

WAR ON TERROR AND LEGAL REFORMS IN FATA - AN ANALYSIS IN THE HISTORICAL AND NATIONAL SECURITY PERSPECTIVE

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Abstract

Pakistan joined the War on Terror (WOT) in the wake of American demands but became the subject of terrorism and ultimately turned into a battlefield to fight the WOT. President Musharraf joined American WOT to protect national interests and save Pakistan's strategic depth vis-à-vis India. Despite launch of military operations against the terrorists and success of Zarb-e-Azb operation, Pakistan is not protected from terrorist attacks, which are overwhelmingly controlled and funded from Afghan soil. This scenario caused colossal human, material, economic and political losses to Pakistan, especially Federally Administered Tribal Areas (FATA). National and internal security of Pakistan was jeopardized with deteriorating law and order situation in the country. Insecurity and lawlessness became order of the day. Peace and justice became an illusion. Performance of the agencies of criminal justice system became subject of open public criticism. Life and liberty of the citizens, government functionaries and the organs of criminal justice system was compromised. The issues of human rights violations, arbitrary and prolonged arrests, on the one hand, and attacks on the law enforcement agencies, on the other hand, turned into the game of hide and seek. Human rights were pitched against national security interests. People of Pakistan lost their confidence on the criminal justice system, which could not meet the challenges of fight against terrorism. The WOT not only redefined military doctrines but also necessitated legal reforms in the country, including FATA.

This article explores effects of WOT on the national and internal security of Pakistan as well as law and order situation in the country. The article also examines legal and judicial reforms in FATA in the wake of WOT and scrutinizes the Frontier Crimes Regulation (FCR) 1901 in the historical and national security perspectives. The article further

examines vires of the Actions (in Aid of Civil Power) Regulation 2011 for FATA and suggests measures for constructive and perpetual legal reforms in FATA so as to achieve the targets set out in the National Action Plan 2014.

Key Words: War on Terror (WOT), Federally Administered Tribal Areas (FATA), Frontier Crimes Regulation (FCR) 1901, Judicial or Legal Reforms in FATA, Actions (in Aid of Civil Power) Regulation 2011 for FATA, Protection of Pakistan Act 2014, Pakistan Army Act 1952, Pakistan Army (Amendment) Act 2015 and 2017, 21st and 23rd Constitutional Amendment 2015 and 2017

Introduction

It is an undeniable fact that the WOT has affected the whole world. However, its effects on Afghanistan and Pakistan, more specifically in FATA, are enormous and long-lasting. The war initiated in Afghanistan is being fought equally in Afghanistan and Pakistan, initially with the full and subsequently with partial strategic and logistic support of Pakistan. Pakistan not only lost its strategic depth but also fetched enmity and proxy war from Afghanistan, Iran and India. The theatre of war was shifted first into the tribal areas and then to the settled areas of Pakistan. Terrorism, militancy, lawlessness, insecurity and challenge to the writ of the government nurtured as a routine culture (KPK public service coordinators, 2016). Pakistan had to confront the challenges to its national and internal security, experience resurgence of radicalization and militancy, observe economic and political debacles and face the issues of human rights violations, missing persons and Internally Displaced Persons (IDPs) or, as are also called, Temporarily Displaced Persons (TDPs) as well as bear the wrath of the difficulties faced by women and children. Criminal justice system of the country including FATA also faced multi-faceted challenges, which necessitated legislation after legislation to restore peace, reestablish writ of the government and maintain law and order.

Effects of WOT on National and Internal Security

The WOT contributed to the deterioration of internal security situation in Pakistan, whereby scores of innocent people are being killed in suicide/car bombings, specifically targeted against the law enforcing agencies including the army and police, rallies, mosques and other public places (Firdous, 2011). The situation became critical, after the launch of *Al-Mizan*, *Rah-e-Rast*, and *Rah-e-Nijat* operation against militants in Swat, Malakand, Buner, Chitral and other parts of South Waziristan Agency (Shah, 2014); where after the militants in retaliation launched terrorist activities and suicide attacks in Lahore, Peshawar and other cosmopolitan cities (Gabol, 2016). Red Mosque incident in July 2007 (Haaretz, 2007), assassination of Mrs Benazir Bhutto and Mr. Salman Taseer on 27 December 2007 and 4 January 2011 respectively (BBC, 2011), and attacks on GHQ and Mehran Naval Base Karachi on 10 October 2009 and 22 May 2011 (Haque et al. 2011), attack on Quaid-e-Azam International Airport Karachi on 4 June 2014 (Dawn, 2014), Nanga Parbat attack on foreign mountaineers on 22 June 2013 (Sherazi, Dawn, 2013), Army Public School carnage on 16 December 2014 (Haaretz, 2014), attack on Shikarpur Imambargah on 30 January 2015 (Dawn, 2015), Safoora Goth attack on bus of

Ismaili community on 13 May 2015 and Baddher Airbase Attack on 18 September 2015 respectively(Akbar & Haider, 2015) and target killings on sectarian, linguistic and ethnic basis also intensified militants' activities in Pakistan. The toll of terrorism related fatalities in the country during 2003-2016 had reached 61,497 which included 21,489 civilians, 6,663 security forces personnel and 33,345 terrorists (South Asia Terrorism Portal, 2016).The toll of terrorism related fatalities in FATA during the last ten years i.e. 2006-2016 had been calculated at 27,252 which included 4,451 civilians, 2,231 security forces personnel and 20,670 terrorists (CRSS, 2016, P.19). Today, most of the major cities of Pakistan are experiencing the repercussions of terrorist and suicide attacks, target killings, bomb blasts and the like anti-state activities, yet *Zarb-e-Azb* (Crisis group Asia Report No. 271, 2015) followed by operation *RaddulFasaad* is likely to yield the desired dividend.

Effects of WOT on Law and Order Situation in the Country

The law was delivering with leaps and bounds until the WOT ensued in the wake of 9/11 attack on the twin towers in New York. Khyber Pakhtunkhwa (KP) was the most affected by the American WOT. Since the people of KP and its adjoining tribal areas of FATA and PATA were considered as the sanctuaries and supporters or sympathizers of Taliban and their *Al-Qaeda* allies, they sought refuge in these areas; hence these areas and the people inhabited therein became the subject of American hunt and pursuits of militants. The questions of legality of American pursuits of the alleged accused or abettors of 9/11 attacks and rationale for her drone strikes in these areas aside, the American WOT challenged sovereignty and national security of Pakistan and contributed to the deterioration of law and order in the whole of country, as the alleged accused scattered in the settled areas of Pakistan, initially in search of safe heavens and subsequently for regrouping and re-organization. Their criminal acts were converted into militancy, terrorism, and anti-state activities in the settled areas against the innocent civilians, Armed Forces and LEAs with the momentum in the American drone strikes and implied and direct support of the Armed Forces and the government of Pakistan to the Americans. As a consequence thereto, when all efforts to restore peace and writ of the government failed, the Armed Forces were called in to conduct operations against the militants, miscreants and terrorists operating in any name or manifestation or garb of non-state actors funded by the friends and foes (amnesty. Org, 2012). Since these military campaigns were aimed at neutralizing activities of the said anti-state elements and incapacitating the said violent non-state actors, the government did not conceive to try them through the special or anti-terrorism courts, especially those apprehended and detained in the FATA and PATA during military operations. On the other hand, those tried before the anti-terrorism courts were either awarded lenient punishments or acquitted of the charges for want of sufficient incriminating and legally admissible evidence (Shah, 2011).

