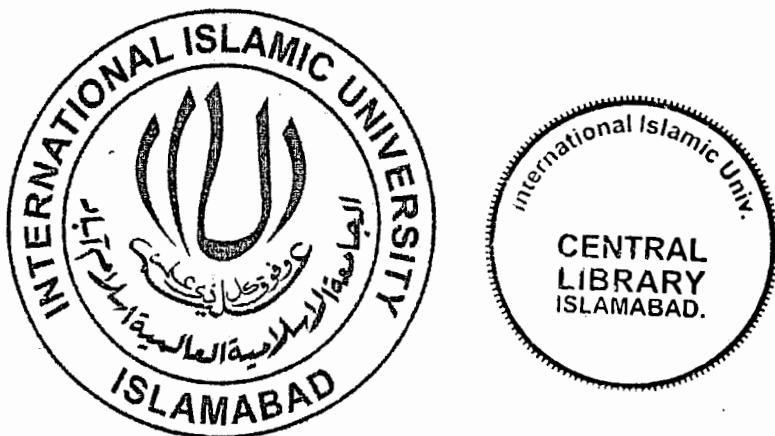


THE FRONTIER CRIMES REGULATION
(In Constitutional, Judicial and Human Rights Perspective)

by

Zulfiqar Ali



A thesis submitted in partial fulfillment
of the requirements for the degree of
MASTER OF LAWS
(Faculty of Shari'ah and Law)
In The International Islamic University

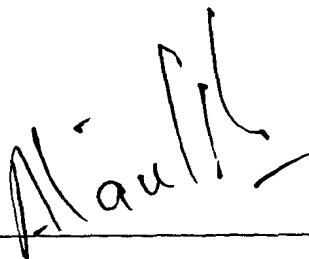
1428/ 2007

Master's (LL.M.) Committee:

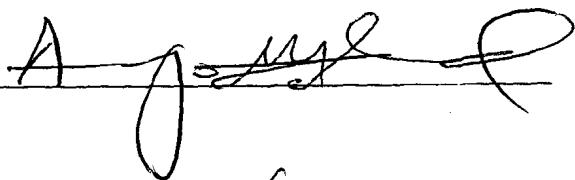
Lecturer Mr. Attaullah Khan
Dr. Imran Ahsan Khan Nyazee
Asst. Professor Mr. S. Amjad Mahmood

VIVA VOCE EXAMINATION COMMITTEE

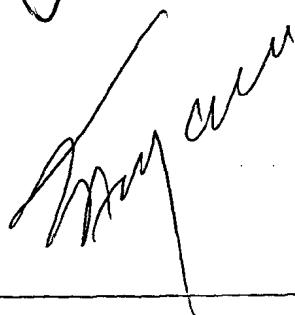
Mr. Attaullah Khan
Lecturer
Faculty of Shariah & Law, IIU Islamabad
Supervisor



Mr. S Amjad Mahmood
Assistant Professor
Faculty of Shariah & Law, IIU Islamabad
Internal Examiner



Dr. Imran Ahsan Khan Nyazee
Access to Justice Programme
External Examiner



MAP OF FATA-PAKISTAN



© Zulfiqar Ali
2007
All rights reserved

TABLE OF CONTENTS

LIST OF ABBREVIATIONS	IV
TABLE OF CASES	V
ACKNOWLEDGMENTS.....	VI
ABSTRACT	VII
CHAPTER I	1
INTRODUCTION	1
CHAPTER II.....	9
THE TRIBES OF FRONTIER AND THE SOCIAL CONTRACT.....	9
2.1 INTRODUCTION.....	9
2.1.1 <i>THE CLOSED BORDER POLICY AND THE SOCIAL CONTRACT</i>	10
2.1.2 <i>THE FORWARD POLICY AND THE SOCIAL CONTRACT</i>	11
CHAPTER III.....	16
STATUS OF FATA UNDER THE CONSTITUTION OF 1973.....	16
3.1 INTRODUCTION.....	16
3.2 ARTICLES 1 AND 246, TRIBAL AREAS IN THE CONSTITUTION OF 1973.....	19
3.3 ARTICLE 247, ADMINISTRATION OF TRIBAL AREAS	19
3.3.1 <i>THE EXECUTIVE SYSTEM OF FATA</i>	20
3.3.2 <i>THE LEGISLATION FOR FATA</i>	21
3.3.3 <i>THE JURISDICTION OF THE SUPREME COURT AND THE HIGH COURT</i>	22
3.3.4 <i>THE JURISDICTION OF THE WAFAQI MOHTASIB EXCLUDED IN FATA</i>	27
3.3.5 <i>FCR'S COURTS AND HUDOOD OFFENCES</i>	27
CHAPTER IV	32
THE FRONTIER CRIMES REGULATION.....	32
4.1 INTRODUCTION.....	32
4.2 FATA'S ADMINISTRATION AND POWERS OF COURTS AND OFFICERS	39
4.3 FLAWS IN THE FCR	41
4.3.1 <i>PREAMBLE OF THE FCR</i>	41
4.3.2 <i>DEFINITION (INTERPRETATION CLAUSE)</i>	43
4.3.3 <i>RELATION OF FCR TO OTHER ENACTMENTS</i>	43
4.3.4 <i>FORFEITURE OF REMISSES OF REVENUE</i>	45
4.3.5 <i>POWERS OF PROVINCIAL GOVERNMENT SAVED</i>	46

CHAPTER V	47
THE COUNCIL OF ELDERS	47
5.1 INTRODUCTION.....	47
5.2 TRIAL PROCEDURE IN CIVIL MATTERS.....	49
5.3 TRIAL PROCEDURE IN CRIMINAL MATTERS.....	52
5.4 PUNISHMENTS ON FINDING OF COUNCIL.....	55
5.5 APPEAL AND REVISION.....	57
5.6 THE PRIVATE JIRGA	60
CHAPTER VI	65
PENALTIES UNDER FCR	65
6.1 INTRODUCTION.....	65
6.1.1 BLOCKADE OF HOSTILE OR UNFRIENDLY TRIBE.....	66
6.1.2 FINES ON COMMUNITIES' ACCESSORY TO CRIME	67
6.1.3 FORFEITURE OF PUBLIC EMOLUMENTS	69
CHAPTER VII	71
PREVENTIVE MEASURES UNDER FCR.....	71
7.1 INTRODUCTION.....	71
7.1.1 POWER TO PROHIBIT ERECTION OF NEW VILLAGES OR TOWER ON FRONTIER... ..	72
7.1.2 POWER TO DIRECT REMOVAL OF VILLAGE.....	73
7.1.3 DEMOLITION OF BUILDING USED BY ROBBERS	74
7.1.4 POWERS TO REQUIRE PERSONS TO REMOVE IN CERTAIN CASES	74
7.1.5 POWERS OF ARREST AND DETENTION	75
7.1.6 SECURITY AND SURVEILLANCE FOR THE PREVENTION OF MURDER OR CULPABLE HOMICIDE OR THE DISSEMINATION OF SEDITION.....	78
RECOMMENDATIONS	82
APPENDIX- I	86
THE LAWS EXTENDED TO THE FEDERALLY ADMINISTERED TRIBAL AREAS.....	86
BIBLIOGRAPHY.....	94

LIST OF ABBREVIATIONS

NWFP North West Frontier Province
FATA Federally Administered Tribal Area
PATA Provincially Administered Tribal Area
FR Frontier Regions
FCR Frontier Crimes Regulation
DC Deputy Commissioner
PA Political Agent
APA Assistant Political Agent
SAFRAN Federal Ministry of States and Frontier Regions

GGO Governor General Order
CrPC Criminal Procedure Code, 1898
PPC Pakistan Penal Code, 1860
UDHR Universal Declaration of Human Rights, 1948
CUN Charter of the United Nations, 1945

TABLE OF CASES

Superintendent Land Custom v. Zewar Khan, PLD 1969 SC 485	Sajjad Husaain and two others v. The State, PLD 1989 FSC 50
Piao Gul v. The State, PLD 1960 SC 307	Sajjad Hussain and two others v. The State, 1993 SCMR 1523
Dosso v. The State, PLD 1958 SC 533	The Quran Sunnah v. FCR, PLD 1979 Quetta. 217
Sar Khan v. The State, PLD 1967 SC 149	Khan Akbar Khan v. Deputy Commissioner, Pesh, PLD 1957 Pesh.100
Abdur Rehman and others v. The State, PLD 1971 Pesh. 61	Abdul Baqi v. Superintendent Prison Mach, PLD 1957 Kar. 694
Malik Noor Badshah v. Deputy Commissioner, Kohat, PLD 1980 Pesh.265	Malik Toti Khan v. The District Magistrate, Sibi and Zirat, PLD 1957 Quetta .1
Mohamad Sadiq v. Government of Pakistan 1981 SCMR 1022	Muhamad Usman v. The State through EAC Quetta, PLD 1965 Lah.229
Nabi Bakhsh and others v. The State PLD 1991 Pesh.10	Mazhar Allahi v. Federation of Pakistan and others, PLD 1975 SC. 66
Haji Saleem Khan v. FCR Commissioner, Kohat 1996 CLC 1702	Government of Pakistan v. Azizullah Memon, PLD 1993 SC 361
Quam Bangash v. Qaum Turi and others, 1991 SCMR 2400	Samandar Khan and others v. the Crown, PLD 1994 FSC 228
Haji Ghulam Sarwar v. Pir Akbar Din, 2000 MLD Pesh.1643	Khan Abdul Akbar v. the Deputy Commissioner, PLD 1957 Pesh. 100.
Shaukat Khan v. Assistant Political Agent, Landi Kotal, PLD 2002 SC 526	Malik Toti Khan v. The District Magistrate, PLD 1957 (W.P) Quetta.1
Dilawar Khan v. Political Agent Khyber Agency, 2002 PCr L.J 1703	
Abdul Baqi v. Mith Khan, 1990 MLD 1960	
Said Amir v. The State, PLD 1990 FSC 28	
Ms. Yasmeen v. The State, PLD 1994 FSC 4	

ACKNOWLEDGMENTS

I am extremely grateful to all those who assisted me in writing of this thesis. I particularly feel indebted to my elder brother Mr. Dilawar Khan Wazir, BBC reporter who supported me throughout my academic career. I cordially appreciate the helping hand of Mr. Latif Afridi, former MNA and Advocate of Peshawar High Court in understanding the FCR. I am also grateful to Mr. Tariq Akhtar and many other friends from whose works and contributions I benefited a lot for purpose of writing this thesis. In concluding words I appreciate and admire the kind and sympathetic attitude of my supervisor Mr. Attaullah who gave me a proper guideline towards the completion of my thesis.

ABSTRACT

THE FRONTIER CRIMES REGULATION

(In Constitutional, Judicial and Human Rights Perspective)

by

Zulfiqar Ali

Chair: Lecturer Mr. Attaullah Khan

The territory, designated as Federally Administered Tribal Area of N-W-F.P, has a special status under the Constitution of the Islamic Republic of Pakistan of 1973. The Frontier Crimes Regulation known as the black law applies in FATA. This separate system of law that does not even complete the basics of any system of justice declared repugnant to the Constitution by the superior courts of Pakistan. The superior courts' judgments relied in part on the right to access to justice, as articulated in Article 10 of the Universal Declaration of Human Rights, the right that has equal relevance in the FATA. This British devised system, with very insignificant changes, is still operational in FATA despite its failure to meet the test of compatibility with fundamental rights provided under the Constitution, various International Human Rights Instruments and commands of natural law. This research paper begins with an introduction. The second chapter is about the tribal society and theories of the Social Contract. Later on, the occupation of the region and in this period what kind of Social Contract entered between the tribes of the North West Frontier and the British? Third

chapter is about the special status of FATA under the Constitution of 1973. In fourth chapter the FCR is discussed in light of the superior courts' judgments and International Human Rights Laws. What actions taken by the government of Pakistan on the direction of the apex courts? This is followed by the council of elders. The trial procedure in civil and criminal matters and appeal are discussed in light of the judgments of superior courts and International Human Rights Documents. The Private Jirga is also discussed. The next two chapters are about inhuman clauses of the FCR and its contradiction with Constitution and International Human Rights Documents. What is the impact of FCR on the life of common person? Moreover, in conclusion recommendations have been made which propose required amendments in the Constitution and FCR in order to bring this law in conformity with the commands of the Constitution, International Humanitarian Law and requirements of natural principles of justice and fair play recognized by the civilized nations of the world.

CHAPTER I

INTRODUCTION

And why should ye not fight in the cause of Allah and of those who, being weak, are ill treated and oppressed men, women and children.

Sura Nisa 4: 75 Al-Quran

The Constitution of 1973 and the Frontier Crimes Regulation provide such an administrative and legal system for FATA that deprives the local tribes of the civil and political rights guaranteed in the Constitution and International Human Rights Laws and the protection of courts.

Pakistan's Federally Administered Tribal Areas (FATA) lie along the Durand Line of 1893, the 2,500-kilometer boarder drawn by the British colonial rulers between British India and Afghanistan (today's Pakistan and Afghanistan) and comprises a whole belt of mountains' territory stretching nearly for hundred miles and merging into Baluchistan. It is an area of 27220 square kilometers. One sixth area of FATA about 5180 square kilometers is plain while 22040 square kilometers is mountains' territory.¹ The tribal belt with population of 3.3 Million (1998 Census)

¹ Latif Afridi, *The Federally Administered Tribal Areas and Reforms* (Publisher Barkat Ali , Peshawar, 1996), 2

are grouped into tight Pakhtoon tribal communities the chief being Bajauris, Mohmand, Afridies, Turies, Wazir, Mahsuds and Sharans each with its own distinct individuality marked off from the others by slight shades of differences ranging from social customs to dialect, but all knit together by common language, culture and religion.²

In the nineteenth century, the British created the tribal areas and used this strategic boarder area as a buffer against Russian expansion from Central Asia and to assert control over Afghanistan.³ After the partition of British United India, Pakistan retained deliberately the colonial-era policy towards the tribal areas that was inherently status qua oriented with no prospects of development of the area at all.⁴ The result of retaining of this policy is that even today FATA is the far flung, lawless and backward area of Pakistan. The majority of people are poor, uneducated and unskilled. Due to non- availability of the agriculture land, socio-economic backwardness and unemployment in the area hundreds of thousands tribesmen have migrated to the Middle East or other parts of the country in search of earnings. Those confined to the tribal region often resort to undesirable means of income due to unemployment.

Articles 1 and 246 of the Constitution of 1973 state that FATA is included in the Federation of Pakistan. FATA is under the executive authority of the Federation and out of the territorial and administrative limits of the four provinces. The

² Syed Abdul Quddus, *The North West Frontier of Pakistan* (Royal Book Company Rehman Centre, Zaibunsaa Street, Sadar Karachi Pakistan, 1990), 79.

³ Diwan Chand Obrai, *The Evolution of the North West Frontier Province* (Saeed book Bank & Subscription Agency, Arbab Road, Peshawar Cant, 1983), 11

⁴ Akbar S. Ahmad, *The Social and Economic Changes in the Tribal Areas* (Oxford University Press Karachi, 1977), 9.

Federal Ministry of SAFRAN exercise overall administration of FATA, but being geographically adjacent to the NWFP the immediate executive authority of the whole of the area is exercised by the Governor as an agent to the President of Pakistan representing the Federal Government. The President of Pakistan, according to Article 247(2), administers and controls the region. Article 247(4) states that the President may, with respect of any matter, make regulations for the peace and good governance of FATA or any part of it.

Though FATA is part of the formal territory of Pakistan and allotted twelve seats in the National Assembly and eight in the Senate, but their representation in the Parliament is nominal. The FATA's parliamentarian sitting in the Parliament can make laws for the whole of Pakistan but they can not make laws for their own areas (FATA). This is due to Article 247(3) of the Constitution that prescribed that the laws of Parliament shall not apply to FATA unless the President so directs. Where any such direction is given, it may provide that the law shall apply not as made by the legislature but subject to such exceptions and modifications as may be specified in the relevant direction. The Constitution does not elaborate and explain the words 'exceptions' or 'modifications'.

FATA has a semi-autonomous status and administered through special laws known as the Frontier Crimes Regulation. As tribes in the tribal areas live within specific boundaries that correspond to geographical or physical areas FATA is divided both by tribe and to area for purposes of administration.⁵ FATA consists of seven Political Agencies i.e. Bajaur, Mohmand, Khyber, Orakzai, Kurram, North and South Waziristan and six Provincially Administered Frontier Regions attached to

⁵ Ibid., 43

Peshawar, Kohat, Bannu, D. I. Khan, Tank and Lakki Marwat.⁶ The Political Agent (mentioned as the Deputy Commissioner in FCR) heads the administration of each Political Agency. An Assistant Political Agent, assisted by a Political Tehsildar at the sub-divisional level, oversees each subdivision of the Political Agency. In addition, the Deputy Commissioners of the adjacent settled districts of N-W-F.P administer the Provincially Administered Frontier Regions as are outside the seven Political Agencies but are contiguous to the boundaries of their districts.

FCR consists of seven chapters, sixty four sections and three schedules. It is the supreme law in FATA and serves all purposes both of procedural as well as substantive law. All the executive judicial and financial powers have been concentrated in the hands of the PA/DC. The administrative and legal system is different from the system that prevails in the settled areas of Pakistan. The feature distinguishing FCR from others laws is that it is an administrative regulation and not a 'pure law' per se. Administratively, FATA has indirect system of administration based on the principle of territorial and collective responsibility of the FCR.⁷

FCR incorporates the custom of trial by council of elders (official jirga). The council of elders' procedure for the trial of cases is different from that of the ordinary courts of law. The Political Agent of a Political Agency or the Deputy Commissioner of an adjacent district in case of a Frontier Region is authorized to refer the civil and criminal cases to the council of elders.⁸ But the selection of the council of elders' members is left to the executive authority and the findings of the

⁶ Article 246, The Constitution of 1973

⁷ Sec 21 & 22 , The Frontier Crimes Regulation

⁸ Sec 8 & 11 , The Frontier Crimes Regulation

council of elders are not binding.⁹ The PA/DC has discretionary powers either to accept the recommendations of the council of elders or refer it back to the same council of elders for review or reject it and appoint another council of elders.¹⁰ In this way, the executive has been made the ultimate authority and final arbiter to initiate trial, prosecute offenders and award punishments.

