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C O N T E N T S

|    |  |     |
|----|--|-----|
| 1  | Role of Military as the Guardian of Democracy in Pakistan<br><i>Iram Khalid and Zahid Yaseen</i>   | 1   |
| 2  | An Analytical Study of Criminal Justice System of Pakistan (with special reference to the Province of Punjab)<br><i>Sardar Hamza Ali</i>                     | 17  |
| 3  | Pakistan as a Frontline State in War Against Terrorism: Cost & Benefit Analysis<br><i>Lubna Sunawar</i>  | 43  |
| 4  | An Analysis of the Relationship Between Local and Provincial Governments in Pakistan (2001-2009)<br><i>Zahoor Ahmad, Iram Khalid &amp; Muhammad Muzaffar</i> | 63  |
| 5  | Does Human Development demand an independent policy in Pakistan?<br><i>Mariam Ahmed</i>  | 75  |
| 6  | Political Economy, Concept and Rationale of Winding-up of Companies and Corporate Sector<br><i>Zia Ullah Khan</i>  | 87  |
| 7  | New Threats and Challenges to Federalism: In Pakistan (A Socio-Political Scenario)<br><i>Aamir Hanif Raja &amp; Syed Shahbaz Hussain</i>                     | 103 |
| 8  | Security Dilemma in South Asia<br><i>Umbreen Javaid and Mariam Kamal</i>   | 115 |
| 9  | The Kargil Crisis 1999 and Pakistan's Constraints<br><i>Zafar Mubeen Adnan</i>   | 129 |
| 10 | Land of Balochistan: A Historical Perspective<br><i>Gulshan Majeed</i>   | 153 |
| 11 | The Resonance of "Islam Versus the West" in Pakistan's Foreign Policy – 1947 to 1957<br><i>Imran Syed</i>  | 167 |
| 12 | New Institutionalism: Identifying Informal Institutions in the Political Process of Pakistan<br><i>Muhammad Ayub Jan and Syed Sami Raza</i>                  | 181 |
| 13 | Pakistan-Afghanistan Relations Post 2014: Impacts on Pakistan's Security<br><i>Ahmed Ali Naqvi</i>   | 197 |
| 14 | Governance Reforms in Federally Administered Tribal Areas (FATA) of Pakistan: The Past and Present<br><i>Altaf Ullah</i>                                     | 215 |
| 15 | Spanish "Politically Correct" Movement: Reasons for Failure<br><i>Maria Isabel Maldonado Garcia</i>  | 237 |
| 16 | China – Pakistan Future Prospects and their Strategic Compulsions<br><i>Umbreen Javaid</i>   | 253 |

## **Governance Reforms in Federally Administered Tribal Areas (FATA) of Pakistan: The Past and Present**

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### **Abstract**

*Governance of Federally Administered Tribal Areas of Pakistan is different in its nature and essence than other parts of the state. The theoretical framework for the governance of these areas has been enshrined in the historical regulation called Frontier Crimes Regulation (FCR) designed and implemented by the colonial government in British India during 19<sup>th</sup> century in order to achieve its specific ends. FATA became an integral part of Pakistan immediately after the great divide of August, 1947. The newly established state of Pakistan co-opted the same Regulation to govern these areas directly. Despite of so many shortfalls and drawbacks it was executed to maintain status quo in tribal areas of the country. Since then the state could neither fully integrate these areas in its fold nor could properly introduce such reforms which could bring tribal areas at par with other parts of the country. The legal-administrative mechanism of FATA which bestows more powers in the hands of political administration under FCR is basically responsible for the miseries of its downtrodden populace and the miserable condition of these areas as well. The present research endeavour seeks to observe whether the proverbial notion of “power corrupts and absolute power corrupts absolutely” is applicable to FATA or not. It also highlights that how and to which extent the recent governance reforms introduced via Frontier Crimes (Amendment) Regulation 2011, could curtail the power of political administration and safeguard rights of the people of FATA.*

**Key Words:** FATA, Pakistan, Reforms, FCR, Administration, Constitution

### **FATA of Pakistan: A Brief Introduction**

Federally Administered Tribal Areas extending over 27220 sq. km along Pak-Afghan border covers 3.4 per cent of Pakistan's land area. This mountainous land is inhabited by a majority of *pakhtun* population. It is surrounded by the province of Khyber Pakhtunkhwa in the north and east, the province of Balochistan in the south, the province of Punjab in the south-east and in the west by the state of Afghanistan (*IPRI Factfile*, 2008, p. 15). It is thus connected in the north with the district of Lower Dir of Khyber Pakhtunkhwa, whereas in the east with the districts of Bannu, Dera Ismail Khan, Karak, Kohat, Lakki Marwat, Malakand, Nowshera, Charsadda and Peshawar. In the southeast, FATA is physically linked with the district of Dera Ghazi Khan in the

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Punjab province, while in the south it joins the districts of Zhob and Musa Khel of Balochistan province (*Ibid*, p. 21). Pak-Afghan border also known as Durand Line lies to the west of FATA.

