



A bad law nobody can defend



Human Rights Commission
of Pakistan

Peshawar Chapter

HFRCP

FCR

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Preface

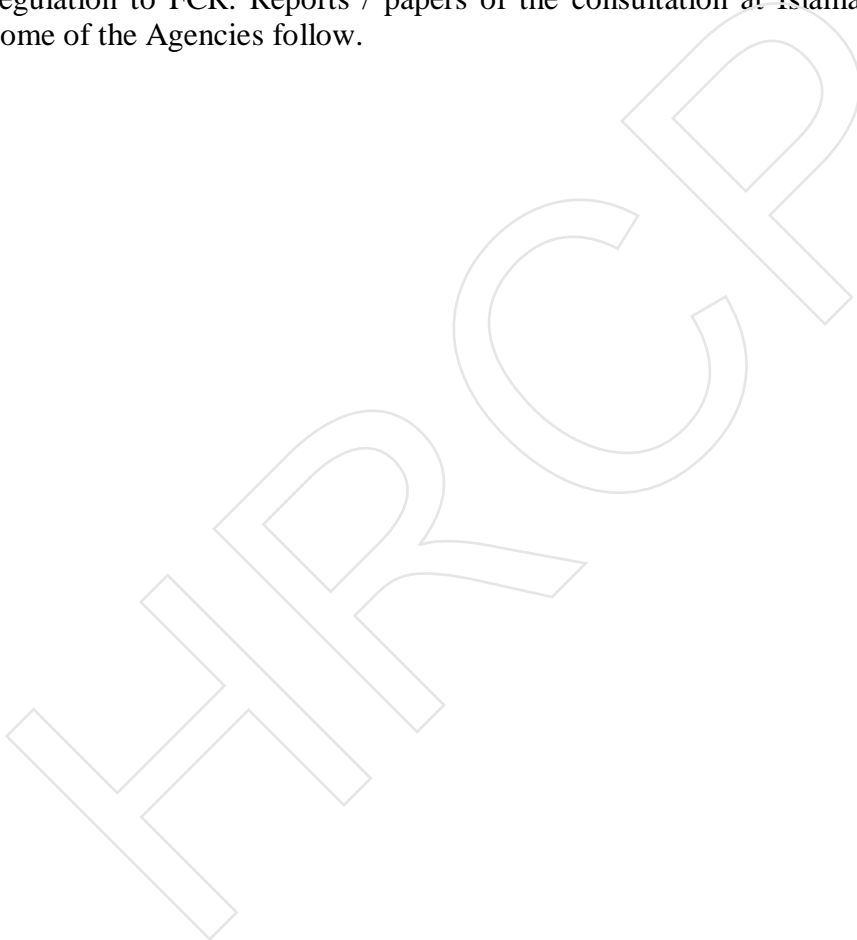
The Tribal Areas of Pakistan, known as the Federally Administered Tribal Areas (FATA), comprise seven Agencies and five Frontier Regions. These areas have a semi –autonomous status and are administered through a special law known as the Frontier Crimes Regulation (1901). The basic purpose of the FCR (Frontier Crimes Regulation 1901) was to indirectly administer this strategic area in the interest of the colonial power. Unfortunately, more than half a century after Pakistan’s independence FATA is still ruled through an out- dated administrative and legal system. Despite the fact that the FCR lost its rationale decades ago the government has yet to come up with a rational thesis regarding FCR and FATA.

The provisions of the FCR are in violation of the Universal Declaration of Human Rights and the Constitution of Pakistan. The superior judiciary of Pakistan, including the Federal Shariat Court, has made categorical judgments against the FCR and has recommended its repeal. In addition, there is a strong desire among the common tribal people that the FCR should be done away with. However, certain elements, having stakes in the present system, want to retain the status quo in the name of tradition and people’s culture. The government continues to dither on its reform agenda despite the fact that the tribal areas have undergone great socio-economic changes, which necessitate corresponding changes in the legal, administrative and judicial orders. For instance, the FCR is silent about crimes against women and there is no representation of women in the FCR judicial system.

Opinions about the status of the FCR vary. Some people want its total replacement by a modern legal and judicial system while others want to retain it in its present shape, albeit with some minor modifications. In order to fully appreciate the different points of view about the FCR and work out a viable strategy, the Human Rights Commission of Pakistan, in collaboration with the Tribal Reforms and Development Forum, organized a consultation at Islamabad on October 4 and 5, 2004. The consultation was attended by lawyers, journalists, foreign diplomats and common tribesmen.

Dr. Faqir Husain, Secretary Law & Justice Commission of Pakistan, presented a paper on the constitutional status of FCR; Mr. Sang-e-Marjan Khan, Ex-Chief Secretary, Northern Areas of Pakistan, presented a paper on the Devolution Plan for FATA and prospects of Agency Councils’ success; Professor Dr. Mumtaz Bangash talked about the social impact of the FCR; Mr. Ibrahim Shinwari read his paper on Press under the FCR; Mr. Jamal Khan talked about the impact of FCR on FATA economy; and Ms. Mariam Bibi discussed the rights of women and children under the FCR.

At the end recommendations were put forward by the three groups that had been formed to discuss the various aspects of the FCR. As a follow-up to the consultation, a committee comprising tribal intellectuals was constituted to further expand the debate on the FCR and organize sub- committees in each Agency/FR to hold similar consultations at Agency level and work on an alternative regulation to FCR. Reports / papers of the consultation at Islamabad and day-long workshops in some of the Agencies follow.



A critical review of FCR

(Summary of consultation at Islamabad, October 4-5, 2004)

Introduction

In his introductory remarks Mr. Afrasiab Khattak, former HRCP chairperson, stated that the tribal areas had become focus of attention across the world in the ongoing international conflict between the US and the Al-Qaeda. It was widely believed, he said, that foreign aid agencies were planning to form a consortium for the development of FATA. He asked the foreign agencies to link the funding for that purpose with reforms in FATA, and added that these funds should be used through elected representatives and not through the Political Agents who were already involved in plundering the resources of the tribal areas. The international funding would go down the drain if it was not linked with reforms in FATA.

Mr. Khattak said that a large number of innocent civilians had been killed in the ongoing military operation in the tribal areas and thousands of people had been dislocated. Why were troops not deployed along the border in North and South Waziristan for preventing the Al-Qaeda elements from entering these Agencies after the US attacked Afghanistan he asked. The government, he claimed, provided safe passage to these militants by not deploying troops on that border. He added that for more than a year the government denied presence of Al-Qaeda suspects there and now they had deviated from that stand. There were elements within the government who were sympathetic towards the agenda of Al-Qaeda, he maintained.

Mr. Khattak stated it was necessary to do proper homework before launching a struggle for reforms in FATA. He warned that further delay in the long- awaited reforms would be disastrous for these areas. For their own vested interests, he said, the bureaucracy had been claiming that the situation was not ripe for reforms in FATA. He was of the opinion that the insiders in FATA, who were the inhabitants of these areas, now wanted change / reforms there, whereas the outsiders including the administration were averse to any reforms. He said that first the government put forward plans for

local government elections, which was welcomed by the tribal people as it was in accordance with their aspirations. However, he added, later on, hurdles were created in the way of polls and different reasons, including security concerns, were cited for not holding polls. Now, he said, the tribal peoples were asked to nominate persons on clan and sub-clan basis. He said that while the government was trying to push the tribal people away from democracy, the inhabitants of FATA in different areas, even in the nomination process, held elections among themselves for selecting their nominees to become councillors. He added the establishment wanted to push them backward by asking them to select their nominees on the basis of sub-clans through Jirgas.

About the FCR, Mr. Khattak pointed out that initially this was a special law enacted by the colonial rulers for the frontier regions, as they believed that for controlling these people disproportionate punishments were required. He stated that in the neighbourhood the Afghans had modernized their traditional Loya Jirga by introducing reforms in it. The reforms he mentioned in the Loya Jirga are: the Jirga members came through vote in their areas; women participated in the Jirga for the first time and they even made speeches; and, the Jirga functioned in a democratic fashion by first electing its chairman. He regretted that unlike the Loya Jirga in Afghanistan the Jirga in tribal areas continued unchanged and it needed many reforms. He said that it was the right of the inhabitants of FATA to make their own decisions. He added that they had the right to know who prepared the budget for FATA, who implemented that budget and who conducted its audit.

Mr. Afrasiab Khattak said that if representation had been given to FATA in the NWFP Assembly, its integration with other areas could have started. He said that the Political Agent was the administrative as well as the judicial officer. "The Political Agent has been wearing various caps," he added.

Constitutional status of FCR

Presenting his paper on the topic "Constitutional Status of FCR", Dr Faqir Hussain, Secretary of Law & Justice Commission of Pakistan, stated that the history of FCR dated back to the occupation and annexation of the six Frontier districts housing the Pakhtoons by the colonial government in 1848. Initially, the ordinary civil and criminal law, in force in British India, was extended to such districts. However, the rate of conviction under the ordinary criminal law was very low. This led the British administration to devise a special law for the Pakhtoon region and the first FCR of 1871 was enacted, Dr Hussain said. He added: "This regulation was re-enacted in 1873 and 1876 with minor modifications. With the passage of time the regulation was found to be inadequate: hence its scope was extended by adding new acts and offences to it. This was done through promulgation of the Frontier Crimes Regulation 1901."

He said that Article 1 of the Constitution included FATA in the territory of Pakistan. Article 247 prescribed the manner and method of administering FATA. The Article stated that the executive authority of the Federation extended to FATA and that the Governor on the direction of the President shall administer it. Dr Hussain pointed out that Article 247 excluded the tribal areas from the jurisdiction of the Supreme Court and High Courts except when Parliament by law otherwise provided. He cited various articles related to tribal areas including those related to representation of FATA in Parliament.

He was of the opinion that as the fundamental rights given in the Constitution extended to the whole of Pakistan, these rights also extended to FATA as the area was part of Pakistan. However, enforcement of these rights was through the high courts and the Supreme Court under Article 199 and Article 184(3) respectively. "It means that whereas fundamental rights are available to the residents of FATA, their enforcement is precluded by the bar to the jurisdiction of the courts in such territory," he maintained.

Dr Faqir Hussain stated that "judging by the standards of international human rights principles, the norms practised in civilized states and the fundamental rights guaranteed in the Constitution of Pakistan, the FCR failed to meet the test of compatibility." He added that the British devised the regulation as an instrument of subjugating the tribes and disciplining the Pakhtoon population. While devising it, he said, the government relied upon some of the customs and traditions prevalent in the tribal belt, but such customs and traditions were twisted to suit the government plan of securing convictions. The selection of Jirga members, he said, was therefore left to the executive authority, and the findings of the Jirga (a council of elders acting as a jury) were not binding. He pointed out the trial fora including appellate and revision authorities were from amongst the Executive and the law contained no concept of an independent judicial authority or a court of law to dispense free and fair justice.

Dr. Hussain cited various sections of the FCR which were in conflict with the provisions of the Constitution. He also cited different judgments of the superior courts relating to the FCR. (*See Annexure - 2, the paper presented by Dr. Faqir Hussain*).

Social impact of FCR

Prof. Dr Mumtaz Bangash stated that three important elements constituted the justice system in FATA:

- Role of Jirga in the FCR;
- Role of the Political Administration; and
- The law of FCR.

He stated that the Jirgas constituted under the FCR were different from the traditional Jirgas. An FCR Jirga could only put forward recommendations that were not binding on the Political Agent. The Jirga was believed to be better than normal courts for various reasons, such as: the Jirga members had information about the event; the members were aware of the traditions; the proceedings were informal; and, it was a cheap source of justice.

Dr Bangash cited various basic disadvantages of the FCR's Jirga, stating that it did not correspond to the basic norms of justice. Sometimes the Jirga members had preconceived designs and sometimes the vision of the Jirga members was not adequate for a particular dispute. He added that the Jirga members could also become partisan, especially when their clans and sub-clans were involved.

About the role of the political administration, Dr. Bangash stated that the Political Agent was the executive head, magistrate, sessions judge, and revenue magistrate, and most of the powers were concentrated in a single office. He said that when a person performed different executive and judicial functions at the same time, the justice system was invariably compromised. He pointed out that due to vast functions of a Political Agent the adjudication of cases lingered on for years. In longstanding

disputes, he believed, the Political Agents always played safe and they never tried to resolve disputes. The government believed a good administrator/ political agent was the one who dealt with the tribal people with an iron hand. He added that the administration always considered the inhabitants of FATA as their subjects and not citizens of this country. He believed that the colonial rulers, in order to subjugate the people of these areas, introduced the FCR and now there was no rationale behind the continuation of such black laws. He added that under Article 175 of the Constitution, the judiciary should be separated from the executive, but in the FATA this had not been done.

Regarding the third component, Dr Mumtaz Bangash was of the opinion that the FCR was violative of the basic ideals of the justice system — a person arrested under it was not considered innocent unless proven guilty. The due process of law to prove a person guilty was not followed under the FCR. And the burden of proving himself innocent was on the shoulders of the accused person, he added. He said that the concepts of territorial responsibility and collective responsibility could not be imagined in a civilized society. He posed the question: " How can a person be convicted for the wrongs committed by a member of his tribe?"

Dr. Bangash stated that it was a normal practice that while assigning any responsibility to a person he was also given some powers. but in the FATA the inhabitants were made responsible for protecting the interest of the government but without assigning any powers. All over the world governments were responsible for the safety of their citizens, but in FATA the inhabitants were responsible for the safety of the government.

Dr. Bangash, who was also a member of the FATA Reforms Committee, highlighted various recommendations put forward by the committee for reforms in the tribal areas. One of the recommendations was that judicial functions should be separated from the executive and judicial officers should be appointed out of the legal cadre. He said that as the FCR Jirga had flaws in it, they had recommended that the Jirga should be declared to be an independent forum. He added that they had not recommended abrupt abolition of the FCR as the example of PATA was before them where after the superior courts had struck down the PATA Regulations a legal vacuum had emerged. He demanded that a high court bench should be established for FATA.

Press under the FCR

Mr. Ibraheem Shinwari, correspondent of the daily *Dawn* and a member of the Tribal Union of Journalists, in his presentation stated that the harsh provisions of the FCR did not allow the bringing out of any newspaper, journal or any other publication in the tribal area. He stated that FCR was an infamous law that the political administration wielded, brandished and used to the maximum effect to stifle the voice of reason and prevent truth from reaching the outside world. He said: "*Cover up, do not let facts be divulged*, seems to be the motto of the political administration. This has been the corner-stone of the policies of every political administration in all tribal agencies since independence. The motive behind this charade is simple to understand and it stems from self-interest."

Mr. Shinwari was of the opinion that credible evidence was available to show that the aim of sanctioning billions of rupees for FATA was not so much the development of these areas as it was to keep the supposedly formidable and wily tribesmen in check on the porous western border. "An

inquiry in such affairs is neither appreciated nor allowed under any set of circumstances. It is here that the elements of gagging the press through the infamous FCR come into play," he stated. It was a disgustingly shameful fact, he added, that apart from one or two none of the hundred or so newspapers paid their stringers any stipend or salary at all in the tribal agencies. "Even more shameful is the fact that a majority of the newspapers would see to it that a go-getter type reporter could be found who should instead feed the newspaper," he claimed.

Mr. Shinwari stated amidst all this suffocation there were journalists who remained undaunted and steadfast. No amount of pecuniary considerations or coercion could force these journalists to yield on their principles. He added that the relatives and friends of such journalists had been picked up, persecuted and thrashed and their properties confiscated and demolished under the collective responsibility clause of the FCR.

"Wana is the wages of the great cover-up in the shape of suppression of journalists and concealment of facts that preceded the latest operation. Lessons have still not been learnt. Journalists are still being denied access to truth," he said. The tribal areas, he maintained, should be opened up by doing away with the draconian laws and by introduction of basic laws that apply to human beings everywhere else in the world. (*See Annexure – 3*)

Success prospects of Agency Councils

A former bureaucrat and ex-chief secretary of Northern Areas, Mr. Sang-e- Marjan Khan, who belongs to the troubled South Waziristan Agency, elaborated various aspects of the Agency Council plan in the FATA. He said that for achieving the objective of good governance and sustainable development in FATA institutionalized and effective participation of the community in the decision-making process was a must. He added that the necessity of establishing local self-government institutions duly tailored to the ground realities and sensitivities of the area could not be ignored. He pointed out that the devolution plan enshrined in the FATA Local Government Regulation 2002 in its present form, prepared by various intellectuals, was not in accordance with the ground realities and it would not be digested by the concerned community with the result that it might not be sustainable and viable in the true sense.

Mr. Sang-e-Marjan Khan suggested that the appropriate forum for scrutinizing and revamping the devolution plan could be a committee of elected representatives of FATA and till then as an interim arrangement the proposal of establishing Agency Councils would be a step in the right direction. "Though selection of councillors through the tribal Loya Jirga may not be a substitute for proper election on adult franchise basis, yet it is far better than a council totally nominated by the bureaucracy," he added.

