

Tribal Reforms in Pakistan: Bridging the Gap between the Frontier Crimes Regulations 1901 and Fundamental Rights

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Abstract

At the time of British rule, Pakistan was divided into two regions: the Raj and the one governed by the Frontier Crime Regulations (FCR) 1901. There as under the jurisdiction of the FCR are called Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA). The fact that FATA is being governed under the FCR has been problem for decades. The provisions of FCR have always been in contradiction with the fundamental rights. This law was initially enacted by the British just to subjugate the local people of Northern Frontier belt from being rebellious. Several decades after independence, the state of Pakistan still has not been able to remove FCR from FATA and PATA and introduce Constitution of 1973 to the region. This article focuses on the shortcomings of the FCR as a law and how it has been in contradiction to the Fundamental Rights guaranteed under the Constitution of Islamic Republic of Pakistan. However as a positive change there have been talks of reform and some related agendas like merger of FATA and Khyber Pakhtunkhwa.

Historical Background

During the British rule, Pakistan was divided into two regions by the British. First region was called the *Raj*, where the British built their modern political and bureaucratic institutions. It included a modern legal system, a tax system, a civil service and an army. The second region was governed by the Frontier Crimes Regulation (FCR), where the British put small number of political agents in charge of large tribal area. Unlike the *Raj* system, the traditional local councils (*Jirgas*), which already existed in subcontinent, were handed over the force of law.¹ Since the inception of the independence of Pakistan, she has been freed from FCR except for small regions like Bajaur Agency, Khyber Agency, Kurram Agency, Mohmand Agency, Orakzai Agency etc. along the Afghan border, commonly known as Federally Administered Tribal Areas or FATA, and few other tiny Provincially Administered Tribal Areas known as PATA.

A. Tribal Areas and Their Status

According to the Constitution of Islamic Republic of Pakistan, “tribal areas” means the areas which include the Tribal areas of Balochistan and Khyber Pakhtunkhwa Province and the former states of Amb, Chitral, Dir, and Swat.² “Provincially Administered Tribal Areas” (PATA) include the districts of Chitral, Dir and Swat (which includes Kalam), the tribal area of Kohistan district, Malakand protected Area, the Tribal are of Mansehra district, the former State of Amb; Zhob district, Loralai district excluding Duki Tehsil, Dalbandin Tehsil of Chagai district, Marri and Bugti Tribal territories of Sibi district.³ Similarly, “Federally Administered Tribal Areas” (FATA) means, Tribal Areas adjoining Peshawar, Kohat, Bannu, Lakki Marwat, Dera Ismail Khan, and Tank districts including Bajaur Agency,

¹ Michael Callen, et al., ‘Choosing Ungoverned Space: Pakistan’s Frontier Crimes Regulation’ (*econweb*, 18 October 2017)

<http://econweb.ucsd.edu/~arezaee/pdfs/fcr_29sep2015> accessed 1 November 2017.

² Constitution of Islamic Republic of Pakistan, art 246(a).

³ Constitution of Islamic Republic of Pakistan, art 246(b).

Orakzai Agency, Mohmand Agency, Khyber Agency, Khurram Agency, North Waziristan Agency, and South Waziristan Agency.⁴ According to the Constitution of Pakistan, FATA is a part of Pakistan but it has a semi-autonomous status and is administered under Frontier Crimes Regulation (FCR). The Constitution further states that these areas would be under the direct supervision of the President of Pakistan.⁵ It is further stated in the Constitution that no act of Parliament shall apply to FATA unless the President directs so and no acts of Parliament or Provincial Assembly shall apply to PATA unless the Governor of the province with the approval of the President directs so.⁶ The same provision of Constitution also bars the jurisdiction of Superior judiciary over these areas stating that neither Supreme Court nor the High Court shall exercise any jurisdiction under the Constitution in relation to the Tribal Ares; unless provided for by the incumbent law.

B. Promulgation of The Frontier Crimes Regulations'1901

The British introduced Frontier Crimes Regulation in the year 1901 to defeat the fiercely free people of this region who might stand up against the British *Raj* in order to save their lands and people from subjugation. John William Kay, the then Head of the Political and Secret Department of Indian Office justified the imposition of FCR by quoting “We cannot rein wild horses with silken braids”.⁷ Ironically the British went away but FCR is still in existence and practice in Pakistan, an otherwise constitutional democracy.

Historically, in FATA and PATA, the British gave power to the *Loya Jirga* and let them made most of the legal decisions. Under the FCR

⁴ Constitution of Islamic Republic of Pakistan, art 246 (c).