FATA is consisted of seven political agencies and six tribal pockets called 'Frontier Regions'. The political agencies are, Bajaur, Khyber, Kurram, Mohmand, North Waziristan, Orakzai and South Waziristan agency. Whereas Frontier Regions are in the district of Bannu, Dera Ismail Khan, Kohat, Lakki Marwat, Peshawar and Tank. With a minor exception of Orakzai agency, the rest the political agencies have common border with the state of Afghanistan (GOP, 2006, p. 3). To the north and west, FATA and the province of Khyber Pakhtunkhwa collectively join a chain of nine provinces in Afghanistan from north to south i.e. Nuristan, Kunar, Nangarhar, Khost, Paktika, Zabol, Kandahar, Helmand and Nimruz, which are predominantly inhabited by *pakhtun* ethnic group (Shuja, 2009, p. 2). The census report of Pakistan 1998 demonstrates 3.138 million population of these areas which makes 2.4 per cent of the total population of the country. But the current estimate shows its population almost 3.5 million. FATA is inhabited by majority of *pakhtun* tribes with a limited number of other religious groups such as Sikhs and Hindus (Sarfraz: 2008, pp. 8-9).

### **Origin of the Frontier Crimes Regulation (FCR)**

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 of 19<sup>th</sup> 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 (Nichols, 2013, p. x). The colonial authorities after thorough visualization drafted and executed a comprehensive system of legal and formal codes in the form of Indian Penal Code and Code of Criminal Procedure 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 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 in the Afghan border regions set a part as tribal agencies in particular. The colonial authorities quickly differentiated between the peaceful agriculturists residing in the valleys and wild tribesmen of the frontier border. 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

## ***Governance Reforms in Federally Administered Tribal Areas***

almost alike. When the government observed high rate of killings, robberies and violence across Peshawar valley, the government eventually developed the Punjab Frontier Crimes Regulation and implemented it in early 1872 (*Ibid*, pp. x-xi). 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 (*Ibid*, p. xi). Hence, the colonial authorities implemented it on 24 April, 1901 as an administrative, judicial, legal, and governance system for the North West frontiers of their Indian Empire, bordering Afghanistan (Summary, 2011, n.p).

Frontier Crimes Regulation has been promulgated by the British colonial authorities via regulation III of 1901. FCR is a brief law consisted of seven chapters spread over sixty three sections (Wazir, 2007, p. 177). 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 (Shah, 2011, Wazir, 2007, p. 175). 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 (now Khyber Pukhtunkhwa) 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 (Afridi, 1993). 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 (Wazir, 2007, p. 183).

### **FATA and Its Administrative Mechanism**

The effective control of north western frontiers of the British Indian Empire was an imperative colonial policy which protected imperial holdings in the region and served as bulwark against the Russian expansionism in Central Asia. Although it was difficult for the British government to fully establish its writ in these areas yet they monitored and administer it through their appointed agents and tribal elders. So far as the internal affairs of these areas were concerned, the masses were independent in their local matters due to strong prevailing tribal codes, customs and traditions. However, the government oversaw the overall security and external affairs of these areas for the sake of their vested interests (Rakisits, 2008, p. 1, *IPRI Factfile*, 2008, p. 16).

Since the occupation of Sind and Punjab respectively in 1843 and 1849, the British colonial masters had to oversee the plains of the subcontinent towards the north west. For this purpose they established five settled districts i.e.

Bannu, Dera Ghazi Khan, Dera Ismail Khan, Kohat and Peshawar as distinct from the tribal areas. A dual function of administering the affairs of these districts as well as controlling the tribes adjacent to these five districts was thus the responsibility of British government in Punjab (Haq, 2012, n.p). During the course of administering the tribal belt, the British administrative authorities reached to the conclusion that the available armed forces could not effectively defend the vast and rough tribal belt so they had to depend on the political administration of the tribes. It was thus decided that the central government would itself directly keep an eye on the frontier policy and administration instead depending on the Punjab provincial government. In this context, the system of political agencies was launched in the tribal belt (*Ibid*).

