to live in the midst of a population in which English gentleman could not return from mess to their own houses without arms; where the whole cantonment, as at Peshawar, was girdled with sentries and watched by mounted patrols. Chief Commissioners had been struck down in their own verandahs; commanding officers had been murdered in their own lines; a lady had been struck down at Kohat: such a state of things was not conceivable in a civilized country, and could only be considered to be a feature of but half-suppressed war and flagrant hostility.*[23]

It is imperative to understand that Mansfield's portrayal of the region, that of being in a state of unending conflict with rebellious natives was not an opinion that was unique to him. It had been expressed in much the same way by Henry Durand, who stated that they were in *a watchful truce with hostility ever impending; and maintained towards frontier tribes notorious for the blood-feuds which raged among themselves.*[24] With that in mind, we can see that the central driving force behind the need for special legislation such as the MOA was not necessarily to maintain law and order, but rather to fight an undeclared domestic war.

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[21]Ibid.

[22]Memorandum by His Honour the Lieutenant-Governor of Punjab, D. F. McLeod, 20 November 1866, IOR, P/438/15, no. 14, p. 14. (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[23]Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, p.200. (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[24]Ibid. p.198.

The creation of the MOA itself stands out as possibly anomalous, since at the very time that this law was being drafted, the rest of British India was undergoing a notable modernization of its laws. Arbitrary and discretionary expressions of colonial powers were being reduced, and instead, governance was being codified through a series of sweeping legislations, such as the Code for Civil Procedure, the Indian Penal Code, the Code of Criminal Procedure, and the Evidence Act.[25]

Chief among the reformist-minded jurists advocating for accountable and rational law-making was Henry Maine, the very man tasked with the creation of the MOA. Maine believed that unregulated expressions of colonial authority were not acceptable and that for every act committed by the Indian government, there should be an associated legal power that allowed them to do so.[26] Being committed to these ideals, he argued against the application of special dispensations to the government of Punjab and its officers in carrying out what amounted to extrajudicial killings. On this, he wrote:

> *It sets all law aside, for our Code of Criminal Procedure has no application to such a Court and system as this. And, further, it seems to me to afford no security against wholesale and hasty executions.*[27]

He added further:

> *The danger of the Bill arose from the probability of its being applied somewhat under the influence of panic, and therefore, it was desirable that the utmost reasonable time for reflection and enquiry should be secured.*[28]

This fear of misuse of a law that was vaguely worded, for its subjects, the fanatics, were as ill-defined a term as can be imagined, and the powers granted, that of judicially sanctioned killings, wore heavy on Maine.[29] He was perhaps right to worry, since in the years that followed the implementation of the law, it was initially used with great restraint with the explicit understanding that

[25]Karuna Mantena, Alibis Of Empire (1st edn, Princeton University Press 2010).

[26]Letter from Henry Maine to Charles Wood, 19 February 1864, Charles Wood Collection, IOR, Mss/Eur/F78/114/2, fp. 41. (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[27]Henry Sumner Maine, Minutes By Sir H.S. Maine, 1862-1969 (1st edn, Superintendent of Govt Print 1890).

[28]Legislative Council Proceedings, 4 January 1867, IOR, V/9/10, p. 8.

[29]MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.

it was to be used only in the case of the most heinous crimes, to wit: only five cases were tried under the law between 1867 and 1877.[30] This however, quickly accelerated and between 1881 and 1905, a total of 93 cases were recorded in Balochistan alone.[31] Even so, he felt that if such a law did not exist, then the officers and the government would be forced to act in a manner that was not consistent with the law of the land. His belief that regular legal actions should prevail over what amounted to mob justice, thus led him to regularize and sanction their actions under the MOA. This he believed, would restrain the officers into complying with the legal code, and thus their actions would be legitimized and therefore controllable. In illustrating this, he stated:

> *. . . was not so much a Bill permitting officers on the trans-Indus frontier to order summary executions, as a Bill recognizing the fact that summary trials and executions were occasionally unavoidable in the trans-Indus territory, but placing the practice under regulation and restraint.*[32]

In effect, it can be said that, in this case, instead of the law sanctioning a government action, it was the other way around, with an existing action prompting the law into existence.

In 1925, a bill was introduced in the Legislative Assembly of India for the repeal of extraordinary laws[33] that cost too much in freedoms lost, for the scant benefit in safety that they seemed to provide. Among those so noted was the MOA, which was believed by V. J. Patel, the jurist who introduced the bill, to be entirely contrary to the functioning of a just government, believing that they armed the government with extraordinary powers at the direct expense of fundamental rights. One of his supporters is noted as saying, 'the days of regulations and ordinances are long past, and they are anachronisms in all civilised systems of jurisprudence.'[34] This however did not mean that

[30]Statement of Fanatical Outrages in the North-West Frontier Province and Baluchistan (1905), Intelligence Branch, Quarter Master General's Department, Simla, IOR/L/PS/20/203. (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[31]Ibid.

[32]Legislative Council Proceedings, 4 January 1867', IOR, V/9/10, p. 8; 'Legislative Council Proceedings, 22 February 1867, IOR, V/9/10, p. 89 (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[33]Legislative Assembly Debates, 3 February 1925, IOR, V/9/66 (as cited in MARK CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[34]Legislative Assembly Debates, 19 March 1925, IOR, V/9/68 (as cited in MARK

these laws were going to be done away with, since the Legislative Assembly was constrained by the Council of State, which was loath to whittle away at executive powers. Even in the Assembly itself, there were members who were opposed specifically on the grounds of inclusion of the MOA in the bill, Diwan Rangachariar, chief among them. He went so far as to say that any repeal of the bill was so detrimental to the well-being of the Indian state, that it would in itself constitute a crime.[35]

Even Muhammad Ali Jinnah, who would go on to create a state, ostensibly, to protect the very people that he was now condemning, opined that since the law applied in so few districts and was restricted in its application only to 'fanatics', it was necessary to allow its continued existence[36], even if that came at the cost of dilution of basic rights in those areas.

