

Frontier Crimes Regulations (FCR), Status of Fundamental Human Rights in FATA and Pakistan's International Obligations

Noor Hamid Khan Mahsud* Muhammad Zubiar† Sumbal Hussan‡

Abstract

After taking control of the North West Frontier from Sikhs, British India introduced a special legal and administrative system, Frontier Crimes Regulation (FCR) in the early 1870s to administer the frontier. The suppression of resistance to British rule from the native people being its main objective, this special code was in violation of the very fundamental human rights. In this research paper, the researcher will give a brief overview of FCR and will highlight the harsh nature of this colonial-era regulation which violates basic rights of people of Federally Administered Tribal Areas (FATA). The paper will analyze the implications of FCR for the rights including right to self-determination, equality between man and women, freedom of expression, freedom of religion, right to peaceful assembly and protest, and equal treatment before law. International Human Rights Law (IHRL) will be applied as theoretical framework for this paper. This research paper is based on both primary and secondary sources. Interviews, participant observation, colonial era reports and documents include in primary sources. The method for this analysis will be first to state very briefly as to what standards the articles of the ICCPR demand of states parties to it, and then explain in detail the actual position of these rights in FATA.

Key Word: FATA, FCR, Human Rights, IHRL

Introduction

After annexing Punjab in 1849, British India also assumed the control of North West Frontier. Like the past, the series of revolts and rebellions from the locals continued even after the shift of political power to Britishers. Of 98 years (1849-1947), when NWFP remained under British control, there were very few years in which the colonial power did not face revolts, uprisings and rebellions. In order to cope with the situation, British adopted various policies like Close Border Policy

* (PhD Scholar at Department of Politics and IR at IIU, Islamabad, Pakistan.
Email: nhkmaseed22@gmail.com)

† Associate Professor & Chairman, Department of Law, AWKUM, Mardan, Pakistan.

‡ Junior Research Fellow at HRC, Islamabad, Pakistan.

(Baha, 1978) Forward Policy (FP) and the introduction of Frontier Crimes Regulation (FCR) in the early 1870s (Embree, 1977).

In the beginning, the government, like in other parts of Indian sub-continent, applied Indian Penal Code to the settled districts of NWFP. However, it soon realized that the conviction rate in criminal cases in NWF was very low as compared to other areas of India (Abdul Malik Khan, 2008). Considering Pashtunwali as legitimate law, the Pashtuns residing in NWF thought of the ordinary laws enforced in the rest of the sub-continent as unjust and unfair and thus resisted them (Groh, 2006). Thus, British revisited its policy and one of the special measures which it took was the introduction of Punjab Frontier Crimes Regulation of 1872 (PFCR) in 1872 to supplement IPC (Aziz, 2013). The aim of the new system, which was mixture of Pashtun customs and English legal codes, was to deal with Pashtuns' resistance towards the colonizers (Groh, 2006).

Under the new Regulation, officers were given vast powers to detain people without review and to award punish whole communities for the acts of individual(s). The officers would get lots of money for buying influential elders' loyalties (Mansoor Ali, 2011). The regulation concentrated executive and judicial powers in same hands (Wazir, 2007). Because of its harsh nature, the system came to be known as "black law" (Ali and Rehman, 2001). Even the Indian Office itself described the FCR as "an exceptional and somewhat primitive" law (Baha, 1978). According to Francois Tanguay-Renaud, who quoted Willard Berry, the FCR can neither be accepted as a mechanism of justice in traditional or western sense nor can it be thought of as substitute for any one (Renaud, 2002). Similarly, Jules Stewart writes that "Unjust arrests, derogatory trials, inhuman prison conditions and human abuses are some of the common attributes of retributive justice in the [tribal] areas" (Stewart, 2007).

While formulating FCR, British authorities twisted Pashtun social and cultural norms in such manner to make it appeal to Pashtun standards of justice. The real purpose of FCR was to increase conviction rate without enough and required evidence. Resultantly, what emerged was a mixture of law and local customs but satisfied neither.

The first Regulation was reviewed in 1873 and 1876 and minor changes were made in it (HRCF, 2005). With the passage of time, the colonial power realized that the special code was not comprehensive enough to serve their interests properly. The officers serving on the Frontier would also send suggestions to their seniors about required changes in the Regulation (Aziz, 2013). Therefore, the Regulation was revisited in 1887 and its scope was extended by adding new offences and acts into its scope (HRCF, 2005). As a result, a complete new document called as Punjab Frontier Crimes Regulation 1887 was introduced by the British India (Wazir, 2007). Though FCR was revised in 1901 but most of its contents remained unchanged and thus are in operation till present.

Theoretical framework (Pakistan's Obligations under International Covenant on Civil and Political Rights to Protect Fundamental Rights of FATA People)

The International Covenant on Civil and Political Rights (ICCPR) is one of the major international treaties on human rights. Pakistan ratified this treaty on June 23, 2010. While ratifying the Covenant, Pakistan recorded several reservations relating to the Articles 3, 6, 7, 12, 13, 18, 25 and 40 (Akstiniene, 2013). Owing to international pressure particularly from European countries, Pakistan withdrew its reservations on most of the articles Pakistan Decides to Withdraw Most of Reservations on ICCPR-UNCAT, The Nation, June 23, 2011. Therefore, Pakistan is bound to implement the Covenant in all parts of the country including FATA.

Under Article 2 (1) of the ICCPR, it is states' obligation to immediately implement the ICCPR at domestic level. The obligation's immediacy facilitates the definition and justifiability of states' duties under the Covenant. The significance of the immediate obligations under this Covenant becomes evident when one compares it with the progressive obligations as provided for under Article 2 (1) of the ICESCR. Under this article, a state is required to take steps according to its available resources to ensure enjoyment of rights mentioned in it while under the ICCPR a state is straight away bound to implement it without any mention of available resources or any other factors (Joseph & Castan, 2013).

Article 2 (2) of the ICCPR makes it obligatory for the states parties to enforce the rights enumerated in the Covenant if there does not already exist effective guarantees (Kaye, 2013). According to the General Comment 31, Article 2(2) of the ICCPR requires that if states, at the time of ratification of the Covenant, have not legally protected civil and political rights, they are bound to introduce domestic laws as well as practices on the ratification of the Covenant to harmonize them with Covenant's provisions. Under this article, a state cannot refer to certain social, economic, cultural or political conditions within its borders to justify its failure to fulfill its obligations under the Covenant (Joseph & Castan, 2013).

