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THE CONSTITUTIONAL RIGHTS OF THE PEOPLE OF THE FEDERALLY ADMINISTERED TRIBAL AREA (FATA): THEIR ENFORCEMENT & CONSTITUTIONAL REMEDIES AND THE ROLE OF FCR

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Abstract

This work sheds lights on some important aspects of one of the chapters of the Pakistani Constitution comprising of “fundamental rights”. It then, gives chronological and analytical study of the administration of justice in Pakistan in respect of the people of the Federally Administered Tribal Areas (FATA) of Pakistan. The work deals also with a significant issue that is the jurisdiction of the Apex Courts over the FATA. In this regard the work puts its entire stress upon constitutional rights of the people of the FATA alone. In doing so, the writer necessitates to give a brief introduction to the FATA, its distinctions in the legal system of Pakistan as contrast to the other parts of the country and whether those contrasts may or may not be justified in the present era of democracy and Human rights? The work, however, for providing solid propositions on such an important issue, discusses, though briefly, the international instruments on Human rights as well as the case-law from the superior courts of Pakistan in order to elaborate the true sense of the legal points and explore their reasonable and jurisprudential meanings, so that it may help in determining the status of the FATA rather equate it with that of the all other parts of the country as the underlying principles of the Constitutional law and Human rights law require so.

Key word: Constitutional rights, remedies, FATA, jurisdiction, Supreme Court of Pakistan

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Introduction

The Federally Administered Tribal Areas (hereinafter referred to as FATA) has been the part of Pakistan since its creation up till today. It has however, a different legal system as compare to the other parts of Pakistan. This is, perhaps, because of the difference in costumes and traditions followed by the people over there, and that of values conceived in these areas. This difference, on one hand, has definitely affected the legal system of that area, and on the other hand, it has utmost impacts on the social, economic and political lives of the people thereof as well.

Today a necessity is felt to work more on it from another aspect i-e the place of FATA and people thereof in the Constitution of 1973 with regard to Fundamental Rights. There are many works have so far been done regarding the FATA related issues, for instance its history, the chronology of the Pashtuns of this belt, analytical and critical study of its law i-e Frontier Crimes Regulation (FCR), comparative study of its traditions and laws with Islamic law, the rights of the people thereof in the international human rights paradigm etc.

In present work I will undertake to dig out the answers to few more questions, which have not been concentrated upon in so far studies as this humble scribe knows. Those are for example: what are the rights that have been conferred upon all the citizens of Pakistan and their remedies are assured if they violated everywhere in the Pakistan including FATA? What are the reasons for not giving the remedies for those constitutional rights if they violated in FATA? The Pakistani High Courts do not have the jurisdiction over the FATA but despite of this, Peshawar High Court has heard and given decision in some cases that arose in the FATA, what are the bases for hearing those cases? There are more than dozen of laws that have not been applied to the FATA, the reasons and secrets? There is a distinct and unique type of legal systems applied for the FATA, what were the reasons for that? What are the justifications that may be given for

its continuation even in the democratic and the era of the human rights; their analytical and critical scrutiny.

Topography and Geo-strategic of Federally Administered Tribal Areas (FATA) and its status in the legal system of Pakistan

The Tribal areas of Pakistan, according to the Article 246-A of the Constitution of Pakistan, consists two types of areas i.e. Agencies and Frontier Regions. There are seven agencies: South Waziristan, North Waziristan, Bajaur, Khyber, Mohmand, Kurram and Orakzai. Frontier Regions are six: Frontier region of Peshawar, Frontier region of Kohat, Frontier region of Bannu, Frontier region of Lakki Marwat, Frontier region of Tank and Frontier region of Dera Ismail Khan²¹¹. Agencies are divided in subdivisions and Tehsils.