Subsequently, any references to the MOA were removed from the bill, and it was passed by the Legislative Assembly. It would seem that the instincts of the opposition were not unfounded in their criticism of the bill as being too inflammatory, and something that would never be implemented. The bill was never adopted by the Council of States, and the MOA was never overturned.

The debate about this particular Act's efficacy would rage on, even after the departure of the British, and the partition of India. In Pakistan, its bloody legacy would live on in the form of the Frontier Crimes Regulation.

1.3 Conclusion

We can see through the historical narrative that we have established that in governing the tribal areas, the laws and regulations established worked more towards solidifying colonial authority, rather than in ensuring the welfare of the people. To take it a step further, it can be said that these were, in a manner of speaking, laws governing warfare and not relations between the state and its subjects.

CONDOS, 'Licence To Kill: The Murderous Outrages Act And The Rule Of Law In Colonial India, 1867–1925' (2015) 50 Modern Asian Studies.)

[35]Ibid.

[36]Ibid.

Chapter 2

Post-Independence FCR

2.1 Introduction

With the creation of the new state of Pakistan, there was an opportunity to revamp the arrangement by which the tribal areas were governed, it is my aim, that through an analysis of the relevant Articles of the Constitution of Pakistan and the text of the FCR, we will ascertain if such a path was taken. I also examine the distribution structures of political and judicial powers in the area, and how it affected governance and dispute resolution in the tribal areas.

2.2 Constitutional Background

The Federally Administered Tribal Areas (FATA), are made up of seven political agencies and six frontier regions.[37] The political agencies are, Bajaur, Khyber, Kurram, Mohmand, North Waziristan, Orakzai, and South Waziristan. The frontier regions are Bannu, Dera Ismail Khan, Kohat, Lakki, Marwat, Peshawar, and Tank.[38] Following the independence of Pakistan, it was determined that the existing laws that governed the area should not be changed, and that the authorities that governed them should simply be changed from those of the former colonial masters, to the new Governor General of the State.[39] These areas thus came to be governed in an indirect manner through the Federal Government, and therefore as previously, had a great deal of autonomy in local governance, however, formal legal matters that cannot, or are not resolved through local jirgas, are administered through a set of special laws known as the Frontier Crimes Regulation.[40] As discussed in the previous chapter, these laws are a further evolution and refinement on the existing set of laws that governed the area when it was under British rule. It is my aim in this chapter to ascertain whether the FCR followed the template that was set up by the British, that being to contain and subjugate the populace, or whether the advent of Pakistan led to a new order in FATA.

It would have been thought that since the Constitution of Pakistan applies to all of Pakistan, that any special laws would have been eliminated on

[37]'Chapter 3: "Tribal Areas." Of Part XII: "Miscellaneous"' (Pakistani.org, 2017) <http://www.pakistani.org/pakistan/constitution/part12.ch3.html> accessed 26 April 2017.

[38]Ibid.

[39]Afridi, Latif, (1993) "Human Rights and Discriminatory Laws in FATA" in The Frontier Post, Peshawar, 12 December.

[40]'The Frontier Crimes Regulation, 1901' (Government Stationery and Print Department 1973).

the adoption of the Constitution. This is however, not the case, as the Constitution of 1976 makes special provisions specifically for these areas in the form of the Article 247. Article 247 contains a number of provisions that deal specifically with how and on what grounds the tribal areas are to be governed.[41] In order to understand the true effect of this article, we will analyze each subsection of it, to determine who it gives power to, and to what extent.

The Article concentrates power into the hands of the President and his Provincial Governors over the administrative framework that governs FATA, thus creating a dangerous confluence of powers with nearly no checks and balances in place.[42] Acts of Parliament do not apply to FATA without presidential consent, and the President may, of his own volition, create regulations for the governance of FATA.[43] Parliament and the various Provincial Assemblies, may make recommendations to the President, however, these have no binding authority and serve merely as advisory statements.[44] The President may, at any time, remove parts or all of the tribal areas from the ambit of this section, and integrate them into other provinces.[45] However, it also provides that before taking any such action, the President should ascertain, in any manner he deems appropriate, the views of the people in the tribal areas, as represented by the tribal jirgas.[46] The article further states that the authority of the judicial system in the rest of Pakistan has no jurisdiction in the tribal area, unless there is an Act of Parliament, that states that it does, this again being subject to the earlier approval required from the President.[47] As we can see, this creates a rather interesting dynamic, whereby all authority is vested into the President regarding administrative matters of the tribal areas, the judicial authorities cannot intervene, without Parliamentary approval, which would in turn require Presidential approval, and the Parliament itself cannot intervene without Presidential approval. What this leaves us with, is essentially a framework that is very inimical to change, and provides almost no say or recourse to the citizens of the tribal areas, in the ways in which they are governed.

[41]'Chapter 3: "Tribal Areas." Of Part XII: "Miscellaneous"' (Pakistani.org, 2017) <http://www.pakistani.org/pakistan/constitution/part12.ch3.html> accessed 26 April 2017.

[42]Ibid.

[43]Ibid.

[44]Ibid.

[45]Ibid.

[46]Ibid.

[47]Ibid.

Further concentration of powers into the hands of the President occur in Articles 51 of the Constitution, which states that the method of representation of FATA in the national assembly is subject to the President's approval, stating, 'the President may, by Order, make such provisions as to the manner of filling the seats in the National Assembly allocated to the Federally Administered Tribal Areas as he may think fit.'[48] This along with a similar statement in Article 59 regarding representation in the Upper House[49], render the Federal Government well in control over the politics of FATA.

We also must tackle the question of whether jurisdictional power provided for in the Constitution under Article 199 and 184, that being powers granted to the High Courts[50] and the Supreme Court[51] over Pakistan, hold sway over FATA as well. It would seem that this article falls into direct contradiction with the previously mentioned Article 247, which dismisses the ability of the court system to operate in FATA. We are essentially faced with the issue that although the citizens of FATA are granted all the rights that are given to the citizens of Pakistan, there is no method through which they can enforce those rights, since the institutions that are supposed to have that power, do not have jurisdiction over FATA. It seems then that the issue that we face is one of contradictory and paradoxical powers, leaving FATA unprotected from abuse.

