

Federally Administered Tribal Area (FATA) of Pakistan: Study of a Special Model of Governance

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Abstract

Although the Federally Administered Tribal Area (FATA) is an integral part of Pakistan, yet its political and administrative mechanism is quite different from rest of the state's territories. The theoretical framework for the governance of FATA is enshrined in the historic regulation called Frontier Crimes Regulation (FCR) designed and implemented by the colonial government in British India during the nineteenth century. After the division of the Subcontinent in August 1947, the newly established State of Pakistan continued with the same regulation to govern these areas directly. Despite many drawbacks, it was applied to maintain status quo in the tribal areas of the country. Since then the state could neither fully integrate these areas in its mainstream nor could properly introduce such reforms which could bring FATA at par with other parts of the country. The extraordinary powers in the hands of political administration of FATA seem to be one of the major factors responsible for its overall miserable condition. Along with historical background, this research paper critically analyses the pros and cons of legal-administrative set up of FATA provided by the FCR on one hand and the reforms package introduced

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through the Frontier Crimes (Amendment) Regulation 2011 on the other.

Introduction

The FATA extending over 27220 sq. km along the Pak-Afghan border constitutes 3.4 per cent of Pakistan's total area. This mountainous land is inhabited by a majority of the *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.¹ 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 South-East, FATA is physically linked with the district of Dera Ghazi Khan in the Punjab province, while in the South it joins the districts of Zhob and Musa Khel of Balochistan province.² Pak-Afghan border, also known as the Durand Line, lies to the West of FATA.

FATA consists 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 Bannu, Dera Ismail Khan, Kohat, Lakki Marwat, Peshawar and Tank districts. With a minor exception of Orakzai Agency, rest of the political agencies have common border with Afghanistan.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

1 IPRI Factfile, "FATA: A Profile of Socio-Economic Development," Islamabad Policy Research Institute (2008): 15, accessed January, 23, 2012, <http://ipripak.org/factfiles/ff94.pdf>.

2 IPRI Factfile, "FATA: A Profile of Socio-Economic Development," 21.

3 Government of Pakistan, *FATA Sustainable Development Plan (2006-2015)* (Peshawar: Planning and Development Department, Civil Secretariat FATA, 2006), 3.

predominantly inhabited by *Pakhtoon* ethnic groups.⁴ The *Census Report of Pakistan, 1998*, demonstrates 3.138 millions of 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 *Pakhtoon* tribes.⁵

Administrative Mechanism

Administratively, FATA is divided into two categories i.e. 'protected areas' and 'non-protected areas'. The former is directly governed by the central government via its political appointees called Political Agents while the latter is administered indirectly by the local tribes.⁶ Being a federal and at times provincially appointed 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*,⁷ Levies (tribal militias) and paramilitary forces that work under military command.⁸ The

4 Shuja Nawaz, *FATA – A More Dangerous Place: Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan* (Washington: Centre for Strategic and International Studies, January, 2009), 2.

5 Sarfraz Khan, "Special Status of FATA: Illegal Becoming Licit," *Central Asia*, 63, (Winter 2008): 8-9.

6 Muhammad Tayyab Ghafoor, "Impediments Involved in the Integration of Federally Administered Tribal Areas (FATA) in the National Mainstream of Pakistan", (M.A. thesis, War Studies, Baluchistan University, 2005), 13.

7 It is an irregular force which works under the overall command of the Political Agent to protect roads and other government installations and performs the duties of guards.

8 Claude Rakisits, "Pakistan's Tribal Areas: A Critical No Man's Land" (paper presented at Webster University Forum, Geneva, April 25, 2008), 2, accessed on 19 March, 2013, http://www.geopoliticalassessments.com/Pakistan_s_Tribal_Areas.pdf. Also see Naveed Ahmad Shinwari, *Understanding FATA: Attitudes towards Governance, Religion & Society in Pakistan's Federally Administered Tribal Areas*, Vol. IV (Islamabad: Community Appraisal & Motivation Programme, 2010), 7.

