

ADR (Grand Jirga), Truth, Justice and Reconciliation Commission and peace on the Pakistan -Afghanistan frontier

Zia Akhtar ¹

Abstract

The mechanism for dispute resolution in the Pushton heartlands of Afghanistan and Pakistan is the *Jirga* which is based on a tribal forum that offers a form of restorative justice. It has an established constitutional role in Afghanistan where it is part of the legislative Assembly, and is responsible for approving laws and ratifying treaties. In the north- west- frontier province of Pakistan (now Khyber Pakhtunkhwa), the tribes who live on the borderlands also convene a local *jirga* when settling disputes by mediation. The Pushton tribes live in the Federally Administered Territorial Area (FATA) ,which has been absorbed into the KP province by the 25th Constitutional Amendment in 2018. This transformation is in the aftermath of the allied US - Pakistani military success in the ‘war on terror’ and the tribes who live in this region fear the encroachment of state institutions that will erode their Code of Paktunwali. The excesses in the war have had a continuing impact on the Pushton population and as the casualties have mounted the Pushton rights organization Pushton Tuhaffaz Movement (PTM) has been formed. This advocates the redress of grievances and protection for their ethnic group as well as accountability. The argument of this paper is that there should be a Truth, Justice and Reconciliation Commission (TJRC) modelled on the *Loya or 'Grand' Jirga* that will serve as an instrument for healing. The settlement needs to be based upon the Declaration of the Rights of the Indigenous Peoples 2007, that will facilitate peace on both sides of the border.

Key words:

Loya Jirga, FATA, Paktunwali, Afghanistan, free, prior informed consent, Truth, Justice and Reconciliation Commission, Peacemakers.

¹ LLB (Lon), LLM (Lon), Gray's Inn, Sussex university (Phd candidate).

D)

Introduction

i/ Law as Custom

The customary law of the Pushton people who live on both sides of the boundary that divides Afghanistan and Pakistan is a spectrum of written and unwritten rules expressed in the Code of Paktunwali. These inhabitants who inhabit the hinterland of the Khyber Pass have been through the 'war on terror' prosecuted by the military of the United States (US) since 11 September 2001. The mechanism for settling internal disputes is the *Jirga* which serves as a framework of dispute resolution and enforces their customary laws. The tribes who have suffered from the human cost of the war have been incorporated by the dissolution of the autonomous FATA region and they are now demanding the implementation of the Truth, Justice and Reconciliation Commission (TJRC) modelled on the *Loya* or 'Grand' *Jirga* (LJ). This mechanism could successfully redress and build trust towards a permanent settlement that borrows from the experience of Indigenous peoples in North America in bringing peace between the tribes and the federal government.

The framework of western legal systems is dependent on legislation or determined according to court precedence. The judicial process implements a law that concentrates on the defendant's guilt and punishes them accordingly. The vertical courts hierarchy provides a forum for testing the evidence presented from the differing perspectives of the parties and interaction between them remains adversarial throughout.² The machinery of justice is based on a "retributive philosophy that is hierarchical, adversarial, punitive, and guided by codified laws and written rules, procedures, and guidelines".³ It imposes punitive sanctions that limits accountability of the offender to the state instead of those he or she has harmed in making amends.

² Lawrence F Travis, *Introduction to Criminal Justice* (8 th Ed. Cincinnati: Anderson Publishing Co., 2014) and David Neubauer, and Henry Fradella, *America's Courts and the Criminal Justice System*, (11th Ed. Monterey: Brooks/Cole Publishing Company, 2013).

³ Robert Yazzie, 'Life Comes from It: Navajo Justice Concepts', 24 *New Mexico Law Review* 175 (1994) 175-190, James W Zion "Searching for Indian Common Law," in Morse and Woodman, (eds.), *Indigenous Law and the State* (Forus Publications, 1988) 121-148

However, in Indigenous societies such as the Pushton communities and the North American Indian tribes the law cannot be distinguished from custom and justice is a part of the life cycle that does not need the structure of a formal court system. This is because the adopted procedure of restorative justice is based on the ethos guided by the customs and traditions that are imbibed by the oral teachings of tribal elders. The underlying thread of customary law in the Pushton heartlands binds the tribes that surround the north-west frontier of Pakistan that is geographically placed in Central Asia and where these communities live in the hinterland surrounded by the natural landscape. In this rural background the "Customary law is more easily discovered, understood, and applied in insular tribal community where there are few outsiders and the tribal language is widely spoken".⁴

ii/ Historical background to the conflict

The resolution process based on custom is dependent on consensus where the underlying issues can be dealt with by the process of mediation or arbitration which can be met by making amends and restoring relationships. The Pushton communities who live on either side of the Durand line practice a form of restorative justice that is premised in the customs and tribal traditions. They are spiritually united even if they are physically separated by the Durand line that the British colonial authorities imposed by sending Sir Henry Mortimer Durand to negotiate an agreement to demark a boundary between Afghanistan and British India, by signing a treaty with the Afghan ruler or the Amir, Abdul Rehman Khan.

It was also an attempt to establish a buffer state and prevent open conflict between two of the pre-eminent imperial powers of the age. This power struggle, known as the Great Game, was defined by the British sense of debilitating national insecurity surrounding the expanding Russian Empire combined with a desire to increase their territorial possessions. In 1879, the Amir had been forced to sign the Treaty of Gandamak which had made Afghanistan a protectorate of the British. This secured control of the strategic Khyber Pass for the British but divided the Pushtons in two parts with a segment of the tribal region being annexed into British India and the remainder coming under the jurisdiction of Afghanistan.⁵

This boundary which determined the political and administrative division of the Pushton territories had several defects in its formulation as an international border. Giunchi argues "the

⁴ Alan Watson, 'An Approach to Customary Law', *University of Illinois Law Review* (1984) 3, 561- 576

⁵ Louis Dupree, *Afghanistan*. (New Jersey: Princeton University Press, Princeton 1973). 425

demarcation which followed, between 1894 and 1896, was actually defective on many counts. The Anglo-Afghan joint commission had different maps and they were not all precise. Durand was not able to clarify what were the exact terms of the agreement, as in 1894 he was sent as minister plenipotentiary to Persia. Some parts of the boundary close to Mohmand areas and the Khyber Pass could not be demarcated, and the agreement was followed by local uprisings that would last until the end of the century”.⁶ However, at the time of its commissioning the frontier was considered an instrument of lasting peace between the British and the Afghanistan sectors of the Pushton territories. This boundary was made “permanent” in a 1907 Anglo-Russian convention and their agreement was without consultation with the Afghan government.⁷ Its contentiousness became a source of conflict between Afghanistan and the newly created state of Pakistan in 1947.

The legal powers that the British authorities exercised within their jurisdiction was by promulgating the Frontier Crimes Regulations (FCR) in 1901. This established their rule over Bajaur, Mohmand, Khyber, Orakzai, Kurram, and Waziristan agencies located between the North West Frontier Province (NWFP) and Afghanistan. These regulations were part of a separate legal framework of what came to be called the FATA region, and this denied the tribal people access to colonial courts in India. The institutionalisation of the FCR also recognised and codified the existence of the *Jirga*, or Council of Elders, which continued to issue punishments and decisions based on tribal customs in both civil and criminal matters under its resolution process.

