

**THE FRONTIER CRIMES REGULATION**

**(Amendment) Regulation, 2011.**



**Commentary**

**By**

**MUHAMMAD MUSHTAQ JADUN  
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**DEDICATED**

***TO***

**All those  
Who died, got injured,  
In the line of duty.**

## **PREFACE**

During the last decade (2002-2012) Federally Administered Tribal Areas (FATA) has witnessed multiple legal, social and administrative changes. In August, 2001 Magistracy was abolished alongwith the Commissionerate. With the abolition of Magistracy PCS (Executive) Service became non-functional as regard to Magisterial functions.

By 2005, and accelerated promotions due to devolution, PCS (Executive) BS-17 officers got promoted to BS-18 and BS-19. A Vacuum was thus created at lower level of BS-17. A new cadre under the name of Provincial Management Service (PMS) was introduced. Mass scale induction of some 167 officers, in 2010 and their training in the Institute of Management Sciences, produced officers having scant knowledge of laws and adjudication. Additional Commissioners FCR were appointed for Peshawar and Southern Tribal Areas at Bannu. Immediately after 9/11 army was deployed in FATA. Efforts to reform FCR started in 2008 by a Committee under the Chairmanship of Justice<sup>®</sup> Ajmal Mian. Resultantly amendments were introduced in 2011. In June, 2011 special statute "Actions (in Aid of Civil Power) Regulation, 2011, was promulgated. It vested certain powers in the Army and Civil Armed Forces. In October, 2013 the Governor Khyber Pakhtunkhwa announced appointment of Assistant Political Agent (Judicial) in each Sub Division of Tribal Areas. It is a good move and would ensure a neutral and prompt adjudication under the FCR. Executive officers may be authorized to retain the quasi-judicial powers such as preventive action under 40 FCR for securing peace. Separation of Judicial powers from Executive also warrants further reformation of FCR; which will also be briefly discussed.

FCR is unique law in the sense that it is procedural as well as substantive law. It also empowers the judicial officers to deal with Civil, Revenue and Criminal cases. Contrary to common perception FCR (Regulation III of 1901) was enacted for the then North-West Frontier Province (Renamed as Khyber Pakhtunkhwa) under the Eighteenth Constitutional Amendment, 2010). It was extended to FATA in 1937. FCR is inclusive in nature. Its relation to other laws has been comprehensively

explained in Section-3 of Regulation. The powers conferred under FCR may be exercised in addition to any other law for the time being in force in Tribal Areas in which all or any of the provisions of FCR are, for the time being, in force. FCR refers to various provisions of Code of Criminal Procedure (Cr.P.C) 1898 (Act V of 1898), Pakistan Penal Code (PPC) 1860 (XLV of 1860) and Limitation Act, 1908 (IX of 1908). Besides recording evidence, framing issues, passing judgment in Civil and Revenue cases and extensive referrals to other laws in FCR, presupposes comprehensive training, experience and knowledge of Presiding Officers with regard to Law of Evidence and Code of Criminal Procedure. Jurisdiction of High Court and Supreme Court of Pakistan has been specifically ousted under Article 247(7) of Constitution of Islamic Republic of Pakistan. While Under Section 10 of FCR there is restriction on jurisdiction of Civil Courts to call in question the legality of anything done, or purported to be done, in respect of any matter, the cause of action whereof has arisen in Tribal Areas. Thus very little Case Law, so far, developed for guidance of Presiding Officers. The Vacuum created due to abolition of Magistracy in 2001, and recruitment of PMS (Provincial Management Service), with poor training, has adversely affected the quality of adjudication in FATA. While hearing appeals against the decisions of Assistant Political Officers, both, in Criminal and Civil cases, serious irregularities were noticed. Need was felt to consolidate main provisions of various statutes, and elaborate certain basic concepts of evidence, Criminal and Civil Procedure. The ingredients of sections have been explained while referring to the legal terms, and their explanation, in the relevant statutes.

It is first ever such attempt. I expect suggestions from lawyers, and officers both serving and retired, having rich experience of tribal areas. It will enable us to make further improvements.

December, 2013.

**MUHAMMAD MUSHTAQ JADUN**  
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## FOREWORD

Pakistan is blessed, by Nature, with rich and diverse geographical, ecological, climatic, social and cultural conditions. The tribal belt; comprising of seven Agencies from Bajaur in the North to South Waziristan in the South, alongside six Frontier Regions located between the Settled districts and the tribal Agencies, forms a significant geographical and administrative unit.

The existence of more than one laws, in one country with reference to FATA has often been questioned. However, FATA is not the sole exception in this regard. In modern countries like USA, and more relevantly in India, due to commonality of history and culture, such multiplicity of laws is common.

The tribes living in this region were, for centuries governed by their own traditions and customs, which they inherited from generation to generation, till the British extended the Frontier Crimes Regulations to their area. The “Riwaj”; the amalgamation of local customs, traditions, cultural and social values of the tribal people is the crux of FCR. Because of this very fact, this law was hardly felt as an alien document by the tribal people.

After Independence, FATA continued to be governed by the same law wherein the President of the country is the highest executive authority and the Governor of Khyber Pakhtunkhwa (former NWFP) discharges the responsibilities as Agent to the President while exercising powers of Chief Executive of this tribal belt.

Extensive legal reforms were introduced by successive governments in rest of the country which led to a desire amongst the tribesmen and their elected representatives to reform the FCR as well. The national leadership and the government responded to the will of the tribesmen, and after having sought their opinion through a consultative process, finally introduced a set of reforms in FCR in 2011.

In the back-drop of the above realities, this book is a good attempt with objective commentary on FCR and CPC which would serve as a valuable guide to the students of law and government functionaries alike.

The definitions and explanations of different articles; sections and the sub-sections of the FCR reflects the hard work of the author. Explanation of the law in relation to Cr.PC, CPC and Qanoon-e-Shahadat Order-1984, already enforced in rest of the country, gives a clear picture of the thoughts and aims of the author in making it a truly educative and useful document.

Also, the law in itself sufficiently speaks about its peculiar nature and the author has also rightly explained the pros and cons of the circumstances which warranted to bring amendments. Since reforms is a continuous process, therefore, the author rightly deserves due acknowledgement of his valuable contribution in making it understandable for public servants and students of law. I wish him all the best.

**February, 2014**

**Engr. Shaukat Ullah  
Governor  
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- **Administrator Municipal Committee Abbotabad, Project Manager Dir Integrated Project.**
- **Deputy Secretary to Governor, Deputy Commissioner Kohat, Political Agent, North Waziristan and Deputy Secretary Home Department.**
- **Director Civil Defence, Managing Director, Elementary Education Foundation, and Programme Director Primary Health Care KPK.**
- **Secretary Inter-Provincial Coordination, Khyber Pakhtunkhwa.**
- **Secretary Elementary & Secondary Education, Khyber Pakhtunkhwa. Currently serving as Commissioner DIKhan KPK (2014).**

### **Research Papers and Publications.**

- **FATA: A Socio-Political Appraisal**
- **Forestry: Facts and Fallacies.**
- **Institutional Reforms and Devolution of powers to Districts.**
- **Durand line issues.**
  
- **UNESCO Publications.**
- **Conceptual Framework of Literacy Programme**

- **Operation Plan for Literacy**  
**(UNESCO.Org.PK/education/Life/nfer – library).**
- **Supervision and mobilization of literacy programme**
- **Social mobilization for literacy.**
- **Quality Assessment of Literacy programme.**
- **Huner Zindagai, Amli aur Samaji Khwangi – 1**
- **Amli aur Samaji Khwandgi – 2**



## **VIEWS OF ADDITIONAL CHIEF SECRETARY FATA**

The FCR was promulgated in 1901. Major amendments were made in 2011. It was the law of land in the true sense of the word. Those who are well-versed in it know that much debate and correspondence preceded its promulgation. In spite of much forethought given to it, for over a century, no attempt was made to explain its true spirit and utility to its critics.

This commentary is a maiden attempt by Mr. Mushtaq Jadoon, who has been through the mill and has seen it all over the years as a practitioner. I strongly feel that it will not only serve as a commentary but also as text book, a reference, and a digest of case law relating to the FCR. It will also be useful for the students who wish to gain insight, for the pleaders who contest cases under FCR in various courts; and for the presiding officers who adjudicate according to its provisions. This commentary will provide much needed guidance to all who look for a truer comprehension of this less understood legal framework.

This commentary also lays down a strong foundation for further research and study in this important area of law. It may therefore act as encouragement for other practitioners and academicians to further explore this law, which has ensured maintenance of semblance of peace and order in one of the most volatile regions in the world.

**Peshawar  
Feb, 2014.**

**ARBAB MUHAMMAD ARIF  
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## Chapter - I

### HISTORICAL BACKGROUND

Britishers annexed Punjab in 1849. Present day Province of Khyber Pakhtunkhwa, Federally Administered Tribal Areas (FATA), Former Princely states mainly constituting, Provincially Administered Tribal Areas (PATA) were part of Punjab. In 1901 North-West Frontier Province (NWFP) was created as Chief Commissioner Province under the overall governorship of Governor Punjab. Mianwali, a Sub Division of District Bannu, was detached and created as separate district. Sub Divisions of Bhakkar, Lybia and District of Dera Ghazi Khan was separated from Derajat Division and placed under Multan Division. Bhakkar remained as sub Division of Mianwali District in Rawalpindi Division. Attock Tehsil was detached from Hazara District and placed under Rawalpindi Division as a separate district.

Under 1935 Act, NWFP was upgraded to full Province under a Governor and the Provincial Assembly came into being after 1937 elections. FATA remained under the Central Government and administered through the Governor NWFP. Same Constitutional status granted to FATA under 1935 Act, Independence Act, 1947, 1956 Constitution, Constitution of 1962, Legal Frame Work Order 1969 and 1973 Constitution. During One Unit the FATA was given representation in the West Pakistan Assembly as well as Central Assembly. Under the Constitution of 1973 FATA is represented by twelve Members in the National Assembly and eight Senators in the Senate of Pakistan.

#### 2. **Sikh Rule (1818 -1849)**

Sikh only succeeded to penetrate upto Jamrud in Khyber Agency of FATA. During their brief rule they dealt with the people of FATA through the Governor and District Administration of Settled Districts.

#### 3. **British Rule (1849 – 1947<sup>1</sup>)**

Except Malakand, Britishers consolidated their position in the rest of the Khyber Pakhtunkhwa in 1849. Malakand Expedition of 1895 gave weak foothold to the Britishers mainly through the Maliks and Rulers of Princely States in Malakand Division.

### **3.1. Close- Door Policy, (1849 – 1870)**

Since annexation of Punjab by the Britishers in 1849 the administration of NWFP and Tribal, occupying the territories between administrative border of British India and Afghanistan, remained a sour point.

Anglo-Afghan-Wars of 1843 and 1878, vaguely, set the area of control between the British and Afghan Governments. The boundaries between the Settled Districts of erstwhile NWFP like Peshawar, Kohat, Bannu, DIKhan, Hazara, D.G.Khan and Tribal Areas were quite demarcated not due to efforts of British Government of India but due to historical tribe- wise distribution of land since Centuries. Beyond the territories of Colonial Indian Government the Tribal, of present day FATA, constituted a 'Buffer Zone' between Afghanistan and India. In fact there was no demarcated boundary between Afghanistan and FATA and the Kabul Government had claim over entire FATA and Pushtun Territories of Baluchistan – then called British Baluchistan.

**3.2.** Russian advancement under the Czar of Russia, into Central Asia, from 1870 onward and efforts of Iran to gain influence over Herat and Kandahar, alerted the British Government of India to abandon the Close- Door Policy, described by some of the authors as an "Era of masterly inactivity"

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<sup>1.</sup> 'The Pathan' by Sir Olaf Kirk Caroe .Oxford University Press, 1958.

Under Close- Door Policy the Deputy Commissioners of the adjoining districts to Tribal Areas, were managing the Tribal affairs mainly through the Rulers of Princely States, Nawabs and Khans who acted as 'Middle Man' between the Tribal and British Sarkar. Incursions by the Tribal into settled territories remained frequent and punitive expeditions into tribal areas resulted in huge loss of life on both sides. Besides the 'Middle Man' rarely acted as honest brokers. Soon the British Government realized the futility of Closed- Door Policy. External factors like Russian designs, and access to, "Warm Waters" theory were also some of the catalysts prompting change in the 'Frontier Policy'.

And with this the theatre for the "Great Game" set, which unfortunately, with some change, both, of strategy and actors, continue till this day. As the First Phase of the 'Great Game' ended in 1947 the 'Cold War' (1947-1992) set the Second Phase which culminated with the Russian invasion of Afghanistan in December, 1979. Second Phase ended with the Russian withdrawal in 1989. Revolution in Iran (1979) and emergence of Central Asian States prompted the neighboring countries to extend their sphere of influence in Afghanistan and FATA. Thus Third Phase of 'Great Game', played with much inferior mindset, continued till September, 2001. American, and Western Allies, invasion of Afghanistan in October, 2001 has pressed into action the Fourth Phase with no ending in sight as we step into the year 2014.

3.3. It was Sir Robert Sandeman, who in 1866, convinced the British Sarkar to break loose from this 'Close Door' Policy.<sup>2</sup>

He was of the view that one could not tame a Pathan or Baluch tribe merely by coercion and threats backed up by spasmodic use of force through military expeditions



### 3.4 **Open - Door Policy.**

It was under the pressure of Great Britain that the boundaries of Afghanistan with Russia and Iran were demarcated. British succeeded to create a 'Buffer State' of Afghanistan as Russia ceded control of Wakhan Corridor. By 1890 Russia was exerting pressure on the Great Britain to demarcate the eastern boundaries of Afghanistan with India. After hectic diplomatic efforts Durand Line Treaty was signed in November, 1893 and Afghanistan relinquished all claim over Chitral, Bajaur, Kurram, Waziristan and British Baluchistan.<sup>3</sup>.

British made advancement into tribal areas and by 1895 Tribal Agencies of Malakand (including Bajaur), Khyber, Kurram, North and South Waziristan were created. Frontier Regions were attached with the adjacent districts. For all the five Tribal Agencies independent Political Agents were appointed. Commissioner of Peshawar and Derajat (including DG Khan district, Mianwali, Bhakkar and Liah Districts of present day Punjab) were vested with the powers under Punjab Frontier Crimes Regulation 1887(PFCR) and later on Frontier Crimes Regulation, 1901.

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2. 'Notes on Frontier Policy' Civil Secretariat NWFP, 1938.

3. "Durand Line Issues" by Muhammad Mushtaq Jadun (DMG) Deputy Secretary Home and Tribal Affairs Department NWFP (2003): Unpublished.

#### **4. Evolution of Frontier Crimes Regulation.**

The areas constituting NWFP (including DG Khan, Mianwali and Attock districts of Punjab) and Baluchistan were managed under Regulation IV of 1873. In 1887 Punjab Frontier Crimes Regulation (PFCR) was promulgated for the areas mentioned above<sup>4</sup>.

The basic structure of PFCR was more or less the same as Frontier Crimes Regulation, 1901 except that under PFCR powers of Deputy Commissioners were limited to imposition of fine only; later on extended upto 7 years imprisonment.

##### **4.1 Analysis of PFCR.**

British Government carried out analysis of PFCR in 1897-98. Extract of views offered by the administration are given as under:-

###### **a. Commissioner Dera Jat (1887)**

“The Councils (Councils for elders), are open to bribery and bending to the wishes of Magistrate. The punishment of innocent persons through the instrumentality of jirgas will cause more distrust and ill feeling. Pathan is deterred by nothing so much as the certainty of punishment. So small punishment of Jirgas are better than none.

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4. Punjab Government Civil Secretariat (Foreign / Frontier)

Volume I-V.1887.

**Capt. C.M.Dalas. D.C Bannu to Commissioner Dera Jat (October 1897)**

“Jirga are very reluctant to bring in simple finding of guilt, especially among the Wazirs. They will try to settle the case and then make the complainant say that he is satisfied or they bring in finding that through guilty according to custom accused should only be fined. I would recommend that the DC should have the power to enhance the punishment, as the crime rate has not decreased during the last ten years.

**b. Commissioner DeraJat (March 1892)**

“Extension of Regulation has tended to suppress the crime. Selection of members of council is very crucial. System is not popular among the people. Since DCs had only powers of fine so they used to impose heavy fine to ensure imprisonment in default of fine”

**c. F.D Cunningham Commissioner Peshawar (Jan 1898) to Chief Secretary Punjab.**

“The conflict between our laws and Pathan code of honour must continue till such time as Pathans change his nature (and that will not be soon) for one cannot mould our system to fit barbarous and blood –thirsty customs”.

**d. Capt, H.S. Fox DC Hazara (18<sup>th</sup> Jan 1898) to Commissioner Peshawar.**

“Jirga system is a failure in connection with murder trial”.

#### **4.2 Salient features of PFCR.**

Apart from security proceedings in case of criminal reference (Section 13) and civil reference (Section 10) the DC had the power to:-

- a. Remand the case to Council of Elders for further inquiry and findings.
- b. Refer the case to a Second Council of Elders for further inquiry and findings.
- c. Acquit or discharge the accused or
- d. Pass the sentence as per findings given by the council with two-third majority. Maximum punishment was upto 7 years. Same procedure existed in regard to civil reference.

#### **5. Creation of Province.**

In 1901 North-West Frontier Province (NWFP) was created as Chief Commissioner Province under the supervision of Governor Punjab. D.G.Khan, Bhakkar, Liah , Attock and Mianwali were separated from new Province and included in Punjab. Dera Ismail Khan ceased to be a Division.

In 1901 Frontier Crimes Regulation FCR promulgated. It was applicable to Baluch and Pathan Tribes., extended to FATA in 1937. In March, 1969 the three princely states of Malakand namely Swat, Dir and Chitral and Amb - Daraband in Hazara District were merged and declared as Provincially Administered Tribal Areas (PATA). Same status exists under the 1973 Constitution. FCR, 1901 amended in 2011.

## **6. Colonial Analysis of Frontier Policy (1938)<sup>5</sup>.**

Ten years prior to our Independence British undertook a review of “Open- Door Policy” after its implementation since 1870. During this long period many military expeditions were carried out plus three Anglo-Afghan Wars. The analysis was made when a war in Europe was imminent; and it started in 1939.

Apart from failures, and successes, of Colonial Masters in NWFP and FATA this report provides an insight into Tribal Administration and tribal psyche. Some of the facts are relevant, even today. One cannot rule out the inherent bias of Britishers but we can always draw our own conclusions.

## **7. Excerpts from confidential documents<sup>5</sup>.**

- i) On Durand Line Lord Lansdowne wrote in 1904.

“It must not be supposed that the agreement which has been concluded will, by itself, be sufficient to prevent all further trouble, unless advantage is taken of the settlement in order to put the affairs of the Frontier upon a proper footing”.

- In 1897 the whole of the tribals between Gomal and Swat broke into open revolt. Military forces were withdrawn and the Government was back to ‘close- border’ system of indirect control from without.

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<sup>5</sup>. Note on Frontier Policy. GS & P Deptt NWFP. 2031-FS-4000 (Confidential). 1938.

In 1899 Lord Curzon introduced the policy of substitution of regular garrisons with Tribal forces.

- Between 1850 and 1922 there were no less than 72 expeditions with an expenditure of one million pounds a year.

During Third Afghan War in 1919 tribals in Waziristan broke into open revolt and the Afghans occupied Wana.

ii) **Causes of failure of policy<sup>6</sup>.**

- (i) “Failure to appreciate the psychology of the tribesman who, though savage, is also a human being, and who will never respond to impersonal treatment alternating between subsidy today and a punitive action tomorrow”
- Above statement may be seen in the context of our post- 9/11 policy of so called 3 D<sup>s</sup> e.g. Deterrence, Dialogue and Development all pressed into action at the same time but in reality none ,effectively

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<sup>6</sup>. Frontier Policy. General Staff Simla June, 1931

iii) **Sir Ralph Griffith Governor NWFP. (8,11.1933)**

Methods of 'burn and scuttle' had failed to obtain any measure of success. Our policy must undergo a radical change in the direction of:-

- a) Friendly relationship with the Afghan Government and
  - b) Substitution of 'burn and scuttle' system with a policy of gradual penetration, control and civilization of the tribes.
- No man is quicker than the tribesman to sense tendencies and to suspect hidden implications in change of policy. No man is quicker to forecast results calculated to be advantageous or adverse to his interests; and probably no mass of men are more ready than are our Frontier tribesman to react in combination to the stimulus of fanaticism, threat or fear.

iv) **Inspector General of Police NWFP. Mr.A.F Perratt (30.5.1938)**

Disarmament may be one of the options. One is led to the conclusion that a, "Roman wall" would be better solution still". The solution is complete withdrawal from Waziristan.

v) **Note by O.K Caroe Resident Waziristan (25.6.1938)**

Advantages of a Close- border policy are economy, safety of NWFP, freedom from dangerous commitments and release of substantial military force. It is better to refer voluntarily at a moment which suits us. The whole of Waziristan should be given up. .

vi) **Mr. A.D.F Dundas Chief Secretary NWFP.**

Withdrawal from tribal areas is a counsel of despair; a defeatist policy and beginning of breakup of the Indian Empire. We have to wean them from their racial and cultural affinities with Kabul. Pathan is by nature prone to take advantage of sign of weakness which he thinks he can detect.

vii) **Political Agent Capt.R.N.Bacon North Waziristan (24.10.1938)**

Although Faqir of Ippi and his followers are blamed for all our troubles but there is:-

- a. Lack of well defined policy.
- b. Hatred of tribesman for the army.
- c. Reduction in benefits and
- d. Anti-British propaganda.

viii) **Mr.E.F.Lydalls APA Miranshah (24.10.1938)**

Ex Governor NWFP Sir Ralph Griffith called our 'Frontier Policy' one of peaceful penetration, while Ex-Commander in Chief of India Sir Philip Chetwode proclaimed that Waziristan was a training ground for our army with a view to next World War. These two aims do not seem very compatible. Government policy lacked definition. With world conditions what they are, can we afford to continue this glorified game of tops?

ix) **Major G.L.Mallam. October, 1938 ICS. Chief Secretary NWFP**

Military occupation of Waziristan has led to increased friction between Government and the tribes and has fostered a war mentality on both sides. It has taken away the leadership from moderates to fanatics and religious elements.

x) **Lt.Col. W.F.Campbell Resident Waziristan. (June, 1939) to Chief Secretary.**

Our policy in Waziristan is, control by means of peaceful penetration and civilization.



## **8      Current Situation.**

Some of the views, expressed by the Colonial Masters in 'Frontier Policy' are relevant even after a period of 75 years.

FATA has witnessed a sea change since then. Somehow externalities, mainly due to Afghanistan, are highly relevant. All the ethnic and religious groups of Afghanistan have century's old blood and sectarian relationship with the same communities in Pakistan, Iran, Turkistan, Uzbekistan, Tajikistan, Turkey and Azerbaijan. Events in Afghanistan have always affected the socio-political landscape of Baluchistan, Khyber Pakhtunkhwa, FATA and to lesser extent the rest of the Muslims in Pakistan and India.

### **8.1      Our policy and causes of failure in FATA<sup>6</sup>.**

Socio-Political aspects and other issues have been discussed in the report, "FATA: A Socio-Political Aspect". Some of the key factors are highlighted as under:-

- i)      Government of Pakistan Policy of appeasement, mainly due to external factors such as security threats from India, Pukhtunistan stunt, weak and unstable Governments in Pakistan lacking public mandate and support.
- ii)     Afghan Jihad (1979 -1990).

Durand Line almost melted away due to our flawed policies. In a bid to win over the tribal monetary benefits and weapons were doled out. The whole tribal society further criminalized. Fundamentalists and religious elements strengthened. The painful realities emerged after 2001. Militancy has weakened the writ of the State.

- iii) Extension of adult franchise and politicization of administration by successive governments, to win over the political representatives through undue favours adversely, affected the political administration. Allocation of huge funds, permits and illegal trade of narcotics and weapons corrupted the officials. Nexus of officers and handpicked Maliks resulted in emergence of a new class of filthy riches. Common man further marginalized.
- iv) In a democratic setup Provincial Government started meddling into tribal affairs due to pressure of elected representatives. We have large vote bank of tribal settled in Charsadda, Mardan, Peshawar, Kohat, Hangu, Bannu, Lakki, Tank and D.I. Khan Districts.
- v) Cultural lag, inefficiency and Corruption of political administration, along with the Maliks, led to degeneration of 'Malki system' which was the basis of Tribal Administration. New power players such as nouveaux riches, religious and political parties emerged. Absentee Maliks lost hold over their fellow tribesmen.

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<sup>6</sup>. FATA: A Socio-Political Appraisal by Muhammad Mushtaq Jadun Deputy Secretary to Governor NWFP (December, 1997).

## 9 **Paradoxes of Tribal Society.**

Sociology deals with the things as they are and not that they ought to be. Tribal society has many merits, one being egalitarianism.

These paradoxes require critical analysis in regard to formulation of policy and its implementation.

i) Ritualistic Islam.

Ready to wage a war for Islam anywhere in the World but not ready to live for it and quickly revert back to their Rewaj in case any Islamic injunction runs parallel to their customs and traditions.

ii) Conservative yet hedonistic. Collectively they depict a posture of conservatism but in their individual capacity they are quite epicureans.

iii) Followers of religious leaders yet non-conformist.

It is mostly 'negative' following against the Government and the State but hardly follow the religious leaders in reforms movements.

iv) Individual actions but collective reaction and always gets united against the Government.

v) Demand for rights albeit without obligations.

vi) Always Clamour for all the fundamental rights available to the people of Settled Areas but not ready to shoulder even constitutional obligations. Tax and even utility bills, are equated with the concepts of honor; commonly known as 'Qalang' (Tax) and 'Nang'.(honour).

- vii) Resist authority yet obey honest and strong leadership.
- viii) May not consent but submit and acquiesce to authority. One cannot buy their loyalties for ever but can only be hired. So a friendship of expediency has existed between them and the State authority over the centuries. Even within their own tribe no elder can claim lifetime ‘Wak’ (mandate). It is temporary and based on issue to issue. There is a clear difference of mode of authority in case of tribal elders, a Punjabi or Sindhi Landlord and Baluch Sardar. In FATA it is collective and consultative leadership.

## **10 Current Stakeholders in FATA.**

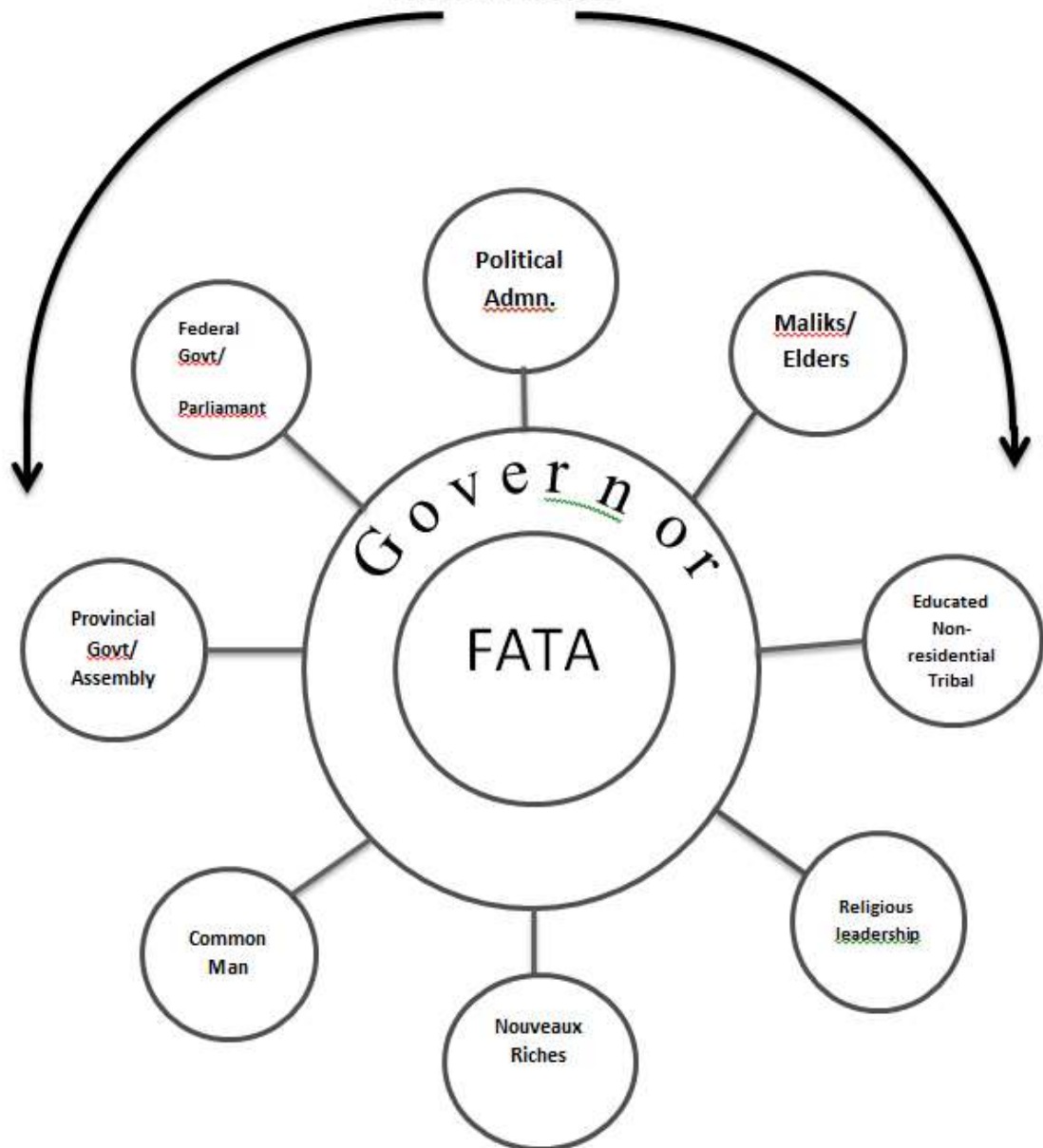
In a tribal society, especially in case of Pushtuns, power vacuums do not last for longer period. Rather it is promptly filled by either new power players or there is change of roles within the current stakeholders. Without description, which is obvious, the current stakeholders in FATA are as per Figure 1.

Each stakeholder has defined role and most of the time with conflicting interests.

Thus all the policies and laws in FATA are to be formulated, implemented and analyzed while keeping in view the paradoxes of society and the stakeholders.

FIG.I

External factors



FATA having an area of 27220 square kilometers; comprises of seven Tribal Agencies and six Frontier Regions of Peshawar, Kohat, Bannu, Lakki, Tank and D.I. Khan Districts. Deputy Commissioners of all the six districts have been declared as Political Agents for the respective Frontier Regions to enable them to exercise all the powers of Political Agents as per provisions of Frontier Crimes, Regulation, 2011.

FATA Population, as per 1998 Census, is 3.176 million. Current estimated population is about 4.7 million (2013) <sup>7</sup>

## **12. Constitutional Position**

Under Article 1 of the Constitution of the Islamic Republic of Pakistan. FATA is a territory of Islamic Republic of Pakistan<sup>8</sup>. Article 246 of the Constitution describes, and categorize, the Tribal Areas into Provincially Administered Tribal Areas (PATA) {Article 246 C (b) (i) (ii)} and Federally Administered Tribal Areas (FATA). Procedure for administration of Tribal Areas has been prescribed in Article 247 of the Constitution. The executive authority of the Federation shall extend to FATA while the executive authority of a province shall extend to PATA:-

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- 7. FATA Statistics, FATA Secretariat, Population Censuses Organization of Pakistan.
- 8. The constitution of the Islamic Republic of Pakistan, 1973, Popular Law Book House Turner Road Lahore.

Under Article 247 (3) no Act of the Parliament shall apply to FATA or to any part thereof, unless the President so directs and in giving such a direction, with respect to any law, the president may direct that the law shall, in its application to a Tribal Areas or to a specified part thereof, have effect subject to such exceptions and modification as may be specified in the direction. The President may, from time to time, give such directions to the Governor of the Province relating to whole or any part of a Tribal Area as he may deem necessary and the governor shall, in exercise of his functions under this article, shall comply with such directions. Thus the Governor Khyber Pakhtunkhwa acts as Agent to the President with regard to administration of FATA. Article 247 (5) empowers the President to make regulations for the peace and good government of FATA or any part thereof.

President may, by order, direct that the whole or any part of a Tribal Area shall cease to be Tribal Area provided the President shall ascertain the views of the people of the Tribal Area concerned, as represented in Tribal Jirga.

Under Article 247 (5) the jurisdiction of Supreme Court and the High Court has been specifically ousted in relation to Tribal Areas. Parliament may, however, by law can extend the jurisdiction of High Court and the Supreme Court of Pakistan.

### **13. One Country and Multiplicity of Laws**

It is the most frequently asked question, by quite a few, that why there are more than one law (s) in one country ? References are made towards Principles of Policy and fundamental rights enshrined in the constitution. Their contention is that multiplicity of laws tantamount to discrimination which is against the spirit of constitution. While Frontier Crimes Regulation, 1901 (FCR) is declared as “regressive” law the proponents, usually, ignore the concessions and privileges granted to the locals of FATA. Tribal Areas of Pakistan is not the sole exception. Even in the most advanced countries like United States of America such multiplicity of laws is common. In all the fifty states of America there is variation in

substantive laws. In USA there are 300 plus Indian Reservations. Under Indian Reorganization Act, 1934 there are 550 Recognized Tribes. Red Indian Constitutes 1.6% of US population. Within the State of Alaska there are 225 Recognized Tribes. There are special laws for Red Indians which ensure certain rights ad privileges to Indian Tribes<sup>9</sup>.

Such special laws range from education to family, inheritance and customs. US Supreme Court has declared that the state has no right to extend its laws to Indians.

Constitution of United States envisages special concessions with regard to tribes as Congress have the power to regulate commerce with the foreign nations, states and with Indian Tribes.

Red Indians were subjected to compulsory education as late as 2009 through “The Right of children to free and compulsory Education Act, 2009” <sup>10</sup>.

India is more relevant to us due to commonalty of history and culture.

Article 44 of the Constitution of India declares that there shall be uniform civil code for the citizens, but the same constitution allows score of exceptions and concessions to various tribes. There are separate chapters and articles exempting Union Territories and even the States from uniform application of provisions of constitution. FATA has remained a distinct administrative and legal entity<sup>11</sup>.

Indian constitution has created quite new entities. Few examples are quoted as under:-

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<sup>9</sup>. John Tierney, June 28, 2005 Tierney @nytimes.com.

<sup>10</sup>. American History Education Material /Non Commercial UB-TAH©2006.

<sup>11</sup>. Constitution of Indian (NIC) Nation Portal of India National Information Centre Deity, MOCIT, Government of India (updated August 21, 2013).



Article 239. Administration of Union Territories. Article 244 deals with the administration of Scheduled Areas and Tribal Areas.

Article 370, 371, 371 A, 371 (I) Temporary Provisions with respect to the State of Jammu and Kashmir.

**Article 239.** Union Territory shall be administered by the President acting, to such an extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.

**Article 240.** The President may make regulations for the peace, progress and good government of the Union Territory of:-

- (a) Andaman and Nicobar Island,
- (b) Lakshadweep
- (c) Dadra and Nagar Haveli.
- (d) Daman and Diu
- (e) Pondicherry
- (f) Chandigarh

**Article 371.** Special provisions with respect to the state of Nagaland

No Act of Parliament in respect of religion or social practice of Nagas, Naga Customary law and procedure and administration of civil and criminal justice according to Naga Customary law, ownership and transfer of land and its resources, shall apply to the state of Nagaland unless the legislative Assembly of Nagaland by resolution so decides.

**Article 371 (B).** Special provisions with respect to the State of Assam.

**Article 371 (C).** Manipur State (Hill Areas of the State).

**Article 371 (D).** Andhra Pradesh. Special quotas in civil service. High Court jurisdiction ousted.

**Article 371 (G).** Mizoram. No Act of Parliament in respect of

- (i) Religious or social practice of the Mizos.
- (ii) Mizo customary law and procedure.
- (iii) Administration of Criminal and Civil justice according to Mizo customary law.

It is evident from above references that Customs and traditions of the Tribals in the States, and Tribal Areas within the States, have been protected under the constitution.

Without being apologetic there is need to reform the laws and administration of Justice. Tribals of FATA are not a legal entity created under the FCR but centuries old social entity. FCR was framed for the North West Frontier Province. It was extended to FATA in 1937.

## CHAPTER -II

### SOME CONCEPTS OF LAW

PA, DCO and APAs exercise the powers of Civil Courts under this Regulation. Unless contrary is provided in the Regulation, the Judicial officers are bound to follow the provisions of Code of Civil Procedure (CPC or may be referred as Code hereinafter). Few concepts alongwith the relevant sections and provisions of CPC are briefly discussed.

#### 1. **Pith and substance theory of law.**

The doctrine was first articulated in *Cushing VS Dupuy* where the judicial committee of the Privy Council held that certain rules of civil procedure could be described under the federal bankruptcy power. The full test was articulated in *General Motors VS City National Leasing* by Dickson CJ.

- Pith means the central part; the heart or essence.

Substance means strength or vigor.

- If there is challenge to the legislative competence of legislature with regard to a particular enactment, the courts to go into, and examine the, true character of the enactment, its object, scope and effect to find out whether an enactment in question is genuinely referable to a field of the legislation. (*Zamer Ahmad Latif ur Rehman VS The State of Maharashtra & others* (2010).

- Nomenclature of an enactment is not conclusive for determining its true character and nature. (The State of Karnataka & others VS M/S Drive US Enterprises (2001).
- To determine the essential character of the law. What the legislature wanted to accomplish?

The doctrine of Pith and substance relates to finding out the true nature of statute.

## 2. **Few Rules of interpretation:-**

- As a whole the statute shall be interpreted while taking ordinary, plain and natural meaning of word. Unless provided otherwise.<sup>1</sup>
- We must analyze the background of a statute in its historical perspective. What were peculiar socio-political and economic factors? What was the intention of framers? In some of the Constitutional petitions, challenging the vires of statute, courts even asked for details of the debate in the Parliament or the Provincial Assemblies.
- What was the evil which the framers intended to curb or specific redressal of grievance?
- The function of the courts is to say not what the legislature meant and ought to have meant, but what has said that it meant (P 1959, 987; P. 1958; A 1943 B 169 FB; A 1942 A 394 FB).
- What warranted amendments in the old statute? What were the deficiencies in the old statute?

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<sup>1</sup> The Code of Civil Procedure (Act V of 1908). Commentary by Aamer Raza A.Khan Senior Advocate Supreme Court of Pakistan. (Tenth Edition, 2010). Printed Irfan Afzal Press Lahore.

Recent such example is amendment in the FCR, 1901. Amendments were required due to external factors and security environment in FATA and to maintain public peace in FATA.

- Where fundamental rights of public are involved provisions of statute, curtailing liberty of public, must be construed strictly. The basic principle is to favor the petitioner against the might of the state.
- The section and the statute should be taken as a whole. The language should not be paraphrased. (2001 SCMR 103, 1998 SCMR 2207).
- Technicalities should not be allowed to defeat ends of justice.
- Illustrations are part of the statute and can be utilized for purpose of construing it, but illustration cannot enlarge, restrict modify or over-ride the provisions of sections. (P 200 6 SC 109; P1951 FC 62).
- The explanation is to clarify the contents and purpose of section and should not be taken in isolation. It does not enlarge the scope of the section.

(P 1981 SC1, 1981 L492).

**2.1 Proviso** is subordinate to main section. It excludes certain provisions or class of people. It provides exceptions.

- The former statute will give way to later. Same applies to sections within a statute.

**2.2 Precedents.** Obiter dictum is not binding as precedent. Decisions of Superior courts are binding on all the courts. Superior Courts interpret and explain the law in many decisions. Minority view in a judgment is not binding, however, judicial officer may learn from such interpretations.

- Some time 'may, will be construed as 'shall'.

### 3. **Decree**

Defined in Section 2(2) of CPC. A decree is formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regards to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include rejection of a plaint (the determination of any question within section 144, and Order XXI) but shall not include:-

- (a) an adjudication from which an appeal lies an appeal from an order, or
- (b) any order of dismissal for default.

**Explanation.** A decree may be preliminary when further proceedings have to be taken before the suit can be completely disposed off. It is final when such adjudication completely disposes off the suit. It may be partly preliminary and partly final.

- A decree means an order by one in authority, a judicial decision. (P1975 SC15; 2004ML D 510).

#### 3.2 **Ingredients of Section 2(2) of CPC**

- **Decree.** A judicial decision in a court of equity. Any court order<sup>2</sup>.
- Adjudication is judicial determination of a matter in controversy. In order that adjudication is a decree within the meaning of Sub Section (2) of Section 2 (CPC), it should be.
  - (i) given in a suit
  - (ii) determine the rights of the parties
  - (iii) such rights should be with regard to all or any of the matters in controversy

- (iv) be conclusive and
- (v) Formally expressed.

### **3.3 Suit.**

Suit has not been defined in CPC. In America referred as Law Suit. Any civil proceeding which is instituted by presentation of a plaint is a suit. An appeal is continuation of suit and will lead to final decree<sup>2</sup>.

### **3.4 Parties**

Persons who are on the record as plaintiff or defendants (1994 MLD 2334). In appeal the parties are referred as Appellants and Respondents.

### **3.5 Rights.**

Refers to substantive rights. Interlocutory orders on matters of procedure which do not determine substantive rights are not decrees.

### **3.6 Regarding.**

All or any of the matters in controversy.

It means subject matters of the suit regarding which relief is sought. A suit should be, normally, disposed off by a single decree except cases where preliminary decree may be required to be passed.

### **3.7 Conclusively.**

The decision should be conclusive by determining the rights of parties, regarding all or any of the matters in controversy.

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<sup>2</sup> Black's Law Dictionary (Eight Edition)

### **3.8 Formal expression.**

A decree should be formal expression which is to be executed and not the judgment.

Various forms of decrees are given in Appendix D to Schedule I of CPC.

Order 20 (Rule 6 of CPC prescribes contents of a decree.

### **3.9 Classes of decree**

Section 2 (2) CPC contemplates

- (i) Preliminary decree. Where further proceedings have to be taken and suit is still pending.
- (ii) Final decree, when suit is completely disposed off.
- (iii) Partly preliminary and partly final decree.

Order 20 (Rule 12) of CPC.

Directing inquiry into rent or profit is a preliminary decree. In FATA such cases of preliminary decree are common. Delivery of possession of property or declaring rent or profit is final decree.

- (iv) Order rejecting a plaint.

It is appealable although rights of parties have not been determined. Order 7 (Rule 11) and rule 13 CPC deals with rejection of plaint.

- (v) Dismissal in default itself constitutes a decree.



**3.10      Decree Holder.**

Section 2(3). Any person in whose favour a decree has been passed or an order capable of execution has been made.

Section 2(8). Judge means Processing Officer of Civil Court.

**3.11      Section 2(9) Judgment.**

Means the statement given by the judge on the grounds of a decree or order.

- There should always be a statement of grounds for decision.

Section 2(10). Judgment - debtor means any person against whom a decree has been passed or an order capable of execution has been made.

**3.12      Section 2(12) 'mesne profits'**

'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefore, together with interest on such profits, but shall not include profits due to improvements made by the persons in wrongful possessions.

Word 'mesne' is pronounced as 'maene'. Improvements made by the person in wrongful possession is a question of fact. Such improvements are usually made by the tenants. It may happens that a legal tenant in occupation of land may be declared in illegal possession if he refuses to pay the rent. In FATA presiding officers frequently confront determining question of mesne profits. Tribal Elders in FATA are already well versant with this concept

and they have centuries old traditions now almost codified. APA, PA or DCO must carefully examine the question of 'mesne' profit.

#### **4. JURISDICTION**

- Courts, in civil cases, must determine question of jurisdiction at the very outset. Once issue of jurisdiction is settled only then admissibility is determined. As per Section 9 of CPC Courts have jurisdiction to try all suits unless barred. Sectional 151(CPC) vests inherent powers in civil court to assume jurisdiction. It is to be barred specifically or impliedly through law. The maxim 'ubi jus ibi remedium' means where there is a right there is remedy.

##### **4.1 Subject matter jurisdiction.**

What is the nature of claim made?

If a court lacks jurisdiction its decision and order will be nullity in law.

Jurisdiction is to be determined by examining the contents and claim made in the plaint.

##### **4.2 Territorial jurisdiction:**

As provided in Section 16 of Civil Procedure Code (CPC). Territorial jurisdiction is to be ascertained from the order of appointment and relevant laws vesting Territorial jurisdiction as a consequence of such appointment.

##### **4.3 Pecuniary Jurisdiction:**

Section 6 and 15 of Code place limitations upon the jurisdiction of courts. Pecuniary jurisdiction is notified by the Government and revised from time to time.

Section 9 of CPC empowers the courts, subject to provisions contained in the Code, to have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred. In the explanation to this Section, it has been further clarified that all suits in which the right to property is contested is a suit of civil nature, notwithstanding that such right may depend on the decision of question as to religious rites or ceremonies.

## **5. RES-SUBJUDICE.**

Section 10 of CPC envisages the concept of Res Subjudice and prescribe the procedure for stay of suit. The purpose of Section 10 is to avoid multiple and parallel jurisdiction and thus to prevent courts, having same jurisdiction, to admit and adjudicate upon two parallel litigation in respect of same matter in issue. In the absence of this legal remedy any person may be subjected to the malafide litigation in various courts in the same place or at different places.

Mr. A resides at place B and carry on business at place C. He cannot file two similar suits at both the places on the same subject and issue.