This state of affairs aggravated terrorism, compromised life and liberty as well as protection of property; while the law and the enforcers of law remained helpless. It also adversely affected the national security and sovereignty of Pakistan, as it was regarded a failed and insecure country for any international and multilateral social, cultural, economic and educational activity. Suicidal and bomb attacks on places of worship, public places, educational institutions, kidnapping and target killings of the philanthropists, businessmen,

intellectuals, moderates and even members of the Armed Forces, LEAs and opponents of the terrorists and miscreants became order of the day. In such circumstances, the efforts to bring the culprits to justice through the existing investigating and prosecuting agencies and the judicial officers did not succeed to give a clear message to the criminals to stop; otherwise they would be eliminated through the force of law. Simultaneously, voices were raised for alleged violations of human rights and enforced disappearances (icrc.org, 2016).

In order to address the issues, the government, besides amendments in the existing laws, for example ATA, promulgated *Shariah Nizam-i-Adl* Regulation 2009 for PATA, Actions (in Aid of Civil Power) Regulations 2011 for PATA and FATA, (President Asif Ali Zardari promulgated Regulation F. No. 11(5) P/L/2011 for PATA and Regulation F. No.11 (6) P/L/2011 for FATA) Investigation for Fair Trial Act 2013 (PLD 2015 Federal Statutes 1 and 3 respectively). It is a general perception that the said laws were promulgated to validate the detentions of persons who had been apprehended and interned without being tried since 2008 and condone any act or omission connected with their continued detention and delay in trial (PLD 2013 (Sup) Federal Statutes 45). The prosecution regime thus in fact has been linked with the 21st Amendment and Pakistan Army (Amendment) Act 2015. Through the said amendments of 2015, the government assigned a role to the Army to establish military courts to try any person accused of terrorism based on religion or sect. This was a temporary assignment commenced on 7 January 2015 and terminated on 6th day of January 2017. During this period, Army established 11 military courts in different parts of the country and disposed of all the 308 cases against 326 accused, assigned by the federal government. Out of the said accused, 274 were convicted out of whom 161 were awarded death sentence; 66 were sentenced to suffer imprisonment for life; 41 were awarded rigorous imprisonment for 20 years; 4 were awarded 14 years whereas 2 were awarded rigorous imprisonment for 10 years. Only one accused was acquitted by the trial court; while cases against 51 accused were dropped at the pre-trial stage for want of requisite nexus of religion or sect or incriminating evidence and other legal grounds. These accused also included at least two juveniles whose cases were referred back to the juvenile or anti-terrorism courts of competent jurisdiction (Syed & Asad, DAWN, 2017).

Despite being temporary, operation of the military courts was extended for another period of two years through the Pakistan Army (Amendment) Act 2017 and 23rd Constitutional Amendment promulgated on 30 March 2017, with retrospective effects from 7th of January 2017, so as to give continuity to the military courts until 6 January 2019 (Act XI and XII of 2017 published respectively in Gazette of Pakistan (Extraordinary) Notification No. F.9 (16) 2017-Legis and F.9 (17) 2017-Legis). This second phase of the operation of military courts is continuing and the accused committing terrorism while misusing the name of religion or sect are being tried by these courts after careful scrutiny and sanction of the federal government. However, provisions of the Protection of Pakistan Act 2014 as included in the 2015 Act were replaced in the 2017 Act with the corresponding provisions of Section 6 of the Anti-terrorism Act 1997, as the 2014 Act had lapsed on 8 July 2016.

This role of the Armed Forces would not only remain temporary but also subject to both criticism and appreciation. Though efforts and sacrifices of the armed Forces in the fight against terrorism are appreciable and commendable yet the pros and cons of the present role assigned to the Army for maintenance of peace and administration of criminal justice would be best calculated after the termination of the assignment and its ultimate effects on the law and order in the country.

Legal Status of FATA and the Applicable Legal Framework

FATA is part of Pakistan within the meaning of Article 1 of the 1973 Constitution of Pakistan. However, it has been kept out of the jurisdiction of the superior judiciary and the law applicable in rest of the country with the exception of certain penal and procedural laws which have been made applicable to FATA on the order or direction of the President of Pakistan (Article 247 of the Constitution which deals with administration of tribal areas). In this milieu, though host of penal laws including Pakistan Penal Code 1860, Official Secrets Act 1923, Anti-terrorism Act 1997, Actions (in Aid of Civil Power) Regulations 2011 for FATA, Protection of Pakistan Act 2014 (lapsed since 8 July 2016) and Pakistan Army (Amendment) Acts of 2015 and 2017 (Pakistan Army Amendment Act, 2015), with certain modifications or adaptations apply in FATA, yet basic applicable law in FATA is FCR 1901. It is thus important to dilate upon this piece of legislation in detail.

Frontier Crimes Regulation (FCR) 1901- Basic Legal Framework of FATA in the Historical Perspective

FCR 1901 (Ashraf, 1964) is not a penal law in itself. It is mainly a procedural law applicable in tribal areas as a substitute for CrPC. Ever since its promulgation, the FCR had been applied by the British for “suppression of crimes in certain frontier districts”, mainly Hazara, Mardan, Peshawar, Kohat, Dera Ghazi Khan and Bannu; and applied on *Pathans* and *Biluchis*. It had even been extended to the Mianwali district of Punjab. However, after the independence, it was initially extended to the whole of West Pakistan. In addition to the said districts, it was also extended to Quetta and Kalat divisions and districts of Lasbela, Nasirabad sub-division of Jacobabad, and Sargodha. However, in 1963, the extent and application of the FCR was limited to Pathans and Biluchis and such classes/persons in the specified districts as the Provincial Government may declare by notification; and enforce the whole of the FCR or any part thereof on such subjects (Ashraf, 1964).¹ However, subsequently, FCR was limited to Federally Administered Tribal Areas (FATA) only (Vide Frontier crimes (amendment) regulation, 2011).

¹See generally, Frontier Crimes (Validation of Acts, Orders and Proceedings) Act 1944; Frontier Crimes (Validation of Orders, Proceedings and Sentences) Act (IV of) 1947; Frontier Crimes Regulation (Amendment) Ordinance 1962; Frontier Crimes Regulation (West Pakistan Amendment) Ordinance 1962; Frontier Crimes Regulations (Second Amendment) Ordinance 1963; Criminal Law (Amendment) Act (VI of) 1963. For all these statutes, see Kazi Muhammad Ashraf, Punjab Laws (Volume I) (Lahore: Mahmood & Company, 1964). See also *Sheru Dharana v M.A. Bajwa*, Deputy Commissioner (PLD 1962 Lah 990) and *Masud Ahmad v The State* (PLD 1962 Lah 878) which validated extension of the Regulation to Sargodha, despite its confined application to Frontier Districts as explained in its preamble. For historical development of FCR, see Dr. S.M Hyder “Evolution of Frontier Crimes Regulation” (PLD 1967 Journal 41 - 47) and Paras 33, 46-47 of *Abdul Bari case* (PLD 2014 Peshawar 132), pp. 149-150, 154-155. For issues relating to the jurisdiction of

Contours of FCR 1901

The provisions of the Regulation have overriding and concurrent effect; hence may take effect, notwithstanding anything contained in any other enactment; and the powers given there under may be exercised in addition to the powers conferred under any other law (Frontier crimes (amendment) regulation, 1901). The Regulation provided a mechanism for resolution of civil and criminal disputes or cases through the “Councils of Elders” or *Jirga*, as is commonly known, nominated by the Deputy Commissioner/Political Agent (Vide Frontier crimes (amendment) regulation, 2011) He may refer any dispute (likely to cause blood-feud, culpable homicide/murder, mischief or breach of peace) for settlement or determination of guilt or innocence of any person(s) accused of any offence (as mentioned in the second schedule and include waging war against the government, sedition, mutiny, unlawful assembly, rioting, murder, kidnapping, dacoity, robbery, house breaking etc.) and decision of the said council/*jirga* regarding his trial by a civil or criminal court (Vide Frontier crimes (amendment) regulation, 2011, Section 8-11).