The FCR has been stated to be in violation of both the Universal Declaration of Human Rights, as well as the Constitution of Pakistan.[52] Soon after the creation of Pakistan, the legality of the FCR was challenged through the Pakistani Judiciary, with the High Court of Lahore declaring it unconstitutional and inconsistent with the fundamental rights that are granted through the Pakistani Constitution[53], although this was of little consequence since the courts of Pakistan do not have any jurisdictional authority over FATA[54]

[48]'Chapter 2: "Majlis-E-Shoora (Parliament)" Of Part III: "The Federation Of Pakistan"' (Pakistani.org, 2017) <http://www.pakistani.org/pakistan/constitution/part3.ch2.html> accessed 26 April 2017.

[49]Ibid.

[50]'Chapter 3: "The High Courts" Of Part VII: "The Judicature"' (Pakistani.org, 2017) <http://www.pakistani.org/pakistan/constitution/part7.ch3.html> accessed 26 April 2017.

[51]'Chapter 2: "The Supreme Court Of Pakistan." Of Part VII: "The Judicature"' (Pakistani.org, 2017) <http://www.pakistani.org/pakistan/constitution/part7.ch2.html> accessed 26 April 2017.

[52]'FCR - A Bad Law Nobody Can Defend' (Human Rights Commission of Pakistan, 2005) <http://hrcp-web.org/hrcpweb/wp-content/pdf/ff/23.pdf> accessed 26 April 2017.

[53]Khan, Sarfraz, (2010) "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia" in Eurasia Border Review, Vol. 1.

[54]Ibid.

It is thought that although there is a consensus that the FCR needs to be repealed, there are still certain elements within the Federal Government and the tribal power structure, who are opposed to the change because of vested interests in maintaining the status quo.[55]

All in all, the independence of the Pakistani state, and the Constitution that followed, did not do much in the way of expanding the civil rights of the people of FATA, nor did it provide true democratic legitimacy, even where representation was granted. The arbitrary nature of powers that existed prior to independence did not fade away as was expected, and instead those same colonial powers were further entrenched, this time through constitutional means. What this meant for the citizens of FATA was that they continued to be governed through the colonial era legislations that had been put into place to keep them subjugated, and this had much the same effect of prevent them from advancing in any meaningful socio-economic metrics, therefore never truly bringing them into the mainstream of Pakistani political life.

2.3 How does the FCR function?

FATA can be said to have essentially been divided into two distinct categories, those which are directly administered through the Federal Government via Political Agents, and those that are instead administered indirectly by the Federal Government through the local tribes.[56] The Political Agent in FATA exercises a blend of judicial, executive and revenue-collecting authority in FATA through the provisions of the FCR.[57] Power, both of the legal and political variety, is centralized into the hands of the Political Agent, with him being the sole arbiter of justice, with very few accountability checks placed.[58]

Each tribal agency that comprises FATA is administered by a single Political Agent each, who is assisted in performing his duties by Assistant Political Agents, Tehsildars (administrative head of a Tehsil) and Naib Tehsildars

[55]Yusufzai Rahimullah, 'Some More Real Change In Fata' (The News) <https://www.thenews.com.pk/archive/print/317053-some-more-real-change-in-fata> accessed 28 April 2017.

[56]Muhammad Tayyab Ghafoor, 'Impediments Involved In The Integration Of Federally Administered Tribal Areas (FATA) In The National Mainstream Of Pakistan' <http://www.dtic.mil/dtic/tr/fulltext/u2/a512301.pdf> accessed 28 April 2017.

[57]Naveed Shinwari, 'Attitudes Towards Governance, Religion & Society In Pakistan's Federally Administered Tribal Areas Volume IV' <http://www.understandingfata.org/files/Understanding-FATA-Vol-IV.pdf>.

[58]Ibid.

(Deputy Tehsildars).[59] Instead of a formal police force, the area is controlled through paramilitary forces, as well as tribal militias, known as khassadars, working under the command of the military and the Political Agent respectively.[60]

The Political Agents main administrative duties are to ensure that government installations and departments continue to function in the area, to that end he is also responsible for dispute resolution between the various tribes, and for regulating trade and commerce between the various districts of FATA.[61] He also serves in a supervisory role for any development projects intended for his agency as well as any proposals or approvals for said projects and schemes.[62]

Internally the tribes are allowed to self-regulated in accordance with their own customary laws and unwritten rules, however this freedom extends only up to a certain point. If government installations are attacked or if government officials are harmed, the tribes become collectively responsible for crimes committed by individual members, to the Political Agent.[63] The Political Agent, is in turn accountable for his actions to the Governor of Khyber Pakhtunkhwa (formerly the North-West Frontier Province), who himself is accountable only to the President of Pakistan.[64] This completely bypasses the democratic representatives of FATA, in the form of members of the National Assembly and the Senate.

The FCR, the tribal jirga system, and the Political Agent are thus the three planks upon which the administration of all political activities in FATA are built.[65] Of these three, it can be said that the FCR and the Political Agent take precedence over decisions by local jirgas, because the Political Agent is not compelled to follow the decisions that are arrived at through the use of local customary law, he merely needs to take them under advisement when deciding on issues.[66]

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[59]'Administrative System' (Fata.gov.pk) <https://fata.gov.pk/Global.php?iId=29&fid=2&pId=25&mId=13> accessed 29 April 2017.

[60]Ibid.

[61]Ibid.

[62]Ibid.

[63]Naveed Shinwari, 'Attitudes Towards Governance, Religion & Society In Pakistan's Federally Administered Tribal Areas Volume IV' <http://www.understandingfata.org/files/Understanding-FATA-Vol-IV.pdf>.

[64]'Chapter 3: "Tribal Areas." Of Part XII: "Miscellaneous"' (Pakistani.org, 2017) <http://www.pakistani.org/pakistan/constitution/part12.ch3.html> accessed 26 April 2017.