⁵ Constitution of Islamic Republic of Pakistan, arts 51, 59, 247.

⁶ Constitution of Islamic Republic of Pakistan, arts 247(3), 247(4).

⁷ ‘Mainstreaming FATA: Defining, Democratizing and Developing’, (Shahid Bhutto Foundation, July 2009) 96.

the political agents appointed the member of the *loya jirga*⁸ and collectively punish the tribe for the behaviour of their members and tribe. Over the time, all Pakistan has been removed from under the jurisdiction of FCR except for the small regions along with the Afghan Boarder known as Federally Administrated Tribal Areas (FATA) and few small tribal areas known as Provincially Administered Tribal Areas (PATA).⁹

In 1947, after the independence of Pakistan, the province of Khyber Pakhtunkhwa (then known as North West Frontier Province (NWFP)) got rid of this law as it was a source of constant violations of the fundamental rights of its people who were otherwise living in an independent country under a constitution that recognized those fundamental rights, after the promulgation of 1956 Constitution. This rescued the areas of Balochistan, Malakand and Dir from the clutches of FCR. This left FATA to fend for itself under the rule of FCR and today, more than a century later, FATA is the only place in entire Pakistan where Frontier Crimes Regulation has its territorial jurisdiction.

Frontier Crimes Regulation consists of sixty three provisions and three schedules. Various Human Rights groups and civil society question the place and validity of many provisions of FCR in today's world.¹⁰ It is argued that these provisions¹¹ directly contradict the fundamental rights available in the Constitution to the citizens of Pakistan.¹² FCR is condemned for its cruel, irregular and hard punishments. A report published by Asian Indigenous and Tribal People Network posits.

⁸ *Loya jirga* (Pashto: لویه جرگه, "grand assembly") is a special type of *jirga* that is mainly organized for choosing a new head of state in case of sudden death, adopting a new constitution, or to settle national or regional issue such as war or political alliances.

⁹ Callen (n 1) 2.

¹⁰ The Frontier Crimes Regulation 1901 (hereinafter the FCR), ss 8, 11, 13, 17, 18, 19, 20, 22, 23, 27, 28, 29.

¹¹ FCR 1901, s 40, 45, 51, 55.

¹² Sarfraz Khan and Abdul Hamid Khan, 'Frontier Crimes Regulation: A Socio-Political Assessment' (2012) 3(2) Central Asia Journal 70.

The British colonists enacted FCR as an instrument of subjugation of the local people and to check any rebellion by the tribes.¹³

Frontier Crimes Regulation has been criticized especially for its cruel punishment and way more strict provisions. A report published by FATA Research Center Islamabad, emphasizes on the collective punishment and punishment of whole tribe and family for the crime committed by a single person. Moreover, once the punishment has been declared by the *Loya Jirga*, it cannot be challenged in High Court. For the execution of these punishments, the tribal chiefs are responsible to handover the accused/guilty to the Political Agents or else Tribal Chiefs would face punishment. These Political Agents are senior most bureaucrats in the agency and enjoy unfettered powers and privileges.¹⁴

C. The FCR and its Violation of Fundamental Rights

Following are the provisions and articles which stand in clear contradiction to the fundamental rights as enshrined in the Constitution of the Islamic Republic of Pakistan:

1. The FCR does not allow for certain rights to be accessible to the people of FATA. This includes three basic rights accorded to any subject in a justice system; Appeal¹⁵ i.e. a right to challenge the decision of a lower Court in the Higher Courts, or in this case, the right to challenge the *Jirga's* decision), *Wakeel*¹⁶ which means a right to be represented through a counsel in a legal matter and *Daleel*¹⁷ i.e. a right to defend one's self against an accusation.

¹³ Muhammad Hamid Hussain, 'Frontier Crimes Regulation: A Case Study of Reforms Process' (*Fata Research Center*, 18 October 2017) 96 <frc.org.pk/wp.../Frontier-Crimes-Regulation-A-Case-Study-of-Reforms-Process.pdf> accessed 1 November 2017.

¹⁴ *Ibid.*

¹⁵ FCR, s 48. (Appeals Barred)

¹⁶ FCR, s 48. (Appeals Barred)

¹⁷ FCR, s 53. (Record of Reasons)

2. Article 10(1) of the Constitution of the Islamic Republic of Pakistan accords every citizen of Pakistan has the right to be safeguarded from arbitrary arrest and detention. When a person is accused of an offence, art.10 (1) allows for the right to consult and be defended by a legal practitioner of one's own choice which is in sharp contrast to the FCR's rule of permitting no *wakeel*.

