

## **Child Rights in the Federally Administered Tribal Areas (FATA) of Pakistan: Analyses and A Way Forward**

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### **Abstract**

Pakistan is signatory to a lot of international human rights law and the International Law Conventions, There are many constitutional provisions and national laws in Pakistan which deals with women and children rights , however they are not ideal and the situation is dismal when it comes to the inhabitants of the Federally Administered Tribal Areas (FATA). This paper will review the state of child rights in FATA in light of Pakistan's national and international obligations related to child rights and will make recommendations for improving the situation.

### **Introduction**

Pakistan is party to the United Nations Convention on the Elimination of Racial Discrimination (CERD), Convention on the Elimination of all forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and Convention against Torture (CAT). Pakistan is also party to the Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography and to the core ILO Conventions 100, 138, 182 and 111. Pakistan is also a signatory to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Similarly, there are also some relevant constitutional provisions i.e. Article 10-A about right to a free trial, Article 11 of the Constitution about child labor, Article 25(3) about legislation

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related to women and children, Article 25-A about right to free and compulsory education for children from five to sixteen years to name a few. As a result of the above national and international obligations some national laws have also been introduced in the past two decades i.e. the Employment of Children Act 1991, the Bonded Labor System Abolition Act 1992, the Juvenile Justice System Ordinance 2000 and the Right to free and Compulsory Education Acts of 2012 for the Islamabad Capital Territory and Sindh. Despite integration of the above mentioned instruments of the international human rights law and the ILO Conventions, the Constitutional provisions and national laws in Pakistan are not ideal and the situation is even more miserable for the people of FATA.

#### **The UN Committee on the Rights of the Child and the United Nations Universal Periodic Review (UPR)**

In its second periodic report to the UN Committee on the Rights of the Child Pakistan shared that “Till the year 2000, no national legislation was uniformly applicable to children in conflict with the law. Children, like adults, were subject to the Pakistan Penal Code and the Criminal Procedure Code, which were applicable in the provinces, but not in parts of Pakistan known as the Federally Administered Tribal Areas (FATA)”<sup>1</sup>.

In 2008, during the Universal Periodic Review of Pakistan, Canada had recommended Pakistan to “implement international human rights obligations within Federally Administered Tribal Areas and refrain from detention that contravenes international standards of due process” (the UPR Pakistan Outcome Document: paragraph 23).<sup>2</sup>

In 2009, the Committee on the Rights of the Child in its concluding observations and recommendations against the consolidated third and fourth periodic report by Pakistan showed serious concerns over the non-implementation of the Juvenile Justice System Ordinance (JJSO) 2000 in the FATA. Here, the Frontier Crimes Regulation of 1901 is in force, which does not

take into account child rights and the Committee strongly recommended that Pakistan should repeal the FCR.

### **Relevant Constitutional Provisions**

Under article 247 (2) of the Constitution, FATA comes under the control of the President of Pakistan who has the power to extend laws in the area<sup>3</sup>. Article 1 of the Constitution of Pakistan, 1973, describes FATA as a part of Pakistan and Article 247 describes the manner in which the area is to be administered. “Under Article 247 (3), no Act of Parliament is applicable to FATA or any part thereof unless the President of Pakistan so directs. The Governor of Khyber Pakhtunkhwa [KP] acts as the ‘agent’ to the President of Pakistan”<sup>4</sup> and under Article 247 (7), the tribal areas are excluded from the jurisdiction of the Supreme Court of Pakistan and the High Court of [KP] until Parliament makes law in this regard.

Under Article 199 (14) and 184 (3) and (5), the High Courts and the Supreme Court can ensure the enforcement of fundamental human rights. In view of the fact, however, that FATA is excluded from the Courts’ jurisdiction under Article 247, the enforcement of fundamental rights cannot be foreseen.<sup>5</sup> Under the Article 2-A and 175 of the Constitution, an independent judiciary has to be established, but there is no court in FATA lest an independent one (Mahmood 2004)<sup>6</sup>. Not a single human rights provision in the Constitution can be possibly applied to FATA due to its particular status as per the Constitution of Pakistan.