Explaining the salient features of the blueprint of the interim arrangement, Mr. Khan stated that depending on the population of the Agency/Frontier Region the membership of the agency council should not be less than 20 and not more than 40 and that of FR not less than 10 and not more than 20. He added that there were two options for selecting the councillors for these councils: nomination by the government and selection by the Loya Jirga of the tribes concerned. He proposed that the government might nominate 20 to 25 percent of the members, while the rest of the councillors should be selected by the Jirga.

About the powers and functions of a council, Mr. Khan stated that it should approve laws and rules of business for streamlining the functioning of the Agency/FR council and its various committees. He added that the council should approve taxes of local nature, user charges and services charges, etc; approve long- term and short- term development plans; approve annual budget of the agency; and review the monitoring committees' quarterly reports on the performance of the government departments. He suggested: " The Political Agent should preside over its meetings as convener. However, the council should elect a panel of three or more presiding officers in order of precedence who shall in the absence of the Political Agent preside over the meetings."

Referring to the suggestion of giving representation to the tribesmen in the NWFP Assembly, Mr. Khan stated that it would convert FATA into PATA and the tribal response to such a proposition would be a big 'no' as they had been guarding the existing special federal status of their area. "Under the present circumstances it will be in the fitness of things if provision for a separate FATA Council is made. The NWFP Governor should be its chairman and it should consist of all the MNAs, Senators from FATA and two elected members from each agency preferably Nazim and Naib Nazim of the Agency/FR Council," he proposed. The council, he stated, should be invested with powers to make laws, rules, and regulations for the good governance of FATA. (*See Annexure – 4*)

FCR and economy of FATA

Mr. Jamal Khan, an economist, explained the link between FCR and the economy in FATA. Since the Khyber Agency is one of the major agencies in FATA, he focused his presentation on the economy in that agency . He was of the opinion that over the decades the FCR had helped in the expansion of undocumented economy in FATA. He stated that FATA was known for smuggling and drug trafficking. He added that the economies of different agencies were very much similar to each other. About 70 percent of the total trade between Pakistan and Afghanistan passed along the Peshawar-Torkham-Jalalabad Road, and this gave the Khyber Agency eminence in the economy of FATA, he added.

Mr. Khan said that in the past the Khyber Agency was a poor agency. He added that from 1952 till 1972 Daud Khan served as Prime Minister of Afghanistan and the Pakhtunistan issue surfaced during that time. The Pakistan establishment, he said, paid attention to the issue and in this period the first Bara Market was established in the agency. In late 1950s and early 60s, he claimed, shops were allotted to pro-Pakistani tribesmen. Smuggling of electronic goods, printing of fake currency and other illegal businesses flourished in the market as the government normally tolerated these crimes. In the 1970s, this market was gutted in a big and mysterious fire and a much bigger market replaced it. In that market also, shops were given to pro-Pakistani as well as Pan -Islamic tribesmen.

When leftists came to power in Afghanistan in 1978, new markets were built in Peshawar and in these markets even pro-Pakistani Afghan traders were allotted shops.

Mr. Khan said that the FCR shaped the economy in FATA as under different clauses the business concerns and markets could be seized under the collective and territorial responsibility clauses. He said that there was no transparency in the financial affairs of FATA as no audits were conducted. The Political Agents of respective tribal agencies, he pointed out, had the powers to levy different taxes on items coming into an agency or passing through it. "It is not clear whether these taxes are

collected by the Government of Pakistan or the Political Agents as these are not properly documented," he maintained.

Mr. Khan stated that there was no growth of industrialization in FATA. The land was owned collectively as no land settlements had ever taken place. The magnitude of illegal financial activities, he claimed, not only affected Pakistan but also the entire world. The opium trade in FATA, he added, helped in attracting foreign currency that was much easier for the terrorists to use for their activities. He added that a significant portion of the foreign currency was undocumented in FATA. The infrastructure in FATA, Mr. Khan stated, was in a terrible state as for the last 50 years no specific programmes to improve the infrastructure had been launched.-

Eventually, he suggested, it was necessary to integrate FATA into the NWFP. For that purpose gradual taxation should be introduced. Initially, he added, they could collect taxes and specifically use the funds on the development of FATA. He also proposed establishment of a chamber of commerce and industries in FATA. He said that a proper budget should be presented for FATA on annual basis. (*See Annexure - 5*)

Women's and children's rights under the FCR

Ms. Mariam Bibi, founder of Khwendo Kor (Sisters House) and a former member of the National Commission on the Status of Women, explained that women and children suffered as much under the FCR as the male members of their families. She stated that in FATA even the existence of women was not accepted. They had no right to inherit property. Neither the rights given by Islam nor the rights mentioned in international conventions and laws of the country were guaranteed to women in FATA, she claimed.

The tribal society, she added, was patriarchal in nature and that was one of the reasons that the existence of a woman was attached to the honour of a man. She explained that there were outdated customs and traditions still in vogue in tribal areas. "Minor girls and women are still given in *Badal* to the rival groups for settling disputes. The inhuman custom of Swara is still practised in most of the tribal areas," she stated. Unfortunately, she added, there was no provision in the FCR for curbing such inhuman practices.

At the institutional level, Ms. Mariam Bibi elaborated women had no say in the development of the area or in decision-making. She added that the Jirga in a tribal society was an all-male institution where there was no concept of women's participation. She wanted to know when women could be included in the Loya Jirga of Afghanistan why they could not be members of Jirga in FATA. She mentioned that a deputy commissioner had declined to meet her only because she was a woman.

Ms. Mariam Bibi stated that there was no proper justice system in FATA and there was no support mechanism for women and children under the FCR. "When male members of a family are arrested under the FCR, the women have to look after their homes and children, and thus they equally suffer because of the misuse of FCR," she added. Recently, the tribal administration in different agencies had started invoking different provisions of the FCR against women and children. She pointed out various examples of the detention of children and women, stating that it was a recent phenomenon that even women and children were not spared.

Concluding session

Mr. Afrasiab Khattak presented the concluding remarks, stating that it was encouraging that all the participants had given their input in the day-long consultation. He stated that the organizers would formulate recommendations to the government in the light of the recommendations of the three seminar groups. He said that when decades back the Tehrik-e-Ittehad-e-Qabail (Movement for Unity of the Tribes) had started its movement nobody had thought for a while that the right of adult franchise would be given to the tribal people. But after a long struggle, he added, they were given that right by the caretaker government in 1997. "The tribal people are not averse to reforms in FATA and the actual resistance is from within the government," he added. The bureaucracy did not want establishment of local government system on the basis of adult franchise because of its own selfish interests.

Mr. Khattak recalled that when Mr. Afzal Khan was made federal minister for tribal affairs during Benazir Bhutto's second term as Prime Minister, he had stated that reforms would be introduced in FATA. However, the bureaucracy convinced Benazir Bhutto that his plans would create anarchy in FATA as tribesmen were against reform. He added that within 48 hours the portfolio of Afzal Khan was changed, as the bureaucracy did not want him to head that ministry.

He praised the tribesmen for conducting elections in their Jirgas for selecting their representatives for the proposed agency councils, stating that although the administration wanted to push the tribal people backward they proved that they were politically mature. "Without any election commission, the tribal people conducted fair elections in their Jirgas, which proved their maturity and preference for reforms in the tribal areas," he added.

Mr. Khattak suggested that a reforms committee comprising enlightened tribesmen should be formed which would continue the ongoing struggle for bringing positive changes in the FATA. He added that follow-up measures should be continued so as to put pressure on the concerned quarters for the introduction of reforms.

Group work

During the second session, the participants were divided into three groups. Each group was given a topic for discussion and asked to give its recommendations.

Group – 1 discussed the legal and constitutional aspects of FCR

The group members were unanimous in affirming that the Constitution described the Federally Administered Tribal Areas (FATA) as an integral part of Pakistan and there was no justification for any law in the tribal areas that was contradictory to the fundamental rights enshrined in the Constitution and the international rights conventions to which Pakistan was a signatory. It was observed that the FCR was in clash with both the Constitution and the charter of universal human rights. The FCR was for state security and not human security. The FCR gave all executive, judicial and police powers to one person - the Political Agent. The people of the tribal areas had no access to superior judiciary against decisions of the Political Agent or his handpicked Jirgas.

One of the participants suggested that the FCR should be repealed to bring FATA legally and administratively on a par with the settled areas of the country. However, a majority of the participants were of the opinion that abrupt repeal of the FCR will create an administrative chaos. They supported legal and administrative changes with proper prior homework to pave the way for a gradual change in the legal/constitutional status of FATA.

Mr. Asad Afridi suggested that the administrative and legislative powers of the President of Pakistan under Article 247 of the Constitution regarding FATA should be transferred to the Parliament. FATA had representatives in the Parliament who were elected on adult franchise basis and could better safeguard the interests and wishes of the tribal people than the elders handpicked by the Political Agents.

Three members of the group raised a point that the people of the tribal areas also owned properties in Afghanistan and had economic interests on both sides of the Durand Line. Therefore, they should be given the right to dual citizenship.

The group gave the following recommendations:

- 1) Constitutionally FATA is an integral part of Pakistan and any law repugnant to the Constitution should be repealed.
- 2) FCR in its present shape is in clash with fundamental human rights. Amendments should be made in the FCR to ensure protection of the rights of the tribal people.
- 3) FCR should be renamed as FATA Regulation.
- 4) The legislative and administrative powers of the President of Pakistan under Article 247 of the Constitution regarding FATA should be transferred to the Parliament.
- 5) Amendments should also be made to Article 247 of the Constitution for extending jurisdiction of the superior judiciary to FATA.
- 6) Recommendations of the FATA Reforms Committee should be given practical shape.
- 7) Judiciary in FATA should be separated from the executive.
- 8) Protection of the rights of women and children should be ensured.

Group II discussed the socio- economic impact of FCR and arrived at the following conclusions and recommendations

- 1) Political reform is a pre-condition to socio-economic development.
- 2) FATA's taxation system needs to be reformed and overhauled.
- 3) FCR is based on patriarchal norms and discriminates against women and children.
- 4) FCR is an impediment to social change in tribal areas.

- 5) There should be right of association and right to freedom of expression.
- 6) Collective punishment and territorial responsibilities should be abolished.
- 7) Ban on bank loans should be lifted.
- 8) Investment in arms locks up a large portion of tribal capital and hence deweaponization is necessary.
- 9) Lack of modern education infrastructure led to the rise of extremism.
- 10) Massive electrification in FATA, and bills on flat rates needed.
- 11) Preservation of existing forests and extensive new plantation.
- 12) The mining sector should be regularised.

Group III discussed political/ administrative system under the FCR and gave the following suggestions/ recommendations

- 1) Political Parties Act must be extended to FATA immediately.
- 2) Local government (elected on adult franchise) plans must be immediately implemented.
- 3) Separation of executive, judicial and administrative organs.
- 4) Amendments in the FCR to the extent that all obnoxious sections that violate universal justice or human rights principles are repealed.
- 5) The role/ functions of Political Agents should be limited to co-ordination.
- 6) A transparent financial system for FATA must be ensured.

Follow-up

As a follow-up to the consultation on FCR on October 4-5, 2004 at Islamabad a committee of the following was constituted:

1) Asad Afridi	(Khyber Agency)	Convener
2) Haji Muhammad	(South Waziristan)	Member
3) Nisar Wazir	(South Waziristan)	Member
4) Shams	(Mormand Agency)	Member
5) Ahmed Zeb	(Bajaur Agency)	Member
6) Wali Khan Afridi	(FR Kohat)	Member
7) Musarrat Hussain Advocate	(Kurram Agency)	Member

(Guidelines for formation of committee: (a) At least one member from each Agency; (b) Members should know legal and judicial matters; (c) Members should be pro-reform).

The Committee will have the following Terms of Reference:

- 1) To extend the process of consultation at the Agency level so as to gather opinions/ suggestions of a cross-section of society for amendments in the FCR. In this regard, sub-committees should be formed at each Agency level and each sub-committee should hold, at least, one consultative meeting.
- 2) To draft a regulation on the basis of the consultative process and to amend the FCR for making it a civilized law; and to circulate the draft for a wider debate.
- 3) To discuss the formation of a proper judicial system for FATA.
- 4) To strategize/ plan public awareness and social mobilization for replacing the FCR with the new draft FATA Regulation.

The committee was asked to submit its recommendations/ report within three months.

Litigation under the FCR

Background

The Government of India Act, 1935 had special provisions for Tribal/ Special Areas. However, the Provisional Constitution Order 1947 did not have these provisions. In Chapter 2 of the Constitution of 1956, in the territorial clause on Pakistan, the Tribal Areas and Frontier Regions were mentioned along with NWFP. In the Constitution of 1962, higher judiciary had jurisdiction over Tribal Areas/ Frontier Regions but later on an amendment was made in Article 223 (5) to erase the jurisdiction of higher judiciary in the Tribal Areas. The Constitution of 1973, for the first time, made a territorial and geographical division of the Tribal Areas, bifurcating them into Provincially Administered Areas (PATA) and Federally Administered Tribal Areas (FATA). The FATA also included special regions called the Frontier Regions. Malakand Agency which was established in 1895 was included in PATA, whereas Bajaur Agency and Orakzai Agency were included in FATA. The FATA included seven Agencies and five Frontier Regions.

History of litigation under the FCR

There was no regular court procedure before 1970. Most of the cases in the Tribal Areas were tried under Section 40 of the FCR. The court procedure, which is in vogue in tribal areas today, started in 1970. It is also important that till 1978 Assistant Political Agents could not exercise the powers under the FCR that they now exercise. Originally an Assistant Political Agent was called Assistant Political Officer (APO), and he had no judicial powers till 1978 when Assistant Political Agents were declared Assistant District Magistrates (ADM). Divisional commissioners at D. I. Khan and Peshawar had power of revision. Cases of South and North Waziristan Agencies went to the Commissioner of D.I. Khan for revision while cases of Khyber, Kurram and Momand would go to the Commissioner of Peshawar.

About a decade ago certain reforms were made in FATA in relation to enforcement of FCR. A special tribunal was formed, called FCR Tribunal, comprising Secretary Law, and Home Secretary to NWFP Government. At present all revision petitions in FATA are made to the FCR Tribunal at Peshawar.

The memorable cases registered under FCR include the incident of abduction of Ms. Ellis by Ajab Khan Afridi from Kohat Fort. The case was registered in Khyber Agency on April 14, 1923. But there was no trial or conviction.

One still hears references to the orders of British Political Agent at Khyber Agency which made it mandatory for proclaimed offenders in Khyber Agency to get a permit from his office before they could enter the British territory, which could mean that the provisions of FCR were not applicable to the present FATA in 1930. The case of the murder of Muhammad Boota of Gujranwala, bearing number 2903/B-1 (1970), was decided in four months on April 4, 1970. The accused was convicted and sentenced to imprisonment for four years and fined Rs.6,000. This was the first case of jirga award . Before that the Political Agents did not constitute jirgas in murder cases. Trials for drug offences started in FATA only in 1980.

Cases tried in Khyber Agency

The following figures are related to civil and criminal cases tried in the Khyber Agency.

Criminal cases

1970---6; 1971---10; 1972---8; 1973---7; 1974---8; 1975---6; 1976---7; 1977---6; 1978---7; 1979---7; 1980---6; 1981---7; 1982---3; 1983---1; 1984---7; 1985---4; 1986---1; 1987---10; 1988---10; 1989---1; 1990---14; 1991---3; 1992---10; 1993---2; 1994---8; 1995---4; 1996---6; 1997---6.

Civil cases

1970---65; 1971---33; 1972---72; 1973---46; 1974---26; 1975---29; 1976---0; 1977---0; 1978---32; 1979---0; 1980---0; 1981---2; 1982---2; 1983---0; 1984---1; 1985---1; 1986---1; 1987---2; 1988---2; 1989---0; 1990---0; 1991---1.

Cases registered before the FCR Tribunal

Total cases Registered in 2003 --- 152; cases decided= 122

Kurram Agency; Civil = 56; Criminal = 11. Bajaur Agency; Civil = 15; Criminal = 6. Khyber Agency; Civil = 2; Criminal = 4. Momand Agency; Civil = 6; Criminal = 2. Orakzai Agency; Civil = 2; Criminal = 4. North Waziristan; Civil = 5; Criminal = 8. South Waziristan; Civil = 2; Criminal = 4. FR Kohat; Civil = 4; Criminal = 2. FR Bannu; Civil = 2; Criminal = 3. FR DI Khan; Civil = 3; Criminal = 2.

Total cases registered in 2004 = 208; cases decided --91

Kurram Agency; Civil = 73; Criminal = 31; Khyber Agency ; Civil = 7; Criminal = 17; Bajaur Agency; Civil = 25; Criminal = 6; Momand Agency; Civil = 2; Criminal = 1; Orakzai Agency; Civil - 1, Criminal -5; North Waziristan; Civil 2, Criminal 15-South Waziristan Agency; Civil Nil, Criminal 7; FR Peshawar; Civil Nil, Criminal 3; FR Bannu; Civil Nil, Criminal 2; FR DI Khan; Civil Nil, Criminal 1; FR Kohat; Civil 8, Criminal 2.

There are three types of criminal cases-- murder, car lifting and kidnapping. The murder cases are fewer than car- lifting and kidnapping cases. There are two kinds of civil cases, i.e. property and money disputes. Most of the money cases are related to illegal transactions like drugs, etc.