The area of this belt is located along Pakistan's north-western and south-western Mountains. It stretches and gets lengthy from north to south instead of inflating or expanding to all four sides. This belt constitutes an area of 27224 sq. km and is inhabited by around 3.17 million people belonging to different *Pukhtoon* tribes. The 1400 miles (2500 KM) long Durand Line, which was drawn in 1893 by the British colonial rulers of India, geographically divides the *Pukhtun* tribes in the region between Afghanistan and the FATA of Pakistan²¹².

Chronology of the FATA

The belt of the Tribal areas, as has just been mentioned, is located between the Northwest Frontier of the Pakistan and Afghanistan. This belt also referred to as 'land of unruly', 'land of free', 'land of the rebels' and the 'land of insolent'²¹³. This particular region was ungovernable

²¹¹ Frontier regions are also called "Protected-areas", while Agencies are also called "Non-protected areas". There is a slight difference between these two types as to the judicial process, visit for a detailed note on it: <https://fata.gov.pk/Global.php?iId=29&fid=2&pId=25&mId=13> (accessed 29 September 2016).

²¹² Sort to: <http://www.understandingfata.org/about-u-fata.php> (accessed 29 September 2016).

²¹³ See: Idrees Masood, *Changing Patterns of Economy in the Tribal Areas Adjoining North West Frontier (Pakistan)* unpublished PhD Thesis, Area Study Center (Russia, China, and Central Asia), University of Peshawar, 1992, p.5

and most hazardous for the British Empire; it was, thus, left outside the British administrative structures of 'settled India'²¹⁴. In 1877, the Lord Lytton, British Viceroy.... devised a system whereby the central government would have direct control over administration and policy of the Frontier. The intention of the English rulers from the creation of this belt to control the people of these areas direct by themselves; because the people were of hard nature, worriers and not be governed and controlled conveniently²¹⁵. Another purpose of creation of this belt was to create a buffer-zone area between the Afghanistan and British India. This was, although, after having a buffer-zone state of Afghanistan between British and Russia; because the British Gov. was scared of Afghanistan as that of Russia²¹⁶. To achieve these purposes the system of political agencies was introduced in the tribal belt and a special status of semi-autonomous was granted to this area. The administrative control of an agency was entrusted to a Political Agent (PA). The political agent was required to liaise with the tribes (Elders in the form of 'Jirga')in the area of his jurisdiction²¹⁷.The system continued as such after the Pakistan was established in 1947 until the Article 246 was added to the Constitution of Pakistan and some changes were made which continues up till today.

It is to be mentioned here that these terms might have been used in history long ago for this belt, but they are quit new for recent and perhaps near past generations, particularly since Pakistan had been established. The present generations of the FATA, therefore, are neither familiar with what their progenitors' land was refereed to, nor are these terms, even rarely, used in today's political, legal or journalistic language.

²¹⁴ The British Gov. divided the region between 'Settled' and 'Tribal Areas'. The first were headed by Deputy Commissioners, while the second were controlled by Political Agents. See: Salman Bangash, "The Frontier Tribal Belt, Genesis and Purposes under the Raj", oxford University Press Pakistan, 1st Edition. 2016, p.35

²¹⁵ *ibid*

The author, at deferent places in his work, in a short but a comprehensive manner, elaborated that this was the intention of the British people behind the creation of the political Agencies, as at one place he has stated: that since the tribal Areas were too wide to be defended by the available armed forces, the British had to depend on political management of the tribes (p.215-216)" referring to authoritative and, especially, to their correspondences to their rulers in England. Despite all of it, it was not the fundamental and premier intention of English rulers of the creation of this belt as it forthcoming.

²¹⁶ See: Salman Bangash, "The Frontier Tribal Belt, Genesis and Purposes under the Raj", p 215. 220.