### **Section 10 (CPC)**

No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under same title where such suit is pending in the same or any other court in Pakistan established or continued by the Central Government and have like jurisdiction or before the Supreme Court of Pakistan.

**Explanation:**

The pendency of suit in a foreign court does not preclude the courts in Pakistan from trying a suit founded on the same cause of action.

**5.1 Condition of Res Subjudice:**

- (i) The matters in issue in both the suits must be directly or substantially the same. (P1976K249.P1971 i>286).
- (ii) Previously instituted suit must be pending.
- (iii) In both the cases courts must be having jurisdiction.
- (iv) Same parties in both the suits.
- (v) Same title under which both the parties are litigating.
  - Any party may object and raise question of Resubjudice. Party may withdraw or the court may dismiss such suit. The court where suit was filed may dismiss such suit.
  - The purpose is to save time of courts, cost and also facilitate the common man who should not be subjected to parallel litigation.
  - Decision given in the previous suit shall operate as Resjudicata by virtue of Section 11.

**6. RES JUDICATA.**

Section 11 of CPC deals with, and explain essential ingredients of, Resjudicata.

- Legal maxim. No one should be vexed twice for the same cause.

## **6.1    Essential Ingredients of Section 11 (Resjudicata).**

- (i) Same issue in which the matter was directly and substantially an issue in a former suit.
- (ii) Same parties or between parties under whom they or any of them claim.
- (iii) Same title.
- (iv) In a court of competent jurisdiction.
- (v) Such matter has been heard and finally decided by such court.

Explanation to Section 11 describes the circumstances which may attract the principles of Resjudicata.

- No party can claim relief from the same court on the basis of injustice. Review provisions are attracted when there is an error apparent on the face of record. Scope of review is quite limited and can not be enlarged to restart the adjudication. Right of appeal and revision is there but to the superior forum.
- To put an end to litigation.
- Resjudicata prohibits a court to allow raising the same action in successive action. It precludes a suitor from raising the same cause in successive actions.

## **7.    Estoppel:**

It prevents the parties from saying inconsistent things in successive actions (2012 CLC 1620).

Resjudicata prohibits the court to allow re-agitating the same issue. Estoppel prevents a party from raising an issue and saying self-contradictory things.

### 7.1 **Bar to further Suit:**

Section 12 CPC precludes a plaintiff from instituting a further suit in respect of any particular cause of action. He shall not be entitled to institute a suit in respect of such cause of action in any court to which the Code applies.

- Suit barred in cases covered under Order 2 rule 2 (frame of suit), order 9 rule 9 (appearance of parties and consequence of non-appearance). Order 23 rule 1 (Death, Marriage and insolvency of parties) and order 7, rule 11 (Plain).
- Courts in FATA to examine issue of Resjudice and Resjudicata at the time of admissibility.

Section 33 CPC, order 20 rules 1-6 (Judgment and Decree).

## **THE FIRST SCHEDULE (CPC)**

### **ORDER 1: Parties to Suits**

**Rule 1**            who may be joined as plaintiffs. All persons in a suit in whom any right to relief in respect of or arising out of the same act

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## **CHAPTER -III**

### **Frontier Crimes Regulation**

#### **(Regulation-III of 1901)**

It is clarified that the current effort is not, strictly speaking, confined to Section by Section, commentary of Frontier Crimes Regulation, 1901 (FCR) and Frontier Crimes (Amendment) Regulation, 2011 (Regulation). Relevant concepts related to Regulation, and peculiar circumstances of FATA, are also explained.

Regulation is, to some extent, substantive as well as procedural law. Provisions of Code of Criminal Procedure 1898, Qanun -e- Shahadat 1984, Pakistan Penal Code 1860, Limitation Act 1908, Civil Procedure Code 1908 and score of other laws, mutatis mutandis, apply to adjudication under this Regulation.

At appropriate level relevant concepts of others statutes shall also be explained. FCR was amended in 2011 through a Regulation by the President of Pakistan in Pursuance of the Provisions contained in clause (5) of Article 247 of the Constitution of the Islamic Republic of Pakistan. It is now called, "The Frontier Crimes (Amendment) Regulation, 2011 (henceforth to be referred as Regulation). Sections and sub-sections of Regulation have been reproduced in original and with different font in order to facilitate the reader. Sub-sections and Clauses of a Section given in brackets. While paras of commentary are in numerals (1,2,3.....), or Roman (I,II,III.....) or alphabet (a,b,c.....) but without brackets.

**Regulation.**

***Further to amend Frontier Crimes Regulations, 1901.***

***Amended FCR (12-08-2011).***

***Whereas, it is expedient further to amend the Frontier Crimes Regulation, 1901 (III of 1901) for the purpose herein after appearing;***

***Now, therefore, in pursuance of provisions contained in clause (5) of Article 245 of the constitutions of Pakistan, the President of Pakistan is pleased to make the following Regulation:-***

**Section (1). Short Title and Commencement.**

- (1) This Regulation may be called the Frontier (Amendment) Regulation, 2011.***
- (2) It shall come into force immediately.***

For this purpose amended Sub Section - 2 is as under:-

**2. Substitution of long title and preamble Regulation III of 1901.**

***In the Frontier Crimes Regulation, 1901 (III of 1901), hereinafter referred to as the said Regulation.***

- (a) for the long title, the following shall be substituted, namely:-***  
  
***“further to provide for maintenance of peace, law and order and good governance in the Federally Administered Tribal Areas;***
- (b) for the preamble, the following shall be substituted, namely:-***



***“WHEREAS it is expedient further to provide for maintenance of peace, law and order and good governance in the Federally Administered Tribal Areas.***

***NOW, THEREFORE, in pursuance of clause (5) of Article 247 of Constitution of the Islamic Republic of Pakistan, the President is pleased to make the following Regulation:-“and***

***(c) the words, colon and dash “ it is hereby enacted as follows”***

***Shall be omitted.***

**3. General Amendment, Regulation III of 1901:-**

***In the said Regulation, for the words “Deputy Commissioner” or “District Magistrate” wherever occurring the words “Political Agent” or “District Coordination Officer” or “Assistant Political Agent”, as the case may be, shall be substituted***

**4. Amendment of section 1, Regulation III of 1901:-**

***In the said Regulation, in section 1:-***

***a) for sub-section (3) the following shall be substituted, namely:- <sup>(4)</sup>***

***(3) It shall extend to such Federally Administered Tribal Areas as may be notified by the Governor from time to time in pursuance of Article-145 of the Constitution of Islamic Republic of Pakistan. The Federally Administered Tribal Areas include the tribal areas as specified in the Third Schedule of this Regulation; and***

***b) Sub Section (4), (5) and Explanation: - Omitted***

- Previously there were sub sections 3, 4 and 5 which have been omitted through the Frontier (Amendment) Regulation, 2011.

Under Section 3 FCR was to be extended to the areas specified in the Third schedule. The Governor was competent to exempt any such area from the operation of all or any of its provisions. These areas included the Divisions of Quetta, Kalat, District of Lasbela, Nasirabad Sub-Division of Jacobabad District. The added areas of the Hazara, Mardan, the former excluded areas of upper Tanawal and the Baluch Areas of Dera Ghazi Khan.

Now the amended Regulation is applicable to the seven Tribal Agencies and six Frontier Regions (FRs) of FATA. Its current application is according to constitution. It was at the time of One Unit, upto March, 1969, that the Governor of West Pakistan was competent to exempt, or extend to, areas of Sindh and Baluchistan. Word 'Governor' has not been defined in Section 2 of the amended Regulation. Tribal Areas under Article 246(a)(i) of Constitution include Tribal Areas of Baluchistan as well.

- For the first time reference to Article 247 (5) of the Constitution of Islamic Republic of Pakistan has been given. Under Clause (5) of Article 247 the President may make regulations for the peace and good governance of FATA or any part thereof. The very purpose of Clause (5), with regard to good governance, has been incorporated in the preamble of amended Regulation. Thus now Constitutional and legal cover has been provided to the amended Regulation. Clause (5) of Article 247 starts with, "Notwithstanding anything contained in the Constitution"

This proviso clearly accord exemption to the special articles of the Constitution dealing with administration of FATA. Such exemptions are common, both, in the Constitutions of India and Pakistan. It is the basic principle of law that the specific provisions and articles exclude the application of general articles and provisions.

- This amendment was made to replace the words”, District Magistrate or Deputy Commissioner” wherever occurring with the words, “Political Agent or “District Coordination Officer” or Assistant Political Agent” as the case may be. Now the office of Deputy Commissioner has been restored; so amendment is required. Since trial under Regulation is mostly done by the Assistant Political Agents, therefore, the current adjudication is legally covered as per provisions of Section 4 of amended Regulation. But there are other Sections such as Section 4(3), 4(4), Section 5, 8 (1) 2, 4, 9(b) 11(1,2) 11A (1,2,3,4,5), 11 B, 12,19,20,21, 26, 34, 36, 39 (1,2), 40 (1,1,2,3,4,6), 40-A, 41,42,43(3), 45,51,54,55,55AAA (1,2) 57(1), 58 (1,2), 58A and 64 (Part I); where words, ‘District Coordination Officer, still appears.

### **3.1 Proposed amendment in Sub Section 3 of Section 1.**

“Words ‘District Coordination Officer’ wherever occurring in the Frontier Crimes Regulation (Amendment) Regulation (III) of 1901 shall be replaced, and deemed to be replaced the day office of Deputy Commissioner was revived, with the words, “Deputy Commissioner”

- In FCR, 1901 there were Sub Sections 4 and 5 alongwith explanation. Now under Sub Section 4, Sub Section 3 of Section 1 (FCR, 1901) has been amended.

### **Sub Section 3.**

The FATA Areas specified in the Third Schedule of Regulation also mentioned. Third Schedule also amended, and areas of Khyber Pakhtunkhwa and Baluchistan deleted from Third Schedule. Now it contains seven Tribal Agencies and six Frontier Regions. Frontier Regions (FRs) placed under the administrative control of respective Deputy Commissioners of Districts to which these six FRs are attached.

Furthermore Sub Section 4 and 5 alongwith Explanation defining 'class' have been deleted. Previously FCR was applicable to Baluchis and Pathan Tribes and against such other classes as the Provincial Government may, by notification in the official Gazette declare.

**Section 2. <sup>(5)</sup> Definitions:-**

*In this Regulation unless there is anything repugnant in the subject or context, :-*

- (a) *“Appellate Authority” means an Authority established under Section 48 of this Regulation;*
- (b) *“Counsel of Elders” means in the Federally Administered Tribal Areas, a Council of three or more respectable elders appointed by the Political Agent or District Coordination Officer, as the case may be, and presided over by Assistant Political Agent vested with powers under Section 30 of the Code of Criminal Procedure 1898 (Act V of 1898);*
- (c) *“FATA Tribunal” means a Tribunal established under Section 55A;*
- (d) *“Governor” means the Governor of Khyber Pakhtunkhwa as Agent to the President of Pakistan for Federally Administered Tribal Areas in terms of Article 145 of the Constitution of the Islamic Republic of Pakistan;*
- (e) *“Qaumi Jirga” means Jirga consisting of respectable elders and representatives of the tribes; and*
- (f) *“Rewaj” means usages, traditions and Customs of tribes in vogue in Federally Administered Tribal Areas.*

- 1) Prior to amendments definitions included Quetta and Kalat Divisions of Baluchistan, Deputy Commissioner, Commissioner and the Governor. Now definition of “Appellate Authority”, “FATA Tribunal”, Qaumi Jirga” and “Rewaj” have been added and defined. Definitions at Section 2 (a), (b), (c) and (d) are clear.

At Section 2 (e) “Qaumi Jirga” has been defined as, ‘Jirga consisting of respectable elders and representatives of the Tribe’. In the Frontier Crimes Regulation, 1901 (FCR) there was Section 11 dealing with criminal reference to Council of Elders (Council). In the amended Regulation 11 (B) has been added which empowers the Political Agent or District Coordination Officer to take cognizance of any offence or civil dispute in exceptional circumstances, if so recommended by a ‘Qaumi Jirga’ of the Tribe in the interest of justice and public peace. Ingredients of Section 11(B) will be discussed at later stage. The purpose is to draw the attention of adjudicators and lawyers towards the importance of this definition. Current definition of Qaumi Jirga is too broader and can be misinterpreted and misused. Terms “respectable elders” and ‘representatives of the tribes’ needs further clarification. These terms are more socio-political in nature than legal. Words “tribes” has not been defined anywhere in the amended Regulation either in the body of the statute or Section 2. The whole Agency or Sub Division may constitute a tribe. Utmanzai Tribe of North Waziristan Agency includes both Wazirs and Dawars. Tribes in FATA are divided into sub-tribes, sections and sub-sections, right up to the level of village. In the whole FATA genealogical tree is clear and quite segmented. In definition there is need to add the word “Tribe, section, and sub-section, to be notified as such by the Political Administration, for the purpose of ‘Nikat’ which means share in profit and loss. It may happens that ‘elders’ and representatives’ at section and sub-section level may recommend taking cognizance of an offence or civil dispute by the Political Administration but the other dominant and co-dominant sections, and the tribe as a whole, may not agree to such action. Word ‘respectable’ has more sociological connotation and less legal. It is, thus, a superfluous word added to the definition. Elders and representative for the purpose of this definition should not be

handpicked individuals of Political Administration but elders and representatives nominated by the concerned Tribe, section or the sub section with a clear 'Wak' (Mandate).

- 2) "Rewaj" means usages, traditions and customs of the tribes in vogue in Federally Administered Tribal Areas. Customs, traditions, usage are recognized under Section 62 of Qaunun - e - Shahadat, 1984. It is admissible in evidence. As per Islamic provisions of our constitution, and universally accepted principles of ethics and law, such customs and usage should not be un-Islamic, un-ethical and must be acceptable in the local environment of particular segment of society. One such example of un-Islamic, unethical and illegal customs and usage may be deprivation of female with regard to inheritance and family laws. These are some of the fundamental rights which can not be denied under the pretext of customs, usages and traditions.

### **Section 3. Relation of Regulation to other laws.**

- (1) *The provisions of this Regulation shall take effect in case to which they apply, notwithstanding anything contained in any other law for the time being in force.***
- (2) *The Powers conferred by this Regulation may be exercised in addition to any powers conferred by or under any other law for the time being in force, and where the contrary is not expressed or implied, other laws in force in Tribal Areas in which all or any of the provisions of this Regulation are for the time being in force shall, so far as may be, apply to cases dealt within that place under this Regulation.***
- (3) *<sup>6</sup>The laws specified in the second schedule shall apply to the Federally Administered Tribal Areas.***

1. In FCR, 1901, there were two Sub Sections. Now Sub Section 3 added which specify laws applicable to FATA as specified in the Second Schedule to amended Regulation. Section 3 (2) is an enabling Clause which further elaborates exercise of powers conferred under this Regulation. Thus powers conferred by this Regulation are inclusive and in addition to the powers already conferred under any other law for the time being in force in Tribal Areas.

This Regulation is procedural as well as substantive law. Many additional powers have been conferred, as specified in the Second Schedule to this Regulation. Few such laws are Pakistan Penal Code 1860, Custom Act 1969. Prohibition (Enforcement of Hadd Order, 1997 and Employment of Children Act, 1991. However in exercise of additional powers, conferred under other laws extended to FATA, regard will be had to the provisions of other laws where contrary is expressed or implied.

2. **Section 3 (2).** Specify the laws mentioned in Second Schedule which are applicable to FATA. Second Schedule is at annexure (II). The laws mentioned in the Second Schedule will be commented upon in the relevant chapter. Section 3, explains the relationship of amended Regulation to other laws.

3. Sub Section 1 of Section 3, elaborates that provisions of this Regulation shall take effect. It may be mentioned, or not mentioned, in any other law for the time being in force. For example, as per provisions of Code of Criminal Procedure, 1908, Ordinary and Special powers of Magistrate First Class have been specified including Section 30 (Cr.P.C) 'powers'. Still while exercising these powers, the Magistrates elsewhere in Pakistan cannot try some of the offences like 302, 304 etc of Pakistan Penal Code, 1860 (PPC) as these are triable by the court of Sessions Judge. The same have been mentioned in the Second Schedule of amended Regulation and APAs, having powers of First Class Magistrate and Section 30 Magistrate, are competent to adjudicate the offences mentioned in Clause (1) of the Second Schedule to amended Regulation.

4. Sub Section 2 further clarifies the position. The powers conferred by this Regulation are in addition to any other powers conferred by or under other law which has been extended to FATA. The purpose of Sub Section 1 and 2 is to bring the laws, which have been extended to Tribal Areas and are applicable in FATA, in conformity with the amended Regulation especially in procedural matters. There is one provision that unless contrary is expressed or implied.

**5. Extension of Laws to Tribal Areas.**

Tribal Areas include both FATA and PATA. No law of a Provincial Assembly, which means Provincial Assembly of Khyber Pakhtunkhwa and Baluchistan, shall extend to Tribal Areas or any part thereof, unless the Governor of the Province in which the Tribal Area is situate, with the approval of the President, so directs. Section 1 of statutes, usually, states that it shall extend to the entire Khyber Pakhtunkhwa or Baluchistan. In case of Punjab and Sindh Provinces such law gets extended to the entire province but in Khyber Pakhtunkhwa and Baluchistan because of article 247(3) of the constitution, a Summary is moved by the Home Department for approval of Governor to seek permission of President with regard to extension of law(s) to PATA. Summary is then moved to State and Frontier Regions, and after vetting by the Federal Law Division, sent to the Presidency. As soon as approval is accorded, and received back, the Home Department send the same to Law Department for Gazette Notification. After gazette notification such law stands extended to PATA. It is a misconception that no law of province or Federation can extend to PATA. All the Provincial and Federal laws can be extended to PATA but its extension requires procedure laid down in article 247 (3). PATA of Khyber Pakhtunkhwa (KP) were mostly princely states, three in Malakand and one in former Hazara District. Framers of Constitution had fair idea of tribal nature of society both in KP and Baluchistan. Immediate extension of Federal and Provincial laws would have met resistance as is evident from disturbances of Malakand in 1994, when PATA Regulation was repealed by the Supreme Court of Pakistan.



Similarly no Act of Parliament shall apply to FATA, or any part thereof, unless the President so directs under Article 247 (3). As per Article 247(1) the executive authority of the Federation, subject to the constitution, shall extend to the FATA and the executive authority of a province shall extend to PATA. In extension of any Federal law to FATA and PATA and any provincial law to PATA the President or the Governor, as the case may be, may direct that the law shall, in its application to a Tribal Area have effect to such exceptions and modifications as may be specified in the direction. The language of Article 247(3) and (4) indicates that the Governor can give such directions, with the approval of President, in case of PATA. In case of FATA the Governor can do so with the approval of the President as Agent to the President for FATA. Both in case of FATA and PATA certain areas can be excluded from extension and operation of Provincial or Federal laws. We see such exception and modification in application of Code of Criminal Procedure 1898, in case of amended Regulation. Such exceptions and modifications have been given legal protection in Section 3 of amended Regulation, 2011.

Article 247(1) makes the exercise of Executive authority of the Federation to FATA and executive authority of Province to PATA subject to constitution.

After the Eighteenth Constitutional amendment the discretionary powers of Governor and President abolished. Now under Article 105 of the Constitution the Governor shall act on, and in accordance with, the advice of the Cabinet or the Chief Minister. But Article 105 of the Constitution opens with the words, "subject to the Constitution". Experts are of the view that as per article 129 of the Constitution the executive authority of the province shall be exercised in the name of the Governor by the Provincial Government, consisting of Chief Minister and Provincial Ministers, which shall act through the Chief Minister. Thus whatever directions are received by the Governor from the Federal Government and the President he shall, while exercising his authority, in regard to PATA, is bound to act upon the advice of Chief Minister and the Cabinet. Similarly the executive authority of the Federation shall extend to FATA (Article 247 (1). The President may, with respect to any matter within the legislative competence of parliament,

make regulations for peace and good governance in FATA. The Governor of a province can also make such regulations, with the prior approval of President, with respect to any matter within the competence of the Provincial Assembly, (Article 247 (4). Under Article 48 of the Constitution the President shall act on, and in, accordance with the advice of Prime Minister or the Cabinet. However Article 48(2) empowers the President to act in his discretion in respect of any matter which he is empowered by the Constitution to do so. Article 47(5) empowers the President with respect to any matter to make regulations for the peace and good government of FATA or any part thereof. One view is that since Sub Article (5) of Article 247 opens with the words, "Notwithstanding anything contained in the Constitution" therefore while reading the article 247(5) with article 48(2) the President may exercise his discretionary powers in respect of FATA. Some legal experts are of the view that since all the powers emanates from exercising the executive authority of the Federation and language of Article 247(1) is quite clear that the executive authority of the Federation shall extend to FATA, but even this Sub Article (1) of Article 247 open with a qualifying Clause, "subject to the Constitution". Thus if the Constitution makes certain exclusions and exemptions then provisions of Article 48 are not attracted. Budget for the FATA is sanctioned by the Parliament (referred to Senate for non-binding advice only). Therefore one view is that after the passage of 18<sup>th</sup> Constitutional amendment both the President and the Governors are bound to act upon, and in accordance with the advice of Federal and Provincial Governments, respectively. Still some are of the opinion that the powers of Governor and the President, in regard to Tribal areas, are discretionary.

**Section 4. Assistant Political Agent:-**

- (1) *In any <sup>(7)</sup> Agency or Frontier Region in the whole or any part thereof where all or any of the provisions of this Regulation are for the time being in force, the <sup>(8)</sup> Governor may confer powers under Section 30 of the Code of Criminal Procedure, 1898 (act V of 1898) on any Assistant Political Agent.***
- (2) *<sup>(9)</sup> Every Assistant Political Agent so appointed shall have all the ordinary powers of a Magistrate of the first class as specified in Schedule III and additional powers as specified in Part I of Schedule IV to the Code of Criminal Procedure, 1898(Act V of 1898), and may pass any sentence of imprisonment or fine or both as provided in this Regulation.***
- (3) *When exercising any of the powers of a Political Agent or District Coordination Officer under this Regulation, an Assistant Political Agent shall be deemed, for the purpose of this Regulation to be the Political Agent or District Coordination Officer, as the case may be, and shall exercise all or any of the powers specified in the first schedule.***
- (4) *Every Assistant Political Agent shall exercise his powers in subordination to the Political Agent or District Coordination Officer, as the case may be, and in such cases or class of cases and within such local limits as the Political Agent or District Coordination Officer may, by order in writing, direct.***

1. Section 4, having four Sub Sections, deals with the powers of Assistant Political Agent, Political Agent and District Coordination Officer. Under FCR, 1901 the Provincial Government was empowered to appoint any

Magistrate to exercise powers under the District Magistrate. Under amended Regulation the powers have been more classified.

Now, as per Section 4(1), Governor may confer powers under Section 30 of the Code of Criminal Procedure, 1898, (Cr.PC) in any Agency or Frontier Region, on any Assistant Political Agent (APA).

➤ **Section 30 Cr.P.C.**      **Offences not punishable with death.**

Notwithstanding anything contained in Section 28 and 29, the Provincial Government may invest any Magistrate of the first class with power to try as a Magistrate all offences not punishable with death.

**2. Sub Section (2)**

- Apart from conferment of powers under 30 of Cr.P.C every Assistant Political Agent (APA), so appointed, shall have all the ordinary powers of a Magistrate of the First Class as specified in Schedule III and additional powers as specified in Part-I of the Schedule IV to the Cr.PC. Such APA, having special powers of Section 30 and additional powers, may pass any sentence of imprisonment or fine or both as provided in this Regulation.

**2.1 Schedule III.**      **Ordinary powers of Provincial Magistrates**

Ordinary powers specified in Schedule III to Cr.PC are conferred under Section 36 of Cr.PC. All Magistrates shall have the powers hereinafter respectively conferred upon them and specified in the Third Schedule. Such powers are called “their ordinary powers” After the word, “All” the “Judicial and Executive Magistrates” omitted by ordinance XXXVII of 2001 with effect from 14.8.2001.

These Ordinary powers under Schedule III (Annexure II) specify powers of Magistrate Third Class. Part II of Schedule II specifies ordinary powers of a Magistrate of the Second Class. While Part III of Schedule III deals with ordinary Powers of a Magistrate of First Class.

Under Section 4 (2) of amended Regulation every APA shall have all the powers of Magistrate of the First Class. It means that every APA will, also, be having ordinary Powers of Magistrate of the Third Class and Magistrate of the Second Class. These powers, of all the three categories of Magistrate, broadly, deals with powers of arrest, custody, power to attach and sell property, power to issue search warrant, power to initiate proceedings under Section 107, 108, 109, 110 and 126, record confession under Section 164, to take cognizance of offences under Section 190 Cr.PC and other powers. Judicial Officers must carefully study the relevant provisions of Cr.P.C as well as the case law. Ample case law has been developed with regard to these procedural powers.

### **3. Sub Section (3)**

Powers are conferred on APAs as Additional District Magistrates. This Sub Section further clarify that the APAs, while exercising the powers under amended Regulation, shall have the powers of a Political Agent (PA) or District Coordination Officer (DCO), as the case may be. Thus APA, PA and DCO have concurrent judicial powers. Due to this reason appeal against the decisions of APA lies to the Commissioner.

### **4. Sub Section (4)**

Every PA and DCO has supervisory powers to regulate the exercising of judicial powers by the APA. PA and DCO, under Sub Section 4 are empowered to specify, by order in writing:-

- (a) The Local limits for APA within which the powers conferred under Section 4(1) and (2) are to be exercised. Thus it is not essential that an APA must exercise these powers in the entire FR or Sub Division of any Agency, as the case may be. Keeping in view the administrative expediency and public interests PA or DCO can define the local limits for an APA. It means a Tehsil or any area of a Sub Division may be excluded from the jurisdiction of APA. PA or the DCO may assign such excluded area to any other APA or he can himself assume the role of Magistrate to exercise the powers as per

section 4 (1) and (2). Similarly PA or DCO may also specify the class of cases to be adjudicated by the APA. Thus a PA or DCO may assign certain cases, both falling in criminal and civil jurisdiction, to APA. In both the cases PA or DCO is required to issue such an order in writing. It invariably means that he will give reasons for doing so.

- b. In such written order PA or DCO will clearly specify the local limits of APA which means territorial jurisdiction. PA or DCO may also specify the nature of cases, such as Criminal and Civil, to be adjudicated by the APA. Prior to Code of Criminal Procedure (Amendment) 2001, in the District of Khyber Pakhtunkhwa District Magistrates were exercising the similar powers. Now under Section 17 of Cr.P.C of the Sessions Judge exercise similar powers for the Magistrates appointed under Section 12, 14 and 14(A) of Cr.P.C. Under Section 16 of Cr.P.C Provincial Government may make such rules for the guidance of Magistrates respecting the classes of cases to be tried.

**Section 5. Power of Political Agent or District Coordination**

**Officer to transfer the case:-**

***The Political Agent or the District Coordination Officer may, on the application of any of the parties, after notice to the other party and hearing them, transfer any civil or criminal matter to any Assistant Political Agent, within thirty days from the appointment of the Council of Elders and shall record reason thereof for such transfer of the case.***

1. The Political Agent or the District Coordination Officer may transfer a case from one APA to another. The ingredients of Section 5 set the following parameters for such transfer of case.
  - a. On an application of any of the parties. Any one or both the parties may file such an application, stating grounds, for such transfer.

- b. On receipt of such an application it is incumbent upon the Political Agent or the District Coordination Officer to examine the application judiciously.
- c. **Notice to other party.** If a PA or DCO, after examination of the case, come to conclusion that there are sufficient and reasonable grounds for such transfer he will issue a notice to the other party. It is basic right of any or, both, the parties to know the grounds for such transfer. Such notice must state the grounds for transfer. Application filed by the opponent party may also be enclosed.
- d. Both Civil and Criminal cases can be transferred on such application.
- e. **Hearing them.** The PA or the DCO shall give hearing to both the parties. Very word 'them' indicates that both the parties must be heard. Complainant should be the first one to justify his application for the transfer to be followed by the other party; who may, or may not, agree to such transfer.
- f. **Shall record reasons.** Such order, transferring the case, will be a judicial order. The transferring authority shall state the reasons for order. In this hearing both the parties shall adduce evidence in support of their contention. It is evident that the PA or DCO may agree to such requests. It is not mandatory to accede to all such request with regard to transfer of cases. Word 'may' indicates that if the PA or the DCO is satisfied that sufficient grounds do not exists for such transfer the application may be rejected. Both in case of acceptance or rejection of transfer application reasons are to be recorded, because these orders are appealable. There is no bar in the amended Regulation to take away the right of a party to file an appeal to the Commissioner against acceptance or rejection of such an application. Basic spirit of law is that, both interim as well as final orders are appealable.

2. **Limitation.**

Application for transfer of case is to be filed within 30 thirty days from the appointment of Council. Section II of amended Regulation deals with Criminal Reference to Council. Under this Section, when cognizance of offence is taken, case is registered and referred to Council of Elders. Council is nominated within ten days from the date of arrest of accused. The Council is required to submit its finding within thirty days. The purpose of this limitation is to avoid un-necessary delays. Otherwise also the parties have right of appeal against the decision of APA.

**Section -6** **Omitted.**

Under FCR, 1901 Criminal courts in Tribal Areas were competent to pass a sentence of whipping for certain offences, under the Indian Penal Code, 1860, in addition to any other punishment.

**Section -7** **Tender of pardon to accomplices:-**

*Section 337 of the Code of Criminal Procedure, 1898 (Act V of 1898), for the purpose of this Regulation, shall be construed to read as under:-*

- (1) *In the case of any offence, the officer, at any stage of the investigation or inquiry into, or trial of the offense, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, the Political Agent or the District Coordination Officer, as the case may be, may tender pardon to such person on condition of his making full and true disclosure of the whole of the circumstances within his knowledge related to the offence and to every other person concerned, whether, as principle or abettor, in the commission thereof:*



***Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or 'qatl' without permission of the victim or, as the case may be, of the heirs of the victim.***

- (2) The Political Agent or District Coordination Officer, as the case may be, who tenders a pardon under sub-section (1) shall record his reasons for doing so.***
- (3) Every person accepting a tender of pardon under this section shall be examined as a witness in the subsequent trial, if any.***
- (4) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.***

1. It is modified version of Section 337 Cr.PC.

Prior to Code of Criminal Code (Amendment) of 2001 District Magistrate was competent to tender pardon in case of offences of Pakistan Penal Code, 1860, including Section 216-A, 369, 401, 435 and 477-A. Now after amendments it is Officer In charge of Prosecution in the District. After promulgation of Qisas and Diyat Ordinance, as Criminal Law (Second Amendment) Ordinance, 1990, proviso was added in 1997 (Criminal Law (Amendment) Act, 11 of 1997) that no person shall be tendered pardon who is involved in an offence relating to hurt or 'Qatl' without the permission of the victim or heirs of victim. State can no longer accord pardon to an accomplice, unless heirs of victims or the victim give permission.

In 'Qatl' and hurt cases only victim or the heirs of victim can waive off Qisas in Qatl-i-amd (Section 309). Heirs can waive off Qisas with or without Diyat (Section 310, Section 312 and Section 313 PPC). On the basis of same principle; pardon can not be tendered to an accomplice in Qatl and hurt cases. Under Section 345 Cr.P.C Qatl and hurt cases are now compoundable. While Constitution of Pakistan Article 227 states that any law which is repugnant to the

injunctions of Quran and Sunnah shall be null and void. Still under Article 45 of the Constitution the President of Pakistan can tender pardon to any accused or convert death penalty to life imprisonment. Constitution is the Supreme law. While after the incorporation of Qisas and Diyat in the PPC the Presidential pardon should have been curtailed as far as punishments of Qatl and hurt are concerned. Such constitutional amendment would be in conformity with the basic Islamic principles of constitution.

The framers of amended Regulation had in mind the amendments made in the Code of Criminal Procedure in 2001 and Pakistan Penal Code in 1980 and 1997. Therefore the provisions of Section 337 of Code of Criminal Procedure have been redrafted for the purpose of this Regulation.

### **3. Section 7(1).**

While the Sub Section describes the word 'any offence' the proviso of Sub Section (1) excludes the offences related to hurt or Qatl. (Section 302 to 338 (c) of Pakistan Penal Code, 1860). Thus pardon cannot be tendered to accomplice, or accomplices, in the cases of Qatl and hurt without the permission of the victim or the heirs of the victim as the case may be. In case of Qatl it is the legal heirs (Wali) of the victim. While in case of hurt the victim, if he has attained age of majority, can himself give such permission. Wali (legal heirs of victim) have been explained in Section 305 of PPC, which is reproduced below:

Section 305. Wali. In case of a Qatl, the Wali shall be.

- a) heirs of victim, according to his personal law [but shall not include the accused or the convict in case of Qatl-e-amd if committed in the name or on the pretext of honour<sup>1</sup>, and
- b) the Government, if there is no heir.

Consent of heirs of victim is not valid in cases where the qatl-e-amad has been committed in the name, or on the pretext of honour. It means heir of victim of such

cases can not waive off Qisas under Section 309 and 310 of Pakistan Penal Code, 1860 (PPC). Where there is no legal heir of victim then the Government assumes the role of heir and it is also applicable to tendering pardon to accomplices.

The purpose of Sub Section (1) is to obtain evidence of any person supposed to have been directly or indirectly concerned or privy to offence. Such person, who is tendered pardon, must give full and true disclosure of the whole of circumstances. Such person may be principal accused or abettor.

## **2.1 Accomplice:**

An accomplice is a person supposed to have directly or indirectly concerned in or privy to the offence. He is guilty associate (PLD 1979 SC 53 P.93).

Under Section 16 of the Qanoon-e-Shahadat Order, 1984 an accomplice is a competent witness.

An accomplice is a co-accused until he is granted pardon after which he becomes approver and ceased to be co-accused. Exculpatory statement cannot be used against another co-accused (1989 P.Cr LJ 1262 P.Cr.L.J 211)

## **2.2 Exculpatory Statement:**

As abettor or principal accused the approver must make true and inculpatory confession of his guilt. Only inculpatory confession is relevant and admissible against the co-accused but such confession is to be proved in the very terms of Section-43 of Qanoon-e-Shahadat and occasion of proof or otherwise only come at trial (1998 MLD 1195).

Court may take into consideration such confession as circumstantial evidence against such other person. But the courts have held that punishment to co-accused should not be solely based on uncorroborated evidence of such an accomplice-turned approval. The reasons are that:

- a. Such a person is of low character as he joined the other co-accused in committing an offence.
- b. He turned against other co-accused just to save him.

Although, conviction of evidence of approval will not be illegal because it was based upon uncorroborated testimony of an accomplice. (Section 16 of Qanoon-e-Shahadat).

The court must examine the whole circumstantial evidence, given by the approver, in conjunction with the facts of the case. In administration of criminal justice no two situations can be exactly identical. Evidence of accomplice is to be scrutinized if evidence is inherently worth reliance and he is also corroborated through independent evidence (PLD 2002 Kar. 152).

The most known case of evidence based on confession of approver is conviction of Zulfiqar Ali Bhutto, (Former Prime Minister of Pakistan), (PLD 1979-SC-38). The final judgment was passed by the Supreme Court of Pakistan and the decision of Lahore High Court was upheld with 4:3 majority. The three dissenting judges elaborately discussed "Double Test Theory" for approver and held that conviction cannot be based on mere confession of an approver unless corroborated through independent evidence.

It must be noted that before recording the statement, of an accomplice turned approver, he must be granted pardon. When no pardon is tendered then approver makes his statement under Section 164 Cr.PC. Statement can only be recorded as confession subject to the restriction of this Section, but where such person has been previously tendered pardon and accepted, the statement has to be recorded as that of a witness, the former being without oath as an accused and the later being on oath (2005 YLR 717).

### **2.3     Restrictions.**

With the promulgation of Hudood Ordinance pardon cannot be tendered to an accomplice who is involved in an offence relating to hurt or 'qatl' without permission of the victim, or as the case may be, of the heirs of the victims. Insane and minor heir can not give permission in such cases. Now the state cannot tender pardon to accomplice in cases of Jurah or Qatl (1992 P.Cr.L.J.171). Evidence of an accomplice against a co-accused is inadmissible in case of 'Hadd' and 'Qisas' and though admissible in cases relating to offence liable to 'Tazir' only but conviction in such cases cannot be based solely on the uncorroborated testimony of such accomplice (1992 P.Cr.L.J.171).

#### **2.4 Who is Competent to tender Pardon ?**

In case of settled areas, prior to 1996 and 2001 amendments in the Cr.PC District Magistrate was competent to tender pardon to the accomplices. Now under Section 337 of Cr.PC in all the cases triable by the High Court or Court of Sessions and offences punishable upto ten years of imprisonment the Officer In charge of the Prosecution in a district may tender pardon to accomplice(s).

APA holding an inquiry, investigating or during the trial may recommend such an accomplice to the Political Agent or District Coordination Officer, as the case may be, for tendering pardon. While recommending such case for pardon, Assistant Political Agent must give reasons and justification for such pardon. In Hudood cases consent of the victim or heirs of victim must be obtained, recorded as statement and annexed with the recommendations. The Political Agent or the Deputy Commissioner shall pass an order, giving the background and reasons for tendering pardon to accomplice (s).

Under Section 7(2) of amended Regulation the Political Agent or the District Coordination Officer, as the case may, is competent to tender pardon.

#### **2.5 Recording of reasons.**

The purpose of section 7 is not to benefit an accused, or to encourage the crime. There must be compelling reasons to do so. Where there is sufficient

circumstantial evidence and the Inquiry Officer or the Prosecutors are sure that the case may stand the scrutiny of law there is hardly any need to tender pardon to an accomplice. In Hudood cases when victim or heir of victim agrees with the prosecution for requesting the court to tender pardon, Political Agent or the District Coordination Officer, as the case may be, shall record reasons for tendering pardon. In FATA circumstances may warrant such tendering of pardon in cases of hurt and murders, narcotics smuggling, kidnapping for ransom and sabotage activities. If there are sufficient grounds, and reasons to believe, that such disclosure is not only essential to convict the co-accused but may also be helpful in busting the gangs of criminals and those waging war against the country.

## **2.6     When Pardon can be tendered.**

Language of Section 337 Cr.PC and Section 7 of amended Regulation is clear. Pardon to an accomplice can be tendered at any stage of the investigation or inquiry or during the trial of offence.

- While Pardon may be tendered at any stage of investigation or inquiry; in case of trial it may be during any stage of trial but justice demands that when all the prosecution and defense witnesses are examined and evidence closed for final arguments, if so required, tendering pardon at such stage may tantamount to reopening and retrial of case. CrPC Section 338 empowers the High Court and the Court of Sessions to tender pardon any time before the judgment is passed.

## **2.7     Custody of accomplice.**

As per provisions of Section 7 (3) such person, unless he is already on bail, shall be kept in custody until the termination of trial. Bail is a concession and can be

cancelled and the accomplice can be called back if the court is satisfied that there are reasonable grounds. It may happen that an accused is bailed out and pardon is tendered at later stage.

## **2.8 Accomplice custody till termination of trial:**

Apart from other reasons , in case of FATA, custody of such person till termination of trial is in the interest of justice and may be for the accomplice own security. Such an accomplice, if allowed, may jump the bail and can jeopardize the whole trial of a heinous crime which may ultimately benefit the accused for want of evidence. Section 339 Cr.PC amply classify the logic behind keeping the accomplice(s) in custody till termination of trial.

## **2.9 Section 339 (Cr.PC). Commitment of person to whom pardon has been tendered.**

1. Where a pardon has been tendered under Section 337 or Section 338, and the Public Prosecutor certified that in his opinion any person who has accepted such tender has, either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter.

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

2. The statement made by a person who has accepted tender of pardon may be given in evidence against him at such trial.

3. No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Section 339 deals with the Pardon tendered by District Prosecutor.

Under Section 337 Cr.PC pardon can be tendered by the High Court or Court of Sessions before announcing a judgment. If the Public Prosecutor is of the opinion that such person, who accepted such tender, is either willfully concealing crucial facts essential regarding adducing evidence for trial or giving false evidence and thus not complying with the conditions of pardon such pardon may be cancelled. And what are those conditions? As the language of Section 337 Cr.PC and Section 7(1) of amended regulation indicates that pardon is only tendered when such person undertakes to make full and true disclosure of the whole of circumstances, within his knowledge, related to offence and to every other person concerned, whether, as principal or abettor in the commission thereof.

As explained earlier, quoting case law, such confession must be inculpatory. Section 339 Cr.PC empowers the prosecution and the courts to cancel the pardon and such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection of same matter.

Proviso to Section 339 Cr.PC sets the procedure for such person and his rights during the trial.

- Such person shall not be tried jointly with any other accused.
- He shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made.
- It shall be for the prosecution to prove that such conditions have not been complied with.
- Under Sub Section (2) and (3) of Section 339 Cr.PC, the statement made by such person who, earlier, was tendered pardon, may be given in evidence against him at such trial and such person shall not be prosecuted for the offence of giving false evidence in respect of such statement without



the sanction of the High Court. In Section 339 (A) Cr.PC procedure in trial of person Under Section 339 has been provided.

In amended Regulation only amended version of section 337 Cr.PC, is given in Section 7. We can only infer that the principles of 339 and 339A are also applicable to the accomplices' tendered pardon under amended Regulation. Suitable amendments are, however, required to cater for all legal requirements. Judgments of Presiding Officers in Hudood cases are appealable to the Federal Shariat Court thus any procedural lapse may benefit the accomplice(s) in the superior courts.

**Section 8.** **<sup>(11)</sup>Civil reference to the Council of Elders.**

*(1) Where the Political Agent or the District Coordination Officer, as the case may be, is satisfied from any information that a civil dispute exists between the parties which is likely to cause breach of peace, he may, for the settlement thereof make an order in writing stating the grounds for his being so satisfied, refer the dispute within fifteen days to the Council of Elders, for findings in accordance with Rewaj who shall give its findings within ninety days on the issue in dispute after making necessary inquiry and hearing the parties and their witnesses.*

*(2) <sup>(12)</sup> Where a reference to the Council of Elders is made under sub-section*

*(1), the Political Agent or the District Coordination Officer, as the case may be, shall nominate the Council of Elders. The names of the members so nominated be communicated to the parties, and any objection taken thereto by any of the parties, shall be*

***recorded. The Political Agent or the District Coordination Officer, as the case may be, shall dispose off the objections after hearing the parties and recording the reason thereof appoint the members of the Council accordingly.***

***(3) The order of reference made under sub-section (1) shall state the issues in dispute on which the findings of Council of Elders is required.***

***(4) <sup>(13)</sup>On receipt of the findings Council of Elders, the Political Agent or the District Coordination Officer, as the case may be, by recording his reasons may,-***

- a) pass a decree in accordance with the findings of the majority of the Council of Elders; or***
- b) remand the case to the Council of Elders for further inquiry and findings.***

1. This Section governs the civil adjudication in respect of land, other immovable and movable property, contracts, agreements, financial transactions, business, easement rights, its enforcements and all civil matters as per provision of Code of Civil Procedure 1908, (henceforth, to be referred as CPC or Code).

Where a reference is made to a Council of Elders, (hereinafter to be referred as Council) Political Agent or District Coordination Officer, as the case may be shall exercise all or any of the powers conferred by the C.P.C and Cr.PC. It means when such powers can be exercised, and are to be exercised, in a civil or criminal case then the courts are bound to follow all the procedures laid down in the C.P.C and Cr.PC with modifications made in the amended Regulation such as reference to Council. The relationship of other laws with this Regulation has already been explained, and discussed in Section 3 of amended Regulation. Section 3 is an enabling Section giving legality to modifications of provisions of Cr.PC, CPC and

other laws. The powers conferred under this Regulation are in addition to powers conferred, by or, under any law. However, in case of specific provision in any other law which may be contrary, whether expressed, or implied, than such provisions of law may apply to cases dealt under this Regulation.

- Section 8 has been modified under amended Regulation.

## **2. Information as to existence of dispute.**

PA or the DCO, as the case may be, may receive such information through his own sources, Sub Divisional and Tehsil staff or the parties to the dispute may file an application. The main purpose of this section in the FCR was to prevent land dispute, which used to be, and are common in FATA. Such disputes may lead to bloody clashes and the other friendly and hostile, tribes may also join. PAs and the DCOs, as the case may be, have been empowered to take Suo motto notice in such case to prevent bloody clashes causing breach of peace. In an emergency situation the steps required are:-

- a) to disengage the tribals.
- b) action under section 145 and 146 of Cr.PC, to evict both the parties.
- c) to ask for sureties for maintaining peace as per provisions of amended Regulation.

These measures are required to contain and manage the conflict.

### **2.1 Conflict Resolution**

To refer the case to Council for findings in accordance with Riway.

- FCR was framed in 1901 with the sole objective to maintain public peace for ensuring writ of the state. Public welfare and administration of justice was a secondary and ancillary issue. In the amended Regulation it seems that the PA and DCO should only take cognizance and interfere when there is danger of breach of peace and not otherwise. The fact is that even now

hundreds of tribals file applications under Section-8 for resolution of disputes and some landmark decisions have been given by the Council of Elders putting an end to decades-old land disputes. Keeping in view the peculiar environment of FATA such emergency provision is required and the PAs and DCOs are taking cognizance of such disputes. There is need to amend the Section 8 making expressed provisions as it is Islamic and fundamental right of tribal to file suit under Section-8 for enforcement of their rights. For emergency situation which may lead to breach of peace the provisions in respect of taking cognizance by the PA and DCO may also stay. APAs, having powers of Magistrate First Class may also proceed under following Sections of CrPC ;

**2.2 Section 145 (i).** Notice to the parties for written statements of their respective claims regarding possession.

**2.3 Section 145 (4).** The Magistrate may also inquire into possession. Party in possession shall retain possession.

**Section 45 (5).** Tribal Riwaj also recognizes continuation of such possession.

- The purpose of Section 145 is to preserve peace, prevent illegal, and forceful, dispossession of a party, and not enter into the controversy of title of the party (KLR) 1992 Cr.C. 192(b).

