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Inhuman Laws in Frontier Crimes Regulation: A Case Study of FATA

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Abstract:

The Frontier Crimes Regulation popularly known as FCR is the only formal document which deals with the legal-administrative affairs of Tribal Areas since long. This law forms the bulwark of the government machinery in Federally Administered Tribal Areas (FATA) of Pakistan which dates back its origin to the British colonial period in pre-partition India. By the great divide of August 1947, Pakistan inherited these areas as an integral part of its territory. The legal and administrative framework for tribal areas remained the same as designed by British Imperial power during the 19th century for its special interests. The state of Pakistan while keeping intact the colonial legacy also continued the special status of these areas in the post-partition period. Accordingly, the law of the land authorized the central government to administer it directly. The central government thus implemented the same Regulation (FCR) in tribal areas in the coming decades. The present research paper critically observes the prose and cones of FCR in order to know that why this Regulation is often called as black, draconian and inhuman law. It highlights those provisions which voice against human liberty, fundamental and basic human rights recognized by the fundamental law of the land and international humanitarian laws as well.

Keywords: FATA, Pakistan, laws, punishments, constitution, fundamental rights

Frontier Crimes Regulation and its Origin

The British government strengthened their basis of power by establishing a strategic and effective judicial system and an archive of legal record of the necessary documents which ultimately assisted them in tax collection and maintaining public order during the mid-nineteen century in British India. The government was mostly cautious against collective criminal activities and considered it as a direct menace to the empire rather than individual crimes.ⁱ The colonial authorities after thorough visualization drafted and executed a comprehensive system of legal and formal codes in the form of Indian Penal Codeⁱⁱ and Code of Criminal Procedureⁱⁱⁱ in order to rule British India effectively. In the like manner, Criminal Tribes Act was also designed from 1871 through which the government watched, registered and controlled certain tribes. However, the British official authorities realized within a short span of time

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that these formal codes, laws, rules of evidence and fact-finding potentials were insufficient to control lofty velocity of crimes in Peshawar valley in general and particularly in the Afghan border regions set a part as tribal agencies. The colonial authorities quickly differentiated between the peaceful agriculturists residing in the valleys and wild tribesmen of the border areas. The only distinction of the settled district was that surveys of formal tax revenue and settlement had been completed while the rest of the situation and general environ of settled district and tribal belt was almost alike. When the government observed high rate of killings, robberies and violence across the Peshawar valley the government eventually developed the Punjab Frontier Crimes Regulation and implemented it in early 1872.^{iv} After the establishment of North West Frontier Province, the government executed the same Regulation with some minor modifications which was called Frontier Crimes Regulation 1901.^v Hence, the colonial authorities implemented it on 24 April, 1901 as judicial, legal, and administrative system for the North West frontiers of their Indian Empire, bordering Afghanistan.^{vi}

Frontier Crimes Regulation has been promulgated by the British colonial authorities via regulation III of 1901. It is a brief law consisted of seven chapters spread over sixty three sections.^{vii} It is not just a formal document comprising only punishments for different crimes but a comprehensive system of governance and also a major component of administrative system of justice in tribal areas.^{viii} This Regulation has been implemented to protect the interests of British government in North West Frontier Province, Balochistan and in the entire tribal belt. The province of NWFP was fortunate enough which got rid of this harsh and hard Regulation with the promulgation of 1956 constitution while Balochistan was liberated from its rule with the arrival of 1973 constitution. In the like manner, Dir and Malakand were released from its clutches in the same year. But FATA is the only region subservient to FCR even today.^{ix} No other laws, applicable in the rest of the state, are extended to these areas, thus, only this Regulation serves as the supreme law in FATA.^x

Inhuman laws in the Frontier Crimes Regulation

The most critical feature of Frontier Crimes Regulation is the system of ‘collective territorial responsibility’. According to this clause, if a crime initiates anywhere in tribal areas, the whole family or tribe on whose territory the crimes is committed, is held accountable to the political administration. Hence, due to this part of the Regulation an innocent individual may be held liable for the crime of another person. In the same way, under the umbrella of ‘collective territorial responsibility’, the whole family, clan, sub-clan or village may suffer a verity of punishments.^{xi} Even innocent men, women and children become victim of this imperial black law. There are so many instances in which children of about two years of age have been convicted.^{xii} The responsibility to implement the verdict of jirga has been given to the tribe in “non-protected” areas of FATA. Jirga can impose heavy fine on the

accused, expel an individual or a family from the locality, confiscate, destroy or set on fire their homes and property which are the serious measures of punishments.