[65]Abdul Khan, 'The Dispensation Of Justice In The Federally Administered Tribal Areas (FATA) Of Pakistan: Its Application And Analysis' Central Asia ASC.

[66]Ibid.

The findings of the Political Agent are irrevocable and there are no grounds for an appeal or review, even if that decision was contrary to the one that the jirga decided upon, or if new evidence had come to light that contradicted the decision. It was said of the same institution while under the British, by J.W Spain that:

> *The Jirga was beyond doubt a pathan institution, the form it took under the Frontier Crimes Regulation was a far cry from its natural state. In any event, the decision of the Jirga was primarily recommendatory, and the actual acquittal or conviction and sentence were formalized in a decree by the Deputy Commissioner.*[67]

This thinking did not change with Pakistan, and we can see how local customary law was twisted to serve the FCR, thus paying lip service to tribal laws, while completely ignoring them when it came to actual decision-making.

One of the main components of the FCR, and the one that has caused the greatest amount of criticism of it, is the provision that allows for tribes to be held collectively responsible for crimes committed by individuals belonging to that tribe.[68] This meant that any crime committed anywhere in tribal areas became the responsibility of the entire tribe, and they were held liable for those actions by the political administration. There have been instances where even infants are held responsible for such crimes and are convicted based on the principles of collective responsibility. This idea was first articulated by John Coke, an officer during British colonial rule, who stated:

> *. . . to close the Pass at once, seize all the Afridis to be found in the Peshawar and Kohat districts, put the men in jail, sell their cattle, stop all Pass allowances held by the Afridis, and, when the matter is settled, cause all losses to be made good, not from their confiscated allowances, but from the allowances made from the time they may commence.*[69]

This same thought process was applied in Pakistan, with punitive punishments being handed down to all members of a tribe, in order to either force them to turn over the criminal that committed the crime, or if they did not, to suffer collectively for that act.

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[67]James W Spain, The Way Of The Pathans (1st edn, Oxford University Press 1972).

[68]Planning and Development Department, Civil Secretariat FATA, 'FATA Sustainable Development Plan (2006- 2015)' (Government of Pakistan 2006).

[69]Khan, Sarfraz, (2010) "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia" in Eurasia Border Review, Vol. 1.

It is specifically mentioned in Section 22, Chapter IV of the FCR[70] that:

> *Where, from the circumstances of any case, there appears to be good reason to believe that the inhabitants of any village, or part, of a village, or any of them have:*
>
> *(a) connived at, or in any way abetted, the commission of an offence; or*
>
> *(b) failed to render all assistance in their power to discover the offenders or to effect their arrest;*
>
> *(c) connived at the escape of, or harboured, any offender or person suspected of having taken part in the commission of an offence; or*
>
> *(d) combined to suppress material evidence of the commission of an offence;*
>
> *the Deputy Commissioner may, with the previous sanction of the Commissioner, impose a fine on the inhabitants of such a village or part of a village, or any of them as a whole.*

When read at face value, these provisions all seem fairly draconian, if not necessarily unusual in an area long governed by such regulations. It is only with the understanding of the absolute power that the Political Agent possesses, does the scope really become clear. The burden of proving innocence to an infringement of the law, once accused, falls on the person accused.[71] The Political Agent himself needs only to make the accusation, not present corroborating evidence that the individual has in fact violated any of the regulations.[72]

Furthermore, the Political Agent in the tribal areas can detain any member of the tribal areas for up to three years as a form of preventative punishment, in order to deter them from committing possible crimes in the future.[73] Even when being allowed a trial, the tribesmen are not permitted legal

[70]'Section 22, Chapter IV, The Frontier Crimes Regulation, 1901' (Government Stationery and Print Department 1973).

[71]Bureau Report, 'Attorney General Put On Notice in Petition Against FCR' (DAWN.COM, 2017) <https://www.dawn.com/news/766221> accessed 30 April 2017.

[72]Ibid.

[73]Sarfraz Khan, 'Special Status Of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia' 1 Eurasia Border Review <http://src-h.slav.hokudai.ac.jp/publictn/eurasia_border_review/no1/06_Khan.pdf> accessed 28 April 2017.

representation of any sort, they do not have a right to present reasoned evidence in any court of law, and there are absolutely no grounds under which the decision of the Political Agent can be appealed[74], since no regular court has jurisdiction in the area, as discussed earlier.

What this tells us, is that civil rights, as they applied to the rest of Pakistan, never really applied to FATA, and instead what we had was a continued policy of suppression. Principles of individual liability for crimes committed, the norm in the rest of Pakistan, were discarded in favour of achieving the most direct path towards 'justice'. Mohammad Ali Jinnah, then the newly appointed Governor-General of Pakistan, and caretaker of the legacy of the British Raj in the frontier stated:

> *Pakistan has no desire to unduly interfere with your internal freedoms. On the contrary, Pakistan wants to help you and make you, as far as it lies in our power, self-reliant and self-sufficient and help in your educational, social and economic uplift, and not be left as you are dependent on annual doles, as has been the practice hitherto which meant that at the end of the year you were no better off than beggars asking for allowances, if possible a little more. We want to put you on your legs as self-respecting citizens who have the opportunities of fully developing and producing what is best in you and your land. You know that the Frontier Province is a deficit province, but that does not trouble us so much. Pakistan will not hesitate to go out of its way to give every possible help—financial or otherwise—to build up the economic and social life of our tribal brethren across the border.*[75]

Although an admirable notion, that of putting the people of FATA on the same footing as the rest of Pakistan, both in economic opportunities and legal rights, we must remember that it was Jinnah who spoke out against the dismantlement of the MOA, a precursor to the FCR, and to preach such a message of inclusion, perhaps is telling of the duplicity with which the tribes have been treated in their interactions with outside powers.