**2.4 Section 146.** Power to attach subject of dispute. If a Magistrate decides that none of the party was in possession, he may attach it until a competent court has determined the rights of the parties thereto, or the person entitled to possession thereof.

- In issuing notices under Section 145 or Section 146 the Magistrate must give full reasons. Parties must be heard. The Magistrate may withdraw order of attachment if danger to breach of peace is over.

**2.5 Section 147.** Dispute concerning rights of use of immoveable property.

When a dispute is likely to cause breach of peace regarding any alleged right of user of land or water (as explained in Section-145), Magistrate may summon the parties asking them to file their claims and inquire into the matter as per procedure laid down in Section-145.

**Section 147 (2).** If it appears that such right exists he may make an order prohibiting any interference with the exercise of such right.

- If such right does not exist the Magistrate may make an order prohibiting any exercise of alleged right.
- **Section 147 (3).** If it appears to such Magistrate that no such right exists he may make an order prohibiting any exercise of the alleged right.
- **Section 147 (4).** An order under this Section shall be subject to any subsequent decision of a civil court of competent jurisdiction.
- The purpose of brief explanation of relevant sections of Cr.PC is to acquaint the APAs and Magistrates with the peculiar circumstances of FATA. Land, ways and water disputes occur quite frequently.

Forest and Rangelands are, usually, common property (like Shamilate-e-Deh in Settled Areas). Irrespective of ownership and title the tribes especially Powindahs (Nomades) do have grazing rights at various places during winters and summers. In FATA the Magistrates should, preferably, initiate action under Section 145 but should stop short of deciding the question of title, possession, easement rights or dispossession. Under Section 147 Cr.PC parties may be asked to furnish sureties for maintaining peace.

Where the situation so warrants the Magistrate may attach the property which is subject of dispute and evict both the parties.

'Tiga' (ceasefire) or 'Kanre' is very good tradition of Tribal Riway. Parties do observe the terms of 'Tiga'. Magistrate may induct Jirga for dispossession and effect 'Tiga' as it would not be a violation of provisions of Section 8 of amended Regulation.

The Presiding Officers must acquaint themselves with the concepts and ingredients of Section 145, 146 and 147 of Cr.PC as sufficient Case Law is available on this subject.

In nutshell the Magistrates should stop short of determining the rights of parties while initiating proceedings under Section 145, 146 and 147 of Cr.PC. The matter may immediately be reported to PA or DCO for final adjudication under Section 8 of amended Regulation.

### **3. Proceedings Under Section 8**

Civil dispute is a dispute to which civil law applies. Civil law is a body of law imposed by the state as opposed to moral law its object is to redress 'the wrongs'. It is meant to correct a civil wrong.

Civil wrong is a violation of non-criminal law, such as tort, a breach of contract or trust, a breach of statutory duty; the breach of a legal duty treated as the subject matter of a civil proceeding. Thus tort is a civil wrong for which remedy may be obtained.

While dispute is a conflict or controversy specially one that has given rise to a particular law suit.<sup>3</sup>

#### **3.1 Section 8 (1)**

When a DCO or PA is satisfied from any information regarding existence of dispute between the parties which is likely to cause breach of peace.

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<sup>3</sup> Black's Law Dictionary (English Edition) Bryan A. Garner Editor In Chief . West Publishing Co. St. Paul MN. USA.

PA or DCO may take suo motto notice or on an application of a party or a report sent by APA/Tehsildars under Section 145, 146 and 147 of Cr.PC or otherwise.

Application may be received from Human Rights Cell of Governor Secretariat, President Secretariat, High Court and Supreme Court of Pakistan.

Requests by the departments, programs and foreign donors regarding developmental project may result in such a reference under Section 8.

### **3.2 Written Order.**

DCO or PA, while making such an order shall state the grounds. Naturally evidence, and grounds, for such an order will be gathered from the reports of APA, proceedings under Section 145, 146 and 147 Cr.PC, if so carried out, claims and counter claims of parties, documentary evidence from the official record, customs, usage, easement rights and possession etc. Such an order by the PA or DCO must give background, issues and points for determination so that to facilitate the job of Council of Elders to understand, and give comprehensive findings for final disposal of all the issues, both, main and related. Lack of comprehension of the whole issue and stating incomplete grounds will not settle the issue between the parties.

### **3.3 Limitation Period.**

PA or DCO, within 15 days, after receiving an application or reference from the APA shall constitute a Council of Elders and refer the matter to it. Council of Elders shall give its findings within ninety days of receipt of such reference.

### **3.4 Hearing of Parties.**

PA or DCO must provide all relevant documents alongwith the list of witnesses to the Council. Council of Elders shall make further inquiries and may examine witnesses to record evidence, pay visit to the site of dispute and consult official record. Instances are not uncommon that Council of Elders has engaged Revenue Officers for technical assistance and Ulema for opinion on Sharia law in land disputes.

The Council of Elders may receive plaint, report of Magistrates, proceedings under Section 145, 146 and 147 Cr.PC and may ask the parties to file claims, counter claims and list of witnesses. Based on Plaint and written statements the Council of Elders may frame additional issues and may refer back the same to PA or DCO for approval. The Council will only forward his findings to the PA or DCO or APA, if so authorized by the PA or DCO to hear such cases. Thus the Council of Elders will not be issuing a decree but making recommendations alongwith its findings. A civil dispute is not like convicting or acquitting an accused. Such findings may accept the petition, and claim, of a party, wholly or partly. It may also reject the entire claim as based on evidence.

### **3.5 Riwaj.**

Riwaj has been defined in Section 2(f) of this Regulation. It means usage, traditions and customs of the tribe in vogue in Tribal Areas.

As per Section 62 of Qanun-e-Shahadat, 1984 opinion as to existence of right or custom is relevant and thus admissible in evidence.

**3.6** While determining relevancy of facts and computation of time, with regard to limitation period relevant Section of The Limitation Act, 1908 (LA) are discussed below:-

### **ACQUISITION OF OWNERSHIP BY POSSESSION (LA)**

#### **3.6.1 Section 26. Acquisition of right to easement.**



(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years. The right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property, over which, a right is claimed under Sub-Section (1) belongs to the Government that Sub-Section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

**Explanation.**

Nothing is an interruption within the meaning of this section unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

**Illustrations.**

- (b) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction but denies the right-of way. The Plaintiff proves that the right was peacefully and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1<sup>st</sup> January, 1890 to 1<sup>st</sup> January, 1910; the plaintiff is entitled to judgment.

- (c) In a like suit the plaintiff shows that the right was peacefully and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

**3.6.2     Section 27. Exclusion in favour of reversioner of servant tenement (LA).**

Where any land or water upon, over or from while any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

**Illustrations**

A, sues for a declaration that he is entitled to a right of way over B's land. A, proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this Section has only proved enjoyment for fifteen years.

**3.6.3     Section 28.     Extinguishment of right to property (LA).**

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

**3.7     Qanun-e-Shahdat Order, 1984 and Rewaj**

It is evident that such fact with regard to existence of custom, usage or right is a relevant fact. In case of FATA the Presiding Officers must have deep insight into the traditions and customs of tribal Riwaj. Similarly, due to lack of land settlement and land record fact of possession, easement rights and other rights such as grazing, way and water rights are to be determined on the basis of evidence with regard to possession, custom and easement rights.

**3.7.1 Section 62 of Qanun-e-Shahadat (Q.S). Opinion as to existence of right or custom, when relevant.**

When the court has to form an opinion as to the existence of any general custom or right the opinion as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed are relevant.

**Explanation:-**

The expression “general custom or right” includes customs or rights common to any considerable class of person.

**Illustrations**

The right of the villagers of a particular village to use the water of a particular well is general right within the meaning of this Article.

**3.7.2 Section 63. Opinion as to usages, tenets etc. when relevant (Q.S).**

When the Court has to form an opinion as to –

the usage and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people, the opinions of persons having special means of knowledge thereon, are relevant facts.

**3.7.3     Section 66.   Character When Relevant. (Q.S).**

In civil cases to prove conduct imputed irrelevant. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

**3.7.4     Section 67.   In criminal cases previous good character relevant. (Q.S).**

In criminal proceedings the fact that the accused is of a good character is relevant.

**3.7.5     Section 68.   Previous bad character not relevant, except in reply. (Q.S).**

In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

**Explanation 1.** This article does not apply to cases in which the bad character of any person is itself a fact in issue.

**Explanation 2.** A previous conviction is relevant as evidence of bad character.

In FATA 'Riwaj' is, to greater extent, documented and may vary within an Agency like Upper and Lower Kurram. Such usages, customs and traditions must be broadly acceptable to the local community in a Tribal Area. Council of Elders may engage experts elders for interpretation of 'Riwaj' in respect of certain subject. Apart from broader acceptance at the level of tribe such customs, usage and tradition must not be:-

a. Unethical.     (b) Unlawful and (c) against the injunctions of Quran and Sunnah and fundamental rights as enshrined in the Constitution.

### **3.8     Section 8 (2) of Regulation.**

When a PA or DCO nominate a Council of Elders the names of the members, so nominated, shall be communicated to the parties. Objections will be invited. As soon as the objections are received the PA or DCO shall provide an opportunity of hearing. Objections may be accepted wholly or partly. Reasons shall be given for doing so. Parties may object to size of Council or names of persons. Size of Council has not been prescribed in Section 8 of this Regulation. Whenever word 'hearing' appears it may includes recording of statements and evidence of witnesses, if so required, in support, or rebuttal, of objections. It will be judicial order and appealable.

- It is advisable that controversial persons are not nominated for Council of Elders, otherwise objections and counter objection will result in loss of time.
- The number of members of Council should be odd.

### **3.9     Section 8 (3) of Regulation.**

It is the job of PA or DCO to, clearly, frame the issues in dispute for findings of Council of Elders.

#### **➤     Framing of issues**

A judgment in civil case must determine, and dispose off, all the issues finally and effectively leaving no room for any party to re-agitate the issues. Such judgment must operate as resjudicata.

ORDER XIV of CPC deals with the settlement of issues and determination of suit. It must be based on plaint and written statement plus examination of parties, if so required. Where issues of law and fact arise in the same suit the court shall first settle the issue of law and subsequently the issues of facts.

#### **➤     (Rule 2 Order XIV)**

Court may examine witnesses and documents and may amend and strike out issues. (Rules 4 and 5 of Order XIV).

**3.10 Section 8 (4).**

On receipt of findings the PA or DCO may

- a) Pass a decree in accordance with the finding of the majority of the Council of Elders, or
- b) If he does not agree with the findings he may remand the case to the Council of Elders for further inquiry and findings. In exercising option (a) or (b), the P.A or DCO must give a well- reasoned order. It means that it will be a complete judgment. When a case is remanded the judgment must give reasons for partly, or wholly rejecting the findings of the Council of Elders.

**Section 9. <sup>(14)</sup> Effect of decree on finding of Council.**

***A decree passed under clause (a) of sub-section (4) of Section 8 shall:-***

- a) be a final settlement of the case so far as the decree relates to the matter stated in the reference; and***
- b) have, to that extent and subject to the provision of this Regulation with respect to the finding of appeal or revision as the case may be, the same effect as a decree of a Civil Court of ultimate jurisdiction, and be enforced by the Political Agent or the District Coordination Officer, as the case may be, as a decree of such Court.***

**1. Section 9 (a) of Regulation:**

**1.1** Once the P.A or the DCO pass a decree, in accordance with the findings of Council of Elders, it shall be deemed as final settlement of the case. Such final settlement must be in accordance with the reference, and issues framed for the Council of Elders and a decree passed as per provisions of Section-8(4)(a) of this Regulation. It means that the PA or DCO cannot enlarge the scope of a decree beyond the issues framed in the reference as it will tantamount to writing a new judgment. If PA or DCO pass a decree leaving out certain issues, framed for reference to Council of Elders, it will not be a final settlement of the case and resjudicata shall not apply to such a case. It invariably means re-opening of unsettled issues and thus un-ending litigation.

Thus element of finality is attached to a decree or order passed by the PA or DCO in accordance with the findings of Council. It presupposes that the matter in a civil suit has been finally disposed off. Both the parties have a right of appeal or revision. As per provisions of Section 33 CPC, the court, after the case has been heard, shall pronounce judgment and on such judgment a decree shall follow. Decree passed under Section 9 (a) of this Regulation explain the decree passed by the trial court.

Order 20 Rules 1 to 6 of CPC enumerate the contents of judgment and decree, while Order 41 rule 30 and 31 prescribes the contents and the manner of pronouncing an appellate judgment. Section 33 (CPC) very concisely, but comprehensively, prescribes the whole concept of adjudication under the Code by declaring that the court shall pronounce the judgment, "after the case has been heard". Very word 'heard' indicates that all the provisions of Code in regard to adjudication shall be followed.

**1.2 Manner of hearing (Order 18 CPC) Rules 1 to 18)**

The plaintiff has the right to begin, shall state his case and produce his evidence in support of the issues. Witnesses shall be examined in the presence of parties. Court may inspect any property or document.

### **1.3. Contents of Judgment or decree (Order 20 Rules 1- 6).**

Court, after hearing the case shall pronounce judgment in open court and it shall be signed. Contents of judgment defined in Section 2(9) CPC. A judgment should contain (a) background, of the case (b) issues. Points to be determined (c) decision and (d) reasons for decision.

Based on judgment the decree shall contain particulars of claim, the relief granted or other determination of the suit (Rule 6). Decree shall also contain the amount of costs incurred in the suit and by whom to be paid.

### **2. Section 9(b) of Regulation:**

#### **Enforcement of decrees.**

All decrees passed under Section-8(4)(a) and Section 9(a) of Regulation are subject to appeal and Revision. Decree so passed shall be deemed as a decree of Civil Court of ultimate jurisdiction. It will be enforced as a decree passed by the Civil Court. Appeal is continuation of civil suit. Final disposal of appeal and revision will make a decree enforceable and enforcement provisions of Civil Procedures Code-1908, (CPC) shall, mutatis mutandis, apply. The relevant Sections of CPC are Section 36-54 and Order-21 (Rule 1 to 103).

Execution is the process of enforcement of a decree or order. A decree may be executed by the Court who passed the decree or sent to it for execution under Section 39 CPC. Another trial court may also send a decree for execution if a party carry on business in the jurisdiction of such court or property, against which a decree is to be executed, is situate in the jurisdiction of such court. All questions arising between the parties, relating to execution, are to be determined by the court executing the decree and not by a separate suit. (Section 47 CPC).

- Both in settled Areas and FATA execution of decree, especially in case of immoveable property, is the most difficult part. Parties file appeals against mode of execution and, on one pretext or other, succeed to obtain stay



orders. Dispossession and ejectment from the property, at times, becomes a law and order problem.

Where a judgment debtor dies before the execution of decree the holder of decree may apply to the court to execute the same against legal representative of the deceased (Section 50 CPC).

- Court executing a decree shall have the powers of (a) attachment, delivery and sale (Section 60 CPC) of property (b) arrest and detention in prison (Section 55 CPC) (c) by appointing a receiver (Order 40). (d) and in such other manner as the nature of relief granted may require. (Section 54, 68, 72, order 21 (Rule 31, 32, 33, 34, 53).
- Order 21 CPC provides exhaustive procedures in regard to execution of decree.

It includes application for execution (Rules 10-23)

- Process of execution (Rules 24-25).
- Stay of execution (Rules 26-295).
- Mode of execution (Rules 30-36).
- Arrest and detention (Rules 37-40)
- Attachment of property (Rules 41-57)
- Investigation of claims and objectives (Rules 58-62).
- Sale generally (Rules 64-73).
- Sale of movable property (Rules 74-81).
- Sale of immoveable property (Rules 82-103).

#### **Section-10. Restriction on jurisdiction of Civil Courts:-**

***No Civil Courts shall have Jurisdiction to call in question the legality of anything done or purported to be done in respect of any matter. The cause of action whereof has arisen in the Tribal Area. <sup>(15)</sup>***

1. The jurisdiction of civil courts is barred. No Civil court is competent to call in question the legality of anything done or purported to be done under the Regulation. It includes all matters and the cause of action arising out of action done under the Regulation.

Constitution is the supreme law. All civil and criminal courts in the country are subordinate to the High Courts. As per Article 247 (7) jurisdiction of the Supreme Court and High Court has been ousted as regard to FATA. Article 192 (4) of the Constitution regarding the High Court elaborates this position. Any area in Pakistan not forming part of any province; the jurisdiction of High Court can only be extended by an Act of Parliament.

Yet the High Court, as well as Supreme Court, has been taking cognizance of civil and criminal cases.

Supreme Court takes cognizance under Article 184 (3) of the Constitution considering a matter as question of public importance with reference to any of the fundamental rights conferred by Chapter 1 of part II (Article 8 to 28). Peshawar High Court has been taking cognizance of cases in FATA. In some of the cases Petitioners prayed that Regulation has not been properly followed. High Court assume jurisdiction under article 199 of the Constitution issuing Writ of mandamus, Writ of prohibition and Writ of habeas corpus. Although article 199 (a) (i) is very clear that a writ can be issued within territorial jurisdiction of a High Court. High Court assume jurisdiction under inherent powers of courts. Section 151 of CPC vests inherent powers in the courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Such inherent powers can be exercised notwithstanding anything contained in the CPC.

Judicial officers must be very cautious and ensure that under the garb of 'Riwaj' fundamental rights are not violated and provisions of CrPC and CPC, as far as applicable to FATA, are properly followed.

**Section 11. <sup>(16)</sup> *Criminal references to Council of Elders:-***

- (1) Whenever an offence, of which the Political Agent or District Coordination Officer is competent to take cognizance under this Regulation, is committed, the case shall be registered and the accused shall be produced before the Assistant Political Agent concerned within twenty four hours of the arrest of the accused excluding the time necessary for the journey from the place of arrest to the Assistant Political Agent having jurisdiction. The Political Agent or District Coordination Officer, as the case may be shall make an order in writing referring the question for finding of guilt or innocence of any person or persons accused of any offence or offences, to the Council of Elders for its findings who after holding necessary inquiry and hearing the parties and witness, submit its findings to the Political Agent or District Coordination Officer, as the case may be. The Political Agent or District Coordination Officer shall appoint the members of the Council of Elders within ten days from the date of arrest of the accused and shall require the Council of Elders to submit its findings on the question referred to within ninety days.*
- (2) Where a reference to the Council of Elders is made under Sub Section (1) and the members of the Council have been nominated by the Political Agent or District Coordination Officer, as the case may be, the names of the members so*

*nominated be communicated to the accused and the complainant, and any objection taken thereto by any of the parties, shall be recorded. The Political Agent or the District Coordination Officer, as the case may be, shall dispose of the objection after hearing the parties and the reasons thereof be recorded and appoint the members of the Council accordingly.*

*(3) On receipt of the finding of the Council of Elders, the Political Agent or the District Coordination officer, as the case may be, by recording his reasons may:-*

*(a) Pass an order in accordance with the findings of the majority of the Council of Elders: or*

*(b) remand the case to the Council of Elders for further inquiry and findings.*

*(4) No person shall be prosecuted or punished for the same offence more than once”*

1. **INGREDIENTS OF SECTION 11.**

a. **Competency of PA or DCO.**

This section describes the procedure with regard to Criminal reference to Council. One can say that section 11 constitutes the basis of administration of criminal justice. Please see Section 3(3), 13(C) and 40(5) (list of offences mentioned in the Second Schedule to this Regulation). Section 3 of Regulation is related to competence of PA or DCO. Powers conferred by this Regulation are in addition to any powers conferred by or under any other law for the time being in force in FATA. However, if there are certain provisions which are exceptional, and not common in criminal law, then provisions of this Regulation shall apply to the case notwithstanding anything contained in other laws. There are many powers which APAs, PAs and DCOs, while acting as Magistrate First Class may, and shall,

exercise which are otherwise not conferred under Schedule III (Part II, III, IV) to Cr.PC as Ordinary Powers of Magistrate First, Second and Third Class on Magistrates in Settled Areas. Under Section 3(3) the laws specified in Second Schedule apply to FATA. Thus all the Political Officers vested with the powers of Magistrate First, Second and Third class have all or some of the powers to take cognizance of all the offences mentioned in Second Schedule to this Regulations.

Under Section 4 of this Regulation, in any Agency or Frontier Regions, the Governor may confer powers of section 30 of the Code of Criminal Procedure, 1898 on any Assistant Political Agent. As per provisions of Section 4(2) every APA so appointed shall have all the powers of Magistrate First Class as specified in Schedule IV and additional powers as specified in Part I of Schedule IV to the Code of Criminal Procedure. Every APA shall have all the powers of PA or DCO and shall have all the powers as specified in First Schedule to this Regulation.

The powers of APA, PA or DCO, to take cognizance of offences, are not confined to exercising of ordinary powers of Magistrates under the Cr.PC but may exercise power of Magistrate Section 30 (Code of Criminal Procedure), if so empowered by the Governor.

Besides such political officers have the additional powers under this Regulation, to take cognizance of offences and award punishments such as imprisonment and fine provided by the Pakistan Penal Code 1860 as per Section 13(c), Section 21, Section 23, Section 25, Section 26, Section 30, Section 34, Section 36, Section 37, Section 39 and Section 44 of Regulation.

The Political officers must be well versant with the Regulation and special powers of Magistrate First, Second and Third Class plus the special powers under Section 30 of Criminal Procedure, 1898. Political Officers may take cognizance of all the offences, specified as above, on

- (a) report of Police (Levy or Khasadars, Political Moharar having powers of Police,

- (b) on a complaint
- (c) and on his own. Section 190 of Cr.PC empowers the Magistrate to take cognizance of offences through the police, on his own or on a complaint.

## **2. Section 11(3)**

In FCR, 1901 taking cognizance of offence and sending the reference to Council was almost the same. On receipt of findings of Council the PA or DCO was competent to:-

- a. remand the question to the Council for further finding or
- b. refer the Case to a second Council or
- c. acquit or discharge the accused person or persons, or any of them or
- d. in accordance with the findings on any matter of fact the Council, of not less than three-fourth of the members thereof, convict the accused person or persons or any of them, of any offence of which the facts so found show him or them to be guilty.

Provision was also made that any person discharged under class (c) shall not be liable to re-trial for any offence arising out of the same facts, after the expiry of two years, from the date of such discharge.

Under amended Regulations Section 11(3) the PA or DCO are bound to record reasons while passing an order in accordance with the findings of the majority of the Council or remanding the case to Council for further inquiry.

So under FCR, 1901 the PA or DCO could remand the case to a second Council or acquit or discharge the accused. Now the options are limited as PA or DCO can either confirm the findings of Council or remand the case to the same Council for further inquiry and findings. Powers of PA or DCO to acquit or discharge an accused, in spite of recommendations of Council to the contrary, have been repealed.

**2.1.** If Council sends a finding of guilt of an accused, PA or DCO can

- (a) either concur with the findings of council of elders and pass an order
- (b) or if he does not agree with the findings of Council he can remand the case back to the Council for further inquiry and findings.

But again, on remand, if Council recommends the same findings, of guilt or innocence, then Section 11(3) offers no solution and PA or DCO are bound to pass an order in accordance with the findings of the majority of the Council. In fact the law should always favour the accused and not otherwise. In such a case an accused person has no other option but to file an appeal to the Commissioner under Section 48 of this Regulation.

- 2.2.** On the other hand if the Council sends a findings of innocence of accused the PA or DCO, again either pass the order in accordance with the findings of majority of Council or if the PA or DCO does not agree with such majority findings of innocence of accused person, or persons, he may remand the case to the Council for further inquiry and findings.
- It is mandatory for the PA or DCO to give reasons for exercising any of the options as per (a) and (b) of Para 2.1.

The language of Section 11(3) (b) is indicative of the fact that there cannot be a second remand or reference to a second Council as was the case under FCR, 1901. In case of conviction by the PA or DCO, an accused may file an appeal to the Commissioner as per Section 48 of Regulation. Such appeal is to be filed within thirty days of the decision. At the same time complainant may also file an appeal against the findings of acquittal or for enhancement of punishment given by the PA or DCO.

Language of Section 48 of this Regulation leaves no doubt, because the words used in section 48 are: -

- Any decision given.
- Decree or sentence passed or

- Order made by the Political Agent or District Coordination Officer, as the case may be, under this Regulation.

Thus any decision includes a decision of acquittal. Under Section 50 of Regulation the appellate authority (Commissioner or the Additional Commissioner if so authorized by the Governor) may also enhance any sentence but after issuance of show cause notice to the convict.

Sub Section 4 of Section 11 elaborates the basic principle of law that no person shall be prosecuted or punished for the same offence more than once.

It is a constitutional guarantee and a right given to every citizen of the State.

Sub section 4 not only prohibits punishment for the same offence more than once but also the prosecution which means even proceedings cannot be re-initiated. There is Case Law that the police and the prosecution, cannot keep on adding more penal Sections to the FIR (First Information Report) for just keeping the accused behind the bar and denying him bail or any other concession.

### **2.3. RECORDING REASONS.**

“Recording reasons” is very comprehensive term. Whether the Judicial Officer pass an order in accordance with the findings of Council (of guilt or innocence) or remand the case back to the Council for further inquiry and findings, he is bound to record reasons for doing so. It cannot be a ‘single liner’ by merely stating that the findings of Council are in accordance with the law and facts, or the same is remanded back for further inquiry and findings.

It should be a complete judgment and must give (i) full background and history of the case (ii) nominations of Council of Elders (iii) objections, if any, and disposal of objections regarding Council. Such objections may be with regard to the persons or size of Council (iv) procedure followed by the Council (v) engagement of technical experts by the Council (vi) forensic reports(vii) collection of evidence.(viii) examination of witnesses and cross examination.(ix) evaluation of



evidence (circumstantial, oral, documentary). (x) findings of guilt or innocence. (xi) Reasons for such findings. (xii) Based on circumstances, evidence and guilt the punitive Sections of law(s) attracted in the case and reasons for the same.

It should be a complete judgment as per provisions of Section 367 of Code of Criminal Procedure. The order by the Court, based on findings of Council shall, contain the point, or points, for determination, the decisions thereon and the reasons for decision and shall be signed and pronounced by the Presiding Officer in open Court.

It may be noted that the Council only recommends guilt or innocence, of an accused and it is the job of the Judicial Officers to apply relevant Sections of law, as per findings, and award punishment or order acquittal, as the case may.

#### **2.4. Cognizance. Term 'Cognizable offence' appears in Section 54 Cr.PC.**

In case of person concerned in any cognizable offence the Police may arrest without a warrant of arrest on an order from a Magistrate. Cognizance defined in Section 190(Cr.PC). All Magistrates of First Class may take cognizance upon police report, complaint or information received from any other person or upon his own knowledge or suspicions. Taking cognizance of offence means taking notice of an offence. It would include interim orders initiating judicial proceedings (NCR 19981) Cr.L.J 250, PLD 1973 Lab.304). Cognizance means the application of mind by the Trial Court (2002 P.Cr.L.J.130). Magistrate have jurisdiction to take cognizance of both cognizable and non-cognizable offences. No investigation can be made by the Police in alleged commission of non-cognizable offence, without permission of Magistrate.

##### **2.4.1 Section 11 and Cognizance.**

When a Magistrate takes cognizance of an offence It triggers the judicial process. In case of cognizable offence police may arrest the accused without warrant. As per provisions of Cr.PC there is set procedure right from taking cognizance by the

police under Section 54 (FIR), to Section 67 with regard to arrest, summon and warrants (Section 68-86 A), Proclamation and attachment (Section 87-93 Cr.PC) and search warrants(Section 96-105 Cr.PC).

Section 161 (Examination of witnesses by Police), Police custody (Section 167 Cr.PC), Challan (Section 173 Cr.PC) Examination of complainant (Section 200 Cr.PC), charge to state offence(Section 221),commencement of proceedings before court (Section 245), power of Magistrate to acquit at any stage (Section 249 A) and trial of cases by the Magistrates (Section 241-249 A ).

**Section <sup>(17)</sup>11A.     BAIL.**

- (1)     ***Where any person accused of non-bailable offence is arrested or detained or appears or is brought before the Political Agent or District Coordination Officer, as the case may be, he may be released on bail. However he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with imprisonment for ten years:***
- Provided that the Political Agent or District Coordination Officer may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail:***
- Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution and the complainant has been given notice to show cause why he should not be so released.***
- (2)     ***If it appears to the Political Agent or District Coordination Officer, as the case may be, at any***

*stage of the investigation, enquiry or trial that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further enquiry into this guilt, the accused may, pending such enquiry be released on bail with or without sureties for his appearance.*

- (3)** *The Political Agent or District Coordination Officer, as the case may be, releasing any person on bail under sub section (1) or (2), as the case may be, shall record his reason in writing for so doing.*
- (4)** *Nothing herein shall be deemed to authorize the Political Agent or District Coordination Officer, as the case may be, to release on bail any person accused of non-bailable offence not in custody or not produced before him.*
- (5)** *The FATA Tribunal, Appellate Authority or in cause of a person released on bail by the Political Agent or District Coordination Officer, as the case may be, may cause any person who has been released under this section, to be re-arrested and may be committed to custody by an order recording reasons for so doing.*

1. Section 11 (A) was inserted in 2011 in amended Regulation. The purpose was to provide relief of bail to an accused. It is to be noted that in bailable offences, as per Schedule II of Cr.PC, it is the right of an accused to be released on bail. The only requirement is furnishing sureties to the satisfaction of court. On conviction in bailable offences his bail bonds are cancelled and he is rearrested. It is the constitutional, and legal, right of an accused to be produced before a Magistrate within 24 hours excluding the time necessary for journey from the

place of arrest to the court of Assistant Political Agent having jurisdiction. (Section 11 of Regulation).

In bailable offences the accused is sent to lockup on judicial remand till furnishing of sureties as ordered by the court. But such an accused should not be kept behind the bars merely on grounds of his failure to furnish sureties to the satisfactions of court. He can be released on personal surety. It is non bailable offences where bail application is moved for release of bail. Based on circumstances of the case, nature of offence and initial evidence available on record the court, while, using discretionary powers, the court can release such an accused on bail subject to:-

- (a) furnishing sureties as ordered by the court.
- (b) assurance by the accused that he will join the inquiry or investigation as and when required.
- (c) Court is satisfied that he will not interfere or influence the inquiry or investigation, and
- (d) that such an accused person (S) pose no danger to the other party and do not disturb public peace and tranquility.

## **2. Sub Section (1) of Section 11 A of Regulation.**

Any person accused of non-bailable offence arrested or detained may be released on bail by PA or DCO. Bail to a person in non-bailable offences will not be granted to a person, if there appear reasonable grounds for believing that he has been guilty of an offence punishable with imprisonment for ten years. It is the limit of imprisonment prescribed for denial of bail and thus in all the cases having more punishment, than ten years, the same principle shall apply.

## **2.1     Reasonable grounds.**

Reasonable ground is a question of fact. At initial stage the First Information Report or initial inquiry, prima facie, establish existence of a fact that a person accused of an offence is connected with such offence. It hardly establishes guilt or innocence of such person. Reasonable grounds must constitute facts to convince a prudent mind that accused is involved in the offence. Court may exercise discretionary powers but the same should not to be exercised in an arbitrary manner but with judicial discretion and based on reasons.

Superior Courts have set the parameters for such like cases and the basic principle of law is to favour the accused. Otherwise also granting bail has nothing to do with the final outcome of the case. If a person is denied bail and later on convicted on the basis of evidence he may be given benefit of section 382 (B) Cr.PC and the period already spent in jail is counted towards the imprisonment, thus benefiting the accused. Again concession of Section 382(B) of Cr.PC is a discretionary power of court and can be denied in cases of heinous crimes.

On the other hand if a person is allowed bail, where there are reasonable grounds for doing so, and ultimately convicted he will have to undergo full term of imprisonment. But if he is proved innocent, and already bailed out, the court will be having satisfaction of sparing and ensuring freedom of a person not involved in the offence.

## **2.2     Proviso.**

PA or DCO may direct that any person under the age of sixteen years or any women or any sick or infirm person of such an offence be released on bail. Here the word 'may' will be constructed as 'shall'. So when such persons are accused of an offence punishable with imprisonment for ten years, shall be released on bail.

But such persons accused of an offence, as aforesaid, shall not be released on bail unless:

- (a) a notice is given to the Prosecution and the complainant
- (b) to show cause for why such persons should not be released on bail.

In Sub Section 11(1) the word 'guilty' has been used for an "accused".

### **2.3 Bail order.**

#### **Sub Sections 2 and 3 of Section 11A of Regulation.**

PA and DCO may release an accused on bail at any stage of investigation, inquiry or trial when there are reasonable grounds for believing that accused has committed a non-bailable offence. An accused might have been arrested for a non-bailable offence but during all the three stages e.g. investigation, inquiry or trial if there are reasonable grounds that, it is a case of further inquiry and the evidence collected so far is not sufficient to prove the guilt of accused, the PA or DCO may release such an accused on bail with or without sureties for his appearance. When the Court is satisfied that an accused is unable to furnish sureties and there are sufficient reasons to believe that:

- (a) he is prima facie, not guilty of non-bailable offence.
- (b) Is ready to furnish sureties and ready to appear before the court as and when required. The courts in such cases should construe the Section 11(B) liberally and no one should be kept in custody unnecessarily.

There is common perception, developed over the decades, that granting bail is equated with 'acquittal'. One of the reasons for this perception is low conviction rate in the country. Thus most of such accused are, later on, acquitted so the public perception has so developed. In FATA the situation is quite opposite and accused are kept in Jail for prolonged period. In FCR there was no set procedure for bail. Now Section 11 A (3) states that the PA or DCO, while releasing a person

on bail, shall record his reasons in writing. Drawing inference from Pith and Substance Doctrine the purpose of statute is that a proper bail order is to be issued by the court both in case of acceptance or rejection of bail. In Tribal Areas Courts do release the accused on bail but only surety bonds alongwith single liner release order. In settled districts moving bail application is a set norm since last century. As soon as Police custody, maximum fifteen days Section 167(2) (Cr.PC), is over bail application is moved.

Both in civil and criminal cases final as well as interim orders are appealable. Thus any order with regard to bail by PA or DCO, an appeal shall lie to the Commissioner.

Current record keeping of arrests, progress of investigation and release on bail is very poor and there is truth as far as violation of human rights is concerned.

#### **2.4. Section 11 A (4) of Regulation.**

Sub section 4 prevents Pre-arrest bail or Transit Bail which is granted by a Sessions Court. It is applicable to non-bailable offence only. Thus DCO or PA can grant after - arrest bail.

#### **2.5. Section 11 A (5) of Regulation.**

Under this section the FATA Authority and Appellate Authority may cancel the bail and order re-arrest of such accused. Both FATA Tribunal and Appellate Authority shall record reasons for such order. Again relying on Pith and Substance Doctrine the purpose of law is that an accused in non-bailable offences may be released on bail by the DCO or PA and both orders of acceptance or rejection of bail are appealable.

The language of sub Section 5 indicates negative empowerment of FATA Tribunal and Appellate Authority. The superior courts are inclined to give relief to the accused. Both Appellate Authority and the FATA Tribunal may take suo moto notice for cancellation of bail. Victim, heirs of victim and the complainant may move the Appellate Authority and the FATA Tribunal for cancellation of bail granted by PA or DCO. At the moment there is no Prosecution Service in FATA and there is dire need of one. PA or DCO act as courts as well as prosecutors which is against the principles of justice. APA (Judicial) in each Sub Division may be appointed with focus on investigation and court work.

**2.6. Section 11 (A) (1) of Regulation.**

Proviso stipulates that the Court of PA or DCO shall give a notice to the prosecution and the complainant for release of an accused on bail. It necessitates establishment of a separate Prosecution Service in FATA.

Rules under the Regulation may be made for streamlining the procedure of bail, including establishment of Prosecution service. PA or DCO must send a copy of Police custody of an accused under Section 167 Cr.PC, and bail order under Section 11 (A) (2) and (3), to Commissioner.

**CHAPTER XXXIX Cr.PC**

**2.7. Of Bail (Section 496-502)**

It is relevant to briefly discuss the procedure prescribed for bail in CrPC and same principles shall apply to FATA in regard to bail. Amendments in FCR in 2011 and insertion of section 11(A) and reference to prosecution warrants that the courts follow the proper procedure in regard to bail. There is enormous case law on bail and rightly so because arrest and confinement of an accused till conclusion of trial



is an issue of fundamental rights and no one should be deprived of his liberty without due process of law.

**2.7.1 Section 496. In what cases bail to be taken.**

When any person, other than a person accused of non-bailable offence, is arrested or appears or brought before the court, and is prepared to give bail, such person shall be released on bail. The court will release him on bail subject to his furnishing of bail bond, with or without sureties, as ordered by the court. Court may discharge him on his executing a bond without sureties for his appearance as hereinafter provided. Provisions of Section 496 are not applicable to bail under security proceedings as per Section 107 (4) and 117 Cr.PC. By same analogy these are also not applicable to security proceedings under Sections 40, 41, 42, 43, 44 45 and 47 of Regulation.

**2.7.2 Section 497- When bail may be taken in case of non-bailable offence.**

Provides that bail may be taken in cases of non bailable offence. It is non bailable offence where notice to complainant and prosecution is required under Section 11(A)(1) of Regulation and the court may accept or reject the bail application. Both in case of acceptance and rejection of bail application reasons must be given. It will be a judicial order which is appealable. In all bailable offences the accused shall be released on bail.

**2.7.3. Section 514. Procedure on forfeiture of bond.**

When a bond is forfeited the court may proceed against the accused in case of personal surety and against the sureties and may attach and sell moveable property if penalty is not paid or sufficient cause is not shown.

➤ **Warrant of Attachment to enforce a bond.**

Specimen Schedule V. (LIII) Cr.PC. Notice to surety on breach of a bond (XLV).  
Cr.PC. Notice to surety of forfeiture of Bond for good behaviour (XLVI). Cr.PC.

**XLVII.Cr.PC.** Warrant of Attachment against surety.

**XLVIII.Cr.PC.** Warrant of Commitment of the surety of an accused person  
admitted to bail.

**Section <sup>(18)</sup>11.B. Reference by Qaumi Jirga in exceptional cases.**

*The Political Agent or District Coordination Officer, as  
the case may be, may take cognizance of any offence or  
civil dispute in exceptional circumstances, if so  
recommended by a Qaumi-Jirga of the Tribe in the  
interest of justice and public peace.*

**1. Background.**

Section 11 (B) inserted through amendment in 2011. Under Section 8 of Regulation PA or DCO may assume jurisdiction and refer the dispute to Council as Civil Reference in case there is information that a civil dispute exists between the parties which is likely to cause breach of peace. Provisions of Land Revenue Act 1967 do not extend to Tribal Areas neither there is Land Settlement and Revenue record except few pockets of Agencies like North Waziristan (Daur Area) and Kurram. Prior to amendments in F.C.R (2011) Political Administration would not take cognizance of civil disputes and offences in Tribal Territory (T.T.), unless there was danger to peace. Such cognizance used to be administrative intervention and induction of Jirga. Political Administration takes cognizance of criminal cases in Protected Territory (PT) which means state land, offices, residences and Government installations. Now under amended Regulation changes have been made especially due to law and order situation in post 9/11 period. Events of 9/11 are watershed in the history of FATA. Rising militancy and deployment of army under article 245 of the Constitution should be kept in mind while analyzing the objectives and aim of amendments. It is applicable to both

criminal and civil law(s). So lawyers and courts to analyze the purpose of these amendments.

## **2. Cognizance**

It is relevant to briefly discuss 'Cognizance'. In settled Areas the police use the word in First Information Report, Challan and Police Diaries "Qabal Dast Andazi Police" which literally means that an offence where 'Police can lay hands'. Taking cognizance of an offence includes inquiry, investigation and committing to court for trial. Political Administration is competent to inquire, investigate, refer the matter to Council, both civil and criminal, and announce judgment based on the findings of Council or remand the case to Council for further inquiry. Section 54 (Cr.PC) explain the concept of cognizable offence; when police can arrest for any cognizable offence without a warrant from the Magistrate. Schedule II to Code of Criminal Procedure is tabulation of cognizable and non-cognizable, compoundable, bailable and non-bailable offences, relevant Section of PPC and the competent court which can try the offence. Thus taking cognizance of an offence and cognizable offence are two different things. Police may take cognizance of any offence but in case of non-cognizable offence can only arrest with the permission of Magistrate.

## **3. Preventive Measures**

Chapter XIII Cr.PC deals with preventive measures. Under the provisions of Regulation preventive measures are required both in case of commission of an offence, preparation to commit an offence and apprehension of disturbance of public peace and tranquility. Political administration, and the courts, may takes preventive measures under Section 11, 11 B, 21, 29, 30, 38, 40, & 41 of the Regulation. Hence relevant Sections of the Cr.PC are briefly discussed. Besides the terms investigation, trials, custody, cognizance, confessions, remand and adjournments of proceedings have been used in Section 11, 11 A, and 11 B of the Regulation. Court Officers must acquaint themselves with these concepts and intricacies of procedures.

**3.1 Section 151 Cr.PC. Arrest to prevent such offences.**

A Police Officer may arrest without orders from a Magistrate and without a warrant if there is likelihood to commit any cognizable offence.

**3.2 Section 152 Cr.PC. Preventive of injury to public property**

A police officer may on his own authority interpose to prevent any injury, attempted to be committed, to public property, moveable or immoveable.

**Chapter XIV. Information to the police and their powers to investigate.**

**3.3 Section 154 Cr.PC. Information in cognizable cases.**

It is the First Information Report (FIR) relating to the Commission of cognizable offence.

**3.4 Section 155 Cr.PC. Information in non-cognizable cases.**

No Police Officer shall investigate a non-Cognizable offence without the order of a Magistrate. Under Section 156 any police Officer may investigate any cognizable case.

**3.5 Section 167 Cr.PC. Procedure when investigation cannot be completed in 24 hours.**

When investigation of an arrested person cannot be completed within twenty four hours the Magistrate may allow custody of such accused for a term not exceeding fifteen days. The Magistrate is required to send the copy of his order to Sessions Judge. If evidence against an accused is deficient he can be discharged by the Police by executing a bond of his appearance when so required. (Section 169). Complete Challan of Investigation is submitted to court under Section 173 Cr.PC. In case of FATA copy of judicial remand order should be sent to Commissioner.

**3.6 Section 161 Cr.PC. Examination of Witnesses by Police.**

Any Police Officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person is bound to answer all questions other than such which may expose him to a criminal charge or to a penalty or forfeiture. The Police Officer may reduce into writing any such statement. But statement to police not be signed. (Section 162 Cr.PC).

Under Section 38 (Qanun-e-Shahadat) confession by the accused while in custody of police not to be proved against him. Thus all the statements to police under Section 161 Cr.PC are not relevant. Confession, or statements, before a Magistrate is relevant. (Section 164 Cr.PC). Mode of examination of accused explained in Section 364 Cr.PC.

Under Section 40 of Qanun-e-Shahadat information received from accused, while in custody of Police, may be proved. Thus discovery of documents, weapons of offence or other things of evidentiary value is relevant when discovered as a consequence of information given by the accused while in custody of police under Section 167 Cr.PC, commonly called as 'Police Remand'

#### **4. FATA.**

All statements recorded by Levies, Political Moharir and Tehsildars, acting as investigators, will be statements given to the police under Section 161 Cr.PC. However, discovery of fact under Section 40 of Qunun–e-Shahdat may be proved and is relevant.

- Proceedings before the Council will be judicial and statements can be recorded as per manner provided in Section 364 Cr.PC and the statement shall be signed by the accused. Council may request a Magistrate for recording of statements under section 340 and 342 (2) Cr.PC.
- Under Section 340 Cr.PC an accused has a right to be defended by a pleader. Accused is not bound to answer to self-incriminating questions. Council may examine accused (Cr.PC 342), The accused shall not render

himself liable to punishment by refusing to answer such questions (Section 342 (2). No oath shall be administered to accused. Witnesses will depose under the Oath.

## **5. Ingredients of Section 11 (B)**

Purpose of Section 11 (B) and its ingredients have close nexus with the criminal proceedings. PA or DCO may take cognizance of any offence or civil dispute in exceptional circumstances if so recommended by Qaumi Jirga of the tribe in the interest of justice and public peace. Cognizance and cognizable offence discussed in the preceding paragraphs.

### **5.1 Cognizance of offence**

When PA or DCO take cognizance of an offence then procedure given in Section 6, Section 11, Section 11(A) and Section 11(B) of this Regulation shall be followed.

### **5.2 Cognizance of Civil dispute**

In case of taking cognizance of civil dispute procedure as per Section 8, Section 9 and Section 10 shall be followed.

### **5.3 Exceptional Circumstances.**

Word 'Exceptional circumstances' not defined. Otherwise also it is socio-political term and not legal one. No parameters set to measure, gauge and declare "exceptional circumstances. What if recommendations to PA or DCO are not made by the Tribe? In FATA public peace greatly dependent upon effective adjudication of civil dispute. Civil dispute, if not resolved may erupt and lead to bloody clashes. Thus a case of civil nature gets converted into series of crimes. Word, "Qaumi Jirga" has already been commented upon, in Section 2 'Definitions' of this Regulation.

- With a view to remove ambiguity word, “exceptional” is to be further crystallized. When PA or DCO take cognizance of any offence or civil dispute under Section 12 of Regulation then procedure, as set out, in 5, 7, 8, 9, 11, 11(A) and Section 12 of Regulation shall be followed.