Similarly, under Article 2 (3) of the ICCPR, it is obligation of a state to provide remedy to its citizens if their rights guaranteed in the Covenant are violated. As far as remedy is concerned, state is free to choose whether to provide administrative, legislative or judicial remedy or a combination of these all or some of them. A state's failure to provide some sort of effective remedy will be tantamount to violation of the said Covenant (Kaye, 2013).

The General Comment 31 states that executive branch of government, which usually represents a state at international forums, cannot absolve itself of its obligations under the Covenant on the pretext that the violation of ICCPR principles was committed by another branch of the government. The same Comment further states that a state cannot invoke its national laws for mitigating its international duties under the ICCPR. Though objective and reasonable

differences among different parts of a federal state are allowed, but these variations must not be of such a nature to violate the ICCPR provisions in any part of the state.

According to Article 50 of the ICCPR, the provisions of the Covenant are applicable to all parts of states having federal system without any exceptions and limitations. Although the ICCPR, as part of the IHRL, imposes obligations on states parties, yet the enforcement of the Covenant is basically a domestic concern. The Covenant obliges states to implement it on national level. The international implementation process such as the supervisory mechanism of the HRC, are principally secondary options for the implementation of the Covenant. Under this mechanism, individuals who claim that their rights have been violated cannot utilize the international forum unless all the domestic remedies/forums available have been exhausted. The primary role given to the state for Covenant's implementation basically strikes compromise between state sovereignty and enforcement of the IHRL. It is also the acknowledgement of expediency, effectiveness and efficiency of national laws (Joseph & Castan, 2013). In the light of the above-mentioned articles and clauses of ICCPR, it is Pakistan's international obligation to ensure fundamental rights to people of FATA.

Methodology

Both primary as well as secondary sources have been used for data collection. Interviews, participant observation, informal conversations, official documents such as the FCR, the Constitution of Pakistan 1973, Actions in Aid of Civil Power, UN documents such as ICCPR, UDHR, IBHR etc. and official letters written by the British officers are the major components of primary data. In addition to primary sources, the researchers also benefited from secondary sources such as books and articles published in various national and international journals, human rights reports published by different human rights organizations, reports and news published in various national as well as international newspapers.

To get intensive, reliable and firsthand information about the topic, the researchers conducted extensive interviews and informal discussions. During formal interviews, the researchers followed semi-structured format. They prepared a set of questions which they asked the respondents with minor modifications in the wording of the questions to make them more understandable to them. Though, they had a ready list of questions, they also asked follow up questions whenever needed. During informal interviews, the researchers talked to almost everyone they thought to be of any relevance to their research. Different aspects of the FCR administration were discussed with them along with its implications for the people. Unlike their informal conversations, they picked their respondents for formal interviews selectively. They also tried to choose such people who in majority cases, were from FATA and were more relevant to the present research. A variety

of people from all the seven agencies were included in the interview list to broaden general understanding of the topic. The interviewed persons included retired servants with vast experience in FATA affairs, serving officials of political administration, maliks, media men, advocates, former inmates, academics and educationists, and human rights activists.

The researchers analyzed the data collected and then derived their conclusions. As the research is mainly based on such discussion, the researchers did not give reference for each statement included in this paper. In cases where they have quoted people by name, they have also provided the references for such statements. There were also people including administration officials who did not want to be named. Therefore, the researcher omitted their names in references and bibliography.

Implications of FCR for Fundamental Rights in FATA

The method of discussion for highlighting the implications of FCR for fundamental human rights will be such that the researcher will first very briefly mention relevant articles of ICCPR and the standards that these articles demand. Then there will be detailed discussion about the real situation in FATA to see whether people of FATA, governed by FCR, have these rights.

Right to Self-Rule

Article 1 of the ICCPR guarantees the right of self-determination to all people (UNGA, 1966). No doubt the purpose of this article at that time was to recognize the rights of colonized people to independence. After studying the process of codification of human rights during the first few decades after the proclamation of the UN Charter, one notices that the newly independent countries that had joined the UN were among those who vociferously raised voice against colonization and for peoples' (nations') right to self-determination across the world. The right to self-determination can no more be interpreted as the right of colonized people to their independence. Rather it has evolved into a right of people to participate in the decisions which will affect them and their future (Klabber, 2006). While interpreting this self-determination right principles, the International Court of Justice, in the Western Sahara case, defined it "as the need to pay regard to the freely expressed will of people" (Klabber, 2006). The Preamble of Pakistan's Constitution of 1973 states that "the state shall exercise its powers and authority through the chosen representatives of the people". Similarly, article 32 of the constitution states that state shall encourage local government institutions composed of elected representatives.

If looked at from this perspective, it becomes difficult to say that residents of FATA enjoy this right of self-determination. Parliament, which is the

manifestation of peoples' will, has been barred from exercising jurisdiction over FATA through article 247 of the constitution. Thus, FATA's parliamentarians, as part of the parliament, have no power to legislate for their people. For example, parliament has passed several laws to protect women against harassment, forced marriage, child marriage, killing in the name of honor, and attacks with acid but none of these laws applies to FATA.

The powers over FATA are vested in the federal government (President) by the Constitution. President enjoys powers to promulgate laws for the area without much consultation with representatives of the people. For example, President Asif Ali Zardari, (on the wishes of security establishment) introduced Actions in Aid of Civil Power Regulation in 2011 without any discussion over it in the parliament or with representatives of tribal people. Contrary to this regulation, the Pakistan Protection Bill, which was of the same nature, was strongly criticized by parliamentarians and the government was to bring many amendments into the bill before it could be passed by parliament. Thus, it is one person, the President, who has exclusive powers regarding FATA at the expense of tribal people's right to determine their fate. The president acts through the Governor Khyber Pakhtunkhwa as his agent. Thus, the President and by extension the Governor enjoys unlimited powers over FATA as they are accountable neither to parliament nor to the local people (Abdul Malik Khan, 2008).

