

THE OTHER PAKISTAN: SPECIAL LAWS, DIMINISHED CITIZENSHIP AND THE GATHERING STORM

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Introduction

Popular perceptions about Pakistan's north-western territories have changed but little from the colonial era. During the British Raj, such perceptions were predominantly molded by the foreign rulers' depiction of this terrain as the domain of barbaric, fickle, and habitually violent *jezail* bearing Pathans, Baluchis and other ethnic groups. Such monochromatic characterization escalated after the disastrous outcome of the First Anglo-Afghan War (1839-1842) and subsequent military campaigns waged by the British in the region. The motivation for these expeditions was to secure Afghanistan and the adjacent tribal belt in modern Pakistan as a center of influence in order to maintain heightened vigilance on British India's north-western border, beyond which lurked the looming specter of Russian expansionism.¹ Since they were not militarily subdued, the colonial policy position – both as a practical strategy as well as a handy slur – was that the tribals had to be bribed in order to persuade them to desist from attacking British expeditions and strongholds in the area. This fuelled a persistent stereotyping of the locals as capricious and dishonorable, while their multifarious aspects, diverse motivations and varying traits remained and were kept disguised. As Sir Olaf Caroe wrote in the introduction to his seminal work on the history of the Pathans: "... [A]fter a hundred years or more of close contact, the Pathan remains to the world, and even to

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¹ For an insightful rendition of the main events and players in the Great Game and their imperatives *see* PETER HOPKIRK, *THE GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA*, Kodansha International (1992). For another fascinating account of the Great Game *see* JOHN KEAY, *THE GILGIT GAME: THE EXPLORERS OF THE WESTERN HIMALAYAS*, Oxford University Press: Karachi (1993).

himself, something of an enigma. Many have spoken and written of him and his country, but the surface has been scarcely scratched. There is need for a deeper ploughing.”²

A century and a half later, the strife wrecked Afghanistan – particularly during the eventually defeated Soviet invasion in the 1980s and the long subsequent years of vicious civil war amongst various warring factions that created the pre-conditions for the rise of the Taliban – and the destabilized neighboring Pakistani territories remain a theater of war between competing geo-political interests.³ More nuanced analyses of this areas’ complex history, culture and political economy do exist. However, they are outnumbered by staunchly statist national security evaluations of the more immediate triggers of violence and overwhelmed by the exigencies of the identification of strategic targets that are held to neither deserve due process nor get any, in the decision-making that precedes their annihilation.⁴ These are also the areas of choice for directly televised frontline landscapes of ideological attrition. Against their backdrop, popular perception is regularly fed the images of a ‘War on Terror’ that is being visited by an alliance for freedom and democracy on a culture of evil whose cardinal article of faith is the export of wanton terror to the rest of the world. The mainstream media’s persistent ‘othering’ of a Darth Wader-like enemy is a narrative visually characterized by frequent grainy images of

² SIR OLAF CAROE, *THE PATHANS: 550 B.C – A.D 1957*, Oxford University Press: Karachi (1958), at xvi.

³ For a persuasive analysis of the background factors that led to the emergence and strengthening of the Taliban movement *see* AHMED RASHID, *TALIBAN: ISLAM, OIL AND THE NEW GREAT GAME IN CENTRAL ASIA*, I.B. Tauris & Co Ltd (2000). Rashid’s account is widely regarded as a fairly objective and at times even sympathetic treatment of the contributory role of various factors, such as the general lawlessness and anarchy created by the brutal warlords that ruled Afghanistan after the Soviet withdrawal, which in turn led to what was initially a natural and well-meaning reaction in the form of the Taliban movement. However, even Rashid cannot resist the temptation of some ethnic stereotyping. He describes the Afghans as, “[B]rave, magnificent, honorable, generous, hospitable, gracious, handsome...” who can also be “devious, mean and bloody-minded.” *Id* at vii. As if such contradictory characteristics don’t exist in other nations of the world.

⁴ For a helpful discussion of the complex and multifarious factors that have molded the overall character of the five central Asian Muslim countries after the collapse of the Soviet Union in 1991 *see* AHMED RASHID, *THE RESURGENCE OF CENTRAL ASIA: ISLAM OR NATIONALISM?* Oxford University Press: Karachi (1992). As a follow-up, the author analyzes the various reasons for the creation of militant Islamic fundamentalism and the formation of militant organizations in these countries in AHMED RASHID, *JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA*, Vanguard Books: Karachi (2002).

anonymous uncouth and half-crazed looking individuals crouching against a grey-brown, rock strewn moonscape, muttering inaudible doomsday dreams.

The ceaseless U.S. Drone attacks on various Pakistani border territories under the justification of exterminating Al-Qaeda operatives and Taliban supporters is the most resonant recent example of a war that seems to transcend centuries and different governance eras – even if it has now taken on a form that is uniquely cold, calculated and seemingly impersonal. These ostensibly targeted killings remain the source of pitched debates in the academic realms of international law and politics; they are also the theme of highly divisive national and international discourses on the legality, suitability and ethics of a form of war that transgresses established notions of territorial sovereignty and conventional principles of legal culpability and due process.⁵ While unmanned aircraft

⁵ The mainstream criticism in the Pakistani electronic, print and social media routinely castigates the Drone attacks as a clear violation of Pakistan's airspace. Even as a tool of destruction, it describes the Drones as recklessly inaccurate, the cause of many innocent deaths and thus the cause of much more damage than benefit. See for instance, *Over 700 killed in 44 drone strikes in 2009*, Dawn, January 2, 2010 at <http://archives.dawn.com/archives/144960> (Accessed on July 13, 2012). See also the story in the popular Pakistani website Buzz Pakistan, *Drone Attacks in Pakistan*, Buzz Pakistan, March 17, 2010 at <http://www.buzzpk.com/drone-attacks-in-pakistan/> (Accessed on July 13, 2012); and, Amir Mir, *60 drone hits kill 14 al-Qaeda men, 687 civilians*, The News, April 10, 2009, at http://www.thenews.com.pk/top_story_detail.asp?Id=21440 (Accessed on July 13, 2012). The media also point out how these attacks make a fragile new democratic government in Pakistan look inept and compromising on territorial sovereignty to its electoral constituents, which in turn also impairs vital areas of international collaboration for investing in Pakistani democracy; the reform of its democratic institutions; the strengthening of tolerant, pluralistic social forces; the creation of economic opportunities; and the boosting of Pakistan's internal capacity to fight terrorism, both socially and militarily. The Drone attacks, they argue, sunder possible consensus and coalition between U.S. efforts to fight terrorism and the booming Pakistani public opinion against the brutalization of their country at the hands of religious radicals. These attacks force a crucible on the Pakistanis that coerces them to overlook the so-called collateral damage. In reality, most Pakistanis can't make any morally valid distinction between the slaughters of children, may it be in urban Lahore or rural FATA, and that for them is the very heart of the matter. Not only do they regard such a war as arbitrary and cruel but also a slippery slope as it helps recruit more suicide bombers and hinders possibilities of local, regional and national alliances against the radicals – the Drones divide Pakistani public opinion to the detriment of all those who want to collectively confront radicalism. See for instance, David Kilcullen and Andrew McDonald Exum, *Death from Above, Outrage down Below*, The New York Times, May 16, 2009, at <http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all> (Accessed on July 13, 2012); Rahimullah Yusufzai, *Drone attacks – where do we stand?*, The News International, March 29, 2011, at <http://www.thenews.com.pk/Todays-News-9-38778-Drone-attacks---where-do-we-stand> (Accessed on July 13, 2012); and, Abid Mehsud, *Drone Attacks threat to our Sovereignty*, The Frontier Post, June 18, 2012, at <http://www.thefrontierpost.com/article/167257/> (Accessed on July 13, 2012). Pakistanis also regard the Drone attacks as the latest in a long lamentable history of overt and covert meddling in Pakistani affairs and territory, usually in cohorts with military regimes and their agencies. The refusal by the U.S., on the other hand, to hand over the requisite intelligence and technology to their Pakistani political and military

hurtle death from the skies, huge questions remain on whether they prevent or promote armed radicalism and whether the anonymous deathly pay loads have some clandestine way of discerning between combatants and innocent civilians. Meanwhile, the fundamentals of the underlying imperatives that have made these areas and its people vulnerable to a ceaseless cycle of violence and mayhem remain largely academically unexplored.⁶ The rabid faces of radicalism are so much more fascinating to the camera than the travails of a struggling democracy, retarded development and domestic access to services. As a result, we are hardly ever told of the genesis of this radicalism; the tell-tale story of its creation; and the genealogy of the angst that seems to grip it. Any attempt to discuss the real necromancer behind the more visible forces of militant radicalism finds relatively little coverage. The bleak backdrop of economic and social disempowerment; the paucity of education and democratic space; and, above all, the historic use and abuse of Pakistani turf and many of its people by a coalition of international interests and local undemocratic regimes, in order to fight wars that the Pakistani citizenry was never consulted about, remains primarily unexplored.⁷

counterparts, is popularly seen as inexplicable. The increasingly loud mainstream criticism argues that the Pakistani people, their political parties, and now their elected governments and armed forces are keen on a larger dialogue and multi-pronged collective strategy to fight extremism. They have the ideas, the will and the capacity but all they hear is the usual drone of ‘do this or else.’ For a dialogue to begin, they say, this drone too has to go. The Pakistani parliament has passed several resolutions calling for a halt to the Drone attacks. *See* for instance, Richard Leiby, *Pakistan calls for end to U.S. drone attacks*, The Washington Post, April 13, 2012 at http://www.washingtonpost.com/world/pakistan-calls-for-end-to-us-drone-attacks/2012/04/12/gIQAN1ZFDT_story.html (Accessed on July 13, 2012). Local newspapers and social media regularly report the enormous body count of these attacks. *See* for instance the website ‘*Pakistani Body Count*’ at <http://www.pakistanbodycount.org/drn.php> (Accessed on July 13, 2012).

⁶ For one particular perspective on this issue *see* OSAMA SIDDIQUE, *Of Judges and Drones: U.S. Policy alienates the Pakistani People*, Harvard Law Record, April 16, 2009.

⁷ *Id.* Contrary to the myth, Pakistanis have a keen sense of history. They remember persistent U.S. foreign policy support for its authoritarian military regimes of yore, as they do its simultaneous castigation of Pakistanis as a people incapable of self-governance and progress. General Ayub Khan’s dictatorship in the 1960s was supported for Cold War era strategic justifications; and the pseudo-Islamist veneer of General Zia-ul-Haq’s harsh dictatorship through the 1980s – an era most commentators blame for rapid democratic institutional decline, rights violations, and abuse of religion for political ends – was aided, financed and bolstered for running the Afghan Jihad. General Musharraf was thus only the latest in what is a long tradition. Equally evident to the Pakistanis is the fact that though Islamic political parties have invariably fared miserably in free elections, they were actively nurtured and strengthened under the Zia and Musharraf regimes, both desperate to carve out any legitimacy through manufacturing alternative political constituencies. The coalition partners for Zia and later Musharraf read like a veritable ‘Who’s Who’ of forces of regression and political absolutism – their links to militant forces well known but strangely unmentioned. In late 2007, soon after Musharraf launched a second *coup* against the people of Pakistan, the author was in the U.S. to give some talks on

Facing particular neglect are the variable and inconsistent administrative and legal regimes that have governed the troubled territories in Pakistan and their linkages with a mounting discontent with the State amongst the inhabitants of this area. This article endeavors to briefly review the distinct administrative and legal history of these territories and then to highlight these neglected issues by discussing recent developments in one specific area in the region – the valley of Swat – in the wake of an eventually quashed Taliban uprising against the Pakistani state. Swat in many ways is a highly illustrative example of why violence and radicalism in this particular region is inextricably knit with its inhabitants' highly differential access to rights that are at least theoretically available to other fellow-citizens. It amply illustrates the historically disjointed link that this region has had with the larger polity, society and legal and governance framework that exists next door – in the same sovereign country.