## **6. CONFESSION**

Language of Section 11 (Regulation) indicates that the Council may inquire into the guilt, or otherwise, can also examine the accused and record statements of witnesses. The word used in Section 11 for the Council are “after holding necessary inquiry and hearing the parties and witness submit its findings”. Proceedings of Council are to be carried as per manner provided in Section 364 Cr.PC. Rights of accused are protected under Section 340 and 342 Cr.PC.

It is not clear whether the Council can record confessional statement of the accused and what would be its relevancy under Qanun-e-Shahadat, 1984? It would be appropriate to request the Magistrate for recording such statements.

Since PA or DCO may tender pardon to accomplices, as per Section 7 of Regulation, at any stage of the investigation or inquiry into or trial of the offence therefore it should be the Magistrate to record confessional statement of accomplices or accused under Section 164 Cr.PC. Council may refer the case to PA or DCO for recording statement under Section 164 Cr.PC.

### **6.1 Section 164 Cr.PC. Power to record statements and confessions:-**

(1). Any Magistrate of the first class and any Magistrate of the second class, especially empowered in this behalf by the Provincial Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this chapter or at any afterwards before the commencement of the inquiry or trial.

(1-A). Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement.]

(2). Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is in his opinion, best fitted for the circumstances of the case. Such confession shall be recorded and signed in the manner provided in section 364, and such statements or confession shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3). A Magistrate shall, before recording any such confession explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the following effect:-

“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate

**6.2** Confessional statement must be made without duress. Judicial Confession alone can be made basis for conviction, when it is found true, convincing and made voluntarily by the accused without any duress or coercion.(2006SC MR 366(b)).Conviction based on confession alone would not be illegal but such confessional statement must be corroborated by evidence (2001 SCMR 1914(c) ).



- In case of FATA Appellate Authority and FATA Tribunal must see to it that the Tribal Courts in FATA also exercise executive powers. Accused have very little access to legal advice and there is no prosecution service. Thus conviction of an accused, based on confessional statement alone, without corroboration of independent evidence must be analyzed with great care.

**7. Section 344 (Cr.PC) Power to postpone or adjourn proceedings.**

(1) If from the absence of witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn an inquiry or trial, the court may, if it think fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody;

**Remand.** Provided that no Magistrate shall remand an accused person to custody under this Section for term exceeding fifteen days at a time.

(2) Every order made under this Section by a Court other than a High Court shall be in writing signed by the Presiding Judge or Magistrate.

**Explanation.** Reasonable cause for remand. If sufficient evidence has been obtained to raise suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is reasonable cause for a remand.

**8.** Section 8 of Regulation stipulates time of ninety days for the Council to finalize its findings in case of civil reference. In case of criminal reference to Council of Elders under Section 11 of Regulation period of ninety days has been prescribed for the Council with regard to inquiry and findings. PA or DCO are bound to appoint a Council within ten days of arrest of accused. Objections are invited (Section 11(2) of Regulation) and disposed off. Non-arrest of some accused may take time and filing of reference may be delayed. Regulation Section 11 is silent about the extension of time frame of ninety days if Council fail

to submit its findings within ninety days. Ideally the Investigation should be completed within fifteen days when accused is sent on judicial remand. Section 364 Cr.PC envisages that delays in criminal investigation are some time inevitable. But it is the right of an accused to be presented before the Magistrate after fifteen days. In FATA this Section of Cr.PC is violated and accused are sent to Jail for months till conclusion of their case or grant of bail. There is shortage of Jail, Sub jails and judicial lock-up in FATA. Security of Jail is also a compelling factor forcing Political Administration to send the under-trial prisoners to far off Jails in Settled Districts. Till full facilities are provided such accused deserve bail. Delay in investigation has always been considered as favorable factor by the Superior Judiciary, in granting bail to the accused.

**Section <sup>(19)</sup>12.      Punishment on conviction on findings of Council:-**

***Where the Political Agent or District Coordination Officer, as the case may be, convicts a person under clause (9) of Sub Section (3) he may pass sentence of imprisonment or fine or both for the offence, provided that the sentence shall not exceed fourteen years.***

- First to point out the clerical mistake. In this section reference has been made to clause 9 of Sub Section 3 regarding powers of PA or DCO to convict a person.

In fact it is Section 11 Sub Section (3) Clause (a). Reference is always made to Section as there cannot be more than one Section with the same title but there may be so many Sub Sections in this Regulation. Otherwise also there is no clause (9) in the entire Regulation. This Section requires correction through amendment. Section 12 prescribes maximum imprisonment of fourteen years which the PA or DCO can pass, as per findings of the Council, under Section

11(1). PA or DCO shall pass a judicial order on receipt of the findings of the majority of Council. Sentence of Imprisonment can be passed with or without fine.

**Section <sup>(19)</sup>13.      Manner of enforcing sentences.-**

***(1) Any sentence passed under section 12 shall be executed in the manner provided for the execution of sentences in Chapter XXVIII of the Code of Criminal Procedure, 1898 (Act V of 1898); and-***

***(a) an offence punishable with imprisonment for life shall be punishable with rigorous imprisonment for a term which may extend to fourteen years;***

***(b) the imprisonment in default of payment of fine shall be simple and the provisions of sections 63 to 70 of the Pakistan Penal Code, 1860 (Act XLV of 1860) shall, subject to aforesaid provisions, apply to sentences passed under this Regulation; and***

***(c) the sentence imprisonment and fine provided by the Pakistan Penal Code or any other law specified in the Second Schedule to this Regulation for the offence shall (1860 XLV of 1860) be applicable to such offence committed in Federally Administered Tribal Areas.***

1. Any sentence passed under Section 12 of Regulation shall be executed in the manner provided in Chapter XXVIII of the Code of Criminal Procedure. Due to relevancy of this chapter, and to understand the mode of execution, provisions of Cr.PC are briefly discussed.

**Chapter XXVIII**

**Execution (Section 476-487) (Cr.PC)**

This Chapter deals with Execution of sentences.

**1.1 Postponement of Execution of sentences of imprisonment. Section 382 (A) Cr.PC.**

This is very important Section and the presiding officers must have in-depth understanding and object of this Section. Notwithstanding anything contained in Section 383 or 391, where the accused:-

- a. is awarded any sentence of imprisonment under Section 476 or
- b. is sentenced in cases other than those provided for in Section 381, to imprisonment whether with or without fine or whipping for a period of less than one year; the sentence shall not, if the accused furnishes bail to the satisfaction of the court for his appearance at such time and place as the court may direct, be executed, until the expiry of the period prescribed for making an appeal against such sentence, or an appeal is made within that time, until the sentence of imprisonment is confirmed by the Appellate court, but the sentence shall be executed as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

**1.2 Purpose.**

The purpose of this Section is to favour the accused in case of imprisonment of less than one year, with, or without, fine. It means either the offence is not that serious for which maximum punishment is upto one year or the trial court, while taking lenient view, has awarded sentence upto one year with or without fine, provided the accused furnishes bail to the satisfaction of court for his appearance in case the appeal is rejected and his sentence is confirmed. Thus the sentence can be suspended by the trial court till filing of appeal by the accused to the Commissioner which is thirty days. If accused fail to file an appeal within thirty days the trial court will cancel his bail bond and recall the accused and commit to jail to undergo his imprisonment. In case his appeal is admitted by the Commissioner then the sentence suspended by the trial court shall remain intact

till decision of appeal. The appellate authority may confirm the decision of the Trial court and send the accused to the Trial court for cancellation of his bail bond and execution of sentence. If the appellate court accepts the appeal and set aside the decision of Trial court the accused shall be acquitted. Bail bond of accused shall be released.

### **1.3     Section 476 Cr.PC. Procedure in cases mentioned in section 195.**

Apart from execution of sentence under Section 382A, this Section elaborates action for offence relating to administration of justice. Section 476 deals with certain offences affecting administration of justice. Offences have been categorized as under.

### **1.4     Section 195 Cr.PC.**

Prosecution for lawful contempt of lawful authority of public servant.

- (a) Any offence punishable under Section 172 to 188 of Pakistan Penal Code (PPC). Section 172-188 PPC deals with contempt of lawful authority of public servants. Violation of Section 144 Cr.PC is punished under Section 188 PPC.
- (b) Offences punishable under Section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, and 211 of PPC. Offences under these Sections relate to giving false evidence, issuing false certificate, removing evidence, fraudulent and concealment of property to prevent its seizure as forfeited or in execution and fraudulent practices in regard to decrees. Such court in relation to which such offences have been committed may file complaint.
- (c) Offences described in Section 463 are punishable under Section 471, 475 or Section 476 of PPC (These offences relate to documents and trade or properly marks).
- (d) Court includes Civil, Revenue and Criminal Court.

- Execution and Sections referred in Section 282(A) be consulted to understand the spirit of Section 382(A) Cr.PC.

**1.5      Section 382 (B) Cr.PC. Period of detention to be considered while awarding sentence of imprisonment.**

It is mandatory for the trial court to consider period for which the accused was detained in custody for such offence while passing a sentence of imprisonment. The period of detention will be counted from the date of arrest of accused for the offence.

- In case the accused is granted bail and later on convicted either by the Trial or appellate authority the court may give benefit of Section 382 (B) while announcing the sentence.
- Court shall take into consideration period of detention for such offence but accused cannot claim it as a matter of right. It is not mandatory to grant benefit under Section 382(B). Keeping in view the gravity of offence and related circumstances Court may decline it. It is discretionary powers of Court but discretion is not to be exercised arbitrarily. (1997 SCMR 55).
- “Take into consideration”, means the Court must give reasons for giving concession under Section 382(B) or declining the same.
- **Section 384 Cr.PC. Direction of warrant for execution.**  
Every warrant for the execution of a sentence of imprisonment shall be directed to the officer-In-charge of the jail or other place in which the prisoners, or is to be, confined.
- **Section 385 Cr.PC. Warrant with whom to be lodged.**  
Warrant with whom to be lodged whenever the prisoner is to be confined in a Jail the warrant shall be lodged with the jailer.

**1.6     Section 386 Cr.PC. Warrant for levy of fine.**

- (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for recovery of the fine in the following ways, that is to say, it may :-

- a) Issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offence.
- b) Issue a warrant to the [District Officer (Revenue)] authorizing him to realize the amount by execution according to civil process against the moveable or immoveable property of both of the defaulter.

Provided that, if the sentence directs that in default of payment of the time the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant.

- (2) The Provincial Government may make Rules Regulating the manner in which such warrants under Sub-Section (1), Clause (a) are to be executed and for the summary determination of any claims made by person other than the offender in respect of any property attached in execution of such warrant

- (3) Where the court issues a warrant to the [District Officer (Revenue)] under Sub-Section(1), Clause(b) such warrant deemed to be decree and the collector to be the decree holder, within the meaning of Code of Civil Procedure, 1898, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purpose of said code, be deemed to be the court which passed the decree , and all the provision of Code as to execution of decree shall apply accordingly.

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

**1.7     Section 387 Cr.PC. Effect of such warrant.**

A warrant issued under Section 386, Sub-Section (1) clause (a), by any court may be executed within the local limits of the jurisdiction of such court and it shall authorize the attachment and sale of any such property without such limits, when endorsed by the Magistrate within the local limits of whose jurisdiction such property is found.

**1.8     Section 388 Cr.PC. Suspension of execution of sentence of imprisonment**

1. When the offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid, the court may:-
  - a). Order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or these installments, of which the first shall be payable of or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and
  - b). suspend the execution of the sentences of imprisonment and release the offender , on the execution by the offender of a bond, with or without sureties; as the Court thinks fit, for his appearance before the court on the date or dates on or before which payment of the fine or the installments thereof, as the case may be, is to be made and if the amount of the fine or of any installment, as the case may be, is not realized or before the latest date on which it is payable under the order , the court may direct the sentence of imprisonment to be carried into execution at once.
- 2) The provisions of Sub-Section (1) shall be applicable also in any case whereas an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to either into a bond such as is referred to in that sub-



Section, fails to do so, the court may at once pass sentences of imprisonment.

**1.9     Section 389 Cr.PC. Who may issue warrant.**

Every warrant for the execution of any sentence may be issued either by the judge or Magistrate who passed the sentence, or by his successor-in-office.

**1.10    Section 395 Cr.PC. Procedure if punishment cannot be inflicted under Section 394.**

- (1) In any case in which , under Section 394, a sentence of whipping is wholly or partly, prevented from being executed , the offender shall be kept in custody till the court which passed the sentence can revise it ; and the said court may, at the discretion, either remit such sentence, or sentence the offender in lieu of whipping , or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.
- (2) Nothing in this Section shall be deemed to authorize any court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said court is competent to inflict.

**1.11    Section 396 Cr.PC. Execution of sentences on escaped convicts:-**

- (1) When sentence is passed under this code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately and, if, of imprisonment ,of 51[imprisonment for life] shall take effect according to the following rules, that is to say :-

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

3). When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, for a further period equal to that which at the time of his escape, remained unexpired of his former sentence.

Explanation.--- for the purpose of this section.

b). a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement, and

c) A sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

**1.12 Section 397 Cr.PC. Sentences of offender already sentenced for another offence.**

When a person is already undergoing a sentence of imprisonment, or imprisonment for life is sentenced to imprisonment, or [imprisonment for life], such imprisonment, or imprisonment for life shall commence at the expiration of the imprisonment, or imprisonment for life to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentences.

Provided further, that where a person who has been sentenced to imprisonment by an order under Section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

**1.13    Section 398 Cr.PC. Saving as to Sections 396 and 397.**

- (1) Nothing in Section 396 or Section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon this former or subsequent conviction.
- (2) when an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of 54 [imprisonment for life] and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, in default of payment of the fine until the person has undergone the further sentence or sentences.

Sub-Section (1) of Section 13 (Regulation) prescribes the procedure for enforcing sentences awarded under the Regulation. Provisions of Chapter XXVIII Cr.PC shall apply to accuse sentenced to imprisonment, or fine, or both under the Regulation.

- Reference to District Collector Revenue may be considered as Deputy Commissioner (District Collector) after amendments in Land Revenue Act, 1967 and put in place with effect from 1st January, 2013.
- Deputy Commissioner may recover such fines, when so ordered by court to recover the fines as arrears of land revenue. Once declared an amount of fine as arrears of land revenue then provisions of Sections 80 - 88 of Land Revenue Act, 1967 shall be pressed into action. Deputy Commissioner may proceed against, both, moveable and immoveable property of accused, now declared as defaulter.
- In case of FATA Governor may make rules regulating the manner in which warrants under Section 386 (Cr.PC) Sub-Section (1)(a) shall be executed. Regulation Section 62 authorizes the Governor to make rules to carry out the purposes and objects of this Regulation.

- Courts in FATA may issue warrants under Section 386 and 387 and seek permission of the Commissioner of Division in case moveable and immoveable property of the accused is situated in Settled Areas.

## **2. Sub-Section (1) (a) of Regulation.**

Sentence passed under the Regulation for an offence punishable with life imprisonment shall be punishable with rigorous imprisonment for a term which may extend to fourteen years. Thus the maximum punishment under the Regulation is fourteen years irrespective of imprisonment provided for any offence under the PPC or any other law for the time being in force in tribal areas.

## **3. Sub-Section (1) (b) of Regulation.**

Section (1)(b) prescribes the procedure and limits of imprisonment in default of fine.

- Such imprisonment in default of fine shall always be simple.
- In no Case accused total imprisonment above fourteen years as per limit laid down under section 13 (1) (a)

## **3.1 Sections 63 - 67 of the Pakistan Penal Code**

### **Section 63 PPC Amount of Fine.**

Amount of fine where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable, is unlimited but shall not be excessible. Schedule-II of Cr.PC. provides, in tabulated form, the nature of offences and in column 7 of Schedule-II punishment is given. It includes, fine, imprisonment (simple or rigorous), and imprisonment as well as fine. For some of offences the amount of fine has been specified while for majority of offences it is imprisonment or fine or both. The amount has not been specified. Section 63 lays down the principle that in cases of offences, where amount of fine has not been specified it must not be excessive but should be proportionate to offence.

### **3.2 Section 64 (PPC) Sentence of Imprisonment for Non-payment of Fine.**

- When an accused is sentenced for an offence,
  - a. Imprisonment and fine
  - b. Imprisonment or fine
  - c. Fine
  - d. Imprisonment.
- In case of (a), (b) or (c) the court may sentence the accused in default of payment of fine. Such imprisonment, in default of fine, shall be in addition to imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

### **3.3 Section 65 (PPC). Limit of imprisonment for non payment of fine, when imprisonment and fine awardable.**

The term for which the court directs the offender for the imprisonment in default of payment of fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for offence, if the offence be permissible with imprisonment as well as fine. This Section prescribes procedure in regard to limit of imprisonment for non-payment of fine.

- a). The term of imprisonment in default of fine shall not exceed one-fourth of the imprisonment which is the maximum period fixed for the offence.
- b). Such imprisonment in default shall be in those offences punishable with imprisonment as well as fine.

#### **Illustration**

- Mr. A is accused of robbery under Section 392 PRC committed on Highway between sunset and sunrise. The punishment is 14 years rigorous imprisonment and fine.

- Court awards sentence of 12 years and fine of Rs.50, 000. Accused fail to pay the fine within the prescribed period. He can be sentenced, in default of payment of fine, to another three years, making it to total of 15 years. But under the Regulation maximum punishment is fourteen years (Section 12 of Regulation). Thus Mr. A can be sentenced to two years imprisonment in default of payment of fine (Total 14 years).

Further restrictions on power of Magistrates to sentence to imprisonment in default of fine are imposed by Section 33 of Cr PC, which is reproduced below.

**3.4     Section 33 (PPC). Power of Magistrates to sentence to imprisonment in default of fine:-**

- 1). The court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default:

Provided that –

- a). The term is not in excess of the magistrate's powers under this Code;
- b). In any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

**3.5     The imprisonment awarded under this Section may be in addition to substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 32.**

- Reading Section 33 Cr.PC in juxtaposition with Section 13 of Regulation and Section 65 of PPC the position gets further clarified.

- a). Magistrate may award one fourth of term of imprisonment in default of fine, prescribed for such offence under the law.
- b). The term must not be in excess of Magistrates powers under the Code of Criminal Procedure.
- c). The punishment awarded for default of fine shall be in addition to substantive sentence of imprisonment for the maximum term awarded by the Magistrate under Section 32 Cr.PC
- d). the imprisonment which the court imposes in default of payment of fine may be of any description to which the offender might have been sentenced for the offence. (Section 66 PPC). As per Section 66 (PPC) the imprisonment in default of fine may be simple or rigorous depending upon the sentence prescribed for the offence. But Section 13 [1(b)] of Regulation describes that the imprisonment in default of fine shall be simple. Thus provisions of Regulation shall prevail.

**3.6      Section 67 (PPC). Imprisonment for non-payment of fine when such offence punishment with fine only.**

- If the offence be punishable with the fine only, the imprisonment which the court imposes in default of payment of the fine shall be simple, and the term for which the court directs the offender to be imprisoned , in default of payment of fine , shall not exceed the following scale , that is to say for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.
- In offences punishable with fine only the imprisonment in default of fine shall be simple and in no case shall exceed six months.

**3.7      Section 68 (PPC). Imprisonment to terminate on payment of fine.**

- The imprisonment which is imposed in default of payment of fine shall terminate whenever that fine is either paid or levied by process of law.

**3.8. Section 69 (PPC). Termination of imprisonment on payment of proportional part of fine.**

If, before the expiration of the term of imprisonment fixed in default of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

**Illustration.**

Mr X is sentenced to simple imprisonment in default of fine of Rs.100. If seventy five rupees of fine is paid or levied before the expiration of one month imprisonment, Mr. X will be discharged as soon as first month has expired.

**3.9. Section 70 (PPC). Fine leviable within six years or during imprisonment: death not to discharge property from liability.**

- The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for this debts.
- Judicial officers to consult Section 71 PPC (limit of punishment of offence made up of several offences), Section 72(PPC), Section 73, Section 74 and Section 75 PPC for award of punishments.

**4 Section 13 [1(c)] of Regulation.**

Sub Clause (c) of Sub Section provides that sentence of imprisonment and fine provided by Pakistan Penal Code or any law in the Second Schedule to this Regulation for the offence shall be applicable to such offence committed in FATA.



The Second Schedule to Regulation enlists offences punishable under this Regulation and other statutes given in the Second Schedule.

Thus any sentence of imprisonment and fine provided in the PPC can be awarded for an offence committed in FATA but subject to provisions of this Regulation as per relation of Regulation to other laws (Section 3 of Regulation). The punishments to be awarded under this Regulation are in addition to any power conferred by or under any law, for the time being, in force in FATA.

**Section 14. Omitted**

**Section 15. Omitted**

**Section 16. Omitted**

**Section 17. Omitted**

**Section 18. Omitted**

**Section <sup>(20)</sup> 19. Record of Political Agent or District  
Coordination Officer,-**

- (1) *Where the Political Agent or District Coordination Officer, as the case may be, passes any sentence or imprisonment or fine or both, he shall maintain a complete record of the case and record his reasons for passing the sentence.*
- (2) *The record shall be made by the Political Agent or District Coordination Officer, as the case may be, and the Council of Elders in Urdu or English or Pushto.*

- Current Position of Record Room and Copying Branch in FATA is not satisfactory.

Rules, under Section 62 of Regulation, may be framed to establish Record Room and Copying Branch. It will provide legal cover to records and issuance of copies of case files and other documents.

**Sub-Section(2). Record may be maintained in Urdu, English or Pashto.**

So translations are required for appeals for Pashto to Urdu and English and vice versa. It necessitates establishment of a Copying Branch under the rules.

**Section. 20. Attendance of Parties and witnesses before Political Agent or District Coordination Officer or Council of Elders:-**

*Where a reference is made to a Council of Elders, the Political Agent or the District Coordination Officer, as the case may be, may exercise all or any of the powers conferred by the Code of Civil Procedure, 1908(Act V of 1908) and the Code of Criminal Procedure, 1898,(Act V of 1898) respectively, as the case may be, for the purpose of compelling the attendance, before himself or the Council of Elders or Joint Council of Elders, of the parties, and witness, or any of them, in any case and at any stage of the proceedings.*

1. As discussed in Section 8 and Section 12 of this Regulation that the job of PA, DCO or APA is not to merely refer the plaint of petitioner to the Council in civil case or copy of FIR in a criminal case. Regulation does not envisage the detachment of PA, DCO or APA from the proceedings once civil or criminal reference is sent to Council. In case of civil proceedings the Presiding Officers are bound to take all the steps till issues are comprehensively framed and a reference is filed alongwith complete evidence in support of claim and its rebuttal by the defendant (s).

Similarly, in criminal cases all measures leading to framing of charges must be completed by the Presiding Officers. List of witnesses, documentary and forensic evidence is to be collected. As per philosophy and approach of Regulation the Council will examine the witnesses, accused and may conduct further inquiry if so required in criminal reference under Section 11. During proceedings Council may direct further inquiry through any officials, and can also seek expert opinion.

Based on inquiry and evidence the Council may recommend findings of guilt or innocence of accused. Even in criminal cases while acquittal is absolute findings of guilt may not be exactly in accordance with the reference. Council may come to the conclusion that some of the offences could not be proved. Council lacks powers to add Sections of law or offences. If during the enquiry evidence is produced which might prove involvement of accused in offences not mentioned in the reference the Council may send back the case to PA or DCO. Political Administration, after further investigation, if so required, will reframe the reference and send the same to Council.

As the Council is competent to recommend findings of acquittal so logically Council is competent to recommend deletion of specific charge and may recommend conviction under some portion of charge.

1.1 It is the job of the presiding officer to apply relevant Sections of laws as regard to offence.

Council only give findings of guilt or innocence.

### **Illustration**

Mr. B is charged for the following offences.

- a). Assault or use of criminal force otherwise than on grave provocation
- b). criminal trespass
- c). house trespass.

Council may give recommendation , based on findings, that charge of criminal and house trespass could not be proved against the accused, while charge of assault or use of criminal force otherwise than on grave provocation stand proved.

PA or DCO may convict the accused under relevant Section of PPC by issuing a well-reasoned order.

In civil reference Council may refer back the issues as the proceedings get underway. Council may also require the Political Administration to seek clarification on issues.

Otherwise also Council has no force to enforce its orders. So ranging from logistic support to legal assistance shall be provided by the Political Administration

**a. Code of Criminal Procedure ,1908**

Chapter VI of Cr.PC deals with the process to compel appearance .

Relevant sections of Cr.PC are briefly discussed as under:-

**1.3 Summons.** (Section 68-74) Magistrates are competent to issue summons. Summons are addressed to police.

Summons and warrants may be addressed or directed to Political Tehsildars, Political Moharirs and Officials of levies and Khassadars. Summons in duplicate, are signed by the presiding officer. Summons shall be served on the person summoned; who shall sign the receipt.(Section 69 Cr.PC)

When person summoned, cannot be found, a copy of summon can be delivered to any male member of the family or affixed on conspicuous part of the house (Section 70-71). When summons shall be served outside the limits of court, the same can be addressed to such Magistrate within the local limits of whose jurisdiction such person resides.

Summon can also be served through the company and the Government Departments in case of employees

**1.4     Warrants of arrest (Section 75-86 Cr.PC)**

Every warrant of arrest by a court shall be in writing and signed by the Presiding Officer.(Section 75) Any Court issuing a warrant shall remain in force until, it is cancelled by the court who issued it, or it is executed.

**1.5     Section 76.     Warrants may be bailable or non-bailable**

If a person executes a bond with sureties for his attendance the officer shall take such security and shall release such person.

A warrant of arrest shall, ordinarily, be directed to Police Officer. (Section-77).

Warrant may be directed to landlord, farmer or manager of land for the arrest of any escaped convict, proclaimed offender or person who has been accused of non- bailable offence. In FATA such warrant may be addressed to elders for execution.

**1.6     Section 81.**

Person arrested to be brought before the court without delay.

When a warrant is to be executed outside the local limits of the jurisdiction of the court. It may be addressed to District Head of Police or Magistrate having jurisdiction over the area. (Section 83).

Presiding Officers in Tribal areas may execute such warrant through the PA, DC or Commissioner.

**1.7     Proclamation and attachment (Sections 87, 88 and 89)**

**Section 87 Proclamation for person absconding.**

If any court is satisfied that any person against whom a warrant has been issued by it has absconded from such court may publish a written proclamation requiring him to appear at a specified place and time not less than thirty days from the date of publishing of such proclamation.

**1.8      Section 88. Attachment of property of a person absconding.**

Court may at any time, after a proclamation under section 87, order attachment of any moveable or immoveable property. (See Section 88 for details)

**1.9      Section 89. Restoration of attached property**

If within two years from the date of the attachment any person whose property is or has been at the disposal of the Provincial Government, under Sub Section (7) of Section 88, appears voluntarily or is apprehended and brought before the court and if he satisfy the Court, that he did not abscond or conceal himself willfully; such property, or, if the same has been sold the net proceed of sale and the residue of property shall be delivered to him.

**1.10     Section 91. Power to take bond for appearance.**

Court may require a person to execute a bond for his appearance.

**Chapter VII** of processes to compel the production of documents and other moveable property.

**1.11     Section 94. Summons to produce documents or other things.**

(1) Whenever any Court, or any officer in charge of a Police Station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summon, or such officers a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order:

Provided that no such officer shall issue any such order requiring the production of any document or other thing which is in the custody of a bank or banker as defined in the Bankers' Books Evidence Act, 1891(XVIII of 1891) and relates, or might disclose any information which relates to the bank account of any person except

**1.12    Section 96.    When search warrant may be issued.**

(1)    Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition or where such documents or thing is not known to the Court to be in the possession of any person, or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance and the provisions hereinafter contained.

**1.13    Section 98 Cr.PC. Search of house suspected to confirm stolen property , forged document etc.**

(1)    Magistrate of the First Class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps, i5[bank notes, currency notes or coins, or instruments or materials for counterfeiting coins stamps, bank notes or currency notes] or for forging. or that any forged documents, false seals or counterfeit stamps [bank note currency notes or coins or instruments or materials used for counterfeiting coins, stamps, bank notes or currency notes] or for forging, are kept or deposited in any place or for the deposit, sale, manufacture or production of any obscene object such as is referred to in section 292 of the Pakistan Penal Code or that any such obscene objects are kept or deposited in

any place; he may by his warrant authorize any police-officer above the rank of a constable:-

- (a) to enter, with such assistance as may be required, such place, and
  - (b) to search the same in manner specified in the warrant, and
  - (c) to take possession of any property, documents, seals, stamps, 17(bank notes, currency notes] or coins there in found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials or of any such obscene objects as aforesaid, and
  - (d) to convey such property, documents, seals, stamps, [bank notes, currency notes], coins, instruments, or materials or such obscene objects before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and
  - (e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents seals, or stamps, (bank notes, currency] notes coins, instruments or materials [or such obscene objects] knowing of having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, bank notes, currency notes, coin, instruments or materials, to have been forged, falsified or counterfeited, or the said instruments or materials have been or to be intended to be used for counterfeiting coin, stamps, bank notes, or currency notes or for forging <sup>20</sup>[or the said obscene objects to have been or to be intended to be sold, let to hire, distributed, publicly exhibited, circulated, imported or exported].
- (2) The provisions of this Section with respect to:



- (a) counterfeit coin,
- (b) coin suspected to be counterfeit, and
- (c) instruments or materials for counterfeiting coin. Shall, so far as they can be made applicable, apply respectively to:

Pieces of metal made in contravention of the Metal Tokens Act, 1889, or brought into Pakistan in contravention of any notification for the time being in force under <sup>21</sup> [section 16 of the Customs Act, 1969].

- Pieces of metal suspected to have been so made or to have been so brought into Pakistan or to be intended to be issued in contravention of the former, of those Acts, and
- Instruments or materials for making pieces of metal in contravention of that Act.

## **2. Bail Section 11(A) of Regulation**

PA or DCO while exercising powers under the Regulation and Cr.PC.

- a). any person under the age of sixteen or any woman or any sick or infirm person accused of a non-bailable offence may be released on bail.
- b). any other such person accused of non-bailable offence may also be released on bail subject to notice to Complainant and the prosecution.
- c). Provisions of Section 496 -502 Cr.PC, shall mutatis mutandis, apply to bail to such an accused.

### **1.14 Chapter XL Commissions for the Examination of witnesses.**

#### **1.15 Section 503 . When attendance of witness may be dispensed with.**

(1) Whenever , in the course of an inquiry , a trial or any other proceeding under this Code , it appears to <sup>120</sup>[\* \*] a Court of Session or the High Court that the

examination of witness is necessary for the ends of justice , and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case , would be unreasonable, such <sup>121</sup>[\* \*] Court may dispense with such attendance and may issue a commission to any <sup>122</sup>[\* \*] Magistrate of the first class, within the local limits of whose jurisdiction such witness resides to take the evidence of such witness.

<sup>124</sup>[(2-A). When the witness resides in an area in or in relation which the President has extra-provincial jurisdiction within the meaning of the Extra-Provincial Jurisdiction Order , 1949 (G.G O.No.5 of 1949), the Commission may be issued to such Court or officer in the area a may be recognized by the President by notification in official Gazette as Court or officer to which or to whom commissions may be issued under this Sub-Section and within the local limits of whose jurisdiction the witness resides.]

(2-B). When the witness resides in the United Kingdom or any other country of the Commonwealth or in the Union of Burma [or any other country in which reciprocal arrangement in this behalf exists], the commission may be issued to such Court or Judge having authority in this behalf in that country as may be specified by the Central Government by <sup>127</sup>[notification in the official Gazette].

(3). The Magistrate or officer to whom the commission is issued, <sup>128</sup>[\* \*] <sup>129</sup>[\* \*] shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner , and may for this purpose exercise the same powers, as in trials of <sup>130</sup>[cases] under this Code.

<sup>131</sup>[(4). Where the commission issued to such officer as is mentioned in sub-section (2-A), he may, in lieu of proceeding in the manner provided in sub-section (3), delegate his powers and duties under the commission to any officer subordinate to him whose powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in Pakistan.

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120. The word " A presidency Magistrate" omitted by A.Q, 1949.
121. Omitted the words "Magistrate or" by the Code of Criminal Procedure (Am) Ord XXXVII of 2001, Dated:13-8-2001
122. Omitted the word "District Magistrate or" by the Code of Criminal Procedure(Am) Ord: XXXVII of 2001 dated:13-8-2001 [(2)\* \*]
123. Omitted by Federal Laws (Revision and declaration) Ord. (27 of 1981).
124. Sups. By Abid.
125. Omitted by Law reforms Ord.,1972
126. Ins. By the Civil and Criminal Procedure Codes(Am) Ord.,1962(67 of 1962).,S.2.
127. For instance of notification see Gaz. of Pak ., 1960, Ext.,pp.461-462.
128. The Commas and words, "or if he is the District Magistrate, he," omitted by Federal Laws (Revision & Declaration) Ord,(27 of 1981).
129. Words and comma "or such Magistrate of the First Class as he appoints in this behalf" omitted by the Law Reforms Ord.1972.
130. Words and comma "or such Magistrate of the First Class as he appoints in this behalf" omitted by the Law Reforms Ord.197.

**1.16     Section 505. Parties may examine witnesses.**

(1) The parties to any proceeding under this Code in which a commission is issued may, respectively forward and interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue and when the commission is directed to a Magistrate or officer mentioned in section 503, such Magistrate or the officer, to whom the duty of executing such commission has been delegated shall examine the witness upon such interrogatories.

(2) Any such party may appear before such Magistrate or officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine) as the case may be) the said witness.

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132. Words "other than a District Magistrate" omitted by the Code of Criminal Procedure(Am) Ord. XXXVII of 2001,dated:13-8-2001.
133. Subs, for the words "such Magistrate shall apply to the District Magistrate" by the Law Reforms Ord., 1972.
134. Words " if he is a Judicial Magistrate" omitted by the Code of Criminal Procedure (Am) Ord., XXXVII of 2001  
dated:13-8-2001
135. Words "and if he is an Executive Magistrate, shall apply to the District Magistrate" omitted by the Code of Criminal Procedure (Am) Ord. XXXVII of 2001, dated:13-8-2001.
136. Subs. The words " such Magistrate shall apply to the District Magistrate" by Law Reforms Ord.,1972.
137. Words " or District Magistrate , as the case may be ," omitted by the Code of Criminal Procedure (Am) Ord., XXXVII 2001 date:13-8-2001.

**1.17     Section 506 Power of Magistrate to apply for issue of commission.**

Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate <sup>132</sup>[\* \*], it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable <sup>133</sup>[such Magistrate <sup>134</sup>[\* \*], shall apply to the Sessions Judge <sup>135</sup>[\* \*] stating the reasons for the application <sup>136</sup>[and the Session Judge <sup>137</sup>[\* \*] may either a 131. commission in the manner hereinbefore provided or rejected the application

**1.18     Section 507. Return of commission.**

(1) After any commission issued under Section 503 or Section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined there under, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times, to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfied the conditions prescribed by section 33 of the Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

**1.19     Section 508. Adjournment of inquiry or trial.**

In every case in which a commission is issued under section 503 or section 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

- Wherever the word, “Session Court” or Session Judge” appears in these section the powers can be exercised by the Commissioner. PA or DCO are bound to refer such matter to Commissioner.

#### **Chapter XLI Cr.PC Special Rules of Evidence.**

**2.      Section 509 Deposition of medical witness.** –(1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) Power to summon medical witness. The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

**2.1      Section 510 Report of Chemical Examiner, Serologist.**

Any document purporting to be a report, under the hand of any Chemical Examiner, Assistant Chemical Examiner to Government [or of the Chief Chemist of the Pakistan Security Printing Corporation Limited] or any Serologist, fingerprint expert or fire-arm expert appointed by Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may, without calling him as a witness, be used as evidence in any inquiry trial or other proceeding under this Code:

Provided that the Court may, [if it considers necessary in the interest of justice] summons and examine the person by whom such report has been made.]

**3.      Code of Civil Procedure , 1908 (CPC).**

Section 20 of the Regulation empowers the PA or DCO to exercise all or any of the powers, conferred by the Code of Criminal Procedure, 1908.

- a) "Where a reference is made to Council of Elders". It means that when a civil reference is filed, PA or DCO have all the powers prior to filing the reference as per CPC.
- b) PA or DCO will be having all the powers of civil court under CPC even when reference is filed to Council.
- c) Powers include compelling attendance, before himself, or Council of elders.
- d) In any cases of Civil or Criminal nature.
- e) At any stage of proceedings i.e. prior to filing of reference, during pendency of reference and after when findings from the Council are received back.
- f) Proceedings include passing of order, as per findings or Council, for further enquiry and findings.
- g) Issuing a decree and its execution.

Regulation vests powers of civil Court in DCO, PA and APA and have all the powers of Civil Court under the CPC.

Court may issue summons to defendants. (Section 27 CPC) and witnesses (Section 31 CPC).

### **3.1 Section 30 C.P.C. Power to Order discovery and like.**

Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party;

- a. Make such orders as may be necessary or reasonable in all matters relating to delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.
- b. Issue summons to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
- c. Order any fact to be proved by affidavit.

**3.2     Section 31.     Summon to witness (CPC).**

The provisions contained in Sections 27, 28 and 29 shall apply to summons to give evidence or to produce documents or other material objects.

**3.3     Section 32.     Penalty for default (CPC).**

The Court may compel the attendance of any person to whom a summon has been issued under section 30 and for that purpose may:

- a. Issue a warrant for his arrest;
- b. Attach and sell his property ;
- c. Impose a fine upon him not exceeding five hundred rupees ;
- d. Order him to furnish security for his appearance and in default commit him to the civil prison.

**4.     The First Schedule to CPC.**

**Order 5.** Issue and service of summons. (Rule 1-30).

**Rule 3.** Summons to defendants or plaintiff to appear in person.

**Rule 7 and 8.** Summons to order defendant to produce documents relied on by him and directions to defendant to produce witnesses.

**Order 9.**     **Appearance of parties and consequence of non-appearance.**  
**(Rule 1-14).**

Court may proceed with the suit in case of non-attendance of plaintiff or defendants.

- Court may issue ex-party order.



**Rules 3.** Defendant may appear and satisfy the Court.

The Court may set aside ex-party order.

- No decree shall be set aside without notice to opposite party.(Rule 14).

**Order 10.**      **Examination of parties by the Court (Rule 1-4)**

**Rule 1.**      **Ascertainment whether allegations in pleading are admitted or denied.**

At the first hearing of suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party , and are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

- This ascertainment is a pre-requisite for framing issues and in fact admissibility of suit depends upon it . It would not be a trial of the suit for the purpose of clarifying the pleading.(P1983.Q114,A1953 SC 225)
- (i) The Court may conduct preliminary proceedings, with the consent of parties, commission to examine the witnesses, admit documents and take other steps.
- (ii) Adopt, with the consent of parties, any alternate method of dispute resolution including mediation, conciliation or any such other means.

**5.    FATA Jirga**

Rule 1(A) give much broader powers to PA or DCO and legal cover to 'Jirga', distinct from Council of Elders. During the pleadings if parties consent to such commission (Jirga) and based on Jirga award, dispute resolution at this stage would not necessitate reference to the Council of Elders. Such consent decree shall operate as res judicata for future litigation.

- **Under Rule 2.** The Court may, at the first hearing of suit, examine the party orally. Substance of examination will be reduced to writing by the Court. (Rule 3).

**Rule 4** where the pleader of any party or party refuses, or is unable to answer any material question, which, in the opinion of Court, he ought to answer the Court may postpone the hearing for future day, if such party fails, without lawful exercise to appear in person on the day so appointed that Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

- If the plaintiff is absent on such appointed day the suit may be dismissed and if the defendant is absent, it may decree the suit.
- Under the Regulation since decree can only be passed on the findings of Council therefore while suit may be dismissed due to absence of plaintiff; a decree against the defendant will require a reference to Council. The Court may refer the case to Council explaining the whole background and if defendant again fails to appear the Council may recommend ex-parte findings and the Presiding Officer shall issue an order as per Section 8 [4(a) or (b) ] of Regulation.

**Order xi**

**6. Discovery and inspection (Rule 1-23) CPC.**

**Rule1.** Plaintiff or defendant, by leave of Court, may deliver interrogatories in writing for the examination of opposite parties.

Rule 1 to 11 relates to interrogations, rules 12, 13 and 20 to discovery of documents, rules 15 to 16 production of documents and rules 17 to 19 inspections of documents.

- Where the plaint or written statement does not sufficiently explain the nature of the party's case, interrogations may be administrated to the party. Its

purpose is to support ones case by obtaining admissions or for destroying the opponent's case.

### **Order xii (CPC)**

#### **7. Admissions ( Rules 1-9)**

Under Rule 1 any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Such admissions may be of fact in pleading or of document (order 12 Rule 2)

In pleading such admission may be (a) expressly or (b) constructively (order 8 Rule 5)

- If admissions is other wise than pleading it can be as a result of:
  - a. Examination by Court (order 10 rule 1),
  - b. Answer to interrogatories (order 11 rule 8)
  - c. On notice (order 12 rule 4)
  - d. On oath (order 14 rule 3)
  - e. On agreement of parties (order 23 rule 3)
- ✓ Admissions, wholly, or partly shorten the litigation and narrows down the issues. Facts admitted need not be proved (Order 7 rule 5).
- ✓ Where a party admits a portion of claim the Court may decree it and trial may proceed in regard to rest of the claims.
- Courts in FATA may record portion of claim admitted and refer the case to Council of Elders. On receipt of findings with regard to un-admitted claim decree can be issued accordingly.
- In FATA admission through oath is quite common and the parties may admit the whole claim or part of it.
- Either party may call upon the other party to admit any document or any specific fact or facts mentioned in such notice (Rules 3 and 34)

**Rule 5.** A notice to admit facts shall be in Form No.10 in appendix. (C) and admission of facts shall be in Form No. 11 in Appendix C to CPC.

**Order XIII (Rules 1- 11)**

**Productions , impounding and return of execution.**

**Rule-1**

Stipulates that documentary evidence to be produced at first hearing by the parties, on which they intend to rely. On production of documents Court may call upon the parties to admit or deny the documents (Rule 3).

- If a party fails to produce documents evidence at first hearing without reasonable justifications, Court may require to admit such documents subsequently.

Only documents admitted shall form part of record and non-admitted documents shall be returned to the party concerned.

Admitted documents may be returned, if not impounded under Rule 8, or not required in appeal.

**Order XIV (Rule 1-7).**

**8.      Settlement of issues and determination of suit on issues of law or on issues agreed upon.**

**Rule 1.   Framing of issues.**

- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

- (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
- (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue
- (4) Issues are of two kinds: (a) issues of fact, (b) issue of law.
- (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, assert upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
- (6) Nothing in this rule requires the court to frame and record issues where the defendant at the first hearing of the suit makes defence.

#### **8.1     Framing of Issues**

The pleadings of the parties are the first stage of a suit. The pleadings may be clarified by the statements of the parties under Order 10 and thereafter additional material may be brought on the record by the inspection and discovery of documents under Order 11, and their production under Order 13. Further the parties may be required to admit or deny documents and facts under Order 12. In addition the statements of the parties or their witnesses may be recorded under Order 14 rule 1 and 4, respectively. On the basis of all this material the court is to frame issues, at the first hearing of the suit, in respect of those material propositions of fact or law alleged by one party and either denied or not admitted by the other, notwithstanding that no written statement has been filed.

- It is the duty of the judge himself to frame the issues, so that the parties may know the controversy, the disputed fact on which evidence is to be led and to enable an effective judgment to be rendered. Trial commences after the framing of issues. Ordinarily for purposes of a proper trial, a written statement should be filed or required; issues framed and after recording of evidence arguments heard Questions of fact or mixed questions of law and fact cannot be decided without recorded evidence. Where a material point not raised in the pleadings comes to the notice of the court, during the course of evidence, the court can frame the issue regarding it and try it. The object of framing issues is to ascertain the real dispute between the parties narrowing down the area of conflict and determining where the parties differ.
- The framing of issues is one of the most important stages of the trial for the following amongst other reasons :-
  - Under Order 18 rule 2 the parties are required to prove the issues and not the pleadings generally.
  - Under Order 20 rule 5 the court is bound to give a decision on each issue framed.
  - The appellate court also decides the appeal on the basis of the issues framed by the subordinate court. See Order 41 rule 31.

Issues are to be framed on the basis of material enumerated in rule 3, and only with regard to material propositions of law or facts as defined in sub-rule (2). Material propositions are those which the plaintiff must allege to show right to sue or a defendant, in order to constitute his defence. The mere fact that an allegation is made and denied does not mean that the proposition is material. In accordance with sub –rule (6) the court is not bound to frame issues regarding matters which are not denied. (Order No.8 rule 5). The mere fact that an issue has not been framed, does not mean that the party admit those facts. No issues are to be

famed with regard to matters admitted by the defendants, and the court will pronounce judgment respecting matters which are admitted. (Order 12 rule 6 and Order 15 ).

Where proper issues are not framed by the trial court, the appellate court can remand the case for framing of proper issues. (Order 41 rules 25 and 27). If no issues are framed at all and the parties are prejudiced, it will be a material irregularity.

A revision lies on the question of wrong allocation of burden of proof or no framing of a necessary issue.

**8.2** Framing of issues is the most crucial stage, especially in FATA, as it is after framing of issues that the case alongwith the documents, and after taking the measures as explained above, will be referred to the Council for further inquiry and findings. Pleading of the parties is the first stage of suit.

