

EXPLOITATION OF PASHTUN'S SOCIO-CULTURAL INSTITUTIONS BY THE BRITISHERS: A CASE STUDY OF JIRGA AND COLLECTIVE RESPONSIBILITY

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Abstract

When the Britishers failed to suppress the resistance from Pashtuns and Baloch, they adopted some special measures for dealing with the situation. One of these special measures was the introduction of Frontier Crimes Regulation (FCR). Through FCR, they tried to exploit local people's socio-cultural values for furthering their own interests. This paper seeks to investigate as to how the British twisted Pashtun socio-cultural institutions like Jirga and collective responsibility to suppress the resistance to the colonial rule. The study is based on qualitative data mainly collected from primary sources like archival material and interviews and focus group discussions with Pashtun elders and educated people having deeper understanding of both Pashtun socio-cultural values and the colonial policies like FCR.

Key Words: Pashtun, Socio-cultural, institutions, Britishers, Jirga, collective responsibility

Introduction

The North-west part of Pakistan has always resisted outside powers exercising political authority over it. From 14th century onwards when Pashtuns emerged as a distinct nation, the history of the residents of this area has been a history of rebellions against external powers. The dwellers of this area fought against *Sultans* of Delhi, forces of Timur the Lame, troops of Zaheer ud Din Babar and the army of Akbar the Great. They also resisted the authority of Jahangir, Shah Jahan, and Aurangzeb. Similarly, Nadir Shah, while returning back after the sack of Delhi was denied passage through the famous Khyber Pass (Khan, 2015). The Sikh regime under Ranjit Singh also failed in bringing peace and stability to the frontier (Baha, 1978). Though the Ranjit Singh administration would collect a small revenue from the Pashtuns from settled districts of the current Khyber Pakhtunkhwa, it

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was primarily with the help of 30,000-40,000 troops stationed in Peshawar (Embree, 1979).

As a result of the two wars fought between Sikhs and the East India Company in the 1840s, Punjab slipped from the hands of Sikhs to the East India Company. The occupation of Punjab by the British extended its authority to River Indus (Stewart, 2007). As the frontier was part of Punjab province at that time, the annexation of the Punjab by the Britishers shifted the responsibility for maintaining peace and order at the frontier from the Sikhs to the Britishers. Under the Britishers, resistance to outside forces continued as earlier and thus the Britishers would frequently send military expeditions to crush the forces of resistance (Khan, 2015). In the words of Olaf Caroe, "But no empire of which we have record had ever succeeded in making subjects of the tribes of Waziristan" (Caroe, 1958).

In the beginning, the application of Indian Penal Code (IPC) was extended to the settled districts of the North-west frontier. However, the conviction rate, due to the nature of the local society, was very low as compared to the rest of India (Khan, 2014). As the Pashtuns recognize *Pashtunwali*³ as legitimate law, they did not consider the English law as fair and would either dodge or overlook it (Mahsud, Zubiar, & Hussan, 2016). In order to deal with this situation, British India introduced several special measures. One of the special measures was the modification of IPC's application by promulgation of Punjab Frontier Crimes Regulation⁴ of 1872 (PFCR) for the trans-Indus districts (Nichols, 2001). It was an administrative and legal code which placed vast powers in the hands of officials serving on the frontier (Embree, 1979). This new code was a mix of British legal codes and the customs of the Pashtuns (Groh, 2006). Under FCR, the officers serving on the frontier not only enjoyed vast powers but they would also get huge sums of money for buying services and loyalty of local elders (Ali, 2011).

British authorities, while promulgating FCR borrowed from Pashtun socio-cultural values and the new code was shaped in such a manner to give the impression that it was based on Pashtun customs to make it appeal to their ideals of justice. They basically twisted Pashtun customs to make convictions in criminal cases easier. The purpose of FCR was to increase conviction rates without due process of law. Thus, what ultimately emerged was a mixture of legal codes and local customs without satisfying any of them (Khan, 2015). FCR was actually formulated in a style to give the impression that the

³ A Code of conduct followed by the Pashtuns for centuries.