There is no quorum fixed for the meeting of the council of elders nor is it required to hear evidence in support of prosecution and the defense as provided by the Pakistan Criminal law Act, 1963 and the Qanun-e-Shahadat. FCR only requires the council of elders to come to a finding after such inquiry as may be necessary and after hearing the accused person.¹¹ In FCR, no time limit is fixed for the disposal of cases but cases are generally decided in about three to six months. Very few cases consume a period of above one year. On the finding of the council of elders, the PA/DC can award punishments under sections 29 and 30 of the FCR itself as mentioned in the second schedule or the Pakistan Penal Code. The council of elders does not recommend death penalty even if the accused deserves.¹²

Earlier, under section 49 of the FCR, only a revision against the PA/DC's judgment was provided in the court of the FATA Commissioner who is not from the judicial services but a Peshawar-based bureaucrat and taking decision after consulting the concerned executive officers. Now by amendment in FCR the right of appeal has been created but the forum of appeal is still the FATA Commissioner, hence

⁹ Sect 9 , The Frontier Crimes Regulation

¹⁰ Sec 8(3) & 11 (3) , The Frontier Crimes Regulation

¹¹ Sec 8 & 11, The Frontier Crimes Regulation

¹² Sec 12, The Frontier Crimes Regulation

substantially no difference has occurred at all.¹³ A new forum for hearing revision petitions consisting of the Law Secretary and the Home Secretary has been created which is called the Tribunal,¹⁴ but it is on record that since its creation this forum of the Provincial Secretaries acting as a Tribunal has not given relief in a single case so far.¹⁵ Consequently, the law contains no concept of an independent, impartial judicial authority or a court of law to dispense free and fair justice. This is contrary to the mandate of the Constitution and International Human Rights Laws, and a vital safeguard of fundamental human rights is consequently altogether missing from the FCR.

The Constitution protects the fundamental rights of citizens by giving them the right to approach the High Courts and Supreme Court. The tribesmen convicted under FCR can not file an appeal against the PA/ DC's judgment in the superior courts. This is due to Article 247 (7) that neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to FATA, unless the Parliament by law otherwise provides.

The institution of the Wafaqi Mohtasib functions under President Order No. 1 1983 (Article 270A (6) with Seventh Schedule of the Constitution, on the preservation of this Order and its constitutional status which is at par with the Constitution for amendment purpose). FATA had been excluded in terms of section 31(3) of the above Order; vide Notification No. 57/104(15) ML-IB/CMLA dated 13-08-1984.

¹³ See 48, The Frontier Crimes Regulation

¹⁴ See 55A, The Frontier Crimes Regulation

¹⁵ Latif Afridi, *Human Rights and Discriminatory Laws in FATA-II*, The Frontier Post Peshawar, 12 December 1993, p.6.

Article 25 of the Constitution and Article 4 read together, render FCR to repugnant to the fundamental rights and due process of law; hence, it is void law in terms of Article 8 of the Constitution. The superior courts of Pakistan questioned the constitutionality of FCR in a number of cases and held to be discriminatory law and against the fundamental rights as enshrined in the Constitution. The Supreme Court of Pakistan in the case of *Mazhar Ellahi v Federation of Pakistan and Others*¹⁶ struck down FCR and held it to be no law within the definition of the terms, discriminatory and against the fundamental rights as provided by the Constitution of 1973. The Shari'at Bench of Baluchistan High Court in the *Quran-Sunna v. FCR*¹⁷ declared FCR as unislamic and subsequently this law was withdrawn from these areas of Balochistan where it was applicable.

In the *Government of Pakistan v. Azizullah Memon*¹⁸ the Supreme Court acknowledged this logic in a case concerning the use of the FCR-like procedures in the tribal areas of Balochistan. In rejecting a justice system in which the executive, represented by a Deputy Commissioner, wielded inordinate authority, the court explained that the “ mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country.

In spite of the fact, that FCR has been declared unconstitutional by the superior courts of Pakistan and being a century old code of law has several drawbacks in its enforcement, still exist in FATA, giving the PA/DC a wide variety of powers and

¹⁶ PLD 1975 SC 66

¹⁷ PLD 1979 Quetta 217

¹⁸ PLD 1993 SC 341,361

is being used brutally against the tribal people. The question is, after half a century of independence, what is the justification for the continue retention of these laws in the areas? The tribal people being citizens of Pakistan also have the right of access to justice as guaranteed in the Constitution and International Human Rights Documents and the protection of courts.

CHAPTER II

THE TRIBES OF FRONTIER AND THE SOCIAL CONTRACT

2.1 INTRODUCTION

The tribal set up of the North West Frontier's tribes has its in-built system for the settlement of tribal affairs without any assistance and help from the agencies of the state. The tribal society being a self-governed society governed by their unwritten code of conduct known as the Rewaj (tribal customs and traditions) developed and flourished over centuries.¹ The Rewaj is a body of law developed as a result of custom and Jirga's decisions, as distinct from the law laid down by legislative assemblies. It may be compared to the Common law that forms the basis of all law that is applied in England and most of the United States.

The Frontier's tribes are traditional people and they in their individual and collective life are strictly adhering to their customs and traditions and therefore resist any external interference through use of force. They fought against Alekzandar the Great, Mughals and finally the British who tried to occupy their land.² The British at last took control of the region and the area became part of the formal territory of the British United India. First the tribes retained their socio-economic and political independence and used to follow their own Rewaj. Later

¹ Abdul Rashed, *Civil Service on the Frontier* (Khyber Printer Peshawar, 1977), 58.

² Latif Afridi, *The Federally Administered Tribal Areas and Reforms* (Publisher Barkat Ali, Peshawar, 1998), 2

on, the British Government was able to extend certain laws to the area. Then and before what rights being given to the state and what state given to the people can be discussed in the light of the theories of Social Contract.

The Social Contract is an agreement among individuals in a society or between the people and their government that describes the rights and duties of each party. It derives from the ideas of Hobbes, Locke, and Rousseau and involves individuals giving up certain freedoms in return for benefits such as state protection.³ The Social Contract theories in relation to the tribal areas can be discussed in two parts.

2.1.1 THE CLOSED BORDER POLICY AND THE SOCIAL CONTRACT

The British first came into contact with the Frontier's tribes when they defeated the Sikh in 1849. At first there was no Special Agency and they relied upon the Closed Border Policy of non-aggression and non-interference in tribal affairs and peace agreements were executed with different loyal tribes. It was aimed that the British will not interfere in their internal affairs and the tribes in return will not raids the administered area of the British India.⁴ In this period the tribes of the Frontier used to pass their own independent tribal way of life without any interference from state. Though in this period the Frontier's tribes were not in a state of nature but a mature society and therefore, we do not concern with the question of the state of nature and there was a Social Contract among individuals of the society. As Rousseau a French philosopher in his famous book "Social Contract" pointed out "that each of

³Encarta® World English Dictionary © & (P) 1999 Microsoft Corporation. All rights reserved.
Developed for Microsoft by Bloomsbury Publishing Plc

⁴ Badshah Gul Wazir, *The Futuristic of Tribal Administration* (Pakistan Academy for Rural Development 1995), 9.

us puts into a single mass his person and all his power under the supreme direction of the general will, and we receive as a body each member as an indivisible part of the whole.” As in Hobbes’ theory, so in Rousseau’s the individual surrenders his all, but, unlike Hobbes, he surrenders not to a single person or body of persons but to the whole community. Rousseau’s contract, like that of John Locke, makes not one person but the whole community sovereign.⁵

The Rousseau’s Social Contract also contains certain defects and paradoxes. He makes no distinction between the state and society. His main defect lies in his explanation of the general will. Some of the writers believe that what he meant by it was that men in the state continue to enjoy the same degree of equality and freedom as they did in the state of nature. In this period the Social Contract was among individuals of the society and not between the people and the state. The tribal people enjoy the same degree of equality and freedom as provided in the Rewaj. This can be explained by illustration. The tribal society make the unwritten code of conduct the Rewaj like the legislature makes law, the Jirga used to interpret it like the judiciary interprets laws and the general will of the community is a sanction like the executive in a state. In this period, the tribes were free and independent and they were not to obey the laws of state but the Rewaj.

2.1.2 THE FORWARD POLICY AND THE SOCIAL CONTRACT

British aware of the fact of the geo-strategic importance of the tribal region abandoned the Closed Border Policy in about 1876 in favor of another one known as the Forward Policy and created tribal areas to create a buffer zone against the

⁵ Mazher-ul-Haque, *Political Science (theory and practice)* (Enverul Haq Khan, Cavalry Ground, Lahore, 1998), 143

expansion of Russian's Communism and to assert control over Afghanistan. The aim of this policy was the physical occupation and direct administration of the tribal areas.⁶ This was the time that the tribal belt became part of the formal territory of British United India and came under the administrative control of the British Government. However, this time the people entered into another Social Contract with the rulers- the legislature. This is a governmental compact. John Locke describes it thus "that the legislative power, constituted by the consent of the people, becomes the supreme in the commonwealth, but it is not arbitrary. It must be exercised as it is given for the good of the subjects. Government is in the nature of a trust and embraces only such powers as are transferred at the time of the change from a state of nature".⁷ But unlike the John Lock, s Social Contract, it was not for the good of subjects but for the advancement of the British objectives and subjugation of the people. Therefore, the annexation of the tribal area to the British India was the result of the Social Contract but the elements of coercion and deception exist on the part of British Government. The British initiated certain administrative and legal rules and regulation in the tribal areas and the following explanation will clarified that in fact the Frontier Crimes Regulation was promulgated to establish the writ of the colonial authority.

1. Before the promulgation of the FCR, there was a well-orchestrated policy of advancing into these areas by establishing contacts with the tribes. Through

⁶ Akbar S. Ahmad, *The Social and Economic Changes in the Tribal Areas* (Oxford University Press Karachi,1977), 47

⁷ Mazher-ul-Haque, *Political Science (theory and practice)* (Enverul Haq Khan, Cavalry Ground, Lahore, 1998), 141.

the principle of divide and rule, momentary incentives, coercion, deception and treachery the British achieved the annexation of the tribal areas into the British India.⁸

2. The Frontier Crimes Regulation was based on the tribal Rewaj, but the Rewaj was distorted to suit the government's plan of securing convictions at will in the respective areas. It was aimed to advance the objectives of the British and to establish the writ of the colonial authority in the area. Thus it was merely a law of convenience or expediency than law to ensure just and fair decision of cases in the respective areas.⁹
3. The Frontier Crimes Regulation provides indirect system of administration and run on the principle of the territorial and collective responsibility executed through the local chief called the Maliks, which means that if a person or group of persons committed a crime and escaped then the whole tribe has to be penalized for the offence of individuals until they hand over the individual or group of persons to the executive authority.¹⁰ The collective responsibility helps in revealing the facts of the matter, identifying the real perpetration of the crimes and inflicting the appropriate punishment but cannot be regarded as just principle of law in terms of any sense.
4. The Frontier Crimes Regulation is executed through tribal headmen called "Malik" (council of elders). The political administration refers the cases to

⁸ Robert Nickson, *Settling the Frontier* (Oxford University Press, Karachi, 2001), 248

⁹ Arbab Arif, The Frontier Crimes Regulation, Seminar on FATA Organized by the Area Study Centre of Peshawar University and Hannas –Seidel Foundation Germany, December 7-8, 2004

¹⁰ Sec 21 & 22, The Frontier Crimes Regulation.

them and after deciding upon the matter in accordance of Rewaj send back to the political administration. They are also intermediaries between the tribes and administration¹¹. On the one hand, it made the tribes happy because the government, by acknowledging the status of their elders, had honored their traditions. And on the other hand, it made the task of the administration easier because dealing or handing a few chosen headmen was easier. Moreover, these Maliks were amenable to all sorts of incentives.

5. British created the hereditary force of Local Khasadars to help the administration in carrying out multifarious duties like the protection of the government's buildings and making arrest under the collective and territorial responsibility.¹² The objectives of creating of such a local force were to perform the above-mentioned duties and to create a strong vested interest of the tribes in running in the administration of the area.
6. As far as jurisdiction is concerned the FCR is applicable in whole FATA, but generally the political agencies are divided into three parts, (a) the administered area (b) the protected area and (c) inaccessible area. The government takes responsibility only for security of the administered area and tribes are left to live under their own Rewaj in the protected and inaccessible areas. When the dispute between the tribes assumes proportions which disturb tranquility of the protected and inaccessible areas

¹¹ Sec 8 & 11, The Frontier Crimes Regulation

¹² Sec 21 & 22, The Frontier Crimes Regulation

than the government takes action under the territorial and collective responsibility. Here it is worth mentioning that gross human rights violation occurred in these areas where the tribes settled their disputes without interference from the state. The Rewaj deprived the women of the right of inheritance, dower, marriage with consent, education and Khulah (divorce through court).

7. As tribesmen by and large do not pay taxes in the present set up in FATA. In the absence of land settlement and the land records, no land revenue can be levied in the tribal areas.¹³ On one hand the regular revenue laws do not extend to the tribal areas and on the other there is no provision in FCR on revenue matters. The disputes over property whether commercial or agriculture land are settled by the tribes themselves according to their own Rewaj without interference of the political administration. A person who is deprived from acquiring, holding and disposing of property is on mercy of Rewaj and has no other remedy.

The tribal region as part of the United India guaranteed special status and administered through FCR. When Pakistan came into being, the successive governments retained the special status in all the Constitutions. These special people of the special area known as free tribes are deprived of the basic human rights due to Rewaj and the state imposed black law. The Rewaj shows the unjust behavior of the society and FCR is the discriminatory law enforced by state.

¹³ Teepu Mahamad Khan, The Land of Khyber (Uzbek Publishers Peshawar, 2004), 93

CHAPTER III

STATUS OF FATA UNDER THE CONSTITUTION OF 1973

3.1 INTRODUCTION

The British, knowing the strategic importance of the tribal belt of N-W-F.P created tribal areas or Political Agencies to serve as a buffer zone between undivided India and Afghanistan. This range now serves as a border between Afghanistan and Pakistan.¹ These tribal areas are located on the Pakistan side of the 2500 kilometers long porous border with Afghanistan called the Durand Line. The border is named after the British official who oversaw the demarcation of the 19th century boundary. The tribal areas comprise a whole belt of mountains' territory stretching nearly for hundred miles and merging into Baluchistan.²

First Khyber Agency was created in 1879 and special political officer was appointed for the Khyber Agency. Kurram became an Agency in 1892. The Malakand , North and South Waziristans Agencies were created in 1895-96. The Malakand, at the outset, was placed under the direct control of the Government of India and all other Agencies remained with the Punjab Government until 1901 when Lord Curzon, Viceroy of India, created the N-W-F.P as the Chief Commissionership. The five settled districts namely, Hazara, Peshawar, Kohat,

¹ Diwan Chand Obhrai, *The Evolution of the North West Frontier Province* (Saeed Book Bank & Subscription Agency, Arbab Road, Peshawar Cant, 1983) ,11.

² Nasser Ali Khan, The Economic Impact of Tribal Areas, Seminar on (FATA) , Organized Jointly by the Area Study Centre of Peshawar University & Hannas-Seidel Foundation Germany, Saeed Book Bank & Subscription Agency, Arbab Road Peshawar, December 7_8, 2004, p.43.

Bannu and Dera Ismail Khan were administered by the Deputy Commissioner who was responsible to the Chief Commissioner. Likewise, the five Political Agencies i.e Khyber, Kurram, Malakand, North and South Waziristan, forming part of the N-W-F.P, were also administered by the Political Agents under the political control of the Chief Commissioner. After Independence three new Agencies were created, the Mohmand in 1951, the Bajaur and Orakzai in 1973.³

The British initiated various constitutional and administrative measures in the tribal areas, starting from the Parliament Act of 1870 supplemented by the Schedule Districts Act of 1874 and followed by such provisions in the various constitutional documents of 1909, 1901 and culminating in the Government of India Act of 1935.⁴ Subsequent to the Government of India Act of 1935, partition movement was started. The partition was affected through the Indian Independence Act of 1947 and it was on the strength of this Act that Pakistan received its first Constitution in the shape of the Provisional Constitutional Order of 1947 but this first Constitution was lacking provisions in respect of the tribal areas so defined in the Government of India Act of 1935. Faced with the Constitutional vacuum GGO.NO.5 of 1949 was issued it was followed by GGO.NO.6 of 1949. Later on, the Establishment of West Pakistan Act of 1955 was issued as so reflected in the Constitutions of 1955 and 1962. Than the Province of West Pakistan (Dissolution) Order of 1970 and finally the Constitution of 1973 was promulgated.⁵ The tribal

³ Akbar S. Ahmad, *Social and Economic Changes in the Tribal Areas* (Oxford University Press, Karachi, 1977), 23

⁴ Arthur Berriedal Keith, *The Constitutional Development of India 1600-1935* (Low Price Publishers, Delhi, 1944), 152-158.