Starting with the plaint, its examinations, possible return for want of documents or lack of precise cause of action, limitation, issues of resubjudice and resjudicata, witnesses, documents, written statements, notices to admission, discovery of documents and their production shall lead to framing of issues. Framing of issues is the last pre-trial stage. When issues are clearly framed the regular hearing of suit towards adjudication starts. In criminal law it is the framing of charge, serving on the accused its admission or denial, set the process of trial in motion.

In civil cases the issues are framed after all the steps, and narrowing it down to the issues where parties are at variance. These are the points which the Court is supposed to determine adjudicate and issue a decree.

- Proper framing of issues not only facilities the job of trial Court but also reduces the burden of appellate forums.

Many a time appellate Courts remand the case over failure of trial Court to properly frame the issues.

- In case of FATA it is all the more important as it is after framing of issues that the case is referred to the Council of Elders for inquiry and findings. Incomplete, and vaguely framed, issues will only result in reference and back references from the Council for want of clarifications but may also result in faulty findings. Such lacunae may also provide an opportunity to the Council of Elders to resort to favouritism or incomplete determination of facts.

The net result is lack of execution of decrees and institution of fresh suits by the same parties, on the same subject and title but lacking one important aspect, that would not attract provisions of res judicata, "Parties heard and case decided" Because the parties may claim that they have not been properly 'heard' or there is lack of determination of all the facts.

Besides there are frequent remand of cases both from the appellate authority and the FATA Tribunal.

- In framing of issues Court must settle the issues of law first; to be followed by issues of fact (Order 14. Rule 2).
- In framing the issues the Courts must follow the steps, and provisions of, Rule 4, 5, 6 and 7 of Order 14.
- It would be failure of Court if the Council finds at the first hearing that the parties are not at issues.[Orders XV (Rules 1 to 4)]
- Thus under the Regulation the Courts in FATA are bound to complete the procedure upto order 15 and then refer the case to Council Elders.

## 9. **Council of Elders.**



Council of Elders will summon the witnesses (Order 16) Adjournments, if so required (Order 17), hearing of suit and examination of witnesses (Order 18). Affidavits (Order 19) but will stop short of judgment and decree (Order 20).

The Council of elders will only give its findings in a civil case as per issues already framed. The Council will give its findings on every issue and send the case back to the Court.

The Court, if it agrees with the findings, shall pass the judgment and order. (Order 20).

As soon as decree is passed and an application for execution is filed the court will start execution proceedings under Order 21 (Rules 1 to 103).

#### **10. Criminal Reference**

The Court will proceed with all the steps right up to framing of charge and send the case to the Council of Elders for inquiry and findings.

Thus in criminal cases the Court procedure starts with taking cognizance of case , investigation, search, arrest, bail ,summons ,warrants, tender of pardon to accomplices, collection of evidence framing charge and submission of report (Challan) under section 173 Cr.PC to the Council of Elders .

- Council of Elders is not competent to award punishment or acquit the accused but after inquiry and examination of witnesses send findings of guilt or innocence in regard to accused person or persons. Based on charge and the recommendations of Council with regard to extent of guilt or innocence the Court may announce punishment or order of acquittal. In criminal case also Court may remand the case to Council of Elders for further inquiry and findings if the Court does not agree with the earlier findings.

As soon as the Court announces punishment the process of execution (chapter xxviii) Pakistan Penal Code (section 381 to 400) starts. This whole execution procedure falls within the jurisdiction of trial Court.

**Section <sup>(21)</sup>21. Blockade of hostile or unfriendly tribe:-**

*In the event of any tribe of Federally Administered Tribal Areas or any section of the tribe or any member of the tribe, acting in hostile, subversive or offensive manner towards the State or to any person residing within the settled area of Pakistan, the Political Agent or District Coordination Officer, as the case may be, by an order in writing may direct,-*

- (a) The arrest of hostile members of such tribe wherever they may be, and the attachment of the property both movable and immovable wherever it may be found, belonging to them or any of them;*
- (b) The detention in safe custody of any person so arrested or property so attached; and,*
- (c) Debar all or any member of the Tribe from access into the settled area of Pakistan by public proclamation:*

*Provided that the above-mentioned actions shall be taken against the plareena of the accused in the first instance, and if the circumstances so warrant, then any or all of the following actions may be taken by a well-reasoned order in writing against,-*

- (i) the sub section of the tribe of the accused.*
- (ii) the section of the tribe of the accused.*
- (iii) any other section of the tribe of the accused.*

*Provided further that the confiscation of the property so attached shall be made after public proclamation and holding necessary inquiry.*

*Provided also that woman, children less than sixteen years of age persons over sixty-five years of age shall not be arrested and detained under this section.*

**Explanation :-**

***Plareena as mentioned in first proviso includes the male descendants of the paternal grandfather of the accused.***

**1. Hostile, subversive or offensive manner.**

In the FCR, 1901 it was 'acting in a hostile or unfriendly' manner towards the British Government'.

Under the amended Regulation it has been replaced with "acting in hostile, or to any person residing within settled area of Pakistan".

Besides in the FCR, 1901 action under Section 21 required prior approval of Commissioner. In the Regulation prior approval of Commissioner not mentioned which is very vital omission.

Political Agents and DCO's do, even now, seek approval of Commissioner but it is without legal cover.

Post of Commissioner was abolished on 14.8.2001 and revived in 2009. Otherwise also any action against the Tribals residing in Settled areas , or their property require approval of Commissioner as it must be in the knowledge of Deputy Commissioner of District. Thus co-ordination of Divisional level is required.

- It is a procedural matter and approval of Commissioner can be streamlined through rules under Section 62 of the Regulation.

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- 20. Substituted for Sec 19 to 32 of Regulation III of 1901.
- 21. Substituted for Sec 21 of Regulation III of 1901.

## **1.2     Grounds for action under Section 21.**

PA or DCO must give valid reasons for such order, seeking approval of Commissioner. Any such tribe or section may appeal against the order. It should not be based on hearsay evidence but PA or DCO must give full justification indicating all the other measures, available under the Regulation, taken so far. Result of such measures and cogent reasons for failure to achieve the desired results. It must be stated, with evidence, that the PA or DCO had no other option to resort to such extreme step as all other options were exhausted.

**Hostile.** Showing ill will or a desire to harm, antagonistic or unfriendly.

**Offensive manner.** Offense is a violation of law, a crime. Also termed criminal offence. Offensive manner means in a way which is with criminal intent.

**Subversive.** The process of overthrowing, destroying by using force or illegal means. (Black's Law Dictionary).

## **1.3     Any tribe or any member of the tribe.**

It may be the whole tribe, sub tribe, section or sub section or even any member of the tribe.

The whole concept of tribal administration is based on territorial and collective responsibility. While territorial responsibility of a tribe, sub tribe, section or sub section is based on the land and area owned by such tribe. The whole tribal society is highly segmented and regimental. There is informal and formal demarcation of land right up to Tribal and down to Sub Section level.

Contrary to issue of jurisdiction of 'Police Station' in Settled Areas such controversy hardly arises in FATA. Irrespective of other dilatory tactics no tribe or Section will ever disown the land just to avoid shouldering the territorial responsibility. They may dispute the exact location of occurrence of a fact (Crime) or try to prove and shift the crime scene beyond their territory but disowning any land means ceding it, and may be forever, to another tribe or sub-tribe.

Thus the tribals are cognizant of the fact that hostility or subversive activities within their territory means earning enmity of their fellow tribesmen due to punitive action against the whole tribe by the Political Administration.

But there are instances, as historical evidence and data of last hundred years, vouch for the fact that any tribe or any member of the tribe may.

- a). act in an hostile , subversive or hostile manner towards the state or
- b). to any person residing within the settled areas of Pakistan.

Tribal Areas located at a strategic place and Pak- Afghan Border right from Bajaur to South Waziristan Agency and FR DIKhan (Sherani) sharing border with the Zhob District of Baluchistan. Any tribe may act against the settled areas of Pakistan.

With the passage of time the tribes have settled down in adjacent districts of Khyber Pakhtun Khwa. They own land and business across the Country and even abroad. Land, border and business disputes are common and quite often lead to armed clashes between the tribals of FATA and locals of adjacent districts of Khyber Pakhtun Khwa.

- There are areas like Kulachi Sub division of DIKhan District and Tank District where tribals have land disputes over the grazing rights in winters. Similarly Tribal Agency versus Settled Districts,

Land, and boundary disputes, exists in case of Mohmand- Charsada , Khyber-Peshawar , Aurakzai-Kohat and FR Bannu-Bannu District.

- Thus the situation warrants, and necessitates, action against the tribals under Section 21.

#### **1.4 Mode of Action.**

- a) Arrest of members of hostile tribe, where ever they may be; whether in FATA or anywhere in Settled District.
- b) Attachment of the property, both, moveable and immoveable, where ever it may be found.
- c) Such property may be owned by the tribe or any one of them.
- d) Detention in custody of such persons so arrested and property so attached.
- e) by making a public proclamation to debar entry of all, or any member of tribe, into settled areas.

### **1.5 Procedure to be followed.**

Tribe where ever referred for the purpose of this section shall include Sub Tribe, Section and Sub Section.

- i. PA or DCO shall make all efforts, through Jirga, and by public proclamation warning the tribe to immediately cease such hostile activities either towards the state or any person residing in settled areas.
- ii. Tribes and Sub Tribes may be asked to furnish bonds alongwith sureties that they shall desist from such activities.
- iii. If such warnings and proclamations are ignored by such tribe and hostile activities continued then. PA or DCO shall issue a final notice to the Plareena of the accused in the first instance followed by series of actions as above.
- iv. But before initiating action PA or DCO shall seek approval of Commissioner.
- v. If the action is required against a person or group of persons, or Plareena and the desired result are achieved the action under Section 21 shall be deemed as Complete.
- vi. If action against Plareena does not yield results than actions as per (i),(ii) and (iii) of Section 21 (c) may be initiated.

The purpose of enlarging the action is to exert pressure on Plareena of the accused for surrender of accused person or Section of Tribe. In FATA, except Scouts or military, operation direct search and arrests are rarely made.

It is through cited measures that the tribe is forced to surrender the accused persons, or cease to continue hostile activities towards the settled areas or the state. When action under this section is started arrests are made on check posts, both, in the Agency / FR and the districts. Vehicles are also impounded.

- Deputy Commissioner of the District are requested for attachment of immoveable and moveable property. Revenue officers may assist the Political Administration in identification of immoveable property. Revenue officer may seal or appoint custodian to receive the profits of such property.

- Political Administration has also devised some indirect co-receive measure such as suspension of all, benefits, attestation of domicile certificate, Passport application , Pay of class IV employees and other Concessions. Such measures may lead to exerting some pressure but is highly damaging to law abiding citizens while criminals are the least affected.

#### **1.6 Exceptions.**

No. actions such as detention and arrest of

- a. all persons of over sixty five years of age.
- b. all persons of less than sixteen years of age.
- c. Inform, sick and women have right to bail under Section 11 B of Regulation and thus preventive arrest under Section 21 is hardly justified.

#### **1.7 Duration of action under Section 21.**

Language of Section 21 does not specify period for which such persons may be detained or property attached. It is open ended which is against the basic canons of justice. Action under Sections 21 is preventive.

It means when there is credible information and evidence about a tribe or persons acting in a hostile, subversive or offensive manner against the state or to any person residing within settled areas. Political Agent or DCO may act if still such tribe is acting in a hostile manner or have designs to do so then any of the actions, or series of action, as explained above, may be initiated. The purpose is either to prevent such an event or force the tribes to desist from such activities.

For such examples may be:

- Raids into Settled areas for kidnapping, looting or damaging the property or for subversive activities.
- Raids and damage to Government property in FATA.
- Subversive and hostile activities against the law enforcement agencies including army and scouts.
- Campaign against social welfare and development policies of the State such as health and education especially female education.
- Efforts to overawe, threaten and obstruct public servants.

- FATA – Settled Areas land dispute and hostile action of Tribals such as taking up arms and occupying the hilltops with a view to threaten the residents of settled areas.

Purpose of action under Section 21 is to prevent the danger to public peace and force the tribals to desist from subversive action and cease hostile activities.

Once the tribe, to whom proclamation is, addressed and notices, issued, is ready to offer sureties further action under Section 21 must stop. The persons arrested are not charged for some offence. It should be only after detail inquiry and investigation to lodge FIR under relevant sections of law.

Section 21 does not envisage open ended action against the tribes.

In settled areas similar preventive measures are taken under 3 and 16 Maintenance of Public Order, 1960 and such arrest is for a period of three months. Under Cr.PC, explained in Section 106 to 126-A, security is asked for under Section 107 for keeping peace is three years. Imprisonment for failure to give security for peace shall be simple. [Section 123(5)]

As per provisions of Section 123 Cr.PC if any person ordered to give security under Section 106 or Section 118 does not give such security he shall be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

- Such procedural lacunae are to be covered under the rules, as the persons arrested can not be kept in the prison for indefinite period.

If the hostilities, on part of tribals persist criminal cases can be initiated under PPC for waging war against the State of Pakistan.(Section 121 PPC ).

Section 121 to 131 PPC deals with the offences against the State and these offences are included in the Second Schedule to Regulation.

Taking cognizance of an offence means ultimately filing criminal reference under Section 11 of Regulation which provides an opportunity to the accused to defend him.



**Section 22. Fines on communities accessory to crime.-**

*Where, from circumstances of any case, there appears to be good reason to believe that the inhabitants of any village, or part of village, or any of them, have.-*

- (a) connived at, or in any way abetted, the commission of any offence, or*
- (b) failed to render any assistance in their power to discover the offenders or to effect their arrest;*
- (c) connived at the escape, or harboured any offender or person suspected of having taken part in the commission of any offence; or*
- (d) combined to suppress material evidence of the commission of an offence;*

*the Political Agent or District Coordination Officer, as the case may be, may with the previous sanction of the Commissioner, impose a fine on the inhabitants of such village or part of a village, or any of them as whole;*

*<sup>(22)</sup> Provided that women, children less than sixteen years of age and persons over sixty-five years of age shall not be arrested and detained under this section.*

*<sup>(23)</sup> Explanation: (2) Nothing contained herein shall be construed to debar the Political Agent or District Coordination Officer, as the case may be, to take any appropriate action against the personnel entrusted with watch and ward duties in the particular locality in accordance with Rewaj.*

**1. Circumstantial evidence.**

To proceed under this Section, against the inhabitants of village or part of village, the Political Administration must have reasonable evidence.

As the legal maxim goes, “No one shall be condemned unheard”, Political Administration is bound to give notice to such population. Based on their response and reply and the evidence Political Administration shall issue a well-reasoned order. The phrase, “appears to be good reason” indicates that there must be irrefutable evidence against such village in regard to abetment of a crime punishable under the Regulation or any other law for the time being in force in FATA.

- Political Administration may investigate or inquire through an inquiry officer, or Commission or Jirga.
- If the village Community, in response to notice of Political Administration, undertakes to handover the accused or the abettors and pray for sometime there appears no justifiable grounds for the Political Administration to hastily impose the fine.

In case fine is imposed, as a punishment, and even, partly or whole, recovered but the village community comply with the orders and all the conditions of notice; further proceedings shall be stopped and the amount recovered as fine shall be returned forthwith.

- This Section must not provide an opportunity to the Political Administration to harass the Tribals to earn money and keeping it for long duration to earn interest; only to be misappropriated.
- Tribals may send a Jirga and ask for some time or ready to give evidence, in rebuttal of allegations, under the Rewaj.
- Political Administration may also constitute a fact finding Jirga.

#### **1.1 Accessory to crime.**

Accessory to crime means a person who assists the perpetrator of a crime without taking part in it. Aiders and abettors have been classed in English law as accessories before the fact, accessories at the fact and accessories after the fact. (D.H.S. Gour’s Penal law of India, 9<sup>th</sup> edition. Zulfiqar Ali Bhutto Vs The State S (409). Some jurists do not consider accessory-after the fact as an accomplice.

## **1.2 Forms of abetment.**

### **1.2.1** Connivance in Commission of any offence.

Any offence means an offence punishable under this Regulation or any law for the time being in force in FATA;

The Political Administration must be competent to take Cognizance of such offence.

Connivance or abetment includes both material help in the form of men and material.

Give information about the movement of public servants, government installations and other assets. It means facilitating the crime through commission or omission.

### **1.2.2** Tribals as per Rewaj, and provisions of Regulation, are bound to render further assistance in their power to discover the offenders or affect their arrest. Common Citizens in settled areas are bound to assist the Police in prevention of offence and also to give information in regard to an offence.

Tribals as per Rewaj, agreements and treaties are bound to assist in discovery and arrest of accused.

Tribals are liable to collective or individual fine if:

- a. An offence has taken place on their 'soil' and they failed to hand over the offender to Political Administration. Such offender may remain in their territory which tantamount to harboring the criminals.
- b. Mr. Z may escape after committing the offence. Again either with the connivance of tribals or due to their negligence and omission. Anyway they shall be held responsible.
- c.
  - i) If an offence take place on the 'soil' of tribe Z and the offender belong to some other tribe; tribe, Z shall be held responsible under territorial responsibility in handing over, preventing escape, give all material evidence related to crime and assist the Political Administration in arrest of offender.
  - ii) Mr. belongs to some other tribe or settled areas and commits an offence on the 'soil' of a tribe. Tribe will be held responsible under territorial responsibility.

- d. Mr. X who belongs to Tribe X, commits an offence in settled areas or in some other areas in FATA. Mr. X may escape to unknown area. Tribe Y is responsible to give information, under Collective responsibility, to Political Administration, about Mr. X and shall assist in his discovery and arrest. In case Mr. X take refuge in the area of his own tribe then Tribe will be held responsible both for failure to produce accused X as otherwise it will be considered as harboring the criminals.
- e. In all the situation when a tribe is connected with the occurrence of an offence, as per provisions of this Regulation and Rewaj and there is credible evidence that the tribe has tried to , and have, suppressed the information regarding commission of an offence or have assisted and convinced with in finishing evidence, shall be held responsible under this section.

### **1.3 Imposition of fine.**

Fine can be imposed on the inhabitants of whole village, or part of a village, or any of them. Amount of fine has not been specified. Justice demands that fine should be proportionate to the gravity of offence, role of residents of village in abetting the offence, harboring the criminals, facilitating the escape of offenders and creating deliberate hurdles in arrest of such offenders. Involvement of whole village or tribe as a whole warrants more strict action as compared to individuals or group of locals. Similarly, unplanned, omission and failure to produce the offenders or failure to render active service may demand less stringent action. Amount of fine, thus, should be proportional to the socio-economic status of locals, nature and gravity of offence, past record of tribe and role in commission, or omission, of an offence.

- When fine is imposed and recovered and the tribesmen subsequently succeed, with all noble intentions or under economic duress, in making good the omissions and meet legal duties it would constitute reasonable grounds to commute the fine.
- In a situation where notice for fine is served and the village inhabitants, meanwhile, meet the legal obligations; Political Administration may withdraw such notice of fine.

- When all the benefits of a tribe such as pay of levies and Khassadars and others benefits may be suspended in default of payment of fine. Political Administration on expiry of notice of payment of fine may
  - a. Suspend all the benefits of such tribe.
  - b. May arrest persons belonging to the concerned tribe in default of fine.

#### **1.4 Imprisonment.**

Imprisonment in default of fine shall be simple and the offender may be released when he is ready to give surety.

Section 22 is not a long run solution to public peace. If problem persists then options under Section 21 and Section 11 of Regulation, may be exercised.

#### **1.5 Proviso.**

When inhabitants of a village fail to pay fine are imprisoned in default of fine, the women, children of less than sixteen years of age and persons over sixty five years of age shall not be arrested and detained under this section.

#### **1.6 Explanation:**

PA or DCO have been empowered to take appropriate action against the personnel entrusted with watch and ward duties in that particular locality in accordance with Rewaj.

Political Administration in the whole tribal area has been taking action against the personnel responsible for law and order in the particular locality. Such action included suspension of Khassadars and levies Personnels, stoppage of pay and even arrests.

Such action included personnel of all the departments. Word, “appropriate” again more social and ethical. Under the laws only those actions are “appropriate” which are legal, because question of ethics is quite distinct from question of law. Provisio has been qualified with the phrase, “in accordance with Rewaj”.

In FATA Khassadars are recruited on the basis of 'Nikhat' and Khassadars of a Tribe, Section or Sub section are responsible for maintaining peace in their area.

Khassadari is almost hereditary. Levis are recent introduction more on 'merit' but with representation of all tribes according to their size and strength.

Thus according to tribal Rewaj action against the personnel interested with watch and ward duties can be initiated and may include their suspension, stoppage of pay and even arrest.

Over the years tribals have accepted these practices which are in accordance with their Rewaj.

**Section 23. Fines on communities where murder or culpable homicide is committed or attempted.-**

*Where, within the area occupied by a village community or part of a village-community, a person is found dangerously or fatally wounded, or the body is found of a person believed to have been killed, the members of the village community or part thereof shall be deemed to have committed an offence under Section 22, unless the elders of the village – community or part thereof show that the members thereof-*

- (a) had not found an opportunity of preventing the offence or arresting the offender; or*
- (b) have used all reasonable means to bring the offender to justice.*

- It is another section of Regulation envisaging imposition of fine on community. Fine under this section on community is in accordance with the philosophy of Regulation and Rewaj.

## **1. Why collective and territorial responsibility ?**

It is the most frequently asked question and by so many. Since the time of Sultanate the tribals have remained, in written and informal, agreement, and understanding, with successive governments including the Colonial period of Britishers. The tribals always resist to accept land revenue and policing laws of settled districts. It is not a unique thing and there are hundreds of Tribes round the globe. There is no denying the fact that there is resentment against this concept of collective and territorial responsibility especially among the educated youth and non- residential tribals.

None is, however, ready to forgo concessions and shoulder the responsibilities imposed on the citizens under multiple laws in settled districts.

### **1.2 What alternatives do we have?**

A very strong religious elements demand Sharia and that too of their choice. Many a time Tribals also raise voice and show their preference for 'Sharia' over the laws of settled districts but no one would be ready to part with their Rewaj which at time may be at variance, with the principles of 'Sharia'

Abolition of collective and territorial responsibility means individual responsibility. Under the PPC and other laws every citizen is bound to inform the Police, and assist as well, with regard to cognizable offence. There are many laws of settled districts, including some sections of PPC and Cr.PC, envisaging concept of collective responsibility.

In case the tribes agree to do away with the concept of territorial and collective responsibility then to fix the individual responsibility law enforcement agencies must arrest the offenders without warrant and carry out search of houses.

Besides minors and women shall also be arrested which is currently unthinkable in Tribal Areas.

### **1.3 Culpable homicide.**

While section 22 explains the abetment and omissions of inhabitants of a village, Section 23 only focuses on heinous crime of murder or culpable homicide.

### **1.4 Village**

Village has not been explained in Section 2 (Definitions) or in the body of Regulation. In Land Revenue Act, 1967 and local Government Ordinance 2013 Khyber Pakhtun Khawa, village, has been defined.

In tribal areas Community is homogeneous and a village is always inhabited by same Section and Sub Section of a tribe. Such main village includes its 'satellite' villages.

In tribal areas, due to enmities, blind murders and attempt to murder are common. Proliferation of automatic weapons has resulted in an increase in this trend.

Where body of a person killed or a person is found dangerously or fatally wounded in the area occupied by a village community the provisions of section 22, to impose fine, shall be attracted.

Area of village may include land owned by the inhabitants of village. Boundaries of villages, and land owned by the inhabitants of village, including 'Shamilat land' or common land are quite marked and very few cases of dispute. Tribals rarely disown a piece of land just to avoid shouldering responsibility of an offence.

### **1.5 Mode of action.**

Prior to initiating action as per provisions of Section 22 the members of village be given a notice and an opportunity of hearing. The members of such village may:

- a. Explain that they had not the opportunity, or could not avail an opportunity, in preventing the offence or arresting the offender.



- b. And as soon as the matter came in their knowledge reasonable means were used to bring the offender to justice.
- Based on hearing, and justification offered by the local tribals, the Political Administrations may give reasonable time to meet the requirements by bringing the 'offender(s)' to justice. Locals may offer bond with sureties to seek time.
- Political Administration, subject to failure of cited measures, may impose fine on all or part of village. Amount of fine in murder should be more than the amount of 'Diyat'. In an Islamic state it is duty of the state to pay 'Diyat' to the legal heirs of person killed when the culprit could not be brought to justice due to any reason. Legal heirs of victim may waive off 'Diyat'. For injuries and Diyat amount is fixed by the Government from time to time.
- Inhabitants of a village pay collective fine and later on succeed to point out and assist in arrest of offender the entire amount of fine should be returned to the villagers.
- If the tribals offer reasonable grounds that either the matter was not in their knowledge or in spite of their best efforts they could not succeed either to prevent the offence or arrest the offender the Political Administration may not impose fine.
- When new facts unearthed and prove connivance of villagers or suppression of information by the village or part of a village, the Political Administration may issue fresh notices to the community.

**Section 24. Recovery of fines.-**

***Fines imposed under Section 22 shall, in default of payment, be recoverable as if they were arrears of land revenue due by***

***the members of the community or part thereof upon whom the fine is imposed.***

1. Fine imposed under Section 22, if not paid within prescribed time, shall be recoverable as arrears of land revenue. Fine under Section 22 is imposed on the whole tribe, Section, Sub Section and even individuals as the phrase, “any of them “ in Section 22 indicates. They can be arrested in default of fine.

District Collector / Deputy Commissioner may declare such amount as arrears of land revenue as per Section 80 of Land Revenue Act, 1967.

- Any other fine or Bank loans, water rate or any government dues may be declared as arrears of land revenue and the procedure laid down in Land Revenue Act, 1967 shall be followed.
  - i. The steps under Land Revenue Act, 1967 shall be :
    - a. Dastak or notice to the defaulter to pay the dues within specified time (Section 81).
    - b. Section 82. Arrest of defaulter. Revenue Officer /Tehsildar to inform the Collector within 24 hours about the arrest.
    - c. Attachment of moveable property and distress of crops.
    - d. Ban on mutation till the purchaser pay the arrears amount.

**Section 85.**     Distress and transfer of land or appointment of receiver.

**Section 86.**     Cancellation of assessment and lease.

**Section 87.**     Distress, cancellation of assessment and publicity in the newspaper.

**Section 88.**     Sale of land.

**Section 25.**     **Forfeiture of remissions of revenue etc. in the case of communities and persons accessory to crime.-**

***Where a village-community or part of village-***

***community has become liable to fine under Section 22, it shall further be liable to forfeit, in whole or in part and for a term or in particularly, any remission of land revenue or which it may be in joint enjoyment, and the members of the village-community or part thereof, as the case may be, shall in like manner be liable severally to forfeit any assignment or remission of land-revenue or allowance paid out of public funds which they, or any of them, may enjoy.***

1. This section prescribes procedure with regard to fine under Section 22 of Regulation. Abetment or accessory to crime, in various situations, already enlisted in Section 22.

Section 25 declares that when a community has become liable to fine its further disposal, plus suspension, remission, temporary withdrawal and cancellation of various concessions shall be as under:

- a. Fine when imposed and recovered shall be liable to forfeiture. Depending upon the nature of crime, past record of the village community and their role the Political Administration may forfeit the entire amount or part of it. The balance amount may be returned. In case of murder or culpable homicide 'Diyat' or compensation, as the case may be, can also be paid to the victim or heirs of victim.
- b. The whole amount of fine or part of it may be kept for a specified period. Proper Bank accounts and Cash Book be maintained. Retention of fine amount for a specified period will deter the community to indulge in anti-state or anti-social activities.
- c. If during such period a tribe violates the term of notice, already served upon them, or become accessory to some other crime the amount of fine kept as 'Amount' may be forfeited in favour of the state.

- d. Any such tribe enjoying remission of land revenue may be, after notice and hearing, be declared as ineligible for such remission or any other concession granted to them in regard to land, right of way and water.
- e. Such tribesmen of a village may be liable severally to forfeit any assignment.
- f. Allowance paid out of public fund, which they, or any one of them may enjoy, may be suspended.

Such allowance may include 'Majab', lungi, Malaki allowance, 'Kharcha' by the Political Agent and Deputy Commissioner.

**Section 26. Forfeiture of public emoluments etc. of persons guilty of serious offences or of conniving at crime.**

*Where it is shown to the satisfaction of the Political Agent or District Coordination Officer, as the case may be, that any person who is in the enjoyment of assignment or remission of land-revenue or allowance payable out of public funds, has been guilty of a serious offence, or has colluded with or harboured any criminal, or has suppressed material evidence of commission of any offence, or has failed, on the investigation of any criminal case, to render loyal and proper assistance to the authorities, to the best of his ability, the Political Agent or District Coordination Officer, as the case may be, may in addition to any other penalty to which such person may be liable under any law for the time being in force, direct the forfeiture, in whole or in part and for a term or in perpetuity, of such assignment or remission of land-revenue or allowance, as the case may be;*

**Explanation:-** *For the purpose of this section the expression "serious offence" means any offence punishable with imprisonment for a term which may extend to three years or more.*

1. Section 25 mainly focused on remission and forfeiture of revenue and other financial emoluments.

Section 26 further broadens the scope of forfeiture of revenue and other financial emoluments.

It may include:-

- a. land revenue
- b. allowance
- c. assignment.
- d. it may include grant , lease of land , building, grazing land within FATA or in Settled districts. Special ,financial concessions , common in FATA are , supply contracts, permits of oil, food and timber , transport permit, flour mills and many other contracts awarded on preferential grounds than competition.
- e. Malaki , Lungi allowance and 'Mawajab'. Maliki or Lungi itself may also be suspended.
- f. All these and other benefits from the state or paid out of public funds.

## 2. **When Punishment is invoked?**

- i. Where DC or PA is satisfied that any person who is in enjoyment of all or any of the cited benefits, both monetary and social:
  - a. has been guilty of serious offences (punishable with more than three years)
  - b. or has colluded with or harbored any criminal or
  - c. has suppressed material evidence of the commission of any offences or
  - d. has failed on the investigation of any criminal case or

- e. failure to render loyal and proper assistance to the authorities to the best of his ability shall be liable to any or all of above actions (a,b,c,d).
- Satisfaction means there must be cogent reasons and material evidence to convince a prudent mind that a person or tribe has committed, or omitted, any of the cited acts.  
It is not an issue of ego-satisfaction but the PA or DCO must give solid reasons for action under section 26 of this Regulation.
- Collusion, harboring, suppression of facts and material evidence, rendering loyal and proper assistance and to the best of his ability are all questions of fact. While PA or DC may have solid proof against a village or part thereof, in regard to harboring a criminal the other terms such as 'loyal' and "proper assistance", and "to the best of his ability" are difficult to quantify.
- Word 'loyal' borrowed from colonial literature and in an independent country loyalty is a norm, unless proved otherwise.
- material evidence is evidence which is vital for proving or disproving a fact.  
It is the core evidence without which a case cannot stand on its own.
- Serious offences, same meanings given as per provisions of Cr.PC.

### **Section 27. Powers to direct forfeiture: -**

***Forfeiture under Section 25 or Section 26 may be adjudged by order of the Political Agent or District Coordination Officer, as the case may be, for a term which may extend to three years, and by order of the Governor or any office authorized by him for any longer term or in perpetuity.***

1. Section 25 and Section 26, though, talk of forfeiture, suspension and cancellation, remission, assignment and allowance, both, partly, for a term or in perpetuity.

Under Section 27 the powers of PA and DCO have been further clarified. PA or DCO may order forfeiture for a term which may extend upto three years.

Governor, or any officer authorized by him, may do so for any longer term or in perpetuity. Governor may authorize any person, including Commissioner, to direct forfeiture for more than three years or in perpetuity. Governor may authorize the Commissioner under FCR Rules as per Section 62 of Regulation. Authorization of Commissioner by the Governor would be in the interest of justice as the aggrieved person or a tribe may appeal to Governor for revision of PA or Commissioner Orders.

Revision may also be filed against the orders of Commissioner to FATA Authority.

**Section 28.** <sup>(24)</sup> **Powers of Governor saved: -**

***Nothing in Section 25, 26 and 27 shall affect the***

***Powers of Governor with respect to grant, continuance or forfeiture, in whole or in part, of any assignment or remission of land-revenue or of any allowance paid out of public funds.***

1. It is logical that the office of Governor have superior executive and judicial powers as appeal, in many executive and service matters, lies to Governor. Provisions of section 25, 26 and 27 shall not affect the powers of Governor in regards to forfeiture, in whole or in part, any assignment or remission of land revenue or of any allowance paid out of public fund. Otherwise also proceedings under Section 25, 26 and 27 are preventive, quasi judicial and of administrative nature, so powers of Governor saved under this section.

**Section 29.** **Preparation to commit certain offences.**

***Where a person is found carrying arms in such manner or in such circumstances as to afford just grounds of suspicion***

***that the arms are being carried by him with intent to use them for an unlawful purpose, and that person has taken precaution to elude observation or evade arrest, he shall be taken in custody and be tried as provided in Section 11 and if found guilty, may be punished with fine which may extend to five thousand rupees and the arms carried by him be confiscated and in case of habitual offender or previous convict, he may be punished, with imprisonment which may extend to two years or with fine which may extend to rupees ten thousand and the arms carried may be confiscated.***

1. In criminal justice there are certain offences which even not committed are culpable and cognizable.

For example no one can be arrested by charging him for preparation of theft.

Offence of theft takes place when Mr. X takes something which was in possession of Mr. Y without his consent. X has committed an offence of theft as per Section 379 PPC.

But Mr. X cannot be punished for preparation of theft unless he actually commits the offence of theft.

- On the other hand attempt to commit robbery is an offence.(Section 393 PPC).

Section 120 PPC prescribes that concealing design to commit an offence, is itself an offence and punishable.

- Criminal conspiracy to commit an offence punishable with death or rigorous imprisonment of two years and more.(Section 120 (B) PPC)
- Waging war or attempting to wage war against Pakistan.(Section 121 PPC)
- Conspiracy to commit certain offences against the state(Section 121 A PPC)



- Section 122. Collecting arms etc. with the intention of waging war against Pakistan.
- Concealing with intent to facilitate a design to wage war.(Section 123 (A) PPC).

## **2. Intent and purpose.**

Based on the analogy of cognizable offences under Section 120 to 123 A of PPC and keeping in view the geo-strategic position of FATA, traditions, precedents, history and proliferation of sophisticated weapons over the last more than three decades (1980-2012) the state can not afford to abdicate. As the historical evidence suggests that the FATA, and for that matter entire Pashtun belt stretching into Baluchistan and Punjab, has never seen a power vacuum. There has always remained a balance of power within the Tribesmen and the power players of the State.

Depending upon the situation and the deftness with which the power players outsmart each other the vacuum is filled before even it arises.

In such an environment State can hardly afford to abdicate. Deterioration of writ of the State is mainly due to abdication and reactive policies.

This section envisages a proactive role for the State.

### **2.1 Provisions of Section 29 and actionable information.**

- a. When a person is found carrying arms in such manner and in such circumstances.
- b. Movement of such person creates reasonable grounds of suspicious that the purpose of collecting and carrying weapon is to use them for unlawful purpose.
- c. Such person(s) has taken precaution to elude observation of intelligence and law enforcement agencies.

- d. that the whole activity, or series of activities, undertaken to avoid arrest and seizure of arms.

## **2.2     Counter measurers.**

Existence of above (a,b,c,d) facts, shall constitute an offence warranting cognizance under this Section. Political Administration must give reasonable grounds for such drastic action. It should be well informed decision.

- a. such persons having activities as above shall be arrested.
- b. a criminal reference shall be framed as per Section 11 of this Regulation. As explained in discussion on Section 11 that reference is to be filed only after collecting sufficient evidence.
- c. If found guilty accused person may be punished with fine which may extend to five thousands rupees. In default of fine he may be imprisoned.
- d. arms shall be confiscated.
- e. In case of habitual offender, or previous convict, an accused may be punished with imprisonment which may extend to two years or with fine which may extend to ten thousands rupees. Besides the arms shall be confiscated.
- Any good piece of legislation should not specify the amount of fine. It may be specified through rules as Rules are easy to amend but not the statute.

## **Section 30.   Adultery.**

***A married woman who, knowingly and by her own consent, has sexual intercourse with any man who is not her husband, is guilty of the offence of adultery, and shall be***

***punishable with imprisonment for a term which may extend to five years, or with fine, or with both.***

***(2) Cognizance shall not be taken of an offence under this section unless a complaint has been made by the husband of the woman, or, in his absence, by person who had care of the woman on his behalf at the time when the offence was committed.***

1. Section 497 PCC. Chapter XX(Section 493-498 PPC) deals with offences relating to marriage.

Same provisions, regarding adultery, were made in FCR, 1901. With the introduction of, "Offence, Zina (Enforcement of Hudood) Ordinance, 1979" punishment for adult married male and female for adultery is stoning to death.(Hadd).

But evidence required for stoning to death is, either confession or four Muslim eye witnesses who qualify to be competent witnesses on the basis of 'Tazkia-ul-Shoud'.

In settled districts punishment for this offence is not being awarded under these sections, due to lack of competent witnesses, and in most of the cases either there are acquittals or conversion to 'Tazir'. There is not a single case of enforcement of Had for 'Muhsin'.

Article 227 of the Constitution states that no law shall be enacted which is repugnant to Quran and Sunnah.

- There is not a single case of conviction in FATA. Again issue of evidence will crop up.

Tribals, due to their social norms, would never agree to medical, Examination for taking of swab and other forensic evidence. Social Taboos

hardly permit reporting of incidents of adultery. In almost all the cases the families take the law into their hands and kill both the male and female.

**Section 31    Power to prohibit erection of new village towers  
on frontier.-**

- (1) ***No new hamlet, village habitation, tower or walled enclosure shall, without the previous sanction in writing of the Political Agent or District Coordination Officer, as the case may be, who may either grant or refuse such sanction as he thinks fit, be erected at any place within in one hundred and twenty yards from the center of road. <sup>(25)</sup>***
- (2) ***Where the Political Agent or<sup>(26)</sup> District Coordination Officer, as the case may be refuses to sanction the erection of any such hamlet, village-habitation, tower or walled enclosure, as the case may be, he shall record his reason in writing for so doing.***

1. In the FCR 1901 it was provided that no new hamlet, village-habitation, tower or walled enclosure shall be made without written permission of Commissioner within five miles of the frontier of British India. The provision was in accordance with Durand Line Agreement 1893. In amended Regulation the same title is maintained. Durand Line Agreement is still in place.

The amended Section now prescribes that the PA or DCO may grant, or refuse, such sanction, as he thinks fit, establishment of new hamlet, village-habitation or walled enclosure within one hundred and twenty yards from the centre of the road. This provision is in line with the National Highway Authority Code in settled districts. PA or DCO shall record his reasons, both, for grant or refusal of such request.

**Section 32.    Power to direct removal of villages:-**

***Where it is expedient on military grounds, the Federal Government may, by order in writing, direct the removal of***

***any village situated in close proximity to the frontiers of Islamic Republic of Pakistan to any other suitable site, and award to the inhabitants such compensation for any loss which may have been occasioned to them by the removal of their village as, in the opinion of the Federal Government, is just and adequate.***

1. In the FCR, 1901 close proximity to British Frontier was specified as within five miles. Under the amended Regulation the Federal Government may direct removal of villages, within close proximity to the Frontiers of Islamic Republic of Pakistan when it is expedient on military grounds.

The Federal Government shall issue an order in writing giving reasons for such removal of villages. It will be relocated to any other suitable site. The villagers shall be entitled to compensation for loss occasioned to them by the removal of their village. The amount of compensation to be paid to the villages shall be determined by the Federal Government but it should be just and adequate.

It will be a major step and entail law and order situation with serious consequences as a result of resistance by the tribals.

Since detail procedures can not be outlined in section of law, thus there is need to streamline the procedures through framing of rules under the Regulation. Such rules may prescribe procedures such as constitution of a commission comprising of representatives of Federal Government, engineers and Revenue officers to determine the just and adequate compensation.

In FCR, 1901 under section 31 erection of tower, walled enclosure or construction of village, without written permission of Commissioner was prohibited. Logically if there were such constructions, without the permission of Commissioner, the Federal Government was competent to direct removal of such villages under Section 32 of FCR, 1901.

Now there is no prohibition as per Section 31 of Regulation. Thus power to direct removal of villages under this Section is not just and equitable. It is serious omission. However it is curable under the Rules and Political Administration may be authorized to specify demarcated areas and prohibiting construction of villages within five kilometers of Frontier without written permission of Commissioner.

**Section -33 Omitted.**

**Section 34. <sup>(27)</sup> Attachment or demolition of buildings used by the robber etc.-**

- (1) *Where the Political Agent or District Coordination Officer, as the case may be, is satisfied that any building is habitually used as a meeting place by robbers, house-breakers, thieves, receivers of stolen properties, protectors or harbourers of thieves or their abettors, habitual offenders who commit or attempt to commit, or abet the commission of the offences of kidnapping, abduction, extortion, cheating, mischief, car lifting, offences involving breach of peace, or by desperate and dangerous criminals or for or for the purpose of gambling, he may, by order in writing, direct the arrest of such persons and prohibit the owner or occupier thereof from so using such building, and , if the order is not obeyed, he may, by a like order, direct that the building be attached in favor of Government of Pakistan, and where such attachment is not feasible, then the Political Agent or District Coordination Officer, as the case may be, may pass an order of the disposal of the building if the Jirga of the Tribe expresses its inability to effect surrender of the accused to the Administration. Such further order shall be without prejudice to any punishment to which the offenders or owner or occupier of such building may, under any law for the time*

***being in force, be liable for disobedience of the prohibitory order.***

***(2) No person shall be entitled to any compensation in respect of the disposal of any building under Sub-Section (1).***

1. It would be appropriate to explain the offences mentioned in this Section as well as legal terms. These offences are included in the Second Schedule to Regulation.

**1.2 Abettor.** A person who aids, encourages, or assist in the commission of Crime (BLD \*).

The main accused in a crime is called 'principal, while those who assist in commission of crime are called abettors. Abetment has been defined in Section 107 of PPC. Punishment for abetment is under Section 109 of PPC. Same punishment will be awarded to the abettor prescribed for the offence in PPC or any other law. (See Section 107 to Section 120 PPC).

**1.2 Crime.**

An act that the law makes punishable. The breach of a legal duty treated as the subject matter of a criminal proceedings. (BLD\*).

**2.2 Criminal (Noun)**

One who has committed a criminal offence. One who has been convicted of a crime

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(BLD \*) Black's Law Dictionary (English Edition) By Bryan A.Gerner Editor In Chief. St.Paul.MN  
United States of America.

### **2.3 Criminal (adjective).**

Having a character of a crime, in the nature of a crime, (BLD).

### **2.4 Habitual.**

Customary, usual, Recidivist (Repeat offender).

## **3 Public Peace and Public tranquility**

Chapter VIII Sections (141-160)PPC. These sections deal with unlawful assembly, joining unlawful assembly, rioting (Use of force or violence by the unlawful assembly in prosecution of the common object. (Section 146 PPC).

Affray (Section 159 PPC). When two or more persons, by fighting in a public place, disturb the public peace, they are said to commit an affray. Punishment for affray is under Section 160 PPC.

## **4 Kidnapping. Section 359 (PPC).**

Kidnapping is of two kinds: kidnapping from Pakistan and kidnapping from lawful guardianship.

### **4.1 Section 360 Kidnapping from Pakistan.**

Whoever conveys any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Pakistan.

### **4.2 Section 361 PPC Kidnapping from lawful guardianship.**

Whoever take or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful Guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful Guardianship.



**4.3     Section 362 PPC.     Abduction**

Whoever by force compels, or by any deceitful mean induces, any person to go from any place, is said to abduct the person.

**4.4     Section 360 - 369 (PPC)** deals with various types and condition of kidnapping, abduction and punishments.

**1.8     Extortion (Sections 383-389) PPC.**

**4.5     Section 383 PPC.**

Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person property or valuable security or any thing signed or sealed which may be converted into a valuable security, commits, extortion. Punishment for extortion is as per section 384 PPC. Various types of extortion, and its punishment, prescribed in Sections 384-389 PPC.

**4.6     Robbery. Section 390 PPC.**

In all robbery either there is theft or extortion. Theft is robbery when offender, in order to carrying away theft property voluntarily causes or attempts to cause any person death or hurt or wrongful restraints or fear of death, hurt or wrongful restraint.

Robbery is extortion when the offender put a person in fear of instant death, or hurt or wrongful restrain, and by so putting in fear, induces the person to put in fear then and there to deliver up the thing extorted.

**4.2     Section 391 PPC. Decoity.**

When five or more persons conjointly commit or attempt to commit a robbery.

When five or more persons conjointly commit or attempt to commit a robbery, or where whole number of persons conjointly committing or attempting to commit a robbery, and person aiding such commission or attempt, amount to five or more, every person so committing attempt or aiding is said to commit “decoity”.

Punishment for robbery is ten years and it shall not be less than three years and shall also be liable to fine. If the robbery is committed on the Highway the imprisonment may be extended to fourteen years. (Section 392 PPC). Decoity (Section 395 PPC) is punishable with imprisonment for life or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years and shall also be liable to fine.

Robbery and decoity with murder, or with attempt to cause death or grievous hurt or belonging to gang of dacoits is punishable under Section 396-402 PPC.

#### **1.10    Mischief.            Section 426 – 440 PPC**

##### **5.        Section 425 PPC.**

Whoever, with intent to cause, or knowing that he is likely to cause wrongful loss or damage to public, or to any person, causes the destruction of any property, or any such change in any property or in the situation there off as destroys or diminishes its value or utility, or affect it injuriously, commits “mischief”. Punishment for mischief is three months or with fine, or with both. Various types of mischief, and its punishments, described in Section 428-440 PPC.