### **Frontier Crimes Regulation (FCR)**

The FCR is a special and substantive law which prescribes trial procedure for offences and civil disputes. It also defines certain offences and describes punishments for those offences.<sup>7</sup> From the preamble of the amended version, now the FCR is meant to maintain peace, law and order and good governance in FATA whereas according to the old version, the FCR aimed to suppress crime in FATA.

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The FCR “basically explains the relationship between the state and the tribes on the one hand through an indirect form of governance; and on the other lays down procedure for dealing with inter-tribal matters”<sup>8</sup>.

The British devised the FCR as an instrument of subjugation. It was meant to discipline the Pashtun population and to establish the writ of the colonial authority. In drafting the regulation, the British relied upon some customs and traditions prevailing in the tribal belt, but these traditions were distorted to suit the government’s plan of securing convictions at will.<sup>9</sup>

Article 247(7) of the Constitution debars the Supreme Court, or a High Court, from exercising their jurisdiction in respect of FATA. Interestingly, Article 2-A and 175 of the Constitution provide for an independent judiciary; however, there has been none in case of FATA. Provisions of the FCR are in violation of several articles of the Constitution including Article 4 (right of individual to be dealt with in accordance with the law), Article 9 (security of persons), Article 10 (safeguards as to arrest and detention), Article 13 (protection against double jeopardy, self-incrimination), Article 14 (inviolability of dignity of man, prohibition of torture for extracting evidence), Article 24 (protection of property rights), and Article 25 (equality of citizens).<sup>10</sup>

In 2005, two committees were constituted on the FCR; The Senate’s Standing Committee on Human Rights had constituted a sub-committee on the FCR comprising of Senator Farhatullah Baber, Senator Hamidullah and Senator Dr. Saad. In August 2005, the sub-committee submitted a final report along with recommendations to the main committee in which amendments were proposed in the FCR.<sup>11</sup> The report of the subcommittee has not been yet made public.

The Governor of Khyber Pakhtunkhwa constituted a review committee under the chairmanship of a former Supreme Court

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Judge, Mian Mohammad Ajmal. The Committee proposed many changes, including the powers of the political agents and the division of judicial powers between the *Jirga* and the FATA Tribunal that may function on the pattern of Sessions Courts. After the submission of a report in 2006, no steps have been taken to implement it. This report has not been made public as well.

On March 29, 2008, the then Prime Minister Yousaf Raza Gilani in his inaugural speech in the National Assembly had promised to repeal the Frontier Crimes Regulation (FCR) 1901. Following this, in March-April 2008, a committee was constituted under the then law minister Farook Naek. The committee eventually made recommendations for changes in the law. The Committee's recommendations were finally accepted and signed in August 2011.<sup>12</sup>

On August 14, 2009, the President of Pakistan announced to repeal the Frontier Crimes Regulations (FCR) and declared it a draconian law that deprived women, children and other innocent people of their rights and privileges guaranteed to them through the Constitution of Pakistan.

In 2009, under the chairmanship of Senator Raza Rabani, a Parliamentary Committee on the Constitutional Reform was constituted. The Committee in consultation with all parties proposed changes in the Constitution which were passed by the National Assembly and the Senate in April 2010<sup>13</sup>. Surprisingly however, the long awaited 18<sup>th</sup> Constitutional Amendment adopted on April 15, 2010, was silent about changes in the relevant Articles of the Constitution i.e. Article 247(2) under which the Federally Administrated Tribal Areas (FATA) come under the control of the President of Pakistan. Civil society had expected that the Article would be amended and steps be proposed to bring FATA into mainstream.

As if FCR was not enough, the President introduced the Action (in Aid Civil Powers) Regulations 2011. Under the Action (in Aid of Civil Power) Regulation 2011, introduced in FATA,

even death could be awarded, which was not the case under the FCR<sup>14</sup>.