⁴ Later, it was renamed as Frontier Crimes Regulation (FCR).

government was not interfering in the matters of local people (Ali & Rehman, 2001). The main feature of FCR was exploitation of Pashtun socio-cultural values by the Britishers. In the following paragraphs, we will briefly discuss the exploitation of some core Pashtun socio-cultural institutions-*Jirga and collective/territorial responsibility*- by the Britishers through FCR.

FCR and the institution of Jirga

Chapter III of FCR 1901 dealt with the Council of Elders locally known as *Jirga*. This chapter empowered the administration to appoint a council of elders for the resolution of civil and criminal disputes. The Deputy Commissioner was given authority to constitute *Jirgas* and refer criminal cases to it where there was insufficient evidence to convict an accused in law of court and then implement the decisions made on *Jirga* recommendations just like a decision of court of law. The *Jirga* worked like a jury but was not bound by law of evidence. The result of this new system was a significant increase in conviction rate (Khan, 2015).

Jirga is basically a socio-cultural institution which has been an integral part of Pashtun society for centuries. Thus, when the British assumed charge of the North-west frontier, it realized *Jirga's* importance and the possibility to exploit it for promoting colonial interests (Baha, 1978). According to James W. Spain, the FCR *Jirga* was very different from the one which existed in Pashtun culture (1963). The observation of FCR Committee of 1899 will further elaborate this aspect. It noted, "The normal or indigenous *Jirga* is a tribal assembly acting unanimously. No doubt we have modified the primitive institution in adopting it to our requirements" (Nichols, 2013, p. 109).

There was also difference in the working of the two types of *Jirga*. In the case of traditional or *Olas Jirga*, the members of the *Jirga* are to be approved by both parties. The common practice is that both the parties to a dispute are asked to nominate an equal number of elders as jury. However, in some cases a *Jirga* already working on a dispute without resolving it may also nominate another *Jirga* for the case but members of the new *Jirga* are to be acceptable to both sides. After deliberations, the *Jirga* unanimously passes a verdict. In the case of FCR *Jirga*, it was the Deputy Commissioner who was authorized to refer a case to a *Jirga* and also nominate its members.

Under the FCR, the British officers enjoyed discretion to refer cases to *Jirga* or regular court. Similarly, section 16 of the Regulation of 1887 empowered British officers to withdraw a case from court at any stage before acquittal or conviction of the accused and refer it to a

Jirga for getting the desired outcome. The Regulation also barred civil courts from taking cognizance of any claim with regard to which the Deputy Commissioner had acted under FCR. The Regulation even authorized the Deputy Commissioner to pass a verdict according to the recommendations of the *Jirga*, to remand the case to the same *Jirga* for further findings, to refer it to a new *Jirga*, or refer it to a civil court (Govt of Punjab, 1887).

The logic for referring cases to the *Jirga* instead of civil courts is understandable-getting easy convictions. For example, a letter written by chief secretary to the Government of Punjab to British officials in Peshawar in 1994 observed, "In several cases of convictions which the Lieutenant-Governor has had before him since he came to Punjab there was no definite finding by the *Jirga* of any facts constituting an offence," (Nichols, 2013, p. 87).

Another letter written by Chief Secretary to the Government of Punjab and its Dependencies H. C. Fanshawe to the Commissioner and Superintendent *Derajat* Divisions in 1896 noted, "In one case which came up on revision, the Magistrate had appointed the whole of the witnesses for the prosecution as *Jirga*, who, needless to add, convicted the accused." He added, "On recently holding temporary charge of the Peshawar Division, I found Magistrates appointing time after time the same men to serve on *Jirgas*" (Fanshawe, 1896).

This clearly shows that the *Jirga* practiced by the colonial power under FCR was much different from the indigenous *Jirga* which acted according to some well-established unwritten norms. The British India actually exploited an old Pashtun cultural institution to safeguard its own interests. The FCR *Jirga* neither satisfied the requirements of modern justice system nor of traditional justice system.