The idea of ‘collective responsibility’ has been articulated by John Coke^{xiii} who was the officer in-charge of Kohat Pass Afridis. He laid down the procedure in certain critical situation and in case of trouble thus: “to close the Pass at once, seize all the Afridis to be found in the Peshawar and Kohat districts, put the men in jail, sell their cattle, stop all Pass allowances held by the Afridis, and, when the matter is settled, cause all losses to be made good, not from their confiscated allowances, but from the allowances made from the time they may commence.”^{xiv} John Coke’s notion of ‘collective responsibility’ was followed by Herbert Edwardes who applied this idea with more accuracy and perfection when he was posted as Commissioner of Peshawar division during October, 1853. He banned the felonious tribes from the environs of Peshawar and thus made them responsible for the involvement in crimes and criminal activities or their reluctance to exert itself for its punishment and prevention.^{xv} Herbert Edwardes first exercised this imperial strategy against Kukikhil Afridis when a British messenger had been seized and deprived by them of quinine jars. In this way, colonial masters during British Raj and various successive ruling juntas even in the post-partition era constantly utilized this imperial instrument of ‘collective responsibility’ in order to control the tribes.^{xvi}

It is interesting to note that the Regulation authorizes political administration to take actions against any tribe or member of any tribe to detain all or any member of the tribe acting in hostile or unfriendly manner without the prior permission of Commissioner. Beside it, he can order to remove villages, restrict the erection of hamlets and can impose heavy fines on tribesmen in certain circumstances.^{xvii} It is mentioned in the Regulation that political administration may impose fine on communities’ accessory to crime. In this respect section 22 of the Regulation thus states:

“Where, from the circumstances of any case, there appears to be good reason to believe that the inhabitants of any village, or part, of a village, or any of them, have:

- (a) connived at, or in any way abetted, the commission of an offence; or
 - (b) failed to render all assistance in their power to discover the offenders or to effect their arrest;
 - (c) connived at the escape of, or harboured, any offender or person suspected of having taken part in the commission of an offence; or
-

(d) combined to suppress material evidence of the commission of an offence;

The Deputy Commissioner may, with the previous sanction of the Commissioner, impose a fine on the inhabitants of such village or part of a village, or any of them as a whole.”xviii

The political executive in tribal areas can detain any person for up to three year as a preventive measure against murder, or culpable homicide or the dissemination of sedition.xix The tenure of this imprisonment can be increased for another three years by the Deputy Commissioner or Political Agent.xx He can oblige an individual to execute a bond for keeping peace and good behaviour for a period not more than three years.xx1 On the pretext of preventive measures against crimes, he can stop any construction near to border or do away with them on security reason, and halt the construction of or demolish buildings which are used as a meeting point for robbers, house-breakers, thieves etc.xxii

Restricted by this law, the people of FATA can not enjoy the right to appeal, wakeel (the right to legal representation) and daleel (the right to present reasoned evidence) in any court of law.xxiii It was, however, the Commissioner who acted as a revisional court but in 1997 FCR was modified (Section 55-A was added) allowing second appeal in the form of revision before the tribunal comprising secretaries of home and law department and chief secretary of NWFP. All these arrangements seem cosmetic having no positive results for the tribesmen.xxiv In fact, trial under this law do not provide any proper and due opportunity to the accused to put forward his case in a legal way. Deprived of legal representation, the accused don't present evidence or cross-examine witnesses. He is denied of the right of appeal and thus can not plead his case in the High Court of the contiguous province or Supreme Court of the country. The authority to revise the Deputy Commissioner or Political Agent's verdicts rests with the Commissioner who can take action either on his own or in response to a petition by an aggrieved party but he is not allowed “to set aside the finding on any question of fact of a Council of Elders, where such finding has been accepted by the Deputy Commissioner, unless he is of the opinion that there has been a material irregularity or defect in the proceedings or that the proceedings have been so conducted as to occasion a miscarriage of justice.”xxv In case of split decision, the FCR tribunal is the ultimate appellate body consisted of three senior civil bureaucrats.xxvi This judicial body cast its decisive vote in case of split verdict. However, it is quiet clear that both the convicted parties have no option to precede to an impartial court of justice and must rely on bureaucratic judgment.xxvii

FCR puts restriction on the jurisdiction of civil courts in the tribal areas, therefore, neither any court can take notice of the verdict made by political administration nor can an individual challenge such verdicts. The right to appeal to

superior courts has been restricted by this law which states, “except as therein otherwise provided, no decision, decree, sentence or order given, passed or made, or, act done, under Chapter III, Chapter IV, Chapter V or Chapter VI, shall be called in question, or set aside by, any Civil or Criminal Court.”xxviii

