

The 18th Constitutional Amendment: A Case Study of FATA

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Abstract

A constitution includes the fundamental principles by which a state and its territories are governed. An amendment in a constitution addresses emerging realities. The 18th Amendment in the Constitution of 1973 of Pakistan, made in April 2010, is considered to be the most important and comprehensive amendment since the adoption of the original constitution. It has curtailed the powers of the president of Pakistan; restored the federal system of government and devolved power from centre to the provinces. In this landmark amendment there are 102 clauses but none relate to FATA. Yet the FATA members voted in favour of the said amendment.

While exploring the constitutional history of FATA, this paper tries to delve into the causes of constitutional injustice to the region. It examines the amendments in Frontier Crimes Regulation (FCR) and questions how constitutional governance can be established in FATA so that people there can enjoy similar rights as enjoyed by the citizens of Pakistan.

Introduction

The Constitution of 1973 has 280 Articles and is divided into twelve parts. The Articles 246 and 247 fall in the last part of the constitution that deal with FATA. Tribal areas are represented in the parliament by 12 members in the National Assembly and eight in the Senate. These members, however, cannot legislate for FATA. The constitution of Pakistan governs FATA through the same FCR that was left by the British in 1901. The region is a part of Pakistan but not included in any province. Theoretically the executive authority of the tribal areas lies with the federation. The President has the supreme powers in FATA; neither the Supreme Court nor a High Court can exercise any jurisdiction under the constitution. A common government officer, named Political Agent, is constitutionally authorized to exercise judicial, legislative and administrative powers.

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The Federally Administered Tribal Areas of Pakistan spread over an area of 25, 500 square miles.¹ The national legislature cannot promulgate laws for this region; instead, the president may either promulgate regulations for the region's governance or may allow certain specific laws to apply.² The 18th Amendment devolved power to the provinces but the fate of FATA remained unchanged. To understand the grievances of FATA there is a need to keep its geography and history in mind.

The province of Khyber Pakhtunkhwa (KP) has a double boundary: one administrative and the other political. The administrative boundary separates the five districts from the tribal territory and extends to the foot of the mountains. The political boundary known as Durand Line marked off Afghanistan from British India. The intervening area between the two boundaries has been occupied by Pushtun tribes.³

Located to the west of KPK and below the Khyber River, the Federally Administrated Tribal areas consist of the Safed Koh Range and the Waziristan Hills. Number of high passes transacts the mountains, serving for centuries as routes of invasion and trade between Central Asia and the plains of the subcontinent. It was a strategic frontier which not only marked the division between the Central and South Asia but served as ethnic break water by diverting the flood of the Central Asian⁴ migration. This led to the superimposition of historical lines.⁵

The northwest frontier region has played an outstanding role in the whole history of the Indo-Pakistan subcontinent. It stretched along the borders of Afghanistan and included Little Pamir, Chitral, Kohistan, Bajaur, Khyber, Tirah, Waziristan, and Baluchistan. The passes of the northwestern hills of Hindu Kush attracted invaders from Persia, Greece, and Central Asia to enter India and earn a place in the region's history. Conquerors like Cyrus, Alexander, Changez Khan, Mehmud Ghaznavi, Mohammad Ghore, Timur, Bahbur, Nadir Shah and Ahmed Shah Durrani all had to make use of this way. It was also through this pass that the British feared a Russian intrusion of the subcontinent in the 19th

¹ Lal Baha, 'N.W.F.P. Administration Under British Rule 1901-1919 Historical Studies', *Muslim India, Series:2* (Islamabad: National Commission on Historical and Cultural Research), 1978, p.2.

² Sikander Ahmed Shah, *International Laws and Drone Strikes in Pakistan: The Legal and Socio-political Aspects* (New York: Routledge, 2015), p.94.

³ Lal Baha, *op.cit.*, pp.1-2.

⁴ R. Gopalakrishnan, *The Geography and Politics of Afghanistan* (New Delhi: Concept Publishing Company, 1980), p.34.