On the local level too, there is no local bodies systems like the rest of the country. Similarly, people of FATA cannot change local government as unelected bureaucrats run the affairs of FATA (US State Dept., 2013). All the decisions are made by political administration which is headed by bureaucrat. As there is no system of representation at local level, the administration works with almost impunity. As there is no check on its authority, real needs of the people are rarely taken into consideration while making decisions about developmental projects. Even People's representatives elected to the parliament have no powers to check the injustices of political administration in Agencies and Frontier Regions.

Clause 6 of article 248 of Constitution of Pakistan states that if Prime Minister thinks that there is need for a referendum, he/she may refer the matter to parliament for approval in a joint sitting. It means that if parliament, peoples' representative body, decides then the issue will be settled directly by the people in referendum. FATA people do not enjoy this right as article 247(6) leaves this authority to the President and his hand-picked Jirga rather than the people (1973 Constitution).

Even the extension of Political Parties Act to FATA has brought no real change to the situation. Many people claim that this decision only divided the traditional tribal leadership into different political parties without these parties having authority to legislate for FATA in parliament. Thus, one can safely claim that people of FATA do not have right to self-determination.

The case for tribal self-government was acknowledged even by the British during the last years of the Raj. A policy paper released just three years prior to partition admitted failure of British government to bring order to the Frontier. It stated, “in short our diagnosis is that the patient is suffering from a lack of good government, just as a human being might suffer from a lack of vitamin B. If this diagnosis is correct, then the obvious treatment is to supply the good government that is lacking” (Stewart, 2007).

Equality of Man and Woman

Article 3 of the ICCPR states that civil and political rights shall be ensured to both man and woman (UNGA, 1966). Though Pakistan has submitted some reservations to the UN about this article, but the researcher has included it the fold of his research because equality between man and woman is an essential pre-requisite for smooth working of any social and political system.

Though the whole tribal population lack most of the civil and political rights mentioned in the Covenant, the FCR, as the official law of the tribal land, is more anti-women. It, on the one hand, discriminates against women, while on the other hand, does not provide enough safeguards to womenfolk like laws do in the rest of the country.

Sections 8 and 11 of FCR provide for referral of civil and criminal cases to a Jirga at local level. This council of elders is an exclusively male body with no representation for women. It means that even those cases which involve women and are brought to the notice of political administration will also be dealt with by male only with no input from women. It was because of this situation that Mariam Bibi, founder of Khwendo Kor (Pashto, Sisters’ House) and former member of National Commission on Status of Women, argues that when women can become part of Loya Jirga in Afghanistan then why not in FATA (HRCP, 2005).

According to section 30 of the FCR, in case a married woman enters out of her free will into sexual relationship with a man other than her husband and a complaint in this regard is filed by her husband or any other person, on her husband’s behalf, under whose care she was at the time of committing this offense, she shall be punished with five years’ imprisonment or with fine or with both (Gazette of Pakistan, 2011). As everyone knows that sexual intercourse is two way business but still the Regulation mentions punishment only for women. Though this section has never been implemented by the administration, yet the very existence of this clause in the Regulation shows the societal behaviors towards women. Even the section has been kept intact after 2011 amendments to the FCR. The state should have done one of the two things: it should have struck the section completely down or the section should have been modified in such a way to also prescribe equal punishment men for the offense.

Furthermore, the political administration in all agencies and FRs of FATA is staffed by male only. There is no concept of women's employment in the administration despite the fact that thousands of women from FATA have been serving the country in different capacities. They are even employed in bureaucracy but within FATA administration there is no role for them. This also shows the discriminatory treatment of women by this colonial-era law.

The settlement of disputes by giving away girls to the aggrieved family has been criminalized in Pakistan with the enactment of Protection of Women Law in 2006. The Supreme Court of Pakistan, in 2012, also ordered all the provinces to stop *Jirgas* from continuing this practice (ICG, 2015). In tribal society, the inhuman practice of giving girls to rivals for settling disputes is still going on. There are no safeguards in the FCR to stop this evil practice (HRCP, 2005).

The FCR is also insensitive towards other forms of violence against women and it does not provide any remedy. For example, parliament has passed several laws to protect women against harassment, rape, forced marriages, killing in the name of honor, domestic violence and attacks with acid but none of these laws applies to FATA. It means that the FCR, as the manifestation of state's writ, does not provide any protection and relief to women. In the rest of the country, some legal channels are also available to women and they can go to court for claiming their rights (Ali, 2013). In FATA, section 10 of the FCR excludes all lower courts from taking cognizance of an act the origin of which is in FATA while article 247 of the constitution bars higher judiciary from exercising jurisdiction over FATA. It means that women in FATA have no legal channel through which they can claim their rights.

Khwendo Kor, NGO working for female rights, in 2011 published accounts of FATA's displaced women regarding physical as well as sexual violence at the hands of both militants and security forces' personnel (ICG, 2015). In the absence of any legal forum, these women have no other option but to bear the agonies silently. Absence of any organization for women's rights and protection in FATA is also violation of CEDAW which Pakistan has ratified, and which requires formation of commission on women's rights.

As far as right to vote is concerned, in many areas women are not allowed to cast their votes. Still no legal forum is available to raise the issue and seek relief. The main objective of the FCR and the political administration, which implements it, revolves around only law and order situation in the area. They are not concerned with rule of law or people's rights. Therefore, it seems that the FCR and the state machinery which works under it not only tolerates discrimination against women, but they have no qualms about it.

During interviews, the researchers encountered both types of people. Almost all the *Maliks* that they interacted with were against any role for women in administration under the FCR. One Malik said that women are naturally unfit to sit in *Jirgas*. On the other hand, the educated people advocated all rights for

women. For example, Anwar Mehsud said, “Womenfolk should have equal rights with men in Jirga because they are as human beings as men are” (Anwar Mehsud , personal communication, April 2, 2015).