FCR Jirgas have also come under criticism from higher courts of Pakistan. For example, while considering the point whether the mechanism provided by FCR for deciding cases be considered as a law, Supreme Court judge Justice A. R. Cornelius observed,

In the case of *Jirgas*, no procedure of any kind is laid down. The [only requirements] are that there should be such inquiry 'as may be necessary' and the accused person should be heard [...] [I]t seems clear enough that the purpose of the Regulation also is that none of the recognized rules of evidence should be binding upon the *Jirga*. The process of decision provided under the Regulation is also foreign to justice as administered by the Courts. The hearing is before a *Jirga* but the power of decision is vested in the Deputy Commissioner, who does not hear the accused or any

of the witnesses, and is not empowered by the law to do so, even if he should desire. In these circumstances, the Jirga is merely an advisory body, and since the Deputy Commissioner does not have the case presented before him through counsel, it is obvious that the decision is wholly vicarious. (NCHR, 2016, 26).

He further added that "*Jirgas* sometimes declare that they have held 'open and secret inquiries', which suggests investigations of a nature entirely different from those which are permissible in a Court of Law" (Shinwari, 46). The hearing is before a *Jirga* but the power of decision is vested in the Deputy who does not see or hear the accused or any of the witnesses, and is not empowered by law to do so, even if he should so desire (Shinwari, 2011, 47).

As the *FCR Jirga* is a distorted form of the traditional or *Olasi Jirga*, there is also much difference in levels of their popularity among the people. For example, the findings of a survey conducted by CAMP in 2011 revealed a huge difference in levels of their credibility. Responding to a question as "In your opinion, what type of *Jirga* is most trusted for resolving disputes in this area?," 70.47% (1057 out of 1500) mentioned *Olasi Jirga*, 12.07% (181 out of 1500) respondents cited *FCR Jirga* while 0.67% (10 out of 1500) opted for *Taliban Jirga* (Shinwari, 2011). These statistics clearly show that it is the traditional *Jirga* which enjoys people's support.

There are also other studies that cast doubts on fairness and impartiality of *FCR Jirga*.

Collective/Territorial Responsibility and *FCR*

Collective and territorial responsibility under *FCR* was the most important tool in the hands of British authorities for establishing colonial writ in the Pashtun lands. The concept of *collective responsibility* was first introduced by *Colonel Coke* immediately after Punjab was annexed by the Britishers. The procedure devised by Cook in case of any trouble was:

To close the pass at once, seize all *Afridis* to be found in [the] Peshawar and Kohat districts, sell their cattle, stop all allowances and, when the matter is settled, cause all losses to be made good, not from the confiscated allowances but from the allowances made from the time they may commence. (Afridi, 2012: para 6).

Herbert Edwards, who assumed charge as Commissioner Peshawar in 1853, further advanced the system of collective

punishment when he ordered the arrest of every *Kuki Khel Afridi* after some members of the subtribe intercepted a British messenger going to *Kabul* from *India* (Afridi, 2012; Embree, 1979). This method of *collective responsibility* was given formal shape with the introduction of *FCR*. For example, Chapter IV of *FCR* 1901 dealt with collective and territorial responsibility. Section 21 of *FCR* 1901 stated;

In the event of any frontier tribe or of any section or members of such a tribe, acting in a hostile or unfriendly manner towards the British Govt. or towards persons residing within British India, the Deputy Commissioner may with the previous sanction of the Commissioner by order in writing direct

- (a) The seizure, wherever they may be found, of all or any of the members of such Tribe and of all or any property belonging to them or any of them:
- (b) the detention in safe custody of any person or property so seized and:
- (c) The confiscation of any such property: and many with the like sanction by Public proclamation:
- (d) Debar all or any member of the tribe from all access into British India: and
- (e) Prohibit 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 tribe or any section or members thereof.

(Govt. of Punjab, 1901, section 21).