⁵ Ishfaq Ali, *Laws Extended to the Tribal Areas with Jirga Laws* (Fine Art Press Mohallah Jangi Peshawar City, 2003), 5-15

Areas are divided into two parts (1) the Provincially Administered Tribal Areas and (2) the Federally Administered Tribal Areas under the Constitution of 1973.⁶

The special status of PATA ceased with the President Order No. 28 of 1970 which later on became an Act No. XXVII of 1973 through which the Supreme Court and the High Court of Peshawar have given the same jurisdiction in respect of PATA (Chitral, Dir, Kalat, Swat and Malakand) as they had in relation to other areas of N-W-F.P. Session Divisions, Civil Courts were created, like the rest of Pakistan, from which appeals are heard in the High Court and the Supreme Court. The police departments and police stations were established. The Frontier Crimes Regulation's (Repeal) Regulation No. 1 of 1973 withdrew the FCR from these areas.⁷

The judicial reforms were introduced in PATA of N-W-F.P from 1970-75 but there was a reverse process through Shariah Courts during 1975-94 when as a result of the historical judgment of the Peshawar High Court (PLD 1990 Pesh 51) upheld by the Supreme Court (PLD 1995 SC 281), the Shariah Laws were enforced.

FATA has a special status under the Constitution of 1973 and governed under the FCR, a set of imperial-era laws designed for expeditious not just governance of the area. The Federal Ministry of SAFRAN exercise over all administration of the area but being geographically adjacent to the N-W-F.P, the immediate executive authority is exercised by Governor as an agent to the President of Pakistan representing the Federal Government.

⁶ Article 246, The Constitution of 1973

⁷ Peshawar High Court Annual Report 2003 (Peshawar, 2004), 22

3.2 ARTICLES 1 AND 246, TRIBAL AREAS IN THE CONSTITUTION OF 1973

Articles 1(2) and 246 state that FATA is included in the Federation of Pakistan, comprising seven Political Agencies Khyber, Kurram, Orakzai, Mohmand, Bajaur, North Waziristan and South Waziristan, and six Provincially Administered Frontier Regions (tribal areas attached to the districts but exclusive of Political Agency) namely Peshawar, Kohat, Bannu, D.I. khan, Tank and Lakki Marwat.

The tribal areas are defined by the Constitution, as areas in Pakistan, which before the commencing day were tribal areas. The definition is, therefore, not exhaustive and depends on the determination of the status of an area before the commencing day, though certain territories are specifically mentioned as being included in tribal areas (1) PATA and (2) FATA.⁸ On the question which tribal areas are part of Pakistan, the Supreme Court in *Superintendent Land Customs v. Zewar Khan*⁹ held that it is for the executive authority of the state to say which territory it has recognized as a part of the state and that the courts are bound to accept that position.

3.3 ARTICLE 247, ADMINISTRATION OF TRIBAL AREAS

Article 247 provides that the executive authority of the Federation shall extend to FATA, and the executive authority of a Province shall extend to PATA. In respect of tribal areas, the President, is the final authority because in case of PATA the President can give direction to the Governor, which the Governor is bound to comply with. The laws of Parliament or a Provincial Assembly shall not apply to

⁸ M. Mahmood, *The Constitution of the Islamic Republic of Pakistan, 1973* (Pakistan Law Times Publication, Lahore, 1995), 368.

⁹ PLD 1969 SC 485.

the tribal areas unless in the case of the former the President, and in the case of the latter the Governor with the approval of the President, so directs. Laws thus extended may, however, be subject to such exceptions and modifications as may be specified in the relevant direction. The President and the Governor with the approval of the President have also the power within their jurisdiction to make regulations for the peace and good governance of tribal areas. The President may, with respect of any matter, make regulation for the peace and good governance of FATA. By an order, the President may put an end to the special status of a tribal area and on the making of any such order the area shall cease to be such area, but before making any such order the President has to ascertain the views of the tribal people as represented in a Jirga. Unless Parliament by law otherwise directs neither the Supreme Court nor the High Court has any jurisdiction in tribal area but the jurisdiction exercised by these two courts before the commencing day in any tribal area is not affected.

3.3.1 THE EXECUTIVE SYSTEM OF FATA

FATA is under the executive authority of the Federation as prescribed by Article 247(1). In Federation the President to act on the advice of the Federal Cabinet or the Prime Minister but Article 48(2) provides that the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so and the validity of any thing done by the President in his discretion shall not be called in question on any ground whatsoever. So here the President is absolved from his relations with the Federal Government as he is

specifically empowered and authorized by Article 247(5) to govern and issue directions and regulations for FATA.

In the same manner Article 105 provides that the Governor to act on advice of Chief Minister or his cabinet but the Governor is also absolved from his relations with the Provincial Government. The Governor of the Province administers FATA under the direction of the President and the executive governance in the field is carried out under Article 145, which bound the Governor of the Province to discharge certain functions as agent of the President. These certain functions of the Governor are specifically provided in Article 247. This is a direct relation of the Provincial Governor with the President and through him with the Federation.

3.3.2 THE LEGISLATION FOR FATA

The judicial machinery for FATA is contained in Article 247(3), 247(4) and 247(5). Article 247(3) provides for the extension of the Acts of the Parliament to FATA or to its part by the President and he can bring necessary specified exceptions and modifications in the Act so extended. The Constitution does not elaborate and explain the words 'exception' or 'modification'.

Second, the President is also empowered to issue regulations for peace and good governance under Article 247(4) for FATA or a part of it. The Constitution does not define the terms 'peace or good governance'. The power of issuing regulations under Article 247(4) is subject to the competency of Parliament and in this context the provisions of Articles 141, 142, 143, with lists given in the fourth Schedule and also (227, 228) are attracted. All of these provisions control the power of legislation of Parliament. The additional control is in Article 8 and 203 DD.

Third, by means of a self contained law in the shape of a regulation as is authorized in Article 247(5), like FCR. Here the power of the President is very wide which is in respect of any matter and is notwithstanding the Constitution.

3.3.3 THE JURISDICTION OF THE SUPREME COURT AND THE HIGH COURT

Article 247(7) provides that unless Parliament by law otherwise provides, neither the Supreme Court nor the High Court shall exercise any jurisdiction under the Constitution in relation to tribal areas; provided that nothing in this clause shall effect the jurisdiction which the Supreme Court or the High Court exercised in relation to a tribal area immediately before the commencing day.

The Supreme Court and the High Court does not possess jurisdiction in relation to FATA even after the promulgation of President Order No. 28 of 1970 or Act No. XXVII of 1973 through which the jurisdiction of the Supreme Court and the High Court jurisdiction was extended to PATA. No other enactment brings about so far extending the jurisdiction of the Supreme Court and the High Court to the area in question, namely FATA. Therefore, it appears that the Supreme Court and the High Court jurisdiction with regard to FATA continued to be excluded by virtue of clause 7 of Article 247 of the Constitution of 1973.

In *Piao Gul v. The State*¹⁰, the trial for the offence was held by the Political Agent at Peshawar but judgment was pronounced at Jamrud which is “Special Area”, the Hon’ able Chief Justice, A.R. Cornelius, as he authored the judgment and while distinguishing *Dosso’s case*¹¹, held that as all the proceedings in *Dosso’s case* were

¹⁰ PLD 1960 SC 307

¹¹ PLD 1958 SC 533

held in “Special Area” where as in the case in hand the proceedings were held at Peshawar, the High Court could assume jurisdiction over the matter.

In Sar Khan v. The State¹², where a person was tried, convicted and imprisoned within the territorial jurisdiction of the Peshawar High Court under section 11 of FCR for an offence committed in the tribal area it was ruled that the jurisdiction of the High Court under Article 98 of the Constitution of Pakistan 1962 to examine the propriety and legality of everything done within its territories not excluded merely because offence was committed outside its territorial jurisdiction.

In the Superintendent, Land Custom, Torkham (Khyber Agency) v. Zewar Khan¹³ the Supreme Court held that as the Truck carrying non-custom paid goods though apprehended in the tribal area but was brought to Peshawar which was within the territorial jurisdiction of the Court, no legitimate exception could be taken to the High Court issuing a writ to the authorities concerned within their jurisdiction to release the Truck from such seizure, because the order would have had to be carried out within the territorial limits of the High Court. It was further ruled that if in case an order of the High Court was sought to take effect in a territory outside the limits of the High Court then the question of non-maintainability of writ would arise.

Following the judgments of the Supreme Court in Piao Gul’s case, Sar Khan’s case and Zewar Khan’s case, the Peshawar High Court in the case of Abdur Rehman and others v. The State¹⁴ held that where an order is made or any action taken within the territorial limits of the jurisdiction of the High Court and even if it

¹² PLD 1967 SC 149

¹³ PLD 1969 SC 489

¹⁴ PLD 1971 Pesh. 61

relates to an occurrence having taken place in the tribal area, the High Court would have jurisdiction to examine the legality and the propriety of the order passed by any authority within its jurisdiction.

In *Malik Noor Badshah v. Deputy Commissioner, Kohat*¹⁵ held that the High Court possessed powers to issue writ of Habeas Corpus to examine the authority for the imprisonment of any person held in a prison in territories amenable to the writ jurisdiction of the High Court notwithstanding that the source of authority was, and the offence committed, outside that territory.

In *Muhamad Sadiq v. Government of Pakistan*¹⁶ it was ruled that ouster of jurisdiction of the superior courts are not to be lightly assumed and the exclusion would be only in those matters which is exclusively concerned with the tribal areas and that the ouster clause can not be so interpreted as to exclude the jurisdiction of the superior courts in which any part of the cause accrues or any effective action taken or performed at a place outside the tribal areas, affecting the life, liberty or property of a citizen and thereby the jurisdiction was assumed.

In *Nabi Bakhsh and others v. the State*¹⁷ it was held that where there was a dispute between the parties relating to partnership business and the agreement deed was executed in the settled area, venue of the business was also in the settled area and all transactions took place in the settled area mere fact that one of the parties to the dispute originally belonged to the tribal area would not confer jurisdiction on the political authorities.

¹⁵ PLD 1980 Pesh. 265

¹⁶ 1981 SCMR 1022

¹⁷ PLD 1991 Pesh.10

However in case of Haji Saleem Khan and others v. Commissioner FCR, Kohat¹⁸, a Division Bench of the Peshawar High Court took a contrary view by holding that the effect of exclusion of the jurisdiction of the High Court under Article 247(7) of the Constitution of the Islamic Republic of Pakistan would be absolute notwithstanding the fact that the officer concerned who passed the impugned order was in the settled area but for administrative reasons.

In Qaum Bangash v. Qaum Turi and others¹⁹, it was held that where legislative history of the High Courts and the extension of their jurisdiction with reference to President Order No. 28 of 1970 or Act XXVI of 1973 read with Article 246 of the Constitution of 1973 and the effect of Article 247(7) was considered. The Phrase/ expression “ in relation to tribal area” was also scrutinized and it was held that where dispute relating to land situated in tribal areas or criminal offences took place in the territorial areas compromised therein and the parties resided within the tribal area, the Peshawar High Court would not have jurisdiction in the matter.

The Peshawar High Court in Haji Ghulam Sarwar v. Pir Akbar Din²⁰, while placing reliance upon Piao Gul’s case, Sar Khan’s case, Zewar Khan’s case, Abdu Rehman’s case, Malik Noor Badshah’s case, Muhammad Sadiq’s case and Nabi Bukhsh’s case held:--

“Where the petitioners belong to the settled area and the dispute, if any, apparently germaning from some business transaction having taken place at Peshawar and where nothing was done between the parties in the tribal area except that one of the parties belongs thereto, the jurisdiction of this court would not be ousted within the

¹⁸ 1996 CLC 1702

¹⁹ 1991 SCMR 2400

²⁰ 2000 MLD Pesh. 1643

purview of the Article 247 (7) of the Constitution and under Article 199 of the Constitution of the Islamic Republic of Pakistan, this court would have the jurisdiction to look into the matter and protect the rights of citizens of the State as guaranteed under the Constitution and to see that a citizen residing within the territorial jurisdiction of this court is dealt in accordance with law and not otherwise.”

In Shaukat Khan v. Assistant Political Agent, Landi Kotal²¹, held that it is by recognized principle of administration of justice that for setting aside an order or to challenge the proceedings, remedy should be availed first of all within the hierarchy of the law under which the forum whose proceedings have been objected to is functioning instead of approaching different forum for the redress of grievances.

The latest judgment in this regard is Dilawar Khan v. Political Agent Khyber Agency²², in which it was held that in order to assume jurisdiction under FCR it is requirement of section 8 of FCR that either or any of the parties should belong to frontier tribe and that there is a dispute which is likely to lead to blood shed or disturbance of peace. If one of the parties belongs to the tribal area, if the dispute is of civil nature and the business transaction had taken place in the settled area and nothing was done by the parties in tribal area, the recourse should be had to the normal civil courts within whose territorial jurisdiction cause of action had accrued. Similarly if a crime is committed in settled area, a person guilty of offence

²¹ PLD 2002 SC.526

²² 2002 P Cr L.J 1703

cannot be picked up/ arrested from the settled area and tried by the political authorities under FCR.

However, the answers of certain questions can not be found in the above cited judgments of the superior courts. Therefore the jurisdictional issue had further been coming for consideration with (a) challenge to the FCR, fundamental rights existing in a particular period suspended and revived (b) challenge to a particular case registered under the FCR in tribal areas but tried in settled areas or the accused kept here (c) the collective and territorial responsibilities' sections of FCR, under which the political authorities' jurisdiction extend to the settled areas (d) the power to extend a particular law (e) the power of the FCR's Courts to try Hudood cases (f) election disputes (g) general issues etc.

3.3.4 THE JURISDICTION OF THE WAFAQI MOHTASIB EXCLUDED IN FATA

The institution of the Wafaqi Mohtasib functions under President Order No. 1 1983 (Article 270A (6) with Seventh Schedule of the Constitution, on the preservation of this Order and its constitutional status which is at par with the Constitution for amendment purpose). FATA had been excluded in terms of section 31(3) of the above Order; vide Notification No. 57/104(15) ML-IB/CMLA dated 13-08-1984.

3.3.5 FCR'S COURTS AND HUDOOD OFFENCES

The Federal Shariat Court in the cases Said Amir v. the State,²³ Ms. Yasmeen v. the State,²⁴ Sajjad Husaain and two others v. the State²⁵ and the Appellate Bench of the

²³ PLD 1990 FSC 28.

Supreme Court in the case of Sajjad Husaain and two others v. the State²⁶ held that the Federal Shariat Court jurisdiction extended FATA and the FCR's Courts had no jurisdiction for the trial of cases registered under the Hudood laws.

In Said Amir v. the State it was held that the Prohibition (Enforcement of Hudood) Order of 1979 was promulgated as President's Order 4 of 1979 and it does not come within the purview and definition of Act of Parliament that requires the direction of the President for its application to FATA as envisaged in Article 247(3) of the Constitution of 1973. By Article 1(2) the President's Order 4 of 1979 has been extended in application to the whole of Pakistan and Article 1(2) described that FATA is included in Pakistan. Thus, the Prohibition (Enforcement of Hudood) Order of 1979 stands extended and applied to FATA.

In Ms. Yasmeen v. the State it was held that under Article 29 of the President's Order IV of 1979 states that the Order has been given overriding effect to any other law for the time being in force in the country and any other law for the time being enforce shall also include FCR in force in FATA.

In the case of Sajjad Husaain and two others v. the State a full Court of the Federal Shariat Court came to the conclusion that under Article 203-DD of the Constitution of Pakistan of 1973 the Federal Shariat Court is competent to examine the orders passed by any criminal courts in respect of enforcement of Hudood laws.

In case of Sajjad Husaain and two others v. the State the Appellate Bench of the Supreme Court of Pakistan held that the other provisions invoked by the Learned Additional Advocate General namely clause (7) of Article 247 of the Constitution

²⁴ PLD 1994 FSC 4.

²⁵ PLD 1989 FSC 50.

²⁶ 193 SCMR 1523

of 1973 is inapplicable to the Federal Shariat Court because it expressly mentions the Supreme Court and the High Court and excludes the Federal Shariat Court. What is excluded by express words can not be included on any principle of interpretation”.

Consequently, there emerges the correct legal position that the Prohibition (Enforcement of Hudood) Order, 1979 applies to FATA; it overrides the provisions of the FCR in Prohibition cases; the trial of the Prohibition cases shall be conducted under the Criminal Procedure Code; an appeal against the conviction and sentences shall lie to the Federal Shariat Court and not to the Commissioner and that there has been conferred exclusive revisional and other jurisdiction on the Federal Shariat Court in Hudood cases by the Constitution.

This Ordinance is a special statute; hence its provisions have been made to override all other related laws. Anything contained in any other law, which is not in conformity with the provisions of this Ordinance shall have no effect. Therefore, section 30 of FCR which is the only section that deals with adultery is in direct conflict of Hudood laws became redundant and inoperative.

It is well settled that the jurisdiction of the Federal Shariat Court extend FATA, and an appeal in Hudood cases shall lie to the Federal Shariat Court against the decision of the FCR’s Courts and not to the Commissioner but the question is whether the FCR’s Courts are competent to hear and decide Hudood cases, if not then what is the alternative because on one hand the Federal Sharait Court held (Said Amir v. the State PLD1990 FSC 28) that authorities working under FCR are

7-4759

not competent to hear and decide Hudood cases and on the other the jurisdiction of ordinary courts barred under the Constitution in FATA.

Secondly if the FCR's Court is to be considered as a criminal court and the Deputy Commissioner as Additional District Magistrate as such reported in one of the cases of Federal Shariat Court (Ms. Yasmeen v. the State PLD1994 FSC 4) and competent to hear and decide Hudood matters then the question is whether the Jirga Procedure by the FCR's Court other than the Criminal Procedure Code for trial of Hudood cases lawful or not, the Federal Shariat Court (Said Amir v. the State PLD1990 FSC 28) held that the trial of Hudood cases shall be conducted under the Criminal Procedure Code. It means that the trial of Prohibition cases conducted through council of elders by the FCR's Court is illegal and therefore, the initiative of the case is in wrong forum. Because the council of elders institution working under FCR declared by the Supreme Court of Pakistan in the case of Mazhar Ellahi v. Federation of Pakistan against the provisions of the Constitution.²⁷

The FCR's Court has no jurisdiction under FCR to take the cognizance of Hudood cases and on the other hand the jurisdiction of the ordinary courts barred under Article 247(7) of the Constitution. So the custom of honor killing, Suara (girls are offered in marriage to settle longtime disputes between rival families), child marriage and marriage without consent of female etc still practiced, particularly in the most backward tribal areas near the Afghan Border. So these basic human rights violation are still exist and practiced in FATA.