Constitutional Anomalies

The constitution of Pakistan although declares that the territories of Pakistan shall comprise among others “the Federally Administered Tribal Areas”xxix presenting FATA as an integral part of the county but the “fundamental human rights”,xxx enshrined in the constitution, do not apply to FATA. All these rights have been rendered null and void by Article 247 of the same constitution so far as the administration of FATA is concerned and explained a different modus operandi for its governance. It debars any act of the parliament to be extended to these areas until the head of the state directs so. He acts like chief executive of these areas and his executive authority is superb. It, however, demonstrates that all the three constitutions (the constitutions of 1956, 1962 and 1973) of Pakistan could not integrate FATA into the national mainstream of the country and carried on the bureaucratic rule instead of constitutional one.xxxi

It goes without saying that since independence successive governments in Pakistan could not mainstream FATA despite of their respective claims for its development. The great constitutional anomaly is that on the one hand Article 1 of the constitution of Pakistan declares these areas as an integral part of the state while on the other hand Article 247 (b) debars the jurisdiction of the parliament by declaring it to be the exclusive preserve of the President to administer its affairs.xxxii Clause 5 of the same Article authorize the President to make rules for the peace and good governance of FATA or any part thereof while clause 6 empower him to abolish a tribal area provided that he determines the opinion of the tribes through a Jirga.xxxiii The only representation the people of FATA have is voting to elect twelve representatives to the National Assembly under Article 51(3) but as per Article 247(3) of the constitution none of the laws made by the parliament apply to FATA, unless ordered by the President of Pakistan.xxxiv Clause 3 of Article 247 declares that “No Act of Majlis-e-Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of Majlis-e-Shoora (Parliament) or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situate, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction”.xxxv Hence, it is ironical that

political representatives elected from FATA to the parliament can not make legislation regarding their own areas but can take part in the legislative processes for the rest of the state.^{xxxvi} In a nutshell, it means that members of the parliament even those elected on party basis representing the people of these areas in a true sense would not be permitted to frame or modify the laws for FATA.^{xxxvii}

Fundamental human rights enshrined in the constitution of Pakistan are not fully applicable to these areas. The Supreme Court of Pakistan is barred from exercising jurisdiction in these areas. It cannot take suo motu action on the sufferings of tribal people. They can not knock at the door of the court to undo the injustice of political administration. With the development of law the concept of judicial review against administrative action has been introduced. The main philosophy behind this concept is to keep check on the arbitrary use of executive power. But this concept of check and balance is nonexistent in these areas in the real sense. ^{xxxviii} Clause 7 of the same Article states that neither the Supreme Court nor any High Court shall exercise any jurisdiction under the constitution in relation to a tribal area unless the parliament modifies the law. Even the Non-Muslims have been safeguarded by the constitution of Pakistan but the fundamental rights of the poor tribesmen are denied who are earnestly called the sword arm of Pakistan.^{xxxix}

Conclusion

Apparently it seemed that this law was executed by the government as an instrument to check crimes and criminal activities but actually the British government in India exploited it as a tool of forward policy in India's North West particularly in tribal areas which furthered its imperialistic designs towards Central Asia and countered the Russian approach as well. The government thus kept these areas untouched and adopted a policy of non-intervention into the traditions of tribal people. By keeping status quo in these areas, the British government kept it away from human rights principles, reformist political activities leading to individual freedom, progress and development. By virtue of unlimited powers in the hands of political administration under FCR, the people of FATA can neither enjoy human rights nor can they claim any other status, privilege, position conferred upon other citizens of Pakistan. Their arms have been stapled particularly by the cruel, illogical and irrational provisions of this law due to which it is often referred as black, draconian and inhuman law.

References

ⁱ Robert Nichols, ed. *The Frontier Crimes Regulations: A History in Documents*, (Karachi: Oxford University Press, 2013), p. x.

ⁱⁱ The Indian Penal Code was first drafted by the 1st Law Commission under the chairmanship of Thomas Babington Macaulay. It was mainly based on the law of England and guidelines were taken from Napoleonic Code and also from Edwards Livingston's Louisiana Civil Code of 1825. This code was finally written in 1860, therefore, it is referred as Indian Penal Code 1860. It was, however, implemented on 1st January, 1862 in India by the British colonial government. Being a comprehensive code of India, it covers all aspects of criminal law. It has been inherited by the state of Pakistan in the post-partition period and now it is called Pakistan Penal Code. It has since been modified several times and is now supplemented by other criminal provisions as well. Government of Pakistan, *The Pakistan Penal Code, 1860 (XLV of 1860): As Modified Upto [sic] the 3rd February 1980*, (Islamabad: Government Printing Press, 1980).