Furthermore, art. 10-A guarantees the right to a fair trial in any case of civil or criminal matter which is inclusive of one's right to appeal against the decision reached upon by the trial court. The Constitution provides for High Courts for all provinces which amongst other jurisdictions also have appellate jurisdiction. If an accused is aggrieved of the decision of a lower court, it has a right to appeal against that decision to the High Court or even the Supreme Court.¹⁸ In FATA, owing to the legal regime installed by the FCR, there is no right to appeal against the decision reached upon by a *Loya Jirga*¹⁹ or relevant political agents.

3. FCR also legitimizes the atrocious and archaic practice of collective punishment of entire tribe for the offence committed by one of its members.²⁰ Therefore, if a person commits a crime, his/her spouse, relatives, parents and even the entire tribe may be punished, or their property be seized.

Section 23 of the FCR makes all the members of the village responsible for murder if a dead body is found in their village. It also provides that fines may be imposed on every resident of that village for the crime of a single person.²¹ Logic and reason have always imputed responsibility for the crimes upon their perpetrators alone, and all justice systems of the world have

¹⁸ Constitution of Islamic Republic of Pakistan, art 175, 199.

¹⁹ Constitution of Islamic Republic of Pakistan, art 175, 199.

²⁰ FCR, s 21. (Blockade of Hostile and Unfriendly tribes)

²¹ FCR, s 23. (Fines on Communities where murder or culpable homicide is committed or attempted)

fallen in tandem with this reasoning. Instituting vicarious liability, based on the nexus of blood, for criminal acts is a principle which undermines the primary purpose of a legal system. Collective punishments are also given for petty crimes, which are inevitably part of any community in which humans exist. Such laws, which punish entire tribes or families for the crime of one of their members, violate one of the primary values of any system of law and justice, i.e. the proportionality of reprimands to the offence and wrongdoing. Such clear disregard for this principle can render any criminal law ineffective as to both sets of possible objectives: retributive as well as utilitarian.

4. Under the procedure given in the FCR all suspects of crimes will be tried by the tribal *Jirga*/council. Once the *Jirga* or council has given its verdict, acquittal or conviction that will be forwarded to a political agent having jurisdiction over that area. The decision pronounced by the political agent cannot be challenged in any High Court.²²As every citizen of Pakistan has the right to challenge the decisions of the lower Courts in High Court, people of FATA should also enjoy such right so that they may be able to access justice.
5. FCR ensures a self-enforcing hierarchy as far as its implementation is concerned. Tribal Chiefs are responsible for handing over the accused to Political Agents or else they themselves are liable to face punishment.²³ Pursuant to the FCR, there is no right to defend one's self from such an accusation, thereby undermining the precept of 'innocent until proven guilty', a core value of any criminal justice system striving to deliver justice.
6. Political agents and their deputy, the assistant political agent, enjoy unchecked powers- both executive and judicial, pursuant

²² FCR, s 11. (Criminal References to Council of Elders)

²³ Seminar Report, 'FCR amendments: A way forward or hurdle for Peace and Development' (*Fata Research Center*, 16 October 2017) 96 <<https://frc.org.pk> > Publications > Seminar Report> accessed 1 November 2017.

to the rules of the FCR. There is no regulatory mechanism to check misuse of power by political agents, which often results in serious human rights violations.

7. In Pakistan, the rule of law is a pervasive doctrine, which has been given the ultimate priority by all three branches of the state. The doctrine allows for no one to be above the law and everyone to be equal in the application and dissemination of the Law. Unchecked powers of both, the executive and the judiciary permit and institutionalize the abuse of power and these provisions of the FCR are in blatant contradiction to the principles of natural justice.
8. Being the citizens of Pakistan, the people of FATA are deprived from their basic fundamental rights which are enshrined in the Constitution of Islamic Republic of Pakistan and safeguarded by the Supreme Court. These people are, hence legally segregated from the rest of Pakistan as they do not enjoy the privilege of citizenship like the citizens in rest of the country.