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* perform these administrative functions. The administrative affairs of Frontier Regions of FATA are overseen by the Deputy Commissioners of the respective districts. All these officials perform their duties under the overall administrative control of Governor's Secretariat FATA.⁹ 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.¹⁰

The Ministry of States and Frontier Regions (SAFRON)¹¹ at federal level has been assigned the task to keep a close watch on certain issues of management, development and other related matters across FATA.¹² However, SAFRON, being a Federal Ministry, is accountable to the Prime Minister and the 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

9 Khan, "Special Status of FATA," 21.

10 Government of Pakistan, *FATA Sustainable Development Plan (2006-2015)*, 5.

11 On April 17, 1948 Quaid-i-Azam Muhammad Ali Jinnah graced an all tribal *Jirga* in Peshawar which was attended by two hundred tribal Maliks who pledged their allegiance to the State of Pakistan. On that occasion, the tribal Maliks put their strong request to the founder of the nation and the first Governor General of Pakistan that they should be placed under the direct administration of the federal government. Hence, the Quaid paid proper surveillance to their request and their demand was met on July 6, 1948 by establishing the Ministry of States and Frontier Regions (SAFRON) and took personally its charge. See Sarfraz Khan, "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia," *Eurasia Border Review*, 1 (Spring 2010): 69.

12 Ghafoor, "Impediments Involved in the Integration of Federally Administered Tribal Areas (FATA) in the National Mainstream of Pakistan," 13.

authority thus rests with the head of the state.¹³ The Governor of Khyber Pakhtunkhwa performs his functions on behalf of the central government and oversees the affairs of these areas through FATA Secretariat located at the provincial capital, Peshawar.¹⁴

FATA under FCR

The British government strengthened its 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 nineteenth 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.¹⁵ The colonial authorities after thorough visualization drafted and executed a comprehensive system of legal and formal codes in the form of Indian Penal Code¹⁶ and Code of Criminal Procedure,¹⁷ in order to rule British India effectively.

13 Muhammad Maqbool Khan Wazir, "FATA under FCR (Frontier Crimes Regulation): An Imperial Black Law," *Central Asia*, 61 (Winter 2007),: 174.

14 Ghafoor, "Impediments Involved in the Integration of Federally Administered Tribal Areas (FATA) in the National Mainstream of Pakistan," 13.

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

16 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 January 1, 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 up to [sic] the 3rd February 1980*, (Islamabad: Government Printing Press, 1980).

17 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 got passed the Criminal Procedure Code from the British Parliament in 1861.

Likewise, Criminal Tribes Act was also designed from 1871 through which the government monitored, 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 increasing crimes in the 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 quarrelsome 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 almost alike. When the government observed high rate of killings, robberies and violence across Peshawar valley, it eventually developed the Punjab Frontier Crimes Regulation and implemented it in early 1872.¹⁸ After the establishment of North West Frontier Province (now Khyber Pakhtunkhwa), the government executed the same regulation with some minor modifications which was earlier called Frontier Crimes Regulation 1901.¹⁹ Hence, the colonial authorities implemented it in April 24, 1901 as an administrative, judicial, legal, and governance system for the North West frontiers of their Indian Empire, bordering Afghanistan.²⁰

Frontier Crimes Regulation had been promulgated by the British colonial authorities via regulation III of 1901. The FCR is a brief document consisted of seven chapters spread over sixty three sections.²¹ It is not just a formal document comprising only punishments for different crimes but a

18 Nichols, *The Frontier Crimes Regulations*, x-xi.

19 Nichols, *The Frontier Crimes Regulations*, x-xi.

20 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)", accessed July 30, 2013, <http://www.fatareforms.org/summary-of-2011-amendments-to-the-frontier-crimes-regulation/>.

21 Wazir, "FATA under FCR," 177.

comprehensive system of governance and also a major component of administrative system of justice in tribal areas.²² This Regulation had been implemented to protect the interests of the British government in the Khyber Pakhtunkhwa, Balochistan and in the entire tribal belt. The Khyber Pakhtunkhwa was fortunate enough to get rid of this harsh and hard Regulation with the promulgation of the Constitution of Pakistan, 1956, while Balochistan was liberated from its rule with the arrival of the Constitution of Pakistan, 1973. Similarly, Dir and Malakand were released from its clutches in the same year. But FATA is the only region subservient to FCR even today.²³ 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.²⁴

Startling Aspects of FCR

The most critical feature of the FCR is a system of 'Collective Territorial Responsibility'. According to this system, if a crime is initiated anywhere in tribal areas, the whole family or tribe on whose territory the crime 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 committed by someone else. In the same way, under the umbrella of 'collective territorial responsibility', the whole family, clan, sub-clan or village may suffer a variety of punishments.²⁵

22 Mahmood Shah, "FCR and FATA Reforms," *Dawn*, April 4, 2011, <http://dawn.com/2011/04/05/fcr-and-fata-reforms.html>. Also see Wazir, "FATA under FCR," 175.