Consultation on FCR in Khyber Agency *Jamrud, December 11, 2004.*

Rapporteur: Musarrat Hussain, Advocate; Member FATA Legal Reforms Committee.

A gathering of around 60 people was arranged at the *hujra* of Mr. Liaqat Afridi. Mr. Asad Afridi briefly explained the objective of the consultation. He said the meeting was in continuation of the two-day consultation on FCR organized by HRCF and TRDF at Islamabad, where it was decided that the views of a large number of tribesmen on FATA reforms should be ascertained.

The participants expressed the following views:

Abdul Rahim Afridi, Chairman, TRDF, and President, ANP

1. Life under FCR is life under slavery. For this very consultation we had approached the PA, Khyber Agency, for permission to use a building where the function could be held but the official concerned not only refused to provide a building he also pressurized the head master of the school into refusing use of school premises. That is why the consultation is being held at a private residence.
2. The tribesmen cannot secure loans from banks which is a major hurdle to industrial and economic progress.
3. No alternatives to the traditional poppy and bhang businesses have been provided.
4. *Seer* instead of kilo is used as a measure of weight and this harms the interest of ordinary people.
5. Peace and business need to be strengthened.

Haji Shakirullah

1. Actions under FCR should be subject to challenge in the High Court.
2. Audit of PA and other officials should be allowed under the law.
3. *Kotal* fund and other finances are embezzled because no one has the right to ask questions.

4. FCR should be abolished altogether.
5. PA is using FCR as a weapon and most of his activities lack legality.
6. The tribal system cannot do any further. Therefore tribesmen should make preparations for the new age.
7. Educational and economic development are needed.
8. There are competent lawyers and intellectuals among tribesmen; they should be consulted and taken into confidence.

Ahmad Khan (councillor, Jamrud Tehsil)

1. FCR should not be totally abolished; its misuse should be checked.
2. The benefits of the of FCR are taken by opportunists while the disadvantages are faced by the poor.
3. Permit system should be abolished.
4. Collective responsibility should be amended and only *Turbor* and *Tawan Sharik* (a person who shares losses with others) may be considered under this clause.
5. Shariat should be implemented.

Habib-ur- Rehman, Advocate

1. PA be designated as *Munsif*.
2. Right of appeal should be granted against PA in the court of the District Judge.
3. High Court jurisdiction be extended to FATA.
4. The clause relating to territorial jurisdiction is not a civilized provision because now no one would be able to make himself accountable for the acts of his brother even.
5. Demolishing of houses is not a civilized provision.
6. FCR used to provide quick justice but its status has declined. Hence amendments are required.
7. *Jirga* has become corrupt.

Amjad Afridi

1. Tribesmen have lost their originality, there is no social justice, and everybody tries to win favour with the PA.
2. Amendment in FCR would not bring any fruits if its abolition is not demanded.
3. The proposition that "tribesmen are afraid that if FCR goes their freedom will disappear" is baseless because tribesmen have no freedom under the system.
4. Tribesmen are capable of mature understanding, and changes should be based on their wishes.

Wali Khan Afridi, Advocate

1. It is a baseless and wrong perception that FCR is the *Riwaj* or customary law of tribesmen or that FCR is based upon *Riwaj* or customary law of tribesman. In fact FCR was promulgated

in the whole of NWFP and Balochistan but subsequently it was confined only to FATA and it is a procedural law.

2. Tribesmen are wrongly presented and perceived by outside people; therefore only tribesmen's views should be listened to and considered.
3. It is regrettable that the constitutional injunction that the executive and the judiciary should be separated does not apply to FATA.
4. PA should be made a *thanedar* while there should be a *Munsif* for judicial work.
5. There should a *Munsif-e-Aala* to hear petitions against decisions of the *Munsif*.
6. There should be a special High Court bench for FATA comprising the Chief Justice and two other judges.
7. The FCR tribunal is an executive forum; it should be a judicial body.

Muhammad Amin Shinwari: Chief Organizer National Awami Party, Landikotal Tehsil.

1. The consultation being held at a private hujra itself shows the hardships faced under the PA administration.
2. The views of prominent lawyers and intellectuals should be sought while amending or replacing FCR.
3. The consultation programme should be continued and another meeting may be arranged at Landikotal.

Iqbal Khyberwal (Member, FATA Reforms Committee; Pukhtoonkhwa Party)

1. FATA Reforms Committee has already prepared a detailed report on reforms, and its report should be considered.
2. President Musharaf's 23 January Devolution Plan should be implemented.
3. If change in FCR means making FATA into a settled area then most of the tribesmen don't like that their present special and free status may be changed.
4. Local government should be established.
5. FCR should provide for accountability.

Muhammad Jan Orakzai (Member, FATA Reforms Committee)

1. It is wrong to discuss FCR in isolation. It should be examined in the context of the wider system wherein besides FCR other democratic institutions should also be provided. At the top of these is the Political Parties Act.
2. FATA is not a single unit but it is seven states of seven PAs and each Agency is a separate state.
3. A credible political system is needed wherein checks and balances are provided, because "power corrupts and absolute power corrupts absolutely".
4. The people of FATA be should be linked through a highway.

5. FATA should either be declared a province or merged with a province or a Council provided as in the Northern Areas.
6. A FATA authoritative council should be established.
7. Judicial forums should be provided.
8. The writ jurisdiction of the High Court should be extended to FATA (as provided to PATA).

Javid Afridi (Tehrik-e-Insaf)

1. It is totally incorrect to say that FCR is the only system available and if it is finished no other system will be found because 5000 years ago we had the most democratic system wherein we had judiciary in the form of Lashkar..
2. No change occurred in FCR over 103 years despite the fact that during these 103 years 87 new states emerged on the world map. No sincere effort made to modify the system.
3. FATA is in the clutches of a triangle of civil bureaucracy, military bureaucracy and babu-cracy.
4. A mass awareness campaign is required in the whole of FATA.
5. Tribesmen are true Muslims and the whole tribal society is based on Islamic principles and there is no need for special legislation for Shariah. If one says that Shariah should be implemented then such a person should implement Shariah on himself because he may not be acquainted with Shariah principles.
6. A forum should be constituted at the FATA level.

Naserullah (Journalist)

1. Tehrik-e-Itehad-e-Qabail's sacrifices are appreciable.
2. How many people are kidnapped and how many arrests are made under FCR.? There is no account with PA nor are they effective in this regard.
3. Jirga's decision has no sanction except for social and moral pressure.
4. Article 175 of the 1973 Constitution guarantees independent judiciary and fundamental rights but FATA is exempted.
5. Article 274 should be amended and parliament empowered to deal with FATA's affairs
6. High Court jurisdiction should be extended to FATA.
7. Political Parties Act should be extended to FATA.

Shams-ul-Qamar Shams (General Secretary, Legal Reforms Committee; Mohmand Agency).

1. An awareness campaign and a movement against FCR should be initiated across FATA .
2. The Senate is considering a bill to amend FCR. Its committee should be contacted and informed of the views of the tribesmen so that the amendments reflect their views and enjoy their support.
3. Amendments must be made with the consent of tribesmen and no system must be imposed on them.

Shah Hussain Shinwari

1. Whatever is refused by the Governor will be in favour of FATA and such measures need to be stressed.
2. FCR should be abolished altogether.
3. The people of FATA are Pakhtoons, not tribals.
4. The people of FATA should work together with international community and should not be isolated from the rest of the world.

Sailab Mehsood (President, Tribal Union of Journalists)

1. 35 years ago Tehrik-e-Ittehad-e-Qabail made sacrifices and raised all these issues concerning human rights.
2. Adult franchise is the foundation of democracy.
3. Senate FCR amendment committee should be consulted.
4. Army has entered Waziristan; so territorial responsibility should be taken by the army.
5. No written and practical steps have been taken; all development is without any footing.
6. PA's financial powers should be curtailed.
7. Tribal judiciary should be formed.
8. 40 FCR be held against only that person who acts against state and tries to cause losses to the Army, etc.

Bazar Gul (Elder of Khyber Union)

1. We will start our journey from the point where we stand. Technology has changed the life of the entire world but no human thinking or approach is visible.
2. Commercial, estate, and economic matters should be excluded from FCR.;
3. The clause of collective responsibility should be eliminated.
4. An all FATA jirga be called.
5. An all FATA political party should be formed.

Conclusions

After the discussion there was a consensus on the following points :

1. Each and every provision of the FCR which is against human rights should be repealed.
2. FATA is an integral part of Pakistan Article 247 of the 1973 Constitution whereby the President alone has authority to make orders on the affairs of FATA, should be amended and Parliament empowered in this behalf.
3. At least the right of appeal to superior court of Pakistan should be granted against executive orders made under FCR.

Consultation on FCR in Kurram Agency *Parachinar, December 27, 2004.*

The participants expressed their views as follows,

Habib Hussain (bank officer and a social worker)

1. Political Administration is using FCR according to its own will and wishes.
2. The most common injustice is caused by the Political Administration itself whenever FCR is violated or is wrongfully used as a weapon against certain elements.
3. Educated and learned people have no respect under the FCR and illiterate Maliks monopolise all the benefits.
4. Doctors, professors, teachers etc. are usually insulted by the administration
5. Only the favourites of Political Administration are appointed as *jirga* members under FCR.
6. Poor people have no place in a *jirga*. That is why they used to avoid litigation even at the cost of their rights.
7. Educated people should be appointed as *jirga* members
8. Judiciary should be separated from the executive.
9. FCR should be abolished altogether. At least it must be amended

Sarwar Ali, Associate Professor

1. PA and APA enjoy undefined authority under the FCR
2. Each and every department should be empowered according to law.
3. Even a Political Muharrir (the lowest rank in Political Administration) is all in all and no one has the right to say anything against him
4. There should be a proper budgeting of finances.
5. FCR has failed to resolve tribal disputes.
6. In addition to FCR there are certain agreements popularly known as Kotal Agreements, according to which the Political Administration has been given additional powers.
7. Even the Kotal Agreement has lost its originality because only fines are imposed while the rest of the provisions are ignored.

8. FCR should be abolished altogether.

Syed Maisam Ali (local politician)

1. The Political Administration is bound to follow *riwaj* but does not do so nowadays.
2. There is no end to litigation under FCR as a case is contested again and again.
3. There is no audit or record of money collected by the administration.
4. All the people of FATA should be consulted before abolishing or amending FCR

Mirza Mohammad (PPP activist)

1. All the people present will join a movement for abolishing FCR
2. Tehrik-e-Itehad-e-Qabail make sacrifices against FCR.
3. FCR was originally used against the opponents of the British empire
4. The clauses of collective responsibility and territorial responsibilities are against Shariah, the Constitution of Pakistan and human rights The clause relating to collective responsibility is inhuman.
5. It is a major question whether the tribal people will be freed of the tyranny of PCR or not?
6. FCR is the cause of tribesmen's misery.
7. Freedom of the Press be ensured,
8. FCR should be abolished completely.

Musarrat Husain (Political activist)

1. There are people who are convicted for 54 and 45 years in jails whom he himself had seen while he was in jail on political basis
2. Kohat agreements are additional tools with Political Administration wherein heavy fines amounting to millions of rupees can be levied against a person
3. Developmental programmes are not related to ground reality.
4. The degree college, the government high schools for boys and girls are heavily crowded but no one is there to consider the situation or raise his voice because of FCR
5. According to certain estimates 90 to 92 crore rupees have been collected from the people of Kurram Agency but no record is available.
6. FCR is the root cause of evils and therefore it should be repealed.

Rajab Ali (social worker)

1. FCR was the required in the interest of the colonial rule.
2. Now there is no need for FCR and it should be abolished

Azmat Ali Alizai (Journalist)

1. A press club for Parachinar was approved but the Political Administration successfully resisted the proposal.

2. Jirga members sign on blank papers and afterwards *rai* (Decision) is written by Political Administration according to its wishes.
3. The formation of *jirga* should not be done by the Political Administration.

Mohammad Shafiq (Journalist)

- 1 Democratic institutions should be established in FATA.
- 2 FATA should be allocated resources proportionate to its population.
- 3 Settlement of tribal areas is not desirable.

Samin Ali (representative of Kurram Rural Support Organization)

1. There were sectarian clashes in the year 2001. The Political Administration ordered the tribes of Pewar and Tari-Mangal to surrender weapons worth Rs 2.9 million each. The Pewar tribe did not have weapons in the required number and had to buy them from the open market. The weapon surrendered to Political Administration included scores of missiles. At a seminar on small arms it was claimed that only one such missile was surrendered. There is no record of the weapons that were surrendered to the Political Administration.
2. Political Muharrir is often an illiterate person. He is not capable of writing a report. But he has no much power under FCR that no one can dare to argue with him.
3. Change is necessary and FCR must be abolished or amended.

Mohammad Alam Jan (President Therik-e-Islah-e-Taleem)

1. The implementation of FCR is not appropriate; its fair implementation must be ensured
2. Quick justice is possible under the *jirga* system.
3. Social Welfare Act has not been extended to FATA. That is why the society is under – developed.
4. The present system must be changed.

Syed Lal Hussain Jan (former activist of Tehriki-e-Ittehad-e-Qabail)

- 1 Before 1998 when adult franchise had not been allowed to tribesmen the Maliks used to buy and sell votes.
- 2 A lot of problems are caused by tribesmen's misuse of their discretion as provided for under *riwaj*. The Maliks are greedy and corrupt. They have caused most of the tribesmen's troubles.
3. FCR is the root cause of all the evils
4. Political Muharrir and Babu of Katchery are corrupt and are very harsh on the people.
5. Riwayat cannot address all the present age problems. The rules of transport for instance have nothing to do with riwayat.
- 6 Unity among tribesmen should be ensured.

7. PA/APA are often not acquainted with *riwaj*. Punjabi and other non-Pakhtoon PA/APA were totally ignorant of *riwaj*.
8. Heavy fines, sometimes without any limit are imposed under FCR.

Syed Nadeem Hussain

1. FCR, *Riwaj* and Kohat Agreement have caused great troubles.
2. Lawyers and educated people should be taken into confidence while making any changes
3. The powers of the Political Agent should be abolished.

Noshi Bangash (a poet)

1. FCR is not in consonance with the needs of the 21st century. It should be eliminated altogether. (Read a poem titled *Da Tarikh Chagha* (the cry of history))

Hamidullah (a teacher and a social worker)

1. Only one person is empowered under the FCR and that makes government a one-man show.
2. Funds are being granted to FATA as charity and not as of right. FATA should be given its due rights.
3. A systematic campaign should be launched to spread awareness among the people.

Musarat Husain, Advocate (member, FATA Legal Reforms Committee)

1. FCR and *riwaj* are often confused by laymen. *Riwaj* is customary or common law of the land whereas FCR is a British enactment.
2. The very basic philosophy of justice requires the separation of judiciary from the administration but FCR envisages the opposite.
3. FCR has big loopholes which make its misuse and abuse of authority possible.
4. FCR can't address the present age requirements. New laws and institutions are required
5. FATA must have an independent judiciary.
6. High court jurisdiction must be extended to FATA.
7. Political Parties Act should be extended to FATA

Conclusion

From the views of participants it was concluded and unanimously held that

1. FCR should be withdrawn.
2. If FCR is not withdrawn, amendments must be made to change it into a civilized law and every provision against human rights deleted.
3. FATA must be brought under High Court jurisdiction.
4. Political rights should be given to the FATA people.

Consultation on FCR in Mohmand Agency

Ghalani, January 10, 2005

After Mr. Asad Afridi, Advocate, and Mr. Tariq Ahmad Khan, HRCP Coordinator, had introduced the subject, the participants expressed their views as follows:

Shehzada (SS teacher)

1. FCR is not a law but a tool for oppressing the people.
2. Separation of powers is necessary,
3. Democratic system should be given to tribesmen.
4. Political administration be made subject to audit.
5. An all-FATA central body should be formed for appraising the FCR.
6. Arrest should be made according to jirga and *riwaj* (custom).
7. Tribal appellate court be formed as the Supreme Court and High Court are not accessible to poor tribesmen. The judges of such a court should know the *riwaj* of tribesmen.
8. We want modernization but not westernization.
9. Imported system is not wanted.

Khan Mohammad Saqi (Mohmand Muttahida Jirga)

1. No system like FCR exists in any country of the world.
2. The whole of FCR should not be abolished abruptly.
3. Jirga system should prevail.
4. The following amendments should be made in FCR
 - Territorial responsibility should be abolished.
 - Houses and villages should not be demolished.
 - Right of appeal should be given.
 - Babu, Steno, Tehsildar etc. should not have power to make arrests and detentions.
 - Thana and police should not be introduced.