##### **5.1      Ingredients of Section**

Purpose of Section 34 is to discourage and curb criminal activities. There is no denying the fact that FATA has remained notorious for crimes like kidnapping, abduction, harboring of criminals and car lifters. Although with the passage of time some of the pockets in settled areas have earned more notoriety in cited crimes.

FATA people, as per centuries-old tradition, carry on all businesses through verbal commitments or deeds on non-stamp papers. Tribals consider it as their inherent right to 'abduct' some one, both, within FATA and from settled districts for default or cheating in business transactions. When called upon by the Political Administration the Tribals very candidly and honestly admit such 'abduction' and are ever ready to pay the fine for violation of sanctity of Protected Area (P.T). But ends hardly justify the means so these stringent measures are required to curb this tendency.

## **5.2 When PA or DCO is satisfied.**

It must be 'judicial satisfaction' which means actionable evidence against such persons and use of building for activities as described in the section. Whenever word 'hearing' or 'satisfaction' appears in the statute it invariably means initiation of judicial proceedings.

At time situation may warrant swift action but ingredients of this section and the concept hardly empowers the Political Administration to do the things in an arbitrary manner or causing irreparable damage especially when offence is not proved.

Political Administration may order inquiry, can give notice to the owner or tenant of such building and after proper hearing can proceed to initiate any of the measures enlisted in the section.

## **5.3 Nature of activities.**

When PA or DCO is satisfied that any building is:-

- a. habitually used. (It means repeatedly and such person cannot claim innocence) as a meeting place by robbers, house breakers, thieves, receivers of stolen property, protectors or harbourers of thieves or their abettors, desperate and dangerous criminals. Obviously such meeting is used for planning and execution of criminal activities and every member

of such unlawfully assembly is equally accountable under the law irrespective of their subsequent defence of participation in lesser evils. Abetment of a crime is equally punishable. Any and every one who attends such meetings is an abettor to the crime.

Use of any building as meeting point for such unlawful assembly attracts the provisions of this Section to direct:

- i. the building be attached in favour of Government of Pakistan and
- ii. if such attachment is not possible and the Jirga of tribe expresses its inability to effect surrender of the accused to the Administration such building may be disposed off.

Both for attachment and demolitions the PA or DCO shall pass an order. Whenever an order is passed it is a judicial order and must give the whole background of the case, notices and warnings given to the owner or occupier of such buildings, intelligence reports and public complaint and reasons for taking action. In case the building is rented out for commercial or residential purposes and the landlord fail to eject or surrender the occupants or his failure to stop such activities shall make him equally responsible and apart from attachment or demolition such owner may be proceeded against for abetment of crime.

Such offenders may have used such building for meeting to plan offences of kidnapping, abduction, extortion, cheating, mischief, car lifting, offences involving breach of peace, or for the purpose of gambling.

- Besides order of attachment or demolition of such building the offender or owner or occupier of such building shall also be held responsible for disobedience of the prohibitory order and orders of public servants for obedience.

As commented upon in the preceding paragraphs PA or DCO shall issue notice to the owner or occupier of such building for surrender of all the accused and forthwith stoppage of activities as specified in the notice.

Thus owner or occupier of such building, apart from action for abetment, shall also be held responsible for disobedience of order.

#### **5.4     Sub Section 2.**

If any building is attached or demolished no person shall be entitled to any compensation.

There can be instances that markets are rented to various tenants who carry on their legal businesses but a portion of rented buildings might be used for illegal activities. PA or DCO may seal a specific portion and allow the others to carry on business. The purpose should be not to cause financial loss to the innocent citizens. Political Administration may appoint a Receiver to collect and deposit the rent in the 'Amanat' Head of Account till final disposal of the case right up to the appellate forum.

- Political Administration may allow the tenants to remove perishable commodities from such market to save the innocent from losses and also to avoid spreading of diseases due to rotting of perishable items.

#### **Section 35. Omitted:**

in FCR, 1905 the repealed section 35 was meant for "Naubati and chaukidari system". Village community was to pay the expenses of chawkidari system as per orders of deputy Commissioner. Since FCR was promulgated for settled areas of erstwhile North West Frontier Province (NWFP) which worked effectively but now non-existent.

In FATA Khasadars is community Police Officials protecting the roads and government installations in their areas of jurisdiction therefore Section 35 omitted.

**Section 36. Power to require persons to remove in certain cases:-**

*Where, in the opinion of the Political Agent or District Coordination Officer, as the case may be, any person,-*

- (a) is dangerously fanatic; or*
- (b) belongs to a frontier tribe and has no ostensible means of subsistence or cannot give a satisfactory account of himself; or*
- (c) has a blood-feud; or*
- (d) has occasioned cause of quarrel likely to lead to blood-shed; the Political Agent or District Coordination Officer, as the case may be, may by order in writing, require him to reside beyond the limits of the territories to which this Regulation extends, or at such place within the said territories as may be specified in the order:*

*Provided that, if the person has a fixed habitation in the place which the Political Agent or District Coordination Officer, as the case may be, requires him to leave, an order under this section may not be made without the recommendations of Council of Elders. <sup>(28)</sup>*

1. In FCR, 1901 action against such persons required previous sanction of the Commissioner. Now under amended Regulation if a person has a fixed habitation in the place which the Political Agent or DCO requires him to leave, an order under this Section may not be made without the recommendations of Council of Elders.

It means PA or DCO to make a criminal reference to Council of Elders as per Section 11 of Regulation. Such reference must contain full background of the case having all the information and grounds for removal of such person beyond the jurisdiction of FATA or to a certain place within the FATA.

Council may inquire into the matter, collect evidence, record statement of witnesses, list of witnesses may be provided by the Political Administration.

Since no body should be condemned unheard therefore PA or DCO, prior to filing the reference to Council of Elders, may give notice to such person(s) and provide him an opportunity of hearing and such person can adduce evidence in his defense.

Council after inquiring may either recommend to PA or DCO removal of such person(s):

- i) beyond the limits of the territories of FATA or
- ii) such place within the FATA or
- iii) the Council may recommend that on the basis of available evidence and inquiry removal of such person beyond the territorial limits of FATA or to a specific place within FATA is not required.

The language of Section 36 indicates that the PA or DCO will be having no option but to file the case. Since reference to (Council under this section falls within the provision of Section 11 of this Regulation therefore by implication PA or DCO may remand the case to Council of Elders for further inquiry and findings. Recommendations of Council of Elder under this Section should be of the majority of the Council. While remanding back the case to the Council for further inquiry PA or DCO must give reasons and may also send additional evidence, if so required.

## **2) Grounds for removal under this Section.**

### **2.1 If a person is dangerously fanatic.**

Fanatic is a relative term and not defined in this Regulation or even FCR, 1909. Coined by the Colonial Masters for almost every tribal who waged a long-drawn war of freedom against the Britishers. Tribals are otherwise more conservative, both, socially and religion wise. A person may be ideologically a 'fanatic' but may not be active in spreading his ideas or forcing others. What are the parameters of fanaticism? For liberal mindset of our country every practicing Muslim may be a fanatic and tribals are more ritualistic. In post 9/11 situation and the war in Afghanistan, more active close to Durand Line, the term 'fanaticism' and 'fanatic', has gained world-wide currency.

**Dangerous.**(adj) of a person who is likely to cause serious bodily harm or a dangerous criminal. A situation, condition which is perilous, hazardous and unsafe. (BLD)

Instead the word 'dangerously fanatic' should have been replaced with 'terrorism' and 'terrorist'. Terrorism defined in Section 6(5) of Anti-Terrorism Act, 1997.

Thus 'dangerously fanatic', is a relative term and an issue of fact which is to be clearly explained and supported with evidence and not merely dubbing anyone as dangerously fanatic.

2.2 Belongs to a frontier tribe and has no ostensible means of subsistence or cannot give a satisfactory account of himself.

Belonging to a frontier tribe was used in FCR, 1901 as it extended to, both, Frontier and Bloch tribes. The same term has been used in amended Regulation albeit without definition. Currently such person may belong to recognized tribes of FATA or may be an outsider from Settled Areas or even a foreigner. For non-tribal reference to Council of Elders, in regard to their removal should not be required. These are some of the procedural issues which are to be streamlined under the Rules. Ostensible means of subsistence and non satisfaction of account of himself has been mentioned in Cr.PC Section 109(b) under chapter (Viii) (Prevention of Offences).



Under Cr.PC a Magistrate is competent to issue show cause notice to such person and asking for a bond of good behavior. Same procedure may be followed for proceedings under this section if in the opinion of PA or DCO a person is required to give bond with sureties to remains peaceful as per conditions laid down in the notice of good behavior.

- a. has a blood feud or
- b. has occasioned cause of quarrel likely to lead to bloodshed.

Grounds for action as per (2.1) and (2.4) are more common in FATA.

Tribes have land disputes and such dispute may be intra or inter tribal.

Business transactions may also lead to blood feuds.

Sectarian disputes in Orakzai and Kurram Agency are too frequent.

Such grounds may occasion action under this section. In case of inter and intra tribal feuds justice demands that action be taken against both the parties to the dispute.

**Section 37. Penalty for breach of certain orders.**

*Whoever contravenes the provisions of Section 31, or disobeys an order under Section 21 or Section 32, or a prohibition under Section 34, or a requisition under Section 36, shall be punishable with imprisonment for a term which may extend to one year, and shall also be liable to fine which may extend to ten thousand rupees.<sup>(29)</sup>*

1. Under this Section punishment has been prescribed for contraventions of provisions such as disobeying the orders, and prohibitions.  
Punishment for contraventions of cited section may extend to one year imprisonment, and shall also be liable to fine which may extend to ten thousands rupees.

2. **Contraventions of provisions of Section 31.**

Section 31 is prohibitory in nature. PA or DCO may prohibit construction of house or walled enclosure within one hundred and twenty yards from the center of the road.

Prohibitory order under 31 is on the pattern of Section 144 Cr.PC. Any violation of order issued under Section 144 is punishable under Section 188 PPC. It is logical that punishment is provided for violation of such order and Section 37 meet this requirement.

**3. Disobeying an order.**

Section 21 of Regulation deals with blockade of hostile or unfriendly tribe. PA or DCO may issue an order under Section 21 for arrest, detention, and debarring all or any member of such tribe from access into settled area of Pakistan. So only those who try to defy such order by resisting arrest and detention or continue to have access to settled Areas can be proceeded against under section 37.

4. Section 32 of Regulation empowers Federal Government, by issuing an order in writing, to direct removal of any village situated in close proximity to the frontier of Islamic Republic of Pakistan to any other suitable place but to subject to suitable compensation to the offenders.

Word, “disobeying” has been used for violation of Section 21 and Section 32 of Regulation because in case of both these sections PA or DCO or the Federal Government, as the case may be, issues a direction to do or refrain from doing any thing which must be clearly specified in such direction or order.

Disobedience of an order under Section 21 or direction of federal Government under Section 32 is punishable under Section 37.

**5. Prohibition under Section 34 of Regulation**

PA or DCO may prohibit use of any building for use of criminal activities as specified in Section 34 of Regulation. While such building may be attached or

demolished the occupier or owner of such building may be punished for disobedience of the prohibitory order. Thus violation of prohibitory order under Section 34 will be punishable under Section 37.

**6. Requisition under Section 36.**

PA or DCO may require persons who are dangerously fanatic or have enmities to be removed beyond the territorial limits of FATA or within specific place in FATA. All such persons who do not follow such requisition can be punished under this Section.

**7. Criminal Reference.**

PA or DCO to follow all the pre-requisite of Section 11 to file a Criminal Reference to Council of Elders and provisions of Section 11 of this Regulation shall be followed.

**Section 38.**

**Powers of arrest.**

***In any place in which all or any of the provisions of this Regulation are for the time being in force.***

- 1) Any private person may, without an order from a local administration and without a warrant, arrest or cause to be arrested, and make over or cause to be made over to Political Agent or District Coordination Officer, as the case may be, or take or cause to be taken to the nearest notified post of the local administration, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned; and.***

**2) <sup>(30)</sup> Section 46 of the Code of Criminal Procedure, 1898 (Act V of 1898), shall, mutatis mutandis apply to Federally Administered Tribal Area.**

**Ingredients of Section 38.**

1. Any private person may, without an order from local administration and without a warrant may:-

(a) arrest or cause to be arrested any person who has been concerned:-

- in any cognizable offence or
- against whom a reasonable complaint has been made or
- Creditable information has been made or
- a reasonable suspicion exists of his having been concerned in any cognizable offence.

(b) make over or cause to be made over to Political Agent or District Coordination Officer or

(c) take or cause to be taken to the nearest notified post of the local administration.

Cognizable offence already discussed in this Regulation. In cognizable offences police may arrest a person without warrant from the Magistrate.

**2. Reasonable complaint.**

Section 190 (a) (Cr.PC) empowers a Magistrate to take cognizance of offences upon receiving a complaint of facts which constitutes such offence. Reasonable complaint must, prima facie, establish the fact that a person is concerned with cognizable office. Complaint should not be mere narration of allegations. Law

never envisages authorizing private person to make arrest on frivolous grounds. Liberal interpretation of “reasonable complaint” may lead to chaos. No one can, and should, deprive any person of his liberty on the basis of mere suspicion.

## **2.1 Reasonable suspicion.**

Reasonable suspicion must be bonafide. Section 54 Cr.PC empowers the police to arrest a person against whom a reasonable complaint has been made or credible information received or a reasonable suspicion exists. These grounds provide concurrent powers to Law enforcement Agencies and private persons to arrest such an accused. Such powers should be construed strictly (PLD 2000 SC 1055). Some evidence must exist to connect such person with the commission of an offence (2001 MLD 132). Section 59 Cr.PC. empowers a private person to arrest any person concerned in cognizable offence and take him or cause him to be taken to the nearest police station.

Arrest, whether by the law enforcement personnel or private person is to be made in accordance with Section 46 Cr.PC. In making arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there is a submission to the custody by word or action. Contrary to common perception, and practice in our country it is not essential to handcuff or blindfold a person. If he follows the command of arrest it will be deemed to be an arrest.

If such persons resist arrest any private person can cause him harm short of death.

- No one is authorized to use excessive force in apprehending an accused irrespective of gravity of offence. All necessary precautions and restraint must be exercised.
- Private person making an arrest shall immediately take such person to the nearest office of political administration or inform the law enforcement agencies. Person arrested can be detained for twenty four hours by the

police officer exclusive of time necessary for the journey from the place of arrest to the Magistrate court (Section 61 Cr.PC). This concession of twenty four hours custody is not available to private person. He shall immediately take such person to nearest post of Political Administration.

## **2.2 Sub Section (ii)**

Section 46 Cr.PC shall, mutatis mutandis, apply to FATA. Section 46 Cr.PC deals with arrest by the Police or any other person. Nothing in Section 46 Cr.PC shall give a right to cause the death of person who is not accused of an offence punishable with death or with imprisonment for life. In FATA every tribal, as per provisions of Regulation, agreements and treaties, bound to prevent offence, arrest and hand over the person (s) concerned with any cognizable offence. It is there territorial and protective responsibility.

### **Section 39. Arrest without warrant in cases under Section <sup>(31)</sup> 496A, Pakistan Penal Code 1860 (XLV of 1860) :-**

*(1) Where there is reason to believe that a person has committed or attempted to commit an offence punishable under Section 496A of the Pakistan Penal Code (XLV of 1860), an officer of Law Enforcement Agencies, under the command of Political Agent or District Coordination Officer, as the case may be, without an order from a Magistrate and without a Warrant, arrest that person on the requisition of the husband of the woman, or, in his absence of a person having the care of her on his behalf, or, in the absence of both the husband and any such person as laws aforesaid from the village in which the woman resides, on the requisition of a head man of the village.*

*(2) An officer of Law Enforcement Agencies, under the command of Political Agent or District Coordination Officer,*

***as the case may be, making an arrest under sub-section (1) shall without unnecessary delay, take or send the person to the nearest Magistrate having jurisdiction <sup>(31)</sup>***

***(3) The Magistrate may in default of bail being furnished to his Satisfaction detain the person arrested for such period, not exceeding fourteen days, as may be necessary to enable the husband, or his absence, a person who had care of the woman on his behalf, to make a complaint.***

1 Chapter XX PPC Prescribed offences, and punishments, of offences relating to marriage. (Section 493- 498 PPC). Section 496-A alongwith Section 496 B and C was inserted under the Protection of Women (Criminal Laws Amendment) Act (VI of 2006)" in 2006. Section 496 is related to marriage ceremony fraudulently gone through without lawful marriage. It is punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Section 496-A was added to further protect the rights of women as such fraudulent practices had increased over the years. Legislature wanted to curb this evil.

## **2. Relevant Sections of Cr.PC are as under:-**

### **2.1 Section 496. Enticing or taking away or detaining with Criminal interest a Woman**

Whoever taken or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which extend to seven years and shall also be liable to fine.

### **2.2 Section 496 A. Enticing or taken away or detain with criminal intent a woman.**

Whoever takes or entices away any women with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any women, shall be punished with imprisonment of either description for a term which extend to seven years, and shall also be liable to fine.

### **2.3     Sub Section 1.**

An offence punishable under section 496 A PPC an officer of law enforcement Agencies, under the command of PA or DCO, may arrest a person without warrant from a Magistrate when there is :-

- a).     reason to believe that a person has committed or
- b).     attempted to commit an offence punishable under section 496 A of PPC.

### **3.     Cognizance of offence.**

Such person may be arrested when there is reason to believe that a person has committed or attempted to commit an offence punishable under Section 496 A

PPC.

- 'Reason to believe' demands that there must be valid grounds to convince a prudent mind.

Even attempt is an offence under Section 39 of Regulation.

Ingredients of Section 496 (A) indicate that following shall constitute an offence cognizable under section 39 of Regulation.

- a).     whoever takes away woman with intent that she may have illicit intercourse with any person.
- b).     entices away a woman for the said purpose as per (a) above.
- c).     conceals with that intent any woman or



d). detains any woman for the said purpose.

**3.1 Who may complaint or give information.**

- i. On the requisition of husband of the women.
- ii. In the absence of husband a person have the care of her on behalf of her husband or
- iii. In the absence of both husband and guardian any such person from the village in which the women resides or
- iv. On the requisition of a headman of the village.

In FCR, 1901 arrest under Section 39 was for violation of Section 498 PPC. Since FCR, 1901 was applicable to NWFP and Baluchistan therefore offence was made cognizable on complaint of Village Headman also. There is no Village Headman in FATA. This important aspect overlooked. Instead it should have been 'Malik' or 'Lungi Holder'.

**3.2 Sub Section 2.** Any person arrested under this section shall be immediately sent to the nearest Magistrate without delay.

**3.3 Sub Section 3.**

The Magistrate may detain such person, upto fourteen days, if no bail is furnished. The purpose is to enable the husband, or in his absence a person who had care of the woman on his behalf to make a complaint. It is also one of the sections of Regulation, other being Section 30, that tribals settle the score with the person responsible for any act, on their own.

**Section 40. <sup>(32)</sup> Security for keeping peace. –**

*(1) where any person, who is likely to do any wrongful act or commit any offence, which may cause breach of peace or disturb the public tranquility, is produced before the Political Agent or District Coordination Officer, as the case may be, he may require such person to show cause why he should not be ordered to execute a bond with or without sureties for good behavior and keeping the peace for a period not exceeding two years.*

*<sup>(33)</sup> (2) The Political Agent or District Coordination Office, as the case may be, shall hold necessary inquiry as nearly as may be practicable, into the truth of the information upon which such action has been taken, in accordance with sub-section (2) of 117 of the Code of Criminal Procedure 1898 (Act V 1898).*

*<sup>(34)</sup> (3) Pending completion of such inquiry, the Political Agent or District Coordination Officer, as the case may be, if he considers that immediate measures are necessary for preventing the breach or commission, of any offence, direct the person to execute a bond with or without sureties for keeping the peace and maintaining good behavior failing which he may be detained until such bond is executed or, in default of execution of bond, until the inquiry is concluded, within a period of 30 days.*

*(4) After holding such inquiry, as provided above, if it is proved that there is an apprehension of breach of peace or disturbance of public tranquility, the Political Agent or*

*District Coordination Officer, as the case may be, may pass an order directing such person to execute the bond with or without sureties for his good behavior and for keeping peace and tranquility for a period not exceeding two years failing which he may be detained. In case it is not proved that there is any apprehension of breach of peace or disturbance of public tranquility, the Political Agent or District Coordination Officer, as the case may be, shall release such person if in custody, and if not in custody shall discharge him.*

<sup>(35)</sup>*(5) Where a person has been convicted of the offences in section 106 of the Code of Criminal Procedure 1898 (Act V of 1898), for the offences under the laws mentioned in the Second Schedule he may be ordered to execute a bond with or without sureties for his good behavior and for keeping the peace. If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.*

<sup>(36)</sup>*(6) Where the Political Agent or District Coordination Officer, as the case may be, is of the opinion that sufficient grounds exist for making an order under sub-section, (4) he may, by order in writing, direct that the person concerned after his release shall notify his residence and any change of his residence in the manner prescribed in section 565 of the Code of Criminal Procedure, 1898, for a term not exceeding two year.*

1. It is the most 'condemned' section of FCR and Regulation. Barring few most of the commentators do so even without taking the trouble to read it. Every law is to be examined on the touch stone of equity, fair play, justice and fundamental rights enshrined in the Constitution of Pakistan. In FCR, 1901 focus

of Section 40 was security and surveillance for the prevention of murder, or culpable homicide or the dissemination of sedition. Commissioner and Deputy Commissioner had concurrent jurisdiction to require a person to execute a bond for keeping the peace, with or without sureties, during such period not exceeding three years. Deputy Commissioner could also make an order on the recommendation of Council of Elders or after an inquiry. In case of imminent threat to peace Deputy Commissioner was competent to require such person to execute a bond, pending inquiry.

2. Under Regulation major changes have been made in Section 40.

- Security for keeping peace is not something novel. It is in practice in Settled Areas as per provisions of Cr.PC and other laws.

Chapter VIII, Section 106-126 A (CrP.C) are meant for keeping peace and for good behavior. All these section exist since Colonial period. Besides very stringent measures have been put in place under the laws.

3. **Anti-Terrorism Act, 1997.**

Preventive measures may be taken under Section 8 (Prohibition of acts intended or likely to stir up sectarian hatred), section 11-A (organization concerned in terrorism), Section 11-D (observation order), Section 11 EE (Security for detention for ) and Seizure and detention under Section 11 (o).

4. **W.P. Maintenance of Public order ordinance, 1960.**

**Section 3.** Government may arrest suspected persons.

- **Section 5.** Power to control suspected persons.

- The purpose is not to support the oppressive and coercive measures whether in Settled Districts or in FATA.

5. Security and preventive laws are more likely to be misused due to following reasons:

- Administration usually over reacts to law and order situation.
- Parliament, Provincial Assemblies, proactive judiciary and media and defensive government are some of the factors exerting pressure on the administrators. Instead of taking the events in normal stride administration ensures that they emerge successful in, now, deteriorating law and order situation.
- Preventive measures are misused under government pressures, personal, ethnic and sectarian bias of administration.
- Ever increasing corruption is the main cause of misuse of these powers.
- In FATA sensitivity level is much higher and, at times, situations may warrant stringent measures.

## 6. **Sub Section (1)**

PA or DCO may require a person to show cause why he should not be ordered to execute a bond with or without sureties:-

- i). for good behavior
- ii). and keep peace for period not exceeding two years.

### 6.1 **Grounds.**

When PA or DCO are satisfied, from credible evidence, that any person is likely to do any wrongful act or commit any offence which may cause breach of peace or disturb the public tranquility.

**Breach of the peace.(BLD).** The criminal offence of creating a public disturbance or engaging in disorderly conduct, particularly by making an

unnecessary or distracting noise. It is disturbance of peace and disturbing the peace. A breach of peace takes place when either an assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult is not sufficient. In loose term 'breach of the peace' is regarded as synonym for crime.

**Wrongful.** Characterized by unfairness or injustice. It is contrary to law, unlawful, wrongful conduct. An action taken in violation of a legal duty, an act that unjustly infringes on another's right.

- Provisions of Regulation and application of other laws and sensitivities of FATA are to be kept in mind. Tribals do enjoy a lot of concessions as compared to Settled Areas but at the same time Regulation imposes additional legal duties upon the tribals.

**Illustration.**

- (A) Mr. X of tribe Z alongwith his co-tribesmen attempts to instigate the locals in an inter-tribal, dispute to take possession of disputed land. Mr. X is likely to do an act under Section (1) of Section 40 of Regulation.
- (B) Mr. Y is instigating the locals over a religious issue by delivering provocative speeches and also collecting arms to be used against the opponents. Mr. Y is likely to commit an offence which may cause breach of peace and disturb the public tranquility.
- PA or DCO is bound to issue show cause notice to such person(s). Show cause notice must contain full grounds to execute a bond with or without sureties. Reasonable time be given to such person for showing cause.
- It is not essential that once notice is issued under Sub Section (1) it should culminate at asking for furnishing bond with sureties. If PA or DCO is satisfied from reply of the respondent that sufficient grounds do not exist for further proceedings; Notice may be withdrawn.

**7. Sub Section(2).** As PA or DCO receives an information warranting issuance of order under sub Section (1) he shall order in inquiry as to the truth of information. Such inquiry shall be in accordance with Section 117(2) of Cr.PC.

Further inquiry may also be ordered on receipt of reply of Show Cause Notice. Administration may be directed to adduce further evidence.

**8. Section 117 Inquiry as to truth of information.**

(1) When an order under Section 112 (Cr.PC) has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 114 the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner prescribed in Chapter XX for conducting trials and recording evidence, except that no charge need be framed].

(3) Pending the completion of the inquiry under sub-section (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section 112 has been made, to execute, a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

Provided that:-

- (a) No person against who proceedings are not being taken under Section 108, Section 109, or Section 110, shall be directed to execute a bond for maintaining good behaviour, and
- (b) The conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section 112.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

**Section 117(2) Cr.PC.**

Such an inquiry shall be made, as nearly as may be practical, in the manner prescribed in chapter XX for conducting trials and recording evidence, except that no charge is framed.

**8.1 Chapter XX(Cr.PC) of the Trials of cases by Magistrates.**

**Section 241-250 A.**

Inquiry under Section 117(2) shall be conducted as nearly as may be practicable, in a manner prescribed in chapter XX of Cr.PC.

- Proceeding under Section 117(2) are of civil nature and no charge will be framed. The person to whom show cause notice is issued is not to be charged for any cognizable or non-cognizable offence but to initiate preventive measures to ensure public peace and tranquility.



- Section 241-250 A (Cr.PC) deals with the procedure of trials by the Magistrates. Accused is to be supplied copies of statements. (Section 241 Cr.PC)

If the accused admits truth of accusation he will be convicted for the offence he is charged.( Section 243).

Magistrate may acquit the accused at any stage when he is satisfied that the charge is groundless and there is no probability of the accused being convicted of any offence. (Section 249 A).

In case of false, frivolous or vexatious accusation a Magistrate may acquit the accused and also issue show cause to the complainant or informant and order them to pay compensation to the accused.(Section 250 Cr.PC).

- Thus show cause, reply, further inquiry, withdrawal of show cause or directing such person to furnish bond, with or without sureties, for good behavior and keeping peace for a period not exceeding two orders.
- Proceedings under Section 40 of Regulation are of administrative nature but should be executed in a judicial manner and procedure as laid down in Section 117 (2) and Chapter XX (Cr.PC) must be followed.

#### **9. Sub Section(3).**

Similar provisions exist in Section 117(3) Cr.PC. Issuance of show cause, reply and inquiry is a time-consuming process, and it should be, so as to meet the ends of justice. Law and order situation may warrant immediate preventive measures when there is grave danger to public peace. In such a situation procedure, as laid down in Sub Section (1) and sub Section (3) offers a solution to such a situation.

So pending such inquiry the PA or DCO may direct the person to execute a bond, with or without sureties, for keeping peace and maintain good behavior, during this period.

If a person to whom such direction is given either refuses or fails to submit a bond, with or without sureties , he may be detained until such bond is executed, or in default of bond, until the inquiry is concluded, within a period of 30 days.

- No one should be detained un-necessarily for want of sureties. If a person offers personal surety for the interim period of 30 days the Political Administration may accept such bond.
- Period of 30 days has been fixed and no person may be detained or asked for bond, with or without sureties. Thus inquiry must be completed within 30 days or such person shall be entitled to release if detained.

**10. Sub Section(4)**

After the conclusion of inquiry , as provided in Sub Section(1),(2) and (3) the PA or DCO may pass an order directing such person to execute a bond , with or without sureties, for his good behavior and for keeping peace and tranquility for a period not exceeding two years. It will be a judicial order stating the grounds of being so satisfied.

- If upon an inquiry PA or DCO is satisfied that reasonable grounds do not exist against such person, justifying direction for executing of bond and there is no danger to public peace PA or DCO may order release of such person if detained, and if not in custody shall discharge him.
- If a person is directed to give bonds for interim period of 30 days, and the inquiry is concluded in less than 30 days if such person is directed to give bond to maintain peace for two years; fresh bond, alongwith sureties if so directed, shall be furnished. In default such person may be detained.
- Proceeding under Section 40 shall not be used to detain the person unnecessary for want of sureties.

Amount of sureties should not be excessive. Demanding cash amount, and that too heavy amount, is not in accordance with the spirit of Cr.PC and this Regulation.

In case of violation of conditions of maintaining peace, show cause notice may be issued to such person and the sureties. If such person does not appear; sureties shall be proceeded against under Section 514 Cr.PC.

**11. Sub Section(5).**

The previous sub Sections of Sections 40 envisage security for keeping peace from the person who, are otherwise not convicted for an offence but , are likely to disturb public peace and tranquility. There are certain offences for which the legislature deemed it fit to require the persons to execute a bond for keeping peace. It is a security for keeping peace on conviction. The trial Court, irrespective of the punishment awarded for the cited offences in Section 106 Cr.PC. and enlisted in Section 11 of this Regulation, may require a bond for keeping peace during such period, as it thinks fit, but not exceeding three years.

- Section 106 Cr.PC mention the offences, for which the Magistrate may ask for security on conviction is as under:-

Any offence punishable under chapter VIII of PPC but other than an offence under Section 143, Section 149, Section 153-A or Section 154, or other offence involving break of peace , or of abetting the same , or criminal intimidation.

#### **11.1 Chapter VIII PPC. offences against the Public Tranquility.**

- Sections 141-160 explain the concept of unlawful assembly (Section 141), being member of unlawful assembly (Section 142), and punishment for being member of unlawful assembly (Section 143), Rioting (Section 146), punishment for rioting (Section 147), inducing students to take part in political activity (Section 153 B), Affray (Section 159) and punishment for committing affray (Section 160).

These are some of the offences which disturb public peace, and weaken the writ of the state. If allowed unchecked these acts adversely affect the socio-economic life of the citizens and may lead to greater chaos facilitating the anti-social elements to exploit the situation and fill the vacuum.

- Since the period of recorded history maintaining peace has remained the prime duty of the States. If public disturbances become routine, it usually lead to anarchy and the whole society gets criminalized.

Sub Section 5, precisely for these reasons, has specifically mentioned security for keeping peace on conviction as per Section 106 Cr.PC. Thus it has been ensured that such person is kept under security bond for a period of three years.

#### **11.2    Exclusion of certain offences for a purview of Section 106 Cr.PC.**

- **Section 153-A.** Promoting enmity between different groups.

This offence is punishable with imprisonment which extends to five years or fine or both.

- **Section 154 PPC.** Owner or occupier of land on which an unlawful assembly is held.

Fine not exceeding ten thousands rupees.

- **Section 143 PPC.** Punishment for being member of unlawful assembly is upto six months, or with fine, or with both.

- **Section 149 PPC.** Every member of unlawful assembly is guilty of offence committed in prosecution of common object.

Since a member of unlawful assembly may be accused of very serious offence having punishment for more than three years or very petty offence, thus Section 149 PPC not included in Section 106 Cr.PC.

- **Assault. Section 351 PPC.** Punishment for assault is upto three months imprisonment or fine extending to one thousands, five hundred rupees or with both.

#### **11.3    Criminal intimidation. Section 503PPC.**

Criminal intimidation is threat to another with an injury to his person, reputation or property.

Punishment for criminal intimidates is upto two years, or with fine, or with both.

But if threat be to cause death or grievous hurt etc. punishment may extend to seven years, or with fine, or with both.

- Offences excluded from the purview of Section 106 Cr.PC are either of petty nature or having punishment for more than three years or are of individual nature. The purpose of Section 106 Cr.PC is to include only those offences which are, usually, committed collectively and by large group of people and greatly disturb public peace. For this reason offences mentioned in Section 106 Cr.PC. are included in Sub Section (5).

#### **11.4    Offences in Second schedule of Regulation.**

In all the offences mentioned in the Second Schedule to this Regulation the Court may, at the time of passing sentence , order such person to execute a bond for keeping peace for a period not exceeding three years.

- Security direction under Sub Section 5 is discretionary power of the trial Court,. If in the opinion of Court it is necessary to issue an order for bond, the Court may order such person to execute a bond with or with sureties. Sum for sureties must not be excessive. It should be proportionate to financial status of such person, and nature of offence.
- If the conviction is set aside in appeal, review or revision the bond so executed shall become void.

#### **12)    Sub Section (6)**

Where the PA or DCO have passed an order under Sub Section(4) directing a person to execute a bond and these are sufficient grounds for making an order, in writing, to direct such person that after his release he shall notify his residence as per provisions of Section 565 Cr.PC.

- PA or DCO shall give reasons for making such order; which shall be in writing.

**12.1 Section 565 Cr.PC. Order for notifying address of previously convicted offender.**

Section 565 Cr.PC prescribes procedure for convict, punished under Section 489-A, 489 B, 489-C, Section 489 –D PPC and punishable under chapter XII or chapter X VII of PPC with imprisonment of either description for a term of three years or upwards, or is again convicted for the above offences the Magistrate may at the time of passing sentences of imprisonment also order such person that his residence and any change of or absence from such residence, after release shall be notified in a manner as hereinafter provided. The Provincial Government may make rules to carry out the provisions of Section 565 Cr.PC. Appellate Court may also order such direction. Same powers are available to Court exercising jurisdiction of Revision.

- Under Sub Section (4) of Section 40 a person can only be detained when he fails to execute a bond so ordered by PA or DCO. Strictly speaking such detention is not conviction but in default of execution of bond.
- Such order of notifying residence of person shall be in writing, giving reasons and the term shall not exceed two years.
- In case of FATA Rules may be framed with the approval of Governor as per Section 62 of Regulation.

**Section 40-A      <sup>(37)</sup> Arrest by Authorities other than Political Agents etc:-**

***Whenever a person is arrested by the authorities other than Political Agents. District Coordination Officer or their subordinate staff and is produced before the Political Agent or District Coordination Officer, as the case may be, he shall immediately***

***inform the Governor or an Officer authorized by him as the Chairman FATA Tribunal about the production of such person before him and thereafter shall proceed against him in accordance with the provision of this Regulation and the circumstances of the case.***

- Section 40-A inserted through amended Regulation, 2011. Militancy, law and order situation in FATA and the operation by the Armed Forces of Pakistan necessitated this amendment.

In the entire FATA army operation launched, from 2003 onward and the army has been called in aid of civil power as per article 245(4) of the Constitution. Word “armed forces” defined in Section 132-A (Cr.PC). It includes military, naval and air force, operating as land forces.

Section 132 [A (aa)]. The expression ‘civil armed forces’ means the Pakistan Rangers, Frontier Corps, Frontier Constabulary, Baluchistan Constabulary, Pakistan Coast Guards or any other force as the Federal Government may notify.

When a person is arrested by the authorities, other than staff of Political Administration, he shall be produced before the PA or DCO. Governor, or an officer authorized by him, shall immediately be informed about such apprehension. Further proceeding against such person shall be in accordance with this Regulation and the circumstances of the case.

**Section 41. <sup>(38)</sup> Security from families or factions in case of blood feud. –**

***Where a blood-feud or other cause of quarrel likely to lead to blood-shed exists, or, in the opinion of the Political Agent or District Coordination Officer, as the case may be, is likely to arise between two families or factions or tribes, the Political***

***Agent or District Coordination Officer, as the case may be, after holding an enquiry as hereinafter provided, order or any of the members of both families or factions or tribes or of either family or faction or tribe to execute a bond, with or without sureties for their good behavior and keeping the peace, during such period, not exceeding two years as he may fix.***

1. Section 41-45 substituted through amendment in FCR, 1901. In the FCR, 1901 Deputy Commissioner was competent to order execution of bond for keeping peace on the recommendations of Council of Elders.

Now under this section PA or DCO may order:-

- (a). after holding an inquiry as provided in Section 42 of this Regulation which is the same as per provisions of Section 117(2) of the Cr.PC.
- (b) any of the members of both families or factions or tribes or of either family or faction or tribe.
- (c) to execute a bond, with or without sureties for their good behavior and keeping the peace during such period not exceeding two years as he may fix.

Proceedings under this Section are similar as per proceedings under Sections 107-126 A of the Cr.PC.

## **2. Grounds for Security.**

Where there is sufficient evidence to suggest that a

- a). blood feud (due to enmity ) personal or tribal
- b). Cause of quarrel. (dispute over land, water, tribal or sectarian) exists. Existence of such facts may lead to bloodshed.PA or DCO shall



make an order requiring the individuals, families, tribe or any of them to execute a bond for keeping peace. PA or DCO shall make an order as per Section 112 of Cr.PC. The order shall state the grounds, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Inquiry as to truth of information in accordance with the provisions of Section 117(2) Cr.PC. Order to give security shall be made as per Section 118 Cr.PC.

**Section 42.** **<sup>(38)</sup> Procedure in inquiry.** –

***Where the Political Agent or District Coordination Officer, as the case may be, hold an inquiry under this Regulation, he shall follow the procedure as prescribed in section 117 (2) of the Code of Criminal Procedure, 1898 (Act V of 1898), as nearly as may be practicable. The record of the enquiry proceedings shall be maintained and such enquiry shall be concluded within thirty days.***

1. Inquiry shall be conducted as prescribed in Section 117(2) Cr.PC. Record of inquiry will be maintained. Inquiry proceedings shall be completed within 30 days. Pending inquiry, PA or DCO may direct a person to execute a bond for keeping peace during interim period of inquiry which shall not be more than 30 days. Upon conclusion of inquiry, as per Section 117(2), order to give security will be made. (Section 118 Cr.PC).

It is not essential that when security proceedings against a person(s) are initiated the same must end up in ordering to execute a bond. If the findings of the inquiry indicate that there are no sufficient grounds for directing such person to execute a bond for keeping peace he may be discharged or released if in custody.

**Section 43.** **<sup>(38)</sup> Breach of bond.**

**(1) A bond executed under Section 40 shall be liable to be forfeited if the person bound thereby to be of good behavior or to keep the peace as the case may be, commits or attempts to commit, or abets the commission of, any offence punishable with imprisonment or fine or both.**

**<sup>(38)</sup> (2) A bond executed under Section 41 shall be liable to be forfeited, if the person or persons bound thereby to be of good behavior or to keep the peace, as the case may be commit or attempt to commit, or abet the commission of, any offence punishable in respect of any member of the opposite family or faction or tribe to which the bond related.**

**<sup>(38)</sup> (3) If, while a bond executed under Section 41 is in force, the life of any member of either family or faction or tribe is taken or attempted to be taken, the Political Agent or District Coordination Officer, as the case may be, may declare the bond of all or any of the members of the other family or faction or tribe and their sureties if any to be forfeited, unless it is shown to his satisfaction that the homicide or attempt was not committed by, or in consequence of the abetment of, any member of that family or faction or tribe.**

**<sup>(38)</sup> (4) The procedure as provided in chapter XLII of the Code of Criminal Procedure 1898 (Act V of 1898) shall be followed for the forfeiture of the bond under this Regulation.**

1. Provisions of Section 43 cover the procedure to forfeit bond in case of violation of terms and conditions, all or any, as set forth in proceedings under Section 40 and Section 41 of this Regulation.

Customs and traditions are generally honored in FATA. Record indicates that, as compared to Settled Areas, there are less violation of peace bond once executed. There is a balance of power and consequences of violation are known to everyone.

Political Administration must guard against even minor violations because these may snow-balled into full-fledged armed clashes leading to damage to life and property.

2. Sub Section (1). Bond executed under Section 40 for keeping good behavior shall be forfeited if the person bound:-

- a). commits an offence punishable with imprisonment. It includes any offence punishable under this Regulation.
- b). Attempts to commit an offence. There are many offences that attempt itself constitute an offence or even preparation to commit such an offence.

**2.1 Examples.**

- Concealing a design to commit an offence punishable with death or imprisonment for life. (Section 118 PPC).
- Criminal conspiracy (Section 128-B PPC). Criminal conspiracy to commit an offence with death, transportation or rigorous imprisonment for a term of two years or upward.
- **Section 121 PPC.** Waging or attempting to Wage war against Pakistan.

**Section 121 A (PPC)** Conspiring to commit certain offences against the State.

<b><u>Section 123(PPC).</u></b>	Concealing with intent to facilitate a design to wage war.
<b><u>Section 325 PPC.</u></b>	Attempt to Commit Suicide.
<b><u>Section 397 PPC.</u></b>	Attempt to commit robbery or decoity when armed with deadly weapons.
<b><u>Section 399 PPC.</u></b>	Making preparation to commit decoity.

**2.2    Abets the commission of any offence.** Abetment defined in Section 109 PPC.

PA or DCO, in case of any or all of the above violations may issue notice, to the person bound thereby of good behavior, stating grounds for forfeiture of bond.

If such person fails to turn up or respond, notice may be issued to sureties.

- Political Administration must give an opportunity of hearing to such person before ordering forfeiture especially in case of abetment or attempt to commit an offence because facts require high standard of evidence to prove or disprove, the abetment.

**3.        Sub Section 2.**

Same grounds for forfeiture set in Sub Section (1) except that since security under Section 41 (Regulation) is required in a situation where a blood-feud or cause of quarrel likely to lead to blood-feud, therefore if such person do a wrongful act in respect of any member of the opposite family or faction or tribe to which the bond related.

**4.        Sub Section 3.**

Sub Section 3 further strengthens the procedure in regard to security proceedings in case of family feud etc. Under Section 41 of Regulation during currency of a bond under Section 41 the life of member of either family or faction or tribe is taken or even attempt is made the PA or DCO may:-

- a). declare the bond of all members of family or faction or tribe and their sureties or
- b). any of the members to be forfeited.

#### **4.1 Notice and hearing.**

Sub Section (3) does not envisage ex-parte proceedings. Such powers of forfeiture are qualified unless it is shown to the satisfaction of PA or DCO that the homicide or attempt was not committed or in consequence of the abetment of any members of the family or faction of tribe.

- Tribal customs and traditions to prove, or disprove such facts, are quite extensive. Parties must be given opportunity to explain their position. Political Administration may also inquire through own staff. Jirga may also be inducted and parties directed to appear before the jirga. It is not only question of forfeiture of bond under this sub section for the alleged violation but such forfeiture may set chain reaction of enmity. In FATA proof or disproof of such facts is quite comprehensive due to tribal customs and traditions. Even the opposite family would admit clarifications under the Rewaj offered by such persons.

#### **5 Sub Section (4).**

After the conclusion of inquiry , as provided in Sub Section(1),(2) and (3) the PA or DCO may pass an order directing such person to execute a bond , with or without sureties, for his good behavior and for keeping peace and tranquility for a period not exceeding two years. It will be a judicial order stating the grounds of being so satisfied.

- If upon an inquiry PA or DCO come to conclusion that reasonable grounds do not exist against such person, justifying direction for executing

of bond and there is no danger to public peace PA or DCO may order release of such person if detained, and if not in custody shall discharge him.

- If a person is directed to give bond for interim period of 30 days, and the inquiry is concluded in less than 30 days and such person is directed to give bond to maintain peace for two years; fresh bond, alongwith sureties if so directed, shall be furnished. In default such person may be detained.
- Proceedings under Section 40 shall not be used to detain the person unnecessary for want of sureties.

Amount of sureties should not be excessive. Demanding cash amount, and that too heavy amount, is not in accordance with the spirit of Cr.PC and this Regulation.

In case violation of conditions of maintaining peace, show cause notice can be issued to such person and the sureties. If such person does not appear; sureties shall be proceeded against under Section 514 Cr.PC.

#### **6. Sub Section(5).**

The previous sub Sections of Sections 40 envisage security for keeping peace from the person who, are otherwise not convicted for an offence but are likely to disturb public peace and tranquility. There are certain offences for which the legislature deemed it fit to require the persons to execute a bond for keeping peace. It is a security for keeping peace on conviction. The trial Court, irrespective of the punishment awarded for the cited offences in Section 106 Cr.PC. and enlisted in Section 11 of this Regulation, may require bond for keeping peace during such period, as it thinks fit, but not exceeding three years.

- Section 106 Cr.PC mention the offences, for which the Magistrate may ask for security on conviction is as under:-
  - i). Any offence punishable under chapter VIII of PPC but other than an offence under Section 143, Section 149, Section 153-A or Section 154, or other offence involving breach of peace, or of abetting the same, or criminal intimidation.

## **Chapter XLII Cr.PC.**

### **6.2 Provisions as to bonds.**

**Section 513-516.** Procedures as provided in chapter XLII of the Cr.PC shall be followed for the forfeiture of bond under this Regulation.

### **6.3. Procedure for forfeiture of Bond.**

#### **Section 513. Deposit instead of recognizance.**

Court, except for a bond for good behavior, may permit such person to deposit a sum of money or Government promissory to such amount as the Court may fix, in lieu of executing such bond.