On August 12, 2011, the President of Pakistan signed the Frontier Crimes (Amendment) Regulations 2011 which to some extent addressed a grave violation of child rights taking place in the shape of the collective responsibility Clause no. 21 in the FATA region. The amendment stated, 'children below 16 years of age cannot be arrested or detained' under Clause 21. Secondly, if a child is sentenced by the political agent, that sentence can be challenged in the judicial commission proposed to be made under the amended regulations. Under the JJSO however, which was extended to FATA in 2004, and in CRC, a child is defined as a person below 18 years of age. The amendment in FCR will hardly ensure that the judicial commission will be impartial. Besides, the judicial commission should never be the final remedy in the process of justice; High Courts and Supreme Court must have been brought into the ambit of justice for children and adults in FATA.

#### **Arrest of women and children under the collective responsibility clause**

It was 2004, during Women Ward of Central Prison Haripur visit that I came to know about twenty one members of a fugitive's family including fifteen minors. None of them had committed any offence. The only wrong that they had done was to belong to a person who was accused of an offence and declared absconder. So these innocent people were put behind bars under the collective responsibility clause 21 of the Frontier Crimes Regulation (FCR) 1901. Among those arrested was also a two years old child, Zarmina. I realized that previously no one knew about women and children being dragged into the criminal justice system wanting of their any fault.

It was a painful and onerous task to make the government realize that under the guise of draconian law (FCR) children and women are suffering in jails without committing any offence. I requested a

journalist from the News-Line Magazine for joining me to meet with 21 members of the said family convicted under Section 40 of the FCR. That journalist wrote a detailed article<sup>15</sup> in his Magazine on the helplessness and plight of women and children. Even then the government denied accepting that children were convicted and argued that the children were kept under the protective custody to shield them from any offence done against them from the people of Lakki Marwat whom the fugitive had allegedly enraged.

### **FATA Reforms**

The so called changes in the FCR were made after a century when the FCR had totally devastated social, economic, and judicial fabric of communities in FATA and had allowed foreign elements to exploit their land for making nurseries of suicide bombers mainly exploiting children. Looking at the will of successive governments it seems that another amendment in the FCR will not be possible in near future and it is not very sure that law will be brought in consonance with the Constitution and international provisions. The changes made so far are not meeting the minimum human and child rights standards enshrined in the Constitution, the UNCRC and the Universal Declaration on Human Rights (UDHR).

The last parliament lost a great opportunity of bringing FATA into mainstream by ignoring this important task in the historic 18<sup>th</sup> Constitutional Amendment. When the parliamentary committee was established for framing 18<sup>th</sup> constitutional amendment, FATA reforms were part of its terms of reference and there was also representation from FATA in the parliament. Surprisingly, there was no amendment in the 18<sup>th</sup> Constitutional Amendment Act 2010 related to FATA. Article 1, 246 and 247 of the Constitution are still intact and FATA has the same status as it ever had.

In response to the growing demand for reforms in FATA, in August 2011, the President introduced the Frontier Crimes (Amendment) Regulation 2011 and extended Political Parties

Order 2002 to FATA. The nation was informed that major changes have been made in FCR and now children below 16, women and elderly will not be arrested under the collective responsibility clause of the FCR; there will be a right to appeal against the judgments of the political agents.

While going through the Frontier Crimes (Amendment) Regulation 2011 one comes to the conclusion that there is no major change in the FCR and even this regulation was introduced to divert attention from the Actions (in Aid of Civil Power) Regulation 2011 introduced earlier same year with more stringent and inhuman sentences and procedures in complete violation of the fundamental rights enshrined in the constitution and the international human rights laws. Human rights activists consider it stringent than FCR as it has also introduced death sentence which was not a part of the FCR.

The long standing demand of extending the jurisdiction of superior judiciary to FATA has been ignored once again and the collective responsibility clause is still very much a part of the FCR. National laws will be still required to be extended to FATA by the President and no legislation is automatically applicable to FATA unless extended by the President. This implies that the women of FATA will remain deprived of the Women Protection (Criminal Laws Amendment) Act 2011 unless it is extended to FATA by the President.

