



CGPA

CENTRE FOR GOVERNANCE
AND PUBLIC ACCOUNTABILITY

POLICY BRIEF

**FATA Governance Reforms
Issues and Way Forward**

October 2014

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Executive Summary

Under Article 1 of constitution of Pakistan, Federally Administered Tribal Areas (FATA) is an integral part of Pakistan. However, Article 247 of constitution gives special status to FATA. Under Article 247, the laws enacted by the parliament are not applicable to FATA. Rather the President of Pakistan is vested with such powers to extend laws to FATA. Similarly, under Article 247, Supreme Court of Pakistan and High Courts have no jurisdiction whatsoever in FATA.

Article 247 of constitution of Pakistan directly violates many fundamental rights. These fundamental rights are not only enshrined in the constitution for all citizens of Pakistan, including FATA, but are also guaranteed in international agreements and treaties which Pakistan has ratified. These international agreements and treaties include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social Economic and Cultural Rights (ICSECR), and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

For ensuring protection of fundamental rights of FATA inhabitants, lasting peace and stability in FATA, Article 247 shall be amended.

Key Policy Recommendations are:

- 1) Constitutionally, FATA is an integral part of Pakistan and any law repugnant to the constitution should be repealed. The people of FATA are as much citizens of Pakistan as people of any other part of the country. The constitution must treat all the people equally.
- 2) The legislative and administrative powers of the President of Pakistan under Article 247 (3) of the constitution regarding FATA should be transferred to parliament. FATA is represented by elected members in parliament and the people of FATA deserve to be duly represented. The decisions made and laws enacted in parliament should automatically be applicable to FATA.
- 3) Article 247 (7) of the Constitution should be removed from the constitution to extend jurisdiction of the superior judiciary to FATA. Denial of superior courts' jurisdiction in FATA is a denial of fundamental rights available to the Pakistani citizens there. The denial of rights is blatant discrimination and should be removed from the constitution.

See additional recommendations inside the policy brief.

Background

The Federally Administered Tribal Areas (FATA) are situated in northwestern Pakistan. Covering 27,220 square kilometers, FATA has an estimated population of 4.38 million with an annual growth rate of 2.19 percent.¹ FATA consists of seven agencies (districts) and six frontier regions² (FRs) and is administered and governed by the federal government of Pakistan under Article 247 of the Constitution of Pakistan. Despite its inclusion as part of “the territories of Pakistan” in Article 1 of the Constitution, Article 247 defines a special status for the tribal areas, different from the rest of Pakistan.³

In addition to this constitutional discrimination, FATA has long been virtually “stateless”.⁴ Normal state institutions—including police, judiciary, democratically elected representatives, local government and municipal institutions—do not exist as they do in other parts of the country.

FATA has long served as a trade corridor between Pakistan and Afghanistan, and prior to independence in 1947 it provided the primary business route between India and central Asia. Pakistan’s tribal areas also served as a buffer zone between British India and Afghanistan before partition. Before British colonization of India, most central Asian crossed through the Khyber Pass, also part of FATA.

FATA is governed by special regulations known as the Frontier Crimes Regulation (FCR), imposed originally in the late 19th century by the colonial masters of the sub-continent on the pretext of respecting traditions in the region while subjugating local people to the wishes of ruling classes. The FCR is unrepresentative and prescribes a judicial system lacking independence from administrative government structure. The FCR is regularly criticized by academics, political and civic leaders in Pakistan, yet despite 2011 amendments, the regulation continues to deny residents of FATA many of the fundamental rights enjoyed in the four provinces.

These fundamental rights are not only enshrined in the constitution for all citizens of Pakistan—including FATA—but are also guaranteed in international agreements and treaties which Pakistan has ratified, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Social Economic and Cultural Rights (ICESCR), and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The FCR violates many principles of international customary law generally, and the Universal Declaration of Human Rights (UDHR) more specifically.⁵

¹ FATA Secretariat

² Bajaur, Khyber, Kurram, Mohmand, North Waziristan, Orakzai, South Waziristan, FR Bannu, FR Dera Ismael Khan, FR Kohat, FR Lakki, FR Peshawar, and FR Tank

³ Article 247(1) states that “the executive authority of the Federation shall extend to the Federally Administered Tribal Areas”.

