

# ***Controversies Regarding the Accession of Tribal Areas to Pakistan: A Case Study of Khyber Agency***

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## **Abstract**

*The partition of Indo-Pak Subcontinent in 1947 was surrounded by many controversies, some of which preceded the partition while others were the product of partition itself. One such controversy was about the accession of the tribal areas of the North West Frontier Province to Pakistan. It initially started between India and Pakistan but in the course of time the players changed and it ended up being a dispute between Afghanistan and Pakistan.*

## **Introduction**

The Federally Administered Tribal Areas of Pakistan or FATA consists of seven contiguous Agencies out of which four were created during the British rule while three were carved out of them after the birth of Pakistan. These seven Agencies include Bajaur, Khyber, Kurram, Mohmand, Orakzai, North Waziristan, and South Waziristan. Apart from these seven Political Agencies, there are also five tribal areas attached to settled districts and known as "Frontier Regions" of Peshawar, Kohat, Bannu, Tank and Dera Ismail Khan. The Tribal Agencies in FATA stretch from North to South on the Durand Line and all have a common and contiguous border with Afghanistan, except the Orakzai Agency. The question of the accession of these tribal areas

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to Pakistan at the time of partition of Indo-Pakistan Subcontinent in 1947 is important in two respects: in respect of the legitimacy of Pakistani authority in the eyes of the tribesmen; and in respect of the claims of Afghanistan's Government over certain territories to the East of the Durand Line, the boundary between Afghanistan and British India inherited by the independent state of Pakistan as international boundary between Pakistan and Afghanistan. The claims of the Afghan Government gave birth to the Pakhtunistan issue that marred the relations between Pakistan and Afghanistan and generated a lot of controversies. Main objectives of the paper are to remove many of the misconceptions about the legitimacy of the accession of the tribal areas to Pakistan and to set the record straight about the role of different political figures and officials in the decision making process regarding the accession of North Western tribal areas to Pakistan. It is based on a case study of Khyber Agency and gives ample information about the decision making process regarding accession to Pakistan in 1947.

The days of the Partition were a very crucial and important period of history. During this period the people of Subcontinent, particularly the people of erstwhile North West Frontier Province (now Khyber Pakhtunkhwa) and the adjoining tribal belt had to make a few important decisions. Some of these decisions became controversial and the controversies then persisted for a fairly long period of time. It affected not only the domestic politics of Pakistan but also the relations with its neighbouring countries.

It is not easy to understand all the dynamics of the period and the complex situation in which the decisions were made by the people of NWFP and the tribal areas adjacent to the settled areas of the province. Despite all the complexities of time, the tribesmen, including those of the Khyber Agency, overwhelmingly decided in favour of joining the Muslim state of Pakistan.

### **Political Developments just before Partition: On the Road to Freedom**

Politics in India was taking a new turn by the beginning of the third decade of the twentieth century. The British India experienced a rising tide of modern Indian Nationalism. In NWFP and the adjacent tribal areas, including the Khyber Agency, neither of the two biggest political parties in India i.e. the Indian National Congress and the All India Muslim League, had greater influence than the Khudai Khidmatgaran [Pashto: Servants of God], also known as 'The Red Shirts'<sup>1</sup> — a nationalist Pakhtoon political group organized in 1929 by Khan Abdul Ghaffar Khan. He had made an alliance with Indian National Congress which, according to some analysts, was an unnatural alliance as ninety-four percent of the people in NWFP were Muslims and Congress was regarded a pure Hindu organization.

Just before the partition, Abdul Ghaffar Khan and his brother Dr. Khan Sahib had been maligned and discredited in the eyes of the Pakhtoons in general and the tribesmen in particular due to the Muslim League propaganda against their alliance with the Hindu dominated Congress Party. Consequently, most of the tribesmen solidly aligned themselves with Muslim League and their demand for Pakistan.<sup>2</sup>

Previously, the freedom-loving Pakhtoons had aligned themselves with the Congress because they considered it as an enemy of the British Raj. So Congress at best was viewed by the Pakhtoons as an enemy of their enemy and not as a friend of the Pakhtoons. But in the post-World War II period when they sensed that the Congress was dreaming about replacing the British Raj by Hindu Raj and assuming the control of the NWFP, there was a change in the Pakhtoons' attitude towards the Congress.

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1 They wore shirts dyed with brick-dust to make them look red.

2 David Montgomery Hart, *Guardians of the Khyber Pass: The Sociological Organization and History of the Afridis* of Pakistan (Lahore: Vanguard Books Pvt. Ltd., 1985), 139.

The catchy slogans of Muslim League like "no Hindu Raj" and "Muslim unity" also attracted the Pakhtoons and weaned them away from the Congress. By December 1946, the Muslim League had emerged as the dominant political force in NWFP and the adjacent tribal areas. In March 1947, there was a total shift in Pakhtoon politics in NWFP in favour of the Muslim League when it launched the Civil Disobedience Movement against the Congress government in the province.