The Deputy-Commissioner had an overseeing power over the *Jirga* which he exercised when a civil dispute was likely to lead to a blood-feud or a breach of the peace, and was at liberty to refer the case to a *Jirga* of his own nomination. Article 11, Section (1) of the FCR stated, "The Deputy Commissioner may or if the Commissioner so directs, shall, by order in writing, refer the question to the decision of a Council of Elders (*jirga*), and require the Council to come a finding on the question after such inquiry as may be necessary and after hearing the accused person. These powers included imposing collective punishments that were enforced over whole tribes which were often corporal. Article 36 of the FCR granted the British government the authority to "remove persons" ostensibly referring to a colonial form of deportation: one that forced inhabitants of the frontier region to "reside beyond the limits to which this regulation the FCR extends". The *Jirga* existed as an adjunct to the British Raj and served to implement a parallel form of justice while the FCR had an apparatus that was penal and its purpose was deterrence.

⁶ Elisa Giunchi, 'The Origins of the Dispute over the Durand Line. Internationales Asien forum', (2013) Vol. 44, No. 1-2, 25-46

⁷ Paul Fitzgerald and Elizabeth Gould, *Invisible History: Afghanistan's Untold Story*. (2009) 34

Since 'independence' the Pakistani government has adopted the *Jirga* as an instrument of local resolution and permitted the enforcement of the Code of Paktunwali. However, in Afghanistan it has a constitutional status and is invoked when issues are debated that are of crucial importance such as treaty ratification. The *Jirga* is only an informal judicial mechanism in Pakistan and it functions by extending devolution in the former FATA region. This dispensation is likely to be affirmed after the integration of this region into the KP province in 2020.

This paper addresses the question of the *Jirga*'s utility for the purpose of the Truth, Justice and Reconciliation Commission in the aftermath of the Pakistan military's success in the 'war against terror' that was launched post the 9/11 attacks in the US. The Pakistani army has restored the status quo after suppressing the Taliban in the former FATA territories, and with the incorporation of the region into the Khyber Pakhtunkhwa province the federal government should now establish the forum which can take account of the deaths, disappearances and forced marches that stemmed from the conflict. This should be modeled on the consultative mechanism of the 'Grand' *Jirga* that comprises the council of elders, tribal chiefs and other notables which can then address the injustice suffered and to establish permanent peace. There should be a fair hearing for those aggrieved and a constitutional process that leads to an 'open' border between Pakistan and Afghanistan. The *Jirga* can be a platform for building trust and redress grievances because it is intrinsic to the customary law of the Paktunwali, and that it would be constructive in reaching a settlement for the Pushtons who straddle the international border.

1/

Code of Paktunwali and the Jirga

The Pushtons are an Indigenous peoples who are defined by the lands where they live, their tribal identity and the customary codes to which they are bound. The Pushton communities in Afghanistan according to data compiled by the Afghanistan's Central Statistics Survey, out of a population of 26 million, constitute around 42 per cent of the population.⁸ They live mainly in the south and the east of the country.⁹ In Pakistan there are two regions where tribal peoples live

⁸ 'Afghanistan's population reaches 26m', Pajhwok Afghan News
<http://www.pajhwok.com/en/2011/11/20/afghanistans-population-reaches-26m> , accessed 20 November 2011

⁹ [Minorityrights.org/minorities/pushtons](http://minorityrights.org/minorities/pushtons)
http://news.bbc.co.uk/1/hi/english/static/in_depth/world/2011/war_on_terror/key_maps/ethnic_pashtun_stm, accessed 10 June 2018

who are ethnically Pushton as defined in Article 246 of the 1973 Constitution. This includes (i) FATA which is tribal area adjoining the districts of Peshawar, Kohat, Bannu, Lakki Marwat, Dera Ismail Khan, Tank, and seven tribal agencies of Bajaur, Orakzai, Mohmand, Khyber, Kurram, North Waziristan and South Waziristan and (ii) PATA that comprises the districts of Chitral, Dir and Swat (which includes Kalam), [Kohistan district], Malakand, the tribal area adjoining Mansehra district, the former state of Amb; Zhob district, Loralai district (excluding Duki Tehsil), Dalbandis Tehsil of Chagai district, Marri and Bugti areas. They have lived according to their own Code since coming under British colonial rule and this process has continued since Pakistan was formed.

The Pushtons are an Indigenous peoples who have a connection to their ancestral land whose rights comprise a specific geographic area that forms a central element in their identity regarding their contemporary political demands. The international human rights framework applies to them in terms of legal protection and this has been established in regional courts dealing with protection of fundamental rights.¹⁰

The United Nations Secretariat of the Permanent Forum on Indigenous Issues have established the criteria that includes self-identification as a “*historical continuity with pre-colonial and/or pre-settler societies; strong link to territories and surrounding natural resources; distinct social, economic or political systems; distinct language, culture and beliefs; forming a non-dominant group of society; and a resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities*”.¹¹

The lack of court structure of the Pushtons has been part of the framework as previously nomadic peoples who adopted an agricultural lifestyle.¹² Their method of dispute settlement is embedded in their customs where decisions are made by consensus and these are mainly overseen by the tribal elders. The international boundary that separates the tribes has not diminished their

¹⁰ It has been clarified by the Inter American Court of Human Rights that general international legal principles applicable in the context of Indigenous human rights include “the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property” [IACHR, Report No. 75/02, Case 11.140, Mary and Carrie Dann (United States), December 27, 2002, par. 130]; indigenous and tribal peoples have a right to communal property over the lands they have traditionally used and occupied, and “the character of these rights is a function of [the respective people’s] customary land use patterns and tenure” [IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004, par. 151

¹¹ Secretariat of the Permanent Forum on Indigenous Issues, Department of Economic and Social Affairs, *The Concept of Indigenous Peoples*.” (New York, 19-21 January 2004)
www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc. assessed 18 May 2017

¹² Lutz Rzehak, *Doing Pashto: Pashtunwali as the ideal of honourable behavior and tribal life among the Pashtuns*. Afghan Analysis Network (AAN) (Thematic Report. 01/2011) 1-21
<file:///C:/Users/ADMIN/Desktop/20110321LR-Pashtunwali-FINAL.pdf> accessed 11 February 2017

adherence to the Paktunwali. Their traditional lifestyle is woven into the social fabric from where the Code of Honour draws its legitimacy.¹³

The rules and customs allow the elders of the Pushton community to convey the *Jirga* decisions inter-generationally and without any written protocols or codified laws of the Paktunwali. These local traditions of every community differ according to the geography, climate, and patterns of living. Even though the Paktunwali is considered to have a uniform meaning in every community, however, the decisions of the *Jirga* vary according to the local customs and traditions.¹⁴ The operation of *Jirga* has been defined as functioning according to the dictates of the Paktunwali that since time immemorial is an "inclusive code of conduct guiding all aspects of Pushton behaviour and often superseding the dictates of both Islam and the central government. Thus, in the tribal Pashton areas, local *jirga* settles (nearly) all issues, unless assistance is requested from another tribe or the government".¹⁵ It is necessary to consider the framework of the *Jirga* in both Afghanistan and Pakistan in order to understand the role it plays in the structure of Pushton society.