I. The Special Territories and the Lesser Citizens

Pakistan's north-western 'special territories' could easily be conceived as small and significantly different neighboring countries. In contrast to the legal and administrative system in place in the rest of the country, they are characterized by different, complicated and, at times conflicting, administrative and legal regimes. They are administratively divided into regions called the 'Political Agencies' and the 'Frontier Regions' – these constitute what are collectively referred to as the 'Federally Administered Tribal Areas' ('FATA'); as well as the separately governed 'Provincially Administered Tribal Areas'

Musharraf's latest. The author had left behind a country anguished and uncertain. A hapless regime running rampant, arresting the most 'odious threats' to domestic bliss and international peace – i.e., lawyers, university teachers, college students, judges, human rights activists, doctors, engineers, NGO workers, etc. Ironically, this was to bring about an iron order to better face the growing menace of the Taliban. The 'Taliban' is often used as a rather facile catch-all term for what is a complex and convoluted set of radical forces operating in the region in the new 'Great Game,' with multiple handlers, agendas, and financiers, but for paucity of space one will reluctantly stick to this term. In the following months, members of the diverse, burgeoning and highly vocal Pakistani civil society played hide and seek to evade arrest and intimidation; or faced Kafkaesque court hearings while over sixty of the country's top judges had been packed off by Musharraf after his arbitrary and illegal sacking of Chief Justice Iftikhar Muhammad Chaudhry. And yet, at a time when additional draconian curbs were being introduced on all kinds of constitutional freedoms under Musharraf's 'enlightened moderation,' Pakistanis still retained their sense of humor. One popular quip was that Musharraf's new paradoxical strategy is to incarcerate the moderates and vanquish the radicals. But then who will be left for him to lord over, was the logical question. Id.

(‘PATA’).⁸ With a turbulent history shaped by the ‘Great Game’ in the nineteenth century; appeasement-driven administrative arrangements under British India to quell regular rebellions of local tribesmen; the location of some autonomous princely states of British India that retained their special status under treaty arrangements with the newly independent Pakistan; and, continuation of various colonial legal and administrative frameworks and policies of governance into the post-colonial era, this Pakistani region is unique in many ways. Largely tribal in nature and fiercely independent in parts, it is neither governed under Pakistan’s mainstream legal and administrative frameworks nor subject to its regular formal justice system except for limited regions referred to as the ‘Settled Areas.’ Its development indicators, political evolution and socio-economic progress have consistently lagged behind the rest of the country. This is primarily because of tribal resistance to modernization and change; denuded citizenship rights under the Pakistani Constitution; lack of presence of and ownership by Pakistani political parties; international geo-political agendas and their turf management and financing of different local warring factions; and the consequent tumultuous history as well as uncertain present of this area. It, therefore, comes as no surprise that large sections of this area are currently in the international headlines for Taliban militancy; operations by the Pakistani military to overcome sedition and general lawlessness; relentless U.S. Drone attacks; a heightened state of conflict between the State and various outlawed militant and terrorist groups, and recurrent violence and blood-feuds amongst many of its local political, ethnic, sectarian and tribal factions.

⁸ See SHAKEEL KAKAKHEL, *INTEGRATION OF FATA INTO NWFP: AN ANALYSIS*, February 2010 (The Forum of Federations Project in Pakistan by the German Ministry of Foreign Affairs) [hereinafter *Integration of FATA*]. The seven Political Agencies (also referred to as ‘Tribal Agencies’) constituting FATA are Bajaur, Mohmand, Khyber, Orakzai, Kurram, North Waziristan and South Waziristan. The Frontier Regions are FR Peshawar, FR Kohat, FR Bannu, FR Lakki Marwat, FR Dera Ismail Khan and FR Tank. Id. PATA areas, on the other hand, are situated both in the provinces of Khyber Pakhtunkhwa (KP) and Baluchistan. The KP PATA areas are the former princely states and now districts of KP, which are: Chitral District (former Chitral State), Dir District (Upper Dir and Lower Dir, former Dir state), and Swat District (former Swat State including Kalam), as well as the Tribal Area in Kohistan District, the Malakand District, the Tribal Area adjoining Mansehra District (Battagram, Allai and Black Mountain of Hazara, Upper Tanawalormer) and the former Amb state. The Baluchistan PATA areas are: Zhob District, Loralai District (excluding the Duki Tehsil), Dalbandin Tehsil of Chagai District, Kohlu District (former Marri Tribal Territory in Sibi District), and Dera Bugti District (former Bugti Tribal Territory in Sibi District).

Geographically, FATA borders on its north and east with what was formerly known as the North West Frontier Province (NWFP) of the British Empire (now known as Khyber-Pukhtunkhwa' or 'KP'), which shares FATA's conflict ridden history due to the resistance of its inhabitants against British imperialism and its strategic use in the 'Great Game' as well as its cardinal transitory location during the various Anglo-Afghan Wars. FATA is bordered on its west by the highly unstable and perpetually war torn Afghanistan, and to its south by the Pakistani province of Baluchistan which is currently confronting a local insurgency as well as Taliban fuelled violence. The areas constituting PATA, on the other hand, are situated in the provinces of KP and Baluchistan.

FATA itself is an area of great diversity in terms of its administrative arrangements, land revenue regimes and legal systems.⁹ The 'Political Agencies' under FATA continue to operate under the original colonial governance system introduced in the area through a treaty signed soon after Pakistan's independence in 1947. The treaty allowed the tribal elders or '*Maliks*' representing these areas to retain the same administrative arrangements as well as privileges as they enjoyed under the British Raj. As a result, FATA has had a special status under all Pakistani Constitutions so that ordinary Pakistani laws are not applicable there. These areas fall outside the jurisdiction of the Pakistani appellate courts; and their special legislative and legal arrangements are governed by distinctly separate sections of the Constitution.¹⁰ The same holds true for their budgetary arrangements and

⁹ Id. At 3. The 'Political Agencies' of the 'Tribal Areas' comprising FATA have not been subjected to land revenue settlement (except in Kurram valley of Kurram Agency), or to the regular system of administration of the 'Settled' districts of the KP province. The 'Frontier Regions' are smaller areas between the 'Political Agencies' and are administered by the District Coordination Officers of the Government of KP, with powers of the Political Agent for the area. In the 'Settled' Districts, land settlement has been carried out under the Land Revenue Act, 1878. Regular administration is conducted through an extension of normal laws and standard institutions such as the judiciary, magistracy, police and general administration. Id.

¹⁰ Id. At 4. Articles 246 and 247 of the Constitution of the Islamic Republic of Pakistan 1973 ('Constitution') provide the framework of the relationship between FATA and the Federal Government. The President of Pakistan is the Chief Executive of FATA and administers it through the Governor of KP as his agent. No act of Pakistani parliament can be enforced in FATA unless specially directed by the President. The President can make any regulation for the good governance of FATA. The jurisdictions of the Supreme Court and the High Courts have been barred in FATA. The President has the power to end the classification of FATA over any area provided he ascertains the views of the tribe through a *jirga*. FATA is represented in the National Assembly and the Senate by twelve and eight members, respectively, but has no representation in the KP Provincial Assembly. The Parliament is explicitly barred from legislating for FATA and related matters. So while parliamentarians from FATA can participate in legislation for the

overall administration.¹¹ The local system of justice is actually a hybrid of colonial regulations, tribal laws and piecemeal Pakistani legislation.¹²

The Frontier Crimes Regulation 1901 (the 'FCR') enshrines and perpetuates the colonial model of crime control for the tribal areas that constitute FATA in Pakistan.¹³ While seeking to both attract indigenous acceptance and justify itself on the basis of the particular socio-political context of the tribal areas, it co-opted certain features of local criminal dispute resolution such as the extended jury system implicit in the *jirgas*. However, beneath this socially-sensitive guise, the FCR was a blatant example of the colonial discipline and punishment regime that introduced highly intrusive modes of societal monitoring and surveillance and patently coercive mechanisms for control and punishment.

Two striking features characterize the FCR. First, the FCR introduced a framework for crime prevention and criminal adjudication that was distinct from and outside the ordinary administrative, policing and court system of British India. While ousting the jurisdiction of ordinary civil and criminal courts and the concomitant imperatives of due

whole country they cannot legislate for FATA. Id. At 5-6. For an overview of the political administration of FATA, see the official website <http://www.fata.gov.pk/index.php/link?33>.

¹¹ The Federal Government provides the development and non-development budgets for FATA. Since 2002, a separate FATA Secretariat handles its affairs and reports to the Chief Secretary of KP.

¹² The 'Political Agents' are the chief administrators in the Political Agencies and wield judicial and police powers in their areas, deriving their authority from the Frontier Crimes Regulation 1901 (the 'FCR') which is based upon the principle of collective territorial responsibility for the tribesmen. The 'Political Agent' exercises his authority through tribal elders or '*Maliks*' and their tribal councils or '*jirgas*' which act as a jury in disputes of all kinds. The *Maliks* also assist the 'Political Agents' in matters of security and law and order and are paid an allowance by the 'Political Agents' for this purpose. Policing is performed by tribal levies (supplementary police drawn from the tribes. They are lightly armed, wear uniform and receive some basic training) and *Khasadars* (tribal police who patrol FATA and perform multifarious duties under the political administration. They are armed and wear no uniform). Since independence, the Pakistani government has administered only a small portion of Tribal Areas (confined to roads, schools, hospitals, residences and security buildings) and the rest of the area has been managed by the tribes themselves under their '*riwaj*' or local customs and traditions. See SYED ALI MURTAZA, USAID COURT EFFICIENCY ASSESSMENT FINAL REPORT (2010).

¹³ THE FRONTIER CRIMES REGULATION, 1901 (Regulation No. III of 1901). Available at http://www.google.com.pk/url?sa=t&rct=j&q=the%20frontier%20crimes%20regulation&source=web&cd=2&ved=0CFAQFjAB&url=http%3A%2F%2Fwww.pakistansocietyofcriminology.com%2Fflaws%2FTHFRONTIERCRIMESREGULATION1901.doc&ei=kQL4T86DNsPQrQfzzN3QBg&usg=AFQjCNFi4cB01kde39ajZdrs9Gvq5Di_7Q&cad=rja (Accessed on July 7, 2012).

process enshrined in the procedural laws of the territory, it relied on the combined operation of colonial ‘Political Agents,’ deputy commissioners, district magistrates and tribal ‘Councils of Elders’ (*jirgas*). However, unlike the organic modes and indigenous mechanisms for the formation and operation of the traditional *jirgas*, the ‘Councils of Elders’ visualized under the FCR were purely the creatures of the regulation – their members were nominated and appointed and they were convened and presided over by the colonial government’s administrative officers.¹⁴ The FCR granted the administrative officers the discretion of referring particular civil disputes to the ‘Council of Elders’ for conducting an inquiry, holding hearings and coming to a finding. These were disputes that the administrators thought were likely to cause a blood-feud or murder, or culpable homicide not amounting to murder, or mischief or a breach of the peace, or in which either or any of the parties belonged to a frontier tribe, and regarding which they were of the view that a settlement through the ‘Council of Elders’ mechanism would tend to prevent or terminate the consequences anticipated.¹⁵ Once the ‘Council of Elders’ reached a finding, the colonial administrative officers were allowed several options apart from decreeing the finding of the ‘Council of Elders’ (or of not less than three-fourth of the members thereof), such as remanding the case for a further hearing, referring the case to a second ‘Council of Elders,’ referring the parties to a civil court, or declaring that any further proceedings were not required.¹⁶ At the same time, while any such decree was to be a final settlement of the case and have the same effect as the decree of a civil court of ultimate resort, it could not give effect to a finding or a part of a finding of the ‘Council of Elders’ which the administrative officer found to be contrary to good conscience or public policy.¹⁷ By precluding the jurisdiction of the ordinary civil courts, this new domain of administrative discretion thus created a parallel system of civil justice for the tribal areas.¹⁸

¹⁴ Id. §§ 2, 8 (1).