²¹⁷ See: Salman Bangash, "The Frontier Tribal Belt, Genesis and Purposes under the Raj", p.216 onwards. And sort to: "Claude Rakisits: Pakistan's Tribal Area: A critical No-Man's land", available at: http://www.geopolitical-assessments.com/Pakistan_s_Tribal_Areas.pdf (accessed last time 29 September, 2016), also Bangash, Mumtaz A., "Administrative and Political Development of the Tribal Areas: A Focus on Khyber and Kurram", Ph.D. Dissertation, Area Study Centre (Central Asia), University of Peshawar, 1996.

The status of the FATA and FCR in the legal system of Pakistan

Constitutional status of the FATA

According to Article 1 of the Constitution of Pakistan, the FATA is included in the territory of Pakistan. The masses of these areas, exceeding four million, are represented in both National assembly²¹⁸ and Senate²¹⁹. The FATA is under the direct control of the President, and on the behalf of the President, administered by the Governor of the Province, assisted by Political Agents (PAs)²²⁰ in each Agency, assisted by a number of Assistant Political Agents (APA), through Frontier Crime Regulation (FCR) 1901²²¹.

The laws made by either house, National Assembly or the Senate, according to Article 247(3) of the Constitution are not applicable to the FATA unless the President directs and the laws made by the Provinces are also not applicable unless the governor on the approval of the President directs so. Existing laws may be extended to the FATA as many laws have so far been extended to the FATA²²². The President has power to abolish the status of the FATA and convert it into “Settled Areas”. Article 258 of the Constitution provides that the President may make necessary provisions for peace and good government of any part of Pakistan not forming part of a province.

²¹⁸ As Article 51 of the Constitution of Pakistan, 12 seats in National Assembly amongst all 342 seats have been allocated to the FATA.

²¹⁹ As Article 59 of the Constitution of Pakistan, 8 seats in the Senate amongst all 104 seats, have been allocated to the FATA.

²²⁰ See: book and paper with regard to the Political System: Khan, S. (2012). Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia, Eurasia Border Review Part II, Hokkaido University, Japan, 2012.

²²¹ See for understanding the history of FCR and relevant important documents: Robert Nichols. “The Frontier Crimes Regulation; A History in Documents”. Oxford University Press, Pakistan 2013.

²²² There are 158 FATA Legislative Acts, in the form of extension of the existing laws or the enacting new laws, available at: <https://fata.gov.pk/Global.php?iId=439&fId=2&pId=355&mId=230> (accessed last time 5-10-2016) Whereas Acts applicable for the rest of Pakistan are few hundreds which are available at: <http://pakistanlawyer.com/laws/> (accessed last time 5-10-2016). And also sort for a good discussion to: Ali, Ishfaq, “Laws extended to the Tribal Areas with Jirga Laws”, New Fine Printers, Peshawar, 2003

The FATA now is divided into two administrative categories ‘protected areas’ which come directly under the control of central Federal government through political agents, they are vested with judicial powers as well, and ‘non-protected areas’ that are governed through the local tribes indirectly”. At Federal level, the Ministry of State and Frontier Regions (SAFRON) at Islamabad, is given the responsibility to look after the development, management, and related matters of the FATA.

Dispensation of the Justice in the FATA through FCR

FCR is, on one hand, a procedural law, as it prescribes the procedure for the offences and civil disputes, and on the other hand, it is substantive law as well; because it defines certain crimes and prescribes punishments for them.

The System for the administration of the justice in FATA²²³ is that when a dispute arises, the *Jirgah*²²⁴ of the local elders come, and with the negotiations with both parties, settle the issue either in accordance with *Shari’ah* or tribal costumes and traditions, or through arbitrators to whom the parties give “*Waak*” (unconditional authority) for the decision in their discretion.

Interestingly, the term of “*Jirga*” has not been used in FCR; rather it uses the term “council of elders” for it.²²⁵ FCR defines it “a council of three or more persons convened according to the

²²³ See for a precise but a comprehensive note on this: Khan, Mazhar Ali; “Violation of Social, Political and Economic Rights of the People of Federally Administered Tribal Areas (FATA) recognized by International Human Rights Law with special reference to Frontier Crimes Regulation, 1901” unpublished LL.M Thesis submitted to Faculty of Shari’ah and Law, international Islamic university Islamabad, p. 23 (footnote 57).