On receipt of the finding of the council/*jirga*, the Political Agent may remand the case back to the same council/*jirga*, refer the case/question to another council/*jirga*, convict the accused as per the finding of guilty by the council with three-fourth majority, or pass a decree or declare that further proceedings are not required if the dispute/case referred was civil in nature. If the case is of criminal nature, the Political Agent may convict the accused and award punishment or acquit or discharge him who shall not be retried on the same facts after the expiry of two years of such discharge or acquittal (Frontier crimes (amendment) regulation, 2011, Section 11). In case of punishment, the imprisonment may extend to fourteen years depending upon the nature of offence, even in case of murder for which the sentence described in the PPC is death or imprisonment for life or rigorous imprisonment which may extend to 25 years. However, if the offence is murder or dacoity with murder, immovable property of the accused shall also be liable to forfeiture to the government (Frontier crimes (amendment) regulation, 2011, Section 12) The Commissioner or Political Agent may convict and sentence any accused before commencement of the trial in the Court of Session or in case of an inferior court, at any time before an order of conviction or acquittal is made. And for doing so, at any time before commencement of trial or conviction, as the case may be, the public prosecutor may request the court for withdrawal of Prosecution, for reference to the Council of Elders (Frontier crimes (amendment) regulation, 2011, Section 14-15). However, the Political Agent shall not convict or sentence any accused or pass any decree unless he is satisfied that the accused or the parties had been explained the charge/afforded due opportunity of hearing and defence (Frontier crimes (amendment) regulation, 2011, Section 18-20).

superior courts in tribal areas, see also Masud Ahmed, “Constitutional Position of the Tribal Areas of West Pakistan”(PLD 1967 Journal 100-140), Sar Khan v The State (PLD 1967 SC 149-153) and Abdul Bari v Director Livestocks, Dairy Development, FATA Secretariat (PLD 2014 Peshawar 132-170).

The Regulation also authorized blockade or sanctions, fines or forfeiture of public emoluments and remission in revenues on frontier tribes, communities and their members who had been acting in a manner hostile or unfriendly to the government, had connived or abetted commission of offences or harboured offenders or failed to extend assistance for arrest of the alleged offenders and failed to prevent murders or other heinous crimes in their areas. The Regulation also authorized demolition of buildings used by robbers and other criminals, and arrest of criminals by any private person (Frontier crimes (amendment) regulation, 2011, Section 21-29). Similarly, the Political Agent may on the recommendation of the “Council of Elders/*Jirga*” or after conducting an inquiry or at the time of his conviction, require any person convicted or suspected to commit or abet murder or culpable homicide or disseminate sedition, to execute bond, with or without sureties, for maintaining good behavior or keeping peace in the area. The families or factions of the persons involved in the cases of likely blood-feud may also be required to furnish such bonds (Frontier crimes (amendment) regulation, 2011, Section 34-38 and 39).

Contours of FCR Revisited in 2011

It is worthwhile to highlight that massive amendments were introduced in the FCR vide Frontier Crimes (Amendment) Regulation 2011. Preamble of the FCR was substituted to provide “for maintenance of peace, law and order and good governance in FATA”. FATA were re-designated as “tribal areas adjoining the districts of Peshawar, Kohat, Bannu, DeraIsmael Khan, LakkiMarwat and Tank; and Bajur, Orakzai, Mohmand, Khyber, Kurram, North Waziristan and South Waziristan Agencies.”(FCR 1901 substituted vide Frontier Crimes (Amendment) Regulation 2011, Section 1) The amended FCR provided a mechanism of appeal before FATA Tribunal and Appellate Authority, created as a substitute for ‘High Court’ and ‘Sessions Court or Sessions Judge’ respectively. It provided right to appeal before the Commissioner and Additional Commissioner, if so authorized by Governor KP, against the decision of the Political Agent or the District Coordination Officer, within 30 days of his decision (FCR 1901 substituted vide Frontier Crimes (Amendment) Regulation, 2011, Section 47-48).The Commissioner or Additional Commissioner, being the Appellate Authority, may enhance the sentence, after having given notice to the convict, but are not obliged to set aside finding of the Council of Elders accepted by the Political Agent or District Coordination Officer, except in exceptional circumstances to advance the cause of justice ((FCR 1901 substituted vide Frontier Crimes (Amendment) Regulation 2011, Section 50). However, the Appellate Authority may not review its own decision (Section 54 of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011). The Regulation, however, vested in the FATA Tribunal the power to review any of its own order, decision, judgment, advice or sentence and those passed by the Appellate Authority, on the application of any aggrieved person (FCR 1901 substituted vide Frontier Crimes (Amendment) Regulation 2011, Section 54 and 55A). The FATA Tribunal is to consist of Chairman (who has been a grade 21 civil servant) and two members (one of whom to be qualified as judge of High Court and the other grade 20 civil servant having experience in FATA administration) (FCR 1901 substituted vide Frontier Crimes (Amendment) Regulation 2011, Section 55A). The amended Regulation maintained the custom/*Rewaj* of

collective responsibility. The whole village community shall continue to be responsible for any murder or death or attempt thereof and liable to pay fine, except if the village community justifies that they did not find the opportunity to prevent crime or they help bring the accused to justice (FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011, Sections 21 to 27 and 41-45).