Arshad Khan

1. Whenever there is talk of change and amendment, all references are made to section 40 FCR.
2. The British used to apply 40 FCR in circumstances that justified its use and in accordance with principles.
3. Take NADRA work of making identity cards. The procedure is quite smooth. But when it comes to Political Administration hurdles and hardships appear as application of FCR starts.
4. Territorial responsibility is a good provision but often the thief has sat with the Tehsildar.
5. Jury system should be implemented and in it the jirga should have a role.
6. Political Agent has become Customs Judge and Sessions Judge.
7. Territorial responsibility was a good provision when only tribesmen inhabited the land but after the arrival of lacks of Afghan refugees and their mixing with tribesmen in their native lands it is not possible for tribesmen to guarantee the safety and security of the surroundings. As only tribesmen do not live in the various localities, it is not possible for tribesmen to ensure safety in the area..
8. The major question is that if FCR is abolished, what law will be enforced and implemented?
9. FCR should be abolished but it should be replaced with the system that is in harmony with the times.
10. Bank loans cannot be taken by tribesmen.
11. Whatever replaces FCR, it should be told to tribesmen.
12. To question as to what was the difference between the tribal system and the code of Pakhtoons residing in settled districts, the speaker replied that the Qabaily (tribal) system was different in the following matters:
 - The tribal economics is confined to basic necessities (food, employment and health) while Districts focus on profits and luxury.
 - The social set-up of qabail requires consistency and strength while Districts require sophistication, fashion and style
 - The religious aspects of tribal life stress basics and fundamentals of religion while Districts emphasis ceremonies and functions. (Tribals know nothing about Eid-i- milad processions.)

Asad Afridi challenged these observations and said murder was avenged in both down districts and tribal areas and adultery was punished with death, and thus the distinction claimed was not based on facts..

Hassan Raza (General Secretary LEADS Organization)

1. At the entrance to Mohmand Agency undefined taxes and charges are levied upon tribesmen.
2. Amendments should be made in FCR but a system based on PPC is also not welcome.
3. Agency Councillor has no powers.
4. Agency Council elections are not held in a proper format. A lot of enmity is created among tribesmen as one has to say openly that he will vote for such a person and not for such a person.

Syed Ullah

1. There is a big gap between the civilized world and tribal areas.
2. Demolition of houses should not be allowed.
3. The court system in the settled districts has its own defects.
4. Peace prevails in the tribal community and therefore it does not want to be settled.

Malik Badri Zaman (Agency Councillor)

1. There is no awareness of FCR, its nature and application at the grass-root level.
2. Justice is not provided by FCR and poor people specially suffer.
3. Posting in Khasadars and Levy is inherited and in many cases one has sold this right but under the law the title goes to the original person and this creates problems.
4. FCR should be gradually amended and not abruptly abolished.
5. Inhuman provisions should be abolished,
6. Collective responsibility should be restricted to the family of the accused.
7. A booklet on the proposed amendments should be distributed among tribesmen.
8. Agency Council can be a check when the Chief Agency Councillor is elected from amongst the councilors and not by the Political Administration. The plea of the Political Administration that this will promote enmities among tribes is baseless because election of MNAs has not fuelled enmities.

Jaleel Khan

1. FCR is a black law but “court katchehry in settled districts” also are not good models to be followed.
2. Islamic Shariah is followed by all the people.
3. The USA is the most advanced society and yet it tries to develop a jirga system.
4. Jirga system should be developed.
5. A system like the one adopted in the Northern Areas should be introduced in FATA.

Mukaram Khan

1. Under the FCR we don't have the right to even express our views about FCR.
2. A FATA Council should be elected for the whole of FATA and it should function like a provincial assembly.
3. For a transitional period of five years amendments in FCR should be made and freedom of political activities should be given.
4. Political Administration should be subjected to the advice of the Agency Council.
5. President and Governor should be bound to act on the advice of FATA Council
6. FATA should be declared a special area until its economic backwardness is removed.

7. Local institutions should be developed.
8. Political Parties Act should be extended to FATA.

Fazal Hadi (member of Agency Council)

1. 95% to 99% people don't know under what provision of FCR one is arrested/released/released on bail etc.
2. FCR should be translated into Pashto into and its copies widely distributed. The people should be informed of amendment proposals.
3. Court procedure takes more time than FCR process..
4. Tribesmen should be taught the evils of FCR.
5. Before amending FCR, the alternative should be made public.
6. I am myself not familiar with FCR.

Saeed Khan (Jammat-e-Islami)

1. Tribesmen are passing through a critical phase. We should be cautious about change. We are not ready for the laws of settled areas.
2. Tribesmen are the luckiest people in Pakistan. They are enjoying a peaceful atmosphere which is not available even at Islamabad. This peaceful atmosphere is not because of FCR, it is due to tribal traditions and *riwaj*. If a proliferation of laws could ensure peace dead bodies would not be found in gutters in Karachi. One should look for a perfect system only in Islam.
3. FCR is no doubt a black and unjustified law but we are also not in favour of the laws in force in the settled districts.
4. Political freedom should be given to tribesmen. A FATA Council of 100 to 120 members should be formed through election on adult franchise.
5. The formation of Agency Council is a fraud on tribesmen. It has no authority.

Nisar Ahmad

1. Peace in tribal society is not because of FCR but because of *riwaj* and therefore it should not be disturbed.
2. Jirga should be made independent of the Political Administration as it does not know *riwaj* and should be out of jirga.
3. The signatures of jirga members are taken first and a decision is written by the Political Administration afterwards. The jirga says one thing and the political Administration says something else.
4. Political freedom should be allowed before any change is made.
5. Agency Council should be formed on the basis of adult franchise.

Zahir Shah (member FATA Reforms Committee) He read out certain important provisions of the draft prepared by FATA Reforms Committee.

1. Qabaili riwayat (tradition) is actually Pukhtoon riwayat. When riwayat (tradition) acquires the force of law it becomes riwaj (custom).
3. FCR is just a regulation and not law.
4. The preamble of FCR is biased and discriminatory as it envisages enforcement of FCR only against Pakhtoon and Baloch tribes.
5. There is no provision for death sentence or more than 14 years imprisonment under FCR but PA administration usually awards the sentence of imprisonment consecutively and the terms may exceed 14 years.
6. Demolishing of houses is an inhuman provision, After criticizing the FCR, Mr. Zahir Shah said that President Musharaf had on January 23, 2002 consented to introduce reforms in FATA. Accordingly the FATA Reforms Committee was constituted and it published a detailed report after consulting different prominent figures and lawyers belonging to FATA. Some of the proposed amendments were:
 - i. The definition may be amended to eliminate the discrimination made against Pakhtoon and Baloch tribes.
 - ii. Jirga should be made independent and free from the control of the PA administration. (Jirga members should not be nominated by the PA administration.)
 - iii. A Munsif should be appointed for dealing with judicial matters. He should be qualified as a judge. The right of appeal to an independent judicial forum should be allowed.
 - iv. Jurisdiction of the High Court should be extended to FATA.
 - v. Chief FATA Court should be established and the Judge of such a court be equivalent to a judge of High Court. A convict falling sick during imprisonment. should have the opportunity of relief
 - vi The provision relating to collective responsibility is not justified. It should be invoked only against an accomplice or in case of conflict between tribes or when there is a dispute with the government.

Conclusion

Different speakers expressed different views but the most commonly expressed views were:

- Amendments must be made in FCR.
- Proper timeframe and procedure should be enunciated according to the wishes of tribesmen.
- Provision for collective responsibility and house demolishing should be eliminated.
- High Court jurisdiction or a bench in High Court should be established for hearing appeals of tribesmen.
- Political rights and freedoms must be allowed to tribal peoples..
- Agency Councils should be empowered.
- Political Agents' undefined power should be eliminated.

Annexure -1

THE FRONTIER CRIMES REGULATION, 1901

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FRCR

REGULATION NO. III OF 1901

THE FRONTIER CRIMES REGULATION, 1901

A Regulation further to provide for the suppression of crime in certain frontier districts

Whereas it is expedient further to provide for the suppression of crime in certain frontier districts;

It is hereby enacted as follows:-

CHAPTER I PRELIMINARY

1. Short title, commencement and extent.

1) This Regulation may be called the Frontier Crimes Regulation, 1901; and

2) It shall come into force at once.

¹[3] It shall extend to the areas specified in the Third Schedule, but the Governor may by notification² in the official Gazette exempt any such area from the operation of .all or any of its provisions.]

4) 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 case may be, only against Pathans and Balochis, and against such other classes as the³ [Provincial Government]⁴, may, by notification in the ⁵[official Gazette], declare to be subject thereto.

5) A notification under Sub-section (4) may declare a specified class only to be subject to all or any of the provisions of this Regulation in a district or part of a district⁶.

¹ Substituted by West-Pakistan Ordinance XLIII of 1963, S.2, for Sub-sections (3) and (4) which were earlier substituted by Central Ordinance VIII of 1962 for the original Sub-section (3). The F.C.R. had been amended by the Amended Act XII] of 1954 only by N.W.P.P. Government and w.e. from 21st Dec. 1954, in the six districts of N.W.F.P. The said Amendment was in force- only which was repealed in 1963 alongwith the entire F.C.R. vide Section 34 of the Criminal Law (Amendment) Act (VII of 1963).

² Exempted vide Government of West Pakistan, Home Department Notification No. Judl.-1-K72) 64(1), dated 17th December, 1964, Gazette of West Pakistan, Extraordinary, 17th December, 1964 (the entire areas of the Third Schedule). And the. areas of the Malakand Division (Provincially Administered Tribal Areas) exempted through Frontier Crime Regulation . (Repeal) Regulation No. .1 of 1973 with effect from 1.9.1973 vide Gazette of Pakistan, Extraordinary Part I of 31st Jan; 1973.

³ Substituted for "Local Government" by the A.O., 1937.

⁴ The words "with the previous sanction of the Governor-General in Council" omitted, *ibid*.

⁵ Substituted *ibid*, for "local official Gazette".

⁶ For persons ordinarily resident in any area to which this Regulation does or does not apply. See Schedule B to Government of West Pakistan, Home Deptt: Notifications No. Judl-l(5)/62, dated 19th April, 1962 (W.P) and No. Jud-M(5) dated 7th May, 1962 for Amendment in Schedule B to Notification No. Judl.-l(S)62, dated 19th April, 1962 which runs:- "(4) All persons ordinarily resident in any .area to which the said Regulation III does not apply, who commit any offence in any area to which the said Regulation applies".

Explanation. — The word "class", as used in Sub-section (4) and (5) includes any persons who may be collectively described in a notification under this section as persons subject to all or any of the provisions of this Regulation.

2. Definitions. — In this Regulation unless there is anything repugnant in the subject or context

⁷[(a) "Council of Elders" means -

- i. in relation to Quetta and Kalat Divisions and District Lasbella a Council of three or more persons convened according to the Pathan, Biluch or other usage, as the Deputy Commissioner may in each case direct; and
 - ii. in relation to other areas, a Council of three or more persons whether officials or otherwise convened by the Deputy Commissioner and presided over by a Magistrate invested with powers under Section 30 of the Code of Criminal Procedure, 1898 (V of 1898);]and
- (b) "Deputy Commissioner" includes any Magistrate of the first class appointed by the Deputy Commissioner by order in writing to exercise all or any of the functions or powers specified in the first part of the first Schedule, and also any Magistrate appointed by the ⁸[Provincial Government] to exercise all or any of such functions or powers;

⁹[(c) "Commissioner" or "Court of the Commissioner" means the Provincial Government or such officer or officers as the Provincial Government may appoint in this behalf.]

3. Relation of Regulation to other enactments.

- 1) The provisions of this Regulation shall take effect in case to which they apply, notwithstanding anything in any other enactment.
- 2) 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 force shall, so far as may be, apply to cases dealt within that place under this Regulation.

CHAPTER II POWERS OF COURTS AND OFFICERS

4. Additional District Magistrate.

- a) In any district in the whole or any part of which all or any of the provision of this Regulation are for the time being in force, the [Provincial Government]¹⁰ may appoint any Magistrate or

⁷ Substituted for clause (a) by W.P. Ordinance XII of 1962.

⁸ Substituted for "Local Government" by the A.O. 1937.

⁹ Added by W. P. Ordinance XII of 1962, S.2.

¹⁰ Substituted for "Local Government" by the A.O. 1937.

Magistrates of the first class to be an Additional District Magistrate or Additional District Magistrates, without any limit of time.

- b) Every Additional District Magistrate so appointed shall have all the ordinary powers of a District Magistrate specified in the fifth part of the third schedule to the Code of Criminal Procedure, 1898.
- c) When exercising any of the powers of a Deputy Commissioner under this Regulation, an Additional District Magistrate shall be deemed, for the purposes of this Regulation to be the Deputy Commissioner.
- d) Every Additional District Magistrate shall exercise his powers in subordination to the District Magistrate, and in such cases or classes of cases, and within such local limits as the District Magistrate may, by order in writing, direct.

5. Power of District Magistrate to withdraw or recall cases.

- 1) The District Magistrate may withdraw any case from, or recall any case which he has made over to, an Additional District Magistrate whether the Additional District Magistrate is exercising jurisdiction with respect to the case as a Magistrate or as a Deputy Commissioner.
- 2) If the case may, under the Code of Criminal Procedure, 1898, be referred to another Magistrate competent to inquire into or try it, the District Magistrate may, instead of disposing of the case himself, refer it to such other Magistrate for inquiry or trial, as the case may be.

6. Power to pass sentences of whipping in certain cases.

Where any person against whom, under Section 1, Sub-section (4), this section may for the time being be enforced is convicted by a Criminal Court of an offence punishable under any of the following sections of the¹¹ Indian Penal Code, namely, Sections 304, 307, 324, 325, 326, 376, 377, 382, 392 to 399, 427, 428, 429, 435, 436 and 448 to 460, the Court may subject to the provisions of Section 393 of the Code of Criminal Procedure, 1898 pass upon him a sentence of whipping in addition to any other punishment to which he may be sentenced.

¹²7. Tender of pardon to accomplices.

Section 337 of the Code of Criminal Procedure, 1898, shall for the purposes of this Regulation, be construed as if-

- a) the words in Sub-section (1) "triable exclusively by the High Court or Court of Session or any offence punishable with imprisonment which may extend to ten years or any offence punishable under Section 211 of the¹³ Indian Penal Code with imprisonment which may

¹¹ Now the Pakistan Penal Code, 1860.

¹² Substituted by Regulation VII of 1926, S.2.

¹³ Now the Pakistan Penal Code.

extend to seven years or any offence under any of the following sections of the Indian Penal Code, namely, Sections 216-A, 369, 401, 435 and 477-A", and

- b) the whole of Sub-section (2-A) were omitted.

CHAPTER III COUNCILS OF ELDERS

8. Civil reference to Council of Elders.

(1) Where the Deputy Commissioner is satisfied, from a police 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 consequence anticipated, and if a suit is not pending in respect of the dispute, make an order in writing, stating the grounds of his being satisfied, referring the dispute to a 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 each case, be nominated and appointed by the Deputy Commissioner.

(2) The order of reference made under Sub-section (1) shall state the matter or matters on which the finding of the Council of Elders is required,

(3) On receipt of the finding of the Council of Elders under this section, the Deputy Commissioner may --

- a) remand the case to the Council for a further finding; or
- b) refer the case to a second Council; or
- c) refer the parties to the Civil Court; or
- d) pass a decree in accordance with the finding of the Council, or of not less than three-fourth of the members thereof, on any matter stated in the reference; or
- e) declare that further proceedings under this section are not required.

NOTE

Decree not passed by the Deputy Commissioner in accordance with finding of Council of Elders. Held, direction (of Deputy Commissioner) to file suit in Court of competent jurisdiction to be without any lawful¹⁴ authority where the F.C.R. was repealed after the decision by Deputy Commissioner and the Commissioner, the case was remanded to the Court of Qazi, Bori-Sanjavi at Loralai, through Deputy Commissioner, Loralai for adjudication according to the Regulation of 1976¹⁵.

¹⁴ P.L.J. 1987/Quetta 223.

¹⁵ P.L.J. 1987/Quetta 223.

9. Effect of decree on finding of Council.

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 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 undisposed of; and have, to that extent and subject to the provisions of this Regulation with respect to 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.

10. Restriction on jurisdiction of Civil Courts.

No Civil Court shall take cognizance of any claim with respect to which the Deputy Commissioner has proceeded under Section 8, Sub-section (3), clause (a), clause (b) or clause (d).

11. Criminal references to Council of Elders.

1) Where, 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 Code of Criminal Procedure, 1898, the Deputy Commissioner may or if the Commissioner so directs, shall, by order in writing, refer the question to the decision of a Council of Elders, and require the Council 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 of Elders shall, in each case, be nominated and appointed by the Deputy Commissioner.

2) Where a reference to a Council of Elders is made under Sub-section (1) and the members of the Council have been nominated, the names of the members so nominated shall, as soon as may be, be communicated to the accused person, and any objection which he may then make to the nomination of any such member shall be recorded. The Deputy Commissioner shall consider every objection made by an accused person under this sub-section, 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 members of the Council.

3) On receipt of the finding of the Council of Elders under this section, the Deputy Commissioner may -

- (a) remand the question to the Council for a further finding; or
- (b) refer the question to a second Council; or
- (c) acquit or discharge the accused person or persons, or any of them; or in accordance with the finding on 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 discharged under clause (c) shall not be liable to be retried for any offence arising out of the same facts after the expiry of two years from the date of such discharge.