²²⁴ Many contemporary writers have appreciated the “Jirga” System as for it dispenses speedy, cheaper and transparent justice, and also it is trusted and accessible as compared to the state justice system. See: “Reforming the Jirga System; Sensitization on Fundamental Human Rights” Published: Community Appraisal & Motivation Program (CAMP) Islamabad p.16. See for a comprehensive discussion on the understanding and Role of “Jirga” in administration of the justice in FATA, Shinwari. Naveed Ahmad “Understanding Jirga: Legality and Legitimacy in Pakistan’s Federally Administered Tribal Areas” published by CAMP Head Office Islamabad, Pakistan. and see also: Naveed Ahmad Shinwari and Neha Ali Gauhar “Understanding Justice Systems of Khyber Pakhtunkhwa, FATA and Baluchistan. The Pakhtun Perspective”, especially its chapters 6, 7, 10 and 11. Published by CAMP Head Office Islamabad Pakistan. Bnagash, Mumtaz A, “A Speedy justice of Elders”, Hassan, M. Yousafzai & Gohar, Ali, “Towards Understanding Pukhtoon Jirga: An indigenous way of peace building and more...” published by Just Peace International,(June 2005).

²²⁵ See: S.2 (a) of FCR.

Pathān...usage as the Deputy Commissioner may directs. However, the 1973's Constitution of the Pakistan in article 247(6) has formally used the 'tribal Jirga' in the context of changing the status of FATA.

The decisions that are passed by the “*Jirgah*” are based upon the costumes, traditions and values which are passed down generation to generation in the form of unwritten laws of “*Pakhtūnwālī*”.²²⁶ The costumes and traditions of every community differ according to the differences in geography and climate.

Fundamental Rights under the Chapter-1, Part-2 of the Constitution of Pakistan

The definition, nature and scope of the fundamental rights

A right which is enjoyed by a human, regardless of being man or woman or any other deference, and without depending upon the law or believing in a specific religion or a culture and given by the nature is called “Natural Right”. Such rights are given to each human just because of being a human and there is no need for having it to be a part of a specific legal system or a culture. If such rights further are guaranteed by a Constitution, they become “Fundamental Rights”. A basic or foundational right, derived from natural law; a right deemed by the Supreme Court to receive the highest level of Constitutional protection against government interference.²²⁷

²²⁶ Much more have written about this concept. For example see: Jonathan N Amato, B.S.”Tribes, Pashtunwali and how they impact reconciliation and reintegration efforts in” A Thesis submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University in partial fulfillment of the requirements for the degree of Master of Arts in Security Studies. Daniel Brian Sheets, “Pashtunwali, Counter insurgency, and the Post-Taliban Democratic Government in Afghanistan” A research paper submitted in partial fulfillment of the requirements for the degree of Master of Arts in National Securities Studies. Muhammad Junaid “Living the Code of Honour: Pashtunwali and Entrepreneurial Identity of Afghans in Peshawar”

²²⁷ Read more in this regard: at <http://www.yourdictionary.com/fundamental-right#HOEEDFRSFQj1Y9Ro.99> (accessed last time 6-10-2016)

Supreme Court of Pakistan has explored the nature of the “Fundamental Rights”, guaranteed under the Constitution, at many occasions that “Fundamental Rights” are those rights which the State enforces against itself and they are in essence restraints on the arbitrary exercise of power by the state.²²⁸

Fundamental rights, despite of having been guaranteed by the Constitution itself, are not absolute in their nature in the eyes of law²²⁹. It means that in some situations they may be suspended. For instance if the enforcement of a right runs contrary to the ‘Objective Resolution’ it is to be suspended. Supreme Court, at occasion, held that “Courts, while construing Fundamental Rights have to keep in view ‘Objective Resolution’ and placed widest possible construction as to advance the goals targeted/envisaged therein.²³⁰ Moreover, if the enforcement of a Fundamental Right violates the norm of Islam it is not to be enforced either. This point shall be taken forthcoming in a bit detail.

