



## The Frontier Crimes Regulation in Colonial India: Local Critiques and Persistent Effects

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ARTICLE



# The Frontier Crimes Regulation in Colonial India: Local Critiques and Persistent Effects

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## ABSTRACT

In their pursuit of self-serving goals, sometimes governments create and use various instruments as the means to relatively short-term ends. Such instruments, however, can be tenacious, and have perverse, long-lasting impacts. This paper focuses on one such instrument created during the British Raj: the Frontier Crimes Regulation. Often, the literature on the Regulation focuses on the rationale for its creation from the perspective of the colonisers and refers to the long-term consequences in hindsight, thereby ignoring local voices. However, I show that in 1901, at the time of the drafting of the Regulation, the local colonised population foresaw the potentially lasting pernicious effects stemming from it and voiced their concerns. I demonstrate that these local voices can help us understand the roots of the problems in the Federally Administered Tribal Areas (FATA) of Pakistan today.

## KEYWORDS

British Raj; colonial India; FATA; Frontier Crimes Regulation (FCR); institutions; Jirga; Pakistan

Colonial institutions have proven tenacious in South Asia, and a rich and expanding research agenda has revealed the legacy of these historic institutions.<sup>1</sup> The rationale behind the choice of particular legal and administrative structures from the spectrum of possibilities is often understood from the perspective of the colonial authorities who framed their choices in terms of establishing control and enhancing profit. Yet, the long-term developmental consequences are often discussed only in hindsight, ignoring the contemporary local voices that raised concerns about the potential for

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1. Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996); Robert E. Hall and Charles I. Jones, 'Why Do Some Countries Produce So Much More Output per Worker than Others?', in *Quarterly Journal of Economics*, Vol. 114, no. 1 (1999), pp. 83–116; Daron Acemoglu, S. Johnson, and James A. Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation', in *American Economic Review*, Vol. 91, no. 5 (2001), pp. 1369–401; D. Acemoglu, Simon Johnson, and J.A. Robinson, 'Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution', in *Quarterly Journal of Economics*, Vol. 117, no. 4 (2002), pp. 1231–94; Edward L. Glaeser and Andrei Shleifer, 'Legal Origins', in *Quarterly Journal of Economics*, Vol. 117, no. 4 (2002), pp. 1193–230; Nathan Nunn, 'The Long Term Effects of Africa's Slave Trades', in *Quarterly Journal of Economics*, Vol. 123, no. 1 (2008), pp. 139–76; Melissa Dell, 'The Persistent Effects of Peru's Mining Mita', in *Econometrica*, Vol. 78, no. 6 (2010), pp. 1863–903; Nathan Nunn and Leonard Wantchekon, 'The Slave Trade and the Origins of Mistrust in Africa', in *American Economic Review*, Vol. 101, no. 7 (2011), pp. 3221–52; Avidit Acharya, Matthew Blackwell and Maya Sen, 'The Political Legacy of American Slavery', in *The Journal of Politics*, Vol. 78, no. 3 (2016), pp. 621–41; and Stelios Michalopoulos and Elias Papaioannou, 'The Long-Run Effects of the Scramble for Africa', in *American Economic Review*, Vol. 106, no. 7 (2016), pp. 1802–48.

lasting pernicious effects of the institutions created by the colonial authorities. This paper allows insight into these concerns and provides evidence that at least one local population anticipated the detrimental effects of certain colonial institutions.

Specifically, this paper focuses on a British colonial legal instrument, the Frontier Crimes Regulation (FCR), which was imposed in areas that constitute present-day Pakistan. As this paper describes, the choice of whether to impose the FCR or the existing legal and bureaucratic system that was used throughout most of British India has mainly focused on the decision from the colonial authorities' perspectives. The British used and manipulated the provisions of the FCR for their own ends in governing and maintaining order, and subsequently, the Pakistani government continued this trend for its own ends. Yet, such an instrument had substantial effects on the societies in which it was implemented, and I present the arguments and opinions of the then local population and their representatives to highlight how these voices often pointed out the potential governance and institutional consequences that followed from the imposition of this parallel legal system.

As I show, people spoke about a vast range of harmful effects from the FCR including corruption, bribery, abuse and the perverse incentives created for the police and judiciary. At the time, such effects would impact upon the development of institutions. Furthermore, given the continued usage of the FCR in certain parts of Pakistan after 1947, we would expect that it would be increasingly difficult for political and bureaucratic structures to develop and evolve as they have done in the remainder of Pakistan, which was not subject to this legal instrument. Thus, these local voices from the past can provide helpful insights into understanding the roots of the governance and security problems that plague the Federally Administered Tribal Areas (FATA) of Pakistan today. Furthermore, given the existing problems, the upcoming merger of FATA with Khyber Pakhtunkhwa (KP) may lead to more problems than benefits (at least in the short run) for FATA residents.

The rest of the paper is structured as follows: first, I briefly describe the components of the FCR and its evolution since 1947; then, I summarise the colonial authorities' views regarding the use of the FCR; in the third section, I present the arguments and opinions of local citizens of the time and explain the long-term developmental consequences that might stem from the FCR; fourth, given its long experience under the FCR, I briefly address the outlook for FATA with regards to its pending merger with KP; I conclude with a message of caution that even though citizens' concerns about the FCR were and are legitimate, reforming (even bad) institutions can bring its own set of harmful consequences which could impact upon security conditions in both FATA and the broader region.

## **The history and evolution of the Frontier Crimes Regulation**

In the mid nineteenth century, the British rulers of India wanted to find an effective method to deal with crime in the north-west of the country. Perceiving the existing legal system as unable to deal with the task, they chose to construct a parallel legal system by attempting to incorporate the customs of the Pashtun tribes into the law. The Punjab Frontier Crimes Regulation of 1887 contained clauses that would form

the basis of the 1901 Frontier Crimes Regulation, which was in turn extended to the then newly-formed North West Frontier Province (NWFP).<sup>2</sup>

The legal system under the FCR was distinct from that which generally prevailed in the rest of colonial India. Criminal cases were settled by Jirgas (a council of elders) in which defendants were denied certain key rights: the right to appeal, the right to present evidence, and the right to representation. The codification of Jirgas was the formal institutionalisation of an already existing practice among the Pashtun tribes.<sup>3</sup> Collective responsibility for a crime was also deemed permissible under the FCR. This clause meant that relatives of the defendants or even whole villages could be liable for the defendant's crimes and thus face punishment. For example, if the culprit who committed the infractions were to abscond before being arrested, then the culprit's tribe could be punished instead. In the contemporary British legal system, on the other hand, fundamental individual rights were recognised and collective responsibility was not a permissible option.

