

FATA REFORMS IN INSTITUTIONAL INERTIA

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Abstract

This paper historically contextualizes Frontier Crimes Regulations (FCR) as well as analyzes its political economy. The FCR was the product of specific historical circumstances when Sika Shahi was replaced by the British East India Company operating from Punjab in 1849 and extended its rule to the Pashtun belt. Today's KPK (Khyber Pakhtunkhwa), formerly known as North-West Frontier Province (NWFP) and Federally Administered Tribal Area (FATA) were called North-Western districts of Punjab by the British East India Company. This study will also examine the strength of institutional inertia of FATA administration and its role in preventing reforming the FCR.

Key Words: FATA, FCR, NWFP, Reforms, Corruption, East India Company, Pakistan.

The British rule was precarious in the Pashtun belt and to suppress the anti-British unrest in the region draconian laws were enforced, e.g., 'Murderous Outrages Act' (MOA) in 1867. The MOA was followed by "the 'Criminal Tribes Act' from 1871, designed 'to provide for the registration, surveillance and control of certain tribes' (Nichols, 2013, P. x). The first FCR was enacted in 1872, revised in 1886-87 and that transmuted into the FCR of 1901 after the creation of NWFP in 1901. This paper anatomizes history and resilience of the FCR after the creation of Pakistan in 1947. This Black Law lingers on in the bureaucratic episteme of Pakistan despite many attempts to reform it. We argue that FATA Administration is the principal beneficiary of the FCR and therefore with minor cosmetic changes the substance remains the same.

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According to Nichols the FCR created bureaucratic authoritarianism where:

Deputy Commissioners held ultimate authority in multiple roles as political executive, revenue collector, and magistrate. The need to assert political control transcended any absolute notions of judicial access or due process of law for any charge, trial, conviction, or appeal. Deputy Commissioners could bypass expensive or ambiguous judicial requirements and rules of evidence and send both civil and criminal cases to officially appointed councils of elders, *jirgas*. The *jirgas* would determine facts, judge culpability, and report decisions to the British official responsible for awarding punishments. There was no right of appeal to any higher colonial court (Nichols, 2013, P. xiv).

The Genesis of the FCR started in response to rising crime rate in Peshawar valley after the British replaced Sika Shahi in 1848 (Nichols, 2013). "The law that enabled such a swift execution of justice, in this case, was Act XXIII of 1867, more popularly known as the 'Murderous Outrages Act' (MOA)" (Condos, 2016, p. 2). This brutal law did not offer any fair due process. In this law, the ruthless colonial executive power masqueraded in the new legalistic discourse (Condos, 2016). Anybody convicted under this law for murder of European or their employees were;

"Liable to death or transportation for life, with all their property being forfeited to the state. No juries were allowed for these cases. Instead, the accused were tried by a tribunal consisting of a Commissioner and two other executive officers with full magisterial powers. Sentences were to be carried out immediately, with no need for review and no appeals whatsoever being granted. . . . Offenders tried under the MOA were almost invariably executed, usually within a day or two of their arrest and trial (Condos, 2016, p. 2).

According to Condos in the time span, 1851 to 1867 about 703 homicides were reported in the district of Peshawar. This high level of violence was ascribed to the Pashtun character and their socialization into violence (2016). The Punjab Government took particular steps for the administration of justice by enacting the Punjab Frontier Crimes Regulation in 1872. This new legal

instrument gave tremendous power to Deputy Commissioners of a Frontier districts (Lal Baha, 1978). Formulation of Punjab Frontier Crimes Regulation in 1872 started in 1871 when the British created an artificial distinction of good Pashtuns of settled districts whose land was surveyed for tax purposes and wild Pashtuns living today's FATA regions. There was no innate difference between the people of two regions except taxation (Ullah, 2015).

This colonial legality, inscribed on the body of Pashtuns, was meant to secure their control remained unchanged after the creation of Pakistan in 1947. This historicized document assumed status of an ahistorical facticity designed for immutable FATA denizens who are frozen in time. I argue the genesis of FCR was triggered by specific historical circumstance and was seen by the British as a stop-gap solution till a meaningful solution was found. Resurgent Bismarck's Germany and Japan, World War I, Bolshevik Revolution 1917 and World War II never let colonial administration to the fine-tuning and calibration of the nitty-gritty of the FCR. Curzon and Howell,

recognized nearly a century ago, the administrative system (the FCR) was mere patchwork, and had negative long-term consequences for the legitimacy of local leaders. The system's fundamental flaw was that by co-opting the traditional tribal leadership they undermined the social dynamics that were essential to its legitimacy and effectiveness. The tribal system, corrupted by the activities of the political agents, became less and less workable, until eventually, tribal maliks became hereditary rights holders which was antithetical to the ideals of the Pakhtunwali (Sammon, 2008, p. 57).

We believe that bureaucratic inertia has a predictable propensity of an organizations to preserve the "established procedures and modes, even if they are counterproductive and/or diametrically opposed to established organizational goals" (Wikipedia November 14, 2017). In FATA administration inertia (bias towards the *status quo*) is functional and "can be optimal from an *ex ante* (based on anticipated changes) point of view" (Boyer, & Robert, 2006, p. 343).