Right to Free Movement

Article 11 of the ICCPR states that every citizen shall be free to move within his/her country and to choose residence of his/her choice. However, under the FCR, administration has the authority to ask any individual, who, in the opinion of Political Agent, is dangerously fanatic or belongs to frontier tribe and has no ostensible subsistence means or is unable to give satisfactory account of himself or has blood-feud, to live at such place to which the Regulation does not apply. Similarly, the Regulation authorizes administration to debar, for the crimes of one or few individuals, all members of a tribe/sub-tribe etc. from having any access to the rest of the country. These sections provide vast powers to the administration to restrict the movement of tribal people. Under collective responsibility section, any individual from the tribal areas who enters into the settled areas may be arrested. The researcher remembers the officials of political administration of South Waziristan waiting at Wazirabad, (Tank district adjacent to South Waziristan) for entry of residents of South Waziristan so that they could be arrested under collective responsibility section. The practice continues till this day though some sections of the FCR are not in use in those areas where people have vacated their villages due to military operations.

Another practice which the political administration has invented is that of *Rahdari* (permission certificate for proceeding to your native village). Under this system, the residents of the same tribal agency or belonging to another agency who have been posted in any area of FATA may be required to produce permission certificate to enter the tribal agency. For example, people of South and North Waziristan cannot enter their own area without written permission from administration. At the time of obtaining permission, they should tell about the purpose of entry into agency and will also tell the stipulated time which they would spend there. The application of this rule is so rigid that even if a dead body is to be taken there for burial (tribal people prefer their dead to be buried in their ancestral graveyards) proper permission, including details of those travelling with the body, is to be obtained by the relatives of the deceased.

The situation is much serious for those who do not have domiciles of the agency where they want to go. Many people, during fieldwork, told the researcher that they were not allowed to travel in certain areas. Some even complained that government has issued a circular banning movement of human rights defenders and peace activists in FATA. Similarly, media men complained that administration creates problems for their movement in FATA.

State officials may present the militancy and the subsequent military operations as factors responsible for this situation. But being a resident of FATA, the researcher better knows the ground reality. There is clear difference between militants and common people. For example, army launched military operation in Mehsud (locally pronounced as Maseed) populated areas of South Waziristan in September 2009. Consequently, the whole Mehsud tribe migrated to other parts of the country. Since then, ISPR on many occasions said that the area is cleared-which means that militants have been expelled. But at the same time, we also hear, sometimes through media and mostly through people privy to the developments there, about attacks on military convoys near major towns such as Ladah, Makeen and Sararogha for example, Dawn newspaper (4th August, 2015) quotes ISPR on death of 5 militants and injury of three soldiers in Sarwekai area of South Waziristan. In the same news item, there was Mehsud Taliban spokesman's claim about killing 14 soldiers in two clashes in Ladah Tehsil (Five Militants Killed in S. Waziristan, daily Dawn, August 4, 2015).

Rights of Minorities

Article 18 of the ICCPR requires that every citizen should be free to adopt any religion and to worship it without any interference and coercion (UNGA, 1966). The FCR does not make any reference to minorities or religious freedom. The Regulation, however, has severe repercussions for minorities in FATA. Non-Muslims have been living in FATA for more than 100 years but they still do not enjoy many of the very fundamental and basic rights.

Hindus and Sikhs have been residents of the tribal areas for centuries while Christians migrated to FATA from Sialkot in 1914. Despite this long association with the soil, they were not allowed to get FATA domiciles or purchase land there. Due to denial of domiciles, they were also deprived of jobs. Under administrative set up of the FCR, confirmation by maliks that someone is a bona fide member of a tribe is must for getting domicile. As minorities were not affiliated with any tribe, so they could not get domiciles. The FCR, the law of the land, did not provide them any relief in this regard. It was only in April this year (2015) that government signed a summary to grant right of domicile to non-Muslims. It is a very positive step on the part of government. But the question is of its implementation. Even the changes introduced in the FCR in 2011 have not been implemented so far. Therefore, the future of this change in rules also seem dark to me.

Minorities have also faced threats and acts of violence from militant groups operating in the area. In settled areas, people can launch complaints with police and even seek police help. In FATA, FCR does not provide any such assistance. The FCR-guided administration does not have resources and power to protect minorities against these militant outfits. It was because of this dismal situation that large number of non-Muslims, who had been living there with peace,

left the area for other comparatively safe places. In short, the FCR or the administration which works under it, offers no protection of minorities' rights in FATA.

Right to Freedom of Expression

Article 19 (1) and (2) of the ICCPR seek that every individual shall have the right to hold, without any interference, opinion and to express his/her opinion. This right to express includes the freedom to seek, obtain and convey ideas and information in verbal, written or print form. In the FCR, there is no mention of whether this right is available or denied. In actual practice, however, the people do not have this right.

During researchers' interactions with journalists who work for national and international media channels found them complaining about lack of freedom of expression. For instance, Shahryar Mehsud said that since 2009, he has been writing on corruption in political administration and other injustices that tribal people face due to cruel policies of the administration. His practice hurts interests of certain segments of society who want his mouth shut. Thus, he was arrested in the last week of October 2014 for raising voice for his people. Before arresting him, officials of political administration offered him incentives for not highlighting malpractices taking place in the administration. At last, the administration put two options before him: to become part of the system and take benefits or will be put behind the bars (Shahryar, personal communication, April 2, 2015).

According to BBC (Pashtu service) correspondent, Rehman Ullah, there is no freedom of opinion in FATA. Most of the FATA journalists are stationed outside of FATA because they face threats from militants as well as administration. But still they cannot report freely as they have relatives and properties in FATA which are targeted if they report independently. There have been incidents of journalists' kidnapping for not reporting as per wishes of authorities. In 2007, Rehman Ullah's colleagues were stopped by Political Agent from moving into Mohmand Agency (Rehman, personal communication, March 18, 2015).

Major General Shaukat Sultan, who served as DG ISPR from 2003 to 2007, clearly warned journalists not to cover operation related incidents in Waziristan. Hayat Ullah Khan, a journalist from North Waziristan, was killed because he filed photos and a story showing that a U.S.-made missile had struck a home in Miran Shah, headquarter of North Waziristan (Orakzai, personal communication, March 20, 2015).

If a journalist presents events impartially and objectively then his close relatives are arrested on one pretext or another. They should face other difficulties from the political administration. That is the reason that we rarely have news highlighting negative aspects of the political administration in FATA. In September 2011, Political administration arrested seven journalists in Kurram

Agency because they had turned up to cover news conference held by students about firing on student rally by security forces (Journalists held in Parachinar, daily *Dawn*, September 13, 2011).