Under the FCR, the political agent appointed by the local governor to administer a region had considerable power to 'prevent and maintain' security. He had discretion in appointing individuals to the Jirga, along with the power to overturn the Jirga's decisions. He also had the power to arrest individuals without a warrant, forcibly remove them from areas without due process, and force them to furnish bonds in order to 'keep the peace'. This 'thin' level of political administration meant that these regions were not fully integrated into the broader polity, and inhabitants living under this system had a different relationship to the state than those living under the 'mainstream' legal system.<sup>4</sup> Up to 1947, the FCR had been extended to other districts in Punjab, and even to Baluchistan.

After Pakistan's independence in 1947, the FCR was not immediately repealed by the Pakistani government; instead, this remnant of colonial administration continued to exist in parts of Baluchistan, Punjab, Sindh and the NWFP (renamed Khyber Pakhtunkhwa in 2010). Eventually, it was removed from all parts of these four provinces, but the revocation did not occur uniformly.<sup>5</sup> The last area it operated in was the FATA region where provisions such as the collective responsibility clause remained in force until the middle of 2018. For example, in 2011, there was a case in which two alleged criminals from a particular tribe fled from the authorities before being arrested, and subsequently their tribe was held accountable for their crimes: 'scores of innocent people belonging to the tribe were arrested and jailed, many vehicles of the tribe were impounded and the tribesmen [were] barred from visiting Peshawar'.<sup>6</sup> Under Article 246 of Pakistan's Constitution, unless the president directed otherwise, no act of parliament would apply to FATA; moreover, the Supreme Court and high courts did not have immediate jurisdiction over FATA.

2. Robert Nichols, *The Frontier Crimes Regulation: A History in Documents* (Oxford: Oxford University Press, 2013).

3. Magnus Marsden and Benjamin D. Hopkins, *Fragments of the Afghan Frontier* (New York: Columbia University Press, 2011), p. 70.

4. Benjamin D. Hopkins, 'The Frontier Crimes Regulation and Frontier Governmentality', in *Journal of Asian Studies*, Vol. 74, no. 2 (2015), pp. 369–89.

5. For example, the FCR was removed entirely from the NWFP in 1963 and from Baluchistan in 1977.

6. Gulman S. Afridi, 'FCR's Collective Responsibility', *Dawn* (1 Jan. 2012) [<https://www.dawn.com/news/684791>, accessed 31 Jan. 2017].

Thus, for a long time, the FATA region remained separated from the administrative structure that prevailed in the country's other provinces.

The consequences of the imposition of the FCR on FATA did not go unnoticed. Non-governmental organisations (NGOs) criticised the collective responsibility clause and raised issues about the overall 'draconian character of the law'.<sup>7</sup> Petitions were registered with the Federal Shariat Court claiming that large sections of the Regulation were contrary to Islamic law.<sup>8</sup> Public opinion from both outside and inside FATA also appeared to be overwhelmingly against the FCR.<sup>9</sup>

In 2011, President Asif Ali Zardari announced reforms to the FCR that would provide channels for people to seek recourse to the law in the case of false arrest, and would restrict the use of collective punishments.<sup>10</sup> Finally, in early 2017, it was announced that FATA would be merged with Khyber Pakhtunkhwa province, and that this would lead to the phasing out of the FCR from the FATA region. In the middle of 2018, this merger, and the repeal and replacement of the FCR, was ensured with the passing of the 25th amendment to the Constitution.

### The opinions of the colonial authorities

There was substantial variation in the governing structures that prevailed across and even within India prior to 1947. The strength and extent of the link between the centre and the periphery was a deliberate, calculated choice. Indirect rule was often used by the British to govern their colonies, but this type of rule manifested itself in different ways depending on the circumstances. State 'interests' tend to drive the adoption of particular types of governance and it was these economic, strategic and political interests that determined the type of indirect rule chosen.<sup>11</sup> The FCR is one such form of indirect rule.

Given the normative and real concerns about a legal arrangement such as the FCR (as described above), what was the rationale behind its implementation? Unsurprisingly, the debate in Britain surrounding governance structures tended to revolve around strategic considerations and the incorporation of local customs into administrative structures for more effective governance. Strategic considerations were grounded in the important geopolitics of the period and the region.

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7. Human Rights Watch, 'Pakistan: Protect Civilians from Fighting in North Waziristan' (2006) [<https://www.hrw.org/news/2006/03/08/pakistan-protect-civilians-fighting-north-waziristan>, accessed 1 June 2017]; and International Crisis Group, 'Pakistan's Tribal Areas: Appeasing the Militants', in *Asia Report No. 125* (2016) [<https://www.crisisgroup.org/asia/south-asia/pakistan/pakistan-s-tribal-areas-appeasing-militants>, accessed 10 June 2017].

8. 'FSC Seeks Frontier Govt's Stand on FCR,' *Dawn* (30 Jan. 2008) [<https://www.dawn.com/news/287018>, accessed 10 June 2017].

9. C. Christine Fair, Clay Ramsay and Steve Kull, 'Pakistani Public Opinion on Democracy, Islamist Militancy, and Relations with the U.S.', United States Institute of Peace (2008) [<https://www.usip.org/publications/2008/02/pakistani-public-opinion-democracy-islamist-militancy-and-relations-us>, accessed 10 June 2017]; and Naveed Ahmad Shinwari, 'Understanding FATA: Attitudes towards Governance, Religion & Society in Pakistan's Federally Administered Tribal Areas', Community Appraisal and Motivation Programme (2010), p. 15 [<http://www.understandingfata.org/en/?p=33>, accessed 10 June 2017].

10. For example, women, children under sixteen and men over the age of 65 were exempt from the collective punishment clause.

11. Adnan Naseemullah and Paul Staniland, 'Indirect Rule and Varieties of Governance', in *Governance*, Vol. 29, no. 1 (2016), pp. 13–30; and Joshua T. White, 'The Shape of Frontier Rule: Governance and Transition, from the Raj to the Modern Pakistani Frontier', in *Asian Security*, Vol. 4, no. 3 (2008), pp. 219–43.

The 'Great Game' between the British and Russian empires started in the nineteenth century and continued into the early twentieth century. This geopolitical rivalry may have incentivised Britain to use the NWFP as a buffer region between it and Russia.<sup>12</sup> As a result, legal development in the NWFP was relatively 'thinner' than that prevailing in the rest of colonial India.

Effective governance by controlling crime was also a chief impetus for the imposition of the FCR.<sup>13</sup> The judicial and legal structures in the rest of British India were deemed not 'suitable' to the local conditions in the north-west, so the colonial authorities decided to develop a different legal system that would reflect the customs and preferences of the local people and simultaneously control crime on the frontier.