The British administration enforced a series of special laws i.e. Frontier Crimes Regulations, for the tribal areas distinct from the rest of civil and criminal procedures prevailing in the British India during 1871-1876. With the passage of time, these regulations based on the concept of 'collective territorial responsibility' and which established a *Jirga* for the dispute resolution across the tribal belt, were ultimately considered as inadequate. The year 1901 thus witnessed two major changes in the colonial administration i.e. the issuance of Frontier Crimes Regulation (1901) and the creation of North West Frontier Province. The FCR of 1901 expanded the scope of the previous regulations by providing extensive powers incorporating judicial authority to the government officials (*IPRI Factfile*, 2008, pp. 17-18). The territories that constitute nowadays Khyber Pakhtunkhwa province was first administered by a chief commissioner as an integral part of Punjab province. It was, however, declared a full-fledged province in 1901 with settled as well as tribal areas. The governor of the province had to administer both the settled and tribal areas and was directly responsible to the Governor General of India. In the post-partition era the same status of the administration was retained with the Governor Khyber Pakhtunkhwa reporting directly to the Governor General and now to the President of the state (Wazir, 2007, 174). The administrative structure of British India demonstrated that districts were the administrative units in settled areas/districts on the hand whereas political agencies in the tribal areas on the other hand. Deputy Commissioner in the settled districts and Political Agent in the political agencies were at the helm of affairs in their respective areas in this parallel system of administration across the Empire (Haq, 2012, n.p).

Administratively, Federally Administered Tribal Areas has been divided into two categories i.e. 'protected areas' and 'non-protected areas'. The former are directly governed by the central government via its political appointees called political agents while the latter are administered indirectly by the local tribes (Ghafoor, 2005, p. 13). Being a federal and at times provincially appointed

## ***Governance Reforms in Federally Administered Tribal Areas***

official, the political agent closely watches the administration of the concerned political agency with maximum power and executive authority in hand. He exercises a blend of executive, judicial and revenue powers and also maintains law and order situation and suppresses crimes and criminal activities in the tribal agency. Keeping all these responsibilities intact, he is supported by *khassadars*, levies (tribal militias) and paramilitary forces that work under military command (Rakisits, 2008, p. 2, Shinwari, 2010, p. 7). The administrative structure in each political agency further reveals that a Political Agent is further assisted by an assistant political agent and officer in-charge of specific sub-division. At local level political *tehsildar*, *naib tehsildar* and political *moharir* performs their administrative functions. The administrative affairs of Frontier Regions of FATA have been overseen by the Deputy Commissioners of the respective districts. All these officials perform their respective duties under the overall administrative control of Governor's Secretariat FATA (Sarfranz, 2008, p. 21). The tribes are internally free to regulate their own affairs keeping in mind their tribal codes (unwritten), customs and traditions. They also essentially take care of the principle of 'collective responsibility' for the deeds and actions of their individual family or tribe members and 'territorial responsibility' of those areas which are given under their control (GOP, 2006, p. 5).

The Ministry of States and Frontier Regions (SAFRON) at federal level has been assigned the task to keep a closed watch on certain issues of management, development and other related matters across FATA (Ghafoor, 2005, p.13). However, SAFRON, being a federal ministry, is accountable to the elected Prime Minister and national assembly of Pakistan which is almost immaterial in policy execution in FATA and works mostly as a channel of steering federal funds. The real authority is thus rests with the head of the state (Wazir, 2007, p. 174). Being a representative of the President, the Governor Khyber Pakhtunkhwa province performs his functions on behalf of the central government and oversees the affairs of these areas through FATA Secretariat located at provincial capital Peshawar (Ghafoor, 2005, p. 13).

### **Political Administration, *Jirga* and FCR**

Frontier Crimes Regulation, *jirga* system and political administration are the three essential components of administrative system of justice around which the whole fabric of FATA's political, administrative and judicial structure revolve (Khan, 2008, p. 111). Being an indigenous institution, *jirga* plays an important role in resolving different disputes such as personal, public, inter-tribal conflicts and quarrels among the contending parties in tribal areas in order to provide speedy justice to the people. By incorporating the institution of *jirga* in FCR, the colonial masters apparently demonstrated that they had

proper regard for tribal feelings and sentiments but in fact it was an attractive diplomacy as they retained the real authority in their own hands through political administration which was not bound to the decision of *jirga*.