In November 2012, Political administration of Orakzai Agency imposed ban on entry of journalists into the agency. Security forces would check every vehicle entering the agency through Boya and Ziara checkpoints. A Subedar said that he had orders from the PA not to allow any journalist into the agency. He further said that the journalists would get NOC from PA office before entering Orakzai Agency (Journalists' Entry in Orakzai Banned, *The News*, November 9, 2012). In 2002, Zarmin Khan, President of Koki Khel Youth Organization and Ikram Ullah Jan Afridi, President of Zawan Pakhtun, were arrested by the political administration of Khyber Agency who demanded holding of local bodies' elections in FATA and the repeal of the FCR. Later, the administration arrested more people when they demonstrated to demand the release of organizations' presidents (Youths Demand Leaders' Release, daily *Dawn*, January 20, 2002).

Former bureaucrat, Khalid Aziz, while highlighting the high handedness of state towards tribal people, stated, "I am not aware of any post-operation inquiry into the use of force resulting in deaths in tribal areas. Even today, many are dying in operations. Our press that comments on each and every violent death in the country is quiet in this matter (K. Aziz). Ibrahim Shinwari, senior FATA based journalist, describes this state of affairs in these words, "FCR is an infamous law that political administration wielded, brandished and used to the maximum effect to stifle the voice of reason and prevent truth from reaching the outside world" (CAMP, 2007-8).

Right to Peaceful Assembly

Article 21 of the ICCPR ensures right to peaceful assembly. According to this article, individuals have the right to hold peaceful assemblies and gatherings and there should be no restriction on this right other than which is necessary for maintaining peace and public order (UNGA, 1966). In the FCR, there is no clear mention whether the tribal people enjoy this right or not. But according to Sang-I-Marjan, former Secretary to the Governor Khyber Pakhtunkhwa and current Chairman of FATA Tribunal, as the Regulation does not prohibit public gatherings, it means that people are free to hold peaceful gatherings (Personal communication, March 30, 2015).

In practice, tribal people can hold social and religious gatherings state does not interfere in their private affairs. However, they face problems when it comes to political gatherings or gatherings aimed at protesting against government/administration. According to the interview data, majority of the people and all the maliks that the researcher interviewed said that people need to get previous permission from administration for holding demonstrations. Actually,

administration does not have any problem if people hold pro-state/government/security forces demonstrations even if such demonstrations are held without permission. For instance, people in South Waziristan held protests against drone strikes. Similarly, there were protests in Mohmand Agency against Salala check post attack. Though administration allows people to hold demonstrations in favor of state institutions, it seems that it is not ready to allow outside forces to hold such gatherings even if they support government/state.

In 2012, political administration of South Waziristan stopped Imran Khan's rally from going to the agency to protest against drone attacks. As it was in conformity with Pakistan's declared stance on drone strikes, yet administration's refusal to grant permission was a bit difficult to understand. It was during researcher's fieldwork that many people expressed their apprehensions about this decision. The dominant view that emerged was that security establishment did not want Imran Khan's PTI to set a precedent for future. The state wants to keep tribal areas as a black hole with no access to outside forces especially political ones. This point makes sense when one considers the making of Nawab Safi, the then APA south Waziristan who allowed, with tacit approval of PA, the PTI team to proceed to south Waziristan to select venue for the gathering which the party intended to hold, as Officer on Special Duty (a punishment).

Even though Political Parties Act 2002 has been extended to FATA, people still face hurdles from administration while holding political gatherings. During his field work, many people complained to the researcher that they should get permission from administration for holding political rallies and that they may face punitive measures from administration if they held demonstration without permission. Some correspondents even narrated their own accounts of detention for protesting against the injustices of the administration. According to daily Dawn, political administration of Kurram Agency, in order to put pressure on inhabitants of Parachinar who were protesting over some issues, issued an order in 2014 stating that properties of these people in the settled areas should be sealed. Resultantly, administration sealed businesses of the community in different areas. Among others, administration also sealed Pak Hotel situated in Qissa Khwani Bazar Peshawar. The hotel is a multi-purpose one which also houses an imam bargah and community center for Shia sect. Whenever a Shia from Kurram Agency dies in Peshawar, his/her body is taken there for last rituals. Similarly, administration sealed Alamdar Hotel in Hangu (Black Law of FCR Continues to Evade Legislators' Attention, daily Dawn, and September 8, 2014). Even there were complaints that people were stopped from holding political gatherings during election campaign in 2013.

According to Ijaz Mohmand, (interviewed in March 2015) a few days ago, all political parties in Mohmand formed an alliance to highlight people's problems. Thus, a gathering was held at Ghalanai (Headquarter of Mohmand Agency) press club to demand redress of problems faced by the people. The very next day, APA

issued notice to the president of press club for explaining as to why he allowed the press club to be used for political and private gathering. The press club president was asked to provide explanation within three days otherwise action will be taken against him (Mohmand, personal communication, March 17, 2015).

When the researchers asked some officials of administration, they too said that demonstrations are not allowed. For example, one official said that people have no right to protest but they can send their representatives to meet officials of political administration. It seems to be this policy of zero tolerance towards protests and demonstrations that Khyber Agency administration, while reacting to the protest by tribal people over the killing of eighteen innocent people by security forces in Khyber Agency, kept the dead bodies in custody for one night. The relatives of the deceased could take the dead bodies only after they submitted 5-10 lac surety bond stating that they will not protest over the killings and will bury the dead immediately. While responding to question about right to protest in FATA, BBC correspondent Rifat Ullah Orakzai said that as there is no independent media coverage in FATA and political administration does not allow demonstrations, tribal people prefer to hold rallies in settled areas to highlight FATA-related issues (Rifat Ullah, 2015).

No Marriage without Free Consent of Both Parties

As per article 23 (3) and (4) of the ICCPR, there shall be no marriage without the free and full consent of both the parties, and states parties to the Covenant shall ensure that spouses have equal rights and duties (UNGA, 1966).