In 1901, at the creation of the NWFP, Lord Curzon, the viceroy and governor-general of India, addressed a public durbar in Peshawar at which he told the audience that the British government would not interfere with the religion or independence of the trans-border tribespeople of the area.<sup>14</sup> Olaf Caroe, who served as governor of NWFP on the cusp of decolonisation, wrote in his memoirs that a successful legal system for the Pathans should reflect their customs, and that implementation of the FCR as the sole legal system for this region fulfilled this requirement.<sup>15</sup> Caroe warned that the 'law of one civilization cannot be applied to a society with utterly different standards without the most dire results'.<sup>16</sup>

Parliamentary reports from the early twentieth century reflected this rationale. Arguments were made that under the FCR, the Jirga system was more culturally appropriate for the area. In Baluchistan, the Jirga was seen as a tool that kept 'local authorities in sufficient touch with public opinion',<sup>17</sup> and that the Jirga made decisions that gave satisfaction to the people.<sup>18</sup> Jirgas were seen not only as judicial bodies, but were also greatly valued as advisory councils that were able to interpret the 'customs and wishes of the people'.<sup>19</sup> A 1913 report stated that the FCR system worked well in the NWFP as a structure that incorporated an indigenous institution (the Jirga) in order to decide cases where local custom played an important role.<sup>20</sup> Similarly, a 1918 report suggested that because settlements made by the Jirgas in Baluchistan were accepted by the parties involved in the majority of cases in 1916–17,

12. Amit K. Gupta, *North-West Frontier Province Legislature and Freedom Struggle, 1932–47* (New Delhi: Indian Council of Historical Research, 1976), p. 2; and Marsden and Hopkins, *Fragments of the Afghan Frontier*, p. 61.

13. William Barton, 'The Problems of Law and Order under a Responsible Government in the North-West Frontier Province', in *Journal of the Royal Central Asian Society*, Vol. 19, no. 1 (1932), pp. 5–21; and Nichols, *The Frontier Crimes Regulation*.

14. *Summary of the Principal Events and Measures of the Viceroyalty of His Excellency Lord Curzon of Kendleston, Viceroy and Governor-General of India in the Foreign Department*, Vol. 2 (1904–1905), pp. 19–22 [<https://microform.digital/boa/>, accessed 10 June 2017].

15. Olaf Caroe, *The Pathans: 550 B.C.—A.D. 1957* (Karachi: Oxford University Press, 1958), pp. 353–5.

16. *Ibid.*, p. 355.

17. *Report of the Royal Commission upon Decentralization in India* (Command Paper 4360) Vol. 1 (1908) (London: HMSO, 1909), p. 187 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].

18. *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368) Vol. 9 (1908) (London: HMSO, 1908) (Hobhouse Report), p. 5 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].

19. *Ibid.*, p. 22.

20. India Office, *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1911–1912 and the Nine Preceding Years*, 48th number (1913) (London: HMSO, 1913), p. 19 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].

this was an indication that ‘Baluchistan shows no signs of outgrowing the system of tribal responsibility on which the administration is based’.<sup>21</sup>

The FCR’s ‘appropriateness’ was therefore not only grounded in cultural justifications, but also in claims of inferiority. There was a sense that the Jirga system was best suited to some areas because certain districts were not advanced enough to have an advisory or administrative council.<sup>22</sup> This sentiment was echoed by other important figures such as Herbert Risley, a colonial administrator. He believed that the Pathans were a ‘primitive tribal society’,<sup>23</sup> while Winston Churchill, writing about a military campaign in the north-west of British India, described in great detail the ‘savage’ tribes on the frontier.<sup>24</sup> Based on perceived violations of fundamental philosophical tenets, the rights and privileges accorded to Britons were not extended to the colonised.<sup>25</sup> In sum, ideological biases stemming from differences in custom and culture, and depictions of the frontier inhabitants as ‘inferior’, influenced the administrative response of the British government.

The British viewed the Jirga system as working well, and considered it a valuable institution.<sup>26</sup> In a 1912–13 report, the Jirga system was found to be working satisfactorily in the Sibi and Zhob districts of Baluchistan, and the Jirga’s decisions were usually accepted by the political agent.<sup>27</sup> In 1914, the Jirga system was reported to be effective in the three districts of Punjab to which the FCR applied.<sup>28</sup> Reports in the mid 1910s continued to state that the Jirga system was working well in both Punjab<sup>29</sup> and Baluchistan.<sup>30</sup> Furthermore, given its apparent popularity and usefulness, the chief secretary to the Punjab government noted that an extension of the FCR system to other parts of Punjab was being considered—specifically to Rawalpindi, Attock, Jhelum and Mianwali due to the high crime rates in these districts.<sup>31</sup>

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21. *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1916–1917*, 53rd number (Command Paper 9162) (1918) (London: HMSO, 1918), p. 73 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].
  22. *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368), p. 11.
  23. Herbert H. Risley, *The People of India* (London: W. Thacker & Co., 1915), p. 144.
  24. Winston Churchill, *The Story of the Malakand Field Force* (London: Longmans, Green & Co., 1898).
  25. Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago, IL: University of Chicago Press, 1999).
  26. *East India (Police): Report of the Indian Police Commission and Resolution of the Government of India* (Command Paper 2478) (1905), p. 27; and *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368), pp. 12, 17, 32.
  27. India Office, *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1910–11*, 47th number (1912–13) (London: HMSO, 1913), p. 123 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].
  28. India Office, *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1912–13*, 49th number (1914) (London: HMSO, 1914), p. 12 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].
  29. India Office, *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1913–14*, 50th number (1914–16) (London: HMSO, 1916), p. 11 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].
  30. India Office, *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1914–15*, 51st number (1916) (London: HMSO, 1916), p. 55 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].
  31. Royal Commission on the Public Services in India, *Appendix to the Report of the Commissioners: Minutes of Evidence Relating to the Indian and Provincial Civil Services taken in Madras from the 8th to the 17th January 1913* (Command Paper 7293, 7578, 7294, 7295, 7579, 7580, 7296, 7581, 7582, 7583), Vol. 2 (1914) (London: HMSO, 1914) (Dickson-Poynder Report), p. 261 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].