¹⁵ Id. § 8 (1).

¹⁶ Id. § 8 (3) (a) (b) (c) (d) and (e).

¹⁷ Id. § 9.

¹⁸ Id. § 10.

While the aforementioned framework encompassed any civil disputes that could potentially lead to crimes, the FCR also empowered the colonial administrative machinery to refer any criminal cases to the ‘Council of Elders’ where the administration felt that it was, “inexpedient that the question of the guilt or innocence of any person or persons accused of any offence, or of any several persons so accused,” should be tried by courts under the Code of Criminal Procedure that was applicable in the rest of India.¹⁹ Once again, the members of the ‘Council of Elders’ were nominated and appointed by the concerned colonial administrative officer – any objections by the accused to any of the nominees were to be considered and decided upon by the said officer in his sole discretion.²⁰ Upon receiving the findings of the ‘Council of Elders,’ it was up to the administrative officer to decide whether the question was to be remanded, or referred to a second ‘Council of Elders,’ or whether the accused was to be acquitted or discharged.²¹ Alternatively, the concerned administrator could convict the accused in accordance with the ‘Council of Elders’ finding(s) on any matter of fact (or the finding(s) of not less than three-fourths of the members thereof), of any offence of which the facts so found showed him or them to be guilty.²² In case of conviction, the punishments ranged from fines, whipping, and simple or rigorous imprisonment to transportation.²³ Thus, barring some limits on when a criminal case could be referred to a ‘Council of Elders’ – in case it was already committed before a regular criminal court – the FCR enshrined a regime that allowed the colonial administration tremendous leeway to divert a wide range of criminal cases from the ordinary court system to one which was exclusively under its direct control. Furthermore, this special regime omitted many of the due process ingredients and requirements that the laws applicable in British India possessed.²⁴

The other – and highly notorious – feature of the FCR was the wide-scale coercive powers that it bestowed upon the local colonial administration for controlling, blockading

¹⁹ Id. § 11.

²⁰ Id. §§ 11 (1) and (2).

²¹ Id. § 11 (3) (a) (b) and (c).

²² Id. § 11 (3) (d).

²³ Id. § 12.

²⁴ Id. §§ 14 and 15.

and taming a ‘hostile or unfriendly tribe.’²⁵ These entailed individual and collective punishments such as the seizure of all or any members of such tribes and of all or any property belonging to them; their detention in safe custody; the confiscation of their seized property; debarring the same from all access to British India; and, the prohibition of all or any persons within the limits of British India from all intercourse or communication of any kind whatsoever or of any specified kind or kinds with such tribes or any members thereof.²⁶ In addition, *inter alia*, entire communities could be fined or their remissions of revenue be forfeited upon being declared accessories to a crime for a whole host of acts or omissions or simply because a murder or culpable homicide was committed or attempted in their area.²⁷ At the same time, in a traditionally gun-bearing society, the FCR introduced a wide array of situations where a gun-bearing local could be found culpable of and punished for being in preparation to commit certain offences.²⁸ Concurrently, the colonial state also embarked upon certain modes of moral policing of certain acts, such as adultery, fearing their potential for stirring intra or inter-tribe violence.²⁹

The FCR also allowed the colonial administration additional and far-reaching preventive powers that augmented its capacity for social engineering and control as well the promotion of its strategic military imperatives. Under the FCR, the colonial administration could prohibit the settlement of new villages, etc.; remove entire villages in the area; prevent the building of or the use of any existing building for public meetings and gatherings; demolish any buildings deemed to be used by criminals; operate local systems of watch and ward; and require entire classes of people to remove themselves from territories under the FCR (these were categorized as dangerous fanatics, those with no ostensible means of subsistence or who could not give a satisfactory account of

²⁵ Id. § 21.

²⁶ Id. § 21 (a) (b) (c) (d) and (e).

²⁷ Id. § 22, 23 and 25.

²⁸ Id. § 29.

²⁹ Id. § 30.

themselves, those with blood-feuds, and, those involved in quarrels likely to lead to blood-shed); and punish those in breach of these regulations.³⁰

Wide powers of inquiry, the availability of private citizen arrest, arrest by the police without any warrants – even allowing the right to cause the death of a person in certain stated situations – vast powers for providing security and conducting surveillance for purposes of prevention of murder, culpable homicide, or the dissemination of sedition, and for ensuring peace and good behavior amongst families or factions that were embroiled in blood-feuds or causes and quarrels likely to lead to blood-feuds through the execution of bonds, as well as a related regime of strict punishments, were additional notable features of the FCR.³¹ In this context, the particular model of colonial administration and the special procedures laid down under the FCR ousted the ordinary courts as well as the applicable provisions of the civil and criminal procedure codes applicable in British India.³² The idea of territorial responsibility and collective punishment was also extended in the form of recovery of fines from the relatives of the person(s) liable.³³ Significantly, the FCR prohibited any appeals from any decision given, decree or sentence passed, order made, or act done, under any of its provisions. Only the concerned colonial administrative officer could call for the record of any proceeding under the regulation and revise any decision, decree, sentence or order given, passed or made therein. He also enjoyed the power to direct the tender of pardon or enhance a sentence as well as additional powers that were reserved for the appellate courts under the ordinary criminal procedure of the country.³⁴

Over the years, the FCR has undergone negligible modifications in terms of its geographical reach as well as the operation of its governance frameworks. In essence, it continues to operate unchanged from the colonial era. The ethos of its extant governance arrangements is based on the old colonial principle of pacificatory rule through local

³⁰ Id. §§ 31 – 37.

³¹ Id. §§ 38 – 46.

³² Id. § 47 – 55.

³³ Id. § 56.

³⁴ Id. § 48 – 55.

tribal leaders and chieftains, and the larger policy of the creation of a semi-independent, semi-lawless buffer between Afghanistan and the more settled areas to its east. It is administered by the Governor of KP as an agent of the President of Pakistan, under the supervision of the Ministry of States and Frontier Regions, and through the Political Agents and various additional lower tiers of administration – who have historically ‘maintained the peace’ through a combination of bargaining, cash gifts to the *Maliks* or the tribal leaders, and military force.³⁵ The FCR has come under sustained criticism from various quarters within the country for its violation of internationally accepted due process requirements, its highly differential treatment of the tribal people and their alienation from the rights and protections enshrined in the mainstream Pakistani political and legal system, and the notorious policy of territorial responsibility that attaches culpability to innocent women, children and male relatives or fellow tribal members of the accused.³⁶ It has been blamed for eroding three fundamental rights of the accused, namely, the right to appeal, the right to legal representation, and the right to present reasoned evidence in ones defense – or, as they are referred to by some, respectively as the rights to appeal, *wakeel*, and *daleel*.³⁷

If FATA is complex and its laws discriminatory, PATA does not lag far behind. It is conspicuous for repeated governmental experimentation with different governance systems, ever since the areas therein ceased to be independent states. This shall be

³⁵ See RAZA AHMAD, TOWARDS STATE-BUILDING IN FATA, SOCIAL SCIENCE AND POLICY BULLETIN, VOLUME 2 No. 4 (Spring 2011) [hereinafter *State-Building in FATA*] at http://dprc.lums.edu.pk/components/com_publications/attachments/8-SSPB-Spring-2011.pdf (Accessed on July 20, 2012).

³⁶ See Amir Muhammad Khan, *Justice Denied*, NEWSLINE, December 6, 2004 at <http://www.newslinemagazine.com/2004/12/justice-denied/> (Accessed on July 8, 2012); and I. A. Rehman, *Dark Justice*, NEWSLINE, august 14, 2002, at <http://www.newslinemagazine.com/2002/08/dark-justice/> (Accessed on July 8, 2012).

³⁷ See Manzoor Ali, *Frontier crimes regulation: Centuries-old law will take time to reform*, The Express Tribune, December 2, 2011, at <http://tribune.com.pk/story/301002/frontier-crimes-regulation-centuries-old-law-will-take-time-to-reform/> (Accessed on July 12, 2012). See also Irfan Ghauri, *Political reforms: A century later, some rights for the tribals*, The Express Tribune, August 12, 2011, at <http://tribune.com.pk/story/229954/president-zardari-signs-fata-political-parties-order-2002-extension/> (Accessed on July 12, 2012).

discussed in greater detail in the following section.³⁸ In many ways, the increasing fragmentation and violence in these ‘special areas’ are a direct function of their denuded constitutional status, maladministration, and unrepresentative governance. This has led to the extension of a clearly lesser sets of rights and remedies for their citizens, as also to much lesser opportunities for political growth and economic development. Continued disenfranchisement of local populations at several levels and governmental dependence on the selected elites as its sole constituency, has invariably led the latter to pander to the whims, demands and expectations of these elites. Paradoxically, such demands would be deemed retrogressive, anti-democratic and intolerable in the rest of the country.

The national debate on whether to fully integrate FATA – and also the semi-integrated PATA – into the rest of Pakistan, in order to extend normal legal and governance arrangements to the same is a highly complex and controversial one, with few clearly stated and rigorously argued positions. This is primarily because such debate has been historically suppressed or ignored. The available literature emphasizes that discussing the future of FATA without extensive local engagement and meaningful allaying of local concerns – more particularly those of social development, political reform and economic progress – would be a self-defeating exercise.³⁹ Any evaluation of the legal and administrative challenges in PATA similarly requires not just a scrutiny of its historical experience with different laws, but also an honest appreciation of the various currents of popular resentment against this experimentation. The following snapshot of the valley of

³⁸ Federal and Provincial laws have no applicability in PATA unless the Governor of the Province extends their operation under Article 247 of the Constitution. *See* West Pakistan Regulation I of 1969. Provincial Governors are also empowered to issue Regulations for the peace and good government of PATA areas situated in their Province. *See* PAK CONST. Art 246 (b) (i) and Art 247(3).