i) Afghanistan

The *Jirga* has been elevated to a status of the national assembly in Afghanistan and it has been integrated into the Constitution of 2004.¹⁶ At the post US invasion Constitutional Convention that was held to draft a framework 502 delegates attended on 14 December 2003 from various regions and met in Kabul. It formally convened the national *Loya Jirga* as part of a consultative process and it deliberated for 20 days until a draft constitution was adopted on 4 January 2004 after consensus was reached by the delegates.¹⁷

¹³ RWS Khattak, F Mohammad, R Lee, "The Pushton Code of Honour", Research Journal of Area Study Centre, (2014) Vol 65, 1 http://www.asc-centralasia.edu.pk/Issue_65/01_The%20Pashtun_Code_of_Honour.html

¹⁴ Reforming the Jirga System: Sensitisation on Fundamental Human Rights, *Community Appraisal and Motivation Programme* (CAMP) (2013) 19 www.camp.org.pk/wp-content/uploads/2016/03/Jirga-manual-final-Eng.pdf

¹⁵ L Carter and K Connor, *A Preliminary Investigation of Contemporary Afghan Councils*, (ACBAR, Peshawar 1989) 7

¹⁶ The Afghan Constitution, <http://www.asianlii.org/af/legis/const/2004/1.html>

¹⁷ Aziz Huq, Tom Ginsburg, 'What Can Constitutions Do?: The Afghan Case' 24 *Journal of Democracy* 116 (2014). 22

The Afghanistan Constitution adopted the *Jirga* in its framework by means of the Article 64 which vests the power to inform "the following authorities and duties in national emergencies to convene the *Jirga* except in the situation prescribed in Article 69 of this Constitution".¹⁸ According to Article 69, the President cannot be removed from office for political misconduct or a failure of his policies, but only for wrongdoings which can be qualified as a "crime against humanity, national treason or any other crime".

The Constitution provides under Article 91 that the President be responsible to the *Wolesi Jirga* or House of Representatives (Lower House) This vests the Lower House with the following special powers (i) Deciding on interpellation of each of the ministers in accordance with the provisions of Article 92 of this constitution and (2) Taking the final decision about the state's development programs and state budget, in case of a disagreement between the House of Representatives [*Wolesi Jirga*] and the Senate [*Meshrano Jirga*].

The *Jirga* has been integrated into the state's framework and has legislative powers in the bicameral legislature. Article 110 of the Constitution states : "*The Loya Jirga is the highest manifestation of the will of the people of Afghanistan. It consists of 1. Members of the National Assembly; 2. Presidents of the provincial as well as district assemblies. Ministers, Chief Justice and members of the Supreme Court as well as the attorney general shall participate in the Loya Jirga sessions without voting rights. Article 111 : The Loya Jirga shall convene in the following situations: 1. To decide on issues related to independence, national sovereignty, territorial integrity as well as supreme national interests; 2. Amend provisions of this Constitution; 3. Impeach the President in accordance with the provisions of Article Sixty Nine of the Constitution*".

In 2012 it was invoked nationally to endorse a mutual defence relationship with the US government. The signed text states as follows: "The Islamic Republic of Afghanistan ("Afghanistan") and the United States of ... express their appreciation for the November 2011 Traditional Loya Jirga, which ... The Parties agree that a strong commitment to protecting and promoting ... Special Operations". The *Loya Jirga* then granted its acceptance in favour of a Strategic Partnership Agreement with the US ratified in 2013, which effectively meant that it endorsed the perpetuation on the 'war on terror' that has ramifications on both sides of the border.¹⁹

¹⁸ Mohammad Qasim Hashimzai, *The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan*, (Constitutionalism in Islamic Countries: Between Upheaval and Continuity edited by Rainer Grote and Tilmann Röder, OUP 2015) 665

¹⁹ George W Bush Institute, 'Loya Jirga Votes In Support of U.S.-Afghanistan Bilateral Security' (6,December,2012) <http://www.bushcenter.org/blog/2013/12/06/loya-jirga-votes-support-us-afghanistan-bilateral-security-agreement-karzai-delays>.accessed 16 May '18

ii) Pakistan

In Pakistan the *Jirga* is part of the alternative resolution process in the tribal belt and exists as a grassroots forum to solve disputes. It has a seminal existence in the autonomous FATA territories that have now been designated as part of the KP province by the thirty-First Amendment Act 2018 that makes six amendments in different articles of the Pakistan Constitution that include Article 246. There are two types of *Jirgas* practiced in FATA; the *Sarkari* or FCR *Jirga* and the *Olas* or informal *Jirga*. The *Sarkari Jirga* refers to a forum sponsored by the government, more specifically by the political administration led by agents or subordinates. While *Olas*, or the informal local representatives is an assembly of elders from a certain village or community it convenes to discuss various criminal and civil disputes, and also to resolve them consensually and parties who are vindicated receive compensation accordingly.

As in colonial times the Deputy Commissioner in the tribal areas region has the power to refer all matters of civil disputes to a *Jirga* to conduct their investigations in accordance with the *Rewaj* (Custom). The *Jirga* is composed of the Council of Elders who adjudicate the matter after giving sufficient consideration to the objections raised. Their judgment is then taken into consideration by the Deputy Commissioner who shall issue a decree in accordance with the judgment of the *Sarkari Jirga*.²⁰

The *Jirga* has constitutional and legal status in Pakistan and the Alternate Dispute Resolution Act 2016 has given legal underpinning in all parts of the country where it is established. The preamble states that it is retained "with a view to ensure speedy resolution of petty civil matters and reduce the burden of litigations on the courts". The government will "appoint panels of Neutrals in all districts in consultation with the relevant high courts and the courts will appoint them as mediators in different disputes".²¹

Yousaffzai and Gohar²² observe that the dynamics of *Jirga* as a mechanism which "leads to discussion, builds communication indirectly, and provides a stage for understanding the

²⁰ Ibid

²¹ Syed Irfan Raza, 'NA passes bill giving constitutional cover to jirga, panchayat systems', (2017) <https://www.dawn.com/news/1312498> accessed 16 October 2018

²² H M Yousaffzai and A Gohar, *Towards Understanding Pukhtoon Jirgas: An Indigenous Way of Peace building*, (Centre for Peace building and Conflict Studies, Peshawar , Pakistan, 2012) 16

opposing view" and it places "an overwhelming reliance and belief on the ideology of pacifism that gives them a remarkable edge during a potentially violent situation". The authors of the study contend that the *Jirga* can serve as "potential for peace building as a grass-roots organization that can resolve the enmities and the members serve as an interlocutors between parties which "leads to discussion, builds communication indirectly, and provides a stage for understanding the opposing view".²³

The issue is if it can satisfy the need for a tribunal of extraordinary jurisdiction where problems can be solved that deal with the grievances of an Pushton people arising from the 'war on terror' that was launched in the wake of the 9/11 attacks on the US. This needs to take into consideration the human and material cost of the conflict that has led to grievances of the population that has been most effected by it and whose social fabric has suffered colossal damage.

2/

Impact of war and humanitarian crises

The Operation 'Enduring Freedom' was launched on October 7, 2001, by the US air force bombing Afghanistan and the Pushton lands along the border which were its main targets. General Pervaiz Musharaff, who was President of Pakistan, and head of its military provided logistical support to the US forces and acted as conduit for the American supply lines across the tribal frontier. The West heralded Pakistan "as an exemplary country in the fight against terrorism."²⁴ This caused resentment among the Pushtons in Pakistan who sympathised with their brethren across the international border in Afghanistan and the agitation led to a raft of emergency measures.