Arguments were also made that reliance on the Jirgas was a more efficient form of governance; the secretary of the municipal committee at Abbottabad suggested that, at least in civil cases, the use of Jirgas rather than the courts would save money.<sup>32</sup> According to the 1918 report, all the political agents in Baluchistan agreed that the Jirgas had been good adjudicators and had prevented the use of 'expensive and long drawn out litigation':<sup>33</sup> when cases were small local police matters, using Jirgas was more efficient because time was not wasted writing long, detailed reports.<sup>34</sup>

The FCR also gave the colonial administrators the tools to deal with political developments in the NWFP during the early twentieth century. There were plenty of political activities in the region that posed a threat to British rule,<sup>35</sup> including the Khilafat movement, the Khudai Khidmatgar, the establishment of a provincial branch of the All India National Congress, and so on. Furthermore, political activists such as Abdul Ghaffar Khan magnified the threat of some of these movements by aligning them with the broader independence movement in the rest of the Raj. The colonial administration was able to suppress such political activities by arresting influential political activists using the provisions of the FCR.<sup>36</sup>

However, opinion regarding the effectiveness of the FCR was not uniform. In 1914, even though the FCR system was acknowledged to be working well in the Mianwali and Dera Ghazi Khan districts of Punjab, resulting in some police officers wanting to extend collective responsibility to more districts in the province, the lieutenant-governor of Punjab chose not to extend the FCR because he doubted 'the expediency of extending the Jirga system as a substitute for judicial proceedings'.<sup>37</sup> Some thought that the FCR was actually contributing to an increase in crime. The 1910 Punjab Police Administration Report cited the 'slackness of Jirgas with regard to abductions and the undue leniency with which [brutal and violent] cases were treated' as being responsible for the increase in the number of murder cases in the Dera Ghazi Khan district.<sup>38</sup> In areas under the FCR, collective responsibility was allowed, and political agents could pick Jirga members, could overrule Jirga decisions, and could force people to move from certain areas relatively easily. Thus the FCR provided the tools (however problematic) for the colonial authorities to control unrest and maintain order. As a result, colonial opinions about the system were framed in terms of a cost-benefit calculus with regard to reducing the amount of crime.

Yet the FCR was having broader impacts on society beyond its effects on crime. The opinions and arguments of the local population and their representatives, as

32. *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368), p. 44.

33. *East India (Progress and Condition): Statement Exhibiting the Moral and Material Progress and Condition of India during the Year 1916-1917* (Command Paper 9162), p. 73.

34. *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368), p. 29.

35. Erland Jansson, *India, Pakistan or Pakhtunistan* (Uppsala: University of Uppsala, 1981); and Stephen A. Rittenberg, *Ethnicity, Nationalism and the Pakhtuns: The Independence Movement in India's North-West Frontier Province* (Durham, NC: Carolina Academic Press, 1988).

36. Sayed W.A. Shah, *Ethnicity, Islam, and Nationalism: Muslim Politics in the North-West Frontier Province 1937-1947* (Karachi: Oxford University Press, 1999).

37. 'Administration of Police in the Punjab', *The Tribune* (20 Sept. 1914), p. 3 [<http://www.crl.edu/>, accessed 10 June 2017].

38. 'Police Administration Report Punjab', *The Tribune* (21 Sept. 1911), p. 2 [<http://www.crl.edu/>, accessed 10 June 2017].



expressed in the local newspapers, pointed out the potentially more significant governance and institutional consequences of the FCR. These voices highlight how today's institutional legacies can often be foreseen by a local population.

## The local voices

In contrast to the debate amongst the colonial authorities, local community members and their representatives highlighted the wide-ranging negative consequences of the Regulation. Given the power of political agents under the FCR, there were plenty of opportunities to manipulate the different provisions of the Regulation for their own and the British government's needs. The consequences, as explained below, not only had an immediate effect, but had long-lasting developmental consequences.

Before proceeding, it is important to first clarify what I mean by 'local' voices. Local voices included concerned citizens, political elites, journalists and lawyers (i.e., a relatively educated class of citizens). Furthermore, there was a lack of voices from the Tribal Agencies (districts), although this is not to suggest that those actually living in the Agencies in the tribal belt of the NWFP were not aware of the pernicious effects of the FCR. The lack of voices from the tribal belt reflects an absence of evidence rather than the evidence of absence—the fact that such information is not as readily or easily accessible as it is from the settled districts of the NWFP, Punjab and Baluchistan. However, because the FCR was implemented in these latter regions too, we can gain some valuable insight by studying the local voices from these regions, which this paper does. Although there have been surveys in the tribal areas that study the opinions of FATA inhabitants today,<sup>39</sup> I leave it to future researchers to investigate the opinions of the people in the Tribal Agencies during the early twentieth century.

## The lack of legal rights under the FCR

The British deemed the FCR expedient because certain rights such as the right to appeal, the right to present evidence and the right to legal representation did not exist in the Jirga trials. In a letter to the editor of *The Tribune* in 1906, the writer referred to the absence of these rights and bemoaned the fact that 'abolition of the Jirga system' was not a subject discussed by the 1906 Punjab Provincial Conference. The author felt it was monstrous that the FCR remained in force in some Punjabi districts even after the NWFP had been separated from Punjab.<sup>40</sup> In 1913, when the Punjab government was considering introducing FCR Jirga trials in the districts of Rawalpindi, Jhelum and Campbellpur, *The Tribune* newspaper argued against the move, claiming it was a backward step.<sup>41</sup> The newspaper did acknowledge that due to the prevalence of dacoities and raids, strong and effective methods were needed, but argued that even though 'punishment under the [Jirga] system is sharp and swift',

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39. For example, see Shinwari, 'Understanding FATA'.

40. 'Letters to the Editor: Provincial Conference', *The Tribune* (25 Sept. 1906), p. 3 [<http://www.crl.edu/>, accessed 10 June 2017].

41. 'Jirgah Trial', *The Tribune* (23 April 1913), p. 1 [<http://www.crl.edu/>, accessed 10 June 2017].

that did not mean that the government should employ such primitive methods.<sup>42</sup> Instead, the government should more efficiently apply the 'weapons' that it already had rather than adopting the backward methods used in the 'semi-civilized' NWFP.<sup>43</sup>

Concerns regarding the morality of the FCR appeared in later years as well. In 1917, during debate on the Punjab Crimes Bill, a member of the Lahore Municipal Committee disputed the extension of the FCR provisions because the idea of collective responsibility was 'horrible and unfair'. He felt that the 'laws at present in force in the land are more than sufficient to maintain law and order [so] no new legislation is called for'.<sup>44</sup> *The Tribune* newspaper agreed, again stating that the Bill was 'a retrograde measure which is neither in consonance with progressive notions of jurisprudence, nor consistent with the conditions and sentiments of the people'.<sup>45</sup>

A concerned member of the 1917 Punjab Legislative Council described the FCR as worse than the Rowlatt Act.<sup>46</sup> He condemned the principle of collective responsibility as a crime, stating that the FCR had 'disgraced the criminal justice. It has disgraced the inhabitants of those districts to which it is applicable [and it has] lowered the prestige of the Government'.<sup>47</sup> Such sentiment concerning collective responsibility appears to have been held by most major segments of society: in 1924, the Hindu, Muslim and Sikh members of the Kohat Working Committee all wanted to repeal Section 23 (collective responsibility) of the FCR.<sup>48</sup>

Aside from the immediate moral concerns, the concerns expressed above highlight how a lack of legal rights and the use of collective responsibility could create insecurity, which could then have an adverse impact on economic behaviour and investment in the long term. In a 1922 editorial about the NWFP, *The Tribune* opined that the FCR and the Jirga system were the two evils in the province.<sup>49</sup> It argued that the extreme severity of the Regulation had been 'greatly responsible for the insecurity over life and property' because it most probably increased the number of raids. The accused who had been found guilty under the Jirga system escaped severe punishment by absconding to Waziristan where they then made a living by raiding British territory.<sup>50</sup> The continued implementation of the FCR in FATA since independence and up until today is likely to have created an unfavourable climate for development. The state's creation and usage of the FCR was to serve its own ends, so it not surprising that certain rights were withheld, especially when it came to suppressing political activity.