⁴ Dr. Raza Rehman Khan uses the word “stateless” in the context of local government in his paper titled “Local Government System in FATA”, available at <http://frc.com.pk/wp-content/uploads/2014/01/Research-Paper-7.pdf>

⁵ Pakistan ratified ICCPR in 2010 along with United Nations Convention against Torture (UNCAT). Earlier, in 2008, Pakistan ratified International Covenant on Economic, Social and Cultural Rights (ICESCR). See

This policy brief provides analysis of the constitution's distinct status for FATA and describes how the fundamental rights of the region's residents are violated by that special status.

FATA in the 1973 Constitution of Pakistan

Articles 246 and 247 of the constitution provide a distinct status to FATA. Article 246 defines FATA as areas adjacent to the districts of Peshawar, Kohat, Lakki Marwat, Bannu, Dera Ismail Khan, and Tank (called "frontier regions"), and the agencies (districts) of Bajaur, Orakzai, Mohmand, Khyber, Kurram, North Waziristan and South Waziristan. Article 247 gives administrative and legislative control of these tribal areas to the federal government. The President of Pakistan directly administers FATA through the governor of Khyber Pakhtunkhwa and his appointed political agents (district administrators).⁶

FATA has representation in the National Assembly and Senate, however laws approved by parliament do not apply in FATA unless specifically ordered by the president. The legal system in FATA is defined in the FCR and most laws defining the criminal justice system in the rest of Pakistan have not been extended to the tribal areas. All civil and criminal cases in the tribal areas are decided in line with the FCR.

Each FATA district is administered by a political agent (PA) wielding the power of chief administrative, judicial, police and election official in areas under their jurisdiction. The FCR is based on principles of collective and territorial responsibility and FATA residents are often subjected to punishment and imprisonment to pay the price for the crimes of others in their village or tribe. Political agents exercise their authority through tribal elders or '*Maliks*' and government sanctioned tribal councils or '*jirgas*' acting as a jury in disputes among tribesmen. Council members are selected by the PA and the FCR does not require the PA to abide by tribal council decisions.

In order bring some improvement in the plight of Pakistani citizens in FATA it is important to urgently make amendments to the constitution. Additional changes in the region's legal system, including in the FCR, should be introduced only after amendments to the Constitution of Pakistan. The reason for this urgency is that many provisions of the constitution of Pakistan do not allow the extension of key aspects of law to FATA.

The Constitution and Violation of Fundamental Rights in FATA

Articles 246 and 247 of the constitution provide the framework for relationship between FATA and the federal government. As described below, several clauses of Article 247 violate

<http://www.dawn.com/news/875750/iccpr-ratified>; All these international treaties and the Declaration are binding on the Pakistani state. All regions included in Pakistan or otherwise in Pakistan's control or administrative influence must be guaranteed the rights.

⁶ The constitution describes two types of tribal areas, the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA). The areas designated as part of PATA are under the administrative and legislative control of their adjacent provinces, Khyber Pakhtunkhwa and Baluchistan as opposed to more direct federal control as in FATA. In each province, the governor—as representative of the President of Pakistan—is responsible for tribal area affairs. Any law passed in provincial assemblies does not apply in PATA, unless directed by the governor with the approval of the president.

fundamental rights guaranteed in Articles 8 to 28 of the constitution and observed in civilized states around the world. See Annex A for the complete text of Article 247.

- **Article 247 (1)** describes the special status of FATA and envisages executive authority of the federal government over FATA. As a result, the people of FATA are denied their own elected executive authority and are governed from a distance. Khyber Pakhtunkhwa and other provinces, on the contrary, are governed by elected executive bodies. FATA is governed centrally, only the president has the power to issue regulations for the region, and no legislation by elected representatives applies to FATA without the president's explicit approval.

Clause 1 of Article 247 violates the International Covenant on Civil Political Rights as it denies residents in FATA the right to authentic political participation. Ratified by Pakistan in 2010, the ICCPR states that, "every citizen shall have the right and the opportunity, [...] without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives". The constitution also states in the preamble that, "the State shall exercise its powers and authority through the chosen representatives of the people". Furthermore, Article 32 of the constitution requires that, "the State shall encourage local government institutions composed of elected representatives".