This brutal and outdated Regulation prevented social changes and development in the FATA and has kept the region backward

socially, economically and most importantly in area of education. British were very selective in conferring status of malik because malik was an instrument of Political Agent for indirect administration. It is important to mention that malik or elder is not a tribal chief in Pashtun society rather he has to use his persuasive power to convince his fellow Pashtuns; his status is just “only a *primus inter pares* (a first among equals). He is venerated but cannot give orders to anyone outside his immediate family” (Johnson & Mason, 2008, p. 62).

Sammon believes that the number of maliks rapidly increased in Pakistan with corresponding variation of their influence. The system totally relied on the whim of political agents who saw events and people through the prism of the tribal system. Most of the maliks thrived in Pakistani FATA while FATA remained economically backward (2008). Sammon further writes:

Like their British predecessors, successive Pakistani governments effectively ignored the region because their leaders, even Pakhtuns like President Ayub Khan, continued to view the region as distinct from the rest of Pakistan. The maliks’ legitimacy continued to erode as they became more wealthy and self-interested and averse to reforms that would threaten their power. A virulent form of political Islam eventually grew to fill the void (2008, p. 58).

Hopkins echoed same opinion about the postcolonial FATA of Pakistan:

In addition to the FCR’s imperial life, it has had a lasting postcolonial afterlife. In modified form, it remains in force today in the Federally Administered Tribal Areas (FATA) of Pakistan along the Afghan border, composed of the former tribal agencies of the Raj. These areas continue to be run by political agents charged with roughly similar duties and powers as their British predecessors (2015, p. 385).

One lawyer aptly said, “61 years since independence, FATA’s people are judged by a system that permits “no wakeel (lawyer), no daleel (argument), and no appeal” (Haider, 2009, p. 7).

Since there is no substantive electoral system therefore FATA administration is not confronted by a meaningful popular opposition and hence faces legitimization crisis. We argue that the

structure of the juridico-political institutions is determined by the need to repair the legitimation deficit, and to foreclose and preempt all those possibilities which might undercut the authoritative value of the official account. Because judicial discourse is shaped by the political desires of the ruling classes, all those questions that threaten to problematize the pre-givens of the official discourse must be smothered by the legal arm of the political power (Burton and Carlen 1979). Habermas correctly says, "legality can create legitimation when, and only when, grounds can be produced to show that certain formal procedures fulfil certain material claims to justice under certain institutional boundary conditions" (1976: 99). Burton and Carlen nicely argue:

Official discourse on law & order legitimation deficits and seeks discursively (by digressing) to redeem them by denial of their material geneses. Such denial establishes an absence in the discourse. This absence, the Other (tribesman), is the silence of a world constituted by social relations the reality of which cannot be appropriated by a mode of normative argument which speaks to and from its own self-image via an idealised conception of justice) (1979, p. 138).

Ground realities in FATA have inverse manifestation to the official espoused idealised conception of justice. Yes, there are vested interests that would like to keep FATA isolated and backward. Malakan, FATA administration, contractors and other beneficiaries of the status quo would like to keep business as usual because they have mutually beneficial symbiotic relations. Rewaj is presented as a free tribal way of life, embodiment of Pashtunwali. Rewaj camouflages FCR as if it is an immutable divine or natural law. The FATA reforms are meant for the continuation of FCR by another mean. FATA is a cash cow that feeds many mouths and is sustained by a heterogeneous alliance of bureaucracy, maliks, contractors and MNAs and Senators. These different actors have a mutually beneficial symbiotic relationship for the preservation of the status quo in the new reformed incarnation of the FCR. Wartenberg nicely explains,

situated power does not reside exclusively in a single site or institution of society. The situated conception of power shows that social power is a heterogeneous presence that spreads

across an entire field of agents and practices, although its exercise depends upon the decision of the dominant agents. Such heterogeneity is constituted by a complex coordination among agents located in diverse sites and institutions, all whose presence in a social alignment is necessary to constitute a situated power relationship (Wartenberg 1992, pp. 90-1).

In other words, diverse groups could come together for a hegemonic alliance if it suits their interests. The FCR is a facilitative-power that is situated in FATA administrations where divergent interests intersect and complement one another. This is also consistent with post-structuralist understanding of FATA government that it is made of disparate multiple agencies that are dispersed over its administrative space (Nasr, 2016).

The FATA administrative structure is inherited from the British and was expected to increase interaction with the tribal belt in post-1947 period for national integration. But instead of improved interaction with the tribesmen at the popular level, the administrative engagement decreased as most of FATA offices are located in settled regions (Mazhar, 2010). Haque correctly described this predicament:

After independence, instead of introducing fundamental change in postcolonial bureaucracy, the scope and power of such bureaucracy was expanded further as it assumed the role of enhancing socioeconomic development and undertook massive development activities. The power of bureaucracy has expanded further due to its modernization, technical expertise, coercive authority, and control over information and resources. As a result, bureaucracy is so overwhelmingly powerful that it is difficult to ensure bureaucratic accountability by the relatively weak and powerless political institutions such as parliament, political parties, and interest groups (1997, p.8).