ⁱⁱⁱ The Code of Criminal Procedure of 1861 was the most important legislation on procedure for the administration of substantive criminal law in British India. When the British government took direct control of India after the war of 1857, they passed the Criminal Procedure Code from the British Parliament in 1861.

^{iv} Nichols, ed. *The Frontier Crimes Regulations: A History in Documents*, pp. x-xi.

^v *Ibid*, p. xi.

^{vi} The North-West frontiers of British India were predominantly inhabited by majority of Pakhtun population. "Summary of 2011 Amendments to the Frontier Crimes Regulation (FCR)" <http://www.fatareforms.org/summary-of-2011-amendments-to-the-frontier-crimes-regulation/> accessed on 30 July 2013, n.p.

^{vii} Muhammad Maqbool Khan Wazir, "FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law" in *Central Asia*, No. 61, Winter 2007, Area Study Centre (Russia, China & Central Asia) University of Peshawar, p. 177.

^{viii} Mahmood Shah, "FCR and FATA Reforms" <http://dawn.com/2011/04/05/fcr-and-fata-reforms/> accessed on 11 June, 2012, Also see Maqbool, "FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law" in *Central Asia*, No. 61, Winter 2007, p. 175.

^{ix} Latif Afridi, "Human Rights and Discriminatory Laws in FATA" in *The Frontier Post*, Peshawar, 12 December, 1993.

^x Frontier Crimes Regulations 1901 serves all purposes both of procedural and substantive law in FATA. The Civil Procedure Code (C.P.C), Criminal Procedure Code (Cr.P.C) and other laws of evidence functioning in the country are not

applicable in FATA. Thus, no lawyer can defend an accused at a trial. Maqbool, "FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law" in *Central Asia*, No. 61, Winter 2007, p. 183.

^{xi} Government of North-West Frontier Province Law Department. *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified upto 31 October, 1971]*, Chapter IV, pp. 10-11.

^{xii} Society for the Protection of the Rights of the Child (SPARC) in its annual report of 2004 described that almost seventy children had been detained under this law. Abdullah Khoso, "Pakistan: Human Rights – Infringing Human and Child Rights" n.p, <http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-047-2010> accessed on 12 January, 2013. Also see Muhammad Hamid Hussain, "Frontier Crimes Regulation: A Case Study of Reforms Process" in *TIGAH* Vol. 1, July 2012, FATA Research Centre, Islamabad, p. 99.

^{xiii} Major General John Coke (1806-1897) was appointed as Deputy Commissioner of Kohat district in 1850 with both civil and military powers of the district on the frontier of Afghanistan at a time when security situation of Kohat district was the worst in Punjab. The hill tribes were making constant raids on the villages. G.B. Malleson writes about Coke as follows: "Colonel Coke was one of the best known and most distinguished officers of the Punjab Frontier Force. To a thorough knowledge of his profession he added an acquaintance with the natives of India not to be surpassed, and a rare power of bending them to his will. He had been with Sir Charles Napier in Upper Sind, with Gough at Chilianwala and Gujrat, with Gilbert in pursuit of the Sikhs. After the conclusion of the second Sikh War, he served continuously, up to the outbreak of the Mutiny, on the frontier. There his name became a household word. Scarcely an expedition was undertaken against the wild border tribes but Coke bore a part in it. Twice was he wounded ; but his unflinching demeanour, his power of leadership, whilst it gained the supreme confidence of his men, extorted respect and admiration from his enemies. Wherever he might, be his presence was a power." George Bruce Malleson, *History of the Indian Mutiny, (1857-1859) Commencing from the Close of the Second Volume of Sir J. Kaye's History of the Sepoy War*, (USA: Cambridge University Press, n.d).

^{xiv} Sarfraz Khan, "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia" in *Eurasia Border Review*, Vol. 1, Spring 2010. p. 68.

^{xv} Herbert Benjamin Edwardes, *Memorials of the Life and Letters of Major General Sir Herbert B. Edwardes*, Vol. I, arranged by Emma Sidney Edwardes (London: Kegan Paul, Trench, 1886) p. 230.