NOTE

Issuance of process by A.P.O./A.D.C. Waziristan Agency (Tribal Area) Jurisdiction of the High Court not extended to the Tribal Areas (FATA) constituting Waziristan Agency. However the provisions of Section 86-A of the Criminal Procedure Code, 1898, shall have to be complied with after the execution of the warrants and before the removal of petitioner (accused) to the Tribal areas for his production before the Court.¹⁶

12. Punishment on conviction on finding of Council.

1) Where the Deputy Commissioner convicts a person under Section 11, Subsection (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 Code of Criminal Procedure, 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, 402/494, or 495 of the Indian 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: and

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.

¹⁷[3] In cases of convictions under Section 302 or 396 of the Pakistan Penal Code, the immovable property of the accused shall be liable to forfeiture to the Government].

13. Manner of enforcing sentences.

1) 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 Code of Criminal Procedure, 1898.

2) For the purposes of Sections 64 to 67 of the ¹⁸Indian Penal Code in reference to a sentence under Section 12 of this Regulation,

¹⁶ P.L.D. 1987/Lahore 323,

¹⁷ Added by W.P. Ordinance XII of 1962, S, 3.

- 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;
- b) the imprisonment in default of payment of fine may be rigorous or simple at the discretion of the Deputy Commissioner.

14. Time for exercising power of reference to Council of Elders.

The powers conferred by Section 11 on the Commissioner and Deputy Commissioner, respectively, may be exercised by them, in cases committed to the Court of Session, at any time before the trial before that Court has commenced, and, in cases pending before any Court inferior to the Court of Session, at any time before an order of conviction or acquittal has been made.

15. Motion by Public Prosecutor in view of reference to Council of Elders.

1) In any trial before a Court of Session, the Public Prosecutor may, when instructed in writing in that behalf by the Commissioner or Deputy Commissioner, at any time before an order of conviction or acquittal has been made with respect to any accused person, withdraw from the prosecution of such person in order that the case may be referred to a Council of Elders.

2) The Sessions Judge shall thereupon stay proceedings with respect to such person, and the Deputy Commissioner shall refer the case to a Council of Elders.

16. Case of persons jointly accused of an offence.

The powers conferred by Section 11, as limited by Section 14, may be exercised against and the withdrawal of a prosecution under Section 15 may have reference to one or some only of two or more persons jointly accused of an offence.

17. Powers to set aside orders making or refusing to make references to Council of Elders.

The Deputy Commissioner may, if he thinks fit, at any time reconsider and set aside any order of the Deputy Commissioner under this Regulation -

- (a) directing reference to a Council of Elders, or
- (b) refusing to make such a reference.

18. Recommendation of Council of Elders.

1) Where a Council of Elders to which a reference has been made under this Regulation makes any recommendation to which effect might be given if it were a finding on a matter or question referred to the Council under this Regulation, the Deputy Commissioner may, if the recommendation affects a person mentioned in the order of reference and is relevant to the matter or 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 had the claim or charge fully explained to him and been given an opportunity of entering upon his defence in regard thereto.

- 2) Where the Deputy Commissioner deals with a recommendation under Subsection (1), he may pass any such decree as is authorised by Section 8, or any such sentence as is authorised by Section 12, Sub-section (1), and the decree or sentence shall have the same effect and be enforced in the same manner as if it were a decree or sentence passed under Section 8 or Section 12, Subsection (1), as the case may be.

19. Record of Deputy Commissioner.

- 1) Where the Deputy Commissioner passes, under this Chapter a sentence of fine exceeding two hundred rupees, or of imprisonment for a term exceeding three months, or of transportation, he shall make a record of the facts of the case of the offence committed and of his reasons for passing the sentence.
- 2) The record shall be made by the Deputy Commissioner in English and in his own hand, unless for any sufficient reasons he is prevented from so making it, in which case he shall record the reason of his inability and shall cause the record to be made from his dictation in open Court.

20. Attendance of parties and witnesses before Deputy Commissioner and Council of Elders.

Where a reference is made to a Council of Elders under this Chapter, the Deputy Commissioner may exercise all or any of the powers conferred by the ¹⁹Code of Civil Procedure and the Code of Criminal Procedure, 1898, respectively, as the case may be, for the purpose of compelling the attendance, before himself or the Council of Elders, of the parties, and witnesses, or any of them, in any case and at any stage of the proceedings.

**CHAPTER IV
PENALTIES**

21. Blockade of hostile or unfriendly tribe.

In the event of any frontier tribe, or of any section or members of such tribe, acting in a hostile or unfriendly manner towards the British Government or towards persons residing within British India, the Deputy Commissioner may with the previous sanction of the Commissioner, by order in writing, direct.

- a) the seizure, wherever they may be found, of all or any of the members of such tribe and of all or any property belonging to them or any of them",

¹⁹ See now the Code of Civil Procedure, 1908.

- b) the detention in safe custody of any person or property so seized and; the confiscation of any such property;
- c) and may, with the like sanction by public proclamation;
- d) debar all or any member of the tribe from all access into ²⁰British India; and
- e) prohibit all or any persons within the limits of ²⁰British India from all inter-course or communication of any kind whatsoever, or of any specified kind or kinds with such tribe or any section or members thereof.

22. Fines on communities accessory to crime.

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

- a) connived at, or in any way abetted, the commission of an offence; or
- b) failed to render all assistance in their power to discover the offenders or to effect their arrest;
- c) connived at the escape of, or harboured, any offender or person suspected of having taken part in the commission of an offence; or
- d) combined to suppress material evidence of the commission of an offence; the Deputy Commissioner may, with the previous sanction of the Commissioner, impose a fine on the inhabitants of such village or part of a village, or any of them as a whole.

23. Fines on communities where murder or culpable homicide is committed or attempted.

Where, within the area occupied by a village community or part of a village-community, a person is dangerously or fatally wounded by an unlawful act, or the body is found of a person believed to have been unlawfully killed, the members of the village community or part thereof shall be deemed to have committed an offence under Section 22, unless the headmen of the village-community or part thereof can show that the members thereof -

- a) had not an opportunity of preventing the offence or arresting the offender; or
- b) have used all reasonable means to bring the offender to justice.

24. Recovery of fines.

Fines imposed under Section 22 shall, in default of payment, be recoverable as if they were arrears of land revenue due by the members of the community or part thereof upon whom the fine is imposed.

²⁰ Now to be construed as referring to all Provinces of Pakistan, see G.G.O. 20 of 1947.

²⁰ Now to be construed as referring to all Provinces of Pakistan, see G.G.O. 20 of 1947.

25. Forfeiture of remissions of revenue etc. in the case of communities and persons accessory to crime.

Where a village-community or part of a village-community has become liable to fine under Section 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.

26. Forfeiture of public emoluments etc. of persons guilty of serious offences or of conniving at crime.

Where it is shown to the satisfaction of the Deputy Commissioner that any person who is in the enjoyment of an assignment or remission of land-revenue or allowance payable out of public funds, has been guilty of a serious offence, or has colluded with or harboured any criminal, or has suppressed material evidence of the commission of any offence, or has failed, on the investigation of any criminal case, to render loyal and proper assistance to the authorities to the best of his ability, the Deputy Commissioner may, in addition to any other penalty to which such person may be liable under any law for the time being in force, direct the forfeiture, in whole or in part and for a term or in perpetuity, of such assignment or remission of land-revenue or allowance, as the case may be.

Explanation. — For the purposes of this section the expression "serious offence" means any offence punishable with transportation or with imprisonment for a term which may extend to three years or more..

27. Powers to direct forfeiture.

Forfeiture under Section 25 or Section 26 may be adjudged by order of the Deputy Commissioner for a term, which may extend to three years, and by order of the Commissioner for any longer term or in perpetuity.

28. Powers of Provincial Government saved.

Nothing in Sections 25, 26 and 27 shall affect the powers of the ²¹[Provincial Government] with respect to the grant, continuance or forfeiture, in whole or in part, of any assignment or remission of land-revenue or of any allowance paid out of public funds.

29. Preparation to commit certain offences.

Where a person is found carrying arms in such manner or in such circumstances as to afford just grounds of suspicion that the arms are being carried by him with intent to use them for an unlawful purpose, and that person has taken precautions to elude observation or evade arrest, or is found after sunset and before sunrise within the limits of any military camp, cantonment or of any municipality, he shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both, and the arms carried by him may be confiscated.

²¹ Substituted for "Local Government" by the A.O., 1937.

30. Adultery.

(1) A married woman who, knowingly and by her own consent, has sexual intercourse with any man who is not her husband is guilty of the offence of adultery, and shall be punishable with imprisonment for a term which may extend to five years, or with fine, or with both.

²²[(2) Cognizance shall not be taken of an offence under this section unless a complaint has been made by the husband of the woman or, in his absence, by a person who had care of the woman on his behalf at the time when the offence was committed.]

CHAPTER V**PREVENTIVE AND OTHER AUTHORITY AND JURISDICTION****31. Power to prohibit erection of new villages or towers on frontier.**

- 1) No new hamlet, village-habitation, tower or walled enclosure shall, without the previous sanction in writing of the Commissioner, who may, either grant or refuse such sanction as he thinks fit, be erected at any place within five miles of the frontier of²³ British India.
- 2) Where the 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.

32. Power to direct removal of villages.

Where it is expedient on military grounds, the Central Government may, by order in writing, direct the removal of any village situated in close proximity to the frontier of²⁴ British India to any other site within five miles of the regional way and award to the inhabitants such compensation for any loss which may have been occasioned to them by the removal of their village as in the opinion of the [Central Government], is just.

33. Regulation of Hujras and Chauks.

- 1) No building of the kind commonly known as "hujra" or "chauk" and no building intended to be used as a "hujra" or "chauk" shall be erected or built, and no existing building not now used as a "hujra" or "chauk", shall at any time be used as such, without the previous sanction in writing of the Deputy Commissioner.
- 2) Whoever contravenes the provisions of Sub-section (1) shall be punishable with imprisonment for a term, which may extend to six months or with fine, or with both.

²² Sub-section (2) omitted in its application to the Districts of Peshawar, Kohat, Hazara, Bannu, Mardan and Dera Ismail Khan, by the West Pakistan Ordinance XII of 1962.

²⁴ Substituted for "Local Government" by the A.O., 1937

34. Demolition of buildings used by robber etc.

- 1) Where the Deputy Commissioner is satisfied that any building is habitually used as a meeting place by robbers, house-breakers, thieves or bad characters or for the purpose of gambling, he may, by order in writing, prohibit the owner or occupier thereof from so using such building, and, if the order is not obeyed, may, by a like order, direct that the building be demolished. Such further order shall be without prejudice to any punishment to which the owner or occupier of such building may, under any law for the time being in force, be liable for disobedience of the prohibitory order.
- 2) No person shall be entitled to any compensation in respect of the demolition of any building under Sub-section (1).

35. Naubati chaukidari system.

- 1) Where, in the opinion of the Deputy Commissioner, the custom of providing for watch and ward by what are commonly known as "Naubati chaukidars" exists in the case of any village-community, and the village-community, or any part thereof fails to provide for the due performance of such service, or any member of the village-community fails to perform his duty of watch and ward according to the customary rotation in respect of such duties, the Deputy Commissioner may impose a fine, which may extend to one hundred rupees in any one case, upon the village-community or part or member thereof so failing as aforesaid.
- 2) The provision of Section 24 shall be applicable to the recovery of fines imposed on any village-community or part thereof under this section
- 3) Where such custom as aforesaid has not existed or has fallen into misuse in any village-community, the Deputy Commissioner may, with the previous sanction of the Commissioner, by order in writing, direct introduction or revival, as the case may be, and thereupon the provisions of Sub-section (1) shall apply in respect of the village-community.

36. Power to require persons to remove in certain cases.

Where in the opinion of the Deputy Commissioner, any person

- a) is a dangerous fanatic; or
- b) belongs to a frontier tribe and has no ostensible means of subsistence or cannot give a satisfactory account of himself; or
- c) has a blood-feud; or
- d) has occasioned cause of quarrel likely to lead to blood-shed;

The Deputy Commissioner may, by order in writing, require him to reside beyond the limits of the territories to which this Regulation extends or at such place within the said territories as may be specified in the order:

Provided that, 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.

37. Penalty for breach of certain orders.

Whoever contravenes the provisions of Section 31, or disobeys an order under Section 21 or Section 32, or a prohibition under Section 34, or a requisition under Section 36, shall be punishable with imprisonment for a term which may extend to six months, and shall also be liable to fine which may extend to one thousand rupees.

38. Powers of arrest.

In any place in which all or any of the provisions of this Regulation are for the time being in force.

(i) any private person may, without 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 police officer or take or cause to be taken to the 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 Code of Criminal Procedure, 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 those portions of the Frontier Crimes Regulation 1901 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 circumstance 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 committing or attempting to commit an offence, or resisting or evading arrest, in such circumstances as are referred to in the said clause".

39. Arrest without warrant in cases under Section 498, ²⁵Indian Penal Code.

- 1) Where there is reason to believe that a person has committed or attempted to commit an offence punishable under Section 498 of the "Indian Penal Code, an officer in charge of a police station may, without an order from a Magistrate and without a warrant, arrest that person on the requisition of the husband of the woman, or, in his absence of a person having 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.

²⁵ Now the Pakistan Penal Code.

- 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 of bail being furnished to his satisfaction, detain the person arrested for such period, not exceeding fifteen days, as may be necessary to enable the husband, or, in his absence, a person who had care of the woman on his- behalf, to make a complaint.

40. Security and surveillance for the prevention of murder or culpable homicide or the dissemination of sedition.

- 1) Where 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 behaviour or for keeping the peace, as the case maybe, he may order the person to execute a bond with or without sureties for his good behaviour 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.
- 2) The Deputy Commissioner may make an order under Sub-section (1)
 - (a) on the recommendation of a Council of Elders, or
 - (b) after inquiry as hereinafter provided.

²⁶[(2-A) Pending the completion of an enquiry for the purposes of Sub-section (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 behaviour for a period not exceeding one month, and detain him in custody till such bond is executed].

(3) Where 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, 1898, or punishable under Section 302, Section 304, Section 307 or Section 308 of the ²⁷Indian Penal 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 a 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 Sub-section (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 may be specified in the order.

²⁶ Sub-section (2-A) of Section 40 ins. by W.P. Ord: XXXVII of 1963, S.2, shall apply to Queta and Kalal Divisions only.

²⁷ Now the Pakistan Penal Code.

NOTE

Matter not adjudicated upon by the Deputy Commissioner in accordance with Section 8(3)(d) of Frontier Crimes Regulation. Commissioner too failing to exercise authority vested in him under law in not deciding Revision Petition according to law. Orders passed by the Deputy Commissioner and Commissioner set aside through Constitutional Petition.²⁸

41. Security from families or factions in case of blood feud.

Where a blood-feud or other cause of quarrel likely to lead to blood-shed exists or, in the opinion of the Deputy Commissioner, is likely to arise between two families or factions, the Deputy Commissioner may, on the recommendation of a Council of Elders, or, after inquiry as hereinafter provided, order all or any of the members of both families or factions or of either family or faction to execute a bond, with or without sureties, for their good behaviour or for keeping the peace, as the case may be, during such period, not exceeding three years as he may fix,

42. Procedure in inquiry.

- 1) An inquiry for the purposes of Section 40 Sub-section (2), or Section 41, may be conducted so far as may be necessary out of Court. Provided that a person from whom it is proposed to require a bond under Section 40, or the principal members of a family or faction from which it is proposed to require a bond under Section 41, shall be given an opportunity of showing cause in Court why a bond should not be required and of having his or their witnesses examined there, and of cross-examining any witness not called by himself or themselves who may testify there to the necessity or otherwise for the execution of a bond.
- 2) Sections 112, 113, 115 and 117 of the Code of Criminal Procedure, 1898, shall not apply to an inquiry under this section, but the Deputy Commissioner shall record his order with the reasons for making it.

43. Breach of bond.

- 1) A bond executed under Section 40 shall be liable to be forfeited if the person bound thereby to be of good behaviour or to keep the peace, as the case may be, commits or attempts to commit, or abets the commission of, any offence punishable with imprisonment.
- 2) A bond executed under Section 41 shall be liable to be forfeited if the person bound thereby to be of good behaviour or to keep the peace, as the case may be, commits or attempts to commit, or abets the commission of, any offence punishable with imprisonment in respect of any member of the opposite family or faction to which the bond related.
- 3) If, while a bond executed under Section 41 is in force, the life of any member of either family or faction is unlawfully taken or attempted, the Deputy Commissioner may declare the bond of all or any of the members of the other family or faction and their sureties (if any) to be forfeited, unless it is shown to his satisfaction that the homicide or attempt was not committed by, or in consequence of the abetment of, any member of that family or faction.

²⁸ P. L. J. 1987/Quetta 223.

44. Imprisonment in default of security.

- 1) Where a person ordered to give security under Section 40 or Section 41 does not give security on or before the date on which the period for which the security is to be given commences he shall be committed to prison, or, if he is already in prison, be detained in prison until that period expires, or until within that period he furnishes the required security.
- 2) Imprisonment for failure to give security under this Chapter may be rigorous or simple as the officer requiring the security directs in each case.

45. Length of imprisonment.

Where a person has suffered imprisonment for three years for failure to give security under Section 40 or Section 41, he shall be released and shall not again be required to give security unless a fresh order is passed in accordance with the provisions of this Chapter or of the Code of Criminal Procedure, 1898.