⁵ Lal Baha, *op.cit.*, p.3.

century. Among number of passes the Khyber Pass is the swiftest and the shortest way to enter the subcontinent.⁶

Northwestern India under British rule

When the British consolidated their power the northwestern frontier of India was unsettled. This part of India was included in the Punjab. The British regarded this frontier highly important having Khyber Pass as the key both to the safety of the region and as a gate way to Afghanistan. Throughout the 19th century Afghanistan was threatened by encroaching Russian power from the north, which the British attempted to counter balance from India.⁷ The British established their hold on the princely states of India throughout the 1840s (until the Indian Rebellion of 1857) while the Russian did the same to the khanates of Central Asia, through either military conquest or economic vassalage. The Russian armies conquered vast areas of Central Asia by 1864, Tashkent and Samarkand by 1874, only the Bukhara held out into the twentieth century, to be finally subdued in the bloody Basmachi campaign of the 1920s. Throughout this period the British attempted to extend their influence into Afghanistan, an area they had to control to counter Russian expansion.⁸ The tug of war between British and Russia in the region of South Asia was not over until the boundaries of Afghanistan were not fixed. In the last two decades of nineteenth century the Anglo-Russian boundary commissions did the demarcation of the frontiers of Afghanistan to make it a buffer state between their spheres of influence. At the northwest of India a boundary was defined on 12 November 1893 named as Durand Line. This boundary made the Pushtun tribes a pawn between the Amir of Afghanistan and British India. The Amir continued to maintain his contacts with the tribesmen on the other side of the line and attempted to incite the tribes into action whenever the need arose.⁹

On assuming office as Viceroy in January 1899, Curzon had to deal with the two-fold problem of the northwest frontier: the reorganization of military defence, and the reform of the administration of the trans-frontier districts.¹⁰ In 1900 Lord Curzon sketched out his

⁶ Jaswant Lal Metha, *Advanced Study in the History of Medieval India*, Vol.1 (New Delhi: Sterling Publishes, 1979), p.47.

⁷ Guy Arnold, *World Strategic Highways* (New York: Routledge, 2013), p.216.

⁸ Larry P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of Taliban* (Washington: University of Washington Press, 2011), p.34.

⁹ Rizwan Hussain, *op.cit.*, p.36.

¹⁰ Lal Baha, *op.cit.*, p.12.

scheme for taking over the administration of this area from Punjab government and constituted in into a new province. The northwestern area was carved out from Punjab in 1901. In Curzon's opinion the area between the Swat River and the Gomal Valley was the 'most critical, most anxious and most explosive section of the entire frontier' of India. It was inhabited by the most numerous, fanatical and turbulent of the Pathan tribes.¹¹ For over hundred years, 1837-1947, British and Indian troops remained engaged on the northwest frontier of India, policing the tribes, mounting expeditions, and guarding against the lingering threat from Russia.

Creation of FATA during British rule (1893-1947): The tribal belt between British India and Afghanistan was referred by Afghan Amir, Amir Abdur Rehman Khan (1880-1901), as Yaghistan, 'Land of the Free', 'Land of Rebels', and 'Land of Insolence'.¹² Before 1877 FATA had no separate entity. The British Viceroy, Lord Lytton, instead of depending on the provincial government of the Punjab, devised a system whereby the central government itself would have direct control over the frontier administration and policy. The creation of present day FATA can be attributed to the 'great game'. It was in the mid-nineteenth century when the British decided to refrain from directly influencing FATA; however, this policy was soon modified with gradual extension of authority in the tribal belt. An inimitable system of administering FATA was established under British rule, which exists to this day in Pakistan. With the primary purpose of ensuring the security of governments posts and roads, the British signed agreements with each tribe and permitted the practice of traditional customs in FATA instead of western administrative system.¹³

During British rule in India several regions were left as a buffer zones for protection against perceived threats. In the case of FATA, the main purpose was to use this region as a bulwark against the Tsarist Russia, and later the Soviets. It was also difficult for the British to implement its writ in the tribal areas. In 1879, by the Treaty of the

¹¹ *Ibid.*, p.18.