³⁹ *See* for instance, Justice (R) Mian Muhammad Ajmal (Former Judge Supreme Court of Pakistan, Ex-Law Minister, Government of NWFP), FATA, ITS CONSTITUTIONAL STATUS AND FCR (Undated). While discussing various consultations with tribal elders and proposed changes to existing laws and regulations for FATA, the author emphasizes that without concerted efforts towards poverty alleviation, education and development in the region, a transition towards legal and administrative mainstreaming would be very difficult. There are perspectives that more strongly advocate full integration of FATA into Pakistan in order to address the backwardness and militancy in FATA which they attribute to its administrative and legal isolation, but even they stress the need for very careful steps based on extensive discussions and deliberations so as to not alienate the fiercely independent and culturally distinct Pashtuns of the area. *See Integration of FATA*. A proposed draft of new regulations for FATA has also come into the picture that amends the FCR. *See* FATA REGULATION — 2008 (Amended Frontier Crime Regulation 1901) by Reforms Committee headed by Justice (R) Mian Muhammad Ajmal.

Swat – situated in the Swat District of PATA – and its specific set of historical experiences, legal and administrative regimes, and myriad current challenges, epitomizes in many ways the crisis that besets this entire area.

II. Swat and the Battle for a Different Kind of Justice

“Who, or why, or which, or what, Is the Akond of Swat...

Do his people like him extremely well?

Or do they, whenever they can, rebel,

or PLOT,

At the Akond of Swat?

If he catches them then, either old or young,

Does he have them chopped in pieces or hung,

or SHOT,

The Akond of Swat?

Do his people prig in the lanes or park?

Or even at times, when days are dark,

GAROTTE,

The Akond of Swat?

Does he study the wants of his own dominion?

Or doesn't he care for public opinion

a JOT,

The Akond of Swat? ...”

(The Akond of Swat, Edward Lear 1812-1888)

“...the Akhund of Swat had two sets of progeny. On the one side were his disciples and

deputies who collectively assumed the mantle of Sufi leadership. On the other were his own sons and grandsons, known by the title of miangul (flower of the saints), who took over the Akhund's position of political leadership in Swat and also inherited a degree of spiritual authority from him as well."

(Heroes of the Age: Moral Fault Lines on the Afghan Frontier, Edward B. Edwards, University of California Press: 1996)

Travelling north from the river fed hot plains, the lush mango groves and the timeless citadel cities of Punjab to the ancient, verdure and commercially vibrant valley of Swat also entails a drastic jump from the mainstream Pakistani legal system to PATA – a distinctively governed area under special laws and regulatory mechanisms.⁴⁰ The first half of 2009 brought to international attention the increasingly violent events in the valley. It also demonstrated the combustible potential of law reform as a felt issue, as well as a handy slogan for aspirants to political power with no qualms about using brutal force and wanton violence. Swat was historically governed by a local ruler (known as the *Akhunzada* or the *Akhund* of Swat; subsequently the title changed to the *Wali* of Swat). The *Wali* dispensed largely discretionary but affordable and quick justice by employing a

⁴⁰ Although constitutionally part of Pakistan, PATA is subject to a separate system of governance. Article 246 of the Constitution defines the geographical scope of the tribal areas and Article 247 sets out the governance arrangement. Article 246(b) (i) defines PATA areas in KP to include: 'The districts of Chitral, Dir and Swat (which includes Kalam) [the Tribal area in Kohistan district] Malakand Protected Area, the Tribal Area adjoining [Mansehra] district and the former State of Amb.' Article 247 (1) provides: '... [T]he executive authority of a Province shall extend to the Provincially Administered Tribal Areas therein.' Article 247(2) reads: 'The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of the Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.' Article 247(3) provides: '... [N]o Act of [Majlis-e-Shoora (Parliament)] or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs; and in giving such direction with respect to any law, ... the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.' Furthermore, Article 247(4) provides: 'Notwithstanding anything contained in the Constitution ... [T]he Governor of a Province, with prior approval of the President, may, with respect to any matter within the legislative competence of the Provincial Assembly make regulations for peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province.' Thus, Federal and Provincial laws have no applicability in PATA unless the Governor of the Province extends their operation under Article 247 of the Constitution. In 2009, the Governor of KP issued the Nizam-e-Adl Regulation.

tolerant amalgamation of Islamic as well as local customary law.⁴¹ Edward Lear's enigmatic and misspelled 'Akond of Swat' in his nonsense verse with the same title refers to the same person, though perhaps equally enigmatic today to most Pakistanis except those living in Swat.⁴² Nostalgia in the valley of Swat, however, for that bygone era when the 'Akond' dispensed justice, is arguably not just romantic but also symptomatic of growing weariness with its replacement with multiple variations of an amalgam of Pakistani laws, cosmetic Islam and colonial principles of governance. To better understand recent events in Swat, one also needs to shift the scrutiny back to the nineteenth century and decipher the reasons for its historical affinity to radical Islamic ideologies and movements.⁴³

The outbreak of violence in Swat in 2009 is more of a manifestation of the growing popular disgruntlement with the existing administrative and judicial system. There is less evidence that it denotes a deeper support for the ostensibly growing popularity of the Taliban brand of Islamic governance in certain parts of FATA, KP, and in adjacent Afghanistan. Part of the reason is that the substantive elements of the Taliban brand of Islam remain largely unarticulated and vague. Furthermore, since the Pakistani military operation in Swat in early 2010 to wipe out Taliban networks from the area, reports from the ground largely reveal a guardedly relieved local people. Thus, one has to be persuaded that many of them may have been coerced into subservience to the Taliban's power grabbing and expansionist agendas.⁴⁴ Importantly, Taliban exploitation of local

⁴¹ For an interesting nostalgic description of his local justice, see an interview with the last *Wali* of Swat in CHRISTINA LAMB, *The Wali of Swat mourns his lost land*, The Sunday Times, May 24, 2009 at <http://www.timesonline.co.uk/tol/news/world/asia/article6350519.ece> (Accessed on January 10, 2012). See also the illuminating memoirs of the last *Wali* of Swat that shed light on important aspects of the political and social history of the valley, in FREDRIK BARTH, *THE LAST WALI OF SWAT* (White Orchid, Press 2008).

⁴² This is not to rule out that Edward Lear was deliberately poking fun at a local Indian ruler whose governance system stood apart from the legal system introduced by India's colonial rulers, making him sound like a comical and semi-mythical creature. It is worthwhile to read the rest of his limerick.

⁴³ An insightful recent history that, *inter alia*, looks at Swat and surrounding areas and the fusion of jihad with a strand of anti-colonial nationalism is AYESHA JALAL, *PARTISANS OF ALLAH: JIHAD IN SOUTH ASIA* (Harvard University Press, 2009). For a review of the famous anthropologist Fredrik Barth's classical works on the political anthropology of Swat and its critiques, see DAVID B. EDWARDS, *Learning from the Swat Pathans: Political Leadership in Afghanistan, 1978-97*, *American Ethnologist*, Vol. 25, No. 4 (Nov., 1998), pp. 712-728.

⁴⁴ See e.g., the following Pakistani news reports: ASHFAQ YUSUFZAI, *There is life after Taliban but fear lingers*, October 14, 2009, in IPS NEWS, at <http://ipsnews.net/news.asp?idnews=48856>;

class resentments between wealthy landlords and their landless tenants seems to have also played a major role; as have other grievances of the landless class with lack of employment opportunities, inequitable distribution of wealth and resources, and corrupt administration in the valley.⁴⁵

The slogan of choice for the Taliban in Swat was that their brand of Islamic *Sharia* would provide quick and cheap justice, which the system it meant to replace had failed to do. While being reticent about the substantive ethos and facets of this *Sharia*, the Taliban interestingly put a premium on the ‘speed’ of justice. Before the situation got further out of hand and a military operation was ultimately unleashed in Swat, the battle lines were largely drawn around the structure and contours of a governmental proposal for legal and judicial reform – the *Nizam-e-Adl Regulation*, 2009 (the ‘NAR’).⁴⁶ They have persisted even after the insurgency was militarily defeated. The NAR was not a unique piece of legislation and, in many ways, drew upon earlier ineffective regulatory formulae for the region.⁴⁷ Once again motivated by immediate imperatives of appeasement rather than genuine reform, the government hastily generated this controversial law in order to placate the Swati public and their largely self-appointed Taliban spokespersons. Its underlying assumptions were that the Taliban led insurgency was essentially galvanized

http://www.thenews.com.pk/editorial_detail.asp?id=190048 (Accessed on July 10, 2010); and, AYESHA IJAZ KHAN, *Clearing Misconceptions on Pakistan’s War in Swat*, June 4, 2009, at <http://www.counterpunch.org/khan06042009.html> (Accessed on July 13, 2012).

⁴⁵ See JANE PERLEZ & PIR ZUBAIR SHAH, *Taliban Exploit Class Rifts*, The New York Times, April 16, 2009, at <http://www.nytimes.com/2009/04/17/world/asia/17pstan.html> (Accessed on July 13, 2012).

⁴⁶ See the contents of THE SHARIAH NIZAM-E-ADL (ISLAMIC JUSTICE SYSTEM) REGULATION, 2009 (‘NAR’) at http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C15%5Cstory_15-4-2009_pg7_51 (Accessed on July 14, 2012). The legislative initiative, which literally means “system of justice,” was proclaimed by the Pakistani government as an endeavor to bring peace to the region, and to also address local demands for making justice delivery more expeditious. See also the report from the Pakistani daily ‘The News International’ at http://www.thenews.com.pk/top_story_detail.asp?Id=20372 (Accessed on July 10, 2010).

⁴⁷ The NAR is the latest of a series of justice system regulations issued for this area since 1975. It is evident that local pressures for introduction of a more Islamic law have influenced some of this legislation, though in all instances the Islamization is solely reflected in the official nomenclature rather than in any distinctively Islamic features of the law. These Regulations, in their order of issuance, are provided below:

- (a) The PATA Criminal Law (Special Provisions) Regulation, 1975 and the PATA Civil Procedure (Special Provisions) Regulation, 1975;
- (b) The Provincially Administered Tribal Areas (Nifaz-e-Nizam-e-Shariah) Regulation, 1994;
- (c) The Shariah Nizam-e-Adl Regulation, 1999; and
- (d) The Shariah Nizam-e-Adl Regulation, 2009 (the ‘NAR’).

by two underlying grievances – that the existing legal regime in the area was both painfully slow as well as insufficiently Islamic. The NAR was put forward as the model of a quicker and more Islamic legal framework, and as a practical demonstration of the State's sensitivity to the sentiments of the Swatis who supported the Taliban uprising.

The timing was crucial as the Swat Taliban were more or less besieging the valley, blatantly running a parallel government, and committing human rights atrocities.⁴⁸ However, the government came under severe criticism from international governments and media; as well as local political parties, media, civil society, and human rights groups for what they considered its capitulation to Taliban blackmail. They feared that an accord in the form of the NAR would be nothing short of an encouragement for the spillover of narrowly envisioned, harsh and repressive Taliban style Islam; and that it would exacerbate militancy and coercion in other parts of the country, leading to the creation of additional states within the State.⁴⁹

As it turned out, the government's strategy to implement the NAR to forge an armistice with the Taliban failed.⁵⁰ This was largely due to two fatal miscalculations on part of the

⁴⁸ The possibility of armistice with the Taliban through the NAR was hailed by the Pakistani government as a step welcomed by the Swati locals, weary of Taliban presence and strong arm tactics, as well as wary of the cost of yet another military operation in the area in case a peace accord failed. See <http://www.newspakistan.net/swat-peace-accord-welcomed-by-all-and-sundry-minister-2009-26-02.php> (Accessed on July 9, 2010); and, MUKHTAR A. KHAN, *The Return of Shari'a Law to Pakistan's Swat Region*, March 3, 2009, at http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=34576&tx_ttnews%5BbackPid%5D=7&cHash=081b812552 (Accessed on July 13, 2012).