46. Further Security.

- 1) Where a person has, under the provisions of this Chapter, given security or been imprisoned for failure to give security, he may be brought before the Deputy Commissioner, if on the expiry of the period for which security was required to be given the Deputy Commissioner so directs.
- (2) Where the Deputy Commissioner thinks it necessary, for the purpose of preventing blood-shed, to require security for further period from any person so brought before him, he shall record proceeding to that effect.
- (3) The proceeding may be founded on the facts on which the original order to give security was founded, and it shall not be necessary to prove any fresh facts to justify an order to give security for a further period under this section; but such an order, if passed shall have the same effect and be enforced in the same manner as an original order to give security under Section 40 or Section 41.
- (4) Notwithstanding anything in this section, no person shall suffer, for failure to give security under this Chapter, continuous imprisonment for more than six years or, without the sanction of the Commissioner for more than three years.

47. Modified applications of Chapters VIII and XLII, Act V of 1898.

- 1) Where, within the territories in which all or any of the provisions of this Regulation are for the time being in force, it is found necessary or expedient to take security under this Regulation from Pathans or Baluchis or any other classes against whom all or any of the provisions of Section 40 to 46 may for the time being be enforced, the provisions of Chapters VIII and XLII of the Code of Criminal Procedure, 1898, shall be read as if for the words "High Court", "Court of Session" and "Sessions Judge" wherever they occur, the word "Commissioner" were substituted, and all references to any such Courts shall be deemed to refer to the Court of the Commissioner.

- 2) Subject to the provisions of Sub-section (2) of Section 42 and Sub-section (1) of this section, the provisions of the said Chapters of the Code of Criminal Procedure, 1898, shall, so far as they are consistent therewith, be applicable to every proceeding under this Chapter relating to the taking of security; but all applications for revision in respect to any such proceeding shall be made to, and be disposed of by, the Commissioner.

CHAPTER VI APPEAL AND REVISION

48. Appeals barred.

No appeal shall lie from any decision given, decree or sentence passed, order made, or act done, under any of the provisions of this Regulation.

49. Revision.

The Commissioner may call for the record of any proceeding under this Regulation and revise any decision, decree, sentence or order given, passed or made therein.

50. Powers in exercise of criminal revisional jurisdiction.

The Commissioner may, in the exercise of his revisional jurisdiction in any criminal proceeding, exercise the power to direct tender of pardon conferred by Section 338, and any of the powers conferred on an Appellate Court by Sections 195, 423, 426, 427 and 428 of the Code of Criminal Procedure 1898, and may also enhance any sentence.

Provided that nothing in this Chapter shall be deemed to authorize the Commissioner to set aside the finding on any question of fact of a Council of Elders, where such finding has been accepted by the Deputy Commissioner, unless he is of 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.

51. Sentences which may not be passed on revision.

No sentence shall be passed by the Commissioner in the exercise of his revisional jurisdiction, which the Deputy Commissioner could not have passed under this Regulation.

52. Powers in exercise of civil revisional jurisdiction.

Nothing in this Chapter shall be deemed to authorize the Commissioner to vary or set aside any decision, decree or order given, passed or made in any civil proceeding under the Regulation, unless he is of 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 or that the decision, decree or order is contrary to good conscience or public policy.

53. Record of reasons.

Where, in the exercise of his revisional jurisdiction in any proceeding under this Regulation, the Commissioner varies or sets aside any decision, decree, sentence or order, he shall record his reasons for so doing,

²⁹54. Procedure where the decision, etc. to be revised was given by the officer invested with revisional jurisdiction as Deputy Commissioner.

- 1) No officer shall revise any decision, decree, sentence, or order given, passed or made by himself in the capacity of Deputy Commissioner.
- 2) Where any such decision, decree, sentence or order is brought to the notice of an officer invested with revisional jurisdiction under this Regulation with a view to the exercise by him of revisional powers such officer shall report the case to the Provincial Government and it shall be disposed by the Provincial Government or by an officer other than the reporting officer, appointed by the Provincial Government.

55. Enforcement of orders made on revision.

Every order made by the Commissioner in exercise of his revisional jurisdiction shall be enforced as if it were an order of the Deputy Commissioner or District Magistrate, as the case may be, and the Deputy Commissioner or District Magistrate shall do all acts and things necessary to give effect thereto.

**CHAPTER VII
SUPPLEMENTAL PROVISIONS**

56. Recovery of fines, etc., from relatives of person liable.

Where by a decree passed under Section 8 or by a sentence passed under Section 12, any person belonging to a frontier tribe becomes "liable to pay a fine or other sum of money, the Deputy Commissioner may, on the recommendation of a Council of Elders and on satisfying himself, that such a course is in accordance with local tribal custom, by order in writing, direct that the amount shall be recovered from the property movable or immovable, of such of the relatives of fellow tribesmen of the person so liable as may be specified in the order.

57. Power of Deputy Commissioners to order disposal of certain fines.

- 1) The Deputy Commissioner may make such order as he thinks fit for the disposal of the proceeds of any fine imposed under Section 12, Section 18, or Section 22, and, subject to any order made by the Commissioner under Chapter VI, the proceeds shall be disposed of accordingly.

²⁹ Substituted for the original section by W.P. Ord; XII of 1962, S.5.

- 2) Where, in pursuance of an order made under Sub-section (1), a person has received compensation for an injury out of the proceeds of a fine, no Civil Court shall take cognizance of a claim to compensation based on the same injury.

58. Maintenance of registers.

Registers shall be kept up, in forms to be approved by the ³⁰[Provincial Government], of all cases dealt with by the Deputy Commissioner and by the Commissioner under this Regulation.

59. Jurisdiction of ordinary Courts in cases under Sections 29, 30 and 37.

An offence punishable under Section 29 or Section 30 may be tried by a Court of Session or by the Court of a Magistrate of the first class. An offence punishable under Section 37 may be tried by any Magistrate of the first class.

60. Finality of proceedings under Regulation.

Except as therein otherwise provided, no decision, decree, sentence or order given, passed or made, or act done, under Chapter III, Chapter IV, Chapter V or Chapter VI, shall be called in question in, or set aside by, any Civil or Criminal Court.

61. Application of provisions of Indian Penal Code respecting fines and imprisonment.

The provisions of Section 61, and those of Sections 63 to 74, of the ³¹Indian Penal Code, shall, subject to the provisions of Section 13 of this Regulation, apply to sentences passed under this Regulation.

62. Power, to make rules.

The ³²[Provincial Government] may make³³ rules to carry out the purposes and objects of this Regulation.

NOTE

The court-fee required under the rules framed by the Agent to the Governor-General and Chief Commissioner of Baluchistan through Order No. 1833-V dated the 5th June, 1936 on any document pertaining to criminal cases, or civil cases involving amount not exceeding Rs. 25,000/- are now no longer to be levied with court-fee from 1st August, 1978. Gazette of Baluchistan, Extraordinary, 15th January, 1979.

³⁰ Substituted for "Local Government" by the A.O., 1937.

³¹ Now the Pakistan Penal Code.

³² Substituted for "Local Government" by the -A.O., 1937,

³³ For rules see

(i) N.W.F.P. Gazette, dated the 11th December 1913, page 1134, and dated the 30th April 1926, page 457; and
(ii) Pb. Gazette, 1902, Pt.I, page 6.35,

³⁴[62-A. Power to make rules for the issue and safe custody of rifles and ammunition and for the imposition and recovery of fines.

The ³⁵[Central Government] may make rules for the issue and safe custody of rifles and ammunition for border village defence, and for the imposition and recovery of fines for any breach of such rules. Fines imposed for a breach of the rules made under this section may be recovered in the manner laid down in Section 386 of the Code of Criminal Procedure, 1898].

63. No suit or other legal proceeding shall lie against any person for anything done, or in good faith intended to be done, under this Regulation.

64. Protection for persons acting under Regulation.

[Repeal.] Repealed by the Repealing Act, 1938 (I of 1938), Section 2 and Schedule 1.

³⁴ Inserted by Regulation V of 1928. S.2.

³⁵ Substituted for "Local Government" by, the A.O, 1937.

THE FIRST SCHEDULE
(See Section 2, clause (b))

PART I
POWERS AND FUNCTIONS WITH WHICH MAGISTRATES
OF THE FIRST CLASS MAY BE INVESTED BY
DEPUTY COMMISSIONERS

- (a) In the case of an Additional District Magistrate — all or any of the powers and functions of a Deputy Commissioner.
- (b) In any other case — all or any of the following powers, namely:
- (i) power to make orders of reference to Councils of Elders under Section 8.
 - (ii) power to nominate and appoint the members of the Council when an order of reference to a Council has been made under Section 8, Sub-section (1);
 - (iii) power to nominate the members of the Council when an order of reference to a Council has been made under Section 11, Sub-section (1);
 - (iv) power to consider and dispose of objection made by an accused person to members so nominated, and to appoint the member of a Council of Elders under Section II, Sub-section (2); and
 - (v) power to take security under Section 40.

PART II
POWERS AND FUNCTIONS WITH WHICH MAGISTRATE MAY BE
INVESTED BY THE ³⁶[PROVINCIAL GOVERNMENT]

- a) Power to nominate and appoint the members of a Council of Elders where an order of reference to a Council has been made under Section 8, Sub-section (1).
- b) Power to nominate the members of the Council when an order of reference to a Council has been made under section 11, Sub-section(1); and power to consider and dispose of objections made by an accused; person to members so nominated, and to appoint the members of a Council of Elders under Section 11, Sub-section (2).

THE SECOND SCHEDULE
[See Section 2, Sub-section 1]

1. Any offence punishable under any of the following sections of the ³⁷Indian Penal Code, namely, Sections 121, 121_A, 122, 123, 124-A, 125, 126, 127, 131, 144, 148, 150, 193, 194, 195, 196, 201,

³⁶ Substituted for "Local Government" by, the A. O, 1937.

211, 212, 216, 216-A, 295-B³⁸ 302, 304, 307, 308, 324, 325, 326, 328, 354, 363 to 369, 376, 377, 379 to 382, 386, 387, 392 to 399, 400, 401, 402, 411.to 414, 427 to 429, 435, 436, 440, 448 to 460, 439-B³⁹-489-C³⁹ 494, 495, 497 and 498.

2. Any offence punishable under Section 29 or Section 30 of this Regulation.
3. Abetment of any of the offences aforesaid.
4. Attempt to commit any of the offences aforesaid, which are not themselves expressed to be attempts to commit offence,

⁴⁰THE THIRD SCHEDULE⁴¹
[See Sub-section (2) of Section]

1. The Divisions of Quetta and Kalat.
2. The District of Lasbela.
3. Nasirabad Sub-Division of Jacobabad District.
4. The Added Areas of the Hazara District, specified in the First' Schedule, to G.G.O. No. I of 1952.
5. The Added Areas of Mardan District, specified in Schedule 'A' to G.G.O. No. VII of 1953.
6. The Added Areas of Hazara District, specified in the First Schedule to G.G.O. No. XIII of 1955.
7. The former excluded Areas of Upper Tanawal and Baluch Areas of Dera Ghazi Khan, specified in the Schedule to President Order No.III of 1961.]

³⁷ Now the Pakistan Penal Code.

³⁸ Added by the Amended Regulation I of 1982. See Gazette, Extraordinary Part I 5.4.1982.

³⁹ Added by the Amended Regulation II of 1983, 18th August, 1983 (Gazette).

⁴⁰ Added by the West Pakistan Ordinance No. XLIII of 1963, S.3.

⁴¹ The Regulation is withdrawn from the areas of the Third Schedule through West Pakistan Extraordinary Gazette Dated 14th November, 1964, vide Notification No. T.12/240-61-11(M.P). This schedule has been added to the Regulation by the Amended Ordinance XLIII of 1963, and the Third Schedule added by the Amended (W.P) Ordinance, 1962 XII was substituted by this Ordinance XLIII of 1963.

Annexure - 2

Testing FCR on the touchstone of the Constitution

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Introduction

The Frontier Crimes Regulation 1901 (FCR) has been in operation for more than a century. It is a special law prescribing trial procedure for offences and civil disputes in the tribal areas. It is also a substantive law in as much as it defines certain offences and prescribes punishments for the same.

Genesis and evolution

The history of FCR dates back to the occupation and annexation of the six Frontier districts housing the Pakhtoons by the (colonial) British Government in 1848. Initially, the ordinary civil and criminal laws in force in British India were extended to such districts. However, the rate of conviction under the ordinary criminal law was very low, and this was ascribed to the peculiar customs prevalent in the Pakhtoon areas and their code of honour, whereunder murder under certain conditions was regarded as an obligation rather than a crime. Consequently, during trial, the requisite evidence would not come forth, and hence, convictions were rare. This led the British administration to devise a special law for the Pakhtoon region and the first Frontier Crimes Regulation of 1871 was enacted.

This Regulation was re-enacted in 1873 and again in 1876, with minor modifications. The Regulation had scanty provisions, authorizing the Deputy Commissioner to detain and impose fine on any member of a Frontier tribe, who acted in a hostile or unfriendly manner towards the British Government. It further restricted the erection of any hamlet or village or tower or walled enclosure close to the frontier without authorization, and permitted their demolition by the authorities on

* Views expressed by the author in this paper do not represent the official position on FCR.

military grounds. With the passage of time, the Regulation was found to be inadequate; hence its scope was extended by adding new acts and offences to it. This was done through of the Frontier Crimes Regulation of 1901.

Indigenous features

The FCR contained some indigenous features. The trial procedure was generally in accord with the Pakhtoon traditions, where decision by Jirga was the dominant norm. The sentencing policy of the FCR is somewhat liberal vis-a-vis the criminal law prevalent in settled districts. Sentences prescribed are generally lower than those provided by the Pakistan Penal Code 1860 and there is no provision for the sentence of death.

Trial by Jirga, a unique feature of the law, ensures the independence and impartiality of the system of administration of justice, in as much as the Jirga members, like jurors, pronounce the final verdict as to the guilt or innocence of the accused. Thus, conviction or acquittal is decided by fellow peers rather than any state authority. With proper selection of the Jirga, the system could be most effective and efficacious, with judgments rendered in a most expeditious and economical manner. No wonder, the most advanced societies including the USA and the UK, are moving in the direction of introducing ADR (Alternative dispute- resolution) in the justice system, with beneficial results. Various modes of ADR, it may be stated, have been incorporated in the Civil Procedure Code 1908 for settlement of civil cases and in the Family Court Act 1964 for resolving family disputes. It is also a special feature of the newly promulgated Small Claims & Minor Offences Courts Ordinance 2002, which provides for the expeditious resolution of civil and criminal matters,

Constitutional status

The FCR is operative in specified tribal areas including the Federally Administered Tribal Areas (FATA). Article 1 of the Constitution includes FATA in the territory of Pakistan. Article 246 stipulates some 11 regions and agencies that comprise the FATA. Article 247 prescribes the manner and method of administering FATA. It states that the executive authority of the Federation extends to FATA and that it shall be administered by the Governor on the direction of the President. Existing laws and regulations can be extended and new ones made for FATA. Most of the laws -- civil, criminal, electoral and fiscal -- have been extended to FATA. The President may, subject to ascertaining the views of the tribal Jirga, abolish the special status of a given FATA region/agency and convert it into settled area.

Article 247 however debars the jurisdiction of the Supreme Court and High Courts to tribal areas, except when the Parliament by law otherwise provides. However, this prohibition does not affect the jurisdiction of the Supreme Court or a High Court exercised in relation to tribal areas immediately before the commencing day of the Constitution. Under Article 142(d), the Parliament has the exclusive power to make laws with respect to matters not enumerated in the Legislative Lists for such areas in the Federation as are not included in any province. Further, Article 258 states that until Parliament by law or otherwise provides, the President may make necessary provisions for peace and good governance of any part of Pakistan not forming part of a province. The Constitution further provides for representation of the FATA population in the Parliament. Article 51 reserves 12 seats in the National Assembly, elected through adult franchise and Article 59 reserves 8 seats in the Senate,

filled through indirect system of election through members of the National Assembly from the FATA.

Quite clearly FATA is part and parcel of the territory of Pakistan and as such is governed under the Constitution. The Constitution, however, prescribes a special system of extension/application of laws to FATA and a distinct system of administration. The Constitution defines the fundamental rights, which extend to the whole of Pakistan. Their enforcement (under Articles 199 and 184 (3) of the Constitution) is however through the High Courts and the Supreme Court. It seems that whereas Fundamental Rights remain available to the residents of FATA, their enforcement is precluded by the bar in Article 247(7) to the exercise of jurisdiction of the courts in such territory. The Parliament could remove the bar by enacting a law. These courts however do retain their jurisdiction exercised earlier prior to the commencing day.