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42. *Ibid.*

43. *Ibid.*

44. 'Lahore Municipal Committee: Proposed Extension of Frontier Crime Regulations Provisions', *The Tribune* (27 May 1917), p. 5 [<http://www.crl.edu/>, accessed 10 June 2017].

45. 'New Punjab Crimes Bill', *The Tribune* (27 May 1917), p. 2 [<http://www.crl.edu/>, accessed 10 June 2017].

46. 'Punjab Legislative Council The Frontier Crimes Regulation: Mr. Shah Nawaz's Speech', *The Tribune* (6 Aug. 1921), p. 7 [<http://www.crl.edu/>, accessed 10 June 2017].

47. *Ibid.*

48. 'Refugees' Viewpoint: Rejected Terms', *The Times of India* (24 Dec. 1924), p. 12 [<http://search.proquest.com/>, accessed 10 June 2017].

49. 'North West Frontier Province Problem', *The Tribune* (20 May 1922), p. 4 [<http://www.crl.edu/>, accessed 10 June 2017].

50. *Ibid.*

### ***The qualities of Jirga members***

The character and capabilities of the Jirga members were also important concerns in the local debate surrounding the FCR. A 1908 report suggested that, from the British perspective, impartiality and competence were not considered necessary credentials to participate in the Jirgas because a colonial official was always present.<sup>51</sup> Prominent politician Sivaswami Ayer also noted that the majority of men on the Jirgas were illiterate.<sup>52</sup> Nevertheless the colonial administration was inclined to think that the system was working effectively, although it did recognise that the quality of Jirga members was often poor, which led to difficulties in finding suitable appointees for it. In 1908, even though the commissioner of the Lahore Division agreed that Jirgas had been successfully implemented in three of the frontier districts, he argued against the general adoption of the system because the number of men who could 'exercise these powers usefully in any given district is not great'.<sup>53</sup> The deputy commissioner at Bannu stated that in order for the Jirga system to work well, it was important for the deputy commissioners to know the local people and to have been in the area for some time.<sup>54</sup> He too argued against a standing Jirga because 'you would not get a sufficiently honest body of men together, or men who would be able to resist the pressure which would be brought to bear upon them'.<sup>55</sup>

Sivaswami Ayer described how corruption was an issue amongst Jirga members because 'respectable men were unwilling to serve on Jirgas'.<sup>56</sup> Jirga members were easily accessible, which meant that 'wealthy people and those who have influential connections have greater chances of getting off, while poor people and menials who have neither money nor influence to save themselves have little chance of escape'.<sup>57</sup> Sometimes the accused were given the option of objecting to the nomination of certain Jirga members; however, because such 'objections are generally over-ruled by the Magistrates, the accused dare not take (*sic*) objection lest they might make enemies of the nominees'.<sup>58</sup> Thus the flaws in the Jirga system did not go unrecognised. Nevertheless, the system was still seen as the best available option, as exemplified by the opinion of the deputy commissioner of Peshawar. In 1928, he stated that he believed the Jirga system continued to work satisfactorily, and that its disadvantages were outweighed by its advantages, although he did acknowledge that the system still needed to be administered by experienced British officials who would closely scrutinise the lists of Jirga members in order to reduce the likelihood of corruption.<sup>59</sup>

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51. *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368), p. 12.

52. 'NWFP Province: Sir Sivaswami Ayer's Speech', *The Tribune* (29 Sept. 1921), p. 7 [<http://www.crl.edu/>, accessed 10 June 2017].

53. *Minutes of Evidence Taken before the Royal Commission upon Decentralization in Baluchistan, the North-West Frontier Province, and the Punjab* (Command Paper 4368), p. 148.

54. *Ibid.*, p. 64.

55. *Ibid.*

56. 'NWFP Province: Sir Sivaswami Ayer's Speech'.

57. *Ibid.*

58. *Ibid.*

59. 'Administration of the Frontier', *The Times of India* (22 Nov. 1928), p. 14 [<https://search.proquest.com/>, accessed 10 June 2017].

Given that the Jirga system was primarily a means for maintaining colonial control, and perhaps only incidentally a means for dispensing justice, it is not surprising that, even thirty years after the imposition of the FCR, its 'advantages' continued to outweigh any disadvantages particularly in light of the increase in anti-colonial political developments in the region. Despite the concerns raised, the system's usefulness remained.

Locals, regardless of whether they saw some positive aspects to the FCR, also had concerns regarding the qualifications of Jirga members. In the 1921 Punjab Legislative Council, one member of the council questioned the capabilities of Jirga members, describing them as 'generally ignorant of law', and stating that 'some of them are quite illiterate and cannot follow proceedings'.<sup>60</sup> In 1922, the president of the Hindu Sabha in Peshawar echoed the claims of Jirga corruption and lack of capacity before the Frontier Committee.<sup>61</sup> In the same year, the Abbottabad Bar Association was split on reform to the FCR—some wanted its total repeal, while others wanted changes to certain sections—but the Bar Association's representative suggested that there was agreement that there was a 'good deal of corruption under [the] Jirga'.<sup>62</sup> Some members of the 1922 Frontier Committee argued similarly that the FCR could be maintained, but that reforms needed to be made to the Jirga system. A retired district judge stated that the FCR was 'not totally bad', but that competent people needed to be appointed to better supervise the Jirga.<sup>63</sup> A representative from the Kohat Bar Association said that while he liked the Jirga in principle, it had been 'so badly administered that the people as well as the police had been demoralised'.<sup>64</sup> A Hindu representative acknowledged that the Jirga system 'was suited to the peculiar conditions of this province. But those who sit on it were dishonest and were drawn from hangers on of officials'.<sup>65</sup> He also bemoaned the large amounts of money (in the form of bribes) that were often exchanged between the accused and Jirga members.<sup>66</sup>

Reservations regarding the Jirgas continued. In 1931, the vice-president of the Peshawar Municipal Committee argued that qualifications for membership of the Jirgas should be lifted. He 'advocated for a more critical scrutiny of the Jirga trial because... it based its findings on hearsay, rumours and circumstantial evidence'.<sup>67</sup> By 1940, the Frontier Provincial Muslim League was arguing that the Jirga system was no longer suitable, would not reduce crime, and only 'brought into play the evils of corruption and bribery'.<sup>68</sup> Although these reports and statements emphasised similar points, they span a time period (1921 to 1940) in which political conditions in the frontier region changed significantly. The emergence of the Khudai Khidmatgar,<sup>69</sup> a

60. 'Punjab Legislative Council The Frontier Crimes Regulation: Mr. Shah Nawaz's Speech'.