In January 2002, the government banned five groups including Lashkar- e-Taiba (LT), Jaish-e-Muhammad (JM), Sipah-e-Sahaba Pakistan (SSP), Tehrik-e-Jafria Pakistan (TJP) and Tahrik-e-Nifaz-e-Sariat-e-Muhammadi [sic – spelt elsewhere as Tehrik-e-Nifaz-e-Shariat-e-Mohammadi] (TNSM) Pakistan²⁵ by the military government and anti terror legislation that impacted on the inhabitants of the FATA region. The Pakistan Army Act 1952 was activated to commence the

²³ Ibid 57

²⁴ Z.Hussain, *Frontline Pakistan: The struggle with militant Islam*.(I. B. Tauris & Co Ltd. London and New York (2007)40

²⁵ 'Pakistan: Impact of 11 September 2001 on Muslim extremism; government response': Refugee world. 8 March 2002, <https://www.refworld.org/docid/3df4be8024.html>.UNCHR.

military operation that defines 'enemy' in Clause 8 of its Section VIII as 'any person in arms against whom it is the duty of any person subject to this Act to act'.

The 'war against terror' inside the border, since its inception in 2002, was concentrated in the focal point of the tribal region where the Pakistani military prosecuted it against the inhabitants who were either radicalised, or were giving shelter to the militants. This commenced in North Waziristan and South Waziristan, the most populous agency, then in Mehsud, then in the Khyber Agency, and finally in the Bajaur Agency until 2008, when there was an interim agreements with the restive tribes.²⁶ However, there was no respite for the population who were exposed to the drone strikes that the US military conducted across the border into FATA, There have been a total of 379 recorded drone attacks in Pakistan from 2004 to 2013. The estimated casualties are 3,597 people who have been killed, and 1,357 injured, with an average of 10 victims per attack. About 2,604 civilians have been killed in this drone operation, or 72% of those killed so far. Only 2% of the drone targets have been members of the Al-Qaeda outfit, while 15% of the targeted militants were Taliban (Tehrik-e-Taliban Pakistan and other militant outfits combined).²⁷ This was often with clandestine knowledge and support of the Pakistani military. General Ashfaq Pervez Kayani, Pakistan's Chief of Army Staff, in his policy speech on 14th August 2012, acknowledged this covert support by declaring 'internal threat' bigger than the 'external threat'.²⁸

On 1 October 2009, the post Musharaff government led by the Pakistan Peoples Party (PPP), whose leader Benazir Bhutto was assassinated 2 years prior, increased the stringency of the anti terror laws in the form of the Anti- Terrorism (Amendment) Ordinance. This permitted the extra-judicial confession of the accused before the responsible investigative security personnel in the Anti Terrorism Courts (ATC). The remand period was extended from 30 to 90 days, and the burden of proof was shifted to the accused. The government, through a special presidential order, also extended the Ordinance to the tribal regions and established new ATCs in Peshawar, capital of the KP province and the tribal Malakand region.

²⁶ A.H Raja, 2009. 'Operation Rah-e-Nijat in South Waziristan. A si a n T ri b u n e' (2009)10, 45
<http://www.asiantribune.com/news/2009/11/03/operation-rah-e-nijat-south-waziristan>. Accessed on 2 January 2019

²⁷ ZH Usmani and H Bashir, 'The Impact of Drone Strikes in Pakistan, in Costs of War', Western Institute of International Studies, Brown University (2014) 4 -5,
<http://watson.brown.edu/costsofwar/costs/human/civilian/pakistani>

²⁸ Inter-Services Public Relations (Press Release, 14 August 2012) www.ispr.gov.pk/front/main.asp?o=t-press_release&id=2124#pr_link2124. accessed 15 January 2018

There was a reaction within Pakistan from this conflict on the borderlands and this spawned a Taliban movement amongst the Pushton population in the Swat valley that falls within the Malakand Division. This led initially to conflict with the military but then there was an agreement by which the militants' demand of implementing the Sharia'h, an arrangement originally reached by signing the *Nizam-e-Adl* accords in February 2009.²⁹ This in effect ceded control over the territory to the Taliban movement or Tehrik-e-Taliban Pakistan (TTP) who established the Qazi courts that allowed a strict application of Sharia'h law over the population and redistributed land to the indigenous peasants.

An article in the New York Times reported that there were large-scale seizure and redistribution of land by the Taliban in the Swat valley. There was appropriation of the estates of approximately "four dozen" landlords which were seized by Taliban militias and redistributed to landless peasants in an attempt to "foment a class struggle".³⁰ This was corroborated by the Tehran Times which published an article that stated the Taliban had sympathy in the Swat valley for their landless poor. It was implemented when "[t]he Taliban seized power from about 50 big landlords who ruled the Swat Valley and then organized the long-suffering peasants into armed bands. The entire landowning clique fled the Valley, and the Taliban offered the economic spoils to the landless peasants of Swat Valley".³¹

It was a challenge to the feudal framework of the mainstream parties in Pakistan³² who invited the military to unseat the Taliban in Swat and to remove all traces of Pushton tribal resistance in the valley. This led to a mass exodus of local communities who fled from the approaching army and there were instances of 'forced' marches of the population who were driven out of their

²⁹ Text of Swat Peace Accord (February 16, 2009). <https://www.peaceagreements.org/masterdocument/735>. accessed 10/12/18

³⁰ J.Perelez and P.Z. Shah, 'Landowners Still in Exile From Unstable Pakistan Area' New York Times(2009). <http://www.nytimes.com/2009/07/28/world/asia/28swat.html>. accessed 21 December 2018.

³¹ GJ Hussain, 'To Defeat The Taliban, Pakistani Feudalism Must die', Pakalert website, source: Tehran Times, 14 (2009) <http://pakalert.wordpress.com/2009/05/14/to-defeat-the-taliban-pakistani-feudalism-must-die>. Accessed 18 December 2018.

³² APC endorses Swat operation PML-N's clear stand silences dissenters, Dawn (2009) <https://www.dawn.com/news/856489>

homes by the military into the countryside where they set up makeshift homes which the UN Chief estimated to consist of 1.4 million people.³³

i, Redress of grievances

This displacement of the people is a major factor in the grievances of the Pushton population and there is a severe crisis of internally displaced persons (IDPs) that has been documented and nearly three million people from the tribal region were forced from their homes in the wake of increased hostilities between the military and the Taliban factions. As a result, a mass movement of the people started from Bajaur and Mohmand Agencies in FATA, and by the end of April 2009 more than 550,000 people had registered as IDPs in Khyber Pakhtunkhwa and the tense fighting in the Bajaur (FATA) Agency in October 2009 triggered another wave of displacement and forced 50,000 people to leave their homes.³⁴ At the end of December 2009, more than 250,000 civilians from Bajaur and 180,000 from the adjoining Mohmand Agency were registered as IDPs in Lower Dir and Nowshera.³⁵

The federal government invoked Article 245 of the Constitution and Section 5 of the Anti-Terrorism Act 1997 to oversee and regulate the civilian population in the FATA region. AB Soof states that " *Notification under Article 245 of the Constitution denotes the federal government's executive determination of an adversary falling in the legal category of enemy. This is critical to note because it sets forth a legal compulsion that if the armed forces are deployed and invited to act against any enemy of state, then all institutions of the state must immediately accept the legal status of an adversary as enemy*".³⁶ The Action in Aid of Civil Power Regulations 2011 (AACPR) were implemented to deal with the displaced population which comprises eight chapters, twenty six sections and three schedules. They provide the extra judicial powers of arrest and detention to the military and invoke.