Issue of jurisdiction of Superior Judiciary in FATA

The FCR not only ousted jurisdiction of any other court but also did not provide any appeal against any decree or sentence etc passed under the Regulation except a revision by the Commissioner who may call record of any proceedings and revise the sentence or decree etc., tender pardon to an accused or exercise powers of an appellate court and enhance the sentence (FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011, Sections 48, 50 and 60). Even jurisdiction of the superior judiciary in FATA, the areas where jurisdiction of FCR is extended, has been explicitly ousted vide Article 247(7) of the Constitution, which ordains that the Supreme Court and High Court shall not exercise jurisdiction in relation to tribal areas except if provided by the Parliament. Accordingly the superior judiciary has been exercising restraint to interfere in matters related to tribal areas. Reference may be made to the recent judgment of the Supreme Court in *Piayo Noor case (Additional Chief Secretary (FATA) v Piayo Noor*” (2014 SCMR 17), who was resident of Kala Khel, Bara, Khyber Agency. He was arrested on order of Assistant Political Agent Bara for his alleged involvement in kidnapping, abduction and car lifting. The Political Agent, in concurrence of the petitioner, referred his case to the Council of Elders for trial under Section 365, 400 and 401 of the PPC read with Section 40 of the FCR. The petitioner Piayo Noor challenged his arrest and trial before the Peshawar High Court, who dismissed his petition. He filed another petition in a different bench, without making reference to earlier dismissal of his petition, and got partial relief from the High Court who granted him bail on the ground that the record was silent about his involvement in the alleged offences. The Additional Chief Secretary (FATA) assailed the said order of the High Court in the Supreme Court who accepted his appeal and set aside order of the High Court, inter alia, on the grounds that not only the respondent Piayo Noor was resident of tribal areas but the offences were also allegedly committed by him in the tribal areas, from where he was arrested. Since the High Court was barred to examine and determine the main charge against the respondent, it also lacked jurisdiction to pass interim order to grant bail (*Additional Chief Secretary (FATA) v Piayo Noor*” (2014 SCMR 17) p. 19, 20 & 26). Earlier also the superior courts had been exercising restraint to interference in matters connected with the tribal areas on the basis of constitutional bar (*Ch Manzoor Elahi v Federation of Pakistan*” (PLD 1975 SC 66), “*QaumBangash v QaumTuri*” (1991 SCMR 2400), “*Shoukat Khan v Assistant Political Agent*” (PLD 2002 SC 526), “*Munawar Khan v Political Agent Khyber Agency Station*” [2012 MLD 503 (Peshawar); whereas the FCR has been generally regarded as violative of human rights on different grounds (Express Tribune , 2016). It has been described as “obnoxious to all recognized modern principles governing the dispensation of justice” and termed as “discriminatory, un-Islamic and illegal” (A.R. Cornelius in *Sumandar v State* (PLD 1954 SC 228) and Balochistan High Court, and quoted as such in *Abdul Bari case* Ibid, p. 155).

FCR and Legal Reforms Proposed by FATA Reforms Committee 2016

In view of the sufferings of the people of FATA in the back drop of WOT and deprivation of constitutional guarantees, more specifically right to fair trial, equality before law and equal protection of law under the superintendence of the superior judiciary, the government form a 5 members “Committee on FATA Reforms 2016” headed by Mr. Sartaj Aziz, to suggest reforms in FATA (Report of the Committee on FATA Reforms 2016 headed by Mr. Sartaj Aziz, Advisor to the Prime Minister on Foreign Affairs submitted on 8 August 2016). The committee submitted its report on 8 August 2016 and, amongst others, recommended rehabilitation and reconstruction as well as socio-economic development of FATA, besides local bodies election in 2017, measures for capacity building of Levies and Frontier Constabulary, and land settlement. The committee also recommended legal reforms and phased merger of FATA with the province of KP within a period of 5 years. These reforms are to be implemented by way of bringing necessary amendments in Article 247 of the Constitution. Since discussion in this treatise is restricted to the legal or judicial reforms, the same are articulated in the following paras:-

- a. FCR be repealed and *Tribal Area Rewaj Act* enacted for FATA, which shall be introduced and enforced in phases in such Agencies or part thereof where it is convenient to implement.
- b. *Jirga* system be retained for both civil and criminal cases; wherein Council of Elders will be appointed by a judge instead of Political or Assistant political Agent. The *jirga*/Council of Elders will "decide factual issue in accordance with *Rewaj* and pass a decree in accordance with its findings in a civil reference or pass an order in accordance with its findings and applicable law in a criminal reference."
- c. The system of collective/vicarious responsibility of the family or tribe as recognized in the FCR be omitted and individual made responsible for his own act(s).
- d. Jurisdiction of the Supreme Court and Peshawar High Court be extended to FATA.

Actions (in Aid of Civil Power) Regulations 2011

The discussion on legal reforms and legal framework in FATA will remain inconclusive unless the Actions (in Aid of Civil Power) Regulations 2011 is discussed. The Actions (in Aid of Civil Power) Regulation 2011 for FATA (PLD 2012 Federal Statutes 46) provided an interesting setup. The Regulation ordained that persons accused of different offences including challenging writ of the government or asserting to gain control on any territory of Pakistan, waging war against the state, committing terrorism or sabotage, threatening peace, safety and defence of Pakistan, violating fundamental rights or obstructing action in aid of civil power may be tried and punished with any term of imprisonment or death. Such accused may be tried either under the FCR or the CrPC or the ATA or any other applicable law (Sections 17-18 of Actions (in Aid of Civil Power) Regulations, 2011). This is a strange legal proposition that if a person is accused of any of the above offences or other offences under any of the 32 Laws enlisted in 3rd Schedule of

the Actions Regulations and placed in the Internment Centre, he may be punished with death even by the *Jirga*/Assistant Political Agent. While in the ordinary circumstances, the *Jirga*/Assistant Political Agent cannot award death sentence under the FCR to any person accused of committing murder or spying or other heinous offences which are punishable with death under the ordinary laws (Sections 17-18 of *Actions (in Aid of Civil Power) Regulations*, 2011). This was irrespective of the fact whether the offence was committed in FATA or PATA or the accused was resident of these territories. But the reverse argument is that despite the fact that *the Actions Regulations* provided that death penalty may be awarded for the above mentioned offences under the *Regulations* but practically no person tried under the FCR could be awarded death sentence due to inherent clog on the powers of the *Jirga*/Assistant Political Agent, who cannot award sentence except the maximum of 14 years imprisonment. In the given situation, the accused if tendered for trial under the ATA or CrPC may be awarded death but if tendered for trial under the FCR may be punished for 14 years imprisonment only. This legal complexity will crop up avenues of corruption and miscarriage of justice; and provide excessive role to police in determining fate of the accused before he is formally put to trial before a competent forum.

Analysis of the FCR

At least two distinct forums of trials have been provided under the criminal justice system of Pakistan. One is through the ordinary or special courts of criminal jurisdiction. The courts of ordinary criminal jurisdiction include all courts established under the CrPC such as the High Courts and the Courts of Magistrates and Sessions sections (CrPC 6-17, 28, 31-32). These courts may award varying sentences as provided in the PPC (PPC Section 53). However, the Sessions and the High Courts may award even death sentence (CrPC sections 31-32). The special courts include the ATCs and the courts established under host of special laws, for example, *POPA 2014 (now lapsed)*, *ATA 1997*, *the Official Secrets Act 1923*, *Criminal Law Amendment (Special Court) Act 1976*, *Explosive Substances Act 1908*, and designated as such. Courts martial convened under the military laws, being special laws, may also be described as special courts. These special and ordinary courts of criminal jurisdiction may award any sentence provided under the PPC or the special law, as the case may be, including the sentence of death to any person indicted and convicted by them (PPC Section 53, CrPC Sections 31-32, PAA Section 60, ATA Section 7, POPA Section 16 and Official Secrets Act Section 3). In contrast to the said ordinary and special criminal courts, the second distinctive forum of trial is provided under the FCR 1901, for the people of FATA or those who commit the offences while in FATA or escape to FATA. The FCR suggests that an accused found guilty by the *Jirga*/council of elders may be awarded imprisonment upto a maximum of 14 years. However, if the offence committed is murder or dacoity with murder, the Assistant Political Agent while awarding imprisonment may also award the sentence of forfeiture of immovable property and demolition of building used by the robbers (FCR Sections 12, 21-20). Although massive amendments were introduced in FCR in 2011 in the name of "maintenance of peace, law and order and good governance in FATA" (Frontier Crimes (Amendment) Regulation, 2011), yet the same were predominantly administrative in

nature.² The amendments substituted Deputy Commissioner with Political Agent or District Coordination Officer and District Magistrate with Assistant Political Agent. However, it protected *Rewaj* i.e. the local customs and the system of collective responsibility; and did not provide for the sentence of death in clear words. It strengthened FATA tribunal as another tier of appeal against the decision of the appellate authority (Commissioner or Additional Commissioner) to whom the appeal lied against the decision of the Commissioner and Additional Commissioner (Sections 4, 5 and 48, 55 A and 55 AA, as amended vide the 2011 Regulation). However, it did not extend appellate jurisdiction or judicial review powers of the superior judiciary to the people of FATA (Iqbal, 2012).