In the FCR, there is no reference to marriage or responsibilities and rights of spouses. In tribal society, which is patriarchal in nature, women have never been given equal status with male. However, the FCR is completely silent on this issue. Marriages without the free will of spouses and especially of girls enter into forces on daily basis but this Regulation does not provide any relief to them. Once entered into force, it is very difficult for women, as compared to male, to get out of wedlock. State/Regulation does not offer any assistance to the victims of forced marriages. In other parts of the country, legal channels are available to women to claim divorce or their other rights, but their tribal sisters do not have any such facility. None of the laws passed by Parliament to protect women and their rights apply to FATA. Having no proper channel to get divorce, many women commit suicide as they consider this as the only way which will take them out of the wedlock. Similarly, the FCR does not

guarantee any equality between spouses regarding their rights and responsibilities.

Child's Rights

Article 24 of the ICCPR relates to child's rights. The colonial-era Regulation, however, does not have any safeguard for children. The article states that every child shall be registered but this concept is alien to administration under the FCR. It does not provide for any registration of children as it is considered as fully private affair. Though the Covenant requires states to protect child's rights, the Regulation, on the contrary, violates children rights. Under collective responsibility section, even school going minors are not spared. For example, in March 2015, teachers of Landi Kotal schools protested and demanded the release of an 8th class student, Tahir Khan, who was arrested by political administration under collective responsibility section of the FCR. The teachers, who protested on 13th March, said that the detained student was to take his exam commencing from 14th March (Teachers Seek Release of Teenaged Student, daily Dawn, March 14, 2015). Similarly, another 10th grader was arrested by administration in Landi Kotal under the same section (Student's arrest protested, daily Dawn, April 5, 2015). These incidents are not exceptions rather general rule as such arrests take place almost on daily basis.

The article also states that every child has the right to get a nationality. As for as granting nationality or snatching it is concerned, the FCR is a strange and unique code. Though not permanently, at least it can deprive people of their nationality on temporary basis. In case action is taken against a tribe/sub-tribe/clan etc. under collective responsibility section of the FCR, the administration stops issuing domiciles, National Identity Cards, and verification of documents required for applying for/getting passport to the individuals belonging to the tribe/sub-tribe/clan etc. against which action is being taken. At first, the researcher was reluctant to accept existence of any such practice as it seemed completely illogical to him. But when he asked officials and maliks, they confirmed this practice. When parents in North Waziristan refused to vaccinate their children against polio (as militants had threatened parents not to give polio drops to children), administration stopped issuing domiciles and National Identity Cards to people for several months.

This unique method of punishing people by denying those domiciles, national identity cards or verification of other documents required for passport etc. create numerous problems for innocent people. As these documents are must for admissions to various colleges and universities, students face severe hardships when government deprive them of their nationality for crimes or so-called crimes committed by people with whom even do not they have any acquaintances let alone

blood ties or any other association. The nationality of tribal people thus hangs in balance which can be suspended by the government at any time.

Right to Participate in Public Affairs

Article 25 of the Covenant states that all people should have right to take part in public affairs either directly or through their chosen representatives. The article further states that all the individuals without any distinction shall have the right to vote or get elected. The FCR is silent in this regard. Though people of FATA do elect their representatives to the parliament, yet laws passed by parliament are not applicable to FATA unless President so desires. It means that people of FATA, whether directly or indirectly, have no role in the conduct of public affairs affecting their lives. This aspect has already been discussed in detail.

Equality of Citizens

Article 26 of the ICCPR requires equality of all before the law. According to this article, there should be equal treatment of all before the law without any discrimination (UNGA, 1966).

As far as equality of citizens is concerned, the FCR creates clearly deprives tribal people of their right to equal treatment before law. There are many rights with regard to which people of FATA are not treated like other people. Though some other constitutional provisions may also be blamed for this unequal treatment, yet the FCR is the major factor as it grants special status to FATA. In the following paragraphs, the researchers will discuss only few aspects to show that how are people of FATA not treated with equality.

The FCR clearly bars regular courts from exercising any jurisdiction over FATA. Unlike in other parts of the country, there is no regular court in FATA. People of FATA have little protection against arbitrary arrest and detention. If someone is unlawfully arrested in settled areas of the country, he can go to court against such arbitrary arrests. The court, acting impartially and independently, can ask the police about legality of his arrest. He can also avail services of lawyer of his choice to contest his arrest. In FATA, all the powers of executive and judiciary are vested in the same hands and thus people have no protection against unlawful detention. Similarly, they have no right to hire services of legal counsel.

FATA residents are also not equal to other Pakistanis as for as right to approach higher judiciary for claiming their basic rights is concerned. Under article 247 of Pakistan's Constitution, High Courts and Supreme Court has no jurisdiction over FATA. It means that people of FATA cannot claim fundamental rights when violated by administration of other private individuals. Many petitions, including those related to fundamental rights, filed by tribal people have been dismissed by

the higher judiciary on the basis that constitution does not allow it to entertain FATA related cases.

People of FATA also do not have equal rights with their countrymen with regard to right to self-rule. Representatives of people from across the country can legislate for them but FATA members of Parliament cannot make any laws for their people as parliamentary statutes do not apply to FATA. In same way, there is no local bodies system in FATA like other parts of Pakistan. All this show that people of FATA do not have equal rights like other people of the country.

Rights to expression and peaceful assembly are also not available to tribal people like to other Pakistanis. In the rest of Pakistan, people can express themselves and can protest against government. In FATA, people do not have this right. If they protest, administration takes action against them and makes arrests. A couple of years ago, relatives of eighteen people, who were killed by security forces in Khyber Agency, protested in front of Governor House. Like other parts of the country, they also took the dead bodies to protest. While taking this step, they had forgot that they were from FATA and people of FATA do not have the right to protest over dead bodies. Thus, police tortured the families of the deceased and also opened tear gas on them. Once they were back in Khyber Agency, the dead bodies were taken in custody by political administration for one night. The relatives of the deceased could take the dead bodies only after they submitted 5-10 lac surety bond stating that they will not protest over the killings and will bury the dead immediately. Situation like this clearly shows that people of FATA are not equal before law.