The Deputy Commissioner or Political Agent may by law refer any civil or criminal case to the council of elders (*jirga*) nominated by the political administration in order to investigate into the matter. It, therefore, hears both the contending parties, examines evidence, carries out further investigations and inquiries if requires and finally issues it finding. The finding or decision of *jirga* is examined by the political administration and thus, the Deputy Commissioner or Political Agent may:

- (a) "Remand the case to the Council for a further finding; or
- (b) Refer the case to a second Council; or
- (c) Refer the parties to the "Civil Court; or
- (d) Pass a decree in accordance with the finding of the Council, or of not less than three-fourth of the members thereof, on any matter stated in the reference; or
- (e) Declare that further proceedings under this section are not required" (GoNWFP, 1971, p. 5).

The above instance of civil case demonstrates that real powers always remain with the political executive whose verdict is irrevocable and can not be challenged in any court of justice except an appeal to the Commissioner and thereafter plead to the tribunal against the decision of Commissioner to review the decision. In this way the criminal cases also go through such process (Wazir, 2007, p. 184). About the status of *jirga*, a well-known writer Spain states, "The *jirga* was beyond doubt a *pathan* institution, the form it took under the Frontier Crimes Regulation was far cry from its natural state. In any event, the decision of *jirga* was primarily recommendatory, and the actual acquittal or conviction and sentence were formalized in a decree by the Deputy Commissioner" (Spain, 1963, pp. 145-146).

### **Irrational and Illogical Provisions in FCR**

The most critical feature of Frontier Crimes Regulation is the system of 'collective territorial responsibility'. According to this system, 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 (GoNWFP, 1971, pp. 10-11). Even innocent men,



## ***Governance Reforms in Federally Administered Tribal Areas***

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 (Khosro, 2010, n.p., Hussain, 2012, p. 99). 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 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” (Sarfranz, 2010, p. 68). 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 (Edwardes, 1886, 230). 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 (Sarfranz, 2008, p. 21).

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 (GoNWFP, 1971, p. 10). 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” (GoNWFP, 1971, p. 10, Wazir, 2007, p. 186).

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 (GoNWFP, 1971, p. 16-17). The tenure of this imprisonment can be increased for another three years by the Deputy Commissioner or Political Agent (*Ibid*, pp. 19-20). He can oblige an individual to execute a bond for keeping peace and good behaviour for a period not more than three years (*Ibid*, pp. 16-17). 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 (*Ibid*, pp. 13-14).

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 (Mehsud, 2012). 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 in case of difference of opinion between the two, chief secretary of Khyber Pukhtunkhwa would join the tribunal and the case would be decided by majority opinion. It seems that all these arrangements were cosmetic having no positive results for the tribesmen (Wazir, 2007. p. 191, Afridi, 1993). 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

### ***Governance Reforms in Federally Administered Tribal Areas***

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” (GoNWFP, 1971, p. 21). In case of split decision, the FCR tribunal is the ultimate appellate body consisted of three senior civil bureaucrats (Wazir, 2007, p. 176). 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 (*Ibid*).

FCR put 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 in, or set aside by, any Civil or Criminal Court” (GoNWFP, 1971, p. 23).

### **FATA of Pakistan: The Post Partition Scenario**

The dawn of 14 August, 1947 witnessed the origin of a new state i.e. Pakistan, in South Asia when the British colonial government ultimately winded up its long term rule over the Sub-continent. From the day first, the tribal areas became an integral part of Pakistan and the Governor General of the state directly assumed the responsibility of these areas. Keeping in view the prevailing situational phenomenon at that time, it was decided by the Pakistani state authorities not to alter the status of these areas for the time being. The tribal population was, therefore, left undisturbed and thus the politico-administrative structure of these areas, designed by the colonial masters, remained intact. The tribal people declared their allegiance and support to Pakistan through open *jirgas* organized by the Governor of the North-West Frontier Province, Sir George Cunningham during November, 1947 (Shah, 2012, p. 7).