It is strange and unacceptable that the constitution permits the people of FATA to elect representatives to sit in parliament and make laws, but that the laws enacted by parliament are not applicable to FATA unless explicitly extended by the President of Pakistan.

- **Article 247 (3)** states that no act of parliament is applicable in FATA unless the president so directs. This clause violates the right to authentic parliamentary representation and political participation as described under Article 247 (1) above. In addition to the right to extend legislation approved by parliament, the president may also present, approve and enact his own regulations and orders for FATA. Legislation is made by executive order rather than by elected representatives. FATA's parliamentary representation may not be considered authentic as it is conditional on presidential approval.

Clause 3 creates a contradiction in the constitution as it allows the people of FATA to elect representatives to sit in parliament while preventing parliamentary approved laws from applying automatically to FATA. An additional violation derives from the fact that the president may enact and regulate taxes in FATA. Without authentic parliamentary representation, this power violates the principle of "no taxation without representation". A primary complaint of British colonies as early as the 18th century, this principle has been repeatedly upheld by the superior judiciary in Pakistan.

- **Article 247 (5)** states that the president may make regulations for peace and good government in FATA, giving wide authority of local administration and law and

order. While other regions of Pakistan enjoy authority over their own affairs in matters of peace, FATA is denied this right. In the four provinces for example, maintenance of law and order is a local power exercised by local authorities appointed by elected representative institutions. FATA is denied any elected representative institution.

Good governance also includes local government institutions. FATA does not have any local bodies system and Clause 5 restricts the potential authority of any future attempt to enact and implement one. Article 140A of the constitution also excludes FATA from the guarantee of an elected local government system, including devolved “political, administrative and financial responsibility and authority”. Clause 5 also violates Article 1 (1) of the International Covenant on Economic, Social and Cultural Rights which states that, “all peoples have the right [...] to freely pursue their economic, social and cultural development”.

- **Article 247 (6)** provides the president with the power to remove a specific tribal area from the FATA legal regime. In order to determine the wishes of the people of FATA in this regard, the president is required to call a *jirga* from the local population. The composition and selection of this *jirga* however, is not indicated, thereby potentially leaving this important decision to a small group of hand-picked government allies and not to any representative body.

Clause 6 contradicts Article 48 (6) of the constitution which dictates the procedure for decide matters of national importance. Article 48 states that if “the prime minister considers it necessary to hold a referendum”, he may refer the matter to parliament for approval in a joint session. This same right is not granted to the people in FATA as Clause 6 leaves it to the discretion of the president and the unelected *Jirga*. This clause is also a violation of Article 1 of the ICCPR which guarantees “all peoples” with the right to “freely determine their political status”.

- **Article 247 (7)** states that neither the Supreme Court nor a high court shall exercise any jurisdiction in relation to FATA. As indicated by the Peshawar High Court in April 2014, the non-availability of judicial review and lack of protection of fundamental rights violates guaranteed fundamental rights in Articles 8 to 28 of the constitution.

Provincial high courts and the Supreme Court are the guardians of fundamental rights of the people and without any independent judicial mechanism to ensure these rights in FATA, the courts are denied their constitutional role. As a result, constitutionally and internationally guaranteed rights cannot be ensured. Judicial review is universally recognized and absence of judicial review in FATA means that fundamental rights may not be enforced as provided in Articles 199 and 184 (3) of the constitution.

FATA Reforms Overview

Recent governance and political reforms in FATA started in 1996 when the people of FATA were given the right of adult franchise. In 2011, the Political Parties Order was extended to FATA allowing political parties to carry out activities and participate in National Assembly elections in FATA. At the same time, the President notified amendments to the FCR, which include an exemption of women, children and elderly persons from the collective responsibility clause.