^{xvi} This clause of the Frontier Crimes Regulation (1901) i.e. 'collective territorial responsibility' proved to be the corner stone of political administration across tribal areas and this principle is presumed to be enshrined in the customs and usage prevailing in the tribal belt. Sarfraz Khan, "Special Status of FATA: Illegal

Becoming Licit” in *Central Asia*, No. 63, Winter 2008, Area Study Centre (Russia, China & Central Asia) University of Peshawar, p. 21.

^{xvii} Government of North-West Frontier Province Law Department. *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified upto 31 October, 1971]*, Chapter IV, Section 21, p. 10.

^{xviii} *Ibid*, Chapter IV, Section 22, p. 10. Also see Maqbool, “FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law” in *Central Asia*, No. 61, Winter 2007, p. 186.

^{xix} Government of North-West Frontier Province Law Department. *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified upto 31 October, 1971]*, Chapter V, Section 40, pp. 16-17.

^{xx} *Ibid*, Chapter V, Section 46, pp. 19-20.

^{xxi} *Ibid*, Chapter V, Section 40, pp. 16-17.

^{xxii} *Ibid*, Chapter V, Section 31-34, pp. 13-14.

^{xxiii} Abid Mehsud, “Frontier Crimes Regulations: A Black Law” in *The Frontier Post*, Peshawar, 23 June, 2012.

^{xxiv} Since the inception of Pakistan, the Frontier Crimes Regulation (1901) has not been amended except for few minor changes. It was President Farooq Ahmad Khan Laghari who amended this Law in 1997 on the forceful demand of tribal people and incorporated 55-A by virtue of which an FCR Tribunal has been established. Maqbool, “FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law” in *Central Asia*, No. 61, Winter 2007, p. 191. Also see Afridi, “Human Rights and Discriminatory Laws in FATA” in *The Frontier Post*, Peshawar, 12 December, 1993.

^{xxv} Government of North-West Frontier Province Law Department. *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified upto 31 October, 1971]*, Chapter VI, Section 50, (Peshawar: Government Stationary and Printing Department N.W.F.P, 1973), p. 21.

^{xxvi} The FCR Tribunal comprises the following three persons, (i) Provincial Law Secretary, (ii) Home Secretary, and (iii) Chief Secretary of Khyber Pakhtunkhwa Province. Maqbool, “FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law” in *Central Asia*, No. 61, Winter 2007, p. 176.

^{xxvii} *Ibid*.

^{xxviii} Government of North-West Frontier Province Law Department. *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified upto 31 October, 1971]*, Chapter VII, Section 60, p. 23.

^{xxix} Government of Pakistan, *The Constitution of the Islamic Republic of Pakistan, 1973*, (Islamabad: Ministry of Law and Parliamentary Affairs, 1973), Part-I, Article 1, Clause 2.

^{xxx} The fundamental human rights include, security of person, prohibition of forced labour, slavery etc, protection against retrospective punishments, safeguard against double punishments and self incrimination, inviolability of dignity of man, freedom of movement, freedom of assembly, freedom of association, freedom of trade, business or profession, freedom of speech, freedom to profess religion and to manage religious institutions, protection of property, equality of citizens before law, and preservation of language, script and culture. *Ibid*, Part-II, Chapter- 1, Article 2-A and Article 8 to Article 28.

^{xxxii} Maqbool, “FATA Under FCR (Frontier Crimes Regulation): An Imperial Black Law” in *Central Asia*, No. 61, Winter 2007, p.179.

^{xxxiii} Ayaz Wazir, “Let them Decide” in *The News*, Rawalpindi, 22 June 2013.

^{xxxiii} Government of Pakistan, The Constitution of the Islamic Republic of Pakistan, 1973, Article 247 Clause 5 and 6.

^{xxxiv} Usama Khilji, “Celebrating Independence in FATA” in *Daily Times*, Lahore, 14 August 2012.

^{xxxv} Government of Pakistan, The Constitution of the Islamic Republic of Pakistan, 1973, Article 247 Clause 3.

^{xxxvi} Hussain, “Frontier Crimes Regulation: A Case Study of Reforms Process” in *TIGAH*, Vol. 1, p. 110.

^{xxxvii} Ayaz Wazir, “Is FATA a Part of Pakistan” in *The News*, Rawalpindi, 25 March 2013.

^{xxxviii} Waseem Ahmad, “FATA’s Administrative Anomalies” in *Pakistan Observer*, Islamabad, 21 October 2012.

^{****xxxix} Harris Khalique, “Our Tribal Areas” in *The News*, Rawalpindi, 10 October 2012.