⁴⁹ For an overview of both sides of the debate see the report *Grey Area in Nizam-i-Adl Regulations*, The Daily Dawn, Pakistan, at <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/nwfp/grey-areas-in-nizam-i-adl-regulation-hs> (Accessed on August 1, 2010). See also an overview of the critique of the NAR in the News International, Pakistan at http://www.thenews.com.pk/editorial_detail.asp?id=173260 (Accessed on August 3, 2010).

⁵⁰ Once the possibilities of an accord based on the NAR failed and a military operation was launched to flush out the Taliban from Swat, the Pakistani media then went on to criticize the government for the crisis of internally displaced persons from Swat due to the military operation. See Akhtar Amin, *Taliban big fish still alive – Swat IDPs question operation*, The Daily Times, June 4, 2009, at http://www.dailytimes.com.pk/default.asp?page=2009%5C06%5C04%5Cstory_4-6-2009_pg7_26 (Accessed on July 13, 2012); and, Waseem Ahmad Shah, *Swat IDPs skeptical of return plan*, The Daily Dawn, 2009, at <http://archives.dawn.com/archives/150670> (Accessed on July 13, 2012). However, the Pakistani government as well as supportive sections of international media, maintained that an important shift in the political and popular mood had occurred in Pakistan in favor of the military operation due to blatant violation of the terms of the Swat peace accord by the Taliban. See CARLOTTA GALL, *Pakistan*

Taliban. Unhappy that the key to controlling the legal and judicial system in Swat, i.e. the power of appointment of ‘*Qazis*’ (judges), was not conceded to them under the NAR (which I shall shortly discuss), the Taliban publicly lambasted the government for bad faith and rejected the government legislation out of hand. However, simultaneously, they also exposed their own lack of commitment to bringing about a cessation of on-going violence. Unwilling to lay down arms (and to relinquish their effective rallying cry for a ‘better’ system of justice) as required by the armistice, they decided instead to test the waters for popular support for belligerence. Aggressive forays into surrounding areas followed, while the government’s guns were temporarily averted.⁵¹ The Pakistani government effectively used these two episodes to build public and political party support for sending in the army which eventually stamped out the rebellion.⁵² The question remained, however, as to what would happen to the NAR.

A close examination of the design and details of the NAR is important, particularly as a specimen of how the Pakistani governments have traditionally responded to PATA’s aspirations for reform in particular and to the aspirations of Pakistani citizens for a more efficient and equitable justice system in general. At one level, one can argue that the NAR addressed the Taliban’s Islamic aspirations in a rather facile manner. For instance, the NAR essentially substituted the English titles of existing courts and law officers with more ‘Islamic’ sounding Arabic substitutes. In terms of applicable nomenclature, judges were transformed overnight into ‘*Qazis*’ with no real change in their roles and responsibilities. Importantly, the actual brand of Islamic law to be applied by them in Swat and the rest of PATA was the one already defined, prescribed and anointed by the State. Furthermore, the *Qazis* were to be appointed by the government; their appointment

Army Poised for New Push into Swat, The New York Times, May 5, 2009, at <http://www.nytimes.com/2009/05/06/world/asia/06pstan.html> (Accessed on July 14, 2012), as well as the report, *Gilani urges national consensus as APC convenes*, The Daily Dawn, 2009, [hereinafter *Pakistan Army Poised for New Push into Swat*] at <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/16-gilani-urges-national-consensus-as-apc-convenes-hs-16> (Accessed on July 15, 2010).

⁵¹ See HUMA YUSUF, *Pakistani Taliban expand influence beyond Swat*, The Christian Science Monitor, April 15, 2009, at <http://www.csmonitor.com/2009/0415/p06s13-wosc.html> (Accessed on August 5, 2010); and JANE PERLEZ, *Taliban Seize Vital Pakistan Area close to the Capital*, The New York Times, April 22, 2009, at <http://www.nytimes.com/2009/04/23/world/asia/23buner.html> (Accessed on July 14, 2012).

⁵² See *Pakistan Army Poised for New Push into Swat*

qualifications were to be benchmarked by the State's standards and evaluated by its institutions; and their application and interpretations of *Sharia* law were to be consistent with the methodology and interpretations already used by Pakistani judges. One can thus argue that the NAR did nothing to change the status quo, and in fact staunchly preserved the existing understandings of and mechanisms for applying *Sharia* law in the rest of the country.

Alternatively, one can argue that the NAR cleverly mitigated Taliban attempts to impose their hegemony under the guise of their brand of Islamic law, while genuinely attempting to address popular demands for a better legal and judicial system. According to this point of view, the real promise of the NAR, and a more concrete realization of the official commitment to the promised 'speed' of justice, lay not in the Islamic-sounding titles of judges, etc., but in the NAR's attempt to streamline and expedite disposal of legal cases.⁵³ According to this line of argument, delay reduction and better accessibility were thus the real hidden fruits in the promised basket, and not any substantively different laws. The official understanding of the Swat crisis thus held that public disillusionment with the existing legal system actually lay at the access and operational levels rather than in the Swatis looking upon the existing system as 'un-Islamic' in any way.

⁵³ The NAR sets out certain quantitative performance standards and enhances the mechanisms for judicial accountability of district court judges. The NAR put upper limits of six and four months each for the adjudication of such cases, and introduced certain measures for monitoring and penalizing court delays, in order to introduce greater efficiency to legal proceedings that typically last for years rather than months. Under the NAR, Judicial officers/Qazis and executive magistrates must report the cause and reasons for any delay beyond the NAR prescribed periods to the District Judge/Zilla Qazi or the District Magistrate, or the presiding officer of the principal seat of Dar-ul-Qaza (High Court) who may, then, issue suitable directions. Furthermore, if the presiding officer of a court comes to the opinion that delaying tactics are being used, he may impose a cost on the recalcitrant party. If, on the other hand, the Qazi or the Executive Magistrate is found to be at fault, the relevant presiding officer may issue a 'letter of displeasure' that may lead to an adverse entry in the service record of the judicial officer. The presiding officer may also recommend disciplinary action for the latter. The NAR also mandates that no adjournment can be granted in a case unless the court is satisfied that the adjournment is unavoidable and is subject to costs. The restriction on adjournments is meant to ensure that the Judge/Qazi has more effective control over the pace of legal proceedings in court. The NAR also allows flexibility to the judges in the application of civil and criminal procedure in order to ensure expeditious decision in cases. Further, the NAR links the decision of allocation of a higher number of judges in a court with the level of case pendency in that court, 'to ensure expeditious dispensation of justice within the prescribed time schedule.' The provision of a consensual out of court settlement mechanism and additional mechanisms to discipline and galvanize police performance in the registration and investigation of criminal cases were also positives. Finally, a formal directive to introduce the option of conducting court proceedings in the local languages Pashto and Urdu, as well as in English, was an additional step towards making courts accessible to laypersons.

There is a third perspective as well. This perspective holds that the NAR not only duped the Taliban, but not unlike its many ineffectual predecessors, it duped ordinary Swatis as well. One justification for this view is that since the army operation there is little evidence that the NAR is being implemented.⁵⁴ The other justification is that hasty and purely efficiency oriented as it was, the NAR epitomizes the quick fixes of the past. It is not based on any serious engagement with the real underlying substantive justice issues faced by the citizens, and ignores the various vulnerabilities that debilitate vast sections of them. That the fundamental underlying dissatisfaction with the existing legal system may not be solely caused by delays in courts, but by the overall regime of rights and obligations that this system embraces and protects, was not even cursorily broached. Consequently, it did not contemplate any deeper and wider reforms. This highly flawed approach also permeates justice sector reform in the rest of the country. While a textual review of the NAR reveals the afore-discussed fundamental issues as well as the varying perspectives as to its achievements or failures, the following supplements NAR's textual review with some essential fact-finding on the ground. As it turns out, this fact-finding greatly bolsters the third perspective that has been discussed in this section.

III A View from the Field – Detailed Feedback from Swat

To refer to the NAR as old wine in new bottles may sound rather bizarre since the topic of discussion is an Islamic law. But the metaphor still works. The author had the opportunity to visit Swat in 2010, soon after the Taliban insurgency had been more or less routed, though the area was still racked by sporadic violence. The visit offered a first-hand opportunity to observe the operation of the NAR in the post-insurgency era. Interviews with the judiciary operating in Swat at the time reveal the widely held perception that, as before, the legislative and administrative solution to the popular angst is a highly facile one.

⁵⁴ Detailed conversations with the Districts & Sessions Judge, Swat and additional judicial officers from the area in June and July 2010 revealed that the implementation of the NAR is piecemeal and less than satisfactory even a year after the end of the military operation in Swat.

As mentioned earlier, the NAR essentially comprises of a new set of court rules and procedural relaxations to expedite the time taken for decisions in civil and criminal cases, as well as certain penalties and accountability mechanisms for penalizing delay. It has nothing to do with *Sharia* other than in name.⁵⁵ As before, the judges appointed to function in Swat and elsewhere in the Malakand Division in the post-NAR era, belong to the provincial district judiciary – they merely have new ‘Islamic sounding’ Arabic titles.⁵⁶ Perceiving long delays in the adjudication and decision of cases under the preceding system to be the main political challenge for maintaining the writ of the State, immediate steps for delay reduction have, therefore, been the main focus of law reform in the area. Apart from introducing the NAR, at the time of writing, the Peshawar High Court had sent several additional judges to the area (mostly new appointees) in order to boost the capacity of the local judiciary to tackle the case backlogs.⁵⁷ The administrative decision-makers interviewed in the Peshawar High Court were quite happy with what they described as a positive public reaction to the NAR and a tangible resulting decrease in case pendency.⁵⁸ Whether this euphoria was sustainable and shared by the judicial

⁵⁵ A typical reaction to the NAR from western observers at the time is embodied in the following evaluation: “Like other peace deals between the military and the militants in FATA, this accord, subsequently endorsed by Islamabad and Peshawar in April 2009, made major concessions to religious extremists.” PAKISTAN: THE WORSENING IDP CRISIS, INTERNATIONAL CRISIS GROUP, ASIA BRIEFING N°111, SEPTMEBER 16, 2010, at 12, at http://issuu.com/crisisgroup/docs/196_reforming_pakistans_criminal_justice_system (Accessed on July 13, 2012). There is however little evidence put forward to substantiate this assertion.

⁵⁶ For instance, see the new designations of district court judges in District Swat as well as in the rest of the areas in which the NAR has come into play. Id.

Former office/designation	New Islamic office/designation
Civil Judge/Judicial Magistrate	Illaqi Qazi
Senior Civil Judge	Aala Illaqi Qazi
Additional District/Sessions Judge	Izafi Zilla Qazi
District and Sessions Judge	Zilla Qazi

⁵⁷ Interview with Syed Mussaddiq Hussain Gilani, Registrar Peshawar High Court, dated June 30, 2010. According to him, “Give me an endless supply of judges in any part of Pakistan, and the case backlog will go away. However, obviously that cannot happen due to budgetary constraints. In the case of Malakand, we sent extra judges from other parts of the province and as a result the case backlog has come down.” However, he agreed that this was obviously unsustainable and that the real test of the NAR would come when these extra judges were withdrawn. In his view, the local people had thus far reacted very positively to the NAR as it had effectively addressed the bottlenecks in the previous system.