Challenges to FCR

The FCR did not have a smooth passage. It frequently came under review by the courts for repugnancy to fundamental rights. Cases started coming to courts soon after the promulgation of the 1956 Constitution, which contained fundamental rights for citizens. In a series of judgments the superior courts declared various provisions of the law void, as being inconsistent with the fundamental rights. Such judgments were *Dosso v. State* (PLD 1957 Quetta 9), *Toti Khan v. DM, Sibi* (PLD 1957 Quetta 1), *Abdul Akbar Khan v. DM, Peshawar* (PLD 1957 Pesh 100), *Abdul Baqi v. Superintendent, Central Prisons, Mawlana* (PLD 1957 Karachi 694), *Khair Muhammad Khan v. Government of WP* (PLD 1956 Lahore 668) and *Malik Muhammad Usman v. State* (PLD 1965 Lahore 229). Justice A. R. Cornelius in the case of *Sumunder v. State* (PLD 1954 FC 228) referred to FCR proceedings as "obnoxious to all recognised modern principles governing the dispensation of justice". He therefore concluded that in the circumstances, it was impossible to preserve public confidence in the justness of the decision made under the FCR.

In the given scenario, it was difficult to visualise as to how the FCR could survive the judicial scrutiny and be retained on the statute book side by side with the fundamental rights. The judicial challenge subsided, though, with the Supreme Court verdict in the case of *State v. Dosso* (PLD 1958 SC 533), which justified the abrogation of the 1956 Constitution on the doctrine of "revolutionary legality". The repugnancy of FCR therefore could no longer be tested *viz-a-viz* the Constitution. Later, the Constitution was revived. However in the subsequent years, no serious challenge has ever been posed to the FCR; hence its continuation.

It may be noted that the High Court of West Pakistan in the case of *Dosso v State* (PLD 1957 Quetta 9) exercised jurisdiction despite the ouster clause, under Article 178 of the 1956 Constitution. The Court did so on the ground that tribal areas are included within the areas of Pakistan and the citizens residing therein are entitled to the benefit of fundamental rights, guaranteed by the Constitution. This is how the Court struck down certain provisions of the FCR, which were found to be repugnant to Article 5 (equality before the law and equal protection of law) of the Constitution. The Peshawar High Court in the case of *Mohammad Irshad v Assistant Commissioner, Swat* (PLD 1990 Peshawar 51) struck down the PAT A Criminal Laws (Special Provisions) Regulation I of 1975 and PATA Civil Procedure (Special Provisions) Regulation II of 1975, as these were found to be violative of Article 25 of the Constitution. A stunning blow was delivered by the Supreme Court to the notion of special areas, deprived of the benefits of the Constitution, in the case of *Al-Jehad Trust v Federation*

of Pakistan (1999 SCMR1379), wherein the court assumed jurisdiction under Article 184 (3) on a petition filed before it, seeking the enforcement of fundamental rights of the people of Northern Areas. It may be clarified that the Constitution makes no mention of Northern Areas. [Article 257 refers to Jammu & Kashmir only by stating that when the people of State of Jammu & Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of people of that State. As per judgment of the Supreme Court of A J & K in the case of Federation of Pakistan v Malik Mohamznad Miskeen (PLD1995 SC (AJ&K) 1), the Northern Areas are not part of Azad Jammu & Kashmir territory]. The Supreme Court nevertheless assumed jurisdiction, the matter being of public importance relating to enforcement of fundamental rights. The court ruled that the people of Northern Areas are citizens of Pakistan for all intents and purposes and like other citizens have the right to invoke any of the fundamental rights and liable to pay taxes and other levies, competently imposed. The court observed that the people are entitled to participate in the governance of that area and should have an independent judiciary to enforce, inter alia, the fundamental rights. It accordingly directed the Federal Government to initiate appropriate legislative/administrative measures to enable the people of Northern Areas to be governed through their chosen representatives and to have access to justice through an independent judiciary, inter alia, for enforcement of their fundamental rights. Earlier also the Supreme Court had in the case of Superintendent of Land Customs, Torkham-v-Zewar Khan (PLD 1969 SC 485) ruled that tribal areas were legally part of the territories of Pakistan as several laws including Customs Act were applicable to it. The Court observed that both under the international law as well as the municipal law, the tribal territories are part and parcel of Pakistan, and are duly recognised as such by foreign states.

Reference to international law is important in the sense that international human rights instruments, to which Pakistan is a signatory, are binding on the state in respect of all regions and all people. Therefore, it is incumbent upon the state to take necessary constitutional, legislative or administrative measures to extend international human rights norms/principles to all the people in the state, including the FATA.

Judging by the standards of international human rights principles, the norms practised in civilised states and the fundamental rights guaranteed in the Constitution of Pakistan, the FCR fails to meet the test of compatibility. This is so because FCR has a peculiar origin. The British devised it as an instrument of subjugating the tribes and disciplining the Pakhtoon population. It was necessary to establish the writ of the colonial authority. In drafting it, the Government relied upon some of the customs and traditions prevalent in the tribal belt. However, such customs and traditions were twisted to suit the Government plan of securing convictions. The selection of Jirga members was therefore left to the executive authority, and the findings of Jirga were not binding. This way the Executive was made the ultimate authority and final arbiter to initiate trial, prosecute offenders and award punishments. The trial fora including appellate and revision authorities are from amongst the executive. 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. The very preamble as well as Article 2-A and 175 of the Constitution provide for an independent judiciary. This vital safeguard is altogether missing from the FCR. All its provisions - substantive as well as procedural e.g. selection of Jirga members (section 2), trial procedure in civil/criminal matters (sections 8 & 11), the power to blockade hostile or unfriendly tribe (section 21), demolition of and restriction of construction of hamlet, village or tower on frontier (section 31), removal of persons from their places of residence (section 36), manner and method of arrest/ detention (sections 38 & 39), security for good behaviour (sections 40, 42), imposition/collection of fine (sections 22-

27), etc – are in violation of the Constitution. This is contrary to Article 8 of the constitution, which provides that any law or customs or usages having the force of law, in so far as it is inconsistent with the fundamental rights shall be void. Quite clearly, the provisions of FCR are violative of several articles of the Constitution e.g. Article 4 (right of individual to be dealt with in accordance with the law), Article 9 (security of person), Article 10 (safeguards as to arrest and detention), Article 13 (protection against double jeopardy, self-incrimination), Article 14 (inviolability of dignity of man, prohibition of torture for the purpose extracting evidence), Article 24 (protection of property rights), and Article 25 (equality of citizens).

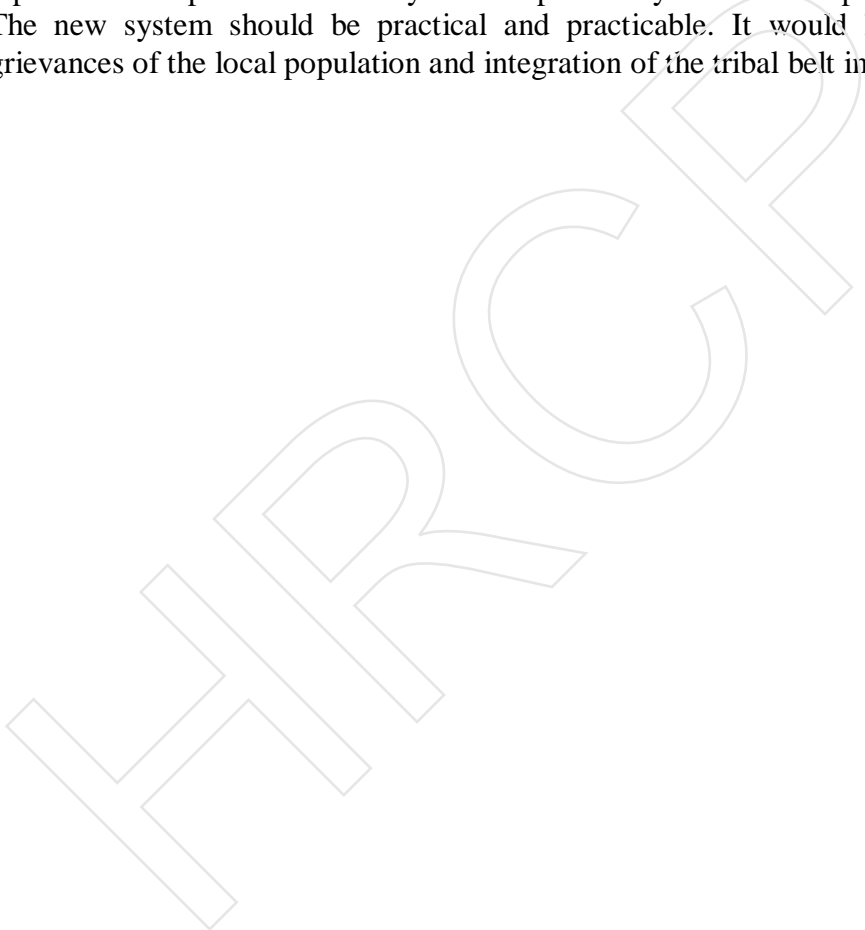
Conclusion

International human rights principles, judicial norms practised in civilised states and the Constitution of Pakistan envisage certain basic principles to be present in the criminal justice system. These principles include the presumption of innocence until proven guilty and trial under due process/procedure. The safeguards available to citizens are: no arrest or detention without breach of law; arrested accused to be informed of the grounds of arrest; the right to and be provided a counsel of choice and if the accused is indigent, such counsel to be provided by the State; production of the detenu before court within shortest possible time but not exceeding 24 hours of arrest; extension in period of detention subject to remand given by the court: release on bail and the bail bond to be of reasonable amount; release/ acquittal of the accused in the event of the prosecution failing to establish the guilt, right to be treated in accordance with the law and enjoy the protection of law, right against self-incrimination or double jeopardy or retrospective punishment or punishment greater than prescribed by law; right of the accused to produce witnesses in favour and cross-examine witnesses against himself, humane and dignified treatment while in custody, prohibition on use of torture for extracting evidence and prohibition of inhuman, degrading or humiliating treatment or punishment. An essential safeguard is trial by an independent and impartial court of law through free and fair dispensation of justice.

These are, let me stress, the established safeguards practised in the advanced societies. Many of them regrettably are missing from the system of criminal justice in vogue in Pakistan. The criminal justice system is confronted with multiple problems and challenges, besides the absence of adequate safeguards for the accused. It is neither expeditious nor economical, and contains major drawbacks for the victim to secure his right or redress of grievance, and the accused to get a fair trial. If the system is still considered better than FCR, then perhaps FCR is the worst form of legislation. FCR is patently contrary to the constitutional norms. The law therefore needs to be reviewed. Review must however follow detailed study of the ground realities and local traditions. It should reflect the social ethos and aspirations of the people of tribal areas. Perhaps a gradual process of reform of the law may be undertaken. To begin with, some of the draconian provisions in the FCR e.g. seizure/confiscation of property and arrest/detention of an individual without due process, debarring a person in tribal area from entering the settled district (Section 21), removing a person from his residence/locality (Section 36), fines on community for crime committed by individuals (Sections 22, 23), prohibition on erecting village, walled enclosure and their demolition (Sections 31 - 33) etc, should be abolished. Where appropriate, ordinary criminal law may be extended to the tribal area to prevent gap/void in legislation.

The accumulation of executive and judicial functions in a single authority should be done away with. The judicial functions at the trial, appeal and revision stages should be exercised by judicial

authorities, working under the High Court. The High Court can be made the court of ultimate appeal in cases under FCR. The Jirga members should not be selected by the Executive and their findings, on facts of the case, be made binding, except when it is against law, equity or public policy. Meanwhile, a study group comprising experts from different fields and local representatives/professionals may be set up to study the law and prepare an alternative framework. The new system should be practical and practicable. It would help facilitate in removing the grievances of the local population and integration of the tribal belt in the country.



Annexure-3

Journalism in the shadow of FCR

Ibrahim Shinwari

Rulers throughout the world have little love lost for journalists. This unremitting hatred of the powers that be applies to journalists of all hues, castes and creeds regardless of their hidden or professed loyalties. This also includes journalists who cherish the illusion of being endeared by the rulers by virtue of being close to them whereas in fact they are considered to be the most loathsome of all. But this by all means is a lesser category of sinners compared to the journalists of the tribal areas of Pakistan. Branded variously in unison with their clansmen as unfaithful, scheming and treacherous, tribal journalists are infinitely more despised by their Political Agent, the virtual authority with the powers to bestow the right of life or death over his subjects as he pleases in the seven federally administered tribal zones of Pakistan.

I am sure most of you have not been to the office of a Political Agent in a tribal area. Given the ways that our bureaucrats have got themselves attuned to, it is however, difficult to imagine and indeed visualize the lavishly embellished interior of such an office, that stands out in sharp contrast to the outside world where the writ of his authority extends. However, without sufficient knowledge of the people and area of tribal agency, it must be difficult to imagine the amount of backwardness, poverty, unemployment, illiteracy and ignorance brushed under the carpet in his office.

This colossal baggage is the product of Frontier Crimes Regulation (FCR), the infamous law that the political administration wields, brandishes and uses to the maximum effect to stifle the voice of reason and prevent truth from reaching the outside world. It is the ferocity of this law that does not allow the bringing out of any newspaper, journal or any other publication in the tribal areas.

At the risk of straying from the subject, I consider it essential to emphasize that this is the role that the Walton* trained cream -of- the- nation- officers play in the much coveted position achieved by dint of wheeling and dealing.

Cover up, do not let facts be divulged, seems to be the motto of the political administration. This has been the cornerstone of the policies of every political administration in all tribal agencies since

* Civil Services Academy at Walton, Lahore.

independence. The motive behind this charade is simple to understand and it stems from self-interest.

The sheer size of the wallet that a tribal political administration possesses, the manner of its disposal and the uncanny acquiescence of the government are all matters that need probing. It lends credible evidence to the fact that the aim behind the sanctioning of funds amounting to billions of rupees is not so much the development of these areas as it is to keep the so called formidable and wily tribesmen in check on the porous western borders. An enquiry in such affairs is neither appreciated nor allowed under any set of circumstances. It is here that the element of gagging the press through the infamous FCR comes into play. The unscrupulous disbursement of millions of rupees has to be protected from the prying eyes of journalists. It is not a difficult deal. A mere envelop could do the trick with journalists who otherwise get no emoluments for their services from their employers -- the champions of the freedom of the press. It is a disgustingly shameful fact that, apart from one or two, none of the hundred or so newspapers pays its stringers any stipend or salary at all in any tribal agency. Even more shameful is the fact that a majority of the newspapers would see to it that a go getter type reporter could be found who should feed the newspaper. But let me state this at this esteemed forum that amidst all this suffocation there are journalists who remain undaunted and steadfast. No amount of pecuniary considerations or coercion could force these journalists to submit. These journalists and their families have suffered immensely at the hands of political administration and the goons working on their orders. The relatives and friends of the non-pliant journalists have been picked up, persecuted and thrashed and their properties confiscated and demolished under the collective responsibility clause of the FCR. Grenades and mortars have invariably been fired at will at the houses of journalists for unpleasant reporting.

I would be the last person to exaggerate or overstate facts but you have to agree with me that Wana reveals the wages of the great cover-up in the shape of suppression of journalists and concealment of facts that preceded the latest operation. Lessons have still not been learnt. Journalists are still being denied possibilities to explore truth. Perhaps the perpetrators of such practices are in the process of undertaking another similar exercise, this one aimed at hiding their year- long follies that would expose them head to toe in the world.

I have to request, let's grant human rights to the people of the tribal areas or else do not expect them to be humane towards us. Let's open up tribal areas by doing away with the draconian laws and introducing basic laws that apply to human beings everywhere else in the world.

Political authorities will have to stop hounding journalists. I would also like to request them to stop bribing journalists as well. This country cannot afford to have another Wana. Sanity demands that truth must be told or else the forces of falsehood would provide further sustenance to the tidal wave of distrust and infidelity enabling it to sweep aside the whole archaic system.

Tribal system of administrative justice and FCR

Sang-e-Marjan Khan (Ex-Chief Secretary, Northern Areas)

Contrary to the misperceptions entertained by some ill-informed elements, tribal society is neither a herd of outlaws nor a lawless society. Rather it is a properly organized society with well-established customary laws. As these laws have been indigenously evolved by the society and accepted as such, they are more expressive of the general will of the people than the laws promulgated formally by the legislative authorities. Though not completely flawless, most of these laws are neither ex-facie unjust, nor contrary to reason. Barring a few (specially inheritance rights of women and some others) a majority of them are not repugnant to Islam because they are based on Pashtoon culture and traditions and the dominant features of Pashtoon culture and traditions are Islam-based. Moreover, the fundamental principles of restorative justice (a concept which is gaining growing popularity in the world) are also embedded in tribal customary laws, which further adds to their effectiveness in maintaining social harmony and cohesion.

In tribal areas whenever an offence occurs or a dispute crops up the Jirga of local elders, through intensive negotiations with the parties, prevails upon them to settle the same either in accordance with Sharia or in accordance with the tribal customary law and traditions or through arbitrators to whom the parties give Waak (unconditional authority) for decision in their discretion. The beauty of the system is that it ensures speedy and cheaper justice, which still remains a cherished but elusive dream not only in Pakistan but in most of the states in the world.