Moreover, the Congress members in the Central and Provincial Legislative Assemblies very often branded the Afridis, the major tribe inhabiting Khyber Agency, and other tribesmen as robbers and hooligans due to which the Afridis hated the Congress. They clearly exhibited this hatred during Nehru's visit to the Khyber Pass in the year 1946, shortly before the partition of India.<sup>3</sup>

## **PRELUDE TO INDEPENDENCE**

### **Nehru's Visit to the Khyber**

When it became obvious that the British would soon grant independence to India and divide it into two countries in the name of religion, the Governor of the NWFP Sir Olaf Caroe was convinced that the people of North West Frontier Province and its adjoining tribal areas would definitely decide to join Pakistan if they were to make the choice between India or Pakistan. In this volatile situation when the passions were running high, Nehru decided to visit the province in October 1946 to persuade the people of NWFP in general and the followers of the Congress in particular that partition of India would be a foolish course of action. During the visit, when Nehru wanted to go to the tribal areas to speak directly to the tribesmen, Caroe warned him against it but Nehru did not like Caroe and ignored his advice.<sup>4</sup>

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3 Mohammad Shafi Sabir, *The Story of Khyber* (Peshawar: University Book Agency, 1966), 72-73.

4 Andre' Singer, *Lords of The Khyber: The Story of the North-West Frontier* (London: Faber & Faber, 1984), 202.

Although Nehru wanted to visit the tribal areas in the Frontier in his official capacity as the head of the External Affairs Department of the Government of India but it was alleged that there were party motives behind this visit.<sup>5</sup> Caroe had also strongly opposed the visit on the same basis and he had dubbed it as 'a deliberate partisan approach to tribal problems'.<sup>6</sup> Khan Abdul Wali Khan writes that Nehru wanted to visit the different tribal agencies during his tour of NWFP "to discuss with them the future of India and the position of the tribal areas in that future setup".<sup>7</sup> This also indicates that the purpose of his visit was to project his party's point of view about the future political developments in India, including the possible plan of partition of the Indo-Pak Subcontinent.

Caroe failed to persuade Nehru not to enter the tribal area. He also tried to persuade Nehru that if at all he insisted on a visit to the tribal area, he should not take Ghaffar Khan with him as Dr. Khan Sahib would be giving him company and Ghaffar Khan was not needed.<sup>8</sup> Nehru ignored all the advices of Caroe.

On October 20, 1946 Pundit Jawahar Lal Nehru, accompanied by Khan Abdul Ghaffar Khan and Dr. Khan Sahib, was heading towards Torkham in a motorcade. They were sniped at by some tribesmen but managed to reach Torkham where they had tea and then proceeded back to Landi Kotal. On their way back, the tribesmen sitting by the roadside began to pelt stones at them. The Political Agent

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5 For details, see Stephen Rittenberg, *Ethnicity, Nationalism and the Pakhtuns: The Independence Movement in India's North West Frontier Province* (Durham, North Carolina: Carolina Academic Press, 1988), 212-15.

6 Parshotam Mehra, *The North-West Frontier Drama 1945-1947: A Re-Assessment* (Karachi: Oxford University Press, 1998), 68.

7 Khan Abdul Wali Khan, *Bacha Khan au Khudai Khidmatgari* [Pashto: Bacha Khan and service of Khudai Khidmatdgars], (Peshawar: Wali Bagh Charsadda, 1993), I: 96 and Syed Wiqar Ali Shah, *Ethnicity, Islam and Nationalism: Muslim Politics in the North West Frontier Province 1937-1947* (Karachi: Oxford University Press, 1999), 469.

8 Abdul Ghaffar, *Zama Jwand au Jidd-wa-Jahad* [Pushto: my youth and struggle] (n.p. : n.d.), 709.

Khyber Sahibzada Khurshid, whose car was in the front, stopped and tried to handle the situation. His armed escort fired a few rounds and the tribesmen fled. A few stones were thrown at the car in which Khan Abdul Ghaffar Khan was sitting with Nehru. The window of the car was broken but nobody was hurt.<sup>9</sup> The incident took place at a place called Charbagh and according to one source, several bullets also hit Pandit Nehru's car. Lala Mehr Chand Khanna's brand new car and the cars of other Congress leaders were also hit by the bullets.<sup>10</sup>

The Afridis and Shinwaris protested against what they termed as 'the forcible visit of Nehru to Landi Kotal without their consent'. A large gathering which was attended by the Afridis of different tribes and the members of the Muslim National Guard from Peshawar was held near Ziarat Wali Baba at Jamrud on October 17, presided over by Haji Gul Akbar Afridi. The Muslim League leaders and Afridi Maliks delivered speeches condemning the British Government and resolving that Pandit Nehru would not be allowed to pass the Jamrud barrier and that if any attempt was made to take him across, the responsibility of any unpleasant incident would lie on the shoulders of Abdul Ghaffar Khan, Dr. Khan Sahib and the British authorities.<sup>11</sup> They claimed that their religious feelings had been hurt injured as they did not like the Hindus and Nehru was a Hindu representative. They blamed Nehru, Ghaffar Khan and Dr. Khan Sahib for creating disturbance and demanded a written apology.<sup>12</sup>

The Congress, however, accused the Political Agent Khyber, Sahibzada Khurshid, and other officials of staging the protest against Nehru's visit. These charges were later on confirmed by Faridullah Shah, Assistant Political Agent of

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9 Syed Waqar Ali Shah, *Muslim League in N.W.F.P.* (Karachi: Royal Book Company, 1992), 118.