61. 'Frontier Enquiry Committee', *The Tribune* (27 May 1922), p. 7 [<http://www.crl.edu/>, accessed 10 June 2017].

62. 'Frontier Committee: Evidence of Hazara Bar', *The Leader* (29 May 1922), p. 4 [<http://www.crl.edu/>, accessed 10 June 2017].

63. 'Frontier Committee', *The Leader* (15 May 1922), p. 5 [<http://www.crl.edu/>, accessed 10 June 2017].

64. 'Frontier Committee', *The Leader* (20 May 1922), p. 4 [<http://www.crl.edu/>, accessed 10 June 2017].

65. *Ibid.*

66. *Ibid.*

67. 'More Trouble Brewing on the Frontier', *The Times of India* (15 June 1931), p. 9 [<http://search.proquest.com/>, accessed 10 June 2017].

68. 'Police Post Set on Fire: Tribal Outrage on Frontier', *The Times of India* (13 Feb. 1940), p. 2 [<http://search.proquest.com/>, accessed 10 June 2017].

69. Based on existing early twentieth-century social reform movements in the NWFP, the Khudai Khidmatgar was a Pashtun group led by Khan Abdul Ghaffar Khan. Along with the Indian National Congress, they participated in non-violent resistance against the British.

Pashtun anti-colonial political movement, its changing relationship with the Indian National Congress and the Muslim League, and the Government of India Act of 1935 all impacted upon the attitudes of individuals and colonial administrators.

Reports on the corruption and bias of the Jirgas in FATA continue to be a feature of contemporary political discourse, which has negative impacts upon people's trust in the Jirga system. Like the pre-independence British authorities, the political authorities in Pakistan today appear to be continuing to self-servingly use Jirgas to ensure that verdicts 'reflect official interests' and the interests of those with 'political or economic clout',<sup>70</sup> while the most vulnerable sections of the population bear the brunt of the costs. In a 1904 letter to the editor, a Mianwali resident had criticised the FCR for creating an environment in which life and property were no longer safe because justice was being delivered by the 'illiterate, untrained, and ignorant' members of the Jirga.<sup>71</sup> The situation appears to have altered little since, with the poor capacities of the Jirgas and their manipulation by government authorities having likely created sufficient insecurity and uncertainty that people's ability to make efficient and optimal economic decisions is limited.

### ***Abusing the provisions of the FCR***

Given the self-serving instrumental use of the FCR by the British authorities, complaints emerged suggesting that politicians and government officials used certain provisions to abuse their power. For example, a 1910 article about the NWFP described how a magistrate acquitted a secretary of the Sanatan Dharma Sabha of firing on a mob during riots in Peshawar, but that the government then ordered the secretary to leave the Peshawar district using an executive order under the FCR.<sup>72</sup> *The Leader* newspaper regarded such recourse to the FCR to be arbitrary and unjust, and called for the administration of the NWFP to be 'brought into line with the rest of British India'.<sup>73</sup> There were further instances when the government was accused of using the FCR for other ends such as controlling political protests. In 1920, a telegram was sent to an Indian statesman suggesting that the government had used certain provisions of the FCR to punish several hundred people in the NWFP who had protested against the Rowlatt Act by making them pay 'heavy securities' (i.e. a bond).<sup>74</sup> At a 1921 meeting of the Lahore City Congress Committee, a resolution was passed unanimously that declared 'that the repressive measures adopted by the NWFP Government and their resort to the Frontier Crimes Regulations for checking legitimate political propaganda are entirely arbitrary, high-handed and uncalled for'.<sup>75</sup> It congratulated 'the victims of the repression for manfully refusing to furnish securities in obedience to the non-cooperation [program]'.<sup>76</sup> In the Punjab Legislative Council

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70. International Crisis Group, 'Pakistan's Tribal Areas', p. 6.

71. 'Letters to the Editor: The District of Mianwali and its Penal Laws', *The Tribune* (1 Dec. 1904), p. 5 [<http://www.crl.edu/>, accessed 10 June 2017].

72. *The Leader* (14 Aug. 1910), p. 3. [<http://www.crl.edu/>, accessed 10 June 2017]

73. *Ibid.*

74. 'N-W.F. Province', *The Leader* (8 Mar. 1920), p. 16 [<http://www.crl.edu/>, accessed 10 June 2017].

75. 'Repressive Measures in Frontier: A Lahore Protest', *The Tribune* (12 May 1921) [<http://www.crl.edu/>, accessed 10 June 2017].

76. *Ibid.*

in 1921, issues related to abuse of the FCR were again brought up. A member of the Council argued that 'it is a well-known fact that the Deputy Commissioners have abused their power given to them' under Section 36 of the FCR (restrictions on the liberty of action), which allowed them to order any 'dangerous' person to move outside the territory covered by the FCR.<sup>77</sup>

Such abuses led to distrust of the FCR system and to the unchecked power of the British administration, and had long-term detrimental economic effects. Unfortunately, this abuse has not ceased in post-Independence Pakistan, where the government's political agents and the military continue to use provisions of the FCR for their own ends. Within FATA, members of the Jirgas are handpicked by the political agents; moreover, Jirga rulings are non-binding (i.e. unfavourable rulings can be vetoed by the government). As a result, there are still complaints that the Jirga system is designed to primarily suit the needs and desires of the government<sup>78</sup> rather than being an independent institution. In addition, the FATA administration and the military have continued to use the FCR's collective responsibility clause in the fight against insurgencies in the region, but they also allegedly use it to threaten others such as journalists: 'relatives and friends of the non-pliant journalists have been picked up, persecuted and thrashed, and their properties confiscated and demolished under the collective responsibility clause of the FCR'.<sup>79</sup>