¹² Louis Dupree, *Afghanistan* (New Jersey: Princeton University Press, 1973), p.XVII.

¹³ Humaira Daniel and Zahid Shahab Ahmed, 'State fragility and adaptation to climate change in water scarce areas: a case study of the federally administered tribal areas of Pakistan', in *Adaptation to climate change through water resources management: Capacity, equity and sustainability* (New York: Routledge, 2015), p.310.

Gandamak concluded with the Amir of Afghanistan, the British government secured control of the Khyber Pass. The Khyber Political Agency, the first of its kind in the Frontier, was then created.¹⁴

The Frontier had two distinct kind of boundaries: one between Afghanistan and British India that was composed of the tribal belt; and another between the tribal belt and the settled areas.¹⁵ To protect the trade routes and passes a system of government subsidies or ‘allowances’ was inaugurated, by which the tribes, in return for a fixed annual payment, pledged themselves to take that particular route under their protection, to abstain from raiding British Indian territory and to perform certain minor services.

The Pushtun territory was carved and annexed by the British to India into two zones known as the FATA and the North-West Frontier Province (NWFP). The NWFP was less hilly and easier to tame than the FATA, and it is often described as ‘settled’. This area subsequently became a regular province of British India and later of the newly independent country of Pakistan. But the Pashtuns in the hills of the FATA were more unsettled, and on many occasions they revolted against their British masters. For this reason they were not fully included in the British state the way the province of Sindh, Punjab, Baluchistan, and the NWFP.¹⁶

In 1934 British extended self-government to the NWFP. One month before the partition of India, in July 1947, the British held a referendum in the settled districts of the province to take their consent about joining either Pakistan or India. The people of NWFP, in general, voted in favour of Pakistan and an assembly of elders, called *loya Jirga*, was convened in the tribal agencies in which the tribes declared their preference for Pakistan.¹⁷

FATA after the creation of Pakistan

The Indian Independence Act of 1947 called for lapse in treaties or agreements in force between His Majesty and the powers having authority in the tribal areas. This required the newly established state of Pakistan to engage in negotiations with tribal leaders in FATA and make

¹⁴ Lal Baha, *op.cit.*, p.52.

¹⁵ C. Christine Fair, *Fighting to the end, The Pakistan Army's way of war* (New York: OUP, 2014), p.110.

¹⁶ Brian Glyn Williams, *Predators: The CIA's Drone War on al-Qaeda* (Dalles: Potomac Books, 2013), p.12.

¹⁷ Claitor's Publishing Division, *Afghanistan: A Country Study* (Baton Rouge, LA: Claitor's Publishing Division, 2001), p.57.

a new settlement. Being a Muslim country, Pakistan found it relatively easier than India to rule the tribal areas. The regular army was withdrawn, amnesties were offered and tribal agencies were treated as autonomous entities within Pakistan.

Preceding the creation of Pakistan, Ghaffar Khan, one of the leaders of FATA, met with the Governor General of Pakistan Mohammad Ali Jinnah, to talk about his proposal to gradually integrate FATA into the NWFP. Accordingly, Pakistani officials visited FATA in 1947 and 1948 to reach an agreement with about two hundred *maliks* (tribal representatives). These *maliks* demanded the same royalties and privileges that they were enjoying under the British rule. Their demands were granted and approved by Quaid-i-Azam. He also pledged to the leaders of FATA that the state would not interfere in their internal matters and would continue granting state benefits in return for FATA joining Pakistan. It was decided that FATA would be directly administered via central government—a decision that led to the creation of the Ministry of States and Frontier Regions. Consequently, the constitutions of Pakistan (1956, 1962 and 1973) retained the essence of the agreement on FATA, providing a special status to the region.¹⁸

FATA in the constitution of 1973: The 1973 Constitution of the Islamic Republic of Pakistan was unanimously approved by all the political stakeholders, but failed to guarantee extension or implementation of full fundamental rights to the people of FATA, including authentic representation in the National Assembly or Senate of Pakistan.