10 Sabir, *The Story of Khyber*, 73.

11 Riaz Ahmad, ed., *The Frontier Muslim League 1913-1947: Secret Police Abstracts* (Islamabad: National Institute of Historical and Cultural Research, 2008), 286-87.

12 Shah, *Muslim League in N.W.F.P.*, 118.

Khyber Agency. He confessed that he had been asked by Sahibzada Khurshid to create a situation unfavorable to Nehru's visit. He recalls the incident in these words:

Two or three days before Nehru's arrival, Khurshid (the Political Agent) sent for me and told me Nehru was coming to Khyber. He said that if the tribesmen should receive him in a docile way, all Musalmans of this part of the country will go under the suzerainty of the Hindus; as Musalman I should do something, but at the same time he warned me not to tell him of the action I would take. Do you know why? He was a religious man and if he was asked anything, he could say he did not know.

I went straight to Jamrud. I contacted a certain Kuki Khel 'Malik' called Swatai Khan. The only question he asked was as to what would be the reaction of the Political Agent. I told him; 'don't worry.' I very strongly told him that nobody was to be killed. They should resort to heavy sniping.

On return from Jamrud, I contacted Mullah Sahib of Manki Sharif. He had then a lot of disciples among the Shinwaris and Mullagoris. So he also went on tour to Landi Kotal and the Mullagori area."<sup>13</sup>

The purpose of the visit of the Pir of Manki Sharif was obviously to stir opposition to Nehru's visit.

After some time, Swatai Khan, the main character involved in this whole episode, sent a detailed letter to Quaid-i-Azam Mohammad Ali Jinnah, the founder of Pakistan, justifying their act resulting in Nehru's disgrace. He wrote to Jinnah that when Nehru decided to visit Khyber Agency, the Political Agent consulted the locals about Nehru's visit. Upon this, the locals told him that they could not stop him from traveling in Khyber Agency as 'the road is government's property' but we would not like to meet him as we do not like Hindus and he is a representative of the Hindus.<sup>14</sup> He also accused the Khan brothers of giving 100 rupees to four *ghundas* [Urdu: hooligans] in order to serve them with tea in Jamrud. The money, according to Swatai Khan, was paid through Yahya Jan, probably a local. He narrates the rest of the story in these words:

13 Erland Jansson, *India, Pakistan or Pakhtunistan?: The Nationalist Movements in the North West Frontier Province, 1937-47* (Uppsala Stockholm: Almqvist & Wiksell International, 1981), 185-86.

14 Shah, *Muslim League in N.W.F.P.*, 119.

When I got the news, I became full with anger. The paid agents were going to present the Afridis. I challenged them, if they intended to garland the Congressite with flowers, I am going to garland them with bullets and if they were presented with tea, Panditji would taste his own blood in that cup of tea."<sup>15</sup>

As mentioned earlier, Caroe had opposed the visit of Nehru to the tribal areas and warned him against doing so at Delhi. This was later disclosed in a letter written to the Viceroy Lord Wavell by Caroe on October 23, 1946.<sup>16</sup> He wrote to Wavell:

The situation in the Khyber was alarming. The *Afridis* as a whole, the strongest and wisest of all the tribes, had refused to see Nehru at all. There was a smaller section that was willing to meet him, but they were overawed by the body of the tribe, who have announced a fine on anybody who deals with either Congress or League.<sup>17</sup>

Caroe also gives an account of what happened at a *Jirga* arranged by the Political Agent, Khyber at Landi Kotal to meet with Nehru. He records that when Nehru spoke to the tribesmen in Urdu they did not like it and were not only rude but became violent. Nehru also lost his temper and at last the Political Agent had to go into the middle of a mob to pull him out and threaten the *jirga* with the use of force if they did not back off. According to Caroe, Nehru was 'very lucky to get back' to Peshawar, where he had a meeting with Caroe in a bad temper. Caroe reminded him of his prior warning but it did not satisfy Nehru.<sup>18</sup>

### **The Paktoonistan Issue**

With the termination of the British rule in India in 1947, all those agreements and treaties which bound the Tribal Areas with the British Government in Delhi were abrogated under the Indian Independence Act, 1947. Thus constitutionally the

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15 Shah, *Muslim League in N.W.F.P.*, 119.