Furthermore, the FCR contains many aboriginal provisions which are entirely unsuitable in today's modern and socially developed society. The criminal procedure lay out in the FCR is more in line with the old *Pakhtoon* traditions²⁴ than the common law criminal jurisprudence. Yet, the legislatures have shown close to no interest in the legislative advancement of FATA. Often the excuse is that the people in FATA are backward and tribal in their nature and culture and do not want to change or do not want any democracy. Unfortunately enough, the people of FATA have also now accepted the FCR as a law representative of their culture even though it keeps them deprived of their rights and protections provided under the Constitution.²⁵ With provisions as unjust as those enumerated above, it remains an anomaly, asking how it could provide any justice to the people of FATA. The punishment of whole village for the offence of a single

²⁴ Human Rights Commission of Pakistan(HRCP), *FCR, a bad law nobody can defend* (HRCP,2005) 58, para 2.

²⁵ Dr. Khurram Yousafzai, 'Great Game: Pashtun's History', (17 October 2017) <<https://drksy.wordpress.com>> accessed 1 November 2017.

alleged person violates the principle of personal liability that is one of the most distinctive features of criminal law. The rules in the FCR that restrict any right of appeal and then the rules that leave legal matters in the hands of *Jirga* and political agents who may not even have any basic knowledge of law and justice, highlight the bleak state of dispensation of justice in FATA.²⁶

Unfortunately, even the Supreme Court of Pakistan has also not yet taken any notice, *suo motu* or otherwise, of the plight of legal system in FATA. The judiciary in a constitutional and democratic set up is the custodian and protector of the fundamental rights guaranteed in the Constitution. Like legislatures, the judiciary has also remained oblivious to the profound injustices inherent in the FCR. When British introduced this law back in 1901, their justification had been that since *pakhtoons* were violent and would continue to retaliate and rebel against the British Raj, it would be important to keep them under control; the FCR being a device to exert that control. The only question which is unanswerable is, “Are people of FATA still that violent?”²⁷, and should the state of Pakistan continue with the FCR and keep the masses of population in FATA constantly deprived of their fundamental human rights while treating them like second grade citizens.

D. 2011 Reforms of The FCR

The last political government (from 2008 to 2013) announced administrative, political and legal reforms in FATA in 2008. After many deliberations and supports from inside and outside of the FATA, after the examination of the then governance system of FATA, it was decided by the President of Pakistan to amend the FCR along with the extension of the Political Parties’ order to FATA on August 27, 2011. In 2011, the incumbent President enacted a presidential order to amend FCR. These reforms, however, were not the first ones. Prior to the 2011 reform, FCR had been amended number of times; however, these reforms in 2011 were major

²⁶ Yousafzai (n 25).

²⁷ Yousafzai (n 25).

reforms compared to the previous amendments in FCR.²⁸ The 2011 amendment includes several extensive amendments to the FCR regulation. Some of the reforms present in this amendment are:

- Protection of women, children below 16 and all people above 65 from collective responsibility arrest or detention.²⁹
- Prohibition against arresting an entire tribe under collective responsibility.³⁰
- Provision for a more independent appeals process.³¹
- Appellate authority power to review and revise decisions and orders.³²
- Strengthening of the FATA Tribunal.³³
- Power to transfer cases from political agent to assistant political agent.³⁴
- Concept of bail.³⁵
- Voluntary reference to a council of elders and *Qaumi Jirga* (people's assembly).³⁶
- Inclusion of local customs and traditions (*Rewaj*).³⁷
- Fines on communities in case of murder.
- Forfeiture of public salary for involvement in crime.³⁸

²⁸ The FCR was also amended in 1928, 1937, 1938, 1947, 1962, 1963, 1995, 1997, 1998, and 2000.

²⁹ Amended Frontier Crimes Regulation 2011, ss 21(c)(3), 22(d).

³⁰ Amended Frontier Crimes Regulation 2011, s 21. Following 2011 amendments, male members of the family must be arrested first, followed by the sub-tribe then by other sections of the tribe.

³¹ Amended Frontier Crimes Regulation 2011, ss 4, 5, 48. Appeals shall be heard by an appellate authority comprised of a commissioner and a dedicated additional commissioner to be notified by the governor.

³² Amended Frontier Crimes Regulation 2011, s 55(A)(4).

³³ Amended Frontier Crimes Regulation 2011, ss 55(A), 55(AA).

³⁴ Amended Frontier Crimes Regulation 2011, s 5.

³⁵ Amended Frontier Crimes Regulation 2011, s 11(a); With some restrictions and at the discretion of the political agent, the 2011 reforms granted the right to bail to FATA citizens. The FATA Tribunal or the appropriate appellate authority also has the power to revoke the right to bail.

³⁶ Amended Frontier Crimes Regulation 2011, s 12(a).

³⁷ Amended Frontier Crimes Regulation 2011, s 8.