⁵⁸ Id.

officers functioning on the ground in the area required an evaluation of the actual situation in the district courts, which now follows.

The Swat district court complex is in an adequately operational condition, though cramped and overcrowded like other district courts in the country. However, at the time of writing, the court infrastructure in the rest of the district had undergone serious damage due to the clash between the Taliban and the Pakistan Army.⁵⁹ As opposed to the administrative spokespersons at the Peshawar High Court, the responses from the district judiciary in Swat about the impact of the NAR were considerably mixed and at times far less enthusiastic. The District & Sessions Court Judge, Swat, who is the administrative head for the district judiciary, for one, agreed with the decision-makers in the Peshawar High Court that the introduction of the NAR timelines for deciding civil and criminal cases, as well as the supply of additional judges from the Peshawar High Court, had shortened case proceedings and accelerated case disposals.⁶⁰ However, he admitted that the continuing lack of facilities and infrastructure constraints posed many impediments to the smooth functioning of the courts.⁶¹ He was of the view that the NAR had furnished the judges with a real power to resist delaying tactics by the lawyers. At the same time, he was also critical of the NAR as he felt that it had been introduced in a great hurry – the rushed introduction not only meant that the NAR had several lacunae and ambiguities, but also that it once again enshrined a ‘special’ legal regime for Swat and the rest of PATA. This, he said, was in violation of earlier judgments of the Supreme Court of Pakistan that had paved the way for mainstreaming the law in PATA in order to bring it

⁵⁹ For instance, at the time of writing, the Tehsil Court Complex in Matta Tehsil, which saw a lot of action between the Taliban and the Army, was badly affected and still unsafe for conducting everyday work, or for that matter even a visit. Hence the presiding officer of that court was actually interviewed in Saidu Sharif – the more secure, army protected capital city of Swat. Interview with Mr. Sajid Khan Additional District Judge, Matta, dated July 8, 2010.

⁶⁰ Interview with District and Sessions Judge, Swat, Dated July 7, 2010. According to the judge there were forty seven judicial officers serving in District Swat at the time of the interview.

⁶¹ Id. Apart from the judges, various members of the court staff were also interviewed who said that the district judiciary continuously faced the problems of poor facilities, inadequate infrastructure, lack of opportunities for training, weak performance incentives etc., – and yet there had been no improvement in these domains despite the rhetoric at the top in the wake of the Taliban uprising in Swat and also the various international donor driven justice sector reform programs. Interviews were conducted with two Reader Assistants, a Stenographer and two Public Prosecutors.

at par with the rest of the country.⁶² While he praised the initial dent made by the NAR on delaying tactics and case backlog, he was very cautious in taking a position on the prospect of a sustainable positive impact.⁶³ The NAR, he stated, was essentially a set of broad guidelines and instructions that allowed the judges the discretion to collapse the civil and criminal procedure in order to fit it into the tight new timeframes mandated under the NAR.⁶⁴ This, however, was not always possible or fair according to him, as the courts often came across complex cases that required additional time for fact-finding, evaluation of evidence, hearing all the pertinent parties, and just decision-making.⁶⁵

The District & Sessions Judge was also explicit in declaring that the NAR was Islamic in name only and that it was no more or less Islamic than the laws in the rest of Pakistan.⁶⁶

⁶² Id. His main criticism was that the earlier system of district magistracy continued its autonomous operation in PATA whereby certain kinds of cases were decided by the district magistrates under local and special laws, despite the fact that such adjudicative powers had been taken away from the district magistracy elsewhere in the country and assigned instead to the judiciary. The latter, he said, reflected the government's decision to abide by several Supreme Court judgments that had mandated a complete separation of powers between the executive and the judiciary. Id. This theme is an area of constant attrition between the judiciary and the district magistracy and hence the District & Sessions Judge's comments were not unsurprising as they stemmed from a certain entrenched institutional position on the debate.

⁶³ Id. The other main challenges faced by the district judiciary, according to the District and Sessions judge, were budgetary constraints, the slow and cumbersome process of the release of funds by the High Courts to the District Courts, poor infrastructure and inadequate training opportunities for judges, especially for training abroad. As far as the training of court staff was concerned, the District & Sessions Judge thought that given the many other more serious challenges faced by the district judiciary, the decision of the justice sector reform donors to focus on the training of court staff was a naïve 'welfare state idea.' As to a contemporaneous USAID initiative for court process reforms for efficient case disposal through the introduction of better management techniques, he was not at all enthused. His view was that more effective case disposal was ultimately a function of personal commitment, dedication and of being God fearing. Id.

⁶⁴ Id. According to him, though the standard civil and criminal procedure code of the country were still in place in Swat and other areas comprising PATA, the NAR had brought about a situation whereby the various steps and timelines therein were no longer binding. An additional tension, according to him, was between officially putting forward the NAR as based on *Sharia* and its specific time-lines for deciding cases. The *Sharia*, he said, provided no timelines for deciding cases but essentially furnished the method for making laws. Id.

⁶⁵ Id.

⁶⁶ Id. The interviewed judge had received relatively extensive training in *Sharia* law, having undertaken the Dars-e-Nizami (a traditional course in Islamic jurisprudence) and having also attended short *Sharia* courses at the Federal Judicial Academy and at the Al Azhar University in Cairo. The interviewee was very uncomfortable with the categorization of the NAR as Islamic as opposed to the laws in the rest of the country and felt that neither were in violation of the *Sharia* and hence particularly different on the litmus test of Islamic/non-Islamic. He was firmly of the view that the NAR was titled as such purely because of political reasons in order to diffuse the Taliban militancy, which had been triggered due to successive years of bad governance in the area, as well as the government's strategic and political use of various radical elements in the past. Id.

It also emerged during the course of the conversation that the framework provided by the NAR for appeals from local district court decisions, i.e. essentially appeals to specified benches of the High Court and the Supreme Court (referred to in the NAR by new Arabic names – the ‘*Dar-ul-Qaza*’ and ‘*Dar-ul-Dar-ul-Qaza*’) was as yet not in place.⁶⁷ Furthermore, the District & Sessions Judge candidly conceded that though the constant pressure from the judicial leadership to clear the backlog of cases had resulted in the district judges having ‘disposed of’ many of the cases before them, they had mostly not yet written down the actual judgments.⁶⁸ He admitted that it was only when these judgments were written and became public; when they were accepted or appealed against; and, if appealed against, when the appeals were either upheld or struck down by the appellate courts, that the effectiveness of and the level of public satisfaction with the NAR’s expedited case disposal regime would truly come to light.

The main operational shortcoming of the NAR, as stressed by many of the interviewed district judges, is that it does not exactly prescribe how the district judiciary in PATA is expected to collapse the complex and elaborate civil and criminal procedures in order to fit them into the tight confines of the NAR mandated case disposal deadlines. There was, as almost always, no deep and participatory engagement leading to the promulgation of the NAR in order to pursue efficiency without jeopardizing the various well-known imperatives of due process and natural justice, including, *inter alia*, adequate opportunities for the contesting parties to meaningfully plead their cases and for the judges to undertake a proper evaluation of facts and evidence.⁶⁹ The NAR is simply silent on how an optimal balance is to be struck between speed and due process. As a consequence, it leaves tremendous discretion to the judges and thereby increases the possibility of inconsistency of court practice as well as flawed trials.⁷⁰ This in turn can

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ This point was strongly emphasized in the interview with Mr. M. Asim Imam, Anti-Terrorist Court Judge, Swat, dated July 6, 2010; in the interview with District and Sessions Judge, Swat, dated July 7, 2010; and, the interview with Mr. Sajid Khan Additional District Judge, Matta, dated July 8, 2010.

⁷⁰ On being probed, the interviewed judges spoke at length about the many problems triggered by the NAR’s short timeframes for deciding civil and criminal cases. These included, *inter alia*, the problems of ensuring the availability of relevant witnesses and adequately recording evidence; the excessive focus on

invariably lead to escalating appeals (and hence further delay) and also additional burdens for the higher courts – as well as for the district courts if the appellate courts decide to remand the cases back to them.⁷¹

The NAR is thus a good example of typically hasty legislation that aims to superficially (and one would venture to add, temporarily) address certain immediate and politically cumbersome symptoms of an inefficient and overworked judicial system. Since it sidestepped any serious engagement with PATA's historical experience with similar *ad hoc* laws; its rapidly changing context that divulges deep-seated popular resentment against various aspects of the operation of the legal system; and, the valuable feedback from the actual operators of the district court system as to the nature of problems that characterize the legal and court system, the NAR essentially offers the mere facade of reform instead of a real solution. It is a façade that is constituted of some Islamic rhetoric and a set of blunderbuss directives introducing some broad deadlines and targets. One may be persuaded to concede that the NAR's attempt to rationalize a cumbersome and delay-inducing procedure and to give more teeth to the courts in order to deter delaying tactics, are generic steps in the right direction. However, on available evidence, there has been no rigorous engagement with these reform themes – this in turn is likely to spawn a whole host of issues, which the interviewed judges warned about.⁷²

case disposals contributing to the growing gap between 'disposed' cases and actual 'decided' cases in view of written judgments; and, growing complaints from lawyers and even some litigants about their dissatisfaction with the excessively rushed pace of court proceedings. The interviewed judges were of the view that much greater legislative attention was required in order to revisit the legal problems of the people in Swat and the rest of Malakand. The mere collapsing of the procedural law or mandating broad and informal practice directions was simply not enough. They also suggested various areas that required concrete procedural law reform such as the introduction of additional formal disclosure requirements at early stages in the trial in order to weed out frivolous litigation. Interview with Mr. M. Asim Imam, Anti-Terrorist Court Judge, Swat, dated July 6, 2010; interview with the District and Sessions Judge, Swat, dated July 7, 2010; and, interview with Mr. Sajid Khan Additional District Judge, Matta, dated July 8, 2010.

⁷¹ Id.

⁷² For instance, the NAR is blind to the relative nature and complexity of the different kinds of cases before the district courts and endeavors to mechanically fit all of them within the tight timeframes provided by it, instead of being cognizant that delay reduction for different types of cases may require multiple case tracks with independent requirements and mandates. There also seems to be no recognition of the particular kind of litigation that takes place in Swat. This vital contextual dimension should ideally inform any special reform prescriptions meant to address immediate violent dissatisfaction, especially since the vehicle for reform can be *ad hoc* and more expeditiously context-specific. A review of the Swat district court data and interviews with the court staff revealed that in terms of civil cases, almost seventy per cent of the cases

The most candidly critical and contextually nuanced assessment of the NAR came from the person arguably conducting one of the most dangerous jobs in Swat, if not the country, i.e. the Anti-Terrorist Court Judge for the entire Malakand Division.⁷³ A pleasant, soft-spoken man, he candidly mentioned that ever since his posting to Swat, his traumatized young son – who with the rest of his family lived in Peshawar – had taken to sleeping with a plastic toy gun under his pillow. The Judge’s assessment laid bare the inadequacies of the government’s reform engagement with the on-going political and legal challenges in PATA. Especially keeping in mind that the NAR was introduced in the wake of a very violent reaction to the prevalent legal system, in his view, various critical areas of reform starkly stood out for their omission. For instance, the Judge confirmed that there were two army detention centers operating in the district, where the ordinary criminal laws applicable in the area had no penetration. Not only was it legally unclear as to under what law the detainees had been arrested and detained – though a legal cover could be constructed owing to the extraordinary circumstances in the area and the consequent special ambit of the government approved army action – importantly, there were no mechanisms in place for handing over these detainees to the police and formally bringing them to a criminal trial. The *status-quo*, in his view, posed serious risks to the sustainability of peace and the public confidence in the criminal justice system.⁷⁴

before the courts were land disputes. Whereas in the criminal domain, around forty per cent of the cases pertained to sexual offences, while the remaining were murder cases (once again the majority of these stemming from long-standing land disputes). However, there has been no attempt in the NAR or thereafter to focus on these specific areas of constant attrition and contestation, and particularly the local land law regime. *See* interview with Mr. Hamid Iqbal, Superintendent to Court of District & Sessions Judge, Swat, dated July 9, 2010. The interviewee pointed out various gaps in the laws and regulations as well as their discordance with local practices and ground realities. These included, *inter alia*, the fact that certain areas in PATA had still not undergone formal land settlement which raised a special set of problems; the fact that women were historically not given their legal share in land also led to multiple disputes and crime; and the experience-based observation that most land disputes were linked to inadequate land record keeping, the corruption of *patwaris* or land record keepers, and various other shortcomings in the land ownership and transfer regime. *Id.*

⁷³ Interview with Mr. M. Asim Imam, Anti-Terrorist Court Judge, Swat, dated July 6, 2010.