23 Latif Afridi, "Human Rights and Discriminatory Laws in FATA," *The Frontier Post*, Peshawar: December 12, 1993.

24 FCR 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. See Wazir, "FATA under FCR," 183.

25 Government of North-West Frontier Province Law Department, *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified up to October 31, 1971]*, Chapter IV, 10-11.

Even innocent men, women and children become victim of this imperial law. There are so many instances in which children of about two years of age have been convicted.²⁶ 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 punishment.

The idea of 'collective responsibility' had been articulated by John Coke²⁷, who was the Officer In-charge of Kohat Pass Afridis. He laid down the procedure in certain critical situations 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

26 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", accessed January 12, 2013. <http://www.humanrights.asia/news/forwarded-news/AHRC-FAT-047-2010>; also see Muhammad Hamid Hussain, "Frontier Crimes Regulation: A Case Study of Reforms Process," *TIGAH* 1, (July 2012): 99.

27 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 seen much service. 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* (New York: Adegri Graphics LLC, 2011).

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.²⁸

John Coke's notion of 'collective responsibility' was followed by 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.²⁹ He first exercised this imperial strategy against Kukikhel Afridis when a British messenger was detained and deprived 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.³⁰

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. Besides, he can order to remove villages, restrict the erection of hamlets and can impose heavy fines on tribesmen in certain circumstances.³¹ 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:

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- 28 Khan, "Special Status of Tribal Areas (FATA)", 68.
- 29 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), 230.
- 30 This clause of the FCR (1901) i.e. 'collective territorial responsibility' proved to be the cornerstone of political administration across tribal areas and this principle is presumed to be enshrined in the customs and usage prevailing in the tribal belt. Khan, "Special Status of FATA", 21.
- 31 Government of NWFP Law Department. *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) [As modified upto October 31, 1971]*, Chapter IV, Section 21, 10.

- 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;
- e. 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.³²

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.³³ The tenure of this imprisonment can be increased for another three years by the Deputy Commissioner or Political Agent.³⁴ He can oblige an individual to execute a bond for keeping peace and good behaviour for a period not more than three years.³⁵ 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.³⁶

Restricted by this law, the people of FATA cannot enjoy the right to appeal, *wakeel* [Urdu: the right to legal representation] and *daleel* [Urdu: the right to present reasoned evidence] in any court of law.³⁷ It was, however, the Commissioner who acted as a court of revision but in 1997 FCR was modified (Section 55-A was added) allowing

32 Government of NWFP Law Department. *The Frontier Crimes Regulation, 1901*, Chapter IV, Section 22, 10. Also see Wazir, "FATA under FCR", 186.

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

34 Government of NWFP, Law Department, Chapter V, Section 46, 19-20.

35 Government of NWFP, Law Department, Chapter V, Section 40, 16-17.

36 Government of NWFP, Law Department, Chapter V, Section 31-34, 13-14.

37 Abid Mehsud, "Frontier Crimes Regulations: A Black Law," *The Frontier Post*, Peshawar: June 23, 2012.

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 case would be decided by the majority. It seems that all these arrangements were cosmetic having no positive results for the tribesmen.³⁸ In fact, trial under this law does 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 does not present any evidence or cross-examines witnesses. He is denied of the right of appeal and thus cannot plead his case in the High Court of the contiguous province or Supreme Court of the country. The authority to revise the Deputy Commissioner's or Political Agent's verdicts rest 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".³⁹

In case of split decision, the FCR tribunal is the ultimate appellate body consisted of three senior civil bureaucrats.⁴⁰ This judicial body cast its decisive vote in case of split

38 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. Wazir, "FATA under FCR," 191. Also see Afridi, "Human Rights and Discriminatory Laws in FATA" *The Frontier Post*, Peshawar: December 12, 1993.

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

40 The FCR Tribunal comprises the following three persons, (i) Provincial Law Secretary, (ii) Home Secretary, and (iii) Chief Secretary of Khyber Pakhtunkhwa Province. Wazir, "FATA under FCR," 176.

verdict. However, it is quite clear that both the convicted parties have no option to proceed to an impartial court of justice and must rely on bureaucratic judgment.⁴¹

The 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."⁴²

Political Administration, *Jirga* and FCR

FCR, *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 revolves.⁴³ 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

41 Wazir, "FATA under FCR," 176.

42 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, 23.