2.4 Conclusion

We can see that no great changes came about from the formation of the Pakistani state with regard to its relationship with the tribal areas. The same

[74]Abid Mehsud, 'Frontier Crimes Regulations: A Black Law' Frontier Post (2012).
[75]Syed Farooq Hasnat, Pakistan (1st edn, 2012).

brutal approach that was taken during the British Raj in their attempts to dominate the tribal areas was employed in much the same fashion. If anything, there has been a further codification of the colonial era laws, where previously, at least there had been some democratic legitimacy to the law, however laughably little, in the form of recourse through the British Parliament, now there was none, with administrative and policing powers directly and at times arbitrarily applied in FATA through the FCR and Article 247 of the Constitution.

Chapter 3

Major Reforms

3.1 Introduction

The law has been amended a number of times since it was first put into force in 1901. However, these amendments have been mostly cosmetic in nature, with only the verbiage changing, while the laws themselves have until only very recently remained mostly static. It is my aim in this chapter, to analyze these new major changes and see what effect they have in the governance of FATA.

3.2 Reform Attempts under Pervez Musharraf (2005-2008)

The first such attempt was undertaken during General Pervez Musharraf's regime.[76] The Governor of the North-West Frontier Province (now Khyber Pakhtunkhwa) created an FCR Reforms Committee headed by Justice Mian Mohammad Ajmal.[77] The Committee consulted tribal elders, former and current civil servants, and various other concerned parties. Public meetings were held throughout FATA to solicit advice and gauge the interest of residents in substantial reforms, primarily that of vastly expanding human rights protections in the FCR.[78] The Committee's recommendations were subsequently submitted to the Governor, although by the time this was done, the political climate had significantly altered, and the new Governor of NWFP, Lieutenant General Ali Mohammad Jan Aurakzai, was not interested in pursuing any reforms.[79] FATA reforms were thus abandoned until Pervez Musharraf's dictatorship was toppled, and the new government was in place.[80]

3.3 Reform Attempts under the PPP Government(2008)

Owais Ahmad Ghani, the Governor appointed by the newly installed democratic government, decided to restart the reforms process where it had been

[76]Yusufzai Rahimullah, 'Undeserving Awarded, Deserving Ones Like Mian Ajmal Unrewarded' (Thenews.com.pk, 2011) <https://www.thenews.com.pk/archive/print/319194-undeserving-awarded-deserving-ones-like-mian-ajmal-unrewarded> accessed 28 April 2017.

[77]Ibid.

[78]Ibid.

[79]Ibid.

[80]Yusufzai Rahimullah, 'Some More Real Change In Fata' (The News) <https://www.thenews.com.pk/archive/print/317053-some-more-real-change-in-fata> accessed 28 April 2017.

left off by the previous administration, to this end, he invite Mr. Ajmal to brief him fully on the recommendations made by the Reforms Committee. Based on his recommendations, a Cabinet Reforms Committee was formed within the Federal Government, headed by the Minister for Law.[81] A number of changes were suggested by this Committee:

(1) The 'Frontier Crimes Regulation' should be renamed to the 'Federally Administered Tribal Areas Regulation.'

(2) A judge from the regular lower level courts of Pakistan should adjudicate on any appeals of a decision made by a Political Agent.

(3) A three member FATA Tribunal, headed by a retired High Court judge, and containing a lawyer and a bureaucrat, should be formed as a final appellate body regarding decisions made or appeals granted by the lower level judge.

(4) The Political Agents power of appointment regarding the composition of a jirga should be discarded, and instead the parties at conflict would together agree on who would be part of the jirga.

(5) The discretionary powers of the Political Agent to preventatively detain residents of FATA should be abolished, instead the arrested person would have to be produced before a court of law within 24 hours of his arrest, and subsequently referred to a jirga within ten days, with a verdict to be announced by said jirga, in no more than 90 days.

(6) The Collective Punishment provisions of the FCR should no longer apply to women and children.

These reforms, although substantially implemented, were not sufficient in providing an adequate framework for governance in FATA, with calls for abolishment of the draconian law in its entirety gaining increasing support. In 2010, an opinion poll was put to the people of FATA asking whether they favoured abolition of the law, fundamental reform of the law, or maintenance of the law as it stands. Of the respondents surveyed, a full 69.1% stated that they wanted either a complete repeal of the law or fundamental changes brought to its structure.[82] This illustrated the growing frustration of the

[81]Raza Khan, 'FATA Political Regime: Changing Legal-Administrative Status Of Tribal Areas' FATA Research Centre <http://frc.org.pk/wp-content/uploads/2012/08/FATA-Political-Regime-Changing-Legal-Administrative-Status-of-Tribal-Areas.pdf> accessed 28 April 2017.

[82]Naveed Shinwari, 'Attitudes Towards Governance, Religion & Society In Pakistan's Federally Administered Tribal Areas Volume IV' <http://www.understandingfata.org/files/Understanding-FATA-Vol-IV.pdf>.

residents of FATA of being saddled with a law that they no longer felt was equipped to provide them with any tangible results.

3.4 Amendments to the FCR(2011)

Building on the reforms of 2008, the government announced administrative, legal, and political reforms to the FCR, aiming to further strengthen the human rights and accountability measures through substantial changes in the language of the FCR. The underlying legal concepts and the parallel nature of the legal system that those concepts created however largely remained unchanged. The major reforms achieved by the amendment[83] are as follows:

(1) Women, children under the age of 16, and senior citizens are exempted from collective responsibility arrests. In addition, entire tribes cannot be held accountable for crimes through the application of collective responsibility arrests, only the particular sub-tribal unit of the offender can be held accountable.

(2) An independent appeals process is to be created for decisions that are made by Political Agents and Commissioners via the strengthening of the FATA Tribunal.

(3) Time limits are placed on cases, so as to prevent potential situations where prisoners are indefinitely detained, and to that end, a system is to be put in place for the provision of bail to prisoners. Jails where these prisoners are held are also to be subject to routine inspections.

(4) Creation of the Qaumi Jirga, with greater emphasis based on local customs in order to achieve more equitable conflict resolution.

(5) Arrest by authorities other than the Political Agent.