FCR does not recognize separation of executive and judiciary as the Political Agent performs both the functions. The mechanism of appeal before FATA Tribunal and Appellate Authority as a substitute for ‘High Court’ and ‘Sessions Court or Sessions Judge’ respectively is regarded as a parallel system of courts, outside the judicial review control of the judiciary (Abdul Bari case op. cit. pp. 153 and 165). The substituted Section 3 of the FCR instead of clarifying the law, created ambiguity. Section 3(1) and (2) provided that provisions of the Regulation shall have precedence and may be exercised in addition to the power conferred by any other law. This means that if the Political Agent or District Coordination Officer intends to award 14 years rigorous imprisonment for the offence of murder or waging war against the government, he may do so; rather than awarding him the sentence of death (Vide Frontier Crimes (Amendment) Regulation, 2011, Section 3 and 12). Even an offence punishable with life imprisonment is punishable only with 14 years rigorous imprisonment; (Vide Frontier Crimes (Amendment) Regulation 2011, Section 13(a)) whereas the entire FCR (even the amended) is silent as to the award of death sentence. Similarly, Section 3(3) of the FCR (Vide Frontier Crimes (Amendment) Regulation, 2011) provided that the laws mentioned in the second schedule shall apply to FATA; but the list of laws specified in Second Schedule does not include ATA 1997, which was existing at the time of promulgation of the Frontier Crimes (Amendment) Regulation 2011.

Analysis of Legal Reforms Proposed by FATA Reforms Committee 2016

² This is not the first time that FCR has been amended. After independence, it had been amended in 1962, 1963, 1995, 1997, 1998 and 2000 as well. For history of FCR, see Dr. S.M Hyder “Evolution of Frontier Crimes Regulation” (PLD 1967 Journal 41 - 47). For issues relating to the jurisdiction of superior courts in tribal areas, see also Masud Ahmed, “Constitutional Position of the Tribal Areas of West Pakistan” (PLD 1967 Journal 100-140), Sar Khan v The State (PLD 1967 SC 149-153) and Abdul Bari v Director Livestocks, Dairy Development, FATA Secretariat (PLD 2014 Peshawar 132-170). The larger bench of the Peshawar High Court in Abdul Bari case, followed the dictum of the apex court in Piayo Noor and MstRohaifa cases (reported as 2014 SCMR 17 and PLD 2014 SC 174 respectively) while deciding the questions of jurisdiction with reference to illegal detention and trial of federal government employees in FATA, their deputation and promotion etc. For an interesting discussion on FATA issues and reforms as well as implication of Peshawar High Court Judgment in Abdul Bari case and case law on FATA, see Kamran Arif and Muhammad Raza, “Peshawar High Court Judgment and Analysis”, August 2014, available at <http://fatareforms.org/2014/08/12/peshawar-high-court-fata-judgment-analysis/>, accessed July 17, 2016.

There have been efforts to bring about social, political and legal reforms in FATA but such reforms did not bear fruit as these were generally politically motivated rather than pre-dominantly criminal justice and welfare specific. It appears as if the Committee for FATA Reforms 2016 was cognizant of the advice of the Peshawar High Court to the Parliament to amend Article 247(7) so as to protect and enforce rights of the people of FATA by invoking jurisdiction of the superior courts and equality before law provision contained in Article 25 of the Constitution (Abdul Bari case op. cit., p. 157). Similarly, it is believed that unanimous resolutions of the KP Provincial Assembly and Senate of Pakistan (Khyber Pakhtunkhwa FATA Resolution, May 7, 2012) to amend Article 247(7) of Constitution to extend jurisdiction of the superior courts to FATA to protect their rights and suggestions of Justice Yahya Afridi for cessation of whole or part of Tribal Areas with KP or creation of a separate province, extension of jurisdiction of the High Court to FATA in terms of Article 192(2) of the Constitution and amendment in Section 55A of the FCR to the effect that FATA Tribunal is headed by a judge of the High Court were also given serious consideration by the committee (Abdul Bari case op. cit., pp. 169-170).

Seen in the overall context, the legal reforms in the proposed FATA Reforms 2016, whereby jurisdiction of the superior judiciary has been extended to FATA and system of collective or vicarious liability dispensed with, are moves in the positive direction but replacing the FCR with the *Tribal Areas Rewaj Act*, which would recognize and protect the *jirga* system in the name of “jury trials”, is self-contradictory and more confusing. Justification of the committee to retain *jirga* system on the plea that its repeal would be resisted and simultaneously suggesting that no *Rewaj* shall be made part of any legal process if it is inconsistent with fundamental rights and substantive laws in KP is a move, which is deficient of clarity and leads to ambiguity. Such legislations are temporary in nature and are generally unenforceable as they lack the spirit and willing acceptance of the people. A critical appreciation of the proposed legal reforms suggests that these are not exhaustive and productive in nature. Repeal of the FCR and introducing *Tribal Areas Rewaj Act* while retaining the *jirga* system in the name of “jury system” in FATA, which is to annex to KP within a period of 5 years, would put the people of FATA in a state of “jumping out of the fire into the frying pan.”

Practical manifestation and ground performance of the government do not conform the theory of proposed FATA Reforms. The idea to create the post of Chief Executive or Chief Operating Officer, who is likely to be a serving or retired General, to ensure development of FATA before its merger with KP (Ghouri, 2017) and desire to extend jurisdiction of “Islamabad High Court”, instead of Peshawar High Court, besides the Supreme Court, to FATA by introducing “the Extension of Jurisdiction to FATA Bill 2017” in the National Assembly (Tanoli, 2017) do not suggest intent to execute the proposed Reforms. The federal government has also extended application of Federal Investigation Agency Act 1974, with *mutatis mutandis* amendments in five villages of Khyber Agency of FATA, and invested role of police in Federal Levies Force and judicial powers in political agents (Express Tribune, 2017). Delay of the government to decide whether the regular police force of KP would take over to maintain peace and order in

FATA or Levies and Khasadars in the tribal areas would be transformed into regular force and assisted by regular police or Frontier Constabulary (FC) is also meaningful (Firdous, 2017). Similarly, introducing *Rewaj* Bill 2017, which has been termed as a new type of FCR or a monster which would keep the tribal people enslave like the FCR and eat up every things, in the National Assembly Standing Committee for States and Frontier Regions (SAFRAN) (Haq, 2017) and failing to evolve a consensus on the Bill reflect lack of the government's resolve at least to the proposed merger of FATA with KP. Intent of the government may be well calculated from the remarks of the SAFRAN Minister Lieutenant General Abdul Qadir Baloch (Retired) who reiterated that "merger right now will have detrimental effect" (The News, 2017).