43 Abdul Malik Khan, "The Dispensation of Justice in the Federally Administered Tribal Areas (FATA) of Pakistan: Its Application and Analysis," *Central Asia*, 62 (Summer 2008), 111.

investigate into the matter. It, therefore, hears both the contending parties, examines evidence, carries out further investigations and inquiries if requires and finally issues its findings. The finding or decision of *Jirga* is examined by the political administration and thus, the Deputy Commissioner or Political Agent may:

- “Remand the case to the Council for a further finding; or
- Refer the case to a second Council; or
- Refer the parties to the Civil Court; or
- 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
- Declare that further proceedings under this section are not required.”⁴⁴

The above instance of civil case demonstrates that real powers always remain with the political executive whose verdict is irrevocable and cannot 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.⁴⁵ About the status of *Jirga*, 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.⁴⁶

The Post-Partition Scenario of FATA

The dawn of August 14, 1947 witnessed the birth of a new state i.e. Pakistan, in South Asia when the British colonial government ultimately winded up its long term rule over the

44 Government of North-West Frontier Province Law Department, *The Frontier Crimes Regulation, 1901 (Regulation III of 1901) (As modified upto 31 October, 1971)*, Chapter III, Section 8, Clause 3, 5.

45 Wazir, “FATA under FCR,” 184.

46 J.W. Spain, *The Pathan Borderland* (The Hague: Mouton and Co., 1963), 145-46.

Sub-continent. From the very first day, the tribal areas became an integral part of Pakistan and the Governor General of the state directly assumed the responsibility of the areas. Keeping in view the prevailing situational phenomenon, it was decided by the 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 Khyber Pakhtunkhwa, Sir George Cunningham during November, 1947.⁴⁷

The first Governor General of Pakistan, Quaid-i-Azam Muhammad Ali Jinnah came to Khyber Pakhtunkhwa 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*. In his speech, he expressed 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.⁴⁸

In respect of the status of tribal areas he said:

47 Syed Wiqar Ali Shah, "Political Reforms in Federally Administered Tribal Areas (FATA): Will it End the Current Militancy," *Heidelberg Paper in South Asian and Comparative Politics*, 64 (January, 2012): 7.

48 Government of Pakistan, *Quaid-i-Azam Mohammad Ali Jinnah: Speeches and Statements as Governor General of Pakistan 1947-1948* (Islamabad, Ministry of Information & Broadcasting Directorate of Films & Publications, 1989), 238.

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.⁴⁹

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.⁵⁰ But 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 thus remained in practice as a legacy of the British Raj. Also, the succeeding 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.⁵¹

With the promulgation of Pakistan's first constitution in 1956, the country came under the umbrella of parliamentary form of government but it could not introduce any change in the political-administrative system of tribal areas.⁵² 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, also kept it outside the domain of both central and provincial laws. It authorized the governor of the province, wherein tribal belt was located

49 Government of Pakistan, *Quaid-i-Azam Mohammad Ali Jinnah*, 239.

50 Raza Rahman Khan, "FATA Political Regime: Changing Legal-Administrative Status of Tribal Areas," *TIGAH* 1 (July 2012), 115.

51 Shah, "Political Reforms in Federally Administered Tribal Areas," 8.

52 Mumtaz Ali Bangash, "Political and Administrative Development of Tribal Areas: A Focus on Khyber and Kurram" (Unpublished Ph.D. Dissertation, Area Study Centre (Russia, China & Central Asia), University of Peshawar, 1996), 339.

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.⁵³

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 independence. Likewise, the Constitution of 1973 did not merge these areas into the mainstream of the country and kept it away from the rest of the 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 109⁵⁴ 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.

It is peculiar in nature to note that the constitution declares that the territories of Pakistan shall comprise among others 'Federally Administered Tribal Areas'⁵⁵ presenting FATA as an integral part of the county but the 'fundamental human rights',⁵⁶ enshrined in the constitution,

53 Government of Pakistan, *The Constitution of the Islamic Republic of Pakistan 1962* (Islamabad: Ministry of Law and Parliamentary Affairs, 1962), Article 223.

54 SRO stands for Statutory Regulatory Order (SRO). The above mentioned SRO had been issued by the federation of Pakistan on June 25, 1970 which declared that administrative and financial powers with respect to FATA vest in the President of Pakistan.

55 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.

56 The fundamental human rights include, security of person, prohibition of forced labor, 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. Government of Pakistan, *The Constitution of the Islamic*

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 authority is supreme. 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.⁵⁷

The Dawn of 21st Century and FATA

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.⁵⁸ In the first decade of the twenty-first century, the initiative to launch a reform process in the century old law has been introduced by Musharraf's regime. In April 2005, the Governor of Khyber Pakhtunkhwa, Khalilur Rahman constituted FCR Reforms Committee under the chairmanship of Justice (Retd) Mian Muhammad Ajmal. The composition of the Committee ensured participation from different walks of life as it accommodated tribal elders,

Republic of Pakistan, 1973, Part-II, Chapter- 1, Article 2-A and Article 8 to Article 28.