²⁷ PLD 1975 SC 66

The Dissolution of Muslim Marriage Act, 1939, the Muslim Family Law Ordinance, 1961 and others Pakistani laws relating to women and family matters are not extended to FATA. And there are also no provisions in FCR for the right of Khulah (divorce through court), recovery of dower, maintenance and inheritance etc, even though no institution for the registration of marriages exists in FATA to make Nikah Namah as evidence in the FCR's Courts.

CHAPTER IV

THE FRONTIER CRIMES REGULATION

4.1 INTRODUCTION

FCR dates back to the occupation of the six Pakhtoon-inhabited frontier districts by the British in 1848. FCR was re-enacted in 1873 and again in 1876 with minor modifications. With the passage of time, FCR was found to be inadequate and new acts and offences were added to it to extend its scope. This was done through promulgation of FCR of 1901.¹

The British devised FCR as an instrument for the suppression of crimes and to establish the writ of the colonial authority in certain frontier districts. In drafting FCR, the British relied upon some customs and traditions prevailing in the area but these traditions were distorted to suit the government's plan of securing convictions at will.² It aimed to advance the objectives of the British, thus it was merely a law of "convenience" or "expediency" than a law to ensure just and fair decision of cases in the respective areas.³

When Pakistan came into being, FCR remained as usual in NWFP, Balochistan and all the tribal areas. It applied to the whole NWFP but was abolished in March 23,

¹ S. Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (All Pakistan Legal Decisions Nabha Road, Lahore, 1966), 395.

² Badshah Gul Wazir, *The Futuristic of Tribal Administration* (Pakistan Academy for Rural Development, 1995), 8.

³ Robert Nickson, *Settling the Frontier* (Oxford University Press, Karachi, 2001), 248.

1956 when the Constitution of 1956 was promulgated. FCR was abolished in Balochistan except certain areas by the Constitution of 1973 where too it ceased to be operative when the Sharia'at Bench of Quetta High Court declared it unislamic in the case of the Quran-Sunna v. FCR⁴. FCR ended in Malakand Division in 1975. It is in vogue in FATA till date with minor and very insignificant changes bring in it so far.⁵

The FCR, a century old code of law consists of seven chapters, sixty-four sections and three schedules. It is the supreme law in FATA and serves all purposes both of procedural as well as substantive law. The feature distinguishing FCR from other laws is that it is an administrative regulation and not a "pure law" per se. Another fact is that more than hundred local and special national laws stand extended to FATA including the Pakistan Penal Code, Criminal Procedure Code and the Custom Act etc.⁶ The British incorporated in the FCR the institution of council of elders (official Jirga). The council of elders' procedure for the trial of cases is different from that of the ordinary courts of law. The Deputy Commissioner who is vested with the administrative, financial and judicial powers is authorized to refer the civil and criminal cases to the council of elders.⁷ The Commissioner acts as a revision court against the judgment of the Deputy Commissioner but in 1997, it was amended and turned into appellate forum and the powers of revision of the Commissioner's verdict were given to the Tribunal consisting of secretaries of

⁴ PLD 1979 Quett 217.

⁵ Latif Afridi, Human Rights and Discriminatory Laws in FATA-II, the Frontier Post Peshawar, 12 December 1993, p.6.

⁶ Ishfaq Ali, *Laws extended to the Tribal Areas with Jirga Laws* (New Fine Printers Peshawar, 2003), 438.

⁷ Sec 8 & 11, Frontier Crimes Regulation

home and law department.⁸ However, all these belong to the same executive authority and are usually hand in glove for all practical purposes. Hence, tribal system of justice tends to be obscure by having no distinction between judicial and administrative functions and the combination of executive and judicial functions has resulted in an arrangement contrary to established norms of justice.⁹

The profile of the FCR is as under.¹⁰

- FCR restricts its operation to offences under the Pakistan Penal Code, and offences under sections 29 and 30 of the FCR itself as mentioned in the second schedule.
- FCR empowers the Commissioner, the Deputy Commissioner to make references to the council of elders even in respect of civil disputes under circumstances specified in section 8 of the FCR.
- The council of elders was originally defined the council of three or more persons convened according to Pathan, Baluch or other usage, as the Deputy Commissioner directs, but in 1954 this definition was replaced by council of three or more persons, official or otherwise, directed and presided over by the Deputy Commissioner as a Magistrate invested with powers under section 30 of the Criminal Procedure Code, 1898.
- There is no quorum fixed for the meeting of the council of elders nor is it required to hear evidence in support of prosecution and the defense as provided by the Pakistan Criminal law Act, 1963 and the Qanun-e-

⁸ Sec 48 & 55A, Frontier Crimes Regulation

⁹ ICG (International Crisis Group) *Building Judicial Independence in Pakistan* (Asia Report N 86 Islamabad Brussels, 2004) 27.

¹⁰ The Law Reforms Commission Report, 1967-70 (Governernent of Pakistan, Ministry of Law and Parliamentary Affairs, Law Division, 1970) 138-139.

Shahadat. FCR only requires the council of elders to come to a finding after such inquiry as may be necessary and after hearing the accused person.

- In FCR, no time limit is fixed for the disposal of cases but cases are generally decided in about three to six months. Very few cases consume a period of above one year
- This council of elders has the power to recommend penalties including fines as well as rigorous imprisonment from three up-to fourteen years but they do not have the power to recommend death penalty even if the accused deserves.
- Another important feature of the FCR is that in case of conviction under sections 302 and 396 of the Pakistan Penal Code, the immovable property of the accused is liable to forfeiture where as, there is no such provision in the Act.
- There is also marked departure in the Pakistan Criminal law Act, 1963 and the FCR in so far as the provisions relating to preventive action are concerned. In the FCR, the Commissioner and the Deputy Commissioner enjoy more extensive powers than under the analogous provisions of the Act.

The judicial review stands for the power of the judiciary to decide the constitutionality of any enactment of the legislature, or any direction or order of the executive. The Constitution is the fundamental law of the state, in opposition to which any other law, or any direction or order, must be inoperative and void.¹¹ The

¹¹ S. Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (All Pakistan Legal Decisions Nabha Road, Lahore, 1966) 38.

superior courts of Pakistan questioned the constitutionality of FCR in a number of cases and held to be discriminatory law and against the fundamental rights as enshrined in the Constitution.

After the independence and in the decade following the promulgation of the Constitution of 1956, FCR frequently came under review in the superior courts due to against of the fundamental rights. In the cases reported as Khan Akbar Khan v. the Deputy Commissioner, Peshawar¹², Abdul Baqi v. Superintendent Prison Mach¹³ and similarly in the case of Malik Toti Khan etc v. the District Magistrate, Sibi and Zirat¹⁴ held that sections 8 and 11 of the FCR providing for reference of proceedings to council of elders offend against fundamental rights guaranteed under the Constitution of 1956 inasmuch as the Deputy Commissioner and the Commissioner given an uncontrolled discretion to select particular cases and even particular accused in the same case for the discriminatory procedure, such discretion being moreover not governed by any settled principle. They were repugnant to fundamental rights guaranteed under the Constitution of 1956, so it was now settled that the council of elders' procedure can not be described as a law in any recognized sense of the term. All other sections dependent on sections 8 and 11 automatically fall with them.

This judicial scrutiny, however, subsided with the Supreme Court verdict in the State v. Dosso¹⁵, which justified the abrogation of the Constitution of 1956 on the doctrine of "Revolutionary legality". The result was that FCR stood revived with

¹² PLD 1957 Pesh. 100.

¹³ PLD 1957 Kar. 694.

¹⁴ PLD 1957 Quett 1.

¹⁵ PLD 1958 SC.533.

full force and there was no difficulty even in extending the FCR to such other parts of the Province of West Pakistan, which originally were not subject to it.

The FCR continued to hold ground even after the Constitution of 1962 until fundamental rights were re-introduced by the first amendment to the Constitution in 1964. The validity of sections 8 and 11 was once again questioned in the High Court in 1964 in the case of Mohamad Usman v. the State through EAC and AIM Quetta and Others.¹⁶ A Full Bench reiterated the decision expressed in the earlier cases.

The special status of PATA ceased with the President Order No. 28 of 1970 which later on became an Act No. XXVII of 1973 through which the Supreme Court and the High Court of Peshawar have given the same jurisdiction in respect of PATA (Chitral, Dir, Kalat, Swat and Malakand) as they had in relation to other areas of N-W-F.P. Session divisions, civil courts were created, like the rest of Pakistan, from which appeals are heard in the High Court and the Supreme Court. The police departments and police stations were established. The Frontier Crimes Regulation's (Repeal) Regulation No. 1 of 1973 withdrew the FCR from these areas.¹⁷

The special status of FATA remained the same as provided in the Constitution of 1973 and the FCR is till applicable in FATA. The Supreme Court and the High Court does not possess jurisdiction in relation to FATA even after the promulgation of President Order No. 28 of 1970 or Act No. XXVII of 1973.

¹⁶ PLD 1965 (W.P) Lah. 229.

¹⁷ Peshawar High Court Annual Report 2003 (Peshawar, 2004), 22

Therefore, it appears that the jurisdiction of the Supreme and the High Court barred in FATA due to clause 7 of Article 247 of the present Constitution.

After the promulgation of the Constitution of 1973 the Supreme Court of Pakistan in the case of *Mazhar Ellahi v Federation of Pakistan and Others*¹⁸ struck down FCR and held it to be no law within the definition of the term, discriminatory and against the fundamental rights as provided by the Constitution, 1973.

Again in the *Government of Pakistan v. Azizullah Memon*¹⁹ the Supreme Court acknowledged this logic in a case concerning the use of the FCR-like procedures in the tribal areas of Balochistan. In rejecting a justice system in which the executive, represented by a Deputy Commissioner, wielded inordinate authority, the court explained that the “ mere existence of a tribal society or a tribal culture does not by itself create a stumbling block in the way of enforcing ordinary procedures of criminal law, trial and detention which is enforceable in the entire country”.

In spite of the fact, that FCR has been declared unconstitutional by the superior courts of Pakistan and being a century old “Code of Law” has several drawbacks in its enforcement, still exist in FATA, giving the Deputy Commissioner a wide variety of powers and is being used brutally against the tribal people. The question is, after half a century of independence, what is the justification for the continuing retention of these laws in the areas?

¹⁸ PLD 1975 SC. 66.

¹⁹ PLD1993 SC. 341,361

4.2 FATA'S ADMINISTRATION AND POWERS OF COURTS AND OFFICERS

At present, there are seven Political Agencies i.e Bajaur, Mohmand, Khyber, Orakzai, Kurram, North and South Waziristans and six Frontier Regions attached to Peshawar, Kohat, Bannu, D.I. Khan, Tank and Lakki Marwat under the jurisdiction of Federal Government, commonly known as FATA.²⁰ The Political Agent (referred here as the Deputy Commissioner in the FCR) heads each Political Agency while the Deputy Commissioners of the respective districts administer the Frontier Regions. Two or three Assistant Political Agents, Political Tehsildars and Naib Tehsildars further assist the Political Agent of each Political Agency. Each Political Tehsildar/Naib Tehsildar is in charge of sub-division tribes. From this administrative division it follows that as tribes in the tribal areas live within specific boundaries that correspond to geographical or physical areas, FATA is divided both by tribe and area for purposes of administration.²¹

As the jurisdiction, the FCR is applicable to the whole of FATA. Offences of different nature in FATA are tried by the council of elders under the FCR, ranging from three or more persons, nominated by the Deputy Commissioner.²² The Deputy Commissioner of an Agency (PA) or the Deputy Commissioner of adjacent district in case of a Frontier Region passes a final order of reference to the council of elders.²³ The council of elders sends their proposal back to the respective Deputy Commissioner's office after their deliberations. If the Deputy

²⁰ Article 246, the Constitution of 1973

²¹ Akbar S. Ahmad, *The Social and Economic Changes in the Tribal Areas* (Karachi Oxford University Press London New York, Delhi, 1977) 43.

²² Sec 2, The Frontier Crimes Regulation

²³ Sec 8 & 11, Frontier Crimes Regulation

Commissioner agrees to what has been recommended by the council of elders it stands otherwise that council of elders would be dissolved and a new one will be constituted. After the executive approval by the Deputy Commissioner, the final award is given.²⁴ An appeal against the judgment of the Deputy Commissioner lies to the Commissioner as provided under section 48 of the FCR. Likewise, any decision given, decree or sentence passed or order made by the Commissioner, revision under section 55-A shall lie to the Tribunal consisting of Home Secretary and Law Secretary. If the members of the Tribunal differ in opinion, under section 55(2) the case shall be referred to Chief Secretary of N-W-F.P.

The collective tribal responsibility of the tribes for the action of their individuals and the territorial responsibility of the tribes for what happens in their area are the two main principles of the FCR for maintaining the writ of political administration in the area.²⁵ The Deputy Commissioner who is vested with both judicial and executive powers is supposed to maintain order, preserve peace and discharge other local magisterial functions in the area. He is empowered to detain members of fugitive's tribes, demolish their homes, confiscate or destroy their property or siege a fugitive village pending his surrender or punishment by his own tribe.²⁶ The Deputy Commissioner is assisted by the Local Levy, Khassadars and in serious law and order situation the Local Militia or Scouts known collectively as the Frontier Corps, comes to rescue the political administration and helps to implement the political and administrative decisions. All such decisions are called executive orders under FCR, which cannot be challenged in a court of law. If at all, these

²⁴ Sec 8(3) & 11 (3), Frontier Crimes Regulation

²⁵ Sec 21 & 22, Frontier Crimes Regulation

²⁶ Sec 21, Frontier Crimes Regulation

decisions are to be legalized, they can be easily camouflaged by referring them to the council of elders for their opinions, which is then unchallengeable in any ordinary court of law, although, under section 48 of the FCR, appeal can be moved in a superior quasi-judicial administrative office of the Commissioner.

4.3 FLAWS IN THE FCR

FCR being a century old code of law is still applicable in FATA with minor and very insignificant modification brought in it so far. The Supreme Court of Pakistan in the *Government of Pakistan v. Azizullah Memon*²⁷ not only declared against the fundamental rights provided under the Constitution of 1973, but held it discriminatory. The FCR is in itself inadequate, outdated and having several flaws and faults in its application and enforcement. The FCR is no more applicable in the Baluchistan and PATA of N-W-F.P but the Preamble, the definitions, and others terms used in various provisions of the FCR create confusion and uncertainty with regard to FATA where it is still applicable.

4.3.1 PREAMBLE OF THE FCR

The Preamble of the FCR provides that “whereas it is expedient further to provide for the suppression of crime in certain frontier districts. It is hereby enacted as follows”.

The object of the enactment may, therefore, be taken as suppression of crimes in certain frontier districts. Subsection (4) of section 1 of the FCR provides that sections 1 to 5, 10, 20, 21, 26, to 28, 31, 32, 36, 37, 56 and 60 to 64 are of general application, but the remaining sections may be enforced in whole or in part, as the

²⁷ PLD1993 SC. 341,361

case may be, only against Pathans and Baluchis and against such other “classes” as the Local Government may, by notification in the Local Official Gazette, declare to be subject thereto.

Further, by West Pakistan Ordinance No. XLIII of 1963, subsection (3) and (4) of the existing section 1 were replaced by a new subsection (3), which runs:

“The FCR shall extend to the areas specified in the Third Schedule, but the Governor may by notification in the official Gazette exempt any such area from the operation of all or any of its provisions.”

The effect of the removal of the old subsection (4) of section 1 is that the question whether the singling out of Pathans and Baluchis, affected by that subsection was discriminatory and therefore contradiction to the Constitution no longer arises.

One curious point, however, is that in spite of the amalgamation of the old subsections (3) and (4) into the new subsection (3), subsection (5) has apparently been left untouched, being not even renumbered. It runs:

“that a notification under subsection (4) may declare a specific class only to be subject to all or any of the provisions of this FCR in a district or part of a district.”

It is obvious that as there is no subsection (4), subsection (5) is meaningless. The importance of the point is that although the old subsection (4) of section 1 of the FCR has disappeared, section 8 still places members of a Frontier Tribe in a different category from others within the same area, thus laying itself open to attack on the ground of discrimination.

It becomes fairly obvious that this section of the FCR is contrary to Article 25 of the Constitution of 1973; namely, “all citizens are equal before law and are entitled

to equal protection of law and to the extent of this inconsistency became null and void under Article 8 which says “laws inconsistent with or in derogation of fundamental rights to be void”.

It is also against Article 7 of the UDHR of 1948 which states that all are equal before the law and are entitled without any discrimination to equal protection of the law.” In addition, it is also against Article 20 of the Draft Covenant on Civil and Political Rights of 1952 that all are equal before the law and shall be accorded equal protection of the law.

4.3.2 DEFINITION (INTERPRETATION CLAUSE)

Section 2 of the FCR is the interpretation clause but it only defines the council of elders, Commissioner, Deputy Commissioner and the Governor. The interpretation clause of the FCR is incomplete and defective because many others things also need clear definitions as with passage of time the terms tribe, clan, sections and family required definitions so that the principle of the collective and territorial responsibility of the FCR can well be determined. In the name of territorial and collective responsibility, glaring injustice is perpetrated against the common tribesmen where as the elites and favorites of the administration escape unaffected.