Unique Methods of Punishment

In the above paragraphs, the researcher tried to discuss the implications of the FCR for civil and political rights mentioned in the ICCPR. Now the researchers would like to also discuss two cruel aspects of the FCR. Though there is no mention in the Covenant of safeguards against these cruelties, their discussion here will not be out of context. May be the framers of the Covenant did not imagine such cruel and unjust practices from states and that is why they did not include safeguard in this regard.

The Closure of Businesses

One of these cruel aspects of the FCR is the authorization of administration by the Regulation to seal businesses of tribal people under collective responsibility. It means that if one or few individuals commit a crime, the administration will close down the businesses of the whole tribe/sub-tribe. This punitive measure is not only applied to businesses located in FATA proper but FATA residents' shops and other businesses in the major cities like Peshawar, Kohat, Bannu, D. I. Khan and Tank

are also closed. Sometimes, the issue of handing over the accused to administration or payment of fine is delayed for months which means that businesses of innocent people will remain closed for months. This creates severe financial problems for people who are dependent on these shops. For example, administration of South Waziristan in 1990s took action against the whole Shaman Khel tribe for the deeds of few individuals. Resultantly, all the businesses of this tribe located in district Tank were closed down and the issue persisted for several months and inflicting huge economic losses on common people. This is not the only case where business of innocent people was closed down. Incidents like this take place on daily basis.

In 2005, political administration of FR Kohat sealed Gul Haji Plaza, the main market for computer accessories in Peshawar with some 400 shops, several petrol pumps, Rehman Medicine Market, and other business belonging to Zarghonkhel sub-tribe of Dara Adamkhel Afridi under collective responsibility section of the FCR—the administration had alleged Zarghonkhel sub-tribe of facilitating the kidnappers of two retired workers of a Tobacco Company who were subsequently killed by their captors. While talking to daily Dawn after the sealing of Plaza and the subsequent protests by shopkeepers of the Plaza, SSP (Operations) Saeed Khan Wazir (himself a tribesman from Wazir tribe of South Waziristan) said that the market will be reopened soon, adding that the traders would pay their rents to District Police Officer (DPO) Kohat who was responsible for the administrative affairs of Dara Adam Khel (Computer Market in Peshawar Sealed, daily Dawn, June 21, 2005).

In 2014, the administration of Kurram Agency, in order to put pressure on some people who were protesting over some issues, ordered the closure of businesses of these people located in settled areas. Thus, Pak Hotel, which also hosted an Imambargah and a community center, situated in Qissa Khawani Bazar Peshawar was sealed (Black Law of FCR, Dawn). It remained closed for many months and it was only in March 2015 that Peshawar High Court ruled the sealing of the hotel as illegal and unconstitutional (Court Rules Sealing of Hotel under FCR Illegal, daily Dawn, March 13, 2015).

This indiscriminate closure of businesses of innocent people has severe repercussions. On the one hand, it denies people the right to earn livelihood for their families. On the other hand, it discourages people from making investments in FATA or adjacent districts. For instance, Azam Mehsud installed a soap factory in Tank. After it was twice closed under collective punishment section, he had no other option but to close the factory. Examples like this can be found in many areas. Punishment to innocent people also leads to further crimes. If someone is punished without any reason, he thinks of revenge which leads to further crimes. According to former Chief Justice Peshawar High Court, Mian Muhammad Ajmal, closing businesses in remote areas of the country under collective responsibility is unjust. Neither Islamic law nor any other law permits such punishment (Ajmal, personal communication, March 22, 2015).

Destruction of Houses and Other Properties

Under the FCR, British authorities could detain relatives of suspects, threaten family and relatives of suspects with destruction of their houses, followed by demolition. Even they could banish families of suspects from their native villages (Nichols, 2013). This practice continues till date as the FCR permits removal of villages on ‘military grounds’ and destruction of houses and other buildings. Though some changes were made in 2011 to the section related to destruction of houses, the practice of bulldozing complete buildings still continues.

Our policy makers may have ideological differences with Israel but still they share with it a method of Punishment—destroying houses and other buildings of people. Under the FCR, state can demolish house shared by the whole family. Thus, women and children are thrown in the open sky for the crimes of persons(s) on whom they have no control. It is not necessary that the state must have valid grounds to destroy people’s houses as it can do it anytime without anyone asking it about such cruel and inhuman acts. It does not have to face any court or other investigative body in this regard. Therefore, hundreds of houses, shops and other buildings have been destroyed across FATA without any accountability for the acts. During research interviews, people narrated stories of how their or other people’s houses were destroyed mercilessly.

In one case, political administration of Mohmand Agency demolished houses of people on the pretext that some unknown armed men opened firing from the area. When international media came (which was told that militants’ houses have been razed to the ground) to cover the demolition of buildings and meet local people, security forces started firing in the area and the international media was told that gun battle has started between security forces and militates. Thus, the media team was sent back on the pretext of security concerns and it could not meet people who would have definitely told the real story. Later, the media team was given a bird eye view of the demolished buildings ‘owned by unarmed and peaceful militants (Safi Advocate, personal communication, March 20, 2015). With their houses demolished, people are compelled to resort to makeshift arrangements using tents etc.

According to residents of FATA, situation with regard to demolition of houses and other buildings has become much serious after the launch of military operations in the area. Security forces demolish houses with explosive materials without any discrimination whether they have been/are being used by militants or not. Videos of army men destroying houses with bombardment can be easily seen on social media. The videos which are shown by TV channels while broadcasting news about destruction of militants’ hideouts should be taken with a pinch of salt. In majority cases, the videos show common people’s houses, rather than militants’ hideouts, destroyed by Pakistan army. For example, in the ongoing military operations in North Waziristan and Khyber Agency, complete markets have been

razed to grounds. These markets had nothing to do with militants and were owned by common people. No civilized law permits this inhuman practice but thanks to the FCR it is a common occurring.

We would conclude this discussion by quoting Engineer Abdul Qayoom Afridi who, in his article published in daily *The Frontier Post* on October 1, 2000, writes:

The FCR authorizes the PA to arrest these hills men, burn their houses and close their business who happen to be even distant relatives or belonging to the same sub-tribe of the criminal. This in itself, is a criminal act on the part of political Agent. It is against all the norms of justice, whether secular or divine. No law would allow the punishing of A for the crimes of B. It is just law of the jungle that is practiced by political authorities in the name of the FCR. One has heard of “Draconian Law” or Kangaroo courts” but this practice has no parallel in the blunders of legal history. This savage law is based not on the concept of reform but revenge (Wazir, 2007).