It may be appreciated that *jirga* proceedings are not conducted on the basis of codified legal procedures such as *Qanun-e-Shahadat 1984* and Code of Criminal or Civil Procedure. Main objective of the *Jirga* or jury trial is to find out truth and reach just conclusion; and in this endeavor, *jirga* does not follow the codified rules of evidence or procedure as applicable in rest of the country. In the given scenario, right to appeal and superintendence of the superior judiciary may not deliver the desired dividend. It may also be highlighted that *Rewaj* or customs in FATA are also not codified but stored in the memories/practices of the elders/tribes which vary from Agency to Agency. The value of Islamic traditions which are deep rooted in the Tribal Areas/FATA and have attained the force of law and assimilated in law of the land also cannot be disregarded so easily. Although the system of collective liability has been dispensed with and individual responsibility recognized in the 2016 Reforms yet in certain civil and criminal matters including issues relating to inheritance, payment of *diyat* (blood money) and fines etc, the principle of individual or personal liability cannot be strictly followed. The issue of continuous violations of rights of children and women including deprivation of inheritance and forced marriages in the name of *Rewaj* or customs is also a matter of serious concern for the human rights activities (Shah, 2016).

It would be unfair that the people of FATA, having become part of KP after its annexation, are governed with laws and procedures different from rest of the provinces or the country. This will offend the mandatory provisions of equality before law and equal protection of law as enshrined in Articles 4 and 25 of the Constitution. It would also be discriminating that people of one Agency of FATA or part of KP are governed under one law and the others are subjected to another set of laws. In the given circumstances, if the people of FATA are to be merged with KP, as has also been expressed by most of the political parties, (Raza, 2017) it is the right time to take rational and prudent decisions to introduce comprehensive legal and judicial reforms in FATA. The government must keep in view the experience of introducing *Shariah Nizam-i-Adl Regulation 2009* for PATA and the Police Order 2002 (Chaudhry, 2017), which have not been implemented in true letter and spirit throughout PATA and the country. Same is the case with ATA 1997, which is still being reconsidered for repeal by enacting new law. It may be cautioned that mere legislation on the basis of majority is not a wise approach. Legislation for the good of the

people, who form a nation, with their capacity and will to adopt and enforce the legislation, is the hall mark of positive legislation and good governance. It may be noted that laws may only be implemented if the organs of justice i.e. judges, police and correction/prison officers are well-trained and well-conversant with the laws and equipped with the capacity to understand and implement the law, with consistency spread over a period of time. Therefore, instead of repealing and replacing the FCR, it is suggested that either it is suitably amended to bring at par with other laws of the country or preferably the laws applicable in rest of the country/province of KP are *mutatis mutandis* applied to FATA, for lasting effects.

It is also on record that despite the fact that the committee has recommended merger of FATA with KP but some political and military leaders have serious reservation on the reforms and are of the view that instead of merger, the option of FATA as separate and independent province would be more productive (Dawn,2017).Therefore, before the proposed reforms are implemented, the government should reconsider giving FATA status of a separate and independent province, for sustainable economic development and political stability. This has been suggested in the backdrop of the existing distinct divisions of KP into settled areas and PATA vis-à-vis difficulties faced by the bureaucracy/administrative hierarchy of the province, repeated voices raised by the ruling and opposition parties in the past for smaller and more provinces for better administrative and political control, effective financial management and judicial independence.

Conclusion

The upshot of above discussion is that the success of *Zarb-e-Azb* and operation *RaddulFasaad* as well as resolve of the political and military leadership in the name of National Action Plan 2014 to eliminate terrorism, rehabilitate the infrastructure, reintegrate the society and bring lasting peace would require legal and judicial reforms on permanent basis in concurrence with the people of the FATA, who intend to break the shackles of the *sardari* system and tribal bonds for their legitimate human rights, which had been adversely affected in the WOT and national security perspective. Merger of FATA with KP may be an option but not the ultimate option; hence may be revisited in terms of Gilgit-Baltistan experience.

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"Frontier Crimes Regulations 1901", Section 3.

"Khyber Pakhtunkhwa FATA Resolution" was passed on May 7, 2012. Notification for Resolution No. 711 dated 8 May 2012 to this effect is available at <http://fatareforms.org/2014/08/12/fata-resolution-of-the-khyber-pakhtunkhwa-assembly>; whereas Senate resolution was passed on 28 October 2014. See "Senate for extending superior court jurisdiction to FATA", at <http://fatareforms.org/2014/10/28/senate-for-extending-superior-court-jurisdiction-to-fata/>, accessed on July 17, 2016.

"Mainstreaming FATA, 'Special' FIA Act extended to five Khyber villages", *The Express Tribune Lahore*, September 24, 2017, p.2.

"Sectarian outrage in Shikarpur; 53 dead", *DAWN* Islamabad, January 31, 2015, pp. 1& 5. A recent report published by Centre for Research and Security Studies (CRSS) reveals encouraging results. See "40 pc reduction in violence-related casualties in second quarter of 2016", *DAWN* Islamabad, July 28 2016, p. 19

Abdul Bari case op. cit. pp. 153 and 165.

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An exclusive discussion with Brigadier Muhammad Amin, former Judge Advocate General, Pakistan Army and G .M. Chaudhry, Advocate Supreme Court of Pakistan, at Islamabad on January 27, 2016.

An exclusive interview with Lieutenant Colonel Rahiem, former officer of the Judge Advocate General's Department, advocate High Court Rawalpindi and human rights activist dated January 29, 2016.

Appeal to Commissioner or Additional Commissioner against the decision of Deputy Commissioner (Political Agent or District Coordination Officer) and District Magistrate (Assistant Political Agent) already existed in the FCR. Establishment of FATA tribunal consisting of a chairman and two members to be appointed by the Governor KP was effectuated through this amendment. See Sections 4, 5 and 48, 55 A and 55 AA, as amended vide the 2011 Regulation. Simultaneously, the amendment protected women and children from arbitrary arrests to effectuate arrests of absconders, introduced provisions of bails and inspection of prisons, *Qaumi Jirga* for settlement of disputes between tribes, persons/accused of tribal areas etc.

As amended vide Frontier Crimes (Amendment) Regulation, 2011.

Asif Chaudhry, "Concern over move to review Police Order 2002", *DAWN* Islamabad, January 10, 2017, p.2.

Being applicable for only two years, the Pakistan Army (Amendment) Act 2015 lapsed on 6 January 2017.

CrPC Sections 31-32 read with PPC Section 53.

CrPC Sections 6-17, 28, 31-32.

During the meeting, all 10 members of the Parliamentary Committee rejected the *Rewaj* Bill; while MNA Salahuddin of PML-N suggested that the President can resolve the issue by declaring that "the whole or any part of a tribal area would cease to be tribal area". See also "FATA and the FCR", *THE NEWS LAHORE*, July 27, 2017, p. 7. The *Rewaj* Bill still recognizes role of political agent, FATA tribunal and the concept of collective responsibility.

FCR Sections 12, 21-20.