⁷⁴ *Id.* These were the army detention centers at Batkhaila and Fiza Garh. The army confined and investigated the ‘most hardened militants’ at these two facilities. Two anti-terrorist court judges were also present at these facilities. However, it was legally impossible for them to function at these detention centers, as they were outside their legal territorial jurisdictions – hence they were essentially conducting jail trials. Detention center inmates were not presented before any civilian courts or handed over to the police. According to informal sources, the detainees were categorized as ‘Black,’ ‘Grey’ or ‘White’ by the army, according to the culpability attached to them by army investigations – they accordingly met different fates. There was no indication of any formal evidence collection by the army, and also no certainty as to its

Asked as to how he generally managed to adhere to the requirements of the criminal procedure given his vast territorial jurisdiction, the spate of terrorist activity in the area, and the much reduced timeframe for a criminal trial mandated by the NAR, the Judge admitted that it was a constant struggle. Given the aforementioned challenges, the biggest problems that he faced in his work – much as the inadequacy of his security, staff, facilities and equipment support were also evident⁷⁵ – were the ones posed by a weak and underdeveloped evidentiary law regime that did not allow an appreciation of circumstantial evidence, so essential otherwise in terrorism cases.⁷⁶ Furthermore, according to him, additional problems germinated from the fact that various important amendments introduced to the country's anti-terrorism laws had not been extended to FATA and PATA – yet another example of the complications spawning from the multiplicity of legal regimes in the country and the slow legislative, executive and judicial responses to fast-changing social, political and security situations.⁷⁷ While certain

appreciation of how a criminal trial took place. A rehabilitation center had been set up for underage militants – called *Subahoon* (which means 'Star of the Morning' or 'Morning Star' in *Pushhto*) – but it was not easy to get the army to release them for induction into this center. There were several instances where the army presence in the area had precluded the engagement of the locals in traditional vocations such as stone-crushing etc., which persuaded or forced some of them to return to militancy. The on-going presence of the army in the area was a necessity of sorts. However, the continuing lack of civilian and army attention to developing a framework for the army to hand over detainees for criminal trials under the law, posed the threat of disenchanting many locals, including innocent detainees and their families, potentially influencing them to turn to militancy. Id.

⁷⁵ In a subsequent discussion, the judge also shared that the judicial leadership had not undertaken the necessary steps to provide adequate security to the judges in areas such as Swat. Financial incentives, risk allowances, housing, transportation, timely procurement and availability of good quality court equipment, the numerical strength and training of the court staff etc., were additional areas of neglect. The district judiciary had negligible access to any training abroad as well as differential access to training at local academies. It was very important, he emphasized, for judges working in special legal regimes such as anti-terrorism law to be exposed to special training programs in anti-terrorism related courses, collection of evidence, detention rules, and trial management; it was also highly necessary to introduce victim assistance and witness protection programs. Id.

⁷⁶ Id. The judge discussed at length the various aspects of the law of evidence, which, according to him, required urgent revisiting and meaningful amendment. He stressed that new situations like armed militancy and suicide bombings threw up important and urgent questions about, *inter alia*, the legal age for crime, the evidence required to get just convictions for new kinds of crime, and the legal definitions of 'complicity in crime' as well as of 'aiding and abetting,' etc. Yet, there seemed to be no real recognition of the actual challenges being faced by the police and law-enforcement agencies in such troubled areas, and hence no concomitant changes in the overall strategy, the laws and the regulations. Id.

⁷⁷ Id. He further pointed out that anti-terrorism trials, not unlike other criminal trials, were acutely hampered by weak police investigations. This in turn was a function of lack of training, equipment,

new administrative arrangements – whereby the provincial finance departments had relinquished the responsibility for managing the court budgets to the provincial High Courts – had been hailed as a step towards greater judicial autonomy by the upper echelons of the judiciary, the judge on the ground had a very different take on this. He identified several new obstructions to the smooth and timely outflow of funds from the High Courts to the district judiciary, owing to the former’s lack of experience in financial management, as well as the domineering attitude of the judicial bureaucracies towards the district judiciary – an attitude that also manifested itself in additional ways.⁷⁸

In conclusion, the several judges and court staff interviewed in Swat attributed the Taliban led militancy to a series of historically ineffective regulatory frameworks for PATA that had created and fanned local resentment against the government and the legal/court systems. They were of the view – and this is remarkably bold feedback coming from state functionaries – that these regulatory frameworks had always been blind to the area’s special history, its local context, and the factors that contributed to popular dissatisfaction and resentment with the legal/court system. Not the least of the main reasons for their unpopularity was that they were the output of non-participatory policy discussions and law-making. This made them, according to the interviewees, ideal targets for the convergence of multiple local and long seething social, political and economic resentments.⁷⁹ To the interviewees, there was nothing novel or particularly

regulations and the scandalous inadequacy of reliable forensics facilities – the entire province had only one such facility. Id.

⁷⁸ Id. According to the interviewee, it was imprudent for the High Courts to take up budget-making and financial responsibilities, given that the Chief Justices and the court administration hierarchies were already over-burdened. He also emphasized that the Anti-terrorist courts covered very large geographical areas and faced excessively high volumes of cases. In many such cases, the accused managed to get bails from the High Courts. Thus, there was a need for greater dialogue and communication between different levels of the judiciary in order to rationalize the area of bail – the High Courts did not always seem to be cognizant of the ground realities faced by the district courts. Repeat offenders and highly dangerous individuals seemed to get routinely bailed out. Another area that in his view required urgent attention was the much-needed rationalization between the anti-terrorist laws and the laws for the protection of juveniles. As things stood, confusion and contradiction between competing policy imperatives prevailed in this area. However, there was simply no dialogue on this between the different levels of the judiciary. Id.

⁷⁹ Interview with Mr. M. Asim Imam, Anti-Terrorist Court Judge, Swat, dated July 6, 2010; interview with the District and Sessions Judge, Swat, dated July 7, 2010; and interview with Mr. Sajid Khan Additional District Judge, Matta, dated July 8, 2010. Contrary to popular reporting, the Taliban led resentment was not solely caused by dissatisfaction with the court system and its delays – the delays were no different from

promising about the NAR solution in terms of its potential to address the complex challenges faced by the district judiciary in PATA. Under an Islamic veneer, it was, they felt, a largely ineffectual antidote for the recent violent challenge to the formal court-based legal system. Neither was it a substitute for deeper and more participatory political, policy and legislative thinking. Hasty patchwork was bound to once again expose the gaping holes in the area's political, economic, administrative and legal governance. Even in terms of dealing with delays, the interviewees stressed that the NAR did not systematically and meaningfully condense the civil and criminal codes in order to shorten the length of trials, while ensuring at the same time that the fundamental requirements of due process and a fair trial were met. It merely provided certain loose guidelines that led to a variety of interpretations and a high degree of variation in practice from court to court. Further, neither an improvement in infrastructure/facilities/resources nor the requisite clarity of direction and consequent deeper law reform had accompanied and supported the increasingly steep targets for monthly case disposals.⁸⁰

elsewhere in the country. In order to understand the deeper underlying reasons one needed to probe deeper and wider. The history and backdrop of a strong centralized state under the *Wali* of Swat, followed by various weak, poorly visualized and ineffective state mandated administrative systems; the unbridled allocation and use of powers by the State's administrative machinery under different regulatory regimes over the years; the cooption and strategic use of local radical elements by the State during different periods with the resulting weakening of the writ of the State; and elements of a class struggle emerging from land and resource distribution patterns in the area; were some of the main reasons behind the Taliban upsurge. These were essentially issues that required closer political and policy examination, negotiation and solutions, and could not simply be remedied by enforcing tight timelines for case disposal in courts – which was just one relatively minor dimension of the larger problem. The ineffective maintenance of law and order in the area had also contributed to the sustainability of safe havens for criminal elements, which were a strong component within the Taliban, and had their own vested interests in promoting anarchy. In the past, certain members of the local administration had also, at times, extended strong ideological support to the Taliban or were hand in glove with the criminal elements, but had evaded detection and accountability. Id.

⁸⁰ Interview with Mr. M. Asim Imam, Anti-Terrorist Court Judge, Swat, dated July 6, 2010. According to him, there is nothing unique about the NAR. It is an old framework that has been tried again and again, i.e. an Islamic sounding law that makes some piecemeal amendments to the court processes in order to bring about relative operational efficiency. The NAR and its predecessors were not the result of any rigorous policy deliberations. In the case of the NAR, he divulged that it was the output of one senior bureaucrat in the provincial law department. The requirement in the NAR to conduct proceedings in Urdu was also onerous for judges trained in English. There was a growing recognition in the district judiciary that the hasty proceedings under the NAR would have serious ramifications for the quality of justice. At the same time, the judges felt that they needed more time to make sound decisions, as they did not want to be appealed against due to the inadequacy of their hastily delivered judgments. Id.

Most of the interviewees specifically pointed out that the law of evidence, and the entire regime of criminal investigation, prosecution and forensic testing capabilities, were in dire need of modernization. They said that they also required advanced training for adjudicating the tremendous number of complex criminal cases generated by the rampant episodes of terrorism related violence in the area. Highly problematic also, they said, were the phenomena of the missing persons and the ambiguous status of terrorism and Taliban insurgency related detainees being held by the army, with no mechanism in place to formally transfer them to the police and the criminal justice system. Apart from the grave possibilities of the miscarriage of justice, the *status quo* could also lead to aggravating local sentiments. Yet, to the utter exclusion of these imperatives, as the interviewees reported, the sole emphasis from the judicial leadership was on the quick disposal of cases. Meanwhile, the judges confessed that they found it very hard to keep up with stiff case disposal targets. While case disposals had gone up on paper, they admitted that it was simply impossible to reason and write the final decisions at such an accelerated pace. It was only once the decisions were actually written and a number of them potentially appealed against, that one could objectively determine their quality as well as the nature of popular reception to the NAR led quick justice. As to the future, the feedback was highly uncertain. The interviewees displayed considerable anxiety about what the coming days held for the legal and court system in Swat.