#### **6.4 Section 514. Procedure on forfeiture of bond.**

When bond is forfeited the Court shall record the grounds and may call upon any person bound by such bond to pay the penalty or to show cause why it should not be paid. If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of moveable property belonging to such person without such limits, when endorsed by the District Revenue Officer (Revenue) within the local limits of whose jurisdiction such property is found. In default of penalty such person may be imprisoned for six months in civil jail.

Court may remit portion of penalty.

- Same proceedings may be initiated against the sureties.

#### **6.5 Section 515.** All orders under Section 514 are appealable to Sessions Judge.

- In case of FATA such appeal shall lie to the Commissioner.

#### **Section <sup>(38)</sup> 44. Imprisonment in default of security –**

*(1) Where a person ordered to give security under section 40 or section 41, does not give security on or before the date on which the period for which the security is to be given commences or in cases of forfeiture of bond, he shall be committed to prison or, if he is already in prison, be detained in prison until the period for which the security was required, expires, or until within such period he or they furnish the required security bond to the satisfaction of the Court.*

*<sup>(38)</sup> (2). Imprisonment for failure to give security under this chapter may be simple as the offence requiring the security directs in each case.*

- If any person fails to give security, when so ordered under Section 40 or Section 41, before the date on which the period for which the security is to be given concludes or in case of forfeiture such person shall be committed to prison until such period for which the security was required or he furnishes the required security bond to the satisfaction of the court.

**Sub Section 2.** Imprisonment in default of security shall be simple as the offence requiring the security directs in each case.

**Section <sup>(38)</sup> 45.**      **Length of imprisonment.**

*Where a person has suffered imprisonment for two years for failure to give security under section 40 or section 41, he shall be released forthwith, provided where the person in the opinion of the Political Agent or District Coordination Officer, as the case may be, is habitual or desperate or hardened criminal or the grounds on which he was detained have not ceased.*



***The Political Agent or District Coordination Officer, as the case may be, may proceed afresh under the provisions of this Chapter for passing a fresh order and reasons thereof be recorded.***

1. It is but logical that nobody can be imprisoned for indefinite period in default of security.

A person may be detained for failure to execute bond and furnish sureties if so ordered under Section 40 or Section 41 of Regulation.

Where a person suffered imprisonment for two years for failure to give security he shall be released forthwith.

Under Section 40 of Regulation maximum period for security is two years and same is the case in regards to security under Section 42 of Regulation.

This section, while prescribes maximum imprisonment two years in default of security, there is few exceptions to this which are:-

- (a) when such person is habitual offender
- (b) desperate or
- (c) hardened criminal or
- (d) the grounds on which a person was detained have not ceased.

The PA or DCO may start proceedings afresh under this section. In Section 45 the word is 'chapter'. There are no chapters in the Regulation as was the case with FCR, 1901.

- PA or DCO are bound to give reasons for starting proceedings afresh and further extension in detention period beyond two years.
- There must be exceptional circumstances for such extension. Opinion of PA or DCO must be based on solid grounds.
- Like any other order of PA or DCO all orders under this Section are appealable.

Rules under Section 62 of Regulation may be framed for elaboration of procedures such as copy of orders of PA or DCO to the Commissioner.

**Section 46.**

***Omitted.***

In FCR, 1901 Section 46 gave procedure for further security.

The same is now covered under Section 45 of Regulation.

**Section<sup>(39)</sup> 47.**

***Modified applications of Chapters VIII and XLII, Act V of 1898.***

***Where, within the territories in which all or any of the provisions of this Regulation are for the time being in force, it is found necessary or expedient to take security under this Regulation from the inhabitants of the Federally Administered Tribal Areas against whom all or any of the provisions of Section 40 to 45 may for the time being in force, the provisions of Chapters VIII and XLII of the Code of Criminal Procedure 1898, shall be read as if for the words “High Court”, “ Court of Sessions” and Sessions Judge” wherever they occur, the words “FATA Tribunal and the Appellate Authority” be substituted, and all references to any such Court shall be deemed to refer to FATA Tribunal or the Appellate Authority, as the case may be.***

1. Chapter VIII Cr.PC. deals with prevention of offences. These are security for keeping the peace and for good behavior. (Section 106-126-A) Cr.PC. In case of imprisonment in default of security when such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall,

if such person does not give such security, as aforesaid, issue a warrant directing him to be detained in person pending the orders of the Sessions Judge; and the proceedings shall be laid, as soon as conveniently may be, before such judge.

2. The Sessions Judge, after examining such proceedings may pass such order on the case as he thinks fit. (Section 123 Cr.PC).

**Section 124 Cr.PC.**

Where the Sessions Judge is of the opinion that any person, imprisoned for failing to give security under this chapter, may be released without hazard to the community or to any other person, he may order such person to be discharged. Sessions Judge may also make an order reducing the amount of the security or the number of sureties or the time for which the security has been required. If such person fails to fulfill the conditions upon which he was discharged, the Sessions Judge may cancel discharge order. When a conditional order of discharge has been cancelled such person may be arrested and produced before the Sessions Judge.

**2.1     Section 125.**     Power of Sessions Judge to cancel any bond for keeping the peace or good behavior.

The Sessions Judge may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behavior.

**2.2     Chapter XLII.   Provisions as to Bonds Cr.PC.**

Section 513-516 Cr.PC.

**2.3     Section 513.**     Deposits instead of recognizance.

**2.4     Section 514.**     Procedure on forfeiture of bond.

**2.5     Section 515.**     Appeal from or revision of orders under Section 514.

All orders passed by a Magistrate under Section 514 shall be appealable to the Sessions Judge, or if no appeal is preferred against any such order, may be revised by the Sessions Judge.

**2.6     Section 516     Power to direct levy of amount due on certain recognizances.**

The High Court or Court of Sessions may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Sessions.

- The purpose of, abridged versions, of Chapter VIII and Chapter XLII Cr.PC. is to acquaint the Presiding officers of Courts in FATA with the procedures to be followed in regard to security proceedings to maintaining peace in the larger public interest.

While taking security measures under Section 40 to 45 of Regulation the provisions of Chapter VIII and XLII of the Code of Criminal Procedure shall be applied to FATA, albeit, in the following modified form.

- For the words “High Court”, “Court of Sessions Judge” where ever they occur the words, “FATA Tribunal and the Appellate Authority” be substituted.

Political Administration to refer the cases under security proceedings to the Appellate Authority (Commissioner) and the FATA Tribunal, as the case may be. Such referral may be for favour of information or approval as per provisions of Cr.PC regarding security proceedings.

- Commissioner may exercise powers of revision in respect of orders under Section 514 Cr.PC which deals with proceeding against the sureties.
- It is mandatory for the PA or DCO to observe the procedure as laid down in chapter VIII (Sections 106-126A) and chapter XLII Cr.PC (Sections 513-516).

It means that security proceedings under Section 40-45 of this Regulation are to be referred to Commissioner under certain circumstances like imprisonment in default of security as laid down in Section 123 Cr.PC.

**Section <sup>(39)</sup> 48.**      **Appeal.**

***An appeal shall lie to the Commissioner or Additional Commissioner, if authorized so by the Governor, within thirty days from the date of any decision given, decree or sentence passed, or order made by the Political Agent or District Coordination Officer, as the case may be under this Regulation.***

1. Section 48 amended under this Regulation. Now specifically mentioned that an appeal shall lie to the Commissioner within thirty days from the date of any:-

- (a) decision given.
- (b) decree or sentence passed or
- (c) order made

by the Political Agent or District Coordination officer, as the case may be, under this Regulation.

Additional Commissioner may also be authorized by the Governor to hear appeals. Additional Commissioner, if so authorized by the Governor, shall be exercising all the powers of Commissioner as Appellate Authority as defined in Section 2(a) of Regulation.

2. **Limitation period.** Appeal to the Commissioner shall be preferred within thirty days from the date of decision given, decree or sentence passed or order made by the PA or DCO. Provisions of the Limitation Act, 1908 for filing an appeal, revision and review before the Appellate Authority or the FATA Tribunal shall, mutatis mutandis, apply under this Regulation. Appellate Court must decide the issue of limitation at the outset for admission, or otherwise, of appeal under this Regulation. Court may Condon the delay if sufficient cause is shown by the appellant.

2.1 **Decree.**

PA or DCO may pass a decree as per Section 8 of this Regulation (civil reference to the Council of Elders).

## **2.2     Sentence passed.**

Section 11 of the Regulation. (Criminal reference to Council of Elders).

## **2.3     Decision given.**

Such decision may be, both, in case of civil and criminal matters. Decision on bail application (Section 11 B). Punishments (Section 12).

## **2.4     Orders.**

Such orders may be interlocutory or final orders. Orders under Section 21, Section 25, Section 26, Section 34, Section 36, Security proceedings and orders under Sections 40,41,43, and Section 44 of Regulation.

- Appellate Authority may exercise powers in exercise of criminal appellate jurisdiction (Section 50 of the Regulation) and powers in exercise of civil appellate jurisdiction (Section 52 of Regulation).

3. It would be appropriate to briefly discuss the provisions in regard to criminal appeals and appeals in civil cases. Provisions of Code of Criminal Procedure, 1998 and Civil Procedure Code, 1908, shall, mutatis mutandis, apply to proceedings under the Regulation. The provisions of this Regulation shall have effect notwithstanding anything contained in any other law for the time being in force (Section3 of Regulation).

## **3.1     Appeals. Chapter XXXI Cr.PC.**

### **Sections 404-431.**

**3.2      Section 404.**

No appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force.

**3.3      Section 405.**

Appeal from order rejecting application for restoration of attached property under Section 89 Cr.PC.

**3.4      Section 406.**

Appeal from order requiring security for keeping peace or for good behavior. Appeal under Regulation shall lie to the Commissioner (Section 47 of the Regulation)

**3.5      Section 405 A.**

Appeal from order refusing to accept or rejecting a security under Section 122 Cr.PC. shall lie to the Commissioner.

**3.6      Section 408.**

Appeal from sentence of Assistant Sessions Judge or Judicial Magistrate.

**3.7      Section 410.**

Appeal from sentence of Court of Sessions shall lie to the High Court. In case of FATA it shall lie to the FATA Tribunal against decision of Commissioner.

**3.8      Section 412.**

No appeal in certain cases when accused pleads guilty, except as to the legality or extent of the sentence.

### **3.9     Section 413.**

No appeal in petty cases. When a Court of Sessions passes a sentence of imprisonment not exceeding one month only or a Court of Sessions or a Magistrate of the First Class passes a sentence of fine not exceeding fifty rupees only.

### **3.10    Section 214.**

No appeal from certain summary convictions under Section 240 Cr.PC.

### **3.11    Section 415 A. Special right of appeal in certain cases.**

When more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

### **3.12    Section 417. Appeal in case of acquittal.**

Provincial Government may direct the Public Prosecutor to file an appeal in a High Court against order of acquittal passed by Court other than a High Court.

- **Section 51 of Regulation.**     No sentence can be passed by the Commissioner against acquittal order of PA or DCO.

### **3.13    Section 418.**

Appeal on what matters admissible? An appeal may lie on a matter of fact as well as a matter of law.

### **3.14    Section 419.    Petition of appeal.**

Every appeal shall be made in the form of a petition by the appellant or his pleader and shall be accompanied by a copy of the judgment or order appealed against.



**3.15    Section 420.    Procedure when appellant in Jail.**

When appellant is in jail he may present his petition of appeal and copies accompanying the same to the officer in charge of the jail, who shall there upon forward such petition and copies to the proper appellate Court.

**3.16    Section 421.    Summary dismissal of appeal.**

When no sufficient grounds for interfering, it may dismiss the appeal.

**3.17    Section 422.**

Notice of appellant or his pleader and to such officer as the Provincial Government may appoint.

**3.18    Section 425.**

Judgment of Subordinate Appellate Courts Rules contained in Chapter XXVI of the Cr.PC. shall apply.

**3.19    Section 426.    Suspension of sentence pending appeal and release of appellant on bail.**

Appellant may, for reasons to be recorded, that the execution of the sentence or order appealed against the suspended, and, also if he is in confinement be released on bail or on his own bond.

**3.20    Section 428.**

Appellate Court may take further evidence or direct it to be taken.

**3.21    Section 430.    Finality of orders on appeal.**

Judgments and orders passed by an Appellate Court upon appeal shall be final, except in case provided for in Section 417 and Chapter XXXVI.

- Section 417 deals with appeal in case of acquittal. Under Section 51 of Regulation no sentence can be passed in appeal by the Commissioner if an accused acquitted by the PA or DCO.

### **3.22    Section 431.    Abatement of appeals.**

Every appeal shall abate on the death of the accused.

### **4.        Appeal in Civil case.**

All proceedings as per Section 8 of Regulation are of civil nature.

**Appeals CPC (Section 96-112)** and Order 41 (Rule 37) Order 42, Order 43 (Rule 1 to 4) and Order 44 (Rule 1-2) deal with appeals.

- Appellate Courts are bound to follow these proceedings in the best interest of justice.

### **4.1      Section 96 CPC.        Appeals from original decrees.**

An appeal shall lie from every decree passed by any Court exercising original jurisdiction.

No appeal lie from an original decree passed ex parte. Similarly no appeal lies from a decree passed by the Court with the consent of parties.

- Under Section 8 and 9 of Regulation when the Council gives findings on the basis of consent of both the parties there shall be no appeal against a decree passed by the PA or DCO.
- Only those persons can appeal who were party to the suit or who are adversely affected by the decree. Such person may apply to the Court to be impleaded as party.

- A person is said to be adversely affected if the determination will be res judicata against such person.

**4.2     Section 99.**     No decree to be varied or modified for error or irregularity not affecting merit or jurisdiction.

**4.3     Section 100.**     Second appeal on point of law to the High Court.

**4.4     Section 104.     Orders from which appeal lies.**

- i.        an order under Section 35 A(Cr.PC.) compensatory cost in case of false or vexatious claims or defenses.
- ii.       an order under Section 47 CPC (Questions to be determined by the Court executing decree).
- iii.      an order under Section 95 CPC. (Compensation for obtaining arrests, attachment or injunction on insufficient grounds).
- iv.       an order in regard to imposing a fine or directing the arrest or detentions in the Civil prison of any person except where such arrest or detention is in execution of a decree.

**Order XLI (41) CPC**

**4.5     Appeal from original decrees.**

Rule -1. Every appeal shall be preferred in the form of Memorandum signed by the Appellate or his pleader to be accompanied by copy of decree appealed from. The Memorandum shall set forth the ground of objection to the decree appealed from without any argument or narrative.

**4.6     Rule-V.         Stay by Appellate court.**

Mere lodging an appeal shall not be considered sufficient to stop execution of the impugned order i.e. order against which appeal has been lodged. A stay order by the appellate forum is necessary to stop execution of the impugned order. However, the court which passed the decree, may on sufficient cause, order to

stop execution of its own order, till expiration of time allowed for lodging the appeal.

**4.7      Rule-16.              Right to begin:-**

The appellate court shall hear the appellant and then, if it does not dismiss the appeal at once, respondent shall be heard and the appellant shall be entitled to reply.

**4.8      Rule-30.              Judgments when and where pronounced :-**

The appellate court after hearing shall pronounce judgment in open court, either at once or on some future day, in respect of proceeding conducted in the same appellate court or in trial court.

**4.9      Rule-35.              Date and contents of decree :-**

Ingredients of a decree are:-

- a)    Date of decision / order.
- b)    Title (s) of appeal(s) being disposed off
- c)    Clear specification of relief granted or other adjudication made.
- d)    Clear order regarding cost
- e)    Signature and date by the judge.

**4.10**    The appeals from orders. An appeal shall lie from the following orders under the provisions of section 104, namely:-

- (a) An order under rule 10 of Order VII returning a plaint to be presented to the proper Court.
- (b) An order under rule 10 of Order VIII pronouncing judgment against a party;

- (c) An order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- (d) An order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex-parte;
- (e) An order under rule 4 of Order X pronouncing judgment against a party;
- (f) An order under rule 21 of Order XI;
- (g) An order under rule 10 of Order XVI for the attachment of property;
- (h) An order under rule 20 of Order XVI pronouncing judgment against a party;
- (i) An order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- 1] an order under rule 62 of rule 103 of Order XXI relating to the right, title or interest of the claimant or objector in attached property;]
- (j) An order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;
- (k) An order under rule 9 of Order XXI refusing to set aside the abatement or dismissal of a suit;
- (l) An order under rule 10 of Order XXII giving or refusing to give leave; giving or refusing to give leave;
- (m) An order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;
- (n) An order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

- (o) An order <sup>2</sup>[under rule 2, rule 4 or rule 7] of Order XXXIV refusing to extend the time for the payment of mortgage-money;
- (p) Orders in inter pleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;
- (q) An order under rule 3, rule 4 or rule 6 of Order XXXVIII;
- (r) An order under rule 1, rule 2 or rule 4 or rule 10 of Order XXXIX;
- (s) An order under rule 1, rule 4 of Order XL;
- (t) An order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;
- (u) An order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of Appellate Court;
- (v) An order made by an Court other than a High court refusing the grant of a certificate under rule 6 of Order XLV;
- (w) An order under rule 4 of Order XLVII granting an application for review,

Whilst an appeal lies against all decrees, an appeal will lie only against such orders as are enumerated in Section 104, or in this rule. This rule is controlled by the provision of Section 104. No appeal lies from an order passed in appeal against an order. When such an appeal is filed it may be converted into a revision. In an appeal against an interlocutory order, other matters relating to the merits of the main suit should not be adjudicated upon. The procedure laid down in Order 41, should be followed as far as possible. Additional evidence cannot be produced without the permission of the court.

#### **4.11    Order-42.        Appeals from appellate decrees.**

The rules of order XLI shall apply, so far as may be to appeals from appellate decrees. Copy of the judgment of trial court must be accompanied.

Procedure for Second appeal will by and large have to be discovered from Order-41 read with other provisions of the Code including section 96 to 99, 107 & 108 CPC.

#### **4.12    Order-43.        Appeals from Orders.**

**Rule-1:-        Appeals from order.**

**Rule-2:-        Procedure:**

Rules of orders XLI shall apply, so far as may be, to appeals from orders.

**Rule-3:-        Notice before presentation of appeal:.**

If the appellant lodges an appeal during pendency of a suit, he shall serve a notice upon respondent, who, with the permission of court will appear before the appellate court and will be awarded cost if appeal is dismissed in-limini.

#### **Order XLIV**

#### **4.13    Pauper Appeals.**

**Rule-1.        Who may appeal as pauper.**

Any person, who is unable to pay the fee, may present an appeal as a pauper.

**Rule-2.        Inquiry into pauperism.**

Either by the appellate court or under the orders of the appellate court by the court from whose decision the decree is appealed from.

**4.14    In FCR, 1901 provisions of Revision was provided as under.**

**Revision.**

“The Commissioner may call for the record of any proceeding under this Regulation and revise any decisions, decree, sentence or order given, passed or made there in”.

- Revisional powers of Commissioner have been repealed. While FATA Tribunal still have the powers of revision. In all statutes immediate appellate authority has the powers of revision. The purpose is to provide better judicial control to check misuse of judicial authority and miscarriage of justice.

**Section 49.**

**Omitted .**

**Section <sup>(40)</sup> 50.**

**Powers in exercise of criminal appellate jurisdiction-**

*The appellate Authority may, in the exercise of its appellate jurisdiction in any criminal proceedings exercise the powers to direct tender of pardon conferred by section 338 of the Code of Criminal Procedure 1898, and any of the powers conferred on an Appellate Court by sections 195, 405 to 410, 422,423,426 to 428 of the Code of Criminal Procedure, 1898(Act V of 1898 ), and may also enhance any sentence after issuance of show cause notice to the convict.*

*Provided that nothing in this Chapter shall be deemed to authorize the Appellate Authority*

*to set aside the findings on any question of fact of a Council of Elders, where such findings have been accepted by the Political Agent or District Coordination Officer, as the case may be, unless it is*



***of the opinion that there has been a material irregularity or defect in the proceedings or that the proceedings have been so conducted as to occasion a miscarriage of justice. The Appellate Authority shall dispose of the appeal within sixty days.***

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39. Substituted for Sec. 47 and Sec. 48 of Regulation III of 1901  
40. Substituted for Sec. 50 to Sec. 55 of Regulation III of 1901

1. Section 50 specifically explains the powers of appellate court in exercise of criminal appellate jurisdiction. Under Regulation Commissioner is the Appellate Authority. Apart from these powers in procedural matters the Appellate Court to follow the procedures as laid down in Chapter XXXI (Section 404-341) of Code of Criminal Procedure for appeals.

- Section 47 of Regulation prescribes that Chapters VIII and XLII of Cr.PC. shall be applicable in modified form, to provisions of Sections 40 to 45 of the Regulation. Appellate Authority (Commissioner) shall be substituted whenever word “Court of Sessions” occur in the Cr.PC and “FATA Tribunal” for the words “High Court”.

2. Under Section 50 the Appellate Court (Commissioner) may exercise the following powers as Appellate Authority in any criminal proceedings.

#### **2.1 Powers to direct tender of pardon.**

Powers to direct tender of pardon is concurrent powers of Commissioner. PA or DCO may also exercise powers to tender pardon to accomplices as per Section 7 of the Regulation.

Section 7 empowering the PA or DCO to tender pardon to an accomplice at any stage of investigations, trial or inquiry. It is modified version of Section 337 Cr.PC.

#### **2.2 Section 338. Power to grant tender pardon.**

At any time before the judgment is passed the High Court or the Court of Sessions trying the case may, with the view of obtaining evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender or order the [officer in charge of the Prosecution in the district] to tender a pardon on the same condition to such person.

Provided that no such person shall be tendered pardon who is involved in any offence relating to hurt or qatl without permission of the victim or, as the case may be, of the heirs of the victim.

- Commissioner may also enhance any sentence after issuance of show cause notice to the convict.

Appellate Court may take additional evidence under Section 428 of the Cr.PC. and may also tender pardon to accomplice.

## **2.3 Powers under other Sections of Cr.PC.**

### **2.3.1 Section 195. Prosecution for contempt of lawful authority of public Servants.**

(1) No Court shall take cognizance –

(a). of any offence punishable under sections 172 to 168 of Pakistan Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate;

(b). of any offence punishable under any of following sections of the same Code, namely sections 193, 194, 195, 196, 200, 205, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except, on the complaint in writing of such Court or of some other Court to which such Court is subordinate; or

(c). of any offence described in Section 468 or punishable under Section 471, Section 475 or Section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing to such Court, or of some other Court to which such Court is subordinate.

- (2) In clauses (b) and (c) of sub-section (1) the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the <sup>235</sup>[Registration Act, 1908].
- (3) For the purpose of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decree or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original Civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate:

Provided that:--

- a).where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate; and
- b).where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.
- (4) The provisions of sub-section (1), with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences, and attempts to commit them.

- (5) Where a complaint has been made under sub-section (1) clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court, and upon receipt thereof by the Court, no further proceedings shall be taken on the complaint.

**2.4** Section 195 specify following offences of PPC. Commissioner may order Prosecution for contempt of lawful authority of public servants in the following offences under the PPC, only then a court can take cognizance.

**Section 172-188 PPC. Chapter X of contempts of the lawful authority of Public Servants.**

***There offences are :-***

- ***Absconding to avoid service of summons or other proceedings (Section 172).***
- ***Omission to produce documents (Section 175), furnishing false information (Section 177 PPC), obstructing public servant in discharge of public service (Section 186) and Disobedience to order duly promulgated by public servant (section 188) etc.***
- **Section 405. Criminal breach of trust.**
- **Section 410. Stolen property.**
- **Section 422. Dishonest or fraudulent preventing debt being available for creditors.**
- **Section 423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration.**
- **Section 426. Punishment for mischief.**
- **Section 427. Mischief causing damage to the amount of fifty rupees.**

- **Section 428.** *Mischief by killing or maiming animal of the value of ten rupees.*

### **3. Enhancement of any sentence.**

Commissioner may enhance any punishment given by PA or DCO under the Regulation. But such enhancement of punishment will be only after issuing a show cause notice to the convict.

- Show cause notice must contain grounds, giving background of the case, reasons for enhancement. Based on reply of such convict, evidence In defense, additional evidence if so required and the application of law, the Commissioner may pass an order :-
  - (a) enhancing the sentence or
  - (b) maintaining the sentence already awarded by the trial Court.

### **4. Proviso.**

Appellate Authority is not authorized to set aside the findings, on any question of fact, of a Council of Elders, where such findings have been accepted by the PA or DCO. As per Section II[3(a)(b)] the PA or DCO cannot set aside the findings of the majority of the Council. On receipt of such findings if PA or DCO does not agree with the findings of the majority of the Council the case may be remanded back to the Council with the direction for further inquiry and findings. In case the Council again submit the same, findings then PA or DCO has no option but to accept the same.

**Under FCR, 1901 the PA or DC had the powers to:**

- (a) remand the question to the Council for further inquiry and findings
- (b) refer the question to a second Council.
- (c) acquit or discharge the accused or
- (d) convict the accused in accordance with three-fourth majority of findings of Council.

- Similarly under FCR, 1901 (Section 49) Commissioner had the power of revision.
- It is to be noted that the Council will give its findings on question of facts only. Regarding question of law the Council may seek clarifications and guidance from the PA or DCO and the reference can be accordingly amended. It is not within the purview of Council to give opinion on point of law as they do not have the expertise. The Council may, however, offer opinion in line with Rewaj.
- Thus the Appellate Authority (Commissioner) is not empowered to set aside the findings of majority of Council where such findings have been accepted by the PA or DCO, and as explained above, now the PA or DCO have to accept the findings of Council if again recommended.

#### **4.2     Whereas, in the opinion of Appellate Authority:-**

- (i) there has been a material irregularity in the proceedings
- (ii) defect in proceedings.
- (iii) Proceedings so conducted as to occasion a miscarriage of justice. It means the Appellate Authority may intervene if there are any or all of the grounds as stated above.
- While the powers of Appellate Court are clear as for as Section 48 and Section 50 of this Regulation is concerned. In the proviso the powers of Appellate Court are restricted.  
Appellate Court may set aside the findings of Council and decision of PA or DCO on the grounds as per (i), (ii) and (iii) above. This power is not unbridled and is to be exercised in exceptional circumstances.
- This exceptional intervention is limited. Appellate Authority to point out such irregularities in application of law and if allowed unchecked may result in miscarriage of justice.
- It is in the interest of justice that the parties are heard. It may include complainant and the representative of political administration since Prosecution Service has not been established in FATA.

#### **4.3 Material irregularity.**

Section 11 of Regulation which constitutes the basis of criminal justice in FATA has already been discussed in detail. PA or DCO are bound to follow the provisions of Regulation and Code of Criminal Procedure and any other law in force in FATA. Material irregularity cannot be equated with technical irregularities. Material irregularity is such irregularity which may affect the outcome of the case causing injustice to the complainant or the accused.

- Whereas the names of the members of Council were communicated to the accused and the complainant, objection invited, but parties not heard and the Council notified without recording an order. It will be a material irregularity.

#### **4.4 Defect in proceedings.**

- Political Administration made a reference to the Council of Elders stating the facts of the case but without proper framing of charge under relevant section of law. It would be a defective reference.
- Political Administration nominated the Council of Elders, invited objections, heard the parties but notified the Council of Elders without recording a proper judicial order. Though both the parties, verbally, agreed to the panel of Council yet it will be defective proceedings ignoring crucial legal requirement.

#### **4.5 Proceedings so conducted as to occasion a miscarriage of justice.**

Council failed or overlooked the defense witnesses and sent its findings to PA or DCO and was accepted as such.

- Political Agent or DCO added new facts to the case after receipt of findings of Council. Justice demands that if such an occasion arises the case may be sent back to the Council for further inquiry and findings. Remanding a case back to the Council invariably means to give an opportunity to, the complainant and the accused, of fresh hearing. Parties have a right to know the grounds, relied upon, in remanding a case. Failure to remand the case, even if there is new evidence, adding new Sections of law and passing an order means proceedings so conducted as to occasion miscarriage of justice.
- Appellate Court to apply more strict criteria to set aside findings of acquittal than findings of conviction of an accused. Commissioner may set aside the findings of Council on question of law and facts and either acquit the accused or remand the case back to PA or DCO with fresh directions. Appellate Authority shall dispose off the appeal within sixty days.

**Section <sup>(40)</sup> 51.      Sentences which may not be passed on appeal :-**

***No sentence shall be passed by the Appellate Authority in the exercise of its appellate jurisdiction which the Political Agent or District Coordination Officer, as the case may be, could not have passed under this Regulation.***

1. As per Section 12 of this Regulation PA or DCO may pass a sentence of imprisonment or fine or both for the offence provided that the sentence shall not exceed fourteen years. Manner of enforcing sentences is given in Section 13 of Regulation.

Section 50 empowers the Commissioner to enhance any sentence, after issuance of show cause notice to the convict, but such enhancement, in no case shall exceed the maximum limits set for the PA or DCO.



**Section <sup>(40)</sup> 52.      Powers in exercise of civil appellate jurisdiction.**

***The Appellate Authority may on appeal confirm, set aside, vary or modify the decision, decree or order appealed against or remand the case.***

***Provide that nothing in this Chapter shall be deemed to authorize the Appellate Authority to vary or set aside any decision, decree or order given, passed or made in any civil proceedings under this Regulation, unless it is of the opinion that there has been a material irregularity or defect in the proceedings or that the proceedings have been so conducted as to occasion a miscarriage of justice or that the decision, decree or order is contrary to good conscience or public policy.***

1.      The powers of Appellate Court under this Section are in conformity with powers of Appellate Court under Section 107 CPC. Powers of Appellate Authority are much broader and more comprehensive than powers, vested in the Appellate Authority, under Section 50 in regard to exercise of powers in criminal appellate jurisdiction. It is quite logical. But ideally the powers of Commissioner in acquittal of accused in criminal jurisdiction should have been unrestricted as law always favours the accused and not the complainant and the prosecution.

2.      In civil appellate jurisdiction the Appellate Authority may:-

- i.      confirm a decree or order appealed against
- ii.     set aside a decree or order appealed against

iii. vary or modify the decision or

iv. remand the case.

- Concepts and provisions of CPC already discussed.
- Any person having a grievance may lodge an appeal both on question of law and fact.
- Appellate Court to settle the question of limitation, jurisdiction and grounds for the appeal at the outset. Court must examine its jurisdiction.
- While the appeal may be returned due to technical infirmities with the direction to appellant to rectify the same. Such return shall not adversely affect the limitation period.
- Appeal is not an inherent right but creation of statute.
- Appeal can be filed against interim decree, interlocutory or final orders, or even against remand of case to Council by the PA or DCO.
- An appeal lies against the decree and not against the findings or decisions contained in the judgment. Where no decree drawn up no appeal lies, but revision may be filed.
- No appeal against consent decrees.

**2.1     Section 97 CPC.**             Where the party does not appeal against preliminary decree no appeal shall be competent against the final decree.

**2.2     Section 99 CPC.**             This section gives much broader powers to the appellate court that no decree shall be reversed or substantially varied, nor any case be remanded, on account of any mis-joinder of parties or cause of action or any error, defect or irregularity in any proceedings in the suit not affecting the merit of the case or the jurisdiction of the court.

- Such technical defects or irregularities cannot be equated with material irregularity or defect in proceeding as mentioned in Section 52 of Regulation.
- Parties may compromise in appeal.
- Appellate Court can grant both interim and final relief.

**2.3     Order 41(16).** Right to begin. Appellant to be heard in support of appeal.

**2.4     Order 41(5).** Stay by Appellate Court. An appeal shall not operate as a stay of proceedings except so far as the Appellate Court may order. Execution of decree shall not be stayed by reason only of an appeal having been preferred from the decree. Appellate Court for sufficient reasons may order stay of execution of such decree. Appellant has to prove that execution of decree would cause him irreparable loss. No stay order unless the Court is satisfied that:-

- a) substantial loss may result to the party applying for stay unless stay is granted.
  - b) that the application has been made without unreasonable delay and
  - c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him
- Practice in civil courts, both trial and appellate, is quite to the contrary. Stay orders, even against the government are issued without notice in violation of section 80 CPC.

**2.5     Section 80 Cr.PC.** A suit may be instituted against the Government or against a public officer, in respect of any act purported to be done, after the expiry of two months next after notice, in writing, has been delivered to at the office. In case of a notice against the Provincial Government, Secretary to the Government or the Collector of the District and in case of a public officer at his office. Plaint shall contain a statement that such notice has been delivered or left at the residence or office.

**2.6     Order 41 Rule 29.** Where additional evidence is directed or allowed to be taken. Appellate Court shall specify the points to which the evidence is to be confined.

**2.7     Order 41 Rule 31.** The judgment of Appellate Court shall be in writing and shall state the:

- (a) points for determination

- (b) the decision thereon
- (c) the reasons for the decisions and
- (d) where the decree appealed from is reversed or varied the relief to which the appellant is entitled.

**2.8** The judgment may:

**2.8.1 Confirm a decree or order appealed against.**

When appeal is admitted and arguments heard, additional evidence, if so required and allowed by the Appellate Court taken, the Court, may come to the conclusion that there are no sufficient grounds for interference; the Appellate Court may confirm a decree or order appealed against by pronouncing a judgment as per Order 41(Rule 31).

The appeal may be dismissed with or without Cost.

- Appeal is continuation of suit.  
On confirmation of a decree, or order appealed against, the Appellate Court while giving judgment may also vacate the stay order if so granted.
- Upon such confirmation of appeal the case file will be sent back to the Trial Court for execution of decree, provided no revision is filed before the FATA Tribunal.

**2.8.2 Set aside a decree or order appealed against.**

It means reversing the decree or order appealed against. On acceptance of appeal the Appellate Authority may set aside a decree or order appealed against. Stay order, if granted, shall become infructuous. Both in case of acceptance or rejection of appeal the Appellate Court shall determine a case finally. (Section 107(a) CPC).

While the powers of Appellate Court to confirm a decree or order appealed against require much less justification and reasons for acceptance of appeal and confirmation of decree or order appealed against. But when Appellate Court set

aside a decree or orders the grounds and reasons must be tested on the touchstone of material irregularity, or defect in proceedings or that the proceedings have been so conducted as to occasion miscarriage of justice. This logic is further clarified under Section 53 of this Regulation which states that where an Appellate Authority varies or set aside any decision or decree reasons shall be recorded its reasons for doing so.

### **2.8.3 Vary or modify the decree.**

Appellate Court may not confirm the decree or set aside the same. It can be partially accepted, or partially rejected, by modifying it. As per Order 41(Rule 32) CPC appellate Court may vary or modify the decree instead of confirming or reversing it. Under Rule 33(Order 41) the Court may modify even that part of the decree which has not been appealed against.

- Where, in the opinion of Appellate Authority there is material defect in the judgment or decree such decree may be varied or modified to the extent of rectifying the material defects.
- Appellate Court cannot, however, substitute for the trial Court and legalize the illegalities. When there are legal omissions or proceedings so conducted to occasion miscarriage of justice the same cannot be cured through modifying the decree by correcting or substituting for the trial court.
- Where there is error in calculation of amount, mesne profits or any profit the decree can be modified.

### **2.8.4 Remand the case. Order 41(Rule 23).**

Where the Court from whose decree an appeal is preferred has disposed off the suit upon a preliminary point and decree is reversed in appeal, the Appellate Court may remand the case.

- Appellate Court shall record reasons for remand and may also give directions to the trial court pointing out errors, both of judgment and

arithmetic, and send the Case to trial court for trial afresh. Remand under Rule 23 is when the trial court has disposed off the case on a preliminary point.

- Where the evidence on record is not sufficient to determine the case finally, it may be remanded back to the trial court. (Rule 24) Order 41.
- Where the trial Court omitted to frame or try any issue or to determine any question of fact which appear to the appellate court essential to the right decision of the suit upon the merit the Appellate Court may frame issues and refer the same to trial court from whose decree the appeal is preferred and also direct to take the additional evidence. (Order 41 Rule 25).

#### **2.8.5 Material irregularity.**

- Judgment without notice.
- Error of judgment. Example. No notice, under Order 1 Rule 8, to parties interested in the Representative suit.
- Where Court pronounced judgment without hearing the party. An irregularity which may substantially affect the final outcome and the decree.
- Exercise of authority without jurisdiction or lack of exercise of authority, having jurisdiction.

#### **2.8.6 Defect in proceedings.**

- Lack of proper notices.
- Non provision of opportunity of hearing to the parties.
- Wrongly framed issues.
- Error apparent on the face of record.

#### **2.8.7 Proceedings resulting in miscarriage of justice.**

- Wrong or non application of law and rules.
- Misreading of law and evidence.

- Res judicata and res subjudice ignored.
- Time barred case admitted without giving reasons.
- Points not finally determined in the judgment.

#### **2.8.8 Good conscience or public policy.**

- Technicalities should not defeat the ends of justice, as justice is in the larger public interest. Jurisdiction of Courts is impliedly barred on the grounds of public policy. It is public policy to ensure welfare of the people as ensured in the 'Principles of Policy' in our Constitution.  
(Article 29 to 40)
- As a matter of Public policy all public servants and judicial officers are protected against suits. For this very purpose Section 80 CPC envisages advanced notice in case of suits against the Provincial Government and public servants.
- Suit impliedly barred in relation to such acts done for the state in exercise of sovereign power must be in accordance with law if being regulated by law.
- Mechanical application of law alone, without taking into consideration the larger public welfare, fair policy, public policy and good conscious, cannot be justified, A judgment should not only be in conformity with the law and public policy but also appeal to the prudent mind and good conscious.
- FCR,1901.  
Under FCR, 1901 Section 52 title: "**Powers in exercise of civil Revisional jurisdiction**".  
Now amended under the Regulation as "**Powers in exercise of civil appellate jurisdiction**"  
Grounds to set aside or vary the decision of PA or DCO are same.

#### **Section<sup>(40)</sup>53.      Record of reasons.**

***Where the Appellate Authority, in the exercise of its appellate jurisdiction in any proceedings under this Regulation, varies or set aside any decision, decree, sentence or order, he shall record its reason for so doing.***

1. Appellate Authority is bound to give reasons when in exercise of its appellate jurisdiction if it:-

- (i) varies or modify a decree
- (ii) set aside any decision, decree, sentence or order.

Section 53 further clarifies the exercise of powers by the Appellate Authority both in case of exercise of criminal appellate jurisdiction under Section 50 and exercise of civil appellate jurisdiction under Section 52 of Regulation.

2. Appellate Authority is otherwise bound to give notice to the parties, adduce additional evidence if so required and after hearing the parties may either confirm the decree or order or sentence passed by the PA or DCO under Section 8 or Section 11 of this Regulation, respectively. Appellate jurisdiction may also be exercised in security proceedings by the PA or DCO.

Obviously when the Appellate Court enhance the punishment or set aside the findings of the Council when such findings have been accepted by the PA or DCO in a criminal reference, the parameters for such interference have, clearly, been set in section 50 of this Regulation.

Appellate court while rejecting a Criminal appeal and confirming the PA or DCO decision must give reasons so as to prove that the criminal proceedings were in accordance with law and facts. Appellate Court must give reasons by giving answers to the points raised in the appeal.

- On the other hand while setting aside the findings on any point of fact of Council, agreed to PA or DCO, requires that the Appellate Court must



point out material irregularity, defects or point out that the proceedings were carried on any way as to occasion miscarriage of justice.

- Same logic is applicable to set aside or vary the decree or order passed by the PA or DCO. Parameters for, both, Section 50 and 52 are the same and discussed in detail.
- Appellate Court while deciding an appeal, will be delivering a judgment and all provisions of CPC in regard to judgment shall apply to judgment of Appellate Court under this Regulation.

3. some of the relevant concepts, Sections, Order and Rules of CPC are briefly discussed so that to fully understand the purpose of Section 53 of Regulation.

### **3.1 Section 2(9) CPC.**

“Judgment” means the statement given by the judge of the grounds of a decree or order.

### **3.2 Section 33 CPC. Judgment and decree.**

The court after the case has been heard, shall pronounce judgment and on such judgment a decree shall follow.

#### **➤ Order 20(CPC). Judgment and decree.**

(Please see Rules 1 to 20)

A judgment should contain

- (i) Concise statement of the case.
- (ii) the points for determination i.e. the issues.
- (iii) Decision of the court with regard to each issue.
- (iv) The reasons for decision.
  - The judgment should not only state the findings but also the evidence and how it supports the finding (1984 CLC 459; A 1945 PC38).

**Rule 5.** Court to state its decision on each issue.

3.3 Code of Criminal Procedure.

**Chapter XXVI.**

**Judgment.**

**Section 367 Cr.PC.**

Each judgment shall contain the points for determination, the decision there on and the reasons for the decision.

It shall specify the offence (if any) of which, and the Section of PPC or other law under which the accused is convicted, and the punishment to which he is sentenced.

**Section <sup>(40)</sup>54.**

**Bar of review of order passed by Political Agent or District Coordination Officer:-**

***The Appellate Authority, Political Agent or the District Coordination Officer, as the case may be, shall not review any decision, decree, sentence or order given, passed or made by itself.***

1. PA or DCO and the Appellate Authority (Commissioner) are barred to review any decision, decree, sentence or order given, passed or made by itself.

Bar of review is applicable to both civil and criminal cases. All the three Courts (PA or DCO as Trial Court) and the Commissioner (as Appellate Court) cannot review, both civil and criminal cases, decided by them or their predecessors. This bar is absolute and review is not allowed under any circumstances.

**Section <sup>(40)</sup> 55.**      **Enforcement of orders made on appeal.**

*Every decision given, judgment and decree passed or order made by the Appellate Authority in exercise of its appellate jurisdiction shall be enforced as if it was a judgment, decree or an order of the Political Agent or District Coordination Officer, as the case may be, and the Political Agent or District Coordination Officer, as the case may be, shall do all acts and things necessary to give effect thereto.*

1. Decision, judgment and orders passed by the Appellate Authority, both , in exercise of criminal appellate jurisdiction under Section 50 and in exercise of civil appellate jurisdiction Section 52 of Regulation, including decree, shall be executed as if it was a judgment, decree or order of the PA or DCO. When PA or DCO convicts a person under section 11[3(a)] of Regulation the sentences are to be enforced as per manner provided in Section 13 of Regulation while in civil cases PA or DCO orders and decree are enforced as per Section 9 of Regulation. PA or DCO to execute the decisions of Appellate Authority. It is the decision of Appellate Authority which will be implemented. The decision of Trial Court shall merge into decision of Appellate Court. For example if a decree is modified or varied it will be the modified version of decree which will be implemented and not that of trial court.

**1.1      Order 41 Rule 32.**      What judgment may direct.

The judgment may be for confirming, varying, or reversing the decree from which the appeal is preferred, or , if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the orders to be made in appeal Appellate Court may pass a decree or make an order accordingly.

**1.2      Order 41. Rule 33.**      **Power of Court of Appeal.**

The appellate court shall have powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or order as the case may require.

- Appeal is continuation of suit so the appellate Court may exercise all the powers of trial court.
  - Order 21 (Rule 1 to 104) prescribes procedure for execution of decrees and orders.
  - Implementation of decision of Appellate Court in criminal jurisdiction shall be implemented as if it were decision of PA or DCO.
- Enforcement of punishments discussed in Section 13 of Regulation.

**Section<sup>(40)</sup>55A.**

***(1) A revision shall lie to the FATA Tribunal within 90 days against any decision given, judgment, decree or sentence passed or order made by the Appellate Authority under this Regulation.***

***(2) FATA Tribunal shall consist of a Chairman, being a person who has been a Civil Servant of not less than BPS-21 having experience of Tribal Administration and two other members, out of whom one shall be a person who is qualified to be appointed as Judge of the High Court, well conversant with Rewaj, and the other who has been a Civil Servant of not less than BPS-20 having experience of Tribal Administration.***

***(3) The Chairman and the members shall be appointed by the Governor on such terms & conditions as he may determine for a period of three years or during the pleasure of the Governor.***

***(4) The Tribunal shall have the same powers which the Appellate Authority has been invested under sections 50 & 52 of this Regulation and may also call for the record of any proceedings or case from the subordinate forum and revise any decision, decree, sentence or order given, passed or made under this Regulation. The Tribunal may whenever it thinks proper, direct:-***

***(a) that a person within limits of its jurisdiction be brought up before the Tribunal to be dealt with according to law;***

***(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;***

***(c) that a person detained in any jail situated within such limits be brought before the tribunal to be there examined as a witness in any matter pending or to be enquired into such Tribunal; and***

***(d) that a prisoner within such limits be removed from custody to another for purpose of trial.***

***(5) The Tribunal may from time to time, frame rules to regulate the procedure in such cases.***

1. Previously, under FCR, 1901, Tribunal, comprising of Home Secretary and Law Secretary, was competent to revise the decision or order passed by the Commissioner. In case of difference of opinion between the members of Tribunal

case was to be referred to the Chief Secretary for decision on the basis of opinion of the majority. Under Regulation the composition of Tribunal, now called FATA Tribunal, has been changed as per Section 55A (2) of this Regulation.

A revision shall lie to the FATA Tribunal within 90 days against any decision given, judgment, decree or sentence passed or order made by the Appellate Authority (Commissioner) under this Regulation.

#### **1.1 Limitation.**

Revision petition is to be filed within 90 days of decision of Commissioner. Provisions of The Limitation Act, 1908 shall apply to revision petition under this Regulation in computing the time.

FATA Tribunal may condone the delay if sufficient cause is shown by the petitioner. Relevant section and provisions of The Limitation Act discussed under Section 61 of this Regulation..