The enforcement of the Fundamental Rights at Domestic & International level and the FCR

Since the Fundamental Rights, which are in fact given by the nature itself, have been guaranteed by the Constitution, it is appropriate to mention that what has been and is being done for their protection at both national and international level, whereas the Role of FCR must not be overlooked either.²³¹

And the same has been held by the Supreme Court of Pakistan in Muhammad Nawaz Sharif v. President of Pakistan and others. PLD 1993 SC 473

²²⁸For example see: (Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1993 SC 473). Watan Party and others v. The Federation of Pakistan and others, PLD 2012 SC 292. Golaknath v. State Of Punjab, AIR 1967 SC 1643.

²²⁹Muhammad Aslam Khan v. Federation of Pakistan PLD 2010 FSC (Federal Shari’at Court) 1.

²³⁰Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1993 SC 473

²³¹ Khan, Mazhar Ali, ““Violation of Social, Political and Economic Rights of the People of Federally Administered Tribal Areas (FATA) recognized by International Human Rights Law with special reference to Frontier Crimes Regulation, 1901”, Chapter 4. See for a general study in this regard: Bangash, Salman: “The frontier

Article 55 of the United Nations Charter states that

'The United Nations shall promote...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'

Article 56 of the United Nations Charter states that

'[a]ll members pledge themselves to take point and separate action in cooperation with organization for the achievement of the purposes set forth in Article 55²³².

Tunkin wrote that the content of the principle of respect for human rights in international law may be expressed in three propositions:

(1) '[a]ll states have a duty to respect the fundamental rights and freedoms of all persons within their territories; (2) states have a duty not to permit discrimination by reason of sex, religion or language, and (3) states have duty to promote universal respect for human rights and to cooperate with each other to achieve this objective.²³³

Since, Pakistan, by at large, is Signatory to all those rights provided in Universal Declaration on Human Rights (UDHR) it was obliged to incorporate all those rights in its Constitution. In order to ensure the protection of the Fundamental Rights and their enforcement the Chapter 2 has been incorporated in the Constitution, and Article 184(3) of the Constitution empowered the Supreme

Tribal Belt: Genesis and Purposes under the Raj” Chapter 5. Khan, Mazhar Ali: “Social, Political and Economic Implications of Frontier Crimes Regulation 1901, in FATA, Pakistan” Asian Journal of Social Science and Humanities. (V.13, (1) Feb 2014), p 250 onwards. Naveed Ahmad Shinwari and Neha Ali Gauhar: “Understanding Justice Systems of Khyber Pakhtunkhwa, FATA and Balochistan. The Pakhtun Perspective”, chapter 7.

²³² Sort for understanding the meaning of the term “pledge” to Akehurst, “Modern introduction to International Law” 7th edition, p 212.

²³³ This quotation has been taken from Malcolm N. Shaw “International Law” sixth Edition Published by Cambridge University Press India 2008 p.268

Court as well as the Article 199 empowered the High Courts to make an order for the enforcement of the Fundamental Rights guaranteed under Chapter 2.²³⁴

Supreme Court while giving much more importance to UDHR stated that;

*Supreme Court while construing the Fundamental Rights may refer to the Articles of the Universal Declaration of Human Rights. If there is inconsistency between the two with object to the place liberal construction as to extend maximum benefits to the people and to have uniformity with comity of nations.*²³⁵

It is from these statements very clear that the Fundamental rights are respected, protected, striven to be enforced and assured their remedies if violated.²³⁶

The fundamental rights, Injunctions of Islam and FCR

The nature of the Fundamental rights, incorporated in the Constitution, is that they are not absolute. Interestingly, these rights are protected in the Islam as well.²³⁷ These rights are for