³³ Megan Davis, 'UN says 1.4 million people displaced in Pakistan Valley'.(19, May 2009) <https://www.reuters.com/article/us-pakistan-displaced-idUSTRE54H57420090518>. Accessed 10 November 2018

³⁴ ZA Khan, *Military operations in FATA and PATA: implications for Pakistan*, (2012) Institute for Strategic Studies, Islamabad) 130

³⁵ Ibid

³⁶ Ahmer Bilal Soof, 'Legal aspects of operation', (2014) Dawn <https://www.dawn.com/news/118645>. Accessed 14 July 2018

MA Khan, a professor at the Department of Law, International Islamic University, based in Islamabad, argues that AACPR are "over ruling the existing laws which contains criminal procedure".³⁷ This is because they allow the military to intern any person who they suspect is involved in subversive activities. There is because there is "*the non- existence of an accurate legal framework under which the fundamental human rights need legal protection. FCR is just a law for its subjects to be governed under a strict legal regime which creates no legal opportunities for its subjects. FCR needs such reforms which can make the people feel able to live their lives in a healthy social environment*".³⁸

This has exacerbated the problem of forced abductions and disappearances of people and the UN Working Group on Enforced and Involuntary Disappearances (WGEID) has published its report on Pakistan in 2013 compiled by the support of the International Commission of Jurists and the Asian Human Rights Commission.³⁹ This recommended that Pakistan amend provisions of the Anti-Terrorism Act 1997 and Actions (in Aid of Civil Power) Regulations 2011, which appeared to facilitate enforced disappearances.

The government established a Commission of Inquiry on Enforced Disappearances (COIED) in 2010 which consisted of one judge who was burdened with hearing thousands of cases a year that led to the advocacy groups abandoning petitioning in this court. The country's judiciary has become essentially the only venue for lodging complaints against the military, but it has had little success in asserting its jurisdiction.⁴⁰ The government promulgated the Protection of Pakistan Ordinance, 2013, Section 9, which allows them to withhold information regarding the location of detainees, as well as their place and grounds of detention for any "reasonable cause". This provision seeks to place detainees beyond the protection of the law by granting blanket immunity to state agents for acts done in "good faith" and provides that any person detained before the ordinance came into force shall be deemed to have been detained pursuant to the ordinance.

³⁷ Mazhar Ali Khan, 'Social, Political and Economic Implications of Frontier Crimes Regulation 1901 in FATA' (2014), Asian Journal of Social Sciences & Humanities , Vol. 3(1) 257

³⁸ Ibid

³⁹ Asian Human Rights Commission , *Pakistan Disappearances : No End in Sight*. (2014) www.humanrights.asia/opinions/columns/AHRCETC-006-2014 accessed 5/3/14

⁴⁰ 'Pakistan's judges and military clash over rule of law', The New Humanitarian, (2013) <http://www.thenewhumanitarian.org/analysis/2013/12/09/pakistan-s-judges-and-military-clash-over-rule-law>. Accessed 14 July 2018

This UN body has expressed concern at the continuing practice of enforced disappearances and made a series of recommendations to the government. It has caused concern at the level of international humanitarian law and the ramifications of the security policy on the civilians.⁴¹ The documented cases have come before the Supreme Court which is empowered under the Article 184(3) as part of its "original jurisdiction" to conduct investigation in cases that concern the fundamental rights under its suo motu powers.

In *Application of Mohabat Shah son of Kabul Shah for recovery of Yasin Shah* HRC 29388-K/13 [2013] the petition challenged the abduction of 66 people in Lakki Marwat in Swat Valley by the military. There were 31 people who were eventually returned but the rest remained missing persons. The brother of one of the disappeared people sought disclosure of information seeking their release including that of his relative. The Court heard from the government that two detainees died of natural causes, nine left the country, three moved to the tribal areas of Waziristan, and 2 were being held in civilian internment centres.

The Chief Justice IM Chowdhary ruled that "the Attorney General was directed to take up the matter with Defence Ministry to produce the above named persons under the Constitution and law from the custody of the Army". (Para 3) The Court was informed that the government had failed to register First Information Report (FIRS) against the 35 missing persons that would have led to registering cases for them separately in the case.⁴²

The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED) 2006 has not yet been ratified by the Pakistani government. This is intended to prevent forced disappearance which have been defined in international law as crimes against humanity. Article 1 of the Convention states : *No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.*

The fatalities in the civilian population had increased in the repercussions from the 'war of terror' and the death rate was higher between 2008 -13 than in the period between 2002 -08.⁴³ The ideological challenge from the egalitarian Taliban authority in the Swat valley was dissipated at a human cost under the pretext that they represented an authoritarian legal regime. The aftermath of this led to "social, political and economic consequences " and led to the "Pashtuns of this area

⁴¹ Saad Sayeed, 'Fate of disappeared stirs anger among Pakistan's Pushtuns'.(21/March 2018) <https://uk.reuters.com/article/uk-pakistan-pashtuns/fate-of-disappeared-stirs-anger-among-pakistans-pashtuns-idUKKBN1GX05F>. Accessed 25 October 2018

⁴² 'No FIR filing of 35 missing annoys Supreme Court' (2014) The Nation <http://www.nation.com.pk/islamabad/07-Mar-2014/no-fir-filing-of-35-missing-persons-annoys-sc>. Accessed 16 April 2016

⁴³ Pakistan Institute for Peace Studies (PIPS), *Pakistan Security Report* (2012) Islamabad. Available at: <http://san-pips.com/>

prone to militancy".⁴⁴ This combined to produce a humanitarian crises that included deaths, disappearances, and expulsion of people from their tribal and ancestral lands.

3/

Demands of the Pushtons and reconciliation process

The legislation that was enacted to prosecute the war on terror in the Pushton heartlands was augmented by the National Action Plan (NAP) that was launched in 2014 to eliminate 'terrorists' and their sanctuaries in the former FATA region and on a country wide basis. This was promulgated in the aftermath of the Army Public School massacre in Peshawar when militants from the tribal region infiltrated the compound of a military sponsored academy in 16th December 2014 and killed up to 132 people as revenge for army excesses in their region. The National Action Plan drawn up by the Ministry of Interior and stakeholders consisted of 20 points the most salient of which were (1) Implementation of death sentence of those convicted in cases of terrorism and (2) Special trial courts under the supervision of Army the duration of which would be two years.⁴⁵

The comprehensive reach of the NAP and removal of the moratorium on the death penalty for 'convicted' terrorists led to a disproportionate impact on the Pushton diaspora in the cities and urban centres of Pakistan and they began to be treated as suspects on the 'war on terror'. Those who belonged to tribal regions and who had migrated to the metropolis were suspected of being terrorists. They were abducted or subject to extra judicial murder by the agencies of state and their cases became publicised when higher profile individuals became targeted in these 'faked' encounters. This reached a critical mass when on 27 January 2018, a Pushton with origins in South Waziristan, Naqueebullah Mehsud, was killed in an extra judicial killing in Karachi allegedly at the hands of the Senior Superintendent of police Rao Anwar. There was no proof found that there had been several such murders without due process for the accused.⁴⁶