Most of the political commentators and civil society representatives term the reforms inadequate as in the presence of the Article 247 of the Constitution the people of FATA are still not the full citizens of Pakistan. Article 1 needs to be amended in order to give FATA the status of a full federating unit by declaring it a part of Khyber Pakhtunkhwa or giving it the status of a separate province in accordance with the right to self determination of the people of FATA.

Article 1 of the Constitution of Pakistan, 1973, describes FATA as a part of Pakistan and Article 247 describes the manner

in which the area is to be administered. “Under Article 247 (3), no act of Parliament is applicable to FATA or any part thereof unless the President of Pakistan so directs. The Governor of [KP] acts as the ‘agent’ to the President of Pakistan” but under Article 247 (7), the tribal areas are excluded from the jurisdiction of the Supreme Court of Pakistan and the High Court of [KP] until Parliament makes law in this regard however, the parliament is not fully authorized to do so.

Under Article 199 (14) and 184 (3) & (5), the High Courts and the Supreme Court can ensure the enforcement of fundamental human rights. In view of the fact, however, that FATA is excluded from the Courts’ jurisdiction under Article 247(7), the enforcement of fundamental rights cannot be foreseen. Under the Article 2-A and 175 of the Constitution, an independent judiciary has to be established, but there is no court in FATA what to talk of an independent one. Not a single human rights provision in the Constitution is possible to be applied to FATA.

With the above analyses one can safely come to the conclusion that the FATA reforms in their present shape are a gimmick or rhetoric and cannot bring any lasting changes in the lives of the people of FATA and is going to play no role in bringing them into mainstream and upholding their human rights. This is unfortunate that despite repeated commitments, the previous government and the parliament lost an important opportunity to bring FATA into mainstream and ensure the people of FATA their rights in light of the Constitution of Pakistan and our international commitments being party to various human rights instruments.

### **Juvenile Justice in FATA**

It was not only Haripur Central Prison that had held children and women under the collective responsibility clause but there were hundreds of children being arrested and sentenced under the same. Serious violations of the national and international laws

were made and atrocities being committed by the officials under the FCR.

### **Children's Right to Health in FATA**

The infant, children less than five years of age, and maternal mortality rates in FATA are high which reveals that no focus was made on child survival. The Expanded Program of Immunization (EPI), the Lady Health Workers Program, and the Mother and Child Health Program are not being used effectively and efficiently to respond to the situation of mother and child health in FATA. The recent measles outbreak in various parts of FATA further exposed the weak routine immunization system in the region.

### **Children's Right to Education in FATA**

The literacy rate in FATA is 17.42 percent with only 3 percent for females. There are 5,579 regular, community, and mosque schools out of which 4,880 are functional. The teacher to student ratio is 1:28 for boys and 1:31 for girls. The drop-out rate at the primary level is 63 percent for boys and 77 percent for girls; while at the secondary level 53 percent for boys and 58 percent for girls.

The above figures clearly depict the poor status of education and particularly girls' education. Following the 18<sup>th</sup> Constitutional Amendment in 2010, the focus of the government, civil society, media and donors increased considerably and advocacy for right to education for children from 5 to 16 years of age resulted in enactment of the Right to Free and Compulsory Education Act 2012 for the Islamabad Capital Territory and the Sindh Right to Free and Compulsory Education Act 2013. Similarly, the provincial governments in the rest of the three provinces were also working on the Right to Free and Compulsory Education Bills. However, there is no focus towards FATA despite such dismal situation of education in this region.

### **Children's Right to Protection from Exploitative and Hazardous Child Labor in FATA**

Although no survey has been conducted in FATA to come up with an authentic figure about the number of children involved in labor in FATA, qualitative research on child labor is common in both formal and informal sectors. Despite the extension of the Employment of Children Act 1991 and the Bonded Labor System Abolition Act 1992, no practical steps could be taken to protect children from exploitative and hazardous labor. Child labor is common in shops and establishments, factories including the marble industry, mining, and smuggling.