FATA is now at a crossroads and the planned 2014 NATO withdrawal from Afghanistan will undoubtedly impact the region. Similarly, the Political Parties Joint Committee on FATA Reforms (FATA Committee)⁷ has worked since 2010 consensus proposals for further reform for FATA. Most recently, the FATA Committee approved eleven recommendations:

- 1) Peace in FATA should be guaranteed.
- 2) Article 247 of the constitution should be amended to guarantee fundamental rights for all FATA citizens and shift legislative power from the President of Pakistan to parliament.
- 3) Local bodies elections should be held in FATA.
- 4) A comprehensive package should be developed for FATA and infrastructure development initiated, with special focus on health, education and employment.
- 5) The future status of FATA should be decided by its people.
- 6) Pakistan Electronic Media Regulatory Authority (PEMRA) jurisdiction should be extended to FATA and media should be provided greater access to FATA to provide tribal citizens with opportunities for media interaction and participation.
- 7) The *jirga* system should be made more democratic and independent.
- 8) Actions in Aid in Civil Powers Regulation should be abolished.
- 9) Executive and judicial powers should be separated in FATA.
- 10) Citizens should not be deprived of property; inheritance laws should be extended to FATA.
- 11) Civil armed forces (khasadar and levies) should be strengthened and professionalized.

Political Parties on FATA Reforms

The Charter of Democracy (COD) signed by the Pakistan Muslim League Nawaz (PML-N) and the Pakistan Peoples Party (PPP) in May 2006 states that, “FATA shall be included in the NWFP [now Khyber Pakhtunkhwa] province after consultation with them”. Several political parties also included plans and promises for FATA reforms in their 2013 election manifestos:⁸

- **Awami National Party (ANP)** is for inclusion of FATA in Khyber Pakhtunkhwa province, legal and administrative changes, amendments to the FCR and judicial oversight by the Peshawar High Court.

⁷ 10 political parties are represented on and support the recommendations of the FATA Committee: ANP, JI, JUI-F, MQM, NP, PML-N, PML-Q, PPP, PTI and QWP.

⁸ “FATA in Political Party Election Manifestos”, June 2013, available at <http://slideshare.net/FATAperties/fata-in-political-party-election-manifestos-2013-22592594>

- **Jamaat-e-Islami (JI)** is for abolishing the FCR, amending the constitution to transfer parliamentary power from the president to parliament and generally for a new form of government in FATA.
- **Jumiat Ulema-e-Islam Fazl-ur-Rehman (JUI-F)** seeks to establish peace and security in Fata through *jirgas* and that the final status of FATA be decided by the people there.
- **Pakistan Muslim League Quaid-e-Azam (PML-Q)** supports political party-based democratic political processes in FATA, promises to abolish the FCR and bring the tribal areas into the national legal system.
- **Pakistan Peoples Party (PPP)** promises gradual reforms in FATA and transformation to a new political entity in line with the wishes of the people of FATA. Furthermore, PPP is in favor of reserved seats for women from FATA in parliament.
- **Pakistan Tehreek-e-Insaaf (PTI)** states that, “FATA will be brought into the mainstream of Pakistan, and the colonial remnants, the FCR will be removed and the people of FATA will be given a sense of ownership in Pakistan”.
- **Qaumi Watan Party (QWP)** is for inclusion of FATA in the political mainstream, gradual reforms, consultation with the people of FATA, amendments to the FCR, reserved seats for women from FATA and local government in the tribal areas.

Policy Recommendations

- 1) Constitutionally, FATA is an integral part of Pakistan and any law repugnant to the constitution should be repealed. The people of FATA are as much citizens of Pakistan as people of any other part of the country. The constitution must treat all the people equally.
- 2) The legislative and administrative powers of the President of Pakistan under Article 247 (3) of the constitution regarding FATA should be transferred to parliament. FATA is represented by elected members in parliament and the people of FATA deserve to be duly represented. The decisions made and laws enacted in parliament should automatically extend to FATA.
- 3) Article 247 (7) of the Constitution should be removed from the constitution to extend jurisdiction of the superior judiciary to FATA. Denial of superior courts’ jurisdiction in FATA is a denial of fundamental rights available to the Pakistani citizens there. The denial of rights is blatant discrimination and should be removed from the constitution.
- 4) Recommendations of the Political Parties Joint Committee on FATA Reforms (FATA Committee) and civil society organizations should be considered on priority basis and be given practical shape.