The Pushton communities began organising themselves to achieve national recognition and gained widespread support in the tribal regions and in the diaspora. They presented a list of

⁴⁴ Manzoor Ahmed, 'Journal of Critical Globalisation Studies', (2010) 3, 102-113

⁴⁵ National Counter Terrorism Authority (NACTA) *National Action Plan*, (2014)
<https://nacta.gov.pk/nap-2014>

⁴⁶ Dawn Investigation : Rao Anwar and Killing fields of Karachi Fahim Zaman, Naziha Syed Ali,
<https://www.dawn.com/news/1389761>

grievances to the federal government under the umbrella Pushton Tahaffuz (safeguard) Movement (PTM)⁴⁷ which assembled on January 26, 2018, by organising a protest march that starting from Dera Ismail Khan, in the KP province and reached Islamabad where a sit-in was called the "All Pashtun National Jirga".

They set out their objectives as follows:

1. A truth and reconciliation commission must be established for all the people who are killed extra judicially in alleged fake encounters by the law enforcement agencies of Pakistan.
2. The missing persons who are imprisoned at unknown places must be tried in a court of law, and forced disappearances must be stopped.
3. Curfews, collective punishment, and torture of the locals in the Pashtun tribal areas (especially after a violent incident) must be stopped.
4. Landmines must be removed from the Pashtun tribal areas.⁴⁸

These demands are premised on the findings of the government's own think tank whose recommendations were issued in 2017 that the federal government "*should create an environment desired for reforms; that is, peace, stability and an interim structure to proceed with the implementation of any reforms; create a consensus with all the stakeholders in the formulation of the reforms, the methods and mechanism to be adopted, and the implementation process; after the restoration of peace, priority should be assigned to rehabilitation of tribal people, reconstruction of tribal areas on war footing and revival of local livelihood opportunities; and retention of Jirga system in the Civil and Criminal Justice system of FATA for the reason that its repeal would be resisted and will destabilize the social order which is undesirable. Moreover, with certain changes in procedures, the Jirga process could start resembling the "jury system" which is acceptable internationally*".⁴⁹

⁴⁷ Daud Khattak, 'Pashtun Tribes Stage Unprecedented Protest in Pakistan' (2018) The Diplomat <https://thediplomat.com/2018/02/pashtun-tribes-stage-unprecedented-protest-in-pakistan>. Accessed 20 February 2018

⁴⁸ Sher Shah Atif "Manzoor Pashteen: Our protest is non-violent and constitutional"(2018) Al-Jazeera <https://www.aljazeera.com/news/2018/04/manzoor-pashteen-protest-violent-constitutional-180409083747159.html>. Accessed 28 April 2018

⁴⁹ Roundtable Conference on Federally Administered Tribal Areas (FATA) *Reforms*, Centre for Global and Strategies in Pakistan (2017). <https://cgss.com.pk/publication/Publications/pdf/Fata.pdf>. Accessed 14 March 2018.

There is at present a trust deficit between the Pushton tribes, whose origins are in the former FATA region or who live in other parts of the country against the military in Pakistan. The mechanism of the Truth Justice and Reconciliation Commission is the appropriate forum to take this forward and to set up a machinery of justice that creates trust between the local peoples of the tribal region and the Pakistan government. The implementation of this forum can be carried out within the framework of the *Jirga* and the argument for such a forum are compelling. This is because only through an interim period of transitional justice can there be an accountability and redress while restoring a relationship through a means of a formal apology to the tribes.

i.

TJRC as international precedence

The UN Human Rights Council has issued documents that override the culture of immunity that may exist in a post conflict zone.⁵⁰ This process can be initiated by means of the traditional dispensation of judicial authority in the country where has been past conflict that exists as a means for alternative dispute resolution. The establishment of the Truth Justice and Reconciliation Commission in the former FATA region can be a basis for a comprehensive settlement for outstanding issues that can have a national mandate. This forum has been utilised in several post conflict zones in the world and it is usually by executive order or legislative act that they are convened. They are separately constituted and each has its own term of reference and procedural codes.⁵¹

⁵⁰ International instruments relating to the promotion of truth, justice, reparation and guarantees of non-recurrence, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1), 2005. <https://www.ohchr.org/EN/Issues/.../Pages/InternationalInstruments.aspx>

⁵¹ Scholars have not concurred on how to define a truth commission, and databases have included between 30 and 57 cases between 1974 and 2014. The common disagreement includes the issue if whether a truth commission should be established by the state or if initiatives by non-state actors should be included as well. Another typical disagreement concerns whether a truth commission should have to have finished its work and published a final report prior to conducting hearings (O, Bakiner, *Truth Commissions: Memory, Power, and Legitimacy*. Philadelphia, PA: University of Pennsylvania Press.(2016, pp. 24-34). Also see D, Babo-Soares, D. (2004). *Nahe biti: The Philosophy and Process of Grass- Roots Reconciliation (and Justice) in East Timor*. *The Asia Pacific Journal of Anthropology*, 5(1), 15-33

The South African Truth and Reconciliation Commission was based upon the Promotion of National Reconciliation and Unity Act, No. 34 (1995) (S.Africa). The TRC's mission, as explained more fully in the Act's long title, was "[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 march 1960..."⁵² The TRC Report issued in 1998 states that it had complied with a "dual responsibility" to offer the grounds upon which the "within which victims could share the story of their trauma with the nation; and it had to recognise the importance of the due process of law that ensures the rights of alleged perpetrators". The Commission had to abide by the "court rulings" which constrained them from obtaining "information about the past" which led to exercise extra "caution" in reaching its "findings". However, despite these obstacles the conclusions that it reached "contributed more to uncovering the truth about the past than all the court cases in the history of apartheid".⁵³

It has been argued that while there is a nexus between the international human rights law and truth commissions the South African TRC provided the vivid background of a "public, embodied and performed dimension" in the hearing process before the Commission. This was manifested by the "completeness of the vision of apartheid that TRC was mandated to achieve that can be discerned by detailed analyses of moments of performed testimony, as it can through macro narratives and quantitative analysis that have so far dominated scholarship".⁵⁴

Although this is a form of transitional justice there has been much research on its mechanisms and time scales for completion. One such study by Braithwaite explains that the process of victims testifying take longer to participate in the aftermath of the experience of the civil war in Bougainville, Papua New Guinea. It demonstrates that it often takes many years of traditional reconciliation work before perpetrators of the worst atrocities acquire the confidence that they can also confess their crimes without fear of revenge. This he defines as a "general issue with all forms of restorative justice and therapeutic jurisprudence".⁵⁵

The United Nations Human Rights Council considers that the institution of the Truth Justice and Reconciliation Commission is necessary to end the culture of "impunity" in conflict zones and its utility as a platform is that it " *may suggest legal, institutional or legislative reforms to prevent*

⁵² Elizabeth Stanley, "Evaluating the Truth and Reconciliation Commission", 39 *Journal of Modern African Studies* (2001) 525