16 Olaf Caroe to Field Marshal Viscount Wavell, letter No. R/3/1/92 (Confidential), D. O. No. Gh-196, dated October 23, 1946, *The Transfer of Power 1942-7*, Nicholas Mansergh, ed., (London: Her Majesty's Stationery Office, 1979), VIII: 786-92.

17 Syed Abdul Quddus, *The Pathans* (Lahore: Ferozsons Pvt. Ltd., 1987), 285.

18 Andre' Singer, *Lords of The Khyber*, 202-203.



Tribal Areas had practically become independent and it was up to the new state of Pakistan to enter into fresh agreements and treaties with the tribal chiefs (Maliks). The tribal chiefs knew the fact that they would have to sign new treaties with Pakistan under terms and conditions that would best guarantee the rights and privileges they enjoyed under the British.<sup>19</sup> This is evident from a meeting of the Afridi Maliks who called upon Caroe at Government House in Peshawar in March 1947. They were not clear about the political situation and had come to discuss the same with the Governor. In this meeting, they clearly announced, reported in the *New York Times*, that: "We won't deal with the Congress Party. We won't deal with the Muslim League. We may deal with a government representing both sides. We own the Khyber Pass and will bargain on that basis."<sup>20</sup>

This statement implicates that the Afridi *maliks* were quite indifferent towards both the Congress and the Muslim League and wanted to retain their special position through a compromise with a proper successor authority of the British Indian Government. However, it is a well-known fact that the majority of the common Afridis supported the struggle for a separate Muslim homeland and favoured to join Pakistan in case of the partition of India.<sup>21</sup> The explanation for the inconsistency between the sentiments of the common tribesmen and the *Jirga* members that met Caroe is the fact that *Jirga* members are always maliks and elders of different tribes and common people have no representation in the *Jirgas*, especially when they gather for a meeting with government officials. The elders who met Caroe were perhaps more concerned at the time of this meeting about their allowances and perks rather than the future of their tribes and their land, while ordinary tribesmen were swept away by the euphoria of a Muslim State created among them by the successful propaganda launched by the religious

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19 Indian Independence Act, 1947, Chapter 30, Section 7 (1).

20 James W. Spain, *The Way of the Pathans* (Karachi: Oxford University Press, 1973), 55.

21 Sabir, *The Story of Khyber*, 73.

leaders and *pirs*<sup>22</sup> supporting the Muslim League who manipulated skilfully to exploit the religious sentiments of the tribesmen.

In 1947, Pakistan by the right of its location inherited the former North West Frontier of India, as the province of NWFP had opted to join Pakistan through a referendum.<sup>23</sup> At that time, a Congress Ministry led by Dr. Khan Sahib was ruling over NWFP. The situation was complex as more than ninety per cent of the population was Muslim and a vast majority of the population who previously supported the Congress and the Khudai Khidmatgaran had shifted their allegiance to the Muslim League. They had also started supporting the idea of Pakistan as the homeland of the Muslims, whereas the provincial government in NWFP was still supporting the Congress. It was, therefore, decided that instead of authorizing the Provincial Legislative Council to decide the fate of the province, the decision should be taken by the people of the province through a referendum.<sup>24</sup> The Khudai Khidmatgaran and their leader Khan Abdul Ghaffar Khan boycotted the referendum on the plea that they were ready to contest the referendum on the issue of "Pathanistan and Pakistan" but not on the basis of a choice for "Pakistan and Hindustan".<sup>25</sup> Abdul Ghaffar Khan and his followers tried to exert pressure on the Government by agitation, violent if needed. This is evident from the fact that the Viceroy received official reports that Abdul Ghaffar Khan had inaugurated the formation of a militia carrying pistols and wearing red uniform. The Muslim League responded by forming the Green Shirt National Guards of the League, equally armed. In the Referendum, which was held in all the settled districts of NWFP from July 6 to July 17, a vast

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22 Saints of different Sufi orders having large number of followers.

23 Azmat Hayat Khan, *The Durand Line: Its Geostrategic Importance*, ed. M. Y. Effendi (Peshawar: Area Study Center, University of Peshawar & Hanns Seidal Foundation, 2000), xvi (Introduction).

24 S. M. Burke, *Foreign Policy of Pakistan: A Historical Analysis* (Karachi: Oxford University Press, 1973)

25 Rahman Pazhwak, *Pakhtunistan: The Khyber Pass as the Focus of the New State of Pakhtunistan* (London: Royal Afghan Embassy, 1960), 115.

majority of the voters opted for Pakistan. Pakistan secured 289,244 votes out of total electorates of 572,798; while India received 2874 votes.<sup>26</sup>

The results were disputed by the Khudai Khidmatgaran who had boycotted the Referendum and even the Congress despite the fact that the Nehru family had agreed to the Referendum provided that Caroe was removed and the polling administration was reorganized.<sup>27</sup> Both these demands had been accepted. Caroe was temporarily replaced by Robert M. M. Lockhart, Chief of Southern Command, Indian Army on June 26, 1947 and Brigadier R. J. Booth was appointed as the Referendum Commissioner.<sup>28</sup>