²³⁴ The same has been reiterated by the Supreme Court and High Courts at many occasions; see for instance: Al-Jihad Trust v. Federation of Pakistan 1999 SCMR 1379. Muhammad Nawaz Sharif v. President of Pakistan and others PLD 1993 SC 473. Pakistan Muslim League (N) v. Federation of Pakistan and others PLD 2007 SC 642. Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others PLD 2000 SC 869. Malik Asad Ali and others v. Federation of Pakistan Through Secretary law and Justice PLD 1998 SC 161. Sue Moto Case no. 10 of 2007, PLD 2008 SC 673. Muhammad Kamran Mullah Khail and others v. Government of Baluchistan through Chief Secretary and others PLD 2012 bal. 57. Human Rights Commission of Pakistan and two others v. Government of Pakistan and others, PLD 2009 SC 507.

²³⁵ Al-Jihad Trust v. Federation of Pakistan 1999 SCMR 1379.

²³⁶ This is however at most parts of the Pakistan. Is the situation same in the FATA? It will be taken soon. A question arises that where a state is party to an international treaty would the individuals of that state be obliged with regard to the provisions of that treaty? You may find a good discussion on this point in 'Paul Sieghart, "The International Law of Human Rights" published by Clarendon Press, Oxford. 1983, p. 39-44. The Pakistani Courts' practice in this regard however, is that for the provisions of an International treaty to be bound on the individuals, it is to be incorporated and transformed in the national law through Parliament. If that treaty or any provision of it is not incorporated in the domestic law it shall be not binding.

²³⁷ For the general study on the Human rights in Islam see: Bassiouni, M. Cherif, "The Shari'ah and Islamic Criminal Justice in the time of War and Peace" Cambridge University Press USA, 2014. Chapter 2. Abdul Aziz Sachedina "Islam and the Challenge of the Human Rights" Oxford, UK: Oxford University Press, 2009. Mashood Baderin "International Human Rights and Islamic Law" Oxford, UK: Oxford University Press, 2005. Anver E Eman, Mark S Ellis and Benjamin Glahn (editors). "Islamic Law and International Human Rights Law, Searching

Islam not new and/or unique. Human beings had been conferred upon dignity, their lives had been protected and all kinds of discrimination against them were outlawed fourteen centuries ago.²³⁸

Since had the Islam been declared as a state-religion for Pakistan; the transformation of the human rights was to be conducted very cautiously. This has resulted in the determination of a General Principle that enforcement of any right, rather any provision of law, that runs contrary to the injunctions of Islam as laid down in Qur'an and Ḥadīth shall be nullified to the extent of repugnancy. Apparently, if the enforcement of any of the Fundamental Right is contradicting to norms of Islam it shall not be enforced, rather it would be suspended²³⁹. This is the testing for the rights guaranteed even by the Constitution on the Injunctions of Islam, now we may realize on the basis of that test of Islam, the status of the FCR. As the Constitution, FCR must protect the Fundamental Rights and the FCR itself must be tested on the norms of Islam.

The issue whether FCR is or not compatible with the Islamic injunctions? The answer, obviously, not as such easy; because the procedural components of it are not contradicting; instead this procedure, as being cheaper, speedy and conveniently accessible, is appreciable; as the procedure of "Alternative Dispute Resolution (ADR)" tended around the world. As far as its substantive elements are concerned, several sections have been faced scathing challenges in the

for Grounds" " Oxford, UK: Oxford University Press, 2012. Abdullah Saeed (editor): "Islām and Human Rights, Key Issues in the Debates", An Elgar Research Collection, UK. 2012