⁵³ Truth and Reconciliation Commission South Africa Report, Volume 1, Chairperson's forward 1998. p 7

⁵⁴ Catherine M. Cole, Performance, Transitional Justice, and the Law: South Africa's Truth and Reconciliation Commission, *Theatre Journal*, The Johns Hopkins University Press, Vol. 59, No. 2 (May, 2007), pp. 167-187

⁵⁵ John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 45-53

abuses in the future; a reparations programme for victims; further exhumations or investigations into key areas where it was not able to conclude all the work needed; or other relevant programmes to address the weaknesses pointed to in its findings". There is also the understanding that particular follow up actions can ensure the positive impact of the Commission's recommendations.⁵⁶

The peace building process will be subsequent to the investing of this tribunal with the scope and power to make its determination. This will help to moderate the parties and their approaches in the 'war on terror' and the building of trust between the former militants and the de commissioned Taliban and the Pakistan military will be an essential step in the human rights-based approach towards participation and empowerment. The consequence of this will be that the Pushton tribal peoples will acquire trust and respect after years of displacement, disappearances and the abuse from a conflict imposed upon them.

The importance of this forum is that it will moderate the perspectives of different groups and find a means for long term peaceful coexistence. Leah Kimathi, who has overseen the process of transitional justice states that it is "*a contested and evolving process, which emerged in the 1990s. It is understood as a set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and aimed directly at confronting and dealing with past violations of human rights and humanitarian law*".⁵⁷

In this paradigm it impacts on a spectrum of methods used by "states or societies that seek to transform, heal and transit from illegitimate and repressive rule or situations of conflict to national reconstruction and good governance." There are a wide range of strategies that include legal reforms, constitutional amendments, indictments, compensation, and "peace building measures, memorialisation, and truth commissions, among others". The objective of these

⁵⁶ 'Rule of Law Tools for Post-Conflict States: *National Consultations on Transitional Justice*', Office of the United Nations High Commissioner for Human Rights (OHCHR), 2008, HR/Pub/02, page 12 United Nations, New York and Geneva https://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf

⁵⁷ Leah Kimathi, '*Whose Truth, Justice and Reconciliation? Enhancing the Legitimacy of the Truth, Justice and Reconciliation Commission among Affected Communities in Kenya*', International Peace Support Training Centre, Nairobi, Kenya, Occasional Paper Series 1, No 6 (2010) Page 23

methodologies is to terminate the "culture of impunity" and to "establish the rule of law" in a democratic environment.⁵⁸

This view is supported by H Haider who has a positive view of transitional justice that could assist in the "*process of reconciliation*" by *firstly supporting and working alongside coexistence initiatives*" by "*incorporating coexistence frameworks within its own processes and mechanisms*". The former can be achieved by a consultative process, interaction between various parties "*aimed at achieving shared goals*", and publicity intended to objectively analyse the dispute for the purpose of "*restoring trust, transforming perceptions and rebuilding relationships*" in a divided environment. This should be based on "*transformed*" circumstances, which replaces the information available "*that confirm their existing beliefs*" towards a new imperative.⁵⁹

The Pushton Tahaffuz Movement's demands for the constitution of the *Jirga* are reasonable and fall within the framework of substantive and procedural justice. This will enable the grounds for redress from the authorities who have pursued the 'war on terror' and its ramifications have been felt in the tribal region, province and in the national conscience. The federal government should be bold enough to take this initiative that has been recognised universally, and apply this mechanism towards the long suffering peoples of the former FATA and the Malakind Division including the Swat Valley.

4/

Free Prior Informed consent

The rights of the Pushton peoples on both sides of the border in Afghanistan and Pakistan should be evaluated under the auspices of the morally binding UN Declaration of Rights of the Indigenous Peoples (UNDRIP) and international Conventions in order to arrive at a settlement. It is this process that will underpin the resolution that will lead to peace in their territories. This should be the basis upon which the Truth Justice and Reconciliation Commission should be invoked and the provisions of international human rights law be made part of its terms of reference.

Article 33 of UNDRIP states "that the indigenous people have the right to their own legal customs and traditions, as long as they accord with international human rights law". There is an express provision in Article 38 for the taking of "appropriate measures, including legislation, for

⁵⁸ Ibid

⁵⁹ H Haider, 'Social Repair in Divided Societies: Integrating a Coexistence Lens into Transitional Justice', Conflict, Security and Development 11, 2 (2011) 175-203

host countries to achieve the ends of the Declaration". However, Article 46 states that the conception of "non-self-dismemberment" of a nation state by non severance of the state boundaries is not acceptable. The text clarifies that "the Declaration does not imply any right to take any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".⁶⁰

This should in principle mean that Pakistan should not be dismembered and there would no basis for severance of the tribal region from the federation. There has not been a secessionist tendency amongst the Pushton peoples but more a movement for autonomy where they can practice the Code of Paktunwali and apply their egalitarian and puritanical strand of Sharia'h law. The intention in the Articles of the Declaration is to provide a framework for recognition of the Indigenous peoples customs in order for them to find expression in their cultural context.

Article 19 of UNDRIP declares "*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them*". It defines the need for "free, prior and informed consent" which gives the instrument enormous moral force and implies that the federal government in any country with an indigenous population does not have authority to displace these inhabitants without their consultation.

This has to be read in conjunction with Article 10 of the Declaration which states "*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return*". Article 28 provides mechanisms of redress "developed in conjunction with indigenous peoples" that are also contingent on consent that has the effect of changing the laws, traditions and customs. This framework can encompass the development of procedures for regenerating or restoring sustainable relationships on reservations or designated tribal lands.⁶¹

It is important to consider what the affected society aspires and how a response can be tailored to the particular cultural, social, and economic contexts in the formation of the Truth, Justice and Reconciliation Commission. The Committee on the Elimination of Racial Discrimination (CERD) in its 1997 General Recommendation No 23 on Indigenous peoples invites States parties to ensure that they are granted equal rights with "specific reference to land and resource rights, the Committee calls for restitution in situations where decisions have already been taken without the prior and informed consent of the affected indigenous peoples".⁶²

⁶⁰ A.Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land* (Cambridge University Press, 2007) 49-67.

⁶¹ Indigenous Peoples and the UN Human Rights System, OHCHR fact sheet No 9 Rev 2 (2013) www.ohchr.org/documents/publications/fs9rev.2.pdf

⁶² General Recommendation 23, *Rights of indigenous peoples* (Fifty-first session, 1997) (U.N. Doc. A/52/18)

The Committee on Economic, Social and Cultural Rights (CESCR) has further expanded on free, prior and informed consent in general comment No. 21.⁶³

The importance of human rights has been recognised in case law and as a source of customary international law. In *Kaliña and Lokono Peoples v. Suriname* *Kaliña and Lokono Peoples v. Suriname*, IACTHR [2015] Series C, No. 309 there was repeated citation of the UNDRIP and in some cases reading of its provisions into the interpretation of the American Convention Human Rights. This reinforced the view that various UNDRIP provisions restate existing law and the Court repeatedly invoked its Articles, including Article 18 that states that part of the exercise of their right as indigenous peoples is “to participate in decision-making in matters which would affect their rights, [...] in accordance with their own procedures and [...] institutions”). (At 196)