Although the Referendum was held in the settled districts of NWFP but it could not be an option in the tribal areas for the simple reason that the Tribal Areas had neither legislature nor electoral roll. The tribes knew only one kind of representative institution and that was their tribal *jirga*. It was through *jirgas* that they governed themselves and made their decisions and choices. According to the Partition Plan of June 3, 1947 the proper successor authority of the British Indian Government was to make fresh agreements with the tribes of North West Frontier of India. It was done in November 1947 on behalf of the Government of Pakistan by Sir George Cunningham the then Governor of NWFP. After ascertaining the views and the wishes of the tribes through their *jirgas*, Sir George Cunningham signed agreement with them and reported: "I interviewed the *jirgas* of all the tribes from end to end of the frontier, and without exception", he said, "they (tribes) stated and confirmed in written statements that they were part of Pakistan and wished to preserve the same relations with Pakistan as they had with

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26 Muhammad Anwar Khan, *The Role of N.W.F.P. in the Freedom Struggle* (Lahore: Research Society of Pakistan, 2000), 237-38.

27 Saleemullah Khan, ed., *Referendum in N.W.F.P. 1947* (Islamabad: National Documentation Centre, 1995), 43-51.

28 Khan, *Referendum in N.W.F.P. 1947*, 197.

the British". Later, this agreement was ratified by the Government of Pakistan.<sup>29</sup>

In January 1948, Jinnah signed the famous 'Instrument of Accession', at the Bannu Tribal Jirga and on April 17, 1948 when he visited the Frontier Province as the first Governor General of Pakistan, a historic *jirga* of all the tribes of the NWFP met with him at the Government House of Peshawar and the tribesmen, including those of the Khyber Agency, pledged their loyalty to Pakistan. They also expressed their desire that they should be placed 'directly under the control of the Central Government.'<sup>30</sup>

The *de facto* accession of the tribal areas to the territories of Pakistan had taken place by the agreements of the tribal *jirgas* but in order to give this *de facto* position *de jure* constitutional status, the Governor General issued two orders on March 31, 1949 called "The Extra-Provincial Jurisdiction Order 1949" (G. G. O. No. 5 of 1949) and "The Pakistan Provincial Constitution (Amendment) Order 1949" (G. G. O. No. 6 of 1949). The Governor General's Order No. 5 extended to all the territories in Pakistan outside the provinces which may be declared by the Governor General of Pakistan to be the territories in which jurisdiction is being exercised by him. This came into force with retrospective effect from August 15, 1947 and in effect re-enacted the provisions of the Indian (Foreign Jurisdiction) Order in Council of 1902, as well as Section 3 and 4 of the Foreign Jurisdiction Act of 1890.<sup>31</sup>

Later on, the Government of Pakistan entered into revised agreements with the tribal chiefs in 1951-52 acquiring greater control and authority in the Tribal Areas. Under these agreements, the *maliks* declared the Tribal Areas a part of Pakistan and pledged to provide any help to the new country whenever the need arose. They also made a commitment to remain peaceful, to abide by the laws and

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29 Burke, *Foreign Policy of Pakistan*, 71.

30 Abdul Quddus, *The Pathans*, 339.

31 Abdul Quddus, *The Pathans*, 339-40.

to maintain friendly relations with the people of the settled districts. In return and on the conditions mentioned above, the Government of Pakistan also pledged to continue the existing benefits and subsidies to the tribal people and not to interfere with the existing internal arrangements in the tribal areas. In order to provide a legal and constitutional cover to these agreements, the Governor General of Pakistan issued a series of orders and notifications, declaring the Tribal Areas a part of Pakistan with effect from August 15, 1947 and placed them under the direct jurisdiction of the Governor General of Pakistan.<sup>32</sup>

In international law, Pakistan was accepted and recognized as 'Proper Successor Authority' of British India and the inheritor of His Majesty's Government, as far as the accession of the tribal areas was concerned. The Secretary of State for Commonwealth Relations made the following statement in the British House of Commons on June 30, 1950:

His Majesty's Government in the United Kingdom have seen with regret the disagreements which there have been between the Governments of Pakistan and Afghanistan about the status of the territories on the North Western Frontier. It is His Majesty's Government's view that Pakistan is in International Law the inheritor of the rights and duties of the old Government of India and of His Majesty's Government in the United Kingdom in these territories, and that the Durand Line is the international frontier.<sup>33</sup>

This was followed in 1956 by a statement of Sir Anthony Eden, the then Prime Minister of the United Kingdom, to the following effect:

In 1947, Pakistan came into existence as a new sovereign independent member of the Commonwealth. The British Government regard her as having, with full consent of the overwhelming majority of the Pushto-Speakig people concerned, both in the administered and non-administered areas, succeeded to