4.3.3 RELATION OF FCR TO OTHER ENACTMENTS

Section 3 of the FCR provides that the powers conferred by this Regulation may be exercised in addition to any powers conferred by or under any other enactment, and where the contrary is not expressed or implied, other enactments in force in any place in which all or any of the provisions of this Regulation are for the time being

in enforce shall, so far as may be, apply to cases dealt with in that place under this Regulation.

It means that where FCR is applicable, others enactments will have effect and shall apply to cases dealt with in that place under the FCR. This clearly means that for same sets of facts the accused can be prosecuted as well as punished under FCR and any other enactments or in other words the FCR and all other laws so far extended to FATA will have effect and apply to the cases brought before the political administration. The Criminal Procedure Code of 1898 is also extended to FATA, but in criminal matters, the procedure under the Criminal Procedure Code and the council of elders' procedure under the FCR are different. Under the FCR the Deputy Commissioner refer the case to the council of elders.²⁸ There is no quorum fixed for the meeting of the council of elders nor is it required to hear evidence in support of prosecution and the defense. The FCR only requires the council of elders to come to finding after such inquiry as may be necessary and after hearing the accused person²⁹. On the finding of the council of elders, the Deputy Commissioner can award punishment under sections 29 and 30 of itself as mentioned in the Second Schedule or the Pakistan Penal Code. The Civil Procedure Code is not extended to FATA. Therefore, in civil matters, the FCR provides the council of elders' procedure, which is different from that of the ordinary courts of law.

²⁸ Sec 11, Frontier Crimes Regulation

²⁹ Sec 11(3), Frontier Crimes Regulation

The result is that FCR, which used as procedural and substantive law, not only lacks the basic requirements of the system of justice but also creates confusion, uncertainty and ambiguity in relation to other laws so far extended to FATA.

4.3.4 FORFEITURE OF REMISSIONS OF REVENUE

Section 25 of FCR provides for forfeiture of remissions of revenue etc, in the case of communities and persons accessory to crime. Where a village- community or part of village community has becomes liable to fine under sections 22, it shall further be liable to forfeit, in whole or in part and for a term or in perpetuity, any remission of land revenue of which it may be in joint enjoyment and the members of the village- community or part thereof, as the case may be, shall in like manner be liable severally to forfeit any assignment or remission of land revenue or allowance paid out of public funds which they, or any of them, may enjoy.”

Section 25 of FCR is redundant and inoperative because the Land Revenue Act, 1969 and most of the other laws relating to property rights are not extended to FATA. In the absence of land settlement and the land records, no land revenue can be levied in the tribal areas. On one hand the regular revenue laws do not apply in the areas and on other the FCR is silent on revenue matters. That is the reason that tribesmen by and large do not pay taxes in the present set up. The disputes over property whether agriculture or commercial are settled by Private Jirga through their own set of codes known as Rewaj without interference of the political authorities. Where a person is deprived of acquiring, holding and disposing of property has no remedy because on one hand the FCR is silent on this fundamental

human right and on the other the ordinary courts of the country have no jurisdiction in FATA due to Article 247(7) of the Constitution of 1973. It is clearly the violation of the fundamental right provided under Article 23 that every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest. In addition, Article 24(1) that no person shall be deprived of his property save in accordance with law. This is also contrary to Article 17 of the UDHR of 1948 that every one has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

4.3.5 POWERS OF PROVINCIAL GOVERNMENT SAVED

Section 28 of the FCR provides that nothing in section 25, 26 and 27 of the FCR shall affect the powers of the Provincial Government with respect to the grant, continuance of forfeiture, in whole or in part, of any assignment or remission of land-revenue or of any allowance paid out of public funds.

This section 28 of FCR creates uncertainty and ambiguity due to its contradiction with Article 247 of the Constitution of 1973 that provides that the executive authority of the Federation shall extend to FATA. The Constitution clearly indicates that the executive authority of the Federation shall extend to FATA and therefore this section of the FCR becomes redundant and in-operative because the Constitution over rides all other laws for the time being enforced in the country.

CHAPTER V

THE COUNCIL OF ELDERS

5.1 INTRODUCTION

The Jirga institution under FCR further strengthened the powers of the tribal chiefs. The FCR regularized the Jirga system, which may be compared to the Panchayat system. However, the system seems to be superior to the Panchayat system, as the latter is an unofficial body of elder men without any judicial powers. The Jirga system is both an official body and a judicial body dealing with the day-to-day problems of the tribesmen.¹ Under the FCR, the members of the Jirga were made to deal with both civil and criminal cases.²

In FCR Jirga means a group of elders designated by the Deputy Commissioner known as the council of elders. The council of elders was originally defined the council of three or more persons convened according to Pathan, Baluch or other usage, as the Deputy Commissioner directs, but in 1954 this definition was replaced by council of three or more persons, official or otherwise, directed and presided over by the Deputy Commissioner as a Magistrate invested with powers under section 30 of the Criminal Procedure Code.³ As far as the composition of council of elders is concerned its members are not nominated on the basis of merit

¹ Syed Abdul Quddus, *The Nort West Frontier of Pakistan* (Royal Book Company Rehman Center, Zaibunssa Street, Saddar Karachi Pakistan, 1990), 179.

² Sec 8 & 11, The Frontier Crimes Regulation

³ Sec 2, Frontier Crimes Regulation

but art of adulation and rapport with political administration are considered the main qualification of the council of elders' members.⁴

The FCR authorized the Deputy Commissioner to refer all cognizable cases within the jurisdiction to the decision of council of elders who are required to give a finding as to the guilt or innocence of the accused in criminal case or civil dispute.⁵

The council of elders is expected to visit the place of crime and dispute, inquire by their own methods to find the facts and the solution. The council of elder's finding need not be based on the recording of any evidence.⁶ On the findings of the council of elders, the Deputy Commissioner can award punishment under sections 29 and 30 of the FCR itself as mentioned in the second schedule or the Pakistan Penal Code. On conviction for murder, the council of elders could recommend up to fourteen year's imprisonment, the maximum penalty.⁷ Against the decision of the Deputy Commissioner, the applicant has the right of appeal on the merit not to the court of law but to the Commissioner under section 48 of FCR. Section 55A of the FCR provides that revision against the judgment of the Commissioner lies in the Tribunal consisting Law and Home Secretaries. Decisions of the authorities, high or low, can be reviewed on limited grounds by the higher one.⁸

In the case of Samandar and Others v. the Crown⁹, the Federal Court held that the proceedings under FCR is not purely judicial in character but partake of the

⁴ Human Rights Commission of Pakistan, State of Human Rights in 2003 (Lahore, 2004), 33-37.

⁵ Sec. 8(1) & 11(1), Frontier Crimes Regulation

⁶ Sec. 8(3) & 11(3), Frontier Crimes Regulation

⁷ Sec. 12, Frontier Crimes Regulation

⁸ Sec. 55A(4), Frontier Crimes Regulation

⁹ PLD 1954 FC 228.

characteristics of an administrative agency. Justice Cornelius, who wrote the main judgment of the Court, has observed at page 235 as under: -

“On a careful consideration of the statutory provisions, and the procedure actually followed in inquiries of that nature, I am satisfied that, if the ascertainment of the commission of an act, falling within one or more of the definitions of offences contained in the Penal Code, by the mode prescribed in section 11 of the FCR can be regarded as a mode of justice at all, it is certainly not such a mode as is operated through the ordinary courts of justice acting in accordance with the law of procedure and of evidence, but is rather to be assimilated to, and included among the agencies of the general administration.”

5.2 TRIAL PROCEDURE IN CIVIL MATTERS

When the Deputy Commissioner is satisfied, from a report or other information, that a dispute exists which is likely to cause a blood feud or murder, or culpable homicide not amounting to murder, or mischief or a breach of the peace, or in which either or any of the parties belongs to a frontier tribe, he may, if he considers that the settlement thereof in the manner provided by this section will tend to prevent or terminate the consequences anticipated and if a suit is not pending in respect of the dispute, make an order in writing, stating the grounds of his being so satisfied, referring the dispute to council of elders and requiring the council to come to a finding on the matters in dispute after making such inquiry as may be necessary and after hearing the parties. The members of the council of elders shall in such case, be nominated and appointed by the Deputy Commissioner.¹⁰

¹⁰ Sec 8, Frontier Crimes Regulation

It is further provided that the order of reference made under subsection (1) shall state the matter or matters on which the finding of the council of elders is required.¹¹

On receipt of the finding of the council of elders, the Deputy Commissioner may-
(a) remand the case to the same council of elders for a further findings; or (b) refer the case to a second council of elders; or (c) refer the parties to the civil court; or (d) pass a decree in accordance with the finding of the council of elders, or of not less than three-fourths of the members thereof, on any matter stated in the reference; or (e) declare that further proceedings under this section are not required.¹²

A decree passed under section 8 sub-section (3), clause (d), shall not give effect to any finding or part of a finding which, in the opinion of the Deputy Commissioner is contrary to good conscience or public policy but shall- (a) be a final settlement of the case so far as the decree relates to any matter stated in the reference although other matters therein stated may remain indisposed of and (b) have, to that extent and subject to the provisions of the Frontier Crimes Regulation with respect to appeal and revision, the same effect as a decree of a civil court of ultimate resort and be enforced by the Deputy Commissioner in the same manner as a decree of such a court may be enforced.¹³

¹¹ Sec 8(2), Frontier Crimes Regulation

¹² Sec 8(3), Frontier Crimes Regulation

¹³ Sec 9, Frontier Crimes Regulation

No civil court shall take cognizance of any claim with respect to which the Deputy Commissioner has proceeded under section 8 subsection (3), clause (a), clause (b) or clause (d).¹⁴

Section 8 of FCR provides that if the Deputy Commissioner thinks that dispute will not end “the consequences anticipated” would not refer the case to council of elders. If the consequences anticipated are a blood-feud, murder etc. but if that be so, then these consequences are so relevant to a dispute where any one of the parties belong to a frontier tribe, it is not clear what considerations shall weigh with the Deputy Commissioner when dealing with such a dispute. However, if even these alternatives do not suit him, he may refer the parties to the civil court under clause (c) or declare under (e) that further proceeding is not required. To affect clause (c) and (e) are identical, because the parties do not require to be told that they should go to the civil court and they cannot be forced to go.

In the case of Khan Abdul Akbar Khan v. the Deputy Commissioner, Peshawar¹⁵ the Peshawar High Court held that section 8 of FCR is contrary to Article 5 of the 1956 Constitution, corresponding to Article 15 of the 1962 and Article 25 of the present^{yy}onstitution, namely, “all citizens a^{yy} all equal before law and are entitled to equal protection of law. If section 8 of the FCR falls, sections 9 and 10 will fall with it. It is pithily expressed by Justice Kayani at page 104 as under:-

“Section 8 of the FCR makes the law a perfect ass, and the Deputy Commissioner can ride to any goal within the five broad clauses of sub-section (3). To enable him to take action, there should be a dispute (in the case of people other than

¹⁴ Sec10, Frontier Crimes Regulation

¹⁵ PLD 1957 Pesh 100.

tribesmen), which is likely to cause a blood feud etc and he should be of the opinion that reference to council of elders will avert the blood feud etc. How reference to council of elders and decision by a Deputy Commissioner has the effect of scintillating good will and charming away hostility is not clear. However, if the Deputy Commissioner could have worked any such magic, why does section 8 forbid references if the matter has already gone to the civil court? This must be on the assumption that a resort to the civil court has the same salutary effect of averting a dangerous situation as reference to council of elders. However, if that were so, why is it not left open to a party to resort to the civil court after the reference has been made? It is clear that section 8 is misconceived and that in the garb of resolving a dispute the Deputy Commissioner can encroach upon civil rights without reference to any law except what appears to him to be in accord with good conscience or public policy. If any good faith had existed in such a reference, the decision would have been made appealable to a superior civil court.”

Relying on the above judgment of the superior court, this section is also against Article 7 of the UDHR of 1948 that all are equal before law and are entitled without any discrimination to equal protection of the law. In addition Article 20 of the Draft Covenant on Civil and Political Rights of 1952 that all are equal before the law and shall be accorded equal protection of law.

5.3 TRIAL PROCEDURE IN CRIMINAL MATTERS

When in the opinion of the Commissioner or Deputy Commissioner, it is inexpedient that the question of the guilt or innocence of any person or persons accused of any offence, or of any several persons so accused, should be tried by a

court of any of the classes mentioned in section 6 of the Criminal Procedure Code, 1898, the Deputy Commissioner may or if the Commissioner so directs, shall by order in writing, refer the question to the decision of council of elders, and require the council of elders to come to a finding on the question after such inquiry as may be necessary and after hearing the accused person. The members of the council shall, in each case, be nominated and appointed by the Deputy Commissioner.¹⁶

The members of council of elders shall, in each case, be nominated and appointed by the Deputy Commissioner. However, this is only in criminal cases that the accused person makes objection to the nomination of the council of elders. The Deputy Commissioner shall consider every objection made by an accused person and may, in his discretion, either accept or reject the objection, provided that in the latter case, he shall record his reasons for so doing. The Deputy Commissioner shall after disposing of any objection made by the accused person, appoint the council of elders.¹⁷

On receipt of the finding of the council of elders, the Deputy Commissioner may-
(a) remand the question to the same council of elders for a further finding; or (b) refer the question to a second council of elders; or (c) acquit or discharge the accused person or persons or any of them; or (d) in accordance with the finding or any matter of fact of the council, or of not less than three-fourths of the members thereof, convict the accused person or persons, or any of them, of any offence of which the facts so found show him or them to be guilty; provided that a person

¹⁶ Sec 11 (1) Frontier Crimes Regulation

¹⁷ Sec 11(2) Frontier Crimes Regulation

discharged under clause (c) shall not be liable to be retried for any offence arising out the same facts after the expiry of two years from the date of such discharge.¹⁸ The result achieved is parallel to that arrived in respect of civil references to council of elders under FCR. Section 11 of the FCR is inconsistent with the provision of the Constitution of 1973, in as much as the accused persons who can be dealt with under that section have been left at the mercy of the arbitrary will of the authorities concerned, for whose guidance in the matter, no provision has been made in the regulation. It is nowhere provided how the authorities are to be guided for selecting cases or persons for reference to the council of elders. It is obvious that the will of the selecting authority is made supreme in the matter and the discretion to make a selection is not a guided and restricted discretion, but is absolute and unfettered one. The Preamble of the FCR which says that the measure was adopted further to provide for the suppression of crimes is hardly a guide for achieving this purpose.

In the case of Malik Toti Khan v. the District magistrate, Sibi and Ziarat¹⁹ held that section 11 of FCR which enabling the executive authorities to refer any criminal case to council of elders offend the equality before law clause embodied in Article 5 of the Constitution of 1956 and to the extent of this inconsistency void under Article 4, corresponding to Article 25 and 8 of the Constitution of 1973. The Judge expressed at page 710 as under:

“It therefore, follows that a person whose case has been referred to the council of elders for trial is deprived of the ordinary methods of defense available to a person

¹⁸ Sec 11(3), Frontier Crimes Regulation

¹⁹ PLD 1957 (W.P) Quett. 1.

tried for an offence by a regular court of law. Although in certain instances, for example, in a murder case, he may receive a lower punishment than might be inflicted by a Session Judge, yet the process by which the final result is arrived at may be highly prejudicial to an accused person in a council of elders trial when judged in the light of accepted canons of a fair trial. There is no guiding principle prescribed by which the discretion of the executive authority as regards the choice of forum is to be regulated. I recognize that this decision may cause difficulties to the administration in the area. Such consideration, however, would not be irrelevant when we are adjudicating on effects of the fundamental rights guaranteed by the Constitution. The remedy obviously lies with the legislature or with the executive authority that can make good the deficiencies of the administration. The argument of inconvenience can not be allowed to override the constitutional provisions granting fundamental rights to all citizens of Pakistan”.

Again relying on the above judgment of the superior court, this section is also against Article 7 of UDHR of 1948 “that all are equal before law and are entitled without any discrimination to equal protection of the law. In addition Article 20 of the Covenant on Civil and Political Rights of 1952 that all are equal before the law and shall be accorded equal protection of law.

5.3 PUNISHMENTS ON FINDING OF COUNCIL

Section 12 (1) provides that where the Deputy Commissioner convicts a person under section 11, sub-section (3), clause (d), he may pass upon him any sentence of fine.

(2) Where the Deputy Commissioner so convicts a person of an offence mentioned in the second schedule, he may, whatever may, be the punishment prescribed for the offence, sentence the person, in lieu of or in addition to fine, to be imprisoned for a term which may extend to seven years, or, subject to the provisions of section 393 of the Criminal Procedure Code 1898, to be whipped or to be whipped and imprisoned for a term which may extend to five years, or to be transported for a term which may extend to seven years; and, where he so convicts a person of an offence punishable with transportation or with imprisonment for a term exceeding seven years, he may, subject to confirmation by the Commissioner, sentence the person to a term either of transportation or of imprisonment exceeding seven years but not exceeding fourteen years;

Provided first, that a sentence of whipping shall not be passed on any person so convicted of an offence under sections 121, 121-A, 122, 123, 124-A, 125, 126, 127, 144, 150, 216, 216-A, 400, 401, 402, 294 or 495 of the Pakistan Penal Code; provided, secondly, that a sentence of transportation or imprisonment for an offence shall not be for a longer term than that (if any) prescribed for the offence; provided, thirdly, that a sentence of transportation shall not be passed for an offence, which is not punishable with transportation or with imprisonment for a term, which may extend to seven years or more.

Section 13(1) of the FCR says that any sentence passed under section 12 shall be executed in the manner provided for the execution of sentences passed by a court of any of the classes mentioned in section 6 of the Criminal Procedure Code 1898.