Barelli argues that there is a nexus between the provisions of the UNDRIP and existing framework of law relating to Indigenous peoples. This "refer to rights and principles already recognized, or emerging, in the realm of international human rights, and, more specifically, within the indigenous rights regime, that represents a first important indication of the legal significance of the instrument".⁶⁴

The ILO Convention No. 169 "concerning Indigenous and Tribal Peoples in Independent Countries". adopted in 1989 is a very important instrument for the protection of Indigenous peoples. It invites a change of approach and considers Indigenous peoples not as populations that must be integrated in the state, but as peoples of the state that must be protected. The safeguards it provides are the right to land and the right to self-determination.⁶⁵ The terms of the Convention

⁶³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life* (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights, 21 December 2009, E/C.12/GC/21) <https://www.refworld.org/docid/4ed35bae2.html>. accessed 10 March 2019

⁶⁴ M Barelli, 'The Role of Soft Law in the International Legal System: the case of the United Nations Declaration on the Rights of Indigenous Peoples'. *International and Comparative Law Quarterly* (2009) 58(4) 957-983

⁶⁵ ILO Convention No. 169: <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> (accessed on 28/02/2014). The entire text of the convention is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO (

are dedicated to the land rights of Indigenous peoples (Part II, Article 13 to 19). Article 13 of this instrument states that the government must respect the special relationship that Indigenous people have with their territories (in the collective aspects), in particular regarding the importance for their cultural and spiritual values. Article 14 makes it an obligation about lands that indigenous peoples “traditionally occupy”. However, neither Afghanistan or Pakistan has ratified this Convention and therefore, it has no legal implications in these two countries

The Pushton diaspora is within the ambit of the international instrument that offer a persuasive and binding obligation on the government to allow the expression of the Code of Paktunwali. The UNDRIP as a human rights instruments has been endorsed all the countries and it provides many of the same conditions for a consultative mechanism before deciding on their future of action. The Pakistan government before annexing the FATA and the PATA territory, that includes the tribal regions and the Malakind Division, should have carried out a referendum and the early indication is the lack of consultation has created a legal 'grey zone'.⁶⁶ This lack of communication and abrupt manner in which the 25 th Constitutional Amendment 2018 was enacted did not facilitate the free, prior and informed consent requirements.

The Truth, Justice and Reconciliation Commission is the appropriate forum to consider these infringements in order to solve the grievances of the Pushton population on both sides of the border, who have suffered in the 'war of terror', and the process will lead to a long term settlement that will redress historic wrongs.

Conclusions

The Pushton societies separated by the Khyber Pass over the artificial boundary of the Durand Line are divided when they are a unitary and they have a common code that has become institutionalised by means of the Paktunwali. This is enforced through the *Jirga* which is the Alternative Dispute Mechanism that enforces the customary norms in its judgments. This preserves an ideal of restorative justice and the offender owes a duty to the other party rather than to the state. It is solved through mediation and the victim and offender are dealt with by means of consensus and rehabilitation.

The function of the *Jirga* needs to be harnessed for the Truth, Justice and Reconciliation Commission that is necessary because of the scale and intensity of the war on terror. It is

⁶⁶ Ismail Khan, 'Uncertainty prevails in tribal districts without legal cover', (2018) Dawn <https://www.dawn.com/news/1450739>. Accessed 12 March 2019

Pakistan that needs to take the initiative in order to reach an honourable settlement with the tribal peoples against whom it prosecuted this war to support the objectives of the US. This led to casualties on a level that needs the rebuilding of trust, accountability and reparations. It must not be viewed as a war of conquest and the Indigenous peoples and their customs need to be respected and due process implemented.

The solution in the long term lies in a treaty such as signed between the Canada-US with the Indigenous tribes known as the Iroquois Confederacy. These states signed the Treaty of Canandaigua in 1794 which recognised the border but also allowed the six tribes to be autonomous and to have overlapping executive and judicial functions. The Iroquois Confederacy which straddle the US-Canada border comprise the Mohawk, Oneida, Onondaga, Cayuga, Seneca and the Tuscarora nations who are also known as the Haudenosaunee from whom the phrase originates meaning "They made the house," symbolising all the nations coming together as a singular unit. The Iroquois League of Peace, established before the arrival of the Europeans to North America was a "remarkable Native-American experiment to replace violence with nonviolence".⁶⁷

The Confederacy's symbol is the 'long house' which their Great Law of the Peace is based on and the role of the Peacemaker symbolises the support for traditional values.⁶⁸ The Haudenosaunee are renowned for its organization and their is drawn from the grassroots level upwards and they practice restorative justice by solving conflicts between member tribes/ nations through consensus on matters of international treaties, territorial disputes, international trade, or any other issue that affects the long-term welfare of the Iroquois Confederacy. The Chiefs of the Grand Council are designated advocates of peace and hold the future welfare of the people in their hands. They are empowered to deliberate, to consider all options, to arrive at agreement, and to legislate laws under their own Code called the Great Law. This parallels the Code of Paktunwali which they have managed to preserve even in modern times. It is a model that

⁶⁷ James C Juhnke, 'The Original Peacemaker: Native Americans', (2001) Vol 56, no 4, Meninite Life <https://ml.bethelks.edu/issue/vol-56-no-4/article/the-original-peacemakers-native-america/> Also see Matthew Dennis, *Cultivating a Landscape of Peace* (Ithaca: Cornell University Press, 1993) 79.

⁶⁸ John Arthur Gibson, *Concerning the League: The Iroquois league Tradition as Dictated in Onondaga* (Winnipeg: Algonquian and Iroquoian linguistics, Translator Henni Woodbury, Hanwack 1992), 29; Matthew Dennis, *Cultivating a Landscape of Peace* (Ithaca: Cornell University Press, 1993) 79; Daniel K. Richter, *The Ordeal of the Longhouse: The Peoples of the Iroquois League in the Era of European Colonization* (Chapel Hill: University of North Carolina Press, 1992). Donald A. Grinde, Jr. and Bruce E. Johanssen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: American Indian Studies Center UCLA, 1991), 246.

maintain harmony and development of infrastructure without undermining the traditional values of the civilisation on both sides of the international border.⁶⁹

The scheme can be adopted for everlasting peace on both sides of the Pushton frontier and this bridge the chasm between Pakistan and Afghanistan if the tribes are granted autonomy within the framework of such a confederacy. The inception of this process can be led by the Truth Justice and Reconciliation Commission that will attain international recognition and will be an instrument for a new dispensation that will provide the Indigenous peoples their overdue rights under the International Conventions and UNDRIP.

The model of the Truth, Justice and Reconciliation Commission could also serve as an example for other un solved conflicts in South Asia. These have been simmering since the end of the colonial period and appear unsolvable because of intransigent attitudes over regional boundaries. The imperial British approach of divide and rule tactics has disrupted more than one community in the subcontinent and it is now time to look beyond and find constructive solutions that send the colonial epoch into history and a period of transitional justice will heralds a new dawn.

⁶⁹ Joyce King Tekahnawiiaks 'The Value of Water and the Meaning of Water Law for the Native Americans known as the Haudenosaunee' *Cornell Journal of Law and Public Policy* (2007) 16,3, 450-472
<http://scholarship.law.cornell.edu/cjlp/vol16/iss3/1>. Accessed 13 February 2019