²³⁸We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with definite preference. (Surat Al-Isra 17:70). O people, we have created you male and female and made you nations and tribes that you may know one another. Verily, the most noble of you to Allah is the most righteous of you. Verily, Allah is knowing and aware. (Surat Al-Hujurat 49:13). "O people, your Lord is one and your father Adam is one. There is no virtue of an Arab over a foreigner or a foreigner over an Arab and neither white skin over black skin or black skin over white skin, except by righteousness. Have I not delivered the message?" (**Musnad Ahmad 22978**). No one is better than anyone else except by religion or good deeds. It is sufficient evil for a man to be profane, vulgar, greedy, or cowardly: (**Shu'b al-Iman 4767**)

²³⁹ The Supreme Court has stated "that Fundamental Rights as given in the Constitution, therefore, must not violate the norms of Islam as anything in the Fundamental Right which violates the Injunctions of Islam must be repugnant to such norms (Al-Jihad Trust v. Federation of Pakistan 1993 SCMR 1718)

Federal *Shari'at* Court (FSC) and many petitions have been filed that some sections of FCR²⁴⁰ are against Islam. But the FCR still is operating with those sections²⁴¹.

Fundamental Rights and the case of the FATA in present era

The aim of this part is to realize that whether the fundamental rights are enjoyed in the FATA or not? And whether they are guaranteed and enforced in the FATA like all other parts of the Pakistan? If not, then the reasons and how they be enforced over there?

The enjoyment of Fundamental rights by the people of FATA

The Fundamental Rights are for all those who are in the territory of Pakistan, regardless of being its citizen or not. The FATA according to the Article 1 of the Constitution is included in Pakistan. Articles 184(3) and 199 empower the apex courts of Pakistan (Supreme Court and High Courts respectively) to make an order for the enforcement of the Fundamental Rights. It means that the Fundamental Rights are enforced through the Supreme Court and High Courts, but the Article 247(7) precludes the FATA from their jurisdiction which means that the Fundamental Rights are enjoyed²⁴² but not enforced in the FATA.

This is the Constitutional scenario of the issue; however the Court practice is that the Fundamental Rights are not enforced by the courts over there.

²⁴⁰ Those sections are: 8, 11, 22, 23, 26, 30, 32, 33, 34, 36 and 40

²⁴¹ Read the story of such a petition at: <http://www.dawn.com/news/409543/fsc-seeks-frontier-govtaes-stand-on-fcr> (last time visited 6-10-2016)

²⁴² Supreme at an occasion states that 'People of Northern Areas are citizens of Pakistan, for all intents and purposes and like other citizens have the rights...said people are also to participate in the governance of their area and to have an independent judiciary to enforce, inter alia, the fundamental rights...(Al-Jihad Trust v. Federation of Pakistan 1999 SCMR 1379). The high Court of Balochistan has explicitly stated that Persons living in PATA (FATA and PATA are same in the the Fundamental Rights not enforced therein. Author) are entitled to enjoy the Fundamental Rights in the same situation and manner which are being enjoyed through the Province as well as in the country by the general public...(Mistri Muhammad Ramazan v. Noor Muhammad and Two others PLD 1995 Quetta)

The Constitutional Remedies for and/or enforcement of the Fundamental rights and the case of the FATA²⁴³

As we have mentioned constitutional remedies are not provided in FATA; because these area are out of the Jurisdiction of the courts. The preclusion of the FATA from the jurisdiction of the Courts is interpreted that “Jurisdiction of the Supreme Court with regard to Tribal Areas is excluded only in matters exclusively concerned with Tribal Areas and the same is not excluded in matters in which any part of cause of action occurs at a place, falling outside Tribal Area and inside settled area²⁴⁴, anyhow the Fundamental Rights are still not enforced by the Supreme Court and High Courts²⁴⁵ .