Similarly, section 22 authorized the Deputy Commissioner to impose fine on the residents of a village or part thereof if he thought that they abetted the commission of a crime on their soil, failed to render all support for the arrest of the culprits, facilitated the criminals escape or harbored them. Section 23 was also closely related to section 22. It added that in case a person was seriously or fatally wounded in the premises of a village or a part of it, the crime would be considered to be committed by the community of that village unless the village headmen showed that they; (a)"had not an opportunity of preventing the offence or arresting the offender (b) have used all reasonable means to bring the offender to justice." (Govt. of Punjab, 1901, section 22 & 23).

The above mentioned sections point toward two types of responsibilities: collective and territorial. *Collective responsibility* was the mechanism through which the British authorities would punish a whole tribe or subtribe for the acts of one individual or few persons.

The action included arrest of anyone found anywhere, seizure of properties, animals, and closure of businesses of persons belonging to the tribe from which someone would commit crime. Under the territorial responsibility section, the administration would hold a complete tribe, subtribe or village responsible for any crime taking place on their soil. These two types of punishments were based, as claimed by the Britishers, on two socio-cultural practices in Pashtun society. The first is the concept of *Baramata* and the second is the practice of collective defense of common or joint land. In the following paragraphs, we will briefly explain them and will also show how they deviated from established practices in *Pashtun* society.

Collective punishment/responsibility

According to the Britishers, the idea of collective punishment (punishing the whole tribe for the acts of individuals) was derived from the concept of *Baramata* in *Pashtun* culture. Olaf Caroe, who first joined Indian civil service and later served as Government of India's foreign secretary and governor of the then North-west frontier province, justified the practice by stating,

It follows from this principle that an aggrieved party can enforce his remedy against any tribesmen on whom he can lay hands. That is the essence of tribal responsibility, a system which admits the justice of *Baramata* as an effective weapon for securing rights and claims. (Aziz, 2013).

Baramata was a practice in Pashtun society under which an aggrieved party would take in custody some goods, animals or even persons of another family, tribe, and subtribe etc. to compel it to make good the losses inflicted upon it or return debts etc. Suppose some people from one tribe kidnapped a few people belonging to another tribe. Now the aggrieved tribe would take in custody an equal number of people from the culprits' tribe to compel it to pressurize the culprits for the release of the captives. Similarly, people would take in custody animals to secure the release of their animals held by another tribe or family etc. People would also use *Baramata* for compelling others to return loans.

No doubt, the British administration at the frontier used the concept of *Baramata* as the foundation for collective punishment but it actually practiced its distorted form.

According to Abdul Qayum, a researcher from Hangu, the concept of *Baramata* provided base to the concept of collective

punishment but there was much difference between the operationalization of the two. Unlike in Pashtun society where the aggrieved party would take in custody an equal number of people or goods from the aggressors, the Britishers would start arresting complete tribes and their properties for the crime of a single individual (personal communication, February 28, 2021). Analyzing the difference between the two, an elder from Orakzai district Ajmal Khan said that in *Baramata*, the aggrieved party taking in custody men or goods was to do so in proportion to the losses done to it. In the case of British system, there used to be disproportionate use of coercive power against complete tribes. Thus, British administration would arrest dozens or even hundreds of people to secure the arrest of one accused (personal communication, February 20, 2021).

Another difference in *Baramata* and collective punishment was about treatment of those taken in custody. In case of the former, the one in custody would get proper respect, food, and dress while those arrested under *FCR* would be treated like prisoners who would even face punishments while in custody (Qayum, 2021). According to Muhammad Saeed, a researcher from Bajaur who has deep understanding of both *FCR* and Pashtun socio-cultural values, those arrested under *FCR's collective responsibility* section would be treated like prisoners while the ones taken in custody under *Baramata* would get better food than his captors (personal communication, March 1, 2021).