(2) For the purposes of section 64 to 67 of the Pakistan Penal Code, 1860 in reference to a sentence under section 12 of the FCR- (a) an offence punishable with death or transportation for life shall be deemed to be punishable with rigorous imprisonment for a term which may extend to ten years; and (b) the imprisonment in default of payment of fine may be rigorous or simple on the direction of the Deputy Commissioner.

Section 19 requires the Deputy Commissioner, when he passes a sentence of fine exceeding Rs. 200 or imprisonment exceeding three months or of transportation, to make a record of the facts of the case of an offence committed and of his reasons for passing the sentence. Under section 40, the Commissioner or the Deputy Commissioner may put a person on security or under surveillance for the prevention of murder or culpable homicide not amounting to murder or the dissemination of seditions, on the recommendation of the council of elders. Similarly, under section 41, security for financial purposes may be demanded from families of factions in case of blood feud, on the recommendation of council of elders.

5.4 APPEAL AND REVISION

Earlier under section 49 of FCR only a revision was provided in the court of Commissioner, but revision powers of the Commissioner have now been converted into appeal powers. Under section 48, an appeal shall lie to the Commissioner against the orders of the Deputy Commissioner. Likewise, section 55A provides that any decision given, decree or sentence passed or order made by the Commissioner, revision shall lie to the Tribunal consisting of (i) Home Secretary

and (ii) Law Secretary. If the members of the Tribunal shall differ in opinion, the case shall be referred to Chief Secretary of N-W-F.P and the case shall be decided according to the opinion of the majority.

Section 55A(3) provides that in exercise of the revision jurisdiction in any criminal proceeding, the Tribunal shall have powers under section 338 and any of the powers conferred on an Appellate Authority under sections 195, 423, 427 and 428 of the Criminal Procedure Code, 1898, and may also enhance any sentence; provided that nothing in this section shall be deemed to authorize the Tribunal to set aside the finding or any question of fact of a council of elders, where such finding has been accepted by the Deputy Commissioner, unless the Tribunal 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.

The above amendments along with some more, have been made to FCR vide amendment No. F2 (3)/97-Pub dated 14-2-1997. These amendments, however, are not sufficient. They raise criticism over the unfettered powers of the executive authority particularly in respect of preventive sections of the FCR. Besides, the fines imposed over the whole tribe in case of failure to fulfill the obligation of territorial responsibilities, bulldozing of houses of offenders and those of their nearest relatives as provided in section 22 of FCR, and easy subservience of council of elders to the dictates of the Deputy Commissioner authorized in dealing with criminals, and above all, negative attitude of the political authorities in granting bail to the criminals under section 40 of FCR. These are some of the

ground realities that make the FCR as Black Law, injudicious and against the spirit of fundamental human rights provided under the Constitution of Pakistan of 1973 and International Human Rights Instruments.²⁰

The power of appeal has been created but forum of appeal is still the Commissioner who is not from the judicial service and has generally been conducting himself as an administrator and taking decisions after consulting the concerned political officers. Hence, substantially no difference has occurred at all. A new forum for hearing revision petitions consisting of Law Secretary and Home Secretary has been created and called the Tribunal, but it is on record that since its creation this Tribunal of provincial's secretaries has not given relief in a single case so far. The failure of the Tribunal in granting relief to the aggrieved person by the decision of the Commissioner is that the nature of the duties and responsibilities of these two officers are such that they can hardly manage to sit together or if at all they sit together they cannot sit for long hours.²¹ This also seems strange that under Article 247(3) of the Constitution of 1973 the Provincial Government powers is barred in regard to FATA, but under FCR the revision powers are vested in the Provincial Government.

It is wrong that the person convicted under FCR has any remedy provided by law. Section 48 and 55A of the FCR do not afford remedy which the High Court provides in the matter, which would be specific, adequate, prompt and efficacious, to the condemned person.

²⁰ Sher Muhammad Khan, *FATA a Socio- Economic and Geo-Political History* (Peshawar Publisher, 1990), 16.

²¹ Latif Afridi, Human Rights and Discriminatory Laws in FATA-II, the Frontier Post, Peshawar, 12 December 1993

5.5 THE PRIVATE JIRGA

Most of the laws of the country do not apply in FATA. The FCR empowered the executive authority to take cognizance of any civil and criminal matters in FATA but the Regulation as a Code of law lacks the basic requirements to cover the tribal affairs.²² The executive authority deals with those civil and criminal cases, at first, a dispute between the parties assumes proportions which disturb tranquility of the area and secondly, the executive authority main duties are to ensure general peace in the Agency, especially in government's headquarters, to protect government roads and buildings, and to maintain the writ of government and recently to supervise development work.²³ The tribal set-up has its in-built system for the cessation of hostility or immediate resolution of serious dispute over property or customary rights. Therefore, both the civil and criminal cases are dealt by the tribal themselves without any assistance and help from the agencies of the state. The tribal society as self-governed society has its own mechanism for solving different disputes, and the executive authority does not interfere in it. These disputes and quarrels are taken to the Private Jirga for an amicable settlement according to their own code of law "Rewaj" which imposed duties as well as rights.²⁴

The Private Jirga is different from the council of elders (Official Jirga) and the difference between the two is based on its status with respect to authority. The council of elders is vested with legal authority in respect of the case referred to it by the administrative authority, which is decided upon the recommendations of the

²² Teepu Mahabat Khan, *The Land of Khyber* (Uzbek Publishers Peshawar, Pakistan, 2004), 93.

²³ Akbar S.Ahmad, *Puthun Economy and Society Traditional Structure and Economic Development in a Tribal Area* (Routledge and Kegan Paul 1980), 307.

²⁴ Abdul Rashed, *Civil Service on The Frontier* (Khyber Printer Peshawar, 1977), 58.

council of elders under sections 8 and 11 of FCR. The Private Jirga is much broader term in its scope and jurisdiction, and out side the ambit of the FCR. Nonetheless Private Jirga does not necessarily carry a government or administrative sanction but a collective will of the residents of the area or representative of various people. They are not constituted or set up under any official direction or decree, but deriving their authority to award judgment from people, their sanctions and traditions²⁵.

In common parlance the term Maraka is used for Private Jirga among the tribal people. It is a general gathering or assembly of people in which important collective issues are discussed, opinions are sought, and decisions are taken. The conclave of a Maraka may represent the whole tribe when some major or collective issues are on the agenda, or it may represent a clan, or a sub-clan, a section or a single family depending on the nature of the issue.²⁶

Generally, there are two types of Jirga. In case of dispute between two individuals or families, in order to avoid bloodshed they ask the elders to form a Jirga to settle the dispute. This is called Shakhasi Jirga. Another type of Jirga is Ulusi Jirga (grand Jirga). When a representative gathering is held, comprising all sections of a tribe to deliberate on the issues concerning the whole community or the tribe can be called Ulusi Jirga.²⁷

In both types of Jirgas, the Jirga passes judgment after necessary investigation into the dispute. No effort is spared to reconcile the disputing parties. However, the

²⁵ Babar Shah, *Constitutional Dichotomy along the Durand line* (Area Study Centre, Peshawar University, Unpublished), 157- 8

²⁶ Olaf Caro, *The Pathans* (Oxford University Press Karachi, 1996), 179

²⁷ Akbar S.Ahmad, *Puthun Economy and Society Traditional Structure and Economic Development in a Tribal Area* (Rout Ledge and Kegan Paul, 1980) , 307.

Jirga decisions are of two types, one is based on the concept of Haq (the right), and the other on Ikhtiar (authority). In the case of Haq both the claimant and the accused present their arguments for and against the prosecution and defense then decision is given. Each party has the right to challenge the decision of the Jirga on its merit. If one of the parties is not satisfied with its verdict and feels that the Jirga has not done justice or the other party complains that Jirga has violated certain precedents and rules (Nurkh) of Rewaj, therefore, the decision is not accepted. It is interesting that different tribes may have different Nurkh in similar cases. In that case, the aggrieved party has the right to bring another Jirga to confront the incumbent one. Every time a new Jirga is constituted, the whole process starts anew. Usually the decision given on third occasion is considered final.²⁸ In the second case, the members of the Jirga get the Ikhtiar (authority), means consensus or the absolute right in deciding the issue between the contending parties. The two parties repose their full confidence in the Jirga, and authorize it to decide according to whatever ruling it arrives at. The parties have to abide by the decision and cannot challenge it. The tradition is that Jirga with Ikhtiar enjoys total authority but the decision taken has to be unanimous.²⁹

However, no person could dare to question the verdict of the elders of the Jirga, as it would amount to the defiance of the whole community. The Jirga determines the punishment to be inflicted on the basis of Nurkh (rule or precedent) of Rewaj. Any body that does not abide by the decision of Jirga is subjected to punitive measures. This practice differs in different parts of the tribal areas. Usually any one who

²⁸ Robert Nickson, *Settling the Frontier* (Oxford University Press, Karachi 2001), 287

²⁹ Syed Abdul Quddus, *the North-West- Frontier of Pakistan* (Royal Book Company Rehman Center Zaibunssa Street, Saddar Karachi Pakistan 1990), 171.

rejects collective wisdom takes a great risk; for a Jirga can impose powerful sanctions to back up its judgment. It can put a man outside the society, so that every one in the village ignores him. It can confiscate his rifles, placed with the Jirga as mortgage, or impose heavy fines payable to the other party in the dispute. If the man remains recalcitrant, the Jirga can use force to fix him by sending men to burn down his house.³⁰

The collective decision of Ulusi Jirga are carried out by tribesmen themselves under different nomenclature of Salwaikhtae in Waziristan, Laskar in Afridwala, and Rapakian in Kurram. It is a type of an executive council of more or less forty members, depending upon the seriousness of the matter. Their effectiveness is mostly determined by strength and sanctions they derive from tribal people (Ulus). At the same time, execution of the decisions of Jirga also depends on the strength of Salwakhitae, Lashkar, and Rapakian.³¹

The Jirga system has its advantages, too. Internal or intertribal matters are decided on the basis of age-old conventions, customs and traditions of the tribesmen called Rewaj. They are saved from unnecessary expenditure on litigation and enjoy quick and speedy justice.

However, the question arise that why is Jirga so important to the tribal people? Does Jirga has relevance as it used to enjoy in past years? Is Jirga the sole alternative of retributive justice? Is there any need to introduce certain changes in the system or abolished it completely? These and similar other questions need to be

³⁰ Olaf Caro, *The Pathans* (Oxford University Press Karachi, 1996), 179

³¹ Robert Nickson, *Settling the Frontier* (Oxford University Press, Karachi, 2001), 287

considered in order to bring the system at par with the more developed and civilized system of Justice.

CHAPTER VI

PENALTIES UNDER FCR

6.1 INTRODUCTION

The FCR, which operates on the principle of collective and territorial responsibility, empowers the executive authority to impose certain penalties upon the fugitive's tribes.¹ The executive authority is empowered to debar a tribe or any section or members of such tribe in FATA from entering the settled district, detain members of fugitive's tribes, demolish their homes, confiscate or destroy their property or siege a fugitive's village, seal any business centre and arrest any tribal person even from the settled area governed by the Provincial Government pending his surrender to the executive authority or punished by his own tribe.²

The principle of the territorial and collective responsibility which means that if a person or group of persons committed a crime and escaped then the whole tribe has to be penalized until they hand over the individual or group of persons to the executive authority. The collective responsibility helps in revealing the facts of the matter, identifying the real perpetrator of the crimes and

¹ Sec 21 & 22, Frontier Crimes Regulation

² Sec 21, Frontier Crimes Regulation

inflicting the appropriate punishment but cannot be regarded as just principle of law.³

There is no difference between the person or group of persons indulge in the commission of crime and a common person. The offender and a common person of a tribe are treated in the same manner and face the same penalties. These sections that relate to penalties of the FCR are contrary to the fundamental rights provided under the Constitution of 1973 and International Human Rights Laws.

6.1.1 BLOCKADE OF HOSTILE OR UNFRIENDLY TRIBE

When hostile or unfriendly tribe or any section or member of such tribe acting in hostile or unfriendly manner towards government, the Deputy Commissioner may, with the previous sanction of the Commissioner by order in writing, directs and impose blockade against them, and banning their entry into the settled area of Pakistan, arrest all or any one of them, can cease their property and confiscate, and prohibit all or any persons within the limits of Pakistan from all inter-course or communication of any kind with others tribes.⁴

This section of the FCR is against the general principle of natural justice and equity that no person shall be punished for an offence, which is not committed by him. It is also directly in conflict with fundamental right enshrined in Article 15 of the Constitution of 1973 that every citizen shall have the right to remain in, and subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof and to extent

³ Arbab Arif, The Frontier Crimes Regulation, Seminar on (FATA) , Organized Jointly by the Area Study Centre of Peshawar University & Hannas-Seidel Foundation Germany (Saeed Book Bank & Subscription Agency, Arbab Road Peshawar, December 7_8, 2004) p..33.

⁴ Sec 21, Frontier Crimes Regulation

of this inconsistency became null and void under Article 8 which provides that any law or custom or usage having the force of law, in so far as it is inconsistent with fundamental rights shall be void.

Though in Article 15 the word subject to any reasonable restriction imposed by law in the public interest used but the restriction on the movement of the tribesmen for an offence of an individual is neither reasonable nor in public interest, because FCR as being declared unconstitutional by the superior courts of Pakistan in the case of *Mazhar Ellahi v. Federation of Pakistan*⁵.

In addition, this section is in conflict with Article 13(1) of the Charter of the United Nations, 1945 that everyone has the right to freedom of movement and residence within a state.

6.1.2 FINES ON COMMUNITIES' ACCESSORY TO CRIME

When from the circumstances of any case, there appears to be good reason to believe that the inhabitants of any village, or part of village, or any of them have connived at or in any way abetted, the commission of an offence, or failed to render all assistance in their power to discover the offenders or to effect their arrest, or connived at the escape of, or harbor any offender or person suspected of having taken part in the commission of an offence or 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 village, or any of them as a whole.⁶

⁵ PLD 1975 SC. 66

⁶ Sec 22, Frontier Crimes Regulation

It is further provided that in cases where murder, or oblique murder takes place within the area occupied by a village community or part of a village community all or any member of the village community shall be deemed to have committed an offence under section 22, unless the elders of the village show that the members thereof had not an opportunity in preventing the offence or arresting the offender or they have used all reasonable means to bring the offender to justice, the Deputy Commissioner can impose fine under section 22 and in default of payment recover as arrears of land revenue under section 24.⁷

The executive authority is empowered to impose fine upon the whole tribe for an offence of an individual who belongs to the village within its limits the offences has taken place. The members of the tribe arrested and detained under the territorial responsibility are deprived of the right of the due process of law and best evidence as the FCR does not afford adequate remedy. Therefore, this section of the FCR is against Article 10 of the Constitution that no person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest nor shall be denied the right to consult and be defended by a legal practitioner of his choice and to the extent of this inconsistency became null and void under Article 8 that laws inconsistent with or in derogation of fundamental rights to be void. In addition, it is against Article 9 of the Covenant on Civil and Political Rights of 1952 that no one shall be subjected to arbitrary arrest or detention.

One apparent flaw in these sections is the fine to recover arrears of land in default of payment. The Land Revenue Act is not extended to FATA. The government

⁷ Sec 23, Frontier Crimes Regulation

keeps and maintains no record of the land, and that is the reason that people do not pay the taxes in FATA.

6.1.3 FORFEITURE OF PUBLIC EMOLUMENTS

When the Deputy Commissioner is satisfied that any person who is in the employment and paid up by the government funds, has been guilty of a serious offence, or has colluded with or harbored any criminal, or has suppressed material evidence of the commission of any offence, or has failed in the investigation of any criminal case to render loyal and proper assistance to the authorities to the best of his ability, the Deputy Commissioner under section 27 may direct the forfeiture in whole or in part of the public emoluments, which pertains to be forfeiture of Longies of Maliks, salaries of the employees of accused tribes, the Deputy Commissioner can order such forfeiture for three years and Commissioner for more than three years or in perpetuity.⁸

The forfeiture of public emoluments etc by the Deputy Commissioner for three years and Commissioner for more than three years or in perpetuity in cases of persons who are in the employment and paid up by the government funds have been found guilty under section 26 of FCR can not be considered as just principles of law and justice. On one hand, the aggrieved party is not provided with the opportunity to prove himself innocent as there is no forum available for the redress of his grievances. On the other the laws of the country, which deal with rights and duties of the government servants are not extended to FATA. The tribal employees

⁸ Sec 26, Frontier Crimes Regulation

in the local political administration are not provided with the right of appeal before the Services Tribunal.

CHAPTER VI1

PREVENTIVE MEASURES UNDER FCR

7.1 INTRODUCTION

Preventive measures of FCR are the precautions that the executive authority takes in order to prevent law and order situation. The executive authority has been given unfettered powers. Besides the fines imposed over the whole tribe in case of failure to fulfill the obligation of territorial and collective responsibilities¹, prohibition of erection of new village or tower on Frontier², removal of village, removal of tribesman from the area, bulldozing of houses of offenders and those of their nearest relatives,³ negative attitude of the political authorities in granting bail to the criminals under section 40 of FCR, which binds down the parties for maintenance of peace and good behavior, are some of the ground realities that are not looked at rightly by the public at large and condemned by terming FCR as Black Law, injudicious and against the spirit of human rights provided under the Constitution of 1973 and International Human Right laws.

These sections of FCR are in violation of several Articles of the Constitution, such as Article 4 (the right of an individual to be dealt with in accordance with the law), Article 9 (security of person), Article 10 (safeguards as to arrest and detention),

¹ Sec 21, Frontier Crimes Regulation

² Sec 24, Frontier Crimes Regulation

³ Sec 21, Frontier Crimes Regulation

Article 13 (protection against double jeopardy, self- incrimination), Article 14 (inviolability of the dignity of man, prohibition of torture for the purpose of extracting evidence), Article 24 (protection of property rights) and void under Article 8 of the Constitution, which provides that any law or custom or usage having the force of law, in so far as it is inconsistent with fundamental rights shall be void.