For allegations of human rights violations, see for example: *The Hands of Cruelty* published in 2012 and is available at <https://www.amnesty.org/en/latest/news/2012/12/report-exposes-hands-cruelty-pakistan-s-tribal-areas/>. The report was followed by a letter no TG ASA 33/2012. 016 dated 20 December 2012 of Mr John Dalhuisen, Senior Director Research of Amnesty International, to Prime Minister Raja Pervaz Ashraf, highlighting human rights violations in tribal areas and criticizing Actions (in Aid of Civil Power) Regulations 2011, for giving legal protection and impunity to Armed Forces for violation of human rights during the military operations in tribal areas. "Torture in 2014" is available at http://www.amnesty.org/en/library/asset/ACT40/004/2014/en/96fde57f-61d9-487b-90de7da21c6c505d/act_400042014en.pdf, accessed on March 31, 2016. See also Human Rights Commission of Pakistan, "*State of Human Rights in 2015*", (Lahore: HRCP, 2016). Also see Niaz A. Shah, *Islamic Law and The Law of Armed Conflict: The Armed Conflict in Pakistan*, (London: Routledge, Taylor & Francis Group, 2011) pp. 134, 148-150. For meanings of IHL, see The Hague and Geneva Conventions of 1949, which are generally regarded as the main sources of modern IHL, which govern armed conflicts. This has been observed by the International Court of Justice in *legality of the threat or use of 'nuclear*

weapons', Advisory Opinion, 1999 I.C.J. 226, 256 (Jul 8) declaring that "two branches of the law applicable in armed conflict have become so closely inter-related that they are considered to have formed one complex system", available at <https://www.icrc.org/fre/assets/files/other/droit-coutumier-article-bugnion.pdf> , accessed on March 31, 2016.

For details of assassinations of Mrs Benazir Bhutto, see "Assassination", available at <http://www.benazirbhutto.com/assassination.html> and "Punjab governor Salman Taseer assassinated in Islamabad" available at <http://www.bbc.com/news/world-south-asia-12111831/>. See also video of news regarding murder of Salman Taseer with caption "Salman Taseer was repeatedly shot at close range with a sub-machine gun" at the same web site, both accessed on April 23, 2016. Also see "Law and Order Situation in Pakistan" <http://laosop.blogspot.com/2010/12/benazir-bhutto-profile.html> , accessed on November 24, 2015.

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Ibid, pp. 19-20, 26.

Iftikhar Firdous, "Regular police force will also be deployed in FATA", *The Express Tribune Lahore*, September 15, 2017, p. 9. Though the notification "the Raise and Train Project - FATA Police" suggests that 11789 Levies and 18600 Khasadar would be trained and assisted by 20000 regular police or security personnel, who may also be the FC personnel. But if FATA is to merge with KP, what shall be the ultimate role of FC is yet to be determined.

In the attack on GHQ, Sepoy Aqeel alias Dr Usman, a military deserter, was leading the attack, who was arrested and later executed during December 2014, as a result of sentence awarded by court martial. See also Captain Mujahid, "One year earlier- the day TTP attacked GHQ - 10 October 2009", *Pakistan Defence Forum*, www.defence.pk/threads/one-year-earlier-the-day-ttp-attacked-ghq-10-october-2009.76025/. The attack on Naval base claimed lives of 15 Navy and Rangers personnel. See Jahanzeb Haque, "Navy says PNS base under control after attack" www.tribune.com.pk/story/173888/blast-on-dalmia-road/, accessed on April 26, 2016.

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KiranFirdous, "Militancy in Pakistan", Institute of Strategic Studies, Islamabad, 2014, www.issi.org.pk/wp-content/uploads/2014/06/1299825170_97247252.pdf ; Umbreen

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See for example suicide attack in Gulshan-e-Iqbal Park Lahore. Imran Gabol, "At least 72 killed in suicide blast as terror revisits Lahore." available at <http://www.dawn.com/news/1248259>. See also video of brutality of Taliban killing law enforcement agency personnel, available at www.tune.pk with caption "TAILBAN Video Smuggled out of Pakistan Shows Taliban killing 15 Pak FC Soldiers Video Dailymoti", <https://tune.pk/video/2857231/tailban-video-smuggled-out-of-pakistan-shows-taliban-killing-15-pak-fc-soldiers-video-dailymoti>., accessed on April 23, 2016.

PLD 2012 Federal Statutes 46.

PLD 2013 (Sup) Federal Statutes 45.

PLD 2014 [Sup (Part II)] Federal Statutes 177.

PLD 2015 Federal Statutes 1 and 3 respectively. See also District Bar Association Rawalpindi v Federation of Pakistan (PLD 2015 SC 401), which had validated both the amendments.

PPC Section 53, CrPC Sections 31-32, PAA Section 60, ATA Section 7, POPA Section 16 and Official Secrets Act Section 3.

PPC Section 53.

President Asif Ali Zardari promulgated Regulation F. No. 11(5) P/L/2011 for PATA and Regulation F. No.11 (6) P/L/2011 for FATA, published in Gazette of Pakistan Extraordinary, 566 and 567 of 27 June 2011 at pages 241-257 and 259-275. The FATA Regulation is also available at PLD 2012 Federal Statutes 46.

Qadeer Tanoli "Bill in NA to bring FATA under SC, IHC writ", *The Express Tribune Lahore*, September 16, 2017, p. 3.

Regarding impact of WOT on different facets of life in Pakistan, see for example "Impact of terrorism on Pakistan", Khyber Pakhtunkhwa Public Service Coordinators, available at http://www.kppsc.com.pk/pages/?Impact_of_terrorism_on_Pakistan, accessed on April 24, 2016.

Report of the Committee on FATA Reforms 2016 headed by Mr Sartaj Aziz, Advisor to the Prime Minister on Foreign Affairs submitted on 8 August 2016, is also a step in the positive direction. The Committee suggested phased reforms stretched over a period of 5 years and annexation of FATA with the Province of KP as well as extension of the superior court's jurisdiction to FATA.

Riazul Haq "Govt fears hasty merger may affect development, fails to evolve consensus on *Riwaj* Bill 2017", *The Express Tribune Lahore*, September 12, 2017, p.2. Since it is planned to provide Rs. 100 billion to FATA for its development and mainstreaming during the next 10 years, the government fears that the funds would be transferred and utilized in main cities of KP, such as Peshawar and Mardan. Therefore, development first and merger later is apparently the government's policy.

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Section 3 read with Section 12 as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Section 50 of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Section 54 and 55AA of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Section 54 of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Section 55A of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Sections 17-18 of Actions (in Aid of Civil Power) Regulations 2011.

Sections 21 to 27 and 41-45of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Sections 47 and 48 of the FCR as amended vide Frontier Crimes (Amendment) Regulation, 2011.

Sections 48-50 and 60. For tender of pardon, see CrPC Section 338; and for powers of Criminal Appellate Courts, see CrPC Sections 195, 423, 426-428.

See Act XI and XII of 2017 published respectively in Gazette of Pakistan (Extraordinary) Notification No. F.9 (16) 2017-Legis and F.9 (17) 2017-Legis, both dated 3 April 2017.

See Article 247 of the Constitution which deals with administration of tribal areas.

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See preamble to the Frontier Crimes (Amendment) Regulation 2011(PLD 2012 Federal Statues 1-25), promulgated by President Asif Ali Zardari on the 25th day of August 2011, under Article 247(7) of the Constitution, and published in the Gazette of Pakistan Extraordinary (Part I) dated 27 August 2011, pp.391-414.

See Section 1 of the FCR 1901 substituted vide Frontier Crimes (Amendment) Regulation 2011 to describe FATA, as may be notified by Governor KP under Article 145 of the Constitution and as specified in the Third Schedule.