### **Children's Right to Justice in FATA**

Despite the extension of the Juvenile Justice System Ordinance (JJSO) 2000 to FATA in 2004, not a single juvenile has been reported to enjoy procedural rights given in the JJSO which includes release on bail and probation, trial by the Juvenile Courts, free legal aid, and rehabilitation through Borstal Institutions etc. Unfortunately, over the last thirteen years, no system has been placed for the implementation of the JJSO.

### **Recommendations**

- The President, the government and above all the newly elected parliament should look into the FATA reforms issue in light of the demands of the people of FATA and Pakistan's international obligations and should recommit themselves to bringing genuine reforms in accordance with the wishes of the people of the FATA.
- Amendments shall be made in Article 1, 246 and 247 of the Constitution not only to bring FATA into mainstream but also to ensure protection of the fundamental rights of the people of FATA including children.

- All relevant laws of the country shall be applicable to FATA without any condition of extension by the president.
- The Parliament shall be empowered to legislate for FATA. Article 247 of the Constitution should be amended and powers should be given to the Parliament to make laws for the people of FATA as well. The Parliament can then immediately remove unlawful and unconstitutional provisions of the FCR.
- The jurisdiction of the Supreme Court, Parliament and High Courts should be extended to the FATA by amending Article 247 of the Constitution.
- Judiciary should be separated from the administration within FATA so that the trials of juveniles and others may take place under the provisions of the JJSO and other human rights standards.
- The FCR should either be replaced or amended to be brought in line with the Constitution and international norms of justice, including the safeguards for fundamental human rights.
- Efforts should be made for child survival in FATA in light of Pakistan's obligations under the Millennium Development Goals (MDGs) related to children and women.
- Budgetary allocation should be made for the Expanded Program of Immunization (EPI), the Lady Health Workers Program and the Mother and Child Health Programs to effectively respond to the situation of mother and child health in FATA.
- The Right to Free and Compulsory Education Regulations should be immediately introduced for FATA in light of Article 25-A of the Constitution about Right to Education for Children from 5 to 16 years of age.
- Special focus should be made to ensure girls their right to education including increase in the number of girls' schools, female teachers and incentives for girls' enrolment.

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- Child labor related laws such as the Employment of Children Act 1991 and the Bonded Labor System Abolition Act 1992 and its 1995 rules should be implemented in FATA.
- Labor Department should be established in FATA not only to protect children from exploitative and hazardous labor but also to ensure the implementation of labor laws in general including the minimum wage laws.
- All laws of Pakistan should be extended to FATA, including the Khyber Pakhtunkhwa Child Protection and Welfare Act 2010 and the Khyber Pakhtunkhwa Borstal Institutions Act 2012.
- Probation and parole system shall be introduced in FATA in light of the related laws and the JJSO 2000 and Probation and Parole Officer should be appointed in each Agency of FATA.

### **Conclusion**

The role of the federal government in maintaining a minimum living standard in FATA is seen as a serious concern by the civil society. . Who will ensure that children living in this region have the same rights? Child protection and welfare legislation has been introduced in Khyber Pakhtunkhwa but there is none in Balochistan, FATA or even the Islamabad Capital Territory. There is no body at the helm of affairs at the federal level, with a statutory status to work for the promotion and protection of child rights and raise such issues and concerns with the provinces and regions. A National Commission on the Rights of Children (NCRC) Bill is in the pipeline for the last three years without any progress though.

The recent amendments in the FCR 1901 will not make any difference in the lives of children of FATA until the law is abolished, Article 247 of the Constitution is amended and powers are given to the parliament to make laws for the people of FATA and the right to appeal in the High Court Peshawar and Supreme

Court of Pakistan is given to the people of FATA. The amended version is not different from the old version of the draconian law; still powers are centered into one office of the PA and APA. The FATA Tribunal replacement of the FCR Tribunal is not an independent body that could deliver justice to children.

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