In Part I of the 1973 constitution, the Republic of Pakistan and its territories are defined and the Federally Administered Tribal Areas are included in the same.¹⁹ The Part XII of the constitution which deals with miscellaneous issues in Chapter 3 deals with tribal areas. In this chapter, Article 246 stipulates:

Tribal areas mean the area in Pakistan which immediately before the commencing day, were Tribal Areas, and includes the Tribal areas of Baluchistan and the NWFP province.

Article 247 deals with the administration of the Tribal Area. It stipulates:

¹⁸ Dominic Stucker and Elena Lopez-Gunn (ed.), *Adoption to Climate Change Through water Resources Management* (New York: Routledge, 2015), p.310.

¹⁹ Makhdoom Ali Khan Barrister (ed.), *The Constitution of the Islamic Republic of Pakistan* (as amended up to March 1988) (Karachi: Pakistan Law House, 1989), p.5.

- 1) Subject to the constitution, the executive authority of the Federation shall extend to the FATA.
- 2) The President may, from time to time, give such directions to the governor of a province relating to the whole or any part of a Tribal agency and the Governor shall, in the exercise of his function under this Article, comply with such direction.
- 3) No Act of [Majlis-e-Shoora (Parliament)] shall apply to any Federally Administered Tribal Areas or to any part thereof, unless the President so directs, and no Act of [Majlis-e-Shoora (Parliament)] or a provincial assembly shall apply to PATA, or to any part thereof, unless the President so directs.²⁰
- 7) Neither the Supreme Court nor the High Court shall exercise any jurisdiction under the constitution in relation to a tribal area.²¹

The Constitution of 1973 thus preserves the colonial practice of containing the unruly tribes rather to extend the rights and privileges of Pakistanis living in the settled areas.²² The administration of the Provincially Administered Tribal Areas (PATA) of the Khyber Pakhtunkhwa (KPK) and Balochistan are administered at the provincial level, however, the administration of FATA remains the responsibility of the federal government acting through the Governor of the KPK, who is appointed by the President of Pakistan. Although it has representation in the National Assembly and the Senate but state authorities chose the representatives of FATA remain under the direct executive authority of the President (Article 51, 59 and 247). Being a semi-autonomous region, laws made in the National Assembly do not apply to FATA, unless they are implemented by an order of the President.²³ The Governor of KPK, currently administers FATA in his capacity as an agent to the President of Pakistan, under the overall supervision of the Ministry of States and Frontier Region.

Frontier Crimes Regulation

The laws to regulate FATA, designed in 1872, called Frontier Crimes Regulation, depict ‘an exceptional and primitive’ regulation, enacted by the British Punjab government and revised in 1887 and 1901. The FCR is a basic component of the administrative system of justice in tribal areas. An urgent incentive behind the promulgation of FCR was the assassination of the Viceroy of India, Lord Mayo, in 1872 by an Afridi

²⁰ *Ibid.*, p.205.

²¹ *Ibid.*, p.206.

²² C. Christine Fair, *op.cit.*, p.131.

²³ Humaira Danial and Zahid Shabb Ahmed, *op.cit.*, p.311.

tribesman. This incident made the situation highly critical for the British government consequently they prepared a separate law code for the tribal belt known as FCR with the primary purpose of ensuring the security of government posts and roads. The British signed agreements with each tribe and permitted the practice of traditional custom in FATA. The tribal customs were codified into law by the British and the political agents appointed *jirgas* (tribal councils) which decided all disputes in the areas according to local customs, *rewaj*.²⁴ The British authority was, thereby, limited to government property and main roads. The FCR became the legal instrument for political agent to govern. It formally tripped tribal citizens of three basic rights: Appeal—the right to appeal their detention; *wakeel*—the right to legal representation, and *daleel*—and the right to present reasoned evidence.²⁵ The FCR allows collective punishment for individual crimes and preventive detention of up to three years.

The regulation empowered the deputy commissioner to refer both civil and criminal cases to the council of elders, called the *jirga*. The *jirga* was a traditional indigenous institution for administering justice, which was recognized and restored by the tribesmen themselves.²⁶ The FCR comprises 40 laws that call for collective punishment, destroying homes and villages in bulk even if just one person commits crime in tribal areas. In over 68 years of the country's history, the people of FATA did not play any role in political or military administration. The British administration system remained enforced in FATA till 1996 with minor changes.