### ***Perverse incentives for the police and judiciary***

Over time, the FCR created perverse incentives for both the police and the judiciary which affected the development of these two institutions. The police were accused of taking advantage of various features of the FCR to reduce their workload. The superintendent of police held police officers responsible for finding the perpetrators of crimes; this led the police to use the collective responsibility provision of the FCR to 'exculpate their inefficiency and to involve a whole population'.<sup>80</sup> In 1917, the Punjab Crimes Bill was introduced, which allowed the Punjab government to extend the collective responsibility provisions of the FCR to other districts.<sup>81</sup> During debate on the bill, a member of the Lahore Municipal Committee suggested that the bill would benefit the police and the Criminal Investigation Department because the collective responsibility measure could be used when they failed to find individual criminals.<sup>82</sup> Furthermore, because convictions were obtained more easily before a Jirga than before a regular court, there would be 'a strong temptation to the police to save themselves the trouble of investigation and report that there is no evidence forthcoming to satisfy the regular courts'.<sup>83</sup>

77. 'Punjab Legislative Council The Frontier Crimes Regulation: Mr. Shah Nawaz's Speech'.

78. Human Rights Commission of Pakistan, 'FCR: A Bad Law Nobody Can Defend' (2005) [<http://hrqp-web.org/hrqpweb/wp-content/pdf/ff/23.pdf>, accessed 1 Oct. 2018]; and International Crisis Group, 'Pakistan's Tribal Areas'.

79. Human Rights Commission of Pakistan, 'FCR', p. 64.

80. 'Punjab Provincial Conference: Punjab Crimes Bill', *The Tribune* (30 Oct. 1917), p. 3 [<http://www.crl.edu/>, accessed 10 June 2017].

81. 'New Punjab Crimes Bill', *The Tribune* (27 May 1917), p. 2 [<http://www.crl.edu/>, accessed 10 June 2017].

82. 'League Movement on Frontier Not to Be Called Off', *The Times of India* (8 May 1947), p. 5 [<http://search.proquest.com/>, accessed 10 June 2017].

83. *The Tribune* (29 Sept. 1921), p. 7.



The judiciary was also apparently willing to delegate its work to the Jirgas because that required less effort. In evidence before the Frontier Committee in 1922, a Punjab sub-divisions officer stated that the government ‘was sending every case which they themselves ought to try to the Jirgas’.<sup>84</sup> A government advocate from Peshawar stated that the FCR had resulted in magistrates not caring about their work and in the police becoming incompetent and disheartened.<sup>85</sup> Another local official giving testimony before the Frontier Committee also criticised the FCR for making ‘the police inefficient and the judiciary a bit slack’; he said that the latter was sending many cases to the Jirgas.<sup>86</sup> He further stated that some sections of the FCR were of ‘great use but some great restrictions must be put on the reference of cases to “Jirgas” and [the] police must be made responsible for tracing the offences in the same way as they were doing in the other provinces’.<sup>87</sup> Up until 1931, it was still acknowledged that a substantial number of cases were being referred to the Jirgas due to the ‘slackness of police investigations into the cases and improper exercise of power on the part of a magistrate’.<sup>88</sup> The vice-president of the Peshawar Municipal Committee stated that it was understood amongst the Jirgas that cases were sent to them in an effort to obtain a conviction.<sup>89</sup> As a result, the police ‘did not properly investigate cases, relying on the fact that the accused, by going to the Jirga, would be convicted’.<sup>90</sup>

Lawyers were also not happy with the FCR and the Jirga system although not always for altruistic reasons: because there was no legal representation under the FCR, there was no need for their services. According to a 1930 *Times of India* article, the main supporters of the All India Congress Committee campaign to remove the FCR in the NWFP were ‘vakils (lawyers) who resent the loss of fees owing to Jirga trials’.<sup>91</sup> Even a House of Commons report noted that ‘vakils and pleaders naturally tend to look askance at [the Jirga] system, for it entirely dispenses with the services of lawyers and no doubt often disregards technical rules’.<sup>92</sup>

The British administration was thus aware of the perverse incentives that were embedded in the FCR. The fact that the colonial authorities could obtain the desired result through the FCR’s various provisions gave them no incentive to reform important institutions—like the judiciary and police—because, as mentioned earlier, they felt the advantages of the FCR system outweighed the negatives. Yet, these perverse incentives retarded the development of these two important institutions, and the current state of FATA illustrates the consequences of such dynamics. The area is not only poorly developed, but its security has also been badly compromised.

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84. ‘Frontier Committee’, *The Leader* (24 May 1922), p. 5 [<http://www.crl.edu/>, accessed 10 June 2017].

85. ‘Frontier Committee’, *The Leader* (2 June 1922), p. 5 [<http://www.crl.edu/>, accessed 10 June 2017].

86. ‘The Frontier Committee’, *The Tribune* (16 May 1922), p. 7 [<http://www.crl.edu/>, accessed 10 June 2017].

87. *Ibid.*

88. ‘The Phenomenal Increase in Crimes in Peshawar’, *The Times of India* (13 June 1931), p. 7 [<http://www.crl.edu/>, accessed 10 June 2017].

89. *The Times of India* (15 June 1931).

90. *Ibid.*

91. ‘Civil Disobedience’, *The Times of India* (27 Mar. 1930), p.13 [<http://www.crl.edu/>, accessed 10 June 2017].

92. Indian Statutory Commission, *Report of the Indian Statutory Commission, 1929–30, Vol. 1* (Command Paper 3568)(1931) (London: HMSE, 1931), p. 321 [<https://parlipapers.proquest.com/parlipapers>, accessed 10 June 2017].



As with the British authorities, the continuation of the FCR system was in the interests of the Pakistan government. The politicians and officials of the FATA administration were able to address their needs and desires, and the military found it easier to fight the insurgencies under such provisions, but there were serious costs. In the absence of a functioning judiciary, even post-independence, a biased and limited Jirga was the only legal recourse. Additionally, without an effective policing infrastructure, the cost of committing crime was lower, which was possibly one of the main reasons for the rise in militancy in FATA. As a result, the Pakistani military took on the role of policing in FATA, which has led to further destruction of infrastructure and economic prospects. Under such circumstances, it was unsurprising that public opinion polling showed that law and order remained a primary concern amongst FATA residents.<sup>93</sup>

### Is integration of FATA and Khyber Pakhtunkhwa the cure?

In early 2017, the Pakistan government approved a plan that would merge the FATA region with the Khyber Pakhtunkhwa province and, in doing so, would integrate the FATA region into the broader Pakistan polity. The 25th amendment to the Pakistani Constitution, passed in 2018, officially established the merger. In conjunction with the merger, the FCR system has been replaced by the FATA Interim Governance Regulation while the merger is in transition. Given the pervasive negative effects of the FCR, why did such integration take so long?