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32 *Gazette of Pakistan* (Extraordinary), dated 27th June 1950, 511-512, cited by Dr. Noor ul Haq, Dr. Rashid Ahmad Khan and Dr. Maqsoodul Hasan Nuri, "Federally Administered Tribal Areas of Pakistan" in *IPRI* Paper 10. Islamabad: Asia Printers, 2005, IPRI (Institute of Policy Research Islamabad), [http://ipripak.org/papers/federally.shtml#\\_ftn113](http://ipripak.org/papers/federally.shtml#_ftn113)

33 Abdul Quddus, *The Pathans*, 341.

the exercise of the powers formerly exercised by the Crown in the Indian North-West Frontier of the Subcontinent.<sup>34</sup>

The Council of the Foreign Ministers of SEATO (South East Asia Treaty Organization), who met in Karachi from March 6-8, 1956 also recognized the Durand Line as international boundary between Pakistan and Afghanistan and the extension of Pakistan's sovereignty up to that line.<sup>35</sup>

The Jurisdiction of Pakistan over the tribal areas was reasserted and reaffirmed by the Supreme Court of Pakistan on August 26, 1969 in a Ruling on the case of the Superintendent of Land Customs, Torkham, Khyber Agency – the Appellant *versus* Zewar Khan and others – the Respondents.<sup>36</sup>

The question of the accession of the tribal areas to Pakistan is important in two respects: in respect of the legitimacy of Pakistani authority in the eyes of the tribesmen; and in respect of the claims of Afghanistan's Government over certain territories to the east of the Durand Line giving birth to the issue of 'Pakhtoonistan'. Interestingly enough, the controversy about the accession of the tribal areas on the north west frontier started between India and Pakistan but ended up being one between Afghanistan and Pakistan.

The Pakhtoonistan Movement emanated from Kabul in June, 1947 well before the partition of India and the creation of Pakistan and the Afghan Government tried to spread this Movement in the NWFP and Baluchistan.<sup>37</sup>

The Afghan Government adamantly insisted that the territories lying between the Durand Line and the River Indus belong to Afghanistan and that the tribes living in these areas must be given an opportunity to decide whether they wished to re-join Afghanistan or become independent. To achieve this objective, the Afghan Government mounted a

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34 Abdul Quddus, *The Pathans*, 342-43.

35 Abdul Quddus, *The Pathans*, 342.

36 Ruling of the Supreme Court of Pakistan, quoted in Abdul Quddus, *The Pathans*, 335-39. See extract from the Ruling in Appendix at the end of this paper.

37 Hart, *Guardians of the Khyber Pass*, 145.

vigorous public and diplomatic campaign but the British made it clear that all the territories claimed by Afghanistan were integral part of British India, recognized as such by the Anglo-Afghan treaty of 1921, and that Afghanistan had no legal right to interfere in the tribesmen's decision concerning their future.<sup>38</sup>

After the Afghan rulers were convinced that the tribal people had little inclinations to join their country, they decided to raise the issue of Pakhtoonistan in connivance with Khan Brothers. Successive Afghan governments made continuous attempts to exploit this issue by establishing links with the tribal people and inciting the Pakhtoon tribes against Pakistan. Thus they raised the slogan of an independent Pakhtoon state. This Pakhtoon state or *Pakhtoonistan* as they preferred to call it, was to consist of the then six settled districts of NWFP and all such other contiguous areas inhabited by Pakhtoons, that wished to join the new state out of their own free will.<sup>39</sup>

On August 12, 1949 a number of Afridi tribes met at Tirah, the place where they held *jirga* meetings, and the flag of 'Independent Pakhtoonistan' was hoisted and a declaration by the 'Pakhtoonistan National Assembly (Tirah Branch) was also published, addressed to all the people of Pakhtoonistan, to the entire Muslim world, to all Pakhtoons living abroad and to the United Nations Organization. The declaration runs as follows:

We, the Tirah Branch of the National Assembly of Pakhtoonistan, having formed the first nucleus of a Free and Democratic Muslim Government amidst the lofty mountains of Tirah, hereby express the hope that with the help of Almighty Allah and the support of the brave and freedom loving Pukhtuns, this young plant will in a short time grow into a sturdy and fruitful tree which will not only benefit Pukhtunistan (from Chitral to Baluchistan and from Khyber and Bolan to the banks of Indus) but will also fulfil its obligations to the cause of progress and world peace.<sup>40</sup>

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38 Burke, *Foreign Policy of Pakistan*, 72.