IV Postscript

Shifting back to FATA, in August 2011, the President of Pakistan signed two Orders to aid towards the process of integrating FATA with the rest of Pakistan. The first Presidential Order extended the Political Parties Order 2002 ('PPO') – the primary law that regulates political activities in the country – to FATA, thus allowing for the operation of mainstream political parties in the region; while the second introduced certain important amendments to the FCR. The allowance of mainstream political activities in the region brings about much greater political freedom by opening up opportunities to the locals to form their own political parties, by lifting the restriction on the country's various political parties to operate in, recruit and organize themselves in the

region, and by enabling the locals to engage with the larger political discourse and activity in the country and to employ national frameworks and platforms for propagating and advocating their rights.⁸¹ This is a major step forward from the previous *status quo* where only independent candidates from FATA without any political party affiliation – invariably handpicked and anointed by the ruling government from amongst the local *Maliks* – were allowed to contest elections from the region and made their way (mostly uncontested) to occupy twelve and eight seats respectively in the country's National Assembly and Senate. Picked without any real political constituencies and competition, these tribal parliamentarians have historically been co-opted *en bloc* by one ruling national elite after another – the phenomenon of securing their loyalty through various kinds of financial and political incentives referred to locally by the term 'horse trading' – in the eventual national governmental set-up and used as pawns in a larger numbers' game for ensuring a ruling majority or coalition. This practice has consistently precluded any meaningful and wider political participation of the people of FATA and rendered their representatives bereft of the ability to effectively and autonomously showcase and advocate the concerns and demands of their constituents in the national legislative fora. The total control exercised over the elected representatives from FATA by whichever party was ruling the center, their use as mere powerless pawns in the larger political bloc-formation in the country, and the culture of visualizing any concessions or reforms for FATA as a handout rather than a politically advocated and negotiated right, have been the main banes of the extant political framework for the region. As it is, adult franchise was only granted to the people of FATA as late as 1997, and the extension of the PPO does promise to usher in a new era of political opportunity and freedom as well as greater linkages with Pakistan. Having said this, the new reforms still do not extend FATA any representation in the KP provincial assembly – or extend it the status of an autonomous

⁸¹ See Muhammad Ali Khan, *FATA to see political activities soon*, The Dawn, August 9, 2011 at <http://dawn.com/2011/08/09/fata-to-see-political-activities-soon/> (Accessed on July 12, 2012). See also Editorial, *FATA Reforms*, The Daily Times, August 14, 2011, [hereinafter *Editorial, FATA Reforms*] at http://dailytimes.com.pk/default.asp?page=2011\08\14\story_14-8-2011_pg3_1 (Accessed on July 12, 2012); and Irfan Ghauri, *Political reforms: A century later, some rights for the tribals*, The Express Tribune, August 12, 2011, [hereinafter *A century later, some rights for the tribals*] at <http://tribune.com.pk/story/229954/president-zardari-signs-fata-political-parties-order-2002-extension/> (Access on July 12, 2012).

province – and to that extent the lifting of the curtain has only been to extent of the national legislature.⁸²

The second Presidential Order envisions certain important amendments to the FCR.⁸³ It visualizes a two-tiered appellate system comprising of the newly created FATA Tribunal (equivalent to a provincial high court) and an FCR appellate authority with a real right of appeal to the people of FATA against decisions under the FCR. The reforms, *inter alia*, also curtail the powers of arbitrary arrest under the FCR and preclude indefinite detention, introduce a requirement to produce a person accused of a crime before a magistrate within twenty-four hours of the arrest, incorporate the potential scenarios where an accused can be released on bail, stipulate a fixed time frame for the disposal of cases, and somewhat dilute the mischief of collective punishment by excluding women, children below the age of sixteen and elders above the age of sixty-five from its mischief as well as mitigate the ambit of such implication as to the other males of the tribe. Furthermore, any seizure of private property by the government would now entail the grant of compensation. Another amendment provides for the possibility of initiating an action for false prosecution in civil and criminal matters while the defendants are now also entitled to adequate compensation in criminal matters and compensatory costs in civil matters. The untrammelled powers of the ‘Political Agents’ to use state funds, ostensibly for promoting rule of law and for keeping the peace, are brought under check as the expenditure of state funds is to be subject to audit by the Auditor General of Pakistan. Certain reforms have also been introduced to promote and safeguard prisoners’ rights in FATA.⁸⁴

Despite these positive developments there is skepticism about the scope of reform and dissatisfaction with its pace. Critics point out that the archaic and draconian notion of ‘collective responsibility’ has been diluted but not fully erased, and neither has the

⁸² See Editorial, *FATA Reforms*.

⁸³ See FRONTIER CRIMES (AMENDMENT) REGULATION, 2011 [hereafter the ‘FCR Amendment Regulation’].

⁸⁴ See the FCR Amendment Regulation. See *A century later, some rights for the tribals*. See also Nasir Iqbal, *Major changes made in FCR: FATA people get political rights*, The Dawn, August 13, 2011, at <http://dawn.com/2011/08/13/major-changes-made-in-fcr-fata-people-get-political-rights/> (Accessed on July 12, 2012).

judicial function been completely separated from the executive as is reflected by the fact that the new appellate bodies are still primarily manned by bureaucrats. They further assert that any effective operationalization of these reforms and the resumption of normal political activity in the region is bound to flounder till such time that the governance policy for the area stops being dictated by security imperatives and the strategic tolerance of violent elements that such policy dictates. Unless the siege of terror by the militants is lifted the tribals, they argue, are not likely to enjoy their new-found rights; neither are they likely to gain from any investments in local development as such development projects are also increasingly controlled by militants – especially since they have been systematically wiping out the local *Malik* leadership and more moderate tribal elders in a series of suicide attacks. The introduction of a robust political and economic empowerment strategy, a much tougher stance against the local militants, and a complete abolition of the FCR is what many argue for.⁸⁵ Quite apart from these various points of criticism, observers also point out a marked lack of alacrity on part of the concerned authorities to roll out the newly introduced reforms. However, they highlight that while the reforms are welcome, they were preceded by negligible necessary groundwork in order to create an enabling environment and a robust absorption capacity. Given such lack of groundwork, others actually caution in favor of gradual and incremental reforms. Yet others persist that any legal reforms have no meaning without sincere concomitant economic and social reforms as what the people really need are schools, water, electricity and hospitals.⁸⁶

The current reforms were initially visualized and publicly announced as a reform package in 2009. However, progress was stalled both because of the escalating violence in the area (reportedly on the military's request) as also due to the historically local levels of governmental direct engagement with the locals in FATA which undermines its overall ability to control conflict as well as to sensitively and comprehensively appreciate local

⁸⁵ See Farhat Taj, *Analysis: New FATA reforms – good but insufficient*, The Daily Times, August 20, 2011, at http://www.dailytimes.com.pk/default.asp?page=2011\08\20\story_20-8-2011_pg3_5 (Accessed on July 12, 2012).

⁸⁶ See Manzoor Ali, *Frontier crimes regulation: Centuries-old law will take time to reform*, The Express Tribune, December 2, 2011, at <http://tribune.com.pk/story/301002/frontier-crimes-regulation-centuries-old-law-will-take-time-to-reform/> (Accessed on July 12, 2012).

grievances and aspirations for state-building and efficient service delivery.⁸⁷ State-building, political empowerment, service delivery, and peace-building are all inextricably knit imperatives which require a cohesive, sustained and multi-pronged effort. However, the all too frequently interrupted democratic process in Pakistan; the resulting scarcity of democratic oxygen, political intent as well as executive autonomy and ability; and the inordinate influence exercised on local governance policies in the tribal areas by security concerns, military imperatives, and geo-political developments in the region, collectively ensure that FATA and the other special territories have never really received the holistic, participatory and unremitting reform attention that their highly convoluted state of affairs strongly merit. In the wake of popular elections that take place not all too frequently in Pakistan, weak and inept political governments stutter and fret for a while, and are then forced into a survival mode by the various endogenous and exogenous factors that perpetuate political instability in Pakistan. Soon enough they are heard of no more. Making highly infrequent appearances, FATA and the other 'special territories' linger for a while in the various extant national discourses, and then lose their limited moments of exposure to some other pressing national concern. The state of affairs since the FATA reforms were introduced in 2011 is no different.⁸⁸

The continuing adverse security situation in FATA is of course a big reason for any lack of progress since the exciting Presidential announcements in August last year; as is the fact that at the time of writing the government is utterly distracted by and embroiled in multiple other issues. These include, *inter alia*, the worst power crisis in the country's history, continued challenges posed by the devastation caused by the floods in 2011, several bitter contestations with a hyper-adventurous judiciary, frequent political brinkmanship with the powerful military, weak governance and poor service delivery in various sectors and a highly hostile and at times partisan media that loses no opportunity of taking the government to task, the general growth of lawlessness in the country as well

⁸⁷ See *State-Building in FATA*, at 16.

⁸⁸ For an overview of the factors that have historically impeded sustained democratic political governance in Pakistan, see OSAMA SIDDIQUE, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents*, 23 Ariz. J. Int'l. & Comp. L. 624-636 (2006).

as sustained acts of terrorism and suicide attacks in various parts, and the special constituency appeasement demands of the forthcoming elections which are just around the corner. Thus, while FATA has fortuitously appeared on the government's menu for reforms, the lack of local community participation while visualizing this recent reform package impairs its ambit and outreach as well as the extent of local demand and ownership, thereby further eroding the legitimacy of the Federal Government instead of augmenting it. At the same time, when the initial excitement and spurts of activity are followed by long-periods of inertia, any momentum gained is soon dissipated.

Meanwhile, lack of security and deteriorating 'law and order' remain big concerns for the people of FATA as do low and differential access to schools, health services, hospitals as well meaningful political freedom.⁸⁹ The situation is not dissimilar in PATA. After the initial buzz around the NAR, one now hardly hears anything anymore about further reforms to address local issues with the courts as well as any steps to tackle the various issues with the NAR framework. At the same time, there are signs on the ground that as the NAR withers away, a storm may be gathering once more in Swat. The deep resentment against the existing legal and court systems – which overlays various additional historical discontents with how Swat has been governed – that preceded, triggered and characterized the Taliban-led uprising, is still seething. This may have been one betrayal too many.⁹⁰

⁸⁹ Important insights about popular perceptions and aspirations of the people of the region are provided by recent surveys and opinion polls in FATA and KP by the Community Appraisal and Motivation Program (CAMP), a research and advocacy focused NGO operating in Islamabad run by people belonging to FATA. CAMP also has various field offices in FATA. See Naveed Ahmad Shinwari, *Understanding FATA: Attitudes towards governance, religion and society in Pakistan's Federally Administered Tribal Areas: Volume IV*. Peshawar: Community Appraisal and Motivation Program (CAMP) (2008); and Naveed Ahmad Shinwari, *Understanding FATA: Attitudes towards governance, religion and society in Pakistan's Federally Administered Tribal Areas: Volume III*. Islamabad: Community Appraisal and Motivation Program (CAMP) (2009). See also CAMP's website at <http://www.camp.org.pk/> (Accessed on July 12, 2012).

⁹⁰ See Jeremy R. Hammond, *The Situation in Swat: An Interview with Shahid R. Siddiqi*, Foreign Policy Journal, July 9, 2009, at <http://www.foreignpolicyjournal.com/2009/07/09/the-situation-in-swat-an-interview-with-shahid-r-siddiqi/> (Accessed on July 7, 2012).