57 Wazir, "FATA under FCR," 179.

58 Frontier Crimes Regulation (1901) was modified in 1928, 1937, 1938, 1947, 1962, 1963, 1995, 1997, 1998 and 2000 but all these modifications were very minor in nature and substance. For instance, punishment by forfeiture of property in the case of conviction under Section 302 or 306 of the Pakistan Penal Code (XLV of 1860) was added to this law. The word "commissioner" was substituted for "court of the commissioner", the definition of the word "Governor" was added and the power to revise decisions made by the commissioner was removed from the FCR during 1997. Its Second Schedule was modified in 1995 and 1998, adding offences related to the Customs Act of 1969, the Prohibition (Enforcement of Hadd) Order of 1979, the Employment of Children Act of 1991 and the Control of Narcotic Substances Act, 1997. "Summary of 2011 Amendments to the Frontier Crimes Regulation (FCR)".

serving and retired civil servants, lawyers, journalists and a FATA parliamentarian.⁵⁹ 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 discussions reached at 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*.⁶⁰ Although the Committee submitted its recommendations to the government, yet the state authorities particularly the then Governor of Khyber Pakhtunkhwa, Lt. General (Retd) Ali Muhammad Jan Aurakzai⁶¹ did not pay heed to the proposals, apparently due

59 Justice (Retired) Mian Mohammad Ajmal was born on July 4, 1934 in Delhi. He remained Chief Justice of Pakistan from December 23, 1997 to June 30, 1999 and also served as Chief Justice of Peshawar High Court from January 6, 2000 to April 27, 2000. Mian Ajmal worked on honorary basis as Chairman of FCR Reforms Committee. The prominent members of the Committee were, Dr. Javed Hussain (MNA from FATA), Khalid Aziz (former chief secretary), Arbab Mohammad Arif and Manzoor Ahmad (senior civil servants), Sange Marjan Khan (retired bureaucrat), Abdul Karim Mahsud and Wali Khan Afridi (lawyers from Fata), and Nawabzada Inayat Khan (tribal elder). Rahimullah Yusufzai, "Undeserving Awarded, Deserving Ones Like Mian Ajmal Unrewarded," *The News*, August 29, 2011. Also see Khan, "FATA Political Regime," 118.

60 Rahimullah Yousafzai, "Some More Real Change in FATA," *The News*, August 16, 2011.

61 Lieutenant-General Ali Muhammad Jan Aurakzai retired as three-star rank general officer in the Pakistan Army who served as the Corps Commander of XI Corps and the principle commander of the Western Command. As Commander, he commanded all military combat assets and oversaw the peaceful deployment of XI Corps in the Northern Areas and FATA. He was a leading army General and after retiring from the military services, he was elevated as the Governor of the Khyber Pakhtunkhwa Province from May 2006 until his resignation in January 2008.

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, Owais Ahmad Ghani was sworn in as the next Governor of Khyber Pakhtunkhwa on January 7, 2008. He invited Ajmal to brief him 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 Pakistan Peoples' Party (PPP) government immediately established a Cabinet Reforms Committee under the chairmanship of Farooq H. Naek, Federal Minister for Law, to observe the modifications proposed by the previous Committee.⁶² 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, headed by a retired judge of High Court 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 *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

62 The Cabinet Reforms Committee on FCR had two Federal Ministers, Najmuddin Khan of PPP and Hamidullah Jan Afridi an Independent MNA from Khyber Agency, and several members of parliament such as Zafar Beg Bhattani, Akhund Zada Chitan and Rahmatullah Kakar etc. Khan, "FATA Political Regime," 118-19.

debarred from the collective responsibility clause of this law.⁶³

Similar efforts were made in 2009, when the central government announced reforms in 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 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 and children under sixteen years and aged ones more than sixty five years would be excluded from this law.⁶⁴ It also envisaged an appellate tribunal and audit of funds received and disbursed by the Auditor General of Pakistan.⁶⁵ Although all these reforms and changes were formally notified, yet these were not considered sufficient for fulfilling the 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.