39 Burke, *Foreign Policy of Pakistan*, 73.

40 Fazal ur Rahim Khan Marwat, Abdul Karim Khan, Syed Wiqar Ali Shah Kakakhel, "Fakir of Ipi", in *Afghanistan and the Frontier*, (eds.) Fazal-ur-

This proclamation was greeted with great enthusiasm in Afghanistan and broadcasted from Radio Kabul.<sup>41</sup>

Another *jirga* was allegedly held at Razmak which elected the Faqir of Ippi as the President of 'southern' Pakhtoonistan. In response to this provocative and hostile propaganda, the Government of Pakistan showed maximum restraint. During this period, Pakistan initiated a number of projects and developmental works aimed at improving the socio-economic conditions in the Tribal Areas. According to a report published in *The Times*, London, June 29, 1949 the tribesmen continued to draw a huge amount in subsidies from the Pakistan exchequer which was more than the total budget of Afghanistan.<sup>42</sup>

Prominent among the Afridis who espoused the Pakhtoonistan Movement was Malik Wali Khan Kuki Khel. He was the one who had presented Jinnah a Darra-made 303 rifle during his visit to Khyber Agency in 1948. However, he defected soon thereafter to the cause of Pakhtoonistan and led two tribal attacks from Kabul on Pakistani territories in January and December 1952, for which the Pakistani Air Force bombed his home in Tirah. In 1959, he was pardoned and was allowed to return to Tirah. Among the other influential Afridi supporters of the Pakhtoonistan Movement were a Zakha Khel ex-Malik named Said Ahmad and the legendary Busti Khel Adam Khel brothers Ajab Khan Afridi and Shahzada Khan.<sup>43</sup>

Pakistan's relations with Afghanistan for most of the time revolved around the issue of Pakhtoonistan, which was the legacy of their past. The result was that Pak-Afghan relations mostly remained strained in spite of the geographical contiguity and identity of religion, culture and economic interests of the two countries. The Durand Line delineated in

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Rahim Marwat and Syed Wiqar Ali Shah Kakakhel (Peshawar: Emjay Books International, 1993), 258-59 and Pazhwak, *Pakhtunistan*, 124.

41 Fazal ur Rahim Khan Marwat, Abdul Karim Khan, Syed Wiqar Ali Shah Kakakhel, "Fakir of Ipi", 259.

42 Burke, *Foreign Policy of Pakistan*, 75.

43 Hart, *Guardians of the Khyber Pass*, 145-46.



1893 by the British between British India and Afghanistan, subsequently inherited by Pakistan as a successor state to British India, proved to be a bone of contention between the two countries. Afghanistan's main argument is that Amir Abdur Rahman had signed the Durand Line Agreement under duress.<sup>44</sup> Therefore, during the partition days, Afghanistan demanded the right of self-determination for the Pakhtoons living on the Pakistan side of the Durand Line, who they pleaded, were forcibly separated from their motherland, Afghanistan. Pakistan being a successor state to British India holds that it had inherited the Durand Line as an international frontier and that the Pakhtoons to the east of Durand Line had already expressed their support for Pakistan in the referendum of 1947. For Pakistan, therefore, the question of self-determination does not arise and it refused to negotiate with Afghanistan on the Pakhtoonistan issue.<sup>45</sup> But the Afghan Governments refused to accept the Pakistani point of view. The Afghan President Daud Khan once remarked that the "British did a wrong many years ago and we have been fighting to rectify it." He also resolved to continue the struggle until the goal was achieved.<sup>46</sup>

The issue of Pakhtoonistan, as stated above, resulted in deterioration of relations between the two countries and tension leading to border clashes. King Zahir Shah delivered an anti-Pakistan speech while inaugurating the seventh session of Afghan National Assembly on June 30, 1949 and the Afghan Assembly also passed a resolution repudiating all treaties, conventions and agreements signed between British India and the Afghan Government before the birth of Pakistan, rejecting the Durand Line as the international border between Pakistan and Afghanistan. In the resolution, the Afghan Assembly also referred to the alleged repression of the 'Afghan Provinces' and states from Chitral to Balochistan and urged the Afghan Government to liberate the inhabitants of these areas from Pakistan's illegitimate

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44 Pazhwak, *Pakhtunistan*, 139.

45 Khan, *The Durand Line*, xvii-xviii.

46 Khan, *The Durand Line*, 185.

rule. In July 1949, a Pakistan Air Force aircraft bombed an Afghan village near the border. A joint Inquiry Commission later on declared the incident to be the result of some misunderstanding. However, the matter was peacefully resolved after Pakistan paid the damages.<sup>47</sup>

The Pakhtoonistan Movement was in great strength till 1970's but later on the growing Pakhtoon spirit of identity with Pakistan and their comparative prosperity as against the Pakhtoons of Afghanistan caused the movement to collapse. The Pakhtoon tribesmen began to receive substantial economic opportunities in Pakistan – far more than in Afghanistan – which began to give them a real stake in the development not only of their own region but of the entire country. This development was successfully pushed forward at a very accelerated pace during the Presidency and later Premiership of Zulfikar Ali Bhutto (1971-1977). After Bhutto's visit to Khyber in November 1973, everyone wanted more of everything modern – roads, schools, hospitals, electricity and tube-wells. Economic change entailed social and political change and by the year 1977-78, 'the politically unrealistic concept of Pakhtoonistan' seemed to be 'virtually down to zero'.<sup>48</sup>