Perhaps, post-independence, Pakistan's limited state capacity was unable to effectively control this peripheral region. Furthermore, the security situation in Pakistan's north-western borderland compounded any existing difficulties in integration. Yet a state also needs an incentive to govern a region.<sup>94</sup> In the 1960s and 1970s, the governments of Ayub Khan, Yahya Khan and Zulfikar Ali Bhutto chose to remove the FCR from various non-FATA regions, and some recent empirical evidence suggests that revenue considerations influenced those decisions.<sup>95</sup> Thus it may have been the will rather than the capability that was the main obstacle to the full integration of the FATA region. Even the 2011 FCR reforms seemed to be more cosmetic than real due to the unwillingness of the government's political agents to fully relinquish all their powers.<sup>96</sup> Yet, is such integration going to lead to better outcomes for the residents of FATA?

The answer is, not necessarily. Institutions are 'sticky' and disruptions and transformations can lead to temporary power vacuums during which conflict can emerge.<sup>97</sup> Completely marginalising the political agents in the FATA region, who

93. Shinwari, 'Understanding FATA'.

94. Catherine Boone, *Political Topographies of the African State: Territorial Authority and Institutional Choice* (Cambridge: Cambridge University Press, 2003).

95. Michael Callen, Saad Gulzar, Arman Rezaee and Jacob N. Shapiro, 'Choosing Ungoverned Space: Pakistan's Frontier Crimes Regulations' (2015), Working Paper [<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.680.9961>], accessed 10 June 2017].

96. Ibrahim Shinwari, 'FCR Reforms: Nothing on the Ground', *Dawn* (6 Jan. 2015) [<https://www.dawn.com/news/1155237>], accessed 10 June 2017].

97. For a good example of this dynamic, see Jacques Bertrand, *Nationalism and Ethnic Conflict in Indonesia* (Cambridge: Cambridge University Press, 2004).

have been primarily relied upon to maintain political order, could result in increased rather than decreased militancy. In fact, there is some evidence to suggest that the initial reductions in the political agents' power could explain the onset of insurgency in the region in 2004.<sup>98</sup> Thus any further changes in control need to be transitioned in such a way that power vacuums are minimised. According to Migdal, if social control is fragmented and spread across different organisations, a state will find it hard to implement its agenda even if a region is consolidated into the broader polity.<sup>99</sup> Moreover, polling evidence from FATA in 2010 revealed that one-third of the population supported the merger, while a quarter wanted to keep the current governing arrangement.<sup>100</sup> Therefore, and in line with Scott's paradigm, a significant proportion of FATA inhabitants might choose to resist the Pakistan government's efforts at state-building.<sup>101</sup>

Given this institutional 'stickiness', it is then not surprising that a 2016 Pakistan government report on FATA reforms argued for the retention of the Jirga system within the FATA region, along with its merger with KP. According to the report, under the reforms, the FCR would be repealed, collective responsibility would no longer be used, and the jurisdiction of the Supreme Court of Pakistan would be extended to FATA. However, because the Jirga system would be retained, the legal infrastructure in FATA would be a 'hybrid' system that is closer to, but not identical with, what prevails in the rest of Pakistan. The report argued against full repeal of the Jirga system because such a 'repeal would be resisted and [would] destabilize the social order',<sup>102</sup> so the FATA Interim Governance Regulation maintains the Jirga system. This reveals the government's concern with social stability (rather than with justice, necessarily), and how full removal of the FCR may not be an optimal decision for development or stability.

This is not to say that the majority of FATA residents are simple tribespeople. They belong to a complex and heterogeneous society.<sup>103</sup> However, institutions are still important and the sudden removal of a well-established (although normatively draconian) system risks the emergence of chaos, albeit temporarily. In sum, although repealing the FCR would be welcomed by the majority of Pakistanis living inside and outside FATA, integration of the region is not a simple process. The finding of substantial, although minority, support for the current FATA arrangements could reflect a fear of future uncertainty or satisfaction with the prevailing system. In either case, it suggests that divisions exist which could potentially lead to conflict if the power transition is badly managed.

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98. Adnan Naseemullah, 'Shades of Sovereignty: Explaining Political Order and Disorder in Pakistan's Northwest', in *Studies in Comparative International Development*, Vol. 49 (2014), pp. 501–22.

99. Joel S. Migdal, *Strong Societies and Weak States: State–Society Relations and State Capabilities in the Third World* (Princeton, NJ: Princeton University Press, 1988).

100. Shinwari, 'Understanding FATA'.

101. James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, CT: Yale University Press, 2009).

102. Ministry of Foreign Affairs, Government of Pakistan, 'Report of the Committee on FATA Reforms' (Aug. 2016), p. 10 [<http://www.safron.gov.pk/safron/userfiles1/file/Report%20of%20the%20Committee%20on%20FATA%20Reforms%202016%20final.pdf>], accessed 10 Sept. 2018].

103. Marsden and Hopkins, *Fragments of the Afghan Frontier*.

## Conclusion

Past institutional choices matter for outcomes today. Although the British colonial government's choice of institutional structure was driven by its own immediate exigencies, the chosen system has had lasting effects. Yet these long-term consequences are not necessarily only understood in hindsight. This paper has focused on one particular British legal instrument, the Frontier Crimes Regulation, which the British government and then the Pakistan government used for their own ends, and it has illustrated how the local population was well aware of the pervasive pernicious effects associated with this parallel legal system.

The FCR enshrined a lack of legal rights, a reliance on Jirga members of frequently questionable calibre, an ability of political agents to exploit and abuse FCR provisions, and a range of perverse incentives for the police and the judiciary. The longer the FCR was in place, the more likely that each of these perversions would have long-lasting pernicious developmental and security consequences. The FCR has now been removed from all of Pakistan's provinces except for the FATA area. The critiques from the early twentieth century highlighted here shine light on some of the foundations of the current economic and security problems in this region.

Given their geographic proximity, the fates of FATA and Afghanistan are intertwined.<sup>104</sup> Therefore, the stakes for any reform (or absence of reform) are higher because the consequences could affect the broader security environment in the region. In 2018, the passing of the 25th amendment to the Pakistan Constitution ensured the merger of FATA with Khyber Pakhtunkhwa, and was followed by a repeal of the FCR. However, the transition may not be smooth if care is not taken to prevent power vacuums. The longer a system like the FCR has been in place, the larger the dislocation will be from any institutional transformation. It is largely agreed that removing the FCR was imperative, but care needs to be taken on how this transition is managed.

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104. Robert Nichols, 'The Final Frontier', *The Friday Times* (3 Mar. 2017) [<http://www.thefridaytimes.com/tft/the-final-frontier>, accessed 10 June 2017].