The first Governor General of Pakistan, Quaid-i-Azam Mohammad Ali Jinnah came to the NWFP (now Khyber Pukhtunkhwa) on an official visit in April 1948. During his stay at Government House Peshawar, he met tribal representatives and *Maliks* and also addressed to the tribal *jirga* there. He expressed in his speech about the intention of central government regarding the future of tribal people, “Pakistan has no desire to unduly interfere with your internal freedom. On the contrary, Pakistan wants to help you and make you, as far as it lies in our power, self-reliant and self-sufficient and help in your

educational, social and economic uplift, and not be left as you are dependent on annual doles, as has been the practice hitherto which meant that at the end of the year you were no better off than beggars asking for allowances, if possible a little more. We want to put you on your legs as self-respecting citizens who have the opportunities of fully developing and producing what is best in you and your land” (*Quaid-i-Azam Speeches and Statements*, 1989, p. 238). In respect of the status of tribal areas he said, “You have also expressed your desire that the benefits, such as your allowances and *khassadari*, that you have had in the past and are receiving, should continue. Neither my Government nor I have any desire to modify the existing arrangements except in consultation with you so long as you remain loyal and faithful to Pakistan” (*Ibid*, 239).

Being a charismatic leader and founding father of the nation, the Quaid was kind enough towards the people of tribal belt of Pakistan. During his visit to the tribal areas he declared that the valiant and brave tribesmen gave sacrifices for the creation of Pakistan. Hence, they would have equal rights of citizenship in Pakistan (Khan, 2012, p.115). After his demise, the succeeding ruling elites in the country could not bring any positive change in the state policy regarding tribal areas and the colonial structure of administration was thus remained in practice as a legacy of the British *Raj*. In the like manner, the coming decades witnessed the same situation in these areas where the *Maliks* and *Lungi* holders represented the local populace and enjoyed their previous position. Consequently, no political, electoral, administrative or judicial and constitutional or legislative reforms have been introduced in the tribal belt (Shah, 2012, p. 8).

### **Constitutional Status of FATA**

With the promulgation of Pakistan’s first constitution in 1956, the county came under the umbrella of parliamentary form of government but it couldn’t introduce any change in the political-administrative system of tribal areas (Bangash, 1996, p. 339). The second fundamental law of the land, formulated under the supervision of military government of Ayub Khan, keeping in view the peculiar situation of tribal areas kept it outside the domain of both central and provincial laws. It authorized the governor of the concerned province wherein tribal areas were located to make special legislation for these areas. The power of making, amending and repealing any regulation or amending any provincial or central law for the entire or any particular part of these areas was given to the governor by the head of the state (GoP, 1962, Article 223).

It seems that no major change has been introduced in the politico-administrative set up of FATA by the fundamental laws of the land since the

## ***Governance Reforms in Federally Administered Tribal Areas***

inception of the county. Even the most popular fundamental law i.e. the 1973 constitution of Pakistan, didn't merge these area into the mainstream of the country and kept it away from the rest of the Pakistani society on the pretext of its special status. Dealing with tribal areas, Article 247 of the constitution declares that FATA comes under the executive authority of the federation of Pakistan. The same Article and SRO 109 authorizes the head of the state to exercise administrative power in FATA. On behalf of the President, the Governor of the adjacent province i.e. Khyber Pakhtunkhwa, acts as his agent exercising executive authority in these areas.

Although the constitution declares that the territories of Pakistan shall comprise among others "the Federally Administered Tribal Areas" (GoP, 1973, Article 1) presenting FATA as an integral part of the county but the "fundamental human rights" (*Ibid*, Article 2-A and Article 8 to 28), 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 debar 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 of Pakistan could not integrate FATA into the national mainstream of the country and carried on the bureaucratic rule instead of constitutional one (Wazir, 2007, p. 179). Indeed, the government could not introduce considerable modifications in FCR in the post-partition period. Only few minor and modest changes have been incorporated in the text of the Regulation but its substance fundamentally remained the same (Summary, 2011, n.p.).

### **The Dawn of 21<sup>st</sup> Century and FATA**

In the first decade of the 21<sup>st</sup> century, the initiative to launch a reform process in the century old law has been taken by Musharraf's regime. In April 2005, the Governor of Khyber Pakhtunkhwa, Mr. Khalilur Rahman constituted FCR Reforms Committee under the chairmanship of Justice (Rtd) Mian Mohammad Ajmal. The composition of the Committee ensured participation from different walks of life as it accommodated tribal elders, serving and retired civil servants, lawyers, a FATA parliamentarian and journalist (Yusufzai, 29 August, 2011, Khan, 2012, p. 118). While inaugurating its work on the assigned term of reference i.e. to recommend necessary modifications in FCR after soliciting public opinion across FATA, the Committee visited FATA and conducted town-hall meetings attended by people belonging to all walks of life. The Committee elicited public opinion and sought their views on FCR. It

also took the opinion of experts, intelligentsia, lawyers, intellectuals, political workers, civil society groups, and parliamentarians from FATA as well.