Under *Baramata*, the aggrieved party would take in custody persons or goods corresponding to the acts of the aggressor. In the case of *FCR*, the state would not only arrest dozens of people but would also close down all shops and other businesses belonging to the members of tribe, subtribe, or clan against which it would take action under *collective responsibility* section. Thus, the Britishers would severely harm the economy of the whole tribe or subtribe. This practice of sealing of businesses of the whole tribe even in the settled areas continued till recently. For example, the political administration of FR Kohat while acting under *collective responsibility* section of *FCR* in 2005 sealed, among other businesses, a multi-storey market (Gul Haji Plaza) in Peshawar with some four hundred shops (Computer market, 2005). Therefore, a state's disproportionate use of coercive force cannot be justified on the basis of socio-cultural values with far limited implications.

Furthermore, in *Baramata*, the aggrieved party could not bar the aggressors from entering markets etc. located at neutral places. The maximum it could do was to bar them from their own (aggrieved party's) village/territory only. In the case of *FCR*, the scope of blockade

was very broad. The government would enforce a blockade against the whole tribe or subtribe in all areas under the writ of the state. It was also stated in the *FCR* that all people within the limits of British India may be prohibited from any kind of interaction or communication with the members of the tribe or subtribe against whom the section had been invoked. The basic purpose of this policy was to create a shortage of food and other necessary items in the areas facing blockade. This was a very harsh and inhumane policy as it also affected women, children, and elderly people (personal communication with a retired bureaucrat who did not want to be quoted by name). In recent years, there were even cases in which government refused to issue identity documents like identity cards and passports to people belonging to a tribe or subtribe facing punishment under collective responsibility. For example, a civil servant⁵ who was once posted in the erstwhile FATA also acknowledged that they would stop processing applications for identity cards and domiciles of people belonging to the tribe facing punishment under *collective responsibility* section.

The second component of *collective responsibility* under *FCR* was territorial responsibility. It meant making residents of a village etc. responsible for a crime taking place on their soil irrespective of who committed the crime. According to Saeed, as land used to be commonly owned, people were collectively responsible for any crime taking place on it. British asked the Pashtuns to ensure that their soil will not be used for attacks against British officers and installations etc. People were unwilling to give such a guarantee. Ultimately, British agreed to pay people in each tribe, clan etc. in return for watch and ward duty. Thus, it would award a fixed number of Khasadar jobs to each subtribe or Khel in return for their pledge that they would protect colonial interests in their respective areas (Saeed, 2021).

Apparently, it was a good system as British had to pay the people for maintaining peace and security in the area. However, in reality it was not that simple. During discussions with several people, it was discovered that the British would take notice of crimes committed either against government officials, installations etc. or taking place in protected areas like roads and premises of government offices. Thus, British's concern was not safety of the people rather safeguarding its own interests. In case a murder would take place on government roads, the administration would impose fine on the killer or his tribe in case the killer was known. In case the killer was unknown, the government would impose fine on the tribe or *khel* on whose soil the murder took place. It would do so not to punish the killer for his crime but to punish

⁵ He did not want to be named in the research article.

him for committing the crime on government land and thus violating the sanctity of government land. Thus, roads' sanctity was more important for the administration than human life and the system was for the protection of state's interests rather than the well-being of the people. The system continued until recently when FCR was withdrawn in 2018.

Conclusion

Though it is said that the idea of collective punishment was derived from local customs, the reality is that the Britishers exploited and twisted Pashtun socio-cultural values and institutions for their own interests. No doubt, the concept of collective and territorial responsibility existed before the introduction of FCR but it was significantly different from the one incorporated in and implemented through FCR. Even under the Close Border Policy, the British officers would prohibit Pashtuns in the tribal areas from entering areas under British administration. The British administrators would even deny the people living in the mountainous areas access to British markets and even to their own lands in the plain areas. Now the question arises whether this segregation of people with common cultural, economic, and family ties was also based on Pashtun values? The answer is definitely negative. There are many people, especially foreigners and non-Pashtun Pakistanis who have tried to prove that FCR was actually based on Pashtun's socio-cultural values. For example, Ty L. Groh observes, "*Pashtuns* accept the *FCR* because it exists under the auspices of *Pashtunwali*." However, the truth is that the Britishers while formulating *FCR* twisted Pashtun socio-cultural norms to give the impression that the system was based on their values which in reality was neither judicial in nature nor traditional.

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