I do not mean that the tribal judicial system is the best in absolute terms but in comparative terms the administration of justice under the regular laws of the country has nothing enticing enough to attract the tribesmen to its fold, because the main body of the regular laws has been inherited from the British. It is a fact that, in consonance with the constitutional provisions, the process of Islamization of these laws through the Council of Islamic Ideology and Federal Sharia Court is in progress. But these laws are still mainly based on English jurisprudence and English common law, and command obedience through coercion but cannot command the reverence motivated by self-sustaining obedience. It is actually the respect for law, which is more important rather than the coercive force. It goes without saying that customary laws being based on native values enjoy the requisite respect more than the laws based on imported concepts and promulgated by authoritarian legislative authorities or by formally democratic legislatures that in technical terms may be representing the will

of the majority of the nation while in reality they may be enjoying the support of just 30 to 40% of the public. It is also noteworthy that with the passage of time excessive formalism, complexities and technicalities have crept into the country's legal system with the result that the processes of dispensation of justice have become too time consuming and expensive to be palatable to the commoners. Moreover they have become immensely complex to be intelligible to the common man without requisite technical assistance. That is why successive governments in the country have been constantly endeavouring to find ways and means for providing speedy and inexpensive administration of justice. This being the ground situation, on what reasonable grounds can we expect that the tribesmen would accept replacement of their less complex, quick and cheap system of justice with a system which is cumbersome, time-consuming, costly and unintelligible to the commoners. At this point of time the tribesmen generally would not brook any significant tampering with their long standing customary laws i.e. Pashto Riway. Of course, FCR through which the political authorities control the deviant tribesman and maintain peace and order in the areas specified by the government as protected areas is one of the most dreaded tools in the hands of the administration, Thus the domain of FCR is limited to roads, government installations/ infrastructures and functionaries and a very small fraction of the area declared by the Government as protected one. However, because of possibilities of its gross abuse by the political authorities the FCR has earned the notoriety of a black law. Besides other reasons this is mainly due to the absence of independent appellate judicial forums to checkmate the waywardness of the political authorities. That is why human rights conscious tribesmen have been vociferously urging amendments in it so as to bring it in conformity with the universally accepted norms of justice and fairplay. But this may not be misconstrued as a demand for change in the system of administration of justice in vogue in the main tribal territories, falling outside the very limited sphere of the FCR. The requisite amendments should be brought in consultation with the tribal legislators. Pending such amendments I would recommend as a first step the appointment of two judicial commissioners equivalent in status and powers to high court judges for hearing appeals against the decisions of the political authorities. They may also be empowered to enforce fundamental human rights in their respective areas of jurisdiction. They should know the law as well as tribal customs and traditions. Their terms and conditions of service must be such that guarantee them maximum independence.

Need for participatory and accountable system of governance

It goes without saying that for achieving the much trumpeted and lofty objectives of good governance and sustainable development effective and institutionalized participation of the community in the decision-making processes is a must, Unfortunately, even in the 21st' century FATA remains deprived of any credible and formalized participatory mechanism at local as well as the provincial level. The necessity of establishing local self-government institutions duly tailored to the ground realities and sensitivities of the area cannot be gainsaid. At the provincial level, too, some formal and genuine apparatus for effective involvement of the FATA people in decision-making processes is direly needed.

At the outset I may venture to point out that the Devolution Plan enshrined in the draft FATA Local Government Regulation 2002, though prepared by well-meaning and knowledgeable experts and theorists, will not be digestible to the concerned community at this point of the time, with the result that it may not be implementable and sustainable in a true sense. Accordingly I honestly think that it requires certain modifications to render it adjustable to the ground realities and local sensitivities so that it is owned and sustained by the people of the area. In all fairness the appropriate forum for

scrutinizing and revamping the said devolution plan can be a committee of the elected representatives of the FATA. Until that is possible, as an interim arrangement and as a modest beginning, the proposal to establish Agency Councils is a welcome move and a step in the right direction. Something is better than nothing. Though selection of councillors by the tribal Loya Jirga may not be a substitute for proper election on adult franchise basis, it is far better than a council totally nominated by the bureaucracy. The proposition may not be to the liking of my idealist and radical friends but to my mind it is a breakthrough. I am sure this modest and interim dispensation will prove a stepping stone for ushering in a graduated and manageable change in the system of governance, in place of what is labelled by impartial observers as an anachronism in the fast changing socio-political scenario.

As regards participatory arrangement at the provincial level no institutionalized mechanism exists for giving effective say to the tribesmen in decision-making despite the fact that almost all the important decisions in respect of FATA are made and implemented by the agent to the President, i.e. the Governor of NWFP. In this regard some quarters plead for giving the tribesmen representation in the NWFP provincial assembly. But this would in all fairness amount to conversion of FATA into PATA with its concomitant politico-economic ramifications. At the moment the tribal response by and large to such a proposition will be a big 'no' as they have been jealously guarding the special federal status of their area. Under the circumstances it will be in the fitness of things if provision for a separate FATA Council is made. The Governor of the NWFP should be its chairman. It should consist of all the MNAs and Senators from FATA and two elected members from each agency, preferably the Nazim and Naib Nazim of the Agency/FR Council. It should be invested with powers to make laws, rules and regulations for the good governance of FATA. It should be empowered to levy taxes and given effective say in budget making. It may be assigned an adequate role in the adoption of five-year development activities/ programmes in FATA. Exercise of the powers of the President of Pakistan, referred to in article 247 of the Constitution, should be subject to prior recommendations made by 3/4th majority of this council. The minimum number of sessions to be convened in each calendar year may be prescribed under the relevant law.

Socio- economic development

Because of its porous border with Afghanistan, FATA happens to be one of the frontline regions of a frontline state. Pakistan assumed this role with the active support of the USA in the jihad against the Soviet occupation of Afghanistan during the eighties and is playing it now on behalf of the USA-led coalition against international terrorism. As a result FATA suffered a lot in socio-economic terms in the past and is bound to be adversely affected by the on-going happenings in Afghanistan in connection with the so called global war against terrorism. Moreover, it is also the most backward area of Pakistan. Therefore, its socio-economic development is as much essential for stability of the region as reconstruction of Afghanistan is considered to be,

The Government may allocate maximum possible funds for carrying out well-planned developmental activities in this area. At the same time, nations that are committed to the reconstruction of Afghanistan should be approached to include this area too in their reconstruction plans. For that matter, the provinces of NWFP and Balochistan as a whole deserve a respectable share in the said reconstruction. With a view to ensuring realistic planning the existing statistical data about the tribal area must be rectified and updated. An appropriate share for FATA should be earmarked in the NFC awards.

Moreover, in order to boost economic activities and augment self-employment opportunities for the residents of the territory the area should be declared a free trade zone. In the end I would once again emphasize that any package which ignores the ground realities, local sensitivities and aspirations will in the long run prove a self defeating exercise.

Composition of Councils

Depending on the size of the population of an agency/FR the membership of the Agency Council should not be more than 40 and not less than 20. Within the above broad contours, on the issue of number of the councillors views of the Political Agent of the unit concerned should be given due weight. Each Agency/FR has well-established distributive system in accordance with which the Political Agent may give representation to the various tribes.

Mode of nomination or selection of Councillors

Keeping in view the fact that as per Government assessment elections on adult franchise basis are not feasible at this point of time we are left with only two options.

- a) Nominations by the Government.
- b) Selection by the Loya Jirgas of the tribes concerned.

Councils totally nominated by the government will not command the requisite credibility and legitimacy in the eyes of common tribesmen. Such a venture will be nothing more than an exercise in futility. It will also draw well grounded flak from the national as well as international print and electronic media. Thus the second option, that is selection through Loya Jirgas of the tribes looks to be the only viable proposition under the prevalent circumstances. Since in the Pashtoon society the Loya Jirga is an internationally recognized device for decision-making, selection of the Agency Council through this process will carry much more credibility and legitimacy. However, to defang the opposition of various vested interests and accommodate some technocrats the government may nominate 20 to 25% of the members. The tenure of the council may be three years.

Powers and functions of Councils

The functions and powers of an Agency/FR council should be to:

- b) Approve by-laws and rules of business for streamlining the functioning of the Agency/FR council and its various committee;
- c) Approve taxes (of local nature), fees, user charges and service charge etc., and the council may explore ways and means to enhance agency's own receipts.
- d) Approve long-term and short-term development plans;
- e) Approve annual budget of the Agency Council;
- f) Elect a committee of the Agency Council for monitoring the performance of various government departments working in the agency.
- g) Review the work of the monitoring committee, prepare quarterly reports on the performance of the Government departments, and oblige the Political Agent to ensure implementation of

the reports/recommendations of the committees in letter and spirit, unless the same are patently mala fide;

- h) Elect an Ehtesab Committee to enforce a code of ethics for regulating the conduct of the members of the Agency/FR Councils;
- i) Elect any committee for performance of any kind of function, which the Council deems necessary for good governance; and
- j) Act as a consultative forum for the Political Agent on law and order problems and other important day to day administrative matters,

Procedures for working of the Agency/FR Councils

- a) The agency council must meet once every month.
- b) Decisions should be taken through resolutions passed by a simple majority of the members present and voting.
- c) Political Agent should preside over meetings as convener. However the Council should elect a panel of three or more presiding officers in order of precedence who shall preside over the meetings in the absence of the Political Agent.
- d) The quorum of the meeting should be 55% of total membership of the council.
- e) Agency Assistant Director Local Government should act as secretary of the council.
- f) For further detailed procedures the agency council may make its own by-laws for attainment of optimum efficiency.

Last but not the least, the agency councillor must have security of tenure. He/ she should be removable by the Governor only when a unanimous resolution to that effect is moved by the Ehtisab Committee and is passed by a majority of the members of the council and endorsed by the Political Agent.

Success prospects

Let me first clarify that I do not know exactly how far my recommendations have been accommodated in the new interim scheme of Agency Councils. Regarding the prospects of success of agency councils, it is too early to give any definite opinion about the success or otherwise of the venture. They may deliver goods provided they are helped to function as effective local self-government institutions. That would be possible only if there is honesty and sincerity of purpose on the part of the government. However, I am sure that this interim set-up is going to provide a sound basis for full-fledged popularly elected local councils in future. Even the raging controversies about the composition and mode of constitution of the proposed Councils are a good omen as these will lead to indigenous demands for further improvements in the system. This is also going to dilute the opposition of the vested interest to the much-needed socio-political change. It will generate considerable political consciousness amongst the common tribesmen. It will pave the way for properly calibrated and manageable change in the archaic and unresponsive system of governance hitherto in vogue in the area.

Impact of FCR on FATA economy

Jamal Khan

It is customary to define the economy of FATA in terms of smuggling, drug trafficking and other forms of undesirable activities. It is also argued that an unmanageable territory such as FATA requires a tough law like the FCR to establish the writ of the Federal Government. My thesis, on the contrary, is that over the decades FCR has contributed directly to the expansion of un-documented economy not only in FATA but also throughout Pakistan.

The economy of FATA shows some variations. In the south there is commerce and agriculture in Waziristan and Parachinar, there is mining in Mohmand Agency and trade in Khyber Agency. Yet the economy of different agencies may be similar as far as economic indicators are concerned. To avoid generalization I will focus on Khyber Agency and present a brief history of economic development in this agency. This will help illustrate the co-relation between public policy and economic development specifically in Khyber Agency and in FATA generally.

The Peshawar-Torkhum-Jalalabad road passes through the Khyber Agency. Even today 70% of all the trade between Pakistan and Afghanistan is along this route. This trade is worth billions of dollars per annum. But this was not always the case.

In 1947 the Khyber Agency was a very poor area. Most of the people were living at the subsistence level. The events in Afghanistan also affected the economy of FATA especially Khyber Agency.

During 1952 - 1962 Daud Khan served as the Prime Minister of Afghanistan. During this time the Pakhtoonistan issue came into prominence. The Pakistan establishment thought it was important to buy the loyalties of the tribesmen. The first Bara market or market for smuggled goods in Khyber Agency was established in Landi Kotal by the political administration. Shops were allotted to the so-called pro-Pakistani, pro-establishment tribesmen. Little attention was given to the nature of business activities in this market. Printing of fake currency and smuggling of electronic goods was tolerated by the political administration if these activities were carried out by pro-establishment traders.

In 1971 Landi Kotal market was gutted in a mysterious fire. A bigger market was built at Bara by the political administration. Again shops were allocated to pro-establishment and pro-Islamic traders.

This time opium traders and other drug traffickers were also accommodated to buy the loyalties of the tribal people against the government of Daud Khan.

On April 27, 1978 the leftists came to power in Afghanistan. Soon afterwards the Bara market was gutted in a mysterious fire. New markets were built in Peshawar. They were called Karkhano Markets. In these markets even pro-Pakistani Afghan traders were allowed to do business. A new class of Afghan traders dependent on Pakistan grew in these markets and it is the group that dominates the economy of Afghanistan even today.

The Political Agent exercises huge coercive powers under the FCR. The political, social and economic environment of FATA has stagnated because of the FCR. There is no transparency in conducting the financial affairs of FATA. There is no formal budget for this area. Neither is there any formal audit of government funds coming to this area.

Political Agents tax all the goods coming in and going out of their respective Agencies. They issue permits for all goods passing through the Agencies. It is not clear, even to many seasoned traders, whether taxes collected by Political Agents are sanctioned by government or whether they are meant for the pockets of individuals in the political administration.

FCR rules and its doctrine of collective punishment have also stopped the growth of financial services/ industry in FATA. There are banks in FATA, but no one can borrow money by mortgaging property. The reason is that land ownership is collective. No land settlement or land mapping has been done in FATA. As a result anyone who wants to borrow money goes to the informal markets.

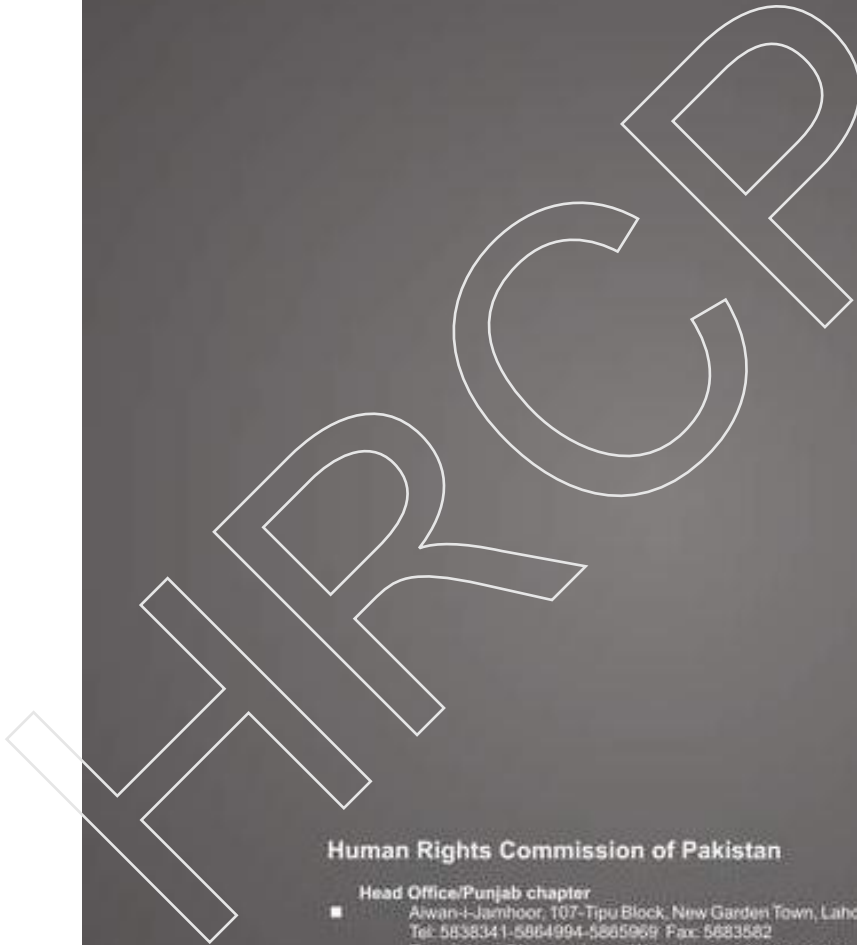
The current interest rate for borrowing in Pakistan is 5-8% while the interest rate in informal markets in FATA is 24-48%. We all know that this interest rate cannot be returned on any legal business.

Is economic mismanagement in FATA harmful only for the people of FATA? I don't think so. The magnitude of illegal activity in FATA is not only harmful for Pakistan and Afghanistan, it is harmful for the entire world. The opium trade, donations for fundamentalists from Middle East and the cross-border smugglers all use the Hawala and other informal financial markets in FATA. Today terrorists planning any new attacks around the world can find this area very favourable for obtaining foreign currency for their operations. Foreign currency for some previous terrorist operations may well have been obtained from this area.

It is true that FATA economy is mostly un-documented and is a mixture of businesses with varying elements of moral and ethical legality. Yet essentially it is the product of the environment created by FCR.

Is there a way out? Even during the talk of political reforms and development going on in FATA under the present government after 9/11, nobody has paid any attention to the fact that nothing systematic has been done to change the political economy in the tribal territories. Free medical camps, isolated buildings of a few more schools and employment in immensely hazardous tribal levies do not translate into any meaningful change in the overall economy of this part of the border region.

There is a great need for infrastructure development and gradual taxation in FATA. But 'no taxation without representation' is very true about FATA. Therefore, a comprehensive socio-economic and political reforms package is needed to mitigate the miseries of the people of FATA.



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