7.1.1 POWER TO PROHIBIT ERECTION OF NEW VILLAGES OR TOWER ON FRONTIER

No new hamlet, village-habitation, tower or walled enclosure without the previous sanction in writing of the Commissioner , who may either grant or refuse such sanction as he thinks fit, be erected an any place within five miles of the Frontier. Where the Deputy Commissioner refuses to sanction the erection of any such hamlet, village-habitation, tower or walled enclosure, as the case may be, he shall record his reasons for so doing.⁴

This section which empowers the Commissioner to erect new hamlet, village-habitation and tower or wall enclosure at any place within five miles of the Frontier is arbitrary. In case, the Commissioner ban a village-habitation, no compensation will be awarded to the aggrieved persons. Secondly, the aggrieved person can raise objection only before the same authority, which will not accept objections on his own order. The conclusion can be drawn rightly, that this section is against the fundamental right provided under Article 23 of the Constitution of 1973 that every citizen shall have the right to acquire, hold and dispose of property in any part of

⁴ Sec 31, Frontier Crimes Regulation

Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest. In addition, Article 24(1) that no person shall be deprived of his property save in accordance with law and to the extent of this inconsistency null and void under Article 8 which says laws inconsistent with or in derogation of fundamental rights to be void".

This is also contrary to Article 17 of the UDHR of 1948 that every one has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

7.1.2 POWER TO DIRECT REMOVAL OF VILLAGE

The Federal Government may, by order in writing, direct the removal of any village near the Frontier within four miles where it is expedient on military ground, and awards to the inhabitants such compensation for any loss which they suffer by the removal of their village as in the opinion of the Federal Government is just.⁵

This power and authority of the Federal Government that by order in writing, direct the removal of any village near the Frontier within four miles where it is expedient on military ground is against good faith and public interest. If the removal of any village near the Frontier within four miles is ordered, the inhabitants of the village are not provided with right to challenge the order of the Federal Government because on one the FCR does not provide the remedy and on the other the jurisdiction of the ordinary civil courts are barred in FATA under Article 247 (7) of the Constitution of 1973.

⁵ Sec 32, Frontier Crimes Regulation

7.1.3 DEMOLITION OF BUILDING USED BY ROBBERS

When the Deputy Commissioner is satisfied that any building is habitually used as a meeting place by robbers, house-breakers, thieves or bad character persons or for the purpose of gambling, he may, by order in writing prohibit the owner thereof from so using such building, and, if the order is not obeyed, direct that the building be demolished and the person whose building is demolished shall not be entitled to any compensation by the government.⁶

This section of the FCR is not only unjust but has also several drawbacks. First it is not mentioned that the robbers, housebreakers, thieves or bad character persons are to be punished but the owner of the building is to face punishment. Secondly, the owner of the building is not provided with the right to challenge or demand compensation from the political administration, because on one hand the FCR does not provide the remedy and on the other the jurisdiction of the ordinary civil courts are barred in FATA under Article 247(7) of the Constitution of 1973.

7.1.4 POWERS TO REQUIRE PERSONS TO REMOVE IN CERTAIN CASES

The Deputy Commissioner is empowered to remove any person who is (a) dangerous fanatic or (b) has a blood feud or (c) belongs to a Frontier tribe and (d) has no ostensible means of subsistence or can not give a satisfactory account of himself or has occasioned cause of quarrel likely to lead to blood shed, from FATA and requires him to reside beyond the limits of the territories to which this

⁶ Sec 34, Frontier Crimes Regulation

Regulation extends or at such place within the said territories as may be specified in the order. However, if the person has a fixed habitation in the place, which the Deputy Commissioner requires him to leave, an order under this section shall not be made without the previous sanction of the Commissioner.⁷

The condition for the application of this section to a person who does not belong to a Frontier tribe is that he should possess the characteristics enumerated in clauses (a), (c) and (d), there is no such requirement in respect of a person belonging to a Frontier tribe. The importance of the point is that this section placed members of the Frontier tribe in a different category from other with in the same area, thus laying itself open to attack on the ground of discrimination. Therefore, this section 36 of the FCR is against the equality before law clause embodied in Article 25 of the Constitution and to the extent of this inconsistency; it is void under Article 8 of the Constitution which says that laws inconsistent with or in derogation of fundamental rights to be void.

It is against Article 7 of the UDHR of 1948 that all are equal before the law and are entitled without any discrimination to equal protection of law and in addition Article 20 of the Covenant on Civil and Political Rights of 1952 that all are equal before law and shall be accorded equal protection of law.

7.1.5 POWERS OF ARREST AND DETENTION

In any place in which all or any of the provisions of the FCR are for the time being in force- (i) any private person may, with an order from a Magistrate and without a warrant, arrest or cause to be arrested, and make over or cause to be made over to a

⁷ Sec 36, Frontier Crimes Regulation

police officer or take or cause to be taken to nearest police station, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned; and

(ii) Section 48 of the Criminal Procedure code of 1898 shall be read as if the following sub-section were added thereto namely;-(4) but this section gives a right to cause the death of a person against whom these provisions of the FCR, which are not of general application, may be enforced-(a) if he is committing or attempting to commit an offence, or resisting or evading arrest, in such circumstances as to afford reasonable ground for believing that he intends to use arms to effect his purpose; and (b) if a hue and cry has been raised against him of his having been concerned in any such offence as is specified in clause (a) or of his resisting or evading arrest, in such circumstances.⁸

It is further provided that where there is reason to believe that a person has committed or attempted to commit an offence punishable under section 498 of the Pakistan Penal Code, the authority, without a warrant, arrest that person on the requisition of the husband of the woman, or, in his absence of a person has the care of her on his behalf, or, in the absence of both the husband and any such person as last aforesaid from the village in which the woman resides, on the requisition of a headman of the village.⁹

⁸ Sec 38, Frontier Crimes Regulation

⁹ Sec 39, Frontier Crimes Regulation

(2) A police officer making an arrest under sub-section (1) shall, without unnecessary delay, take or send the person arrested to the nearest Magistrate having jurisdiction.

(3) The Magistrate may, in default bail being furnished to his satisfaction, detaines the person arrested for such period, not exceeding 15 days, as may be necessary to enable the husband, or , in his absence, a person who cares of the woman on his behalf to make a complaint.

These sections of the FCR have several flaws, outdated, create ambiguity and uncertainty. The FCR is no more applicable to Baluchistan and N-W-F.P. FATA is the only area of Pakistan where this Regulation is extended. There is no police station and other ordinary courts to follow the above mentioned procedure. But the powers and authority given under the above sections are still in the hands of the Deputy Commissioner.

These sections of the FCR are against Article 10 of the Constitution that no person who is arrested shall be detained in custody without being informed as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by legal practitioner of his choice. In addition, Article 15 that no person shall be deprived of life or liberty save in accordance with law, and that all citizens are equal before law and entitled to equal protection of law and void as contravening Article 8 of the Constitution that laws inconsistent with or in derogation of fundamental rights to be void.

In addition, it is against Article 9 of the Covenant on Civil and Political Rights of 1952 that no one shall be subjected to arbitrary arrest and detention.

7.1.6 SECURITY AND SURVEILLANCE FOR THE PREVENTION OF MURDER OR CULPABLE HOMICIDE OR THE DISSEMINATION OF SEDITION

When the Commissioner or the Deputy Commissioner is of opinion that it is necessary for the purpose of preventing murder, or culpable homicide not amounting to murder or the dissemination of sedition, to require a person to execute a bond for good behavior or keeping the peace, as the case may be, he may order the person to execute a bond with or without sureties, for his good behavior or for keeping the peace, as the case may be, during such period not exceeding three years, as the Commissioner or the Deputy Commissioner, as the case may be, may fix-(1) (a) on the recommendation of council of elders, or (b) after inquiry as hereinafter provided.¹⁰

(2-A) Pending the completion of an inquiry for the purposes of subsection (2), the Deputy Commissioner may, if he considers that immediate measures are necessary for preventing any offence referred to in sub-section (1) direct the person in respect of whom the enquiry is to be held, to execute a bond, with or without sureties, for keeping the peace or maintaining good behavior for a period not exceeding one month, and detain him in custody till such bond is executed.

(3) When a person has been convicted in accordance with the finding of a council of elders of an offence mentioned in section 106 of the Code of Criminal Procedure of 1898, or punishable under sections 302, 304, 307 or 308 of the Pakistan Penal

¹⁰ Sec 40, Frontier Crimes Regulation

Code, the Deputy Commissioner at the time of passing sentence, or the Commissioner at the time of revising the sentence, may make an order under subsection (1) with respect to that person.

(4) Where the Deputy Commissioner makes an order under sub-section (1) on the recommendation of the council of elders, he shall record his reasons for acting on the recommendation.

(5) Where the Commissioner or the Deputy Commissioner is of opinion that sufficient grounds exist for making an order under subsection (1), he may, either in lieu of or in addition to such order, by order in writing, direct that the person concerned shall notify his residence and any change of residence in the manner prescribed by section 565 of the Code of Criminal Procedure 1898, during such term, not exceeding three years as he may fix.

One question requiring consideration in connection with section 40 of the FCR is the scope of clause (a) of subsection (2), or, more specifically whether the recommendation arises solely out of proceedings referred to council of elders under section 8 or section 11 of the FCR or whether it is open to the Deputy Commissioner to refer the question of whether a bond should be taken to the council of elders for decision as an alternative to proceedings under clause (b). There is a good deal to be said for the first interpretation. Subsection (2) does not say that in order to determine whether a bond should be required the Deputy Commissioner may refer the matter to council of elders and they act upon its recommendation. Section 18 of the FCR shows that in addition to giving findings

on the matters or the questions referred to them, they may also make recommendation. Sub section (1) of sections 18 says

“Where council of elders to which a reference has been made under the FCR, makes any recommendation to which effect might be given if it were a finding on a matter or question referred to the council of elders under the FCR, the Deputy Commissioner may, if the recommendation affects a person mentioned in the order of reference and is relevant to the matter or the question actually referred, deal with the recommendation or any part of it as if it were a finding under section 8 or section 11:

Provided that no decree or sentence may be passed on any such recommendation as aforesaid against any person who has not the claim or charge fully explained to him and given an opportunity of entering upon his defense in regard thereto”.

The recommendation referred to in the above subsection is no doubt limited in scope, but it does not appear that the council of elders is precluded from making a recommendation on which action may be taken by the Deputy Commissioner under section 40.

The above view also finds support from the new subsection-A, added by Ordinance XXXVII of 1963, which empowers the Deputy Commissioner to make interim security pending the completion of an inquiry under subsection (2). It is obvious that the necessity of taking interim security may equally well arise during the deliberation of the council of elders, and if it were contemplated that a council of elders was to be appointed for the specific purpose of deciding whether a bond should be taken, it is strange that no similar provision was made in respect of such

proceedings referred to the council of elders under section 8 or section 11, there is obviously no need of taking interim security, since the material for a final order is already available. Reference may be made in this connection to subsection (3), which also contemplates the taking of a bond without further inquiry.

If on the other hand, the alternative interpretation be adopted, namely, that council of elders may be specially appointed to consider whether a bond should be furnished, the vires of the section is open to further attack that it confers on the Deputy Commissioner an uncontrolled and arbitrary power to refer the matter to two different forums one of which affords greater protection to the person concerned than the other.

Therefore for the above reasons section 40 and the other sections of the FCR dependent upon it are inconsistent with Article 9 of the Constitution of 1973 that no person shall be deprived of his life or liberty save in accordance of law and Article 25 that all citizens are equal before law and are entitled to equal protection of law and consequently void to the extent of the inconsistency under Article 8 that laws inconsistent with or in derogation of fundamental rights to be void. This section is also against International Human Rights Instruments.

RECOMMENDATIONS

Article 1(2) of the Constitution of 1973 states that FATA is included in the Federation of Pakistan and its people are citizens of this country, but the region and its people are given special status under the Constitution. The Constitution of 1973 and the FCR provide a system that deprives the local tribes of the constitutionally guaranteed civil and political rights and the protection of the courts. Therefore, the special status of the area and the colonial-era laws are subject to increasing criticism, as in a fast progressing world, FATA is lagging behind economic, legal and administrative fields and may become anachronistic and asynchronous with modern realities. It may be recalled that there are very strong voices for such radical reforms as integration of FATA with N-W-F.P, abolition of FCR and change in the administrative structure, extension of Political Parties Act, Local Government. In fact such radical reforms are needed to bring the tribal people into the mainstream of the country. Apart from political and legal reforms, changing the outdated mind set of Pushtun tribal, and bringing them to face the challenges of the 21st century, education and socio-economic development, more than coercion, is the only solution for the free tribes. It will be a long process, but if applied with deliberate conscientious effort it will only take a generation to convert the tribal belt into a vibrant power house of economic activity and political stability with far reaching effects for Pakistan's future security and status as regional power.

Apart from socio-economic developments, the love of freedom of the tribes should be institutionalized into modern democratic norms, and this could be done through radical political and legal reforms in the respective areas.

The Government of Pakistan recently extended its writ of adult franchise in FATA, which remained call of time since long. As a result, whole of FATA is now favored with Universal Franchise meaning thereby that instead of selected few Headmen (Maliks), every rank and file having attained the age of adult franchise, is entitled to cast his vote in favor of any candidate contesting General Election in FATA. Every person whose name is enrolled as a voter in the FATA and who is otherwise qualified can contest election for the National Assembly and Senate irrespective of the fact that he belongs to a particular Agency. The Political Parties Act is not extended to FATA as yet, but once it dose then the introduction of adult franchise and the Political Parties Act will admittedly bring about a healthy change, which might be as follow: -

- (a) Expansion in the electorate suited to the mainstream of political life in the country
- (b) Meet the demand of educated tribesmen, mostly given to the urbanized life style of settled area.
- (c) Reduce the feeling of alienation of tribes especially those located in remote fringe areas.
- (d) Raise the accountability aspect of tribal administration.
- (e) Address the demand of greater human rights in the area.
- (f) Streamline the judicial system and make it akin with the dispensation of justice in rest of the country.

As regard the legal reforms, the point to be remembered is that the real remedy lies in amending Article 247 of the Constitution of 1973 and supplanting the FCR with

the law of land. Before abolition of the FCR and supplanting with the law of the land, Article 247 should be reviewed and amended in such manner that the Parliament instead of the President is empowered and authorized to make laws for FATA. FATA being geo-graphically adjacent to the N-W-F.P is to be integrated with it and administered and governed by the Provincial Governments and institute courts within Pakistan's judicial hierarchy, with right of appeal in the Peshawar High Court and the Supreme Court, for the FATA.

However, If the concerned parties want that their case should be referred to Jirga as per Rewaj, they should be allowed and the Judge of the court of the area appoint trained council of elders with consent of the parties for this purpose. The council of elders is to be free and different from the one provided under the FCR.

APPENDICE

APPENDIX- I

THE LAWS EXTENDED TO THE FEDERALLY ADMINISTERED TRIBAL AREAS

S.No	Title of Law	Extent of Application	Reference
1	The Pakistan Penal Code, 1860	Notf: No.8-W, of Govt of India dated 3.9.1939	Tribal areas beyond Western and Northern Boundaries of N.W.F-P
2	The Sea Customs Act, 1878	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation 1965
3	The Arms Act, 1878	do	do
4	The Explosives Act, 1884	do	do
5	The Telegraph Act, 1885	do	do
6	The Bankers Books Evidence Act, 1891 (XVIII of 1891)	The Whole of the Federally Administered Tribal Areas	The FATA (Applications of Laws) Regulation 1975 (Regulation No.1 of 1975). SAFRAN Notf: No.F.1(3)-secIII 75 dated 2.7.1975 published in the Gazette of Pakistan Extraordinary Part 1 dated 2.7.1975
7	The General Clauses Act, 1897	All Special Areas of N.W.F-P	W.P. Regulation No.1 of 1961
8	The Code of Criminal Procedure, 1898	Tribal areas beyond the Western and Northern boundaries of N.W.F-P	Notf: No.8-W dated 3.9.1939 of the Govt. of India
9	The Post Office Act, 1898	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation 1965
10	The Tolls (Army and Air Force) Act, 1901 (II of 1901)	The Centrally Administered Tribal Areas	The Tolls (Army and Air Force) Act (Application to the Centrally Administered Tribal Areas) Regulation 1972 (Regulation No.II of 1972) SAFRAN Notf.No.F.I (13)-Sect.III 72, dt.27.12.1972, published in the Gazette of Pakistan extraordinary part I dated 27.12.1972
11	The Punjab Minor Canals Act, 1905 (No.III of 1905)(to the Khyber Agency only)	FATA	1980