However, meaningful reforms in the legal-administrative structure of FATA have been carried out by the PPP government, when the then 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 hundred and ten year's history of FCR. The Presidential Order has brought

63 These recommendations were made at a meeting of the Cabinet Reforms Committee on FCR, which was held at the Ministry of Law on August 29, 2008. Federal Minister for Law, Farooq H Naek chaired the meeting. *Daily Times*, August 30, 2008.

64 Khan, "FATA Political Regime," 120-21.

65 International Crisis Group Working to Prevent Conflict Worldwide, *Pakistan: Countering Militancy in FATA*, *Asia Report*, No. 178, October 21, 2009, ii.

considerable changes in the old version of this law including modifications, substitutions, insertions and omissions as well.⁶⁶ A critical evaluation of recent reforms package introduced in FCR would be described in the following lines.

Legal Protection

The amended version of FCR 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 during the investigation, male members of a family must be arrested first, followed by the sub-tribe and then by other sections of the tribe.⁶⁷ It provides some human rights to the residents of tribal belt. The tribal people cannot be detained for indefinite period of time and they would have the right to appeal in FATA Tribunal.⁶⁸ 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

66 Muhammad Hamid Hussain, "Frontier Crimes Regulation: A Case Study of Reforms Process," *TIGAH* 1 (July 2012): 101. Also see "Summary of 2011 Amendments to the Frontier Crimes Regulation (FCR)," accessed July 30, 2013, www.fatareforms.org/summary-of-2011-amendments-to-the-frontier-crimes-regulation/.

67 The Frontier Crimes Regulation, 1901 (Regulation No. III of 1901 As Amended August 2011), Section 21 (c)(iii) and Section 22 (d). (hereafter referred as Frontier Crimes (Amendment) Regulation 2011).

68 Farhat Taj, "New FATA Reforms – Good But Insufficient," *Daily Times*, August 20, 2011.

FATA Tribunal.⁶⁹ 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* [Urdu: tribal customs] and the other be from civil service who has attained BPS-20 rank having experience of tribal administration as well.⁷⁰ The Governor has the authority to appoint chairman and members of the Tribunal for a period of three years or more.⁷¹ 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 appellate authorities below it within ninety days.⁷² It may thus review the verdict made by the commissioner, additional commissioner, political agent or district coordination officer (now deputy commissioner).⁷³ The Tribunal may call for the record of any proceedings from the subordinate forums and revise any decision taken by them under this regulation. Where it deems necessary may order to present a person before the Tribunal to be dealt with according to law. It may set a person at liberty when it finds that he is illegally arrested in public or private custody. During the investigation of any matter pending or inquiry, it may order to produce any person detained in any jail within its limit before the Tribunal to be examined as a witness. It may convert a prisoner from one custody to another for the

69 "Summary of 2011 Amendments to the Frontier Crimes Regulation (FCR)," accessed July 30, 2013, <http://www.fatareforms.org/summary-of-2011-amendments-to-the-frontier-crimes-regulation/>.

70 Section 55A has been substituted by Section 22 of the Frontier Crimes (Amendment) Regulation 2011.

71 Section 55A has been substituted by Section 22 of the Frontier Crimes (Amendment) Regulation 2011.

72 Section 55A has been substituted by Section 22 of the Frontier Crimes (Amendment) Regulation 2011.

73 "Summary of 2011 Amendments to the Frontier Crimes Regulation (FCR)," n.p.

purpose of trial. The Tribunal may make rules from time to time in order to regulate the procedure in all such cases.⁷⁴

Similarly, it may review its own verdict if an application has been filled by any individual within thirty days of any decision taken by the Tribunal.⁷⁵ The commissioner and additional commissioner may hear appeal of the people of FATA against the decision or decree made by the Political Agent or District Coordination Officer within thirty days of any decision.⁷⁶

Being an appellate authority, FATA Tribunal may exercise the power to tender pardon during any criminal proceedings to the convict and may also increase any punishment after issuance of show cause notice to him. The appellate authority would not ignore the findings of the council of elders on any question of fact which has been approved by the political administration unless it believes that there has been a material irregularity or flaw in the proceedings or the proceedings have been so conducted as to occasion a travesty of justice. Any appeal submitted to the appellate authority would be disposed off within sixty days.⁷⁷ It, however, shall pass no sentence while exercising its appellate jurisdiction which the political administration could not have passed.⁷⁸

Likewise, the Tribunal may hear appeal of the inhabitants from FATA in civil cases. It has the authority to confirm, modify, and set aside any decision made in any civil proceedings when it believes that there is material irregularity or imperfection in the proceedings or the