(6) There should be greater accountability of the powers of the Political Agent, and to that end the Political Agent Fund is to be audited by the Auditor General of Pakistan, and the agents arbitrary arresting powers are to be limited in scope. If the agent is found to have misused their powers to instigate false prosecutions, punishment and compensation is prescribed for the victims.

[83]'Frontier Crimes Regulation (FCR) 1901, As Amended In 2011 (English, I...' (Slideshare.net, 2017) <https://www.slideshare.net/fatanews/frontier-crimes-regulation-1901-amended-2011-english-16663284> accessed 27 April 2017.

(7) Any deprivation of private property rights must be adequately compensated.

Due to these amendments, a new hierarchy of legal authority was instituted in FATA, starting with local jirgas which tried to solve grievances through the application of customary law, with a new appeals process in the forms of Qaumi Jirgas, which were composed of tribal elders. After the process based on local customs had failed, or had been seen to not have provided the correct verdict in the eyes of the Political Agent, it then became his domain to decide the verdict, since the Qaumi Jirga was merely an advisory body. The Political Agents decision could further be appealed to a Commissioner or directly to the FATA Tribunal.[84]

FATA Tribunals, although they had been part of the law since 1997, were not very widely used, nor was the true scope of their powers ever properly articulated prior to the 2011 amendment. It now became the final appellate body for all cases in FATA. It was given powers to hear and adjudicate on appeals against decisions made by Political Agents, Commissioners, as well as decisions that the body itself had made.[85]

The Tribunals themselves were to be composed of two retired civil servants and one lawyer. The chairman of the Tribunal must be a civil servant of at least Basic Pay Scale (BPS) 21 rank, with a background in tribal administration. One of the other two members must be a civil servant of at least BPS 20 rank, who also has a background in tribal administration. The third member must qualify to be appointed as judge of a High Court, and needs to be familiar with tribal customary law.[86]

Although this may seem substantial, critics argue that the Tribunals were still essentially representatives of the government, and therefore were not likely to be stray from the government's position on legal matters in FATA. Instead it was recommended, that if the government truly wished to see the emergence of an independent judiciary in FATA, the jurisdiction of regular Pakistani courts should be extended to FATA.

Although the new reforms did technically expand the protection of fundamental right in FATA, application of the changes remained spotty, Abdul Karim Mehsud, a senior lawyer in FATA stated, 'Authorities have so far not shown any interest in implementing the reforms.'[87] He was not alone in

[84]Ibid.
[85]Ibid.
[86]Ibid.
[87]Manzoor Ali, 'Frontier Crimes Regulation: Centuries-Old Law Will Take

these criticisms, with Rustam Shah Mohmand, a former ambassador saying, 'Tribesmen need schools, water, electricity and hospitals and this talk of reforms is only a pastime for people sitting in Islamabad and Peshawar.'[88] Shehryar Fazli, a Senior Analyst and Regional Editor for South Asia at the International Crisis Group wrote, 'Almost two years later, these measures have not been implemented, due primarily to the resistance from the military and civil bureaucracies that benefit from FATA's antiquated and opaque administrative system.'[89]

Therefore, it can be said that although the idea behind the amendment, that of reducing the burden on tribal citizens of the most repressive aspects of the FCR was welcomed, it was not done so without reservations. Progressive factions demanded greater changes, arguing that the role of the Political Agent as judge, jury and executioner, had merely been transferred to the FATA Tribunal and that such a concentration of political and judicial powers in one office was a recipe for abuse. It can even be argued that a complete repeal of the entire system was necessary, the law being too archaic in its formulation for any reforms process to be meaningful. Conservatives, on the other hand, and those who had grown in influence and wealth through the corruptions that the arbitrariness of the FCR invited, bemoaned the amendment and the few changes that it did bring.

Alongside the reforms to the FCR was the extension of the 1962 'Political Parties Act' to FATA by Presidential Decree. This act for the first time, allowed the people of FATA to organize politically under party banners, previously having been limited to running as independents for seats in the National Assembly.[90] This newly given power resulted in a sea change in the political weight of the region, it's parliamentarians now being able to strike wider alliances with Pan-Pakistani political parties. Although this did not necessarily mean that they had greater clout in how their own region was governed, since the Constitution of Pakistan, per Article 247, explicitly stated that Acts of Parliament were to have no authority with regards to the governance of FATA, unless approved by the President. What this led to was

Time To 'Reform' - The Express Tribune' (The Express Tribune, 2017) <https://tribune.com.pk/story/301002/frontier-crimes-regulation-centuries-old-law-will-take-time-to-reform/> accessed 28 April 2017.

[88]Ibid.

[89]Shehryar Fazli, 'Taming A "Strange Land"' (Foreign Policy, 2011) <http://foreignpolicy.com/2011/06/27/taming-a-strange-land/> accessed 28 April 2017.

[90]Umar Sajjad, 'Political Development In Federally Administered Tribal Areas (FATA): A Step To Minimizing Extremism And Radicalization' FATA Research Centre <http://frc.org.pk/wp-content/uploads/2013/07/5.pdf> accessed 28 April 2017.

a scenario where the politicians elected from FATA could vote and legislate on matters of governance for the rest of Pakistan, but could not do so for their own region.