The FCR did not have a smooth passage. It frequently came under review by the courts for repugnancy to fundamental rights. Cases started coming to courts soon after the promulgation of the 1956 Constitution which contained fundamental rights of citizens. In a series of judgments the superior courts declared various provisions of the law void, as being inconsistent with the fundamental rights.²⁴⁶

²⁴³ See for a general study on this topic, Pirzada, S. Sharifuddin: “Fundamental Rights and Constitutional Remedies in Pakistan”, All Pakistan Legal Decisions, Nabha Road, Lahore 1966,

²⁴⁴ Muhammad Aslam vs. Station House Officer and others 1997 MLD 152. The same point is found in many other cases. See for example: Malik Taj Muhammad and others v. Bibi Jano and 25 others 1992 SCMR 1431. Government of N.W.F.P v. Muhammad Irshad and others PLD 1995 SC 281.

²⁴⁵ The author would like to mention here that I asked Hamid Khan (senior advocate of the Supreme of Pakistan) that if the high courts do not have jurisdiction over the FATA then on what basis the Peshawar High Court has heard the case of Drone attacks and gave decision in it? He said that Drone Attacks has remained no longer a regional issue; rather it became a national issue over which a high court may have jurisdiction. I asked him again that the “questions of facts” in the given case are regional then how it would stand a national issue? I got no answer from him. I guess the response to the drone attacks was a national responsibility and we quoted from case-law that if any part of the issue relates to settled area then apex courts would have power to hear the case.

²⁴⁶ Such judgments were *Dosso v. State* (PLD 1957 Quetta 9), *Toti Khan v. DM, Sibi* (PLD 1957 Quetta 1), *Abdul Akbar Khan v. DM, Peshawar* (PLD 1957 Pesh 100), *Abdul Baqi v. Super intendent, Central Prisons, Macleh* (PLD 1957 Karachi 694), *Khair Muhammad Khan v. Government of WP* (PLD 1956 Lahore 668) and *Malik Muhammad Usman v. State* (PLD 1965 Lahore 229). Justice A. R. Cornelius in the case of *Sumunder v. State* (PLD 1954 FC 228) referred to FCR proceedings as “obnoxious to all recognized modern principles governing the dispensation of Justice”. He therefore concluded that in the circumstances, it was impossible to preserve public Confidence in the justness of the decision made under the FCR. See: “F C R. A bad law nobody can defend”, Human Rights Commission of Pakistan Peshawar Chapter, published by Human Rights Commission of Pakistan, Lahore July, 2005, p. 59

Conclusion

So far we have realized the system, political though a bit, administrative and legal, of the FATA, from which we knew that FCR, through which this belt is administered, fails to be able to protect and enforce the Fundamental Rights of the people. The system, therefore, is to be changed; so as to be compatible with norms by, and standers upon which the Fundamental Rights are protected, guaranteed and enforced. At first stage the political and administrative powers to be separated; because Political Agent (PA) has the sole powers alone which is not reasonable in this democratic society and cannot be justified in the era of Human Rights. The new law (*Rewāj* law or customary law) must be as such that can play a significant role in the protection and enforcement of The Fundamental rights. The *Rewāj* law should not be as other ordinary amendments that have been introduced throughout the history.²⁴⁷ The FATA should be included in the jurisdiction of the courts so as the Constitutional remedies are provided. The dispensation of the justice in the FATA by Jirga is to be reformed and should not be abolished; because it is speedy and cheaper in providing the justice, rather it needs to be compatible with principles of the constitution and international instruments of human rights law. Many other laws should be extended to FATA so as to be helpful in the enforcement of the fundamental rights. The FCR is neither justifiable nor cooperative with the Constitution in protecting the fundamental rights. It, therefore, be abolished.

²⁴⁷ This is new set of rules which has not yet been introduced therefore academic much more analyses has not come yet; rather it is debated on TV programs and written in newspapers. sort in this regard to: <https://www.dawn.com/news/1286134/fata-secretariat-directed-to-document-customary-laws>.(visited last time 6-10-2016) And <http://www.dawn.com/news/1284517>(visited last time 6-10-2016) and also see for a critic review of the “*Rewāj* Law”: <http://www.dawn.com/news/1286695>