References

Interviews

Ajmal, Mian Muhammad., (former Chief Justice Peshawar High Court). (2015, March 15). Personal interview.

Mahsud, Shahryar, (journalist from South Waziristan) (2015, April 2). Personal interview.

Marjan, Sangi. (Chairman FATA Tribunal and former Secretary to the Governor Khyber Pakhtunkhwa) (2015, March 30). Personal interview.

Orakzai, Rifat Ullah., (BBC Urdu correspondent from Peshawar) (2015, March 20). Personal interview.

Books

- Ali, S. S & Rehman, J. (2001). *Indigenous People and Ethnic Minorities of Pakistan: Constitutional and Legal Perspective*. New York: Routledge.
- Baha, L. (1978). *NWFP Administration under British Rule 1901-1919*. Islamabad: National Commission on Historical and Cultural Research.
- Embree, A. T. (1977). *Pakistan's Western Borderlands: The Transformation of a Political Order*. Durham: Carolina Academic Press.
- Government of Pakistan. (2011). Frontier Crimes (Amendment) Regulation, 2011.
- Joseph, Sarah & Castan, M. (2013). *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. 3rd ed. Oxford: Oxford University Press.
- Ministry of Law and Parliamentary Affairs (1973). *The Constitution of the Islamic Republic of Pakistan (1973)*. Islamabad.
- Nichols, R. (Eds.) (2013). *The Frontier Crimes Regulations: A History in Documents*. Karachi: Oxford University Press.
- Stewart, J. (2007). *The Savage Border: The History of North-West Frontier*. United Kingdom: Sutton.

Journal articles and Reports

- Afridi, L. (2004). The Impact of FCR, paper presented at a seminar organized by Area Study Centre, University of Peshawar and Hannes Seidel Foundation, Germany, in Peshawar.
- Akstiniene, Aiste. (2013). Reservation to Human Rights Treaties: Problematic Aspects Related to Gender Issues. *Jurisprudencia Jurisprudence* 20 (2), 451-468.

- Aziz, K. (2010). The Reform of the Frontier Crimes Regulation (FCR) and Administration of the Tribal Areas of Pakistan. Retrieved on November 15, 2014 from <http://khalidaziz.com/2005/11/11/the-reform-of-the-frontier-crimes-regulation-fcr-and-administration-of-the-tribal-areas-of-pakistan-part-1/>
- Aziz, Z. N. (2013). Anxieties of Empire: Examining Frontier Government in 19th Century British India. *Student Pulse*, 5(9), 1-25.
- Centre for Governance and Public Accountability (2014). *FATA Governance Reforms: Issues and Way Forward* (Policy Brief II).
- Groh, T. L. (2006). Ungoverned Spaces: The Challenges of Governing Tribal Societies. (Unpublished Master Thesis). Naval Postgraduate School Monterey, California.
- Human Rights Commission of Pakistan (Peshawar Chapter). (2005). FCR: A Bad Law Nobody Can Defend. Retrieved June 5, 2015 from https://www.google.com.pk/url?sa=t&rct=j&q=&esrc=s&source=web&cad=rja&uact=8&ved=0CBoQFjAAahUKEwjy5ea51pXJAhUHkS wKHSn_C8A&url=http%3A%2F%2Fhrcp-web.org%2Fhrcpweb%2Fwp-content%2Fpdf%2Fff%2F23.pdf&usq=AFQjCNHQZZu0QSRND0yo4si2uoPdqrBNQ&sig2=iIznV16xfKFx5rM_3ywp1w&bvm=bv.107467506,d.bGg
- International Crisis Group (ICG). (2015). *Women, Violence and Conflicts in Pakistan, Asia Report* No. 265. accessed May 21, 2015, retrieved from: <http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/265-women-violence-and-conflict-in-pakistan.aspx>
- Kaye, David. (2013). State Execution of the International Covenant on Civil and Political Rights. *University of California Irvine Law Review* 3 (95), 95-125.
- Khan, A. A. (2013). Frontier Crimes Regulation: A contextual Analysis. *Journal of Law and Social Policy*, 2(1), 1-20.
- Khan, A. M. (2008). The Dispensation of Justice in the Federally Administered Tribal Areas (FATA) of Pakistan: Its Application and Analysis.

Central Asia, Journal No. 62, Area Study Centre, University of Peshawar, Peshawar, 107-119.

Klabber, Jan. (2006). The Right to be taken seriously: Self Determination in International Law. *Human Rights Quarterly* 28, (1), 186-206.

Tanguay-Renaud, F. (2002) Post-Colonial Pluralism, Human Rights and the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan. *Singapore Journal of Comparative and International Law*, 6, 541-596.

The United Nations General Assembly (UNGA). (1966). International Covenant on Civil and Political Rights. *Treaty Series*, 999, 171.

United States Department of State. (2013). *Country Reports on Human Rights Practices – Pakistan*, 27 February 2014, available at <http://www.state.gov/documents/organization/220614.pdf> (accessed July 15, 2015).

Wazir, M. M. K. (2007). FATA under FCR (Frontier Crimes Regulation): An Imperial Black Law. *Central Asia*, No. 61, Area Study Centre, University of Peshawar, Peshawar, 173-198.

Community Appraisal & Motivation Programme, (2007-08). Understanding FATA: Attitudes towards Governance, Religion and Society in Pakistan's Federally Administered Tribal Areas, Volume I & II.

Ali, Asma. (2013, December 19). Women's Rights and empowerment under FCR. Moong Qabail Radio Program, Peshawar.

Mohmand, Ijaz. (President FATA Layers Forum) (2015, March 17). Personal interview.

Ullah, Rahman. (BBC Pashtu correspondent) (2015, March 18). Personal interview.

Safi, Zahir Shah., (Advocate High Court) (2015, March 20). Personal interview.

Mehsud, Anwar. (FATA based journalist and activist) (2015, April 2). Personal interview.