Amendments to the FCR: In 1996 the then President of Pakistan Farooq Ahmad Laghari introduced certain reforms when the Government of Benazir Bhutto was dissolved and the caretaker Government of Malik Meraj Khalid was in power. The government made a historical decision by extending the right of adult franchise to FATA. Adult Franchise Act was passed in 1996-97. The locals of FATA, above 18 years were empowered to use their voting right. Subsequently, in 1997 general elections the independent candidates from FATA were directly elected by the people to the National Assembly.²⁷ For the first time the political representative was made answerable to the locals at large in the region. However, the 1997 general elections were contested by the tribesmen

²⁴ <http://tribune.com.pk/story/229954/president-zardari-signs-fata-political-parties-order-2002-extension/>

²⁵ *The Express Tribune*, 12 August 2011.

²⁶ Lal Baha, *op.cit.*, p.30.

²⁷ <http://www.dawn.com/news/651912/fcr-reform-process-should-not-stop>

without having any political affiliations. The government also made certain amendments in the FCR through which the right of appeal against the judicial decisions of the political administration was given. By those amendments, in early 1997, the commissioner FCR was empowered to hear appeals.²⁸

In 2002 General Pervez Musharraf made history by extending the Political Parties Act 1962 to FATA. Previously, tribal candidates had no party association and could only contest elections as independent candidates as political parties had no access to the tribal areas.²⁹ Before Islamist candidates were able to campaign through mosques and madrassahs, as a result mullahs were elected to represent FATA in the legislative assembly. The Political Parties Act 2002 enabled the mainstream political parties to organize them in the Federally Administered Tribal Areas and counter extremist propaganda. In FATA tribal affiliations determine political association. The political parties provided an opportunity for tribal members to campaign for their rights in national institutions.³⁰ It was a departure from prior tribal politics, where power was focused in the hands of *maliks* and *mullahs*.

The 18th Amendment

By signing of the 18th Amendment bill, President Asif Ali Zardari, became the first sitting Pakistani president to devolve voluntarily his extensive powers to the prime minister. This was not a small accomplishment in a country where the president has often enjoyed more powers than the prime minister or the parliament. The 18th Amendment in the Constitution of 1973 was unanimously passed by both houses of the parliament on 19 April 2010. It opened the way for the nation to strengthen the course of democracy. The amendment modified some 97 of 280 Articles of the 1973 constitution. It devolved powers to the provinces and in return the federation turned stronger.

Theoretically 18th Amendment curtailed the powers of the president; practically he remained powerful in FATA. According to the constitution, the parliament cannot make and amend laws for FATA. Only the president has the authority there to amend the laws and promulgate ordinance for the region. For different issues, the legal status of FATA varies. For example, decisions relating to development and planning in the tribal areas are being managed through the FATA

²⁸ <http://www.dawn.com/news/651912/fcr-reform-process-should-not-stop>

²⁹ Daily Times, 7 October 2002.

³⁰ Barnett R. Rubin, *Afghanistan in the post-Cold War Era* (New York: OUP, 2013), p.381.

secretariat. Within FATA, it is the tribes and not the central government of Pakistan that is responsible for security matters.³¹

For the implementation of the 18th Amendment on 4 May 2010, a high-powered parliamentary commission was set up that envisaged more administrative and financial autonomy for the federating units. The commission was assigned the task to complete the devolution process within a year.³² In implementing the 18th Amendment, devolution of power took place in three phases, bringing the total number of devolved ministries to 17 under Article 270 AA of the constitution and giving more administrative and financial autonomy to the federating units.³³ The 18th Amendment initially gave no benefits to the FATA but, in the next year, President Zardari signed two orders that set into motion what may be called the most comprehensive changes in the FCR since it was introduced in 1901.