Since 2002, military had been on the hunt of terrorists in FATA consisting of seven districts i.e. South and North Waziristan, Bajur, Aurakzai, Mohmand, Khyber and Kurram agencies. Military had launched offensives in different districts of the said agencies, which include operations in the name of *Al-Mizan*, *Zalzala*, *Black Thunderstorm*, *Sher Dil*, *Rah-e-Rast*, *Rah-e-Haq*, *Rah-e-Nijat*, *Koh-e-Safaid* and finally *Zarb-e-Azb* launched on 15th day of June 2014 in North Waziristan agency. Operation *Al-Mizan* was initiated in FATA during 2002 and continued till 2006, with the deployment of 70000-80000 troops, out of whom 1200-1500 soldiers laid their lives. *Rah-e-Rast* was launched in Swat during May-July 2009; whereas operation *Rah-e-Nijat* was launched in North and South Waziristan Agencies when approximately 30000 troops were deployed there during June 2009. The mandate was to recapture the areas under the control and influence of the TTP, who was not only providing safe heavens and hide outs to the terrorists but also providing them logistics to continue terrorist activities throughout the country. During these military operations, huge military losses and substantial displacement of the people had been reported. This was not a full fledged operation as General Kiyani remained reluctant for a clean sweep operation, due to its fallout. However, this operation was followed by the operation *zarb-e-Azb* for a decisive military campaign, which is still ongoing. See Umbreen Javaid op.cit. and Mariam Shah, "Comparing Pakistan's Past Military Operations with Operation *Zarb-e-Azb*.", *Pakistan Defence Forum*, available at <http://defence.pk/threads/comparing-pakistan%E2%80%99s-past-military-operations-with-operation-zarb-e-azb-pkhh-tv.328771/>, accessed on April 23, 2016. CNN, "Pakistan: 200 Taliban die in 24 hours.", available at <http://edition.cnn.com/2009/WORLD/asiapcf/05/10/pakistan.swat.taliban.fighting/index.html?eref=onion>. See also "ISPR Update." available at https://www.ispr.gov.pk/front/main.asp?o=t_press_release&id=1046, accessed on April 23, 2016.

Such leaders include Molana Fazal-ur-Rehman and Mehmood Khan Achakzai. Lieutenant General Muhammad Tariq Khan (Retired) had also expressed his reservation on merger at a seminar "Peace and Development in KP and FATA" held at NDU Islamabad and reported as "Fata's merger with KP strongly advocated", *DAWN* Islamabad, September 25, 2016, p.7. See also "JUI threatens agitation if decisions 'imposed' on Fata people", *DAWN* Islamabad, January 9, 2017, p.7 and Ikram Junaidi, "Fata reforms package has flaws: experts", *DAWN* Islamabad, October 23, 2016, p.16.

Suicide attack in Gulshan-e-Iqbal Park Lahore. Imran Gabol, "At least 72 killed in suicide blast as terror revisits Lahore." available at <http://www.dawn.com/news/1248259>, accessed on April 23, 2016.

Syed Irfan Raza, "Parliamentary parties give consent to FATA merger plan", *DAWN* Islamabad, January 7, 2017, p.3.

The words Deputy Commissioner and District Magistrate were subsequently substituted with "Political Agent, District Coordination Officer or Assist Political Agent, as the case may be, vide the Frontier Crimes (Amendment) Regulation 2011(PLD 2012 Federal Statutes 1-25), promulgated by President Asif Ali Zardari on the 25th day of August 2011,

under Article 247(7) of the Constitution. The 2011 amendment provided immunity from arrest to women, children (under 16 years) and old persons (above 65 years); established a two-members “FATA Tribunal” with a retired judge of the High Court as Chairman and District & Sessions Judge or equivalent an ex cadre officer as Appellate Authority; appointed “Joint Council of Elders” by Governor KP to settle disputes between different agencies or Frontier Regions; and maintenance of accounts regarding disposal of money/ fines collected or received under the FCR and their audit through the Auditor General Pakistan.

There have been debates to do away with FCR and provide the people of FATA a judicial system which is at par with the judicial system for rest of the people of Pakistan. See for example:- “Timely reforms in FATA”, *The Express TRIBUNE* Islamabad June 23, 2016, which suggests reforms in the form of “the *Nizam-e-Adl Act 2016*” in place of FCR and I. A. Rehman, “Shadow of the FCR”, *DAWN* Islamabad, June 30, 2016, p. 8, which speaks of vices of the “collective punishment” and decision making on the basis of rivaj (customs) under the FCR, violation of due process and human rights.

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This attack was brutal in its own nature as it was specifically targeted against innocent children of APS School, which claimed at least 151 lives. Zahir Shah Sherazi, ‘Militant siege of Peshawar school ends, 141killed’ <http://www.dawn.com/news/1151203>, accessed on 24 November 2015.

This data is updated as on 31 December 2016 and available at *South Asia Terrorism Portal* through <http://www.satp.org/satporgtp/countries/Pakistan/database/casualties.htm>, accessed on January 3, 2017.

This data is updated as on 31 December 2016 and available at *South Asia Terrorism Portal* through <http://www.satp.org/satporgtp/countries/Pakistan/Waziristan/index.htm>, accessed on January 3, 2017.

This is not the first time that FCR has been amended. After independence, it had been amended in 1962, 1963, 1995, 1997, 1998 and 2000 as well. For history of FCR, see Dr. S.M Hyder “Evolution of Frontier Crimes Regulation” (PLD 1967 Journal 41 - 47). For issues relating to the jurisdiction of superior courts in tribal areas, see also Masud Ahmed, “Constitutional Position of the Tribal Areas of West Pakistan” (PLD 1967 Journal 100-140), Sar Khan v The State (PLD 1967 SC 149-153) and Abdul Bari v Director Livestocks, Dairy Development, FATA Secretariat (PLD 2014 Peshawar 132-170). The larger bench of the Peshawar High Court in Abdul Bari case, followed the dictum of the apex court in Piayo Noor and MstRohaifa cases (reported as 2014 SCMR 17 and PLD 2014 SC 174 respectively) while deciding the questions of jurisdiction with reference to illegal detention and trial of federal government employees in FATA, their deputation and promotion etc. For an interesting discussion on FATA issues and reforms as well as implication of Peshawar High Court Judgment in Abdul Bari case and case law on FATA, see Kamran Arif and Muhammad Raza, “Peshawar High Court Judgment and Analysis”,

August 2014, available at <http://fatareforms.org/2014/08/12/peshawar-high-court-fata-judgment-analysis/>, accessed July 17, 2016.

Vide Frontier Crimes (Amendment) Regulation, 2011 (PLD 2012 Federal Statutes 1-24), Section 1 of the FCR 1901 was substituted to describe FATA, as may be notified by Governor KP under Article 145 of the Constitution and as specified in the Third Schedule, which now include, tribal areas adjoining the districts of Peshawar, Kohat, Bannu, Dera Ismail Khan, LakkiMarwat and Tank; and Bajur, Orakzai, Mohmand, Khyber, Kurram, North Waziristan and South Waziristan Agencies.

Zahir Shah Sherazi, "Gunmen kill nine foreign tourists and their guide in Nanga Parbat" <http://www.dawn.com/news/1020142>, accessed on 24 November 2015.