74 Section 55A has been substituted by Section 22 of the Frontier Crimes (Amendment) Regulation 2011.

75 Section 55AA has been inserted by Section 23 of the Frontier Crimes (Amendment) Regulation 2011.

76 Section 48 has been substituted by Section 19 of the Frontier Crimes (Amendment) Regulation 2011.

77 Section 50 has been substituted by Section 21 of the Frontier Crimes (Amendment) Regulation 2011.

78 Section 51 has been substituted by Section 21 of the Frontier Crimes (Amendment) Regulation 2011.

proceedings have been so conducted as to occasion a mockery of justice or the decision is in contradiction to the ethics and public policy.⁷⁹ The appellate authority in exercise of any jurisdiction i.e. criminal or civil shall be bound to record the reasons where it varies, sets aside or confirm any decision, decree, order or sentence.⁸⁰ The appellate authority below FATA Tribunal such as commissioner, additional commissioner, political agent or district coordination officer shall not review their own decisions.⁸¹ Where the Appellate Authority passes a decision, decree or judgment while exercising its appellate jurisdiction, would be implemented by the political administration like its own decision or judgment.⁸²

Qaumi Jirga

The word *Qaum* refers to a particular community of people having certain common characteristics such as common culture, language, ethnicity, habits and other ways of life. In the larger context, *Qaum* also means a nation. 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 Reforms Package 2011 advocates the introduction of *Qaumi Jirga*, consisting of respectable elders and representatives of the tribes. The newly inserted provision in the amended version of FCR states thus, “the Political Agent of District Coordination Officer, as the case may 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”.⁸³ It is, however, accommodated in

79 Section 52 has been substituted by Section 21 of the Frontier Crimes (Amendment) Regulation 2011.

80 Section 53 has been substituted by Section 21 of the Frontier Crimes (Amendment) Regulation 2011.

81 Section 54 has been substituted by Section 21 of the Frontier Crimes (Amendment) Regulation 2011.

82 Section 55 has been substituted by Section 21 of the Frontier Crimes (Amendment) Regulation 2011.

83 Section 11B has been inserted by Section 8 of the Frontier Crimes (Amendment) Regulation 2011.

a way not to curtail the judicial powers of political administration at all.

Qaumi Jirga is an assembly or gathering of the elders consisting of each household or family unit of a certain community or village. This indigenous or local institution is summoned to deal with matters of collective nature like settling disputes with other tribes, shares of community in forest and other natural resources, rights and distribution of irrigation water, launching of developmental plans such as the selection and construction of sites for schools, hospitals etc.⁸⁴ While discussing either civil or criminal dispute, it tries to resolve the dispute in a way acceptable to both or all the parties concerned.⁸⁵

Qaumi Jirga is announced after initial consultations of few prominent elders of the concerned community and its place of sitting and time is specified and propagated in the surroundings through a *Naqqara* [Urdu: band beat]. It is an open gathering in which every individual has the right to talk and all the opinions are given considerable space. The matter may be resolved in one or more than one sessions depending on its nature.⁸⁶ Although, all the participants have a right to speak during its sessions but most of the people prefer only to observe the deliberations. It begins the proceedings without any moderator and each of them tries to provide others the opportunity to speak first. In order to organize the floor for discussion on the matter any one of them begins with a relevant tale or narrative. Different aspects and parameters of the matter are elaborately discussed while the leadership listens and facilitates the

84 Hassan M. Yousufzai and Ali Gohar, *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peace Building and More* (Peshawar: Just Peace International, n.d.), 47. Also see Fakhur-ul-Islam, Khan Faqir and Malik Amer Atta, "Jirga: A Conflict Resolution Institution in Pukhtoon Society," *Gomal University Journal of Research* 29, No.1 (June 2013).

85 Shinwari, *Understanding Jirga*, 38.

86 Yousufzai and Gohar, *Towards Understanding Pukhtoon Jirga*, 47. Also see Islam, Faqir and Atta, "Jirga".

process of further discussion. At last, common ground is identified and announced for agreement by all.⁸⁷

In order to minimize the tension during any dispute the elderly leadership approaches the contending parties and set up a *Teega*⁸⁸. The monetary value or security for maintaining *Teega* could be either money or weapon. *Teega* is often maintained for a definite period of time during which a *Qaumi Jirga* is constituted which collects evidence, observes and analyses the evidence, talks to both parties and villagers and takes *Waak*⁸⁹ from the parties involved and announces its ultimate decision.⁹⁰

The Frontier Crimes (Amendment) Regulation 2011 has properly recognized *Qaumi Jirga* for the first time in the history of FCR by modifying Section 2 of the Regulation which formally defines it and incorporating Section 11B as well which deals with reference by *Qaumi Jirga* in exceptional cases.