³⁸ Amended Frontier Crimes Regulation 2011, s 26.

- Arrest by authorities other than a political agent.³⁹
- Checks on the arbitrary power to arrest.⁴⁰
- Punishment and compensation for false prosecutions.⁴¹
- No deprivation of property rights without compensation.⁴²
- Audit of political agent's funds by the Auditor General of Pakistan.⁴³

This 2011 amendment in the FCR strengthened the FATA Tribunal. These FATA tribunal were also mentioned in 1997 but 2011 reform enhanced the independence and visibility of the Courts. According to 1997 and 2011 reforms, verdicts accounted by the Political Agents would be appealed in the Commissioner's office of the adjacent settled district. Subsequently, verdict announced by the Commissioner shall be appealed in the FATA Tribunal. According to the 2011 reforms in FCR, following shall be the new hierarchy of FATA Judicial system:

- FATA Tribunal
- Commissioner and Additional Commissioner⁴⁴
- Political agent or district coordination officer
- Assistant political agent
- *Qaumi Jirga* (Tribal Areas Jirga)
- Council of Elders (For giving decisions according to *Rewaj*)⁴⁵

³⁹ Amended Frontier Crimes Regulation 2011, ss 38, 39.

⁴⁰ Amended Frontier Crimes Regulation 2011, s 40(a).

⁴¹ Amended Frontier Crimes Regulation 2011, s 55(AAA).

⁴² As per prevailing market value in accordance with the procedure laid down in the Land Acquisition Act of 1894 (as followed in the rest of Pakistan); Amended Frontier Crimes Regulation 2011, s 56.

⁴³ Though enacted, this amendment has not been implemented to date. As of February 19, 2011, no audit of political agents' accounts has been reported having been performed by the Auditor General of Pakistan; Amended Frontier Crimes Regulation 2011, s 58(2).

⁴⁴ In settled district, the functions and powers of the political agent are held by the district coordination officer.

⁴⁵ Councils of elders existed previously in the tribal areas; the concept was not used as part of the 2011 reforms. However, the reference to the councils of elders regarding the interpretation of the tribal customs was new in 2011.

Finally, after 2011 reforms in FCR, one momentous change that has come to the disposal of the people of FATA is that they can now appeal against the decisions of their political agents, and the highest forum under the FCR, the FATA tribunal can now review their decision on the application by any aggrieved person.⁴⁶

E. A Proposal to merge FATA and Khyber Pakhtunkhwa

It is true that these amendments have been enacted; however, sadly, they are not implemented in the true letter of law. If implemented fully, these changes could bring effective, positive and constructive changes to the tribal people of FATA.

Moreover, these changes have been widely criticized as still being deficient. It is argued that even though these amendments have come afar from its preceding versions, yet they do not incorporate the provision whereby the protection of fundamental rights may be extended to the people of FATA. There is a strong argument for providing the people of FATA, the same rights, status and privileges as the other citizens of Pakistan and one way for that to happen is that FATA may be merged into Khyber Pakhtunkhwa (KPK) province. There is a massive support for this idea amongst the people of KPK. Similarly, the people of FATA also wish for the same. Most of them live, study, work and have their businesses in KPK. Their governmental projects are managed by the officers of KPK and many of their FATA officers are generally stationed and trained in KPK. The people of FATA are in fact, heavily invested in KPK and are keen for a merger between FATA and KPK province. Once FATA is merged with Khyber Pakhtunkhwa, it will not only unite *pashtoons* but will also revive a bond of common heritage, culture and language between the people of FATA and KPK- a bond which has been missing for over a century, the revival of which, in return, will further strengthen the state of Pakistan.

⁴⁶ Amended Frontier Crimes Regulation 2011.

Conclusion

The Frontier Crimes Regulation provides administrative and procedural layout for the governance of the region for both of criminal and civil matters. The 2011 amendment to the FCR has now added some laws which were only available to rest of Pakistan, are now made accessible to people of FATA too.⁴⁷ Since February 2013, two items have been on the fore-list of agendas for people of FATA. First, to have right of representation in the Parliament of Pakistan and second to have right of appeal to a High Court which will allow them the protection of fundamental rights as enshrined in the Constitution of Islamic Republic of Pakistan 1973 and guarded by the higher judiciary of the country. Both these objectives can be achieved if FATA is merged with KPK province and the FCR is abolished bringing the entire FATA region under the Constitution of 1973.

⁴⁷ Amended Frontier Crimes Regulation 2011, sch 2.

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