This reforms package however did not occur in a vacuum, for in Pakistan, there are always two poles of political power. The military, long having treated FATA as their personal playground, could not countenance such a reduction in authority in FATA without adequate compensation. To that end, the FCR amendment was accompanied by another executive order, known as the 'Actions (in Aid of Civil Power) Regulation for Federally Administered Tribal Areas and Provincially Administered Tribal Areas'.[91] This regulation declared that 'there exists (a) grave and unprecedented threat to the territorial integrity of Pakistan by miscreants and foreign funded elements, who assert unlawful control over the territories of Pakistan and to curb this threat and menace, Armed forces have been requisitioned to carry out actions in aid of civil power.'[92] It gave the military unprecedented abilities to act independently in FATA, with little regard for the possible consequences that this would have on the safety of residents and the effect on their fundamental rights. The Armed Forces were allowed to arrest terror suspects—a term so poorly defined, that it could include just about anyone—arbitrarily and detain them for 120 days, it also authorized the military to seize private land across FATA, with no compensation being allowed for.[93]

3.5 FATA Reforms of 2015 under the PML(N)

Following the 2014 Peshawar School Massacre in which 144 people, 132 of whom were children, were brutally murdered by militants of the Tehreek-e-Taliban Pakistan (TTP)[94], the National Action Plan (NAP) was born. The NAP called for radical change in the security posture of the Pakistani state, with military courts, cyber-security legislation, as well as a host of other issues being pushed to the front of the government's list of priorities.[95] One such call was the urgent need to find a permanent solution to FATAs troubles, since the

[91]'The Actions (In Aid Of Civil Power) Regulation, 2011 | The Institute For Social Justice (ISJ)' (Isj.org.pk, 2017) <http://www.isj.org.pk/the-actions-in-aid-of-civil-power-regulation-2011/> accessed 27 April 2017.

[92]Ibid.

[93]Ibid.

[94]Ismail Khan, 'APS Massacre Mastermind Killed In US Drone Strike' (DAWN.COM, 2017) <https://www.dawn.com/news/1270210> accessed 27 April 2017.

[95]'National Action Plan' (Nacta.gov.pk, 2017) <http://nacta.gov.pk/NAPPoints20.htm> accessed 27 April 2017.

area through decades of neglect, had become the epicentre of terrorism-related activities in Pakistan.[96]

Thus, the government announced the formation of a Reforms Committee in November of 2015, comprised of the Foreign Policy Advisor to the PM Sartaj Aziz, Governor Jhagra of KPK, Lieutenant-General Abdul Qadir Baloch, Lieutenant-General Nasser Janjua, and State and Frontier Regions Division (SAFRON) Secretary Muhammad Shehzad Arbab.[97] The aim of this Committee was much the same as those composed during the 1800s, to finally 'civilise' the tribal areas.

They were presented with four possible options[98] for the future of FATA:

(a) Maintain status quo with regard to main elements of the present system in FATA but introduce judicial reforms and increase focus on development activities.

(b) Grant Special Status to FATA on the pattern of Gilgit Baltistan Council.

(c) Create separate Province of FATA comprising of seven Tribal Agencies.

(d) Integrate FATA with Khyber Pakhtunkhwa (KPK) province with each Agency becoming a separate district.

In ten short months, the Reforms Committee presented its findings, advising that FATA should be merged with KPK. They called for the repeal of the FCR and for the enactment of a new act as a replacement, the 'Tribal Areas Rewaj Act.'[99] The jirga system that had been in place under the FCR would be retained in both criminal and civil cases, with a judge appointing the members of said jirga, instead of through a Political Agent, as it was during the FCR regime. The jirga would act in accordance with tribal 'rewaj' or in other words, local customary law.[100]

Provisions of the FCR that related to collective responsibility for crimes were to be eliminated, with each individual now becoming responsible for only his/her own actions, and not those of a member of their tribe. This the Committee claimed addressed the most major of criticisms of the FCR, that

[96] I.A. Rehman, 'Fata Reform: Plans & Pitfalls' (DAWN.COM, 2017) <https://www.dawn.com/news/1281159> accessed 27 April 2017.

[97] Ibid.

[98] 'Report Of The Committee On FATA Reforms 2016' (2017) <http://www.safron.gov.pk/safron/userfiles1/file/Report%20of%20the%20Committee%20on%20FATA%20Reforms%202016%20final.pdf> accessed 27 April 2017.

[99] Ibid.

[100] Ibid.

it was in violation of guarantees in the Constitution of fundamental rights. Lastly, that jurisdiction of the Peshawar High Court and the Supreme Court of Pakistan were to be extended to all of FATA.[101]

One wrinkle in this plan seems to be the proposed Rewaj Act, for if FATA is to be integrated into KPK with the retention of tribal customs as solutions to legal matters, it would conflict with not only regular laws in KPK, but also with the provision of fundamental rights provided for in the Constitution of Pakistan. In any case, if the Judiciary of KPK and Pakistan as a whole applies in FATA, then we can imagine that any rulings to come out of the tribal jirgas empowered by the Rewaj Act would be struck down almost immediately on appeal, and since this court of tribal elders would be perhaps the equivalent of sessions and district courts in the rest of Pakistan, their judgements would be subject to the same rules of binding precedent that the rest of the courts are. In all, it seems to be that there are only two imaginable scenarios. One is where the Rewaj act provides for special judgements to be created, that apply only to FATA and are not subject to appeal, which seems almost like a few steps back towards the FCR, only this time without the supervision of the Federal Government. The other, that the judgements are subject to the same rules as all others, and if that is the case, then the act is pointless. Since any judgement based on customary law would immediately be contrary to Pakistani law, given the vast body of existing judgements. A hybrid system that involves both types of laws does not seem like something that is reconcilable within the current system of Pakistani jurisprudence.

The Committee in addressing why it included the Rewaj act, stated it its report:

> *It is important to note that tribal people have been following for centuries, Rewaj (custom), a strict tribal code that provides dispute resolution through Jirga, imposition of collective responsibility and mutual restraint and revenge. In 1947, the tribesmen decided to join Pakistan on an understanding that they would continue to regulate their lives according to Rewaj, as incorporated in the 1901 Frontier Crimes Regulation. The spirit of this understanding was incorporated in the terms (of accession of Tribal Areas to Pakistan) and was reiterated by the Quaid-e-Azam and thus has been enshrined in all the Constitutions of Pakistan including the 1973 Constitution.*[102]

[101] Ibid.
[102] Ibid.