- 5) Nomenclature relating to the tribal areas and its regulations is a perpetuation of the colonial legacy. FATA should be renamed appropriately.
- 6) FCR—even after 2011 amendments—violates the fundamental human rights of the people of FATA. Further amendments should be made to ensure complete protection of citizen rights in FATA.
- 7) Judicial powers should be taken away from political agents. A separate judicial institution under the supervision of the Peshawar High Court (due to geographic proximity) should be established until the people of FATA are given the opportunity to decide the future status of the tribal areas. This new judicial institution would consider findings of local councils of elders (*jirga*) on case facts and pronounce binding judgments. Fundamental rights and other constitutional provisions should be protected by this new institution.
- 8) If the official council of elders must remain an integral part of the FCR system (for resolution of disputes and adjudication of criminal cases), then selection of its members should not be controlled by the political agents. The council of elders must be independent of executive influence.
- 9) FCR and constitutional provisions in violation of the fundamental rights guaranteed by the constitution and international human rights law should be repealed. Such provisions include those that violate the principle of presumption of innocence, apply collective responsibility, deny right to due process, and allow for destruction of property or detention without charge, among others.
- 10) A constitutional or other legal mechanism should to be devised to determine how the people of FATA will decide the future status of the tribal areas. Article 48 (6) is one example. The mechanism should be designed to include voices of all people of FATA and could be a referendum or indirect representation through locally elected representatives (local representatives would need this mandate explicitly stated in local government legislation or regulation). Such a mechanism should be incorporated in amendments to Article 247 so that the status of FATA is decided once and for all.
- 11) The Federation of Pakistan needs to revise the National Finance Commission (NFC) award and other budget instruments to ensure sufficient financial resources for democratic and economic development in FATA, including funds for effective implementation and enforcement of existing and new reforms in the tribal areas.
- 12) FATA should have an elected local government system. This right is enjoyed by people in the four provinces and people in FATA should also have this right.

ANNEX A

Constitution of the Islamic Republic of Pakistan (1973)

Official text of articles mentioned in the policy brief, updated to and including Constitution (Twentieth) Amendment Act, 2012 assented to by the President of Pakistan 28 February 2012. Article 1 on the Republic and its territories, from Part I: Introduction, from Article 184: Original Jurisdiction of Supreme Court, Article 247: Administration of Tribal Areas, from Part XII: Miscellaneous, Chapter 3: Tribal Areas. (Emphasis added).

Article 1

(1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan.

(2) The territories of Pakistan shall comprise:-

- (a) the Provinces of [Balochistan], the [Khyber Pakthunkhwa], the Punjab and [Sindh];
- (b) the Islamabad Capital Territory, hereinafter referred to as the Federal Capital;
- (c) Federally Administered Tribal Areas; and
- (d) such States and territories as are or may be included in Pakistan, whether by accession or otherwise.

(3) [Majlis-e-Shoora (Parliament)] may by law admit into the Federation new States or areas on such terms and conditions as it thinks fit.

Article 48 (6)

If at any time the Prime Minister considers it necessary to hold a referendum on any matter of national importance, he may refer the matter to a joint sitting of the Majlis-e-Shoora (Parliament) and if it is approved in a joint sitting, the Prime Minister may cause such matter to be referred to a referendum in the form of a question that is capable of being answered by either "Yes" or "No".

Article 184 (3)

Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

Article 247

(1) Subject to the Constitution, the executive authority of the Federation shall extend to the Federally Administered Tribal Areas, and the executive authority of a Province shall extend to the Provincially Administered Tribal Areas therein.

(2) The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of a Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.

(3) No Act of [Majlis-e-Shoora (Parliament)] shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of [Majlis-e-Shoora (Parliament)] or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.

(4) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter within the legislative competence of [Majlis-e-Shoora (Parliament)], and the Governor of a Province, with the prior approval of the President, may, with respect to any matter within the legislative competence of the Provincial Assembly make regulations for the peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province.

(5) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good Government of a Federally Administered Tribal Area or any part thereof.

(6) The President may, at any time, by Order, direct that the whole or any part of a Tribal Area shall cease to be Tribal Area, and such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper:

Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the Tribal Area concerned, as represented in tribal jirga.

(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless [Majlis-e-Shoora (Parliament)] by law otherwise provides:

Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.

ANNEX B

International Covenant on Civil and Political Rights (ICCPR)

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force 23 March 1976, in accordance with Article 49. Ratified by Pakistan 2010.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

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