The FCR strength is in its vagueness and opacity wording in both its 1887 and 1901 forms and that in turn created (Hopkins, 2015) room for multiple interpretations depending on the desire of FATA administration especially in allocation of economic resources. In this type of economic arrangement instead of market forces government bureaucracy regulate who gets what and the whole resource allocation process has become politicized. Because of

enormous regulatory power, political administration creates monopoly over allocation and opportunities for profit (Mbaku 1996).

“As a result, bureaucrats try to capture rents by extorting bribes from entrepreneurs who request them. Where government regulation imposes significant costs on a business, the entrepreneur can minimize those costs by paying bribes to members of the enforcement community” (Mbaku 1996, P. 107).

Corruption in South Asian context could be defined as an unfair allocation of public resources for personal gain. “The most common forms of corruption at the individual level include bribery, fraud, nepotism, undue influence and misuse of public funds and utilities to name a few” (Jabeen, 2006, p. 17). Corruption in the context of FATA administration is issuing of permits for the chosen ones. Permits is regulatory instrument that creates rent for scarce resources and political agent is the gatekeeper of those scarce resources here “competition for preferential treatment is such that the gatekeeper benefits from the influence seeking expenses/activities in the way of a costless income transfer from the beneficiary to the gatekeeper” (Aidt, 2016, p. 146).

The reason is that such regulation creates rents through artificial scarcity. As a consequence, potential producers in the industry is willing to pay a bribe to obtain a license. . This, by itself, involve a social loss. Yet, the public official has a private incentive to do this because he can extract some or all of the rent from the would-be producers who are willing to offer a bribe to be “assigned” the scarcity rent (Aidt, 2016, p. 147-8).

Rent creation make FATA administration as a stake holder and would like the business as usual. Reforms could be detrimental to the lucrative business of rent.

The other paradox in the system is an overdeveloped bureaucracy in a backward society. Colonial administrations needed an overdeveloped bureaucratic machine for exploitation of raw materials, benefiting from cheap labor and collection of taxes in secure environment (Haque, 1997a). “Thus, bureaucratic advancement and economic backwardness went hand in hand. This colonial formation of an advanced bureaucracy and a backward

economy continued in most developing countries” (Haque, 1997a, p. 439). In true democratic societies public officials stick to their role as a public servant and “maintains its public identity, reinforces its legitimacy, sets its ethical standards, determines its roles and duties and distinguishes it from business management in the private sector (Haque, 1999, p. 309). In Pakistan bureaucratic paradigm is based on personal self-interest when it comes to allocation of resources.

Yes, there are vested interests that would like to keep FATA isolated and backward. Malakan (plural of malik), FATA administration, contractors and other beneficiaries of the status quo would like to keep business as usual. FATA administration has developed a commonly advantageous relationship with Malakan to the detriment of FATA inhabitants. Curzon the founder of FCR was aware of its ad hoc nature but FATA bureaucracy still talks about its benefits because it suppresses dissent and punished people without due process; also, it is functional to the rotten system. Three year tenure for administration was meant to prevent officials from cultivating corrupt relationships but almost in last forty years same people go from one agency to the other and comeback to the same place again and again.

Brigadier (retd.) Mahmud Shah who headed the FATA Secretariat said: “FATA is heaven for bureaucracy and hell for people. In an interview, similarly spoke of the presence of “mafias” in the bureaucracy that hamstrung his reform agenda” (Haider, 2009, p. 15). Backwardness in socio-economic and politico-cultural spheres cannot be separated elitist attitude and extensive power in the hands of Political Agents and his bureaucracy (Haque, 1997a). “These interest groups resist change and undermine the capacity of the state to adapt to changes in the environment (Zantvoort, 2017, p. 712).” According to Fukuyama, entrenched elites do everything in counterattacking institutional restructuring. Because of a strong *esprit de corps* these administrative elites are better organized than ordinary people and are in position to maintain a ‘dysfunctional political equilibrium’ in a sinister way (in Zantvoort, 2017).

Lawson is correct in his critique of bureaucracy:

In this line of thinking, bureaucracy is the primary cause of countless problems. Many of these problems cannot be solved because the bureaucracy cannot be changed. Just as the sun

risers daily in the East and sets in the West, bureaucracy's constraints and problems are predictable, inevitable, and impervious to change (2009, p. 1).

In conclusion we should not forget that the FCR operated through Malakans and after war in terrorism Mullah has replaced Malik. Some Malakans are killed by Mullahs and others living in settled districts in their homes or in camps as Internal Displaced People (IDP). We are resurrecting a moribund system where one of the arch stones is almost completely gone. We have seen many committees for FATA reforms we tend to believe that FCR will be reincarnated in some new arrangement. As long as Political Agent runs the show, FCR will always have a special role. This depressing scenario is nicely depicted by Rosa as "Frenetic standstill," 'a situation where nothing remains the same but nothing essentially changes.' According to this thesis, we have an accelerated social life straitjacketed (in Zantvoort, 2017) in the rigid institutional logic of FATA Administration.

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