The FCR Reforms Committee after thorough deliberations and discussion reached to the conclusion that majority of the stakeholders wished for major modifications in FCR in order to make it a humane law whereas some of the beneficiaries under this law wished to maintain the *status quo* (Yousafzai, 16 August, 2011). Although the Committee submitted its recommendations to the government yet the state authorities particularly the new Governor of Khyber Pakhtunkhwa, Lt. Gen. (Retired) Ali Mohammad Jan Aurakzai didn't pay heed to the proposals of the Committee apparently due to the prevailing fragile security environment in FATA. The process of reforms in the century old law was thus put on the back burner.

However, Mr. Owais Ahmad Ghani was sworn in as the next Governor of Khyber Pakhtunkhwa province on 7<sup>th</sup> January, 2008. He invited Mr. Ajmal to brief him on the recommendations drawn by the FCR Reforms Committee. This is how the process of reforms in FCR once again took momentum and after the general elections of 2008, the PPP government immediately established a Cabinet Reforms Committee under the chairmanship Mr. Farooq H. Naek, Federal Minister for Law, to observe the modifications proposed by the previous Committee (Khan, 2012, pp. 118-119). The Cabinet Reforms Committee presented a number of modifications in FCR. It suggested that the title of the Frontier Crimes Regulation should be replaced by Federally Administered Tribal Areas (FATA) Regulation, 2008. A judicial officer i.e. a district and session judge should be appointed to hear appeals against the decisions of Political Agents. A three member FATA Tribunal to be headed by a retired judge of High Court and having two other members i.e. a lawyer and a bureaucrat would be formed with final appellate authority against the decisions of judicial officer. The authority of Political Agent to nominate *Jirga* should be abandoned and the concerned parties would select members of a *Jirga* for arbitrating a case. The discretionary power given to Political Agent by Section 40 of FCR under which he can arrest a person for two years without giving any reason, should be amended and the accused should be brought before a court of law within twenty four hours. The Committee also proposed that children, women and aged ones should be debarred from the collective responsibility clause of this law (*Daily Times*, 30 August, 2008).

Similar efforts were made in the year 2009 when the central government announced reforms to FCR via FATA Regulation 2009. This regulation gave some basic rights to the common people of FATA such as if an individual has been accused of a certain crime. He would be presented before an Assistant Political Agent within twenty four hours of his arrest. His case would be

## ***Governance Reforms in Federally Administered Tribal Areas***

referred to *Jirga* within ten days and within ninety days this body (*Jirga*) would submit its findings to the government authority. The 'collective responsibility clause' was modified to the effect that the whole tribe would not be responsible for the wrongdoing of a member or few members of a tribe. Children under sixteen years and aged ones more than sixty five years would be excluded from this law (Khan, 2012, pp. 120-121). It also envisaged an appellate tribunal and audit of funds received and disbursed by the Auditor General of Pakistan (ICG Asia Report, 2009, p. ii). Although all these reforms and changes announced were formally notified yet still these were not considered sufficient because it could not fulfill legal vacuum in FATA. The people in general and the residents of FATA in particular called for further reforms in FCR while some quarters wanted the total eradication of this law.

### **Frontier Crimes (Amendment) Regulation 2011**

However, meaningful reforms in the legal-administrative structure of Federally Administered Tribal Areas of Pakistan have been carried out by the PPP government when President Asif Ali Zardari signed Frontier Crimes (Amendment) Regulation 2011 along with the Extension of Political Parties Order to FATA on August 12, 2011. This is the first ever substantive reforms package introduced by the government in one hundred and ten years history of FCR. The Presidential Order has brought considerable changes in the old version of this law including modifications, substitutions, insertions and omissions as well (Hussain, 2012, p. 101, Summary, 2011, n.p). The major and most significant characteristics of Frontier Crimes (Amendment) Regulation 2011 would be described in the following lines.