12	The Pakistan Coinage Act, 1906	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation, 1965
13	The Explosive Substances Act, 1908	do	do
14	The Frontier crimes Regulation, 1901	Tribal Areas beyond the Western and Northern boundaries of N.W.F-P	Notf: No.8-W dated 3.9.1939 of the Govt. of India
15	The Patent and Design Act, 1911	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation 1965
16	The Companies Act, 1939	do	do
17	The Passport Act, 1920	do	do
18	The Official secrets Act, 1923	do	do
19	The Land Customs Act, 1924	2.N.W.Agency	Dated 24.1.1938 (N.W. Agency with effect from the 28 th Agust 1954, Gazette of Pakistan Ex.pp.1975
20	The Soldiers (Litigation) Act, 1925	Tribal Areas of N.W.F-P	Notf: No23-W dt:5.11.1940 of the Govt. of India
21	The Cooperative Societies Act, 1925 (Sind Act VIII of 1925	Tribal Areas of Peshawar, D.I. Khan	W.P.Re.I of 1970
22	The Wireless Telegraph Act,1933	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation 1965
23	The Petroleum Act, 1934	do	do
24	The Traffic Act, 1934	Khyber Agency and N.W.Agency	Khyber Agency Gazette pf India, 1939 Pt.I, P.50 N.W.Agency with effect from 28.8.1954, Gazette of Pakistan
25	The Insurance Act, 1938 (IV of 1938)	The whole of the FATA	The FATA (Applications of Laws) Regulation 1975 (Regulation No.1 of 1975) SAFRAN Notf: No.F.I(3)-Sec.III 75 dated 2.7.1975 published in the Gazette of Pakistan, Extraordinary Part I dated 2.7.1975
26	The Standards of Weights Act, 1939	The Tribal Areas of N.W.F-P	Notf: No.103-G dated 11.7.1942 of the Govt. of India
27	The Registration of foreigners Act, 1939	Tribal Areas of Peshawar D.I.Khan	Gazette of India, 1939 Pt.I.P.854
28	The Trade Marks Act, 1940	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation, 1965
29	The Drugs Act, 1940 and the Drugs Rules, 1945	do	W.P.Reg.No.1 of 1964

30	The War Injuries Ordinance, 1941	Tribal Areas of N.W.F-P	Do
31	Exercise by the Provincial Govt. of certain powers under the War Injuries Ordinance, 1941 in the Tribal Areas	do	Notf: No.32-W dated 28.3.1942 of the Govt. of India
32	The War Injuries Regulation 1942 and the War Injuries Scheme, 1942	do	Notf: No.12-W dated 7.2.1942 of the Govt. of India
33	The Enemy Agents Ordinance 1943 and the Rules made there under	do	Notf: No.21-W dated 20.2.43 of the Govt. of India
34	The Military Stores (Unlawful Possession) Ordinance, 1944	do	Notf: No.53-W dated 20.11.43 of the Govt of India
35	The Central Excise and Salt Act, 1944	do	Notf: No.137-F dated 20.6.1945 of the Govt. of India
36	The Police Debt Act,1944	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation, 1965
37	The Railway Stores (Unlawful Possession) Ordinance, 1944	The Tribal Areas of N.W.F-P	Notf: No.29-W dated 10.6.1944 of the Govt. of India
38	The Foreigners Act,1946	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation, 1965
39	The Prevention of Corruption Act, 1947	The Tribal Areas of Peshawar Division	Reg: No. 1 of 1960
40	The Sugar (Temporary Excise Duty Act, 1947	The Tribal Areas of N.W.F-P	See Gazette of India 1947 Pt.1,P.860
41	The Foreign Exchange Regulation Act, 1947 (VII of 1947)	The whole of the FATA	The FATA (Application of Laws) Regulation, 1975 (Regulation No.1 of 1975) SAFRAN Notf: No.F.1(3)-Sec.III 75 dt:2.7.1975 published in the Gazette of Pakistan Extraordinary Part.1 dt: 2.7.1975.
42	The Pakistan Special Police Establishment Ordinance, 1948	Tribal Areas of Peshawar Division	Reg: No.1. 1966
43	The Regulation of Mines and Oilfields and Mineral Dev: (Govt. Control) Act, 1948	All Tribal Areas of N.W.F-P	Notf: No. Legis: 16 (23) 56 dt; 22.3.1956 of Govt. of West Pakistan
44	The Extra Provincial Jurisdiction Order, 1949 (XIX of 1949)	All territories outside the Province of N.W.F-P	G.G.O. No.5 of 1949

45	The National Bank of Pakistan Ordinance, 1949 (XIX of 1949)	The whole of the FATA	The FATA (Application of Laws) Regulation 1975 (Regulation No.1 of 1975) SAFRAN Notf: No.F.1(3)-Sec.III 75 dt: 2.7.1975 published in the Gazette of Pakistan, Extraordinary part 1 dt: 2.7.1975
46	The Pakistan Currency Act, 1950	All Tribal Areas	The Tribal Areas (Application of Acts) Regulation, 1965
47	The Import Export (Control) Act, 1950	FATA	1979
48	The House Building Finance Corporation Act, 1952 (XVIII of 1952)	The whole of the FATA	The FATA (Application of Laws) Regulation, 1975 (Regulation No.1 of 1975) SAFRAN Notf: No. F.1(3) Sec:III 75 dt: 2.7.1975 published in the Gazette of Pakistan Extraordinary Part.1 dt: 2.7.1975
49	The Pakistan Army Act, 1952	FATA	The Tribal Areas (Application of Acts) Regulation, 1965
50	The Pakistan (Control of Entry) Act, 1952	do	Do
51	The State of Pakistan Act, 1956 (XXXIII of 1956)	The whole of the FATA	Do
52	The West Pakistan General Clauses Act, 1956	All Special Areas of West Pakistan	Leg. No.14(43) 57,dt:8.9.1958
53	The West Pakistan Special Areas (Application of laws) Regulation, 1956	All Special Areas(Tribal Areas of West Pakistan)	Reg:No.2 of 1956
54	The Pakistan Criminal Law Amendment Act, 1958	Tribal Areas of Peshawar Division	RegNo.1 of 1967
55	The Agricultural Dev: Bank Ordinance, 1961	Tribal Areas of Peshawar and D.I.Khan Division.	Reg:No.II of 1967
56	The Agricultural Dev: Bank Ordinance, 1961	The whole of the FATA	The FATA (Application of Laws) Regulation, 1975 (Regulation No.1 of 1975) SAFRAN Notf: No.F.I (3)-Sec.III 75, dt:2.7.1975 published in the Gazette of Pakistan, Extraordinary Part.I dt: 2.7.1975
57	The Industrial Dev: Bank of Pakistan Ordinance, 1961 (XXXI of 1961)	do	do

58	The West Pakistan Anti-Corruption Esttb: Ordinance, 1961	The whole of the FATA	The FATA (Application of Laws) Regulation, 1975 (Regulation No.I of 1975) SAFRAN Notf: No.F.I (3)-Sec.III 75, dt:2.7.1975 published in the Gazette of Pakistan, Extraordinary Part.I dt: 2.7.1975
59	The Banking Companies Ordinance, 1962 (LVII of 1962)	The whole of the FATA	The FATA (Application of Laws) Regulation, 1975 (Regulation No.I of 1975) SAFRAN Notf: No.F.I (3)-Sec.III 75, dt:2.7.1975 published in the Gazette of Pakistan, Extraordinary Part.I dt: 2.7.1975
60	The West Pakistan Press and Publications Ordinance, 1963	All Tribal Areas of West Pakistan	Notf: No.I 23 HDC 65 dt:20.9.1965
61	The President's Election Act, 1964 and the rules there under	All Tribal Areas in N.W.F-P	No. D. 2133-FI(SOI) 64 dt: 22.11.1964 See Gazette of Pakistan, 1964 Extraordinary Part.292.
62	The West Pakistan Motor Vehicles Ordinance, 1965	All Tribal Areas of West Pakistan	Notf: No.I 23 HDC 65 dt:20.9.9165
63	The Carriage by Air 9International Convention) Act, 1966 (IX of 1966)	The whole of Tribal Areas	The Carriage by Air (International Convention) Act (Application to Tribal Areas) Regulation 1972 (Regulation No.II of 1972). SAFRAN Notf: No.F.I(4)-Sec.III 72 dt: 16.12.72 published in the Gazette of Pakistan Extraordinary part.I dt:16.12.1972
64	The Administration of Basic Democracies (Tribal Areas) Regulation, 1967	All Tribal Areas of West Pakistan	W.P.Reg.I of 1967
65	The Members of the Electoral College(Functions of Local Govt. in Tribal Areas) Regulation, 1967	All Tribal Areas in N.W.F-P	Notf: No. SRO-70 (R) 67 dt: 12.5.1967
66	The Peshawar District and Tribal Areas (Settlement of Disputes) Regulation, 1971 (XXX of 1971)	1. Peshawar Division 2. Khyber Agency	Extraordinary dtL. 7.10.1971 (Issued by CMLA)

67	The Defense of Pakistan Ordinance, 1971 (XXX of 1971)	The Centrally Administered Tribal Areas	SAFRAN Notf: No.SRO.55(1) 71 dt: 30.11.1971 published in the Gazette of Pakistan Extraordinary dated 1st, December 1971
68	The Centrally Administered Tribal Areas (Employees Status) Order, 1972 (P.O.No.13 of 1972)	do	Law Division Notf: No. F.24(1) 72 dt: 12.4.1972 published in the Gazette of Pakistan Extraordinary dt: 12.4.1972
69	The Delimitation of Constituencies Act, 1974 (XXXIV of 1974)	do	SAFRAN Notf: No. SRO.1418(1) 72 dt: 14.11.1974 published in the Gazette of Pakistan Extraordinary part.II dt: 16.11.1974
70	The Preparation of Electoral Rolls (FATA) Order 1975 (P.O.I of 1974)	FATA	Law Division Notf: No. F.24(1) 72 dt: 10.4.1975 published in the Gazette of Pakistan Extraordinary dt: 10.4.1975
71	The Senate (Election) Act, 1975 (No.LI of 1975)	The whole of the FATA	The FATA (Application of Laws) Regulation 1975 (Regulation No.I of 1975) SAFRAN Notf: No.F.I(3)-Sec.III 75 dt: 2.7.1975 Published in the Gazette of Pakistan Extraordinary part.I dt: 2.7.1975.
72	The Suppression of Terrorist Activities (Special Courts) Act, 1975 (XV of 1975)	The whole of the FATA	SAFRAN Notf: No.SRO.807(1) 75 dt: 18.7.1975, published in the Gazette of Pakistan Extraordinary Part.II dt: 18.7.1975
73	The Criminal Law Amendment (Special Court) Ordinance 1975 (XXIX of 1975)	FATAs	SAFRAN Notf: No.SRO.258(1) 76 dt: 20.3.1976, published in the Gazette of Pakistan Extraordinary Part.II dt: 20.3.1976
74	The Criminal Law Amendment (Special Court) Act, 1976 (XI of 1976)	do	do
75	The Criminal Law Amendment (Special Court) Act, 1976 (XVII of 1976)	do	do
76	Applications of Criminal Law (Amendment) Act, 1976 (ASLI of 1976) to the Tribal Areas of N.W.F-P	do	do

77	Application of Weights and Measures Act, 1976 (N.W.F-P Act of 1976) to FATA N.W.F-P	do	SAFRAN Notf: No.I(10)- Sec.III 76, dt: 30.12.1976 under Regulation No.IV of 1976
78	Extensions of Laws to FATA in respect of peoples Finance Corporation, 1977	do	SAFRAN Notf: No.1(9)- Sec.III 76, dt: 17.12.76 to be published in the Extraordinary Gazette of Pakistan
79	The Representation of the people (Amendment) Ordinance 1979 (L of 1979)	do	1979
80	The Offences against property (Enforcement) of Hudood) Ordinance 1979 (VI of 1979)	do	do
81	The Offences of Zina (Enforcement of Hadd) Ordinance, 1979 (VII of 1979)	do	do
82	The Execution of the punishment of Whipping Ordinance, 1979 (IX of 1979)	FATA	1979
83	The code of Criminal Procedure (Amendment) Ordinance, 1979 (X of 1979)	do	do
84	The Preparation of Electoral Rolls (FATA) (Amendment) Order, 1979 (II of 1979)	do	do
85	The War Injuries Ordinance, 1941 (XX of 1941)	do	Regulation No.1 of 1987 (14 70)
86	The War Injuries Compensation Insurance Act, 1943 (XXIII of 1943)	do	do
87	Census Amendment Ordinance 1990 (XII of 1990)	do	F.4 (10) FIV 90 dt: 4.2.91 (1 29- Laws)
88	Drugs Act 1976 and the Rules made there under	do	SAFRAN Notf: S.R.O668(9) dt: 15.7.91
89	Pakistan Bait-ul-Mall Act, 1991 (I of 1991)	FATA	SAFRAN No.S.R.O608(1)19 dt: 13.6.94 (1 43-Laws 9
90	The Dangerous Drugs Act, 1930 (II of 1930)	FATA	SAFRAN No.SRO816(1)N dt:25.8
91	Enforcement of Hadd Ordinance, 1979	FATA	do
92	Peoples Act, 1976 (LXXXV of 1976)	FATA	do
93	Civil Aviation Ordinance, 1960	FATA	do
94	Air Craft (Removal of Dangerous to safety Ordinance, 1965	FATA	do
95	Pakistan Civil Aviation Ordinance	FATA	do

96	Employment of children Act, 1991	FATA N.W.F-P	SAFRAN No.SRO-1924 (1) 98 dt:16.11.98 N No.1 38-SOSH Laws HD 91
97	Control of Narcotics Substance Act, 1997 (XXV of 1997)	FATA	SAFRAN No.SRO-1295(1) 98 dt: 16.11.98
98	FCR 1901 (Regulation No.II of 1998)	FATA	do
99	FCR 1901(Regulation of 1998	FATA	do
100	Anti Narcotics Force Act, 1997 (Act No.III of 1997	PATA and FATA of N.W.F-P	Home N.W.F-P No.2 6-SOSH(HD) 97 dt:23.8.1997
101	Marriage Functions (Prohibition of ostentatious displays and wasteful expenses) Ordinance, 2000	Whole Pakistan	Home N.W.F-P No.SO(JUDL) HD 12-158 93 dt: 19.1.2000
102	Extent ion of Electoral Rolls Act, 1974 and Rules Framed there under to FATA	FATA	SAFRAN No.18(1) 2000 dt:17.1.2000
103	FCR(Amendment in the FCR 1901) Regulation No.I of 2000	FATA	Home N.W.F-P No.SOTA.I (HD)1-23 97 dt: 1.4.2000
104	Mines Act, 1923 (IV of 1923)	FATA	SAFRAN No.SRO-220(1) 2000 dt: 24.4.2000
105	Foreigners (Amendment) Ordinance 2000 (Ord: No.XXV of 2000	do	Home Letter No.1 77-SOSII Laws HD 2000 dt:12.9.2000
106	Extent ion of Compulsory Primary Education Regulation, 2002	FATA	Home Letter No.1 82-SOSII HD 2000 dt: 1.7.2002

BIBLIOGRAPHY

Rashid, Abdul. *Civil Service on the Frontier*. Khyber Printer Peshawar, 1977

Bruce, R.I. The Forward Policy and its Results. Longman, Green & Co., London, 1900.

Ahmad, Akbar S. *Social and Economic Change in the Tribal Area*. Karachi Oxford University Press, 1977.

----- *Millennium and charisma among Pathans: a critical essay in social anthropology*. Rout Ledge and Kegan Paul, London, 1976.

----- Region and Politics in Muslim society, Order and Conflict in Pakistan, Cambridge University Press, 1983.

Spain. *The way of the Pathans*, Oxford University Press, Karachi, 1972.

Swinson, A. *North West Frontier*. Hutchinson and Co., London, 1967.

Obhrai, D.C. *The Evolution of the North West Frontier Province*. Saeed Book Bank & Subscription Agency, Arbab Road, Peshawar Cant, 1983.

Caro, Olaf. *The Pathans*. Oxford University Press Karachi, 1996.

Khan, Teepu Mahabat. *The Land of Khyber*. Uzbek Publisher Peshawar, 2004.

Barthghrop, Michael. The North West Frontier of British India and Afghanistan- A Political History; 1839_1949; Poole Bland Ford Press; 1982.

Quddus, Syed Abdul. *The North West Frontier of Pakistan*. Royal Book Company Rehman Center, Zaibunssa Street, Saddar Karachi Pakistan, 1990.

Wazir, Badshah Gul. *The Futuristic of Tribal Administration*. Pakistan Academy for Rural Development, 1995.

Ali, Ishfaq. *Laws Extended to the Tribal Areas with Jirga Laws*. Fine Art Press Mohallah Jangi, Peshawar City, 2003.

Brohi, AK. The Fundamental Law of Pakistan. Din Muhammad Press, Mecload Road, Karachi, 1959

Nickson, Robert. *Settling the Frontier*, Oxford University Press, Karachi, 2001.

Fazeel, Ahmer. The Constitution of the Islamic Republic of Pakistan, 1973, Pakistan Law House.

Munir, Justice Muhammad. The Constitution of the Islamic Republic of Pakistan (Vol.II) PLD Publishers 1996.

Pirzada, Sharifuddin. *Fundamental Rights and Constitutional Remedies in Pakistan*. All Pakistan Legal Decisions Nabha Road, Lahore, 1966.

Mahmood M. The Constitution of the Islamic Republic of Pakistan 1973, Pakistan Law Times Publications Kabir Street, Urdu Bazar, Lahore, 1995.

Roberston, A. and Merrills. *Human Rights in the World*, Manchester University Press, (3rd edition), 1992.

Khan, Sher Muhammad. FATA a Socio-Economic and Geo-Political History Peshawar Publisher, 1990

Khan, Tariq Mehmod. *The Constitution of Pakistan, 1973*. Kausar Brothers Law Book Publishers.

Mahmood, Tahir. *Human Rights in Islamic Law*. University of New Delhi, New Delhi, 1993.

Haicly, S,M, Islamic Concept of Human Rights. Lahore, 1978.

The Document of FCR (frontier crimes regulation 1901).

State of Human Rights in 2003. Human Rights Commission of Pakistan. Lahore 2004.

The Law Reforms Commission Report, 1967-70, Government of Pakistan, Ministry of Law and Parliamentary Affairs, Law Division, 1970.

Building Judicial Independence in Pakistan. ICG (International Crisis Group) Asia Report N 86 Islamabad Brussels, 2004.

Seminar on (FATA) , Organized Jointly by the Area Study Centre of Peshawar University & Hannas-Seidel Foundation Germany, Saeed Book & Subscription Agency, Arbab Road Peshawar, 2004.