Further adding:

> *These reforms offer hope and peace and a brighter future for FATA's population, who have witnessed only war and turmoil in the last four decades. Safeguards have been built into the reforms package to ensure its success. In this connection the Committee has proposed a 5-year transition period, ensuring that the role of the Political Administration remains central to this effort so that the tribes are enabled to interact positively in the reform process by continuing to function under their prevailing Rewaj and Jirgas. It is intended to use Article 247 of the Constitution as an enabler to bring about the suggested changes. In order to ensure acceptability of the Reforms, the best vehicle to accomplish it will be to take recourse via the Parliament.*[103]

These statements, while they do provide a historical context for the retention of the jirga system, do not however delve into how such a system would be maintained, except through the usage of Article 247 of the Constitution, which in itself would require some extreme mental gymnastics to maintain once the region is a part of KPK. While the article does include provisions for the removal of regions from its ambit, it does not contain any reference to retention of tribal laws, or any method whereby the executive would have authority to maintain such laws if a region were to be transferred to a province. On this paradoxical matter, the Committee report stated:

> *Simultaneously, any legal instrument, which incorporates 'Rewaj' as part of the judicial process, must ensure that it is not in conflict with the fundamental rights as well as other substantive laws administered in Khyber Pakhtunkhwa.*[104]

This again, only adds further to the existing confusion. If customary law is to be adopted in a manner that is not inconsistent with the regular laws in Pakistan, then it will never be adopted at all, and so any mention of it is unnecessary. Yet, since it is mentioned, the writers of the report clearly envision a scenario whereby both systems of law would be able to coexist, which under the current constitutional regime remains an impossibility.

The proposed Rewaj Act has been opposed unanimously by the 'All FATA Political Parties Alliance', with its leader, Sardar Khan stating, 'Rewaj Act had nothing to do with demands of the people and that it would prove

[103]Ibid.
[104]Ibid.

another FCR. As such, the political parties would oppose it.'[105] In order to seek clarification, a roundtable conference on FATA reforms organized by the Pakhtunkhwa Olasi Tehreek, expressed reservations about the Rewaj Act and the retention of Article 247, and pressed the government to divulge more details about the Act.[106] Regarding the issue, the Federal Law Minister, Zahid Hamid stated, 'the judicial set-up in FATA would be a blend of existing judicial system of the country and centuries old jirga system of FATA.'[107]

Nevertheless, the merger of FATA with KPK, and the repeal of the FCR is moving forward with the Federal Cabinet having granted permission for the reforms to proceed. Marking the occasion, Prime Minister Mian Muhammad Nawaz Sharif stated:

> *The people of FATA will no longer be at the whims of an unjust and unaccountable system. Today, they are on the true path of freedom and now they can share in the dream of prosperity and be a part of a country on the road to becoming stable, secure and safe for people of all stripes.*[108]

However, if the uncertainty that covers the proposed Rewaj act are never clarified, there is a chance that FATA will fall back into the same pattern as before, with tribal jirgas legalizing practices long forbidden elsewhere in Pakistan. The same 'unjust and unaccountable' regulations that governed FATA under the FCR are then merely being further formalized, this time with constitutional cover.

3.6 Conclusion

While the reforms to the FCR have long been overdue, there has been a concerted effort in recent years to amend or repeal it. Although the earlier reforms consisted of mostly small quality-of-life changes with the bulk of the old law kept intact, the reform efforts of 2015 are, regardless of whether the Rewaj Act holds sway, going to result in major changes in the way that FATA is governed.

[105] Dawn Report, 'Fata Alliance Fears Riwaj Act To Prove Another FCR' (DAWN.COM, 2017) <https://www.dawn.com/news/1318487> accessed 27 April 2017.

[106] Bureau Report, 'Govt Asked To Release Details Of Riwaj Act' (DAWN.COM, 2017) <https://www.dawn.com/news/1319260> accessed 27 April 2017.

[107] Syed Raza, 'Cabinet Approves Steps For Fata's Merger With Khyber Pakhtunkhwa' (DAWN.COM, 2017) <https://www.dawn.com/news/1318095> accessed 27 April 2017.

[108] Ibid.

Conclusion

Pakistani politicians often gush at length about the fraternal bonds that tie their nation together, a civilisation composed of a multitude of ethnicities, religions and languages, all equal citizens under the law. I am reminded of a quote by Muhammad Ali Jinnah on his historic address to the Constituent Assembly for Pakistan:

> *We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.*[109]

It has been my aim throughout this research paper to establish whether this equality extended to the tribal areas of Pakistan as well.

Under colonial rule, there is no question that the laws put in place to govern and police the tribal areas were exploitative and barbaric in nature. They served merely as a means to subjugate the population. The colonial authorities did not view the people of the tribal areas as actual people. The Europeans were people, perhaps even the Indians were people, but the tribals? They were savages. You do not reason with savages, you simply control and contain them, leaving them to their own devices at the peripheries of civilisation.

Under Pakistani rule, more was expected. Equal citizens ought to be treated equally, but here again under the new incarnation of the FCR, regressive rules remained the order of the day. Sound administrative laws and policies that transformed the rest of Pakistan were never applied to FATA, it was left forgotten much as before, as long as it did not cause too much trou-

[109]'Mr. Jinnah's Address To The Constituent Assembly Of Pakistan' (Pakistani.org) <http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html> accessed 29 April 2017.

ble. Literacy rates[110], infant mortality rates[111], hospital access[112], education enrollment rates[113], and most other socio-economic indicators deteriorated under Pakistani rule.[114] The state has failed in its obligations to protect all citizens, not due to any external factors, but because it never made the hard choice, choosing instead to maintain the status quo.

That is not to say that there is no scope for change. As has been evidenced by attempts to reform the FCR, there has always been an undercurrent of support for real change in FATA, a recognition that centuries old regulations cannot and do not suffice in the 21st century. The 2015 repeal and reform proposal, which is intended to be implemented over the next 5 years may yet result in real change in the governance of FATA. The legal processes and institutions that protect and enforce the rights of ordinary Pakistani citizens will soon apply to residents of FATA as well. Perhaps finally, there will be equality.

[110]Salman Ali, 'Women Literacy In FATA' (Dailytimes.com.pk, 2017) <http://dailytimes.com.pk/opinion/02-Apr-17/women-literacy-in-fata> accessed 29 April 2017.

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