### **Legal Protection**

The amended version of Frontier Crimes Regulation reduces the severity of the "collective responsibility" provision by debarring the detention of women and children under age i.e. below sixteen years, and aged persons above sixty-five years. The imprisonment of an entire tribe under the same provision has been relaxed in a way that in such a case of investigation the male members of a family must be arrested first, followed by the sub-tribe and then by other sections of the tribe (FCR, 2011, Section 21(c) (iii) and 22 (d)). It provides some human rights to the residents of tribal belt. The tribal people can not be detained for indefinite period of time and they would have the right to appeal in FATA Tribunal (Taj, 2011). It is now obligatory for the detaining authority to produce the accused before an Assistant Political Agent within twenty-four hours of his arrest, will be entitled to bail and can be released on bail as well. Property rights are given to the effect that no one can be deprived

of his property unless he is properly compensated for that in case of confiscation.

### **FATA Tribunal**

Although the idea of establishing FATA Tribunal was basically introduced through the amendments incorporated in FCR during 1997 yet the Frontier Crimes (Amendment) Regulation 2011 further increased its independence and visibility by including two retired bureaucrats and a lawyer in FATA Tribunal (Summary, 2011, n.p). It shall be consisted of a chairman, a civil servant of not less than BPS-21 rank having thorough experience of tribal administration and two other members out of whom one shall be from legal side who is eligible to be appointed as judge of the high court having sufficient familiarity with *Rewaj* (tribal customs) and the other be from civil service who has attained BPS-20 rank having experience of tribal administration as well (FCR, 2011, Section 55A (2). The Tribunal would act as a highest appellate body to hear complaints of the tribal people against any decision or judgment, decree or sentence passed by an appellate authority within ninety days whether made by the commissioner, additional commissioner, political agent or district coordination officer (now deputy commissioner) (*Ibid*, Section 55A). Similarly, it may review its own decision within thirty days by request of any individual across FATA (*Ibid*, Section 55AA). Beneath the Tribunal, the commissioner or additional commissioner can be approached as an appellate body against the decisions, judgments, decrees and orders of political agent and assistant political agent. Hence, to an extent the recent reforms provide the people of FATA the right to contest the actions and judgments passed by the political executive.

### **Qaumi Jirga**

The history of tribal areas demonstrates that *jirga* is an integral part of the administration of justice and regarded as an essential component of the tribal society. The reform package also advocates for the introduction of *qaumi jirga* to be consisted of respectable elders and representative of the tribes. The newly inserted provision in the amended version states thus, “the Political Agent of District Coordination Officer, as the case be, may take cognizance of any offence or civil dispute in exceptional circumstances, if so recommended by a *Qaumi Jirga* of the Tribe in the interest of justice and public peace” (*Ibid*, Section 11B). It is, however, accommodated in a way not to curtail the power of political administration at all.



## ***Governance Reforms in Federally Administered Tribal Areas***

### **Jail Inspection**

The reforms introduce a new concept of jail inspection by inserting the provision which provides that “FATA Tribunal, the Appellate Authority, the Political Agent and District Coordination Officer, as the case may be, shall visit the jails where the tribal convicts or detainees have been kept twice a year” (*Ibid*, Section 58A). FATA is lacking behind in jail facility and the convicted prisoners are sent to different jails located in various settled districts such as Haripur, D.I.Khan, and Peshawar etc. It is thus recommended in the reforms scheme of 2011 that the prisoners of tribal areas imprisoned in different jails would be twice visited in a year by the FATA Tribunal.

### **Audit by Central Government**

The process of audit by the central government has been introduced in the recent reforms. The state fund used by the political agents of their respective agencies or by the district coordination officers of their respective frontier regions, would be subjected to audit by the auditor general of the state (*Ibid*, Section 58 (2)). The central government has taken notice of financial mismanagement and irregularities of more than 24.13 million rupees in FATA in different development projects (Irregularities, 2013, n.p). The insertion of such provision in the text of FCR seems to be of immense vitality in this respect.

### **Critical Evaluation of the Frontier Crimes (Amendment) Regulation 2011**

Although the newly introduced reforms package for Federally Administered Tribal Areas in August, 2011 (Frontier Crimes (Amendment) Regulation 2011) has been appreciated in different quarters of the country yet at the same time these reforms has been criticized in certain academic and intellectual circles as well.