Jail Inspection

The reforms introduced 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."⁹¹ As FATA was lacking behind in providing jail facility and the convicted prisoners were sent to different jails located in various settled districts such as Haripur, D.I.Khan, and Peshawar etc, it was thus recommended in the reforms

87 Yousufzai and Gohar, *Towards Understanding Pukhtoon Jirga*, 48.

88 *Teega* is a sort of truce or ceasefire which is enforced upon the combating parties for a specified period of time in order to dissociate them from fighting and avoid a bigger combat between them.

89 *Waak* means the authority given to the *Jirga* by the disputing parties. When the contending parties give *Waak* to the *Jirga* then both the parties have to accept its verdict wholeheartedly.

90 Syed Irshad Hussain, "Conflict Management at the Grassroots in FATA," *TIGAH I* (July 2012), 139. Also see Shinwari, *Understanding Jirga*, 38.

91 Section 58A has been inserted by Section 25 of the Frontier Crimes (Amendment) Regulation, 2011.

scheme of 2011 that the prisoners of tribal areas imprisoned in different jails would be twice visited in a year.

Audit by Central Government

The process of audit by the central government has been introduced in the 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.⁹² The central government has taken notice of financial mismanagement and irregularities of more than 24.13 million rupees in FATA in different development projects.⁹³ The insertion of such provision in the text of FCR seems to be of immense vitality in this respect.

Comments and Criticism

Although the newly introduced reforms package for FATA in August, 2011 has been appreciated in different segments of the country yet at the same time these reforms have been criticized in certain academic and intellectual circles as well.

It is being criticized that these reforms could not totally do away with the archaic and stringent clause of 'collective responsibility' which presents a very peculiar picture in the present day nation state system.⁹⁴ 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 dismissed.⁹⁵

92 Section 58 has been substituted by Section 24 of the Frontier Crimes (Amendment) Regulation, 2011.

93 "Irregularities Detected in FATA Development Projects," accessed September 19, 2013, <http://www.fatareforms.org/irregularities-detected-fata-development-projects/>.

94 Despite the recent reforms, FATA has been declared as 'human rights free-zone' by Amnesty International Report. Taj, "New FATA Reforms – Good But Insufficient".

95 Hussain, "Frontier Crimes Regulation," 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 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 included 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 Court, a Tribunal has been introduced in FATA. 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 in favour of the people. For instance, a retired civil servant was 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.⁹⁶

The Constitution of the Islamic Republic of Pakistan under section 199 provides right to any individual to proceed to High Court in case his right is violated but the recent reforms package does not provide these rights to the people of FATA.⁹⁷

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 affected the reforms package. The armed forces of

96 Akbar Khan, a retired civil servant was appointed as a member of FATA Tribunal. Hussain, "Frontier Crimes Regulation," 103-104.

97 Report of FATA Seminar Series, *FCR Amendments: A Way Forward or Hurdle for Peace and Development in FATA* (Islamabad: FATA Research Centre, April 15, 2012), 12.

the state have been given unprecedented powers to combat terrorism in FATA. The Regulation declares:

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.⁹⁸

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”⁹⁹ and “it shall come into force at once and shall be deemed to have taken effect from January 1, 2008”.¹⁰⁰ The Armed Forces may arrest terror suspects arbitrarily and keep them in detention for 120 days which would lead to misuse of power in tribal areas. It also authorizes the military to capture any individual’s land without any sort of compensation across FATA.

Conclusion

The dissection of FCR till date, demonstrates that it is the only theoretical model of legal-administrative mechanism which governs FATA of Pakistan since its formulation by the British Imperial power during nineteenth century. However, 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 main 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 areas. There might be so many factors responsible for the socio-cultural, political, economic, judicial and

98 Action (in Aid of Civil Power) Regulation, 2011, The Preamble.

99 Action (in Aid of Civil Power) Regulation, 2011, The Preamble, Article 1, Clause 2.

100 Action (in Aid of Civil Power) Regulation, 2011, The Preamble, Article 1, Clause 3.

administrative decay of FATA but historically important factor is the FCR 1901. 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 some extent, meaningful reforms in the legal-administrative structure of FATA have been introduced 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 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. Despite 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. It is generally observed as an extraordinary initiative of the government that can ultimately lead to further progress and development of FATA if the same process of reforms is continued and implemented timely.