Comprehensive changes made in 2011: On 12 August 2011 an amendment was made in the FCR, cutting the powers of the political agent, the administrative head of an agency. Meant to curtail the power of government officials in the region to arbitrary imprison people,³⁴ the 2011 amendments to the FCR brought the regulation in line with the Pakistan Penal Code (Act XLV of 1860) and the Code of Criminal Procedure (Act No. V of 1898). However, there are still shortcomings, and hence demands to bring the FATA legal regime into harmony with other Pakistani laws as well as rights guaranteed by the constitution. Many of the human and political rights protected by the constitution continue to be denied to those living in FATA.³⁵

The recent Senate elections, held on 5 March 2015, again invoked the feelings of deprivation in FATA when, twelve hours before the polling, an order by President Mamnoon Hussain repealed the 2002 ordinance and the elections were postponed. The ordinance had withdrawn the Statutory Regulatory Order of 7 July 1975, as well as a 2002 executive order issued by former President General Pervez Musharraf, that gave each tribal Senator as many votes as the number of vacant seats.

³¹ Humaira Daniel and Zahid Shahb Ahmed, *op.cit.*, pp.311-12.

³² *The Express Tribune*, 29 June 2011.

³³ *Ibid.*

³⁴ *Ibid.*, 12 August 2011.

³⁵ <http://fatareforms.org/2013/03/13/summary-of-2011-amendments-to-the-frontier-crimes-regulation/>

Following the last mentioned ordinance, each FATA MNA could only cast one vote, unlike the previous method outlined by the ECP which allowed tribal senators to cast four votes. For the four Senate seats from FATA, elections were held on 20 March 2015. A total of 36 candidates contested for the four seats of the Senate from FATA and only 11 voters were there to vote for 36 candidates. After severe criticism from all quarters, the federal PML-N government withdrew the controversial ordinance, allowing the ECP to issue a new schedule for Senate elections for FATA³⁶ and elections were held according to the old procedure. The delayed Senate elections in FATA, however, deprived this area from its right to participate for the elections of Senate chairman and deputy chairman.

The constitutional future of FATA

Theoretically the 1973 Constitution of Pakistan is an impressive document. Part II of the constitution deals with the fundamental rights of the citizens of Pakistan. It contains 25 Articles that give all political, social, economic and legal rights to the citizens of Pakistan. Apart from constitutional rights, Pakistan has signed number of international conventions and protocols for the protection of human rights. The Universal Declaration of Human Rights (UDHR), Convention on the Rights of Child (CRC), the Convention to Eliminate All Kinds of Discrimination Against Women (CEDAW), and Convention Against Torture (CAT) are among them. The people of Federally Administered Tribal Areas are denied all national and international rights, rather centuries old administrative and judicial system continues to prevail there. The colonial legacies are chasing FATA to date. The pace of development over there is very slow. There is a need to streamline FATA with other parts of Pakistan.

The Constitution of 1973 has been amended 22 times and certain amendments have been made in this constitution which derailed parliamentary form of government in Pakistan i.e. the 8th Amendment and 17th Amendment. In contrast the 13th Amendment and 18th Amendment restored the parliamentary system in Pakistan. FATA was not affected with these amendments. The Presidential orders of 1997, 2002, and 2011 gave some rights to the people of FATA but still there is a need to develop consensus among parliamentary members for constitutional reforms in FATA on an urgent bases. Either it should be absorbed in the KPK or formed a separate federating unit. Since 9/11, the Government of Pakistan has ended FATA's autonomy by deploying

³⁶ Dawn, 20 March 2015.

8,000 troops in the mountainous region. Operation against homegrown militants has caused unlimited displacement of people. The ongoing operation *Zarb-e-Azb*, initiated in June 2014, deploys of 30,000 Pakistan Army personnel. The operation is targeting militants and terrorists. As the operation continues the future planning of Pakistan Army includes settlement of the Internally Displaced ersons (IDPs) in their houses with new schools, roads, communication network etc. Harsh terrain and the conservative mind set of the population straddling the porous border with Afghanistan require immense resources to establish an effective administration and law enforcement system but the political integration of FATA into the country is the only solution to stabilize the border region.