It has been criticized on the grounds that these reforms could not totally do away with the archaic and draconian clause of “collective responsibility” which presents a very peculiar picture in the present day nation state system (*Daily Times*, 20 August, 2011). Amendment in the said clause excludes the whole tribe from collective responsibility and limiting this clause to clan and close relatives of the accused identifies the reality that the clause is basically inhuman and draconian in nature and essence. Hence, for the sake of individual freedom, this clause should be straight away abolished (Hussain, 2012, p. 104).

The well known concept of separation of judiciary from the executive has been neglected while incorporating amendments in FCR. For instance, the composition of FATA Tribunal is against the letter and spirit of the constitution of Pakistan which advocates the separation of judiciary from the executive. Instead of retired judges of the Supreme Court or High Court, civil bureaucrats are incorporated in FATA Tribunal. Serious reservations regarding the composition of this appellate body come to surface on the part of civil society, legal fraternity and common people of FATA as well. They argue that instead of extending the jurisdiction of superior courts of the country i.e. Supreme Court and High Courts, in FATA a Tribunal has been introduced. Theoretically, the members of Tribunal are expected to give impartial verdicts in different cases brought before them for review but practically how a civil servant would go against the verdict of another bureaucrat in favour of the people. For instance, Mr. Akbar Khan, a retired civil servant has been appointed as a member of FATA Tribunal who got retired few months back as Commissioner FCR. So, it is not logical to expect him of giving verdicts against his own decisions which he had already made as Commissioner FCR in FATA (*Ibid*, pp. 103-104).

The constitution of the Islamic Republic of Pakistan under section 199 provides right to any individual to proceed to High Court in case his rights are violated but the recent reforms package does not provide this right to the people of FATA (FRC Report, 2012, p. 12).

The announcement of two identical presidential orders i.e. Actions (in Aid of Civil Power) Regulation for Federally Administered Tribal Areas and Provincially Administered Tribal Areas on June 27, 2011 by the central government further affects the reforms package. The armed forces of the state have been given unprecedented powers to encounter terrorism in FATA under this Regulation (Actions in Aid of Civil Power Regulation). The Regulation declares that “whereas there exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants and foreign funded elements, who asserted to unlawful control over the territories of Pakistan and to curb this threat and menace, Armed Forces have been requisitioned to carry out actions in aid of civil power” (AAPC Regulation, 2011). It empowers the military to act vigorously in FATA that may even lead to basic human rights abuse in these areas and create hurdles in the reforms implementation as well. It is a retrospective law as it states that “it shall be applicable to the Federally Administered Tribal Areas of Pakistan” (*Ibid*, Article 1, Clause 2) and “it shall come into force at once and shall be deemed to have taken effect from the 1<sup>st</sup> January, 2008” (*Ibid*, Article 1, Clause 3). The Armed Forces may arrest terror suspects arbitrarily and keep them in detention for 120 days which may lead to misuse of power in tribal areas. It also authorizes the

## ***Governance Reforms in Federally Administered Tribal Areas***

military to capture any individual's land without any sort of compensation across FATA.

### **Conclusion**

The dissection of Frontier Crimes Regulation (FCR) from past to the present demonstrates that it is the only theoretical model of legal-administrative mechanism which governs Federally Administered Tribal Areas of Pakistan since its formulation by the British Imperial power during 19<sup>th</sup> century. But it is noteworthy that after a long political journey extending over a period of sixty five years, the state of Pakistan could neither fully integrate these areas in its fold nor could properly bring positive changes in the legal and administrative framework of FATA which could lead to socio-economic, political, legal and administrative development in these area. There might be so many factors responsible for the socio- cultural, political, economic, judicial and administrative decay of FATA but the utmost and historically important factor is the Frontier Crimes Regulation 1901. This Regulation really bestows more discretionary powers upon the political administration in FATA so, the proverbial notion that “power corrupts and absolute power corrupts absolutely” is thus proved. The government could not introduce considerable reforms in FCR in the post-partition period. Only few minor and modest changes have been incorporated in the text of this Regulation but its substance fundamentally remained the same. However, to an extent meaningful reforms in the structure of governance in FATA by incorporating significant modifications in FCR have been made by the PPP government in August, 2011. This is the first ever substantive reforms package introduced by the government in the history of FCR. But now the question of its implementation is of immense vitality. It is a big challenge for the government to execute these reforms in the present day fragile security situation across FATA. Beside all its shortcomings and deficiencies, the Frontier Crimes (Amendment) Regulation 2011 has been welcomed by the people of FATA in the midst of turmoil across the region.

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