### **Conclusion**

Khyber and its tribes relate themselves proudly to Pakistan. As far as the accession of the tribal areas to Pakistan is concerned there should not be even an iota of doubt in the minds of anyone about the loyalty of the tribesmen to Pakistan. The important thing is that after more than 60 years of the decision that they made in 1947, they do not regret it. The Pakhtoonistan issue is now dead and buried, at least as far as the people of the area in question are concerned. Pakhtunkhwa (North West Frontier Province, now Khyber Pakhtunkhwa, and the adjacent Pakhtun tribal belt) is an integral part of Pakistan and the people of the

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47 *Dawn* (Karachi), 15 July 1949. Cited in Burke, *Foreign Policy of Pakistan*, 74.

48 Hart, *Guardians of the Khyber Pass*, 146-47.

area are proud of their Pakhtoon descent and Pakistani nationality. The issues regarding the Pak-Afghan international border (The Durand Line) had all been settled as far back as 1919 when Afghanistan accepted the Durand Line in the Rawalpindi Peace Treaty after the Third Anglo Afghan War.<sup>49</sup> According to the International Law, Pakistan inherited the tribal belt as one of the two successor authorities to the British Indian Empire and the tribes of the area renewed their agreements with the Pakistani authorities, willingly and happily acceding to the State of Pakistan. Although some senior members of the Afghan Government still raise the issue of the validity of the Durand Line Agreement and they lay claim to several border areas in the Mohmand and Khyber Agency as well as in a few other border areas but all the controversies regarding the accession of the tribal areas to Pakistan are now dead and buried as far as the people of Khyber Pakhtunkhwa and adjacent tribal areas are concerned. Some foreign elements with *mala fide* intentions may try to revive this issue to destabilize Pakistan but its revival is not even a remotest possibility in the near future unless the Pakistan government commits a mistake that is too huge to overpower the loyalty and love of the tribesmen for their country. This necessitates greater caution in the present situation, particularly in the conduct of any military operations in FATA or the steps taken by the Government of Pakistan in dealing with the terrorist elements operating from the tribal belt. The tribesmen must necessarily be taken into confidence about any decision regarding their land. Afghanistan will succeed in reviving the issues related to the Durand Line only if Pakistan alienated the loyal people inhabiting the tribal areas.

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49 Article 4 of the Rawalpindi Peace Treaty of August 8, 1919, File No. 4 B/ II, Serial No. 310, Bundle No. 48, Office of the Political Agent Khyber, Directorate of Archives and Libraries, Khyber Pakhtunkhwa, Peshawar.

## Appendix

Extract from Ruling of The Supreme Court of Pakistan on the case of the Superintendent of Land Customs, Torkham, Khyber Agency – the Appellant *versus* Zewar Khan and others (Respondents) – August 26, 1969

It is true that the tribal territories were never a part of British India as such. Nevertheless the Crown in the United Kingdom had acquired jurisdiction therein by grants, usages, sufferances and other lawful means. The Foreign Jurisdiction Act passed by the British Parliament in 1890 gave the Crown jurisdiction over "territories outside the dominions of the Crown", within a foreign country 'in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.' Section 5 (1) of this Act gave power to the Crown by Order in Council. In exercise of the power given by this act an Order in Council was made in 1902, called the Indian (Foreign Jurisdiction) Order in Council 1902, which delegated the power of the British Crown to the Governor General of India in Council to make such rules and orders as may seem expedient or to extend and apply any of the provisions of any enactment in force elsewhere for territories outside British India, including the tribal areas.

In exercise of the powers delegated to him by this order, the Governor General in Council in his turn applied it to all the Political Agencies of the North-West-Frontier Province certain provisions of law then prevailing in British India on 22 September 1926 by Notification No. 443-F.

Under the Act of 1935, Section 8 gave powers to the executive authority of the Federation, i.e., the Governor General of India, 'to exercise all such rights, authority and jurisdiction as are exercised by His Majesty's treaties, grants, usages and sufferances in or in relation to the tribal areas'. The Indian Foreign Jurisdiction Order 1937 was passed on 18<sup>th</sup> March 1937 which reaffirmed and regularized the position resulting from the enactment of the Government of India Act 1935.

Under the Indian Independence Act of 1947, all powers and responsibilities delegated to the executive authority of the Indian Federation (Governor General of India) now devolved upon the executive authority of the dominion of Pakistan as the proper successor authority of the British India. Although treaties and agreements in force with respect to the tribal areas lapsed under Section 7 (1) (c) of the Act, yet agreements relating to customs, transit and communications, posts and telegraphs or other like matters continued to have effect until the provisions thereof were denounced either by a person having authority in the tribal areas or the dominion or a province or any part thereof or were superseded by subsequent agreements. These agreements and their provisions remained effective as they were never denounced either by any authority in the tribal areas or by the dominion of Pakistan. On the contrary, both sides reaffirmed and recognized them on many occasions.