Section 47 of the Regulation prescribes that modified provisions of chapter VIII and XLII of Cr.PC, 1898 shall apply to Security provisions under Section 40 to 45 of Regulation. Under modified provisions of Cr.PC for the words, “High Court” and, “Court of Sessions” and “Sessions Judge” whenever the words, “FATA Tribunal” and “Appellate Authority (Commissioner)” shall be substituted. Thus the FATA Tribunal in case of revisions shall follow the provisions of Cr.PC and CPC and shall have the same powers, by implication, as available or exercisable by the High Court or Court of Sessions.

FATA Tribunal has the concurrent powers which the Appellate Authority (Commissioner) has been vested under Section 50 and 52 of this Regulation. It means that the FATA Tribunal (here in after to be referred as ‘Tribunal’) shall have appellate jurisdiction, both in criminal and civil cases.

- Besides the Tribunal has been vested with the Revisional powers under Section 55 (1).

- **Revision.** This Revisional jurisdiction is in, both, the criminal and civil cases decided by the PA or DCO in original jurisdiction and the Commissioner as Appellate Authority.

## **2.      Section 55 A(2).              Composition of FATA Tribunal.**

Tribunal shall consist of a Chairman, who has been Civil servant of not less than BS-21 and must have experience of tribal administration. There will be two members, out of which one shall be a person who is qualified to be appointed as judge of the High Court and well versed with the Rewaj. While the other member who has been a civil servant of not less than BS-20, having experience of Tribal Administration.

### **2.1      Appointment.**

The chairman and the members shall be appointed by the Governor on such terms and conditions as he may determine. Such appointment shall be for a period of three years or during the pleasure of Governor.

‘Period of three years’ is clear as it will be a contract appointment as per terms and conditions determined by the Governor. Such terms and conditions will be known, to the person who will be offered the post. Acceptance of offer means accepting the post with all the terms and condition. Thus there will be an offer, consideration and acceptance. It will be according to spirit of law.

### **2.2      “During the pleasure of Governor”**

Post of Chairman FATA, and its members, is the highest judicial post. While Section 55A(3) prescribes the tenure of three years for the Chairman and members, removal by the Governor without notice or giving reasons make this judicial office vulnerable to the authority of executive. Either removal should be made in accordance with the terms and condition which may be made stricter to ensure good conduct of members and the Chairman or security of tenure may be

provided on the pattern of members and Chairman Public Service Commission which is the same as for removal of High Court Judge.

**3. Tribunal may call for the record of any proceeding, or case from the subordinate forum.**

It means any case decided, or pending before the Court of PA DCO and Commissioner. The Tribunal may revise any decision, decree, sentence or order given, passed or made under the Regulation.

- Power to revise is exercisable, both, in criminal and civil cases. Interim order and interlocutory orders may also be revised if someone, aggrieved from such order, files a revision petition.
- Powers of appellate forum in criminal and civil matters already discussed and the Tribunal will be having the same powers as exercisable by the Appellate Authority (Commissioner) under Section 50 and 52 of this Regulation.

**1.2 Enforcement.**

By implication the decisions of Tribunal, both, interim and final shall be enforced in criminal and civil cases as if it were the decisions, decree judgment or an order of PA, DCO and the Commissioner.

**1.3 Section 55 A(5).** The Tribunal may frame rules to regulate the procedures in such case. These are vast powers vested in the Tribunal on the pattern of High Court under Cr.PC and CPC. Thus the Tribunal may follow provisions of Cr.PC and CPC in regard to revision.

**1.4 Revision: provisions of Code of Criminal Procedure.**

**Section 435 Cr.PC.** The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or



himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court and may, while calling such record direct that the execution of any sentence be suspended and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of record.

- Revision, called “Negrani” in Urdu is a supervisory jurisdiction. The purpose is to monitor and supervise so that there is no miscarriage of justice both in criminal and civil cases. It is meant to avoid causing irreparable loss to the accused or the parties.
- Contrary to appeal, revisional jurisdiction is to ensure that on-the-spot correctness, and rectifying the illegality or irregularity in the proceedings before any subordinate forum. It should not be equated with undue interference in the working of subordinate Courts and no one be allowed to resort to obstructive justice causing delays and prolonging agony of parties both in term of financial loss and time. Thus the Superior Courts have ruled that the revision is an exception and not a rule.
- Revisional jurisdiction exercisable in exceptional cases (PLD 1982 S.C (AJK).
- Revisional Court has the jurisdiction to correct the error resulting from non-reading, misreading of evidence or where the court before failed to exercise jurisdiction vested in them. (2005 YLR 2335).
- For invoking Revisional jurisdiction formal application not necessary (1991 P.Cr.LJ 728).
- Rulings of superior Judiciary amply clarify the grounds for invoking revisional jurisdiction. Revision should not be invoked as a practice in appealable cases and the revisional forum should not assume such a role as to substitute for appeal and appellate authority.
- **Section 436 Cr.PC. power to order inquiry.**  
On examination of any record under Section 435 Cr.PC or otherwise.
- Section 436 Cr.PC.

The High Court may direct the Sessions Judge to require a Judicial Magistrate subordinate to him to make, and the Sessions Judge himself may direct any Magistrate to him to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section(3) of Section 204.

The High Court or the Sessions Judge may direct any Magistrate to make further inquiry into any proceeding in which order of discharge or release has been made under Section 119, Cr.PC.

- Tribunal may direct the Commissioner, as per provisions of Section 436, to further inquire the matter.

- **Section 119 Cr.PC.** Discharge of person informed against as per inquiry under section 117 Cr.PC in regard to Security proceedings.

- **Section 203 Cr.PC.** **Dismissal of complaints.**  
A Magistrate may dismiss a complaint if after inquiry or investigation under Section 202 Cr.PC. when no sufficient grounds to proceed further.

- **Section 204 Cr.PC.** **Issue of process.**  
If sufficient grounds for proceedings a Court taking cognizance may issue summons to or warrant against an accused.

### **3.1 Section 439 A Cr.PC. Sessions Judge's powers of revision.**

In case of any proceedings before a Magistrate the record of which has been called for by the Sessions Judge or which otherwise comes to his knowledge, the Session Judge may exercise any of the powers conferred on the High Court by section 439.

#### **Section 440 Cr.PC. Option with the Court to hear parties.**

No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision.

Provided that the Court may, if it think fit, when exercising such powers, hear any party either personally or by pleader, and nothing in this Section shall be deemed to affect section 439, sub-section(2).

**3.2     Section 439(2) Cr.PC.   High Court powers of revision.**

Subsection (2). No order shall be made to the prejudice of the accused unless he appears personally or by pleader in his own defenses.

- The purpose of highlighting the provisions, in regard to revision, is that the authority exercising revisional jurisdiction follows the procedures and principles in revision proceedings.
- Trial Court and appellate authority are obliged to follow the directions of revisional authority.

**4.       Revision and the Code of Civil Procedure, 1908.**

**4.1     Section 115.   Revision.**—<sup>1</sup>[(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate to such subordinate Court appears-----

- (a).     to have exercised a jurisdiction not vested in it by law, or
- (b).     to have failed to exercise a jurisdiction so vested, or
- (c) .     to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.]

<sup>2</sup>[Provided that, where a person makes an application under this sub-section, he shall in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court,]

<sup>3</sup>[Provided that such application shall be made within ninety days of the decision of the Subordinate Court which shall provide a copy of such decision within three days thereof, and the High Court shall dispose of such application within three months].

<sup>4</sup>[(2) The District Court may exercise the powers conferred on the High Court by sub-section (1) in respect of any case decided by a Court subordinate to such District Court in which no appeal lies and the amount or value of the subject matter whereof does not exceed the limits of the applicable jurisdiction of the District Court.

(3) If any application under sub-section (1) in respect of a case within the competence of the District Court has been made either to the High Court or the District Court, no further such application shall be made to either of them.

(4) No proceedings in revision shall be entertained by the High Court against an order made under sub-section (2) by the District Court].

- District Court can also exercise revisional powers. District Court and High Court have Concurrent jurisdiction.
- Section 115 applies only to cases involving the illegal assumption, non-exercise, or the irregular exercise of jurisdiction of the Court. If a Court has a jurisdiction it has jurisdiction to decide and even erroneous conclusions of law or fact can be corrected on appeal, but a revision will not be competent on such a ground.(2001 SCMR 1700;2001 SCMR 443).

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1. Re-numbered as sub-section (1) by Ordinance No. 12 of 1972.
  2. Added by S, 13 of Ordinances X of 1980.
  3. Added by Act VI of 1992, and , Act 14 of 1994.
  4. Added by Ordinance XII of 1972, and Act 14 of 1994.

- Thus revision is not to be construed as substitution for an appeal.
- Powers under section 115 can be exercised upon application of any person aggrieved by a decision or even suo moto by the Court. (1999 SCMR 1060)
- Section 115 lays grounds and conditions for revision.

**4.2     Conditions.**     Following conditions are to be fulfilled for revision.

- a. There should be a case decided.
- b. Decision should be of a Court subordinate to revisional forum
- c. No appeal should lie to the revisional Court on such decision.

Revisional Court may exercise its powers of revision when a sub-ordinate Court has:-

- (i)        exercised a jurisdiction not vested it, or
- (ii)       failed to exercise a jurisdiction vested in it, or
- (iii)      acted in the exercise of its jurisdiction illegally or with material irregularity.

➤ **Following are some of the cases decided.**

- refusal to add a party on his own application.
- refusal to add a party.
- wrongly placing onus of proof.
- refusal to frame issues.

➤ Exercising jurisdiction not vested in it. Accepting a suit or appeal without having territorial, subject matter or pecuniary jurisdiction.

Passing an order without authority.

➤ **Failure to exercise jurisdiction.**

- Failure to decide the matter conclusively or
- Refusal to accept a suit or appeal.
- failure to decide one or more issues.

➤ **Irregular or illegal exercise of jurisdiction.**

- If the Court ignores any law or rule.
- Erroneous exercise of jurisdiction.

- Committing such material irregularity which may adversely affect the final outcome of the case.
- Misreading of evidence.
- Order based on irrelevant facts or inadmissible evidence.
- Failure to correctly determine the points and giving reasons.
- Refusal to grant inherent right of hearing to the parties or any one of them.
- Wrong application of law or rules.

## **5. Section 55 A(4).**

The tribunal has been empowered with some of the powers vested in Sessions Judge and the High Court under the provisions of Cr.PC.

Under Clause (a) and (b) Tribunal may order that any person who is in custody of Political administration be produced before the tribunal. These powers and similarities to those of High Court in a Writ of Habeas Corpus. Tribunal may order disposal of case or order release of such person. Tribunal may also order action against political administration for illegal custody of such person.

Clause (b). In FATA locals are sent to jail under security proceedings for long duration. Some do not have even access to legal advice. Tribunal may call for record of such person and inquire into from political administration and if sufficient grounds do not exist set such person free.

Clause(c). Tribunal may direct production of any person confined in jail for purpose of inquiring or witness in any case pending before the tribunal. Term “detained in jail situated within such limits” needs further clarification. Very few persons are detained in FATA due to security reasons and lack of facilities. Most of them are detained in the adjacent District and Central Prisons. In fact it should be “any person detained under FCR any where”.

Clause (d). Tribunal may order removal of such person from one jail or Agency or Civil Division to another Agency for trial.

6. **Sub Section (5).** Again powers to frame rules are at Par with the powers of High Court. Tribunal may frame its rules for conduct of proceedings under the Regulation, both, of civil and criminal nature

**Section <sup>(42)</sup> 55AA. Review :-**

***The FATA Tribunal may, on an application of any person, filed within thirty days, considering himself aggrieved of any decision given, judgment and decree passed or order made by it, review the same to correct any mistake or error apparent on the face of record or for any other sufficient ground and shall record reasons thereof.***

1. Review is a discretionary power. Appeal is filed to the superior forum; review is by the same court. No review in criminal cases under Cr.PC.

- Any person aggrieved of any decision given, judgment and decree passed or order made. Such application is to be filed within thirty days of decision, order, judgment or decree passed.

1.1 It will be the same court which can review its decision. The court may condone the delay if the petitioner provides sufficient cause for such delay. Few such grounds may be:-

- a. Delay caused in obtaining a certified copy of order, judgment or decree.
  - b. Sickness of petitioner.
  - c. Such person being abroad at the time of decision deciding..
- Court shall pass an order giving reasons for acceptance or rejection of pray.

2. under Land Revenue Act, 1967. Assistant Collector, Collector and the Commissioner can review their orders on an application or suo moto. The grounds for review under Land Revenue Act, 1967 Section 163 are :-

- (i) discovery of new facts and evidence.
- (ii) Such evidence was either not in the knowledge of the petitioner or he could not produce the same in spite of all diligence, or
- (iii) An error apparent on the face of record. However to review the orders, decision and judgment of predecessors the Assistant Collector shall seek approval of next higher authority which means the:-

Assistant Collector shall seek approval of District Collector. District Collector to approach the Commissioner. Commissioner shall seek approval of Board of Revenue. All the authorities must give reasons for review. Besides all orders appealed against shall not be reviewed.

Review petition is to be filed within ninety days of order.

When a court refuse to review or on review the previous order is confirmed no appeal shall lie against both these decisions.

## 2. **Review under the Regulation**

- Regulation only empowers the FATA Tribunal to review its decision. Powers to review its order are not available to the PA, DCO and the Commissioner (Appellate Authority). Since FATA Authority is the Supreme judicial body therefore it should have the power to review its orders whether issued by the sitting presiding officers or by their predecessors. Grounds for review are clear and cases cannot be reviewed on the grounds mentioned for revision and appeal. The purpose of review is not to re-open the cases on frivolous grounds as it would lead to never ending litigation.



Otherwise also it will be prejudicial to the party and persons who have availed the relief. As the legal maxim goes, “no body shall be vexed twice for the same cause” Legislature has set very clear grounds and the parameters referred above. Review is not meant to examine the points of facts and laws which can be raised in appeal.

- In case of FATA review is of utmost importance as in case of any or all of the three grounds an aggrieved person has no other remedy but to file a review; before the FATA Tribunal.

### **3.1 Grounds for review.**

Section-55-AA empowers the FATA Tribunal to review any decision, judgment and decree passed or order made to:-

- a. Correct any mistake or error apparent on the face of record or
- b. Any other sufficient grounds.

The Tribunal shall give reasons for review. Tribunal can do so on an application. While admitting an application to review the Tribunal must give notice to the parties. Contrary to admission of appeal and revision the grounds to review are limited and very specific. After considering, and deciding, the issue of limitation court must give hearing to the parties. Even admission of petition for review requires an order giving reasons and justification for reopening the case. The court will pass an order and set date for adducing evidence, if so required. After correction of mistake and rectifying the error apparent on the face of record or other sufficient grounds the Tribunal will pass an order. It will be judicial order and must have all the essentials of judgment as per provisions of CPC. (See Section 33 and Section 2(9) of CPC).

### **3.2 Review and CPC.**

Provisions of CPC and Land Revenue Act, 1967 shall, mutatis mutandis, apply to review under this Regulation. Since CPC is a procedural law and all the procedures, set to meet the ends of justice, are equally applicable to civil proceedings under this Regulation. These are some of the basic principles of law and justice and ignoring, or bypassing, the same means miscarriage of justice.

### **3.3     Section 114 CPC.**

- (1) Subject as aforesaid, any person considering himself aggrieved:-
  - (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred.
  - (b) By a decree or order from which no appeal is allowed by this Code, or
  - (c) By a decision on a reference from a court of small causes, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
- (2) Nothing contained in sub section (1) shall apply to a review of any judgment or order made by the Supreme Court.

### **3.4     Order 47 (Rules 1 to 9) CPC.**

**Rule1.** Any party not appealing from a decree or order may apply for a review notwithstanding the pendency of an appeal by some other party.

- The principle of finality is embedded in our judicial system as per Order 20 Rule 3. Judgment once signed shall not be altered or added to, except on review.
- Concept of Review in the light of law is to be construed very strictly and any lenient and liberal view of grounds mentioned in the Regulation, CPC and Land Revenue Act, 1967 will tantamount to reopening the issues

once decided. It is to be exercised in very exceptional circumstances and strictly in accordance with the grounds and parameters set for review. The Court must give cogent reasons, in writing, through an order justifying the grounds for review.

- It is not essential to alter the judgments in review. Court may come to conclusion that though, prima-facie, there were grounds for undertaking the review but after examination of evidence, there are no sufficient grounds to alter the judgment, order or decree already passed.
- Review must be granted by statute.
- A court can set aside its own order if obtained by fraud. (PLC 1975 SC 331).
- Grounds for review are given in Rule 1 Order 47.

### **3.5 Procedure in Review.**

- (i) After preliminary hearing of application for review, it may be rejected ex parte or other party may be called to show cause. Reasons must be given for rejection or issuing show cause to other party.
- (ii) The application may be accepted or rejected after hearing the parties. If the application is rejected, such order is final and not appealable. Same provisions exist in Section 163 of the Land Revenue Act 1967. If admitted, Court may give grounds of admission. Similarly the court must give reasons for rejection after hearing the parties.
- (iii) If an application for review is admitted, court will re-hear the parties. Based on discovery of new facts or evidence which could not have been produced or error pointed out in the decree, the court may vary or affirm the decree.

- Person aggrieved must be a legal entity and should have been a party to the earlier order.
- A decree or order from which an appeal is allowed but from which no appeal has been preferred. If an appeal has been filed, no review will be allowed..
- Fact existed but could not be produced despite of diligence.
- **Error apparent on the face of record.**
  - Ignoring limitation period.
  - Issue of jurisdiction to determine a matter.
- **Any other sufficient reasons.**
  - Suit dismissed for default. Later on discovered that the plaintiff was not informed.
  - Onus of proof wrongly placed on defendant.
  - Ordering relief not sought by any party.

**Section <sup>(43)</sup> 55 AAA.**

**False Prosecutions: -**

- (1) *Where the Political Agent or the District Coordination Officer, as the case may be, finds that the accusation against the accused was false or malicious, he may call upon the complainant or the informant to show cause why he should not pay adequate compensation to such accused or, where there are more than one, to each or any of such accused, after considering any cause*

*which such complainant or informant may show, and on the satisfaction of the Political Agent or the District Coordination Officer, as the case may be, was false and malicious, he may, for reasons to be recorded in writing, order the complainant or informant to pay adequate compensation to such accused or each of any of such accused keeping in view the nature of the accusation and quantum of sentence of offence with which he was falsely or maliciously charged and in default of payment of compensation shall suffer simple imprisonment which may extend to six months.*

- (2) *In any Civil matter the Political Agent or the District Coordination Officer, as the case may be, finds that any claim or defence of any party to be false, frivolous or Vexatious, he may direct to pay the cost of litigation and also grant compensatory cost corresponding to the false claim or defense, as the case may be.*

- (1) The Law and the state must protect public against false prosecution, both, in civil and criminal cases. No one can be allowed to abuse the process of law and court. It is common in our country that if the Police and other law enforcement agencies refuse registering an FIR, a media trial starts. Once FIR is registered investigation and prosecution is subjected to pressure, especially in high profile and scandalous cases, to arrest the nominated persons. Police Officer or Investigation Officer is not bound to arrest a person merely on the basis of FIR. There must be sufficient evidence against such person in respect of cognizable offence. The

purpose of legislature is to protect the innocent. It is difficult for the law enforcement agencies to separate the truth from the false hood, at least, in initial stage of a case. Resultantly many innocents are arrested, subjected to investigation, police custody, judicial remand, granted bail and ultimately acquitted by the courts for want of evidence. Such innocent persons are subjected to a lot of stress and financial constraints till they are bailed out and, subsequently acquitted.

- There is common trend in our society, especially in a tribal society, that maximum numbers of persons of opposition party are implicated in a criminal case.

## **2. False prosecution.**

Purpose of Section 55 AAA is that everyone should be cautioned of consequences of giving false evidence and implicating the opponents in fabricated cases.

- Chapter X and XI of PPC relates to contempts of the lawful authority of public servants and false evidence and offences against public justice.

(Sections 172-190-Chapter X and Section 193-229 Chapter XI PPC)

Section 193-229 Chapter XI PPC).

- Section 182 PPC deals with giving false information to a public servant in order to cause him to use his authority to injury or annoyance of any person. Thus any one who lodges a false FIR under Section 154 Cr.PC can be prosecuted under Section 182 PPC for which punishment is imprisonment of either description for 6 months or fine of 1000 rupees, or both.

A Magistrate may take cognizance of an offence under Section 190 Cr.PC upon.

- (a) receiving a complaint of facts which constitute such offence.

- (b) a report in writing of such facts made by any police officer (Challan under Section 173 Cr.PC).
- (c) an information received from any person or upon his own knowledge or suspicion that such offence has been committed which he may try or send to the court of Sessions for trial.

**3. Some of the relevant offences**

- (i) Knowingly furnishing false information to a public servant (Section 177 PPC).
- (ii) Knowingly stating to a public servant, on oath, as true that which false (Section 181 PPC) .
- (iii) Giving or fabricating false evidence in a judicial proceeding (Section 193 PPC).
- (iv) Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence (Section 194 PPC).
- (v) Using in judicial proceeding evidence known to be false or fabricated (Section 196 PPC).
- (vi) Using as a true certificate one knows to be false in material point (Section 198 PPC).
- (vii) Giving false information respecting an offence committed (Section 203 PPC).
- (viii) False claim in a court of justice (Section 209 PPC).

It is evident that giving false evidence, both, in criminal and civil cases are an offence punishable under the PPC.

- Under Regulation special provision has been made under this section. It not only provides compensation for the victim of false prosecution but also punishes the offender. In PPC, the major focus is on punishment of the accused giving false information. Provisions of Regulation cater for both.
- If PA or DCO is satisfied that the complaint against the accused was false and malafide, he will call upon the complainant or informant to show cause. Prior to issuing show cause, the PA or DCO must satisfy himself that the information against the accused was false and with bad intention. It is the duty of the political administration to establish the falsehood of information and ulterior motives of informant or complainant.
- PA or DCO may order an inquiry and investigation to establish the fact.
- Show cause to the complainant or informant (s) must state the facts, the grounds and justification for issuing show cause and the amount of compensation to be paid to the victim(s) of such complaint. In this Section, "adequate compensation", means that it should be proportionate to the nature and gravity of the offence, the period and the intensity of hardship which the victim has suffered. Political administration must give due consideration to the social status of complainant or Informant. It is logical that the person to whom such 'show cause' notice is issued is provided an opportunity of hearing. Such person is bound to respond to the show cause notice within specified time. Court to give reasonable time and ample opportunity to such person. On receipt of reply and the evidence, if such person opts to give, the same will be examined.
- PA or DCO may stop further proceeding if satisfied that further proceeding is not justified. The court may also reduce the amount of compensation, as indicated in the show cause.
- PA or DCO may order that, based on facts complaint or Information was false and malafide. Complainant or Informant to pay, specified amount of,



compensation to such accused. As discussed above the amount of compensation will be determined keeping in view the nature of accusation and quantum of sentence of offence which such person was falsely or maliciously charged. PA or DCO shall issue an order, in writing, giving reasons for the total remission, reduction in amount of compensation or the amount already specified in the notice, as the case may be.

- In default of payment of compensation such person shall suffer simple imprisonment which may extend to six months.
- Even after default as soon as such person pays the compensation amount, he shall be set free.
- Court may order payment of compensation in installments keeping in view the financial status of such person.
- It is not essential that whenever an accused is acquitted or discharged there must be proceedings against the complainant or informant. Acquittal of accused hardly entitles him to compensation. Every day scores of persons are acquitted. Court to establish the falsehood and malafide of complaint or information.

#### **4.      Sub Section 2.**

Whenever PA or DCO is satisfied that any claim or defense of any party is false, frivolous or vexatious, he may order to pay the cost of litigation. Besides the court may also grant compensatory cost. Such cost of litigation and compensatory cost must be proportionate to the false claim or defense as the case may be.

- Appellate Authority (Commissioner) and FATA Authority may also order such compensation and cost.
- All the orders of PA or DCO under this Section will be appealable. Thus the PA or DCO must issue a judicial order giving reasons.

## 5. FATA Rewaj.

Payment of compensation and litigation cost for false and malicious complaint or information or claim or defence (in civil cases) is in accordance with Rewaj. PA or DCO may order payment through a Jirga or Jirga may give surety for payment of such compensation or litigation cost. Payment of Compensation in case of false complaint will not only put an end to litigation but also the enmity which is, and should be, the basic aim of administration of justice. In Tribal society false complaint or litigation lead to unending enmity and payment of such compensation may restore the honour of victim.

### **Section 56. Protection of Property rights.**

***No person shall be compulsorily deprived of his property unless he is paid adequate compensation with consensus rate or government assessed value as in vague in settled areas.***

1. Provisions of this section are in accordance with the Constitution of Pakistan.

As per Article 23 “Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan subject to Constitution and any reasonable restrictions imposed by law in the public interest”. Protection of property rights is enshrined in the Constitution; as no person shall be compulsorily deprived of his property save in accordance with law. It is Fundamental Right of every citizen that he shall not be deprived of his property except through due process of law.

- This Section was inserted through amendment in FCR, 1901 in 2011. This Section substituted for Sections 56, 57 and 58 of FCR, 1901.
- Previously this legal protection was not available to the locals of FATA and there are many examples of such deprivation without compensation. Now Section 56 provides that no person shall be deprived of his property unless:-

- (a). He is paid adequate compensation with consensus rate or
- (b). Government assessed value as in vogue in settled areas.

In case of option (a) word 'adequate compensation' becomes superfluous as 'consensus' means agreement between the parties and in case of FATA it is the owner and the Political Administration. It is called negotiated settlement of rate. Fixation of rate through negotiated settlement is non appealable. Any one aggrieved with regard to measurement, categorization, application and calculation of rate has a right to appeal.

## **2. Application of Government-assessed rates of Settled Areas.**

Practically there is lot of variation in cost of per acre or kanal in FATA and settled areas.

### **2.1 Procedure of Land Acquisition in Settled Areas.**

For the acquisition of land for public purpose or for a company in any locality, under the Land Acquisition Act, 1894, as amended up-to-date, the first stage of operation starts with the issuance of the preliminary notification in the official gazette under Section 4 by the Collector of the district, and a public notice. The notification should clearly indicate the name of the tehsil, village / locality, broad details of the squares / rectangles and field numbers, etc, and the approximate area sought to be acquired. Instances have come to notice in which the issuance of such notification was unscrupulously delayed to provide opportunities to the concerned landowners to get inflated prices recorded in fictitious mutations to enable them to claim compensation at high rates. The Collectors of districts should exercise great vigilance.

- 2.2 The issue of the notification under section 4 is to be followed by a survey of the area as required by section 4(2); and after considering the result of such survey, a further notification has to be issue under section 5, stating that the land in question is needed for a public purpose. If the land is being acquired for a public purpose, the Commissioner of the division

concerned would be competent to issue the notification for a company; such notification is to be issued by the Provincial Government.

2.3 The Commissioners are advised to keep the following considerations in view while issuing the notification under Sections 5 and 17:

- (i). Full description of the village, tehsil and district, and area of land.
- (ii). to ensure that the Collector of the district has:-
  - (a). carefully and prudently calculated the estimated cost of the land sought to be acquired in terms of section 23 and 24 of the Land Acquisition Act; and that
  - (b). funds have been physically placed at the disposal of the Land Acquisition Collector and deposited in the Treasury under the head "Revenue Deposit";
- (iii). If cases of an exceptionally urgent nature are received by the Commissioners in which requests are made for acquiring land for a company by invoking the emergency provisions of section 17 then, under the provisions of section 40, the Commissioners should depute an officer and fix the time and place according to which the officer should hold an inquiry and make specific recommendations regarding the matters mentioned in section 40, particularly about the aspect that the area proposed to be acquired is reasonable for the purpose and is not excessive.
- (iv). It has been observed in many cases that the Department/Local authorities for which land is being acquired, do not give adequate justification for issuing a notification under Section 17. Such requests should not be acceded to. The Commissioners must insist on the acquiring agency to give full justification to their entire satisfaction that the immediate delivery of possession is unavoidable.

2.4. While forwarding the draft notification under section 5 and 17 to the Commissioners, the Collectors of districts should keep the above considerations in view and append the following certificates / documents / information with the case :-

- (i). A certificate to the effect that estimated cost as worked out by the Collector of the district according to the provisions of section 23 and 24 of the Land Acquisition Act, has been physically placed at the disposal of the Land Acquisition Collector and deposited in the Treasury under the head "Revenue Deposit";
- (ii). A recommendation to the effect that the area sought to be acquired is not excessive and is reasonable for the purposes (for declaration under section 6 and 17);
- (iii). A certificate to the effect that any State/Waqf/Evacuee lands, tombs, graveyards or places of religious character have not been included in the draft notification;
- (iv). A certificate to the effect that endeavours to obtain land through private negotiations have been unsuccessful or have been considered inexpedient;
- (v). Site plan of the land involved; and
- (vi). the position of the land, i.e., whether Gair Mumkin / Banjar, culturable or cultivation.

The ultimate responsibility for working out the estimated cost of the land sought to be acquired devolves on the Collector of the district.

It should be borne in mind that the result of pitching the estimates too low will probably be that the award will exceed the estimates; on the other hand, if they

are pitched too high, they may possible be taken as a guide by the officer who makes the award and thus cause unnecessary expense to Government.

- 2.5 Within 30 days of the publication of the notification under section 5, any person interested in the land may, - vide section 5-A (1), raise objection to the acquisition. After hearing the objection, the Collector has to submit his report with his recommendations on the objection. After considering this report, the Commissioner has to publish a declaration in the official Gazette under section 6 that the land in question is needed for a public purpose or for a company.
- 2.6 Section 16 has been amended to provide that except in cases covered by Section 17, possession of the land cannot be taken over without the payment of compensation in terms of section 31. In case where the Government and the persons interested accept the award within six months of its announcement or where no reference under section 18 has been filed by the Government or by the persons interested, through the Collector, within six months of the date of award, the Collector has to tender payment of full amount of compensation awarded by him before taking possession of the land.
- 2.7 The purpose of highlighting the provisions Land Acquisition Act is that the political administration shall follow the same principles.

Political Administration may consult the District Collector/ Deputy Commissioner of adjacent district to obtain 'Yaksala' (annual average) cost of per kanal (5445 square feet) land.

Average cost of land depends upon the nature and type of land. Political Administration may ask for 'Yaksala' of

- (a). Irrigated land

- (b). Maira (Barani)
- (c). Un-irrigated fertile land (Belajat) ,
- (d). Range lands
- (e). Forest land etc.

In the absence of land settlement proportionate ownership is to be worked out on the basis of possession and documentary proof, if any. Distribution of compensation may be according to 'Nikat' within the tribe, section or sub section and according to local Rewaj.

- Instances of injustice, especially in 'Shamilat' (common or community land) are not uncommon. Such injustice in payment of compensation will lead to development of enmities among the tribesmen, un-necessary litigation and possible stoppage of developmental activity.

Instead of payment through handpicked committee of elders it would be appropriate to ask the Section or Sub Section in a tribe to nominate their elders for determination of share of families in the land. Such Committee may also oversee the disbursement of compensation.

Unless there is connivance of political officers, leading to injustice, acquisition of land, determination of rate and disbursement of compensation in FATA, at times, can be more transparent and effective than Settled Areas.

- Provisions, and principles of Land Acquisition Act, 1894 may be provided legal cover through rules under Section 62 of Regulation. Governor is competent to approve such rules. Streamlining of land acquisition through rules would bring more transparency. It would also safeguard the rights of locals.

**Section <sup>(44)</sup> 57. Power of Political Agent or District Coordination Officer to order disposal of certain fines.**

- (1) The Political Agent or District Coordination Officer, as the case may be, may make such order in writing for the disposal of any fine imposed under Section - 12 and 22, deposited in Agency welfare fund to be regulated by the rules to be framed under Section 62.***
- (2). Where, in pursuance of an order made under Sub-section (1), a person has received compensation for an injury out of the proceeds of a fine, no Civil Court shall take cognizance of a claim to compensation based on the same injury.***

1. Fine under Section 12 is a judicial fine imposed by the PA or DCO when a person is convicted as per recommendations of Council of Elders under Section 11[3(a)] of this Regulation. PA or DCO may pass sentence of imprisonment or fine or both for the offence under Section 12 of Regulation.

Section 22 of Regulation deals with the fines on communities' accessory to crime.

Section 57 provides procedure for disposal of fine, imposed and realized, under Section 12 and 22 of Regulation.

- PA or DCO shall make an order, in writing, for disposal of such fine. It invariably means that such an order must contain reasons for disposal of fine.

Currently corruption, in disposal of fine, is quite rampant. Huge amount of fine is retained under the pretext of security proceedings for longer period. Interest accrued over such amounts is, usually, misappropriated.

Draft Rules have already been framed under Section 62 of Regulation for regulation of Agency Welfare Fund.



Political Administration should keep account of collection and utilization of fine as well as interest accrued during the period. Preferably such amount should be kept in interest free account.

- PA or DCO can issue such order with regard to disposal of fine, imposed under section 12 and 22 subject to disposal of appeal and revision in such cases.

## **2      Sub Section 2.**

Through an order under sub Section (1) award compensation may be awarded to an injured person out of proceeds of fine. Due to prevalent law and order situation Government has already set a criteria to compensate the heirs of dead and injured, in sabotage or militants related activities.

When a person is given compensation for an injury the civil Court is barred to take cognizance of a claim to compensation based on the same injury.

- Any order of PA or DCO under Section 57 is appealable or a revision may be filed before the FATA Tribunal.

## **Section <sup>(45)</sup> 58.      Maintenance of register:-**

- (1) Registers shall be kept & maintained, in forms to be approved by the Governor, of all cases dealt with by the Political Agent or District Coordination Officer as the case may be, the Appellate Authority and the FATA Tribunal under this Regulation.**
- (2) The record of all sums received as fines under this Regulation and disbursed by the Political Agent or the District Coordination Officer, as the case may be, shall be maintained and accounted for, which shall be audited annually. The auditing authority, audit mechanism and such other modalities to be**

***determined in the Rules to be framed under section 62.***

**1      Sub Section (1)**

It empowers the Governor to approve form of register to be maintained by the PA or DCO, Appellate Authority (Commissioner) and the FATA Tribunal for all the cases under this Regulation. It will include cases both under criminal and civil jurisdiction.

- Current record keeping of cases is poor. There are no designated Record Rooms and Copying Branch.

In Settled Areas record keeping and copying of judicial documents and case files is under the law and rules.

Rules may be framed under Section 62 of Regulation as it authorizes the Governor to approve rules to carry out the purposes and objects of this Regulation.

**2      Sub Section 2.**

Section 62 empowers the Governor to approve rules to carry out the object and purpose of Regulation.

Sub Section (2) now makes it mandatory to keep record of all sums received as fine under this Regulation and further disposal of such fine.

Full account of the amount released should be maintained. PA or DCO is bound to issue an order, in writing, for disposal of such amount of fine (Section 57 of Regulation). In Account books written orders of PA or DCO regarding disposal or use of fine amount must be available.

For spending all the account procedures in vogue in Government should be followed. For example if compensation is given to the injured, the approval of PA or DCO and the Acquittance Roll must support the entries in the Cash Book.

Similarly for purchase of office equipments procedure of quotations or tenders , as the case may be, should be followed.

In nutshell the procedure being followed for spending government money are to be followed for utilization of all sums. Utilization of funds is auditable on annual basis.

- Procedures can be further refined by framing rules under Section 62 of Regulation. It will not only ensure transparency but also the much needed legal cover to spending of sums out of fine.

**Section <sup>(46)</sup> 58-A. Jail Inspection:-**

***FATA Tribunal, the Appellate Authority and the Political Agent or District Coordination Officer, as the case may be, shall visit the jails where the tribal convicts or detainees have been kept thrice a year.***

- It is mandatory for the PA, DCO, and Commissioner to pay, at least, three visits in a year, to such jails where the tribal convicts or detainees have been kept. Detainees include under-trial prisoners as well as persons detained under security proceedings.

The purpose of this section is to ensure that interests and legal rights of tribal convicts and detainees are protected. Appellate Court may take suo motto action in case of detentions without sufficient grounds. FATA Authority, in revisional jurisdiction, may call for the record of any detainee and proceed accordingly.

Prisoners are, most of the time, kept in the Settled Areas jails.

Such inspections can be coordinated through the Commissioner.

**Section 59.**

**Omitted.**

Under FCR, 1901 Section 59 pertained to jurisdiction of ordinary Courts in cases under Section 29, 30 and 37.

This section was, otherwise, applicable to settled Districts of erstwhile NWFP and Baluchistan.

**Section 60. Finality of proceedings under Regulation:-**

***Except as otherwise provided in this Regulation, no decision made, judgment, decree or sentence passed or order made, or act done, under Chapter III, Chapter IV, Chapter V or Chapter VI of the Code of Criminal Procedure 1898, (Act V of 1898) shall be called in question in or set aside by, any Civil or Criminal Court.***

1. Procedures prescribed for administration of criminal justice, as envisaged under Cr.PC, mutatis mutandis, apply to criminal justice in FATA. Exceptions, additions, and exclusions are required because Cr.PC. was for Settled Districts in pre-partition, India.

Proceedings under Cr.PC in Settled Districts are subject to revision and appeal to District and Sessions Judge and the High Court. Some of the proceedings are of civil nature. For example security proceedings, removal of public nuisance, attachment of disputed property and disposition of such property. Although civil Courts are barred to take cognizance yet the civil courts have been taking notice of proceedings under Cr.PC Sections 133-143 (public nuisance), and disputes in regard to immoveable property (Section 145-148). Now after separation of judiciary from the executive same courts have jurisdiction both in civil and criminal cases.

- Section 61 specifically oust the jurisdiction of all Civil and criminal Courts to call in question or set aside any decision, judgment, decree or

sentence passed, order made or act done under the following chapters of Cr.PC; unless otherwise provided in this Regulation.

- It means PA or DCO has all the powers mentioned in these chapters.

**2) Relevant provisions of Code of Criminal Procedure.**

**(i) Chapter III. Powers of Courts. (Sections 28-41).**

Description of offences cognizable by each court.

Chapter III of Cr.PC prescribes powers of Magistrates and description of offences by various Magistrates such as Magistrate First, Second and Third class.

Special Magistrates are appointed under Section 30 of Cr.PC. They are commonly called Section 30 Magistrates.

Section 30 Magistrate may pass any sentence authorized by law, except sentence of death or of imprisonment for a term exceeding seven years. (Section 34 Cr.PC).

- **Section 33.** Powers of Magistrate to sentence to imprisonment in default of fine.
- **Section 36. Ordinary Powers of Magistrate.**  
All Magistrates have the powers hereinafter respectively conferred upon them and specified in the Third Schedule (Cr.PC). Such powers are called “their Ordinary Powers”.

**Chapter IV Cr.PC. of aid information to the Magistrate, the police and persons making arrests. (Sections 42-45).**

- **Section 42 Cr.PC. Public when to assist Magistrate and Police.**

Every person is bound to assist a Magistrate or police officer, reasonably demanding his aid in taking or preventing the escape of a breach of peace or in prevention of any inquiry attempted to be committed to any railway, canal, telegraph or public property.

- **Section 43 Cr.PC.**      **Aid to person, other than police officer executing warrant.**

When a warrant is directed to a person other than a police officer, any other person may aid in the execution of such warrant.

- **Section 44 Cr.PC.**      **Public to give information of certain offences.**

Every person aware of the commission of, or of the intention of any person to commit any offence punishable under any of the following sections of Pakistan Penal Code.

- **Section 121 PPC.**

Waging or attempting to wage war or abetting the waging of war against Pakistan.

**Section 121A PPC.**      Conspiring to commit certain offences against the state.

**Section 122 PPC.**      Collecting arms with the intention of waging war against Pakistan.

**Section 123 PPC.**      Concealing design with intent to facilitate design to wage war.

**Section 123 A PPC.**      Condemnation of the State and advocacy of abolition of its sovereignty.

**Section 124 PPC.**      Assaulting President, Governor etc with intent to compel or restrain the exercise of any lawful authority.

<b><u>Section 124A PPC.</u></b>	Sedition.
<b><u>Section 125 PPC.</u></b>	Waging war against any Asiatic person alliance or at peace with Pakistan or abetting the waging of such war.
<b><u>Section 126 PPC.</u></b>	Committing depredation on the territories of any power in alliance or at peace with Pakistan.
<b><u>Section 130 PPC.</u></b>	Aiding escape of recuing or harboring such prisoner or offering any resistance to the recapture of such prisoner.

➤ **Sections 143, 144, 145, 146, 147 and Section 148 PPC.**

These sections deal with offences against the public tranquility.

Being member of unlawful assembly (Section 143), joining unlawful assembly (Section 144) Section 147 (Rioting) and rioting armed with deadly weapons.

**Section 153-A PPC.** Promoting enmity between groups.

➤ **Sections 161, 162, 163, 164, 165, 168 and 170 PPC.**

These are offences by or relating to public servants, such as taking illegal gratification, abetment by public servant of offence of illegal gratification (Section 164), and presenting a public servant.

➤ **Sections 231 and 232 PPC.**

These sections prescribe offences, and punishment, for counterfeiting of coins and its abetment.

➤ **Section 255.**

Counterfeiting a Government stamp.

➤ **Sections 302,303,304 and 304 A PPC.**

(Offences affecting the human body)

The offences are Qatl-e-amd, Qatl committed under 'Ikrah-i-tam and or Ikrah-i-Naqis'.

**Section 364 A PPC.** Kidnapping or abducting a person under the age of fourteen.

**Section 382 PPC.** Theft.

**Section 392 PPC.** Robbery.

**Section 393 PPC.** Attempt to commit robbery.

**Section 394 PPC.** Persons voluntarily causing hurt in committing or attempting to commit.

**Section 395 PPC.** Person voluntarily causing hurt in committing or attempting to commit robbery.

**Section 396 PPC.** Murder in decoity.

**Section 397 PPC.** Attempt to commit robbery or decoity when armed with deadly weapons.

**Section 399 PPC.** Making preparation to commit decoity.

**Section 402 PPC.** Being one of five or more persons assembled for purpose of committing decoity.

**Section 435 PPC.** Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upward or in case of agricultural produce 10 rupees or upward.



**Section 436 PPC.** Mischief by fire or explosive substance with intent to destroy a house etc.

**Section 449 PPC.** House trespass in order to commission of an offence punishable with death.

**Section 450 PPC.** House trespass in order to commission of an offence punishable with imprisonment for life.

➤ **Sections 456 ,457,458, 459, and 460 PPC.**

Punishment for lurking house trespass or house breaking and persons jointly concerned in lurking house-trespass or house breaking by night punishable for qatl, hurt caused by one of them.

**Section 489A PPC.**

Counterfeiting currency notes, bank notes shall, in the absence of reasonable cause, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or Police officer of such commission or intention.

**Section 45 Cr.PC.**

Village headman, accountant, land holders and others bound to report certain matters.

2.1 All above persons are bound to inform the Magistrate or Police officer the information about residence of any receiver or vendor of stolen property, passage through such village of any person suspected to be a thug, robber, escaped convict or proclaimed offender or commission of any offence punishable under Section 143,144 145, 147, or 148 of PPC.

Occurrence of sudden or unnatural death of or of any death under suspicious circumstance or any other likely to affect the maintenance of order or the

prevention of crime or the safety of person or property respecting which the Provincial or Federal Government has directed him to communicate information.

➤ **Chapter V Cr.PC. of arrest, escape and retaking (Sections 46-67).**

This chapter deals with manner of arrest (Section 46), search of place (Section 47), No unnecessary restraint (Section 51) and Search of arrested persons (Section 51).

➤ **Arrest without warrant.(Section 54) Cr.PC.** Any police officer may arrest without warrant when there is a reasonable complaint or credible information or reasonable suspicion exists of cognizable offence against any person. Similarly vagabonds and habitual robbers may be arrested without warrant. (Section 55).

➤ **Arrest by private person (Section 59) Cr.PC.** Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence or any proclaimed offender and without necessary delay take him to the nearest police station.

➤ **Section 61 Cr.PC.** No person arrested by the Police shall be detained for more than twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

➤ It is a constitutionally guaranteed fundamental right of every citizen to be produced before the Magistrate within twenty hours of arrest.

➤ **Section 66 Cr.PC.** If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in Pakistan.

**2.2 Chapter VI (Cr.PC). of Processes to compel appearances. (Sections 68-93) Cr.PC.**

**Summons.** ( Section 68-93) form of summons, service of summons, or when person summoned cannot be found (Section 70), service on servant of state, statutory body or company (Section 72) , summons outside local limits (Section 73), proof of service in such cases and when serving (person) not present (Section 74).

➤ **Warrant of arrest (Section 75- 86) Cr.PC.**

**Section 75 Cr.PC.** Warrant shall be signed by the Magistrate and shall remain in force until it is cancelled by the court which issued it or until it is executed.

Court may direct security to be taken (Bailable warrant Section 76).

Warrant shall be directed to police officer but may be directed to any person (Section 77).

Warrant may be directed to land holders (Section 78) or to a police officer outside the jurisdiction.

- In case of FATA, it may be directed to another Political Agent or if such person is in Settled Areas to the District Police Officer or District Head of Prosecution or the Deputy Commissioner. It may be routed through the Commissioner.

**Section 86A Cr.PC** Procedure for removal in custody to tribal Areas.

- **Proclamation and Attachment.** (Section 87-93).

**Section 87 Cr.PC.** **Proclamation for person absconding.**

**Section 88 Cr.PC.** **Attachment of property of person absconding.**

The Court issuing a proclamation under section 87 may, at any time, order the attachment of any property, moveable or immoveable or both, belonging to the

proclaimed person. Such order shall authorize the attachment of any property belonging to such person within the district in which it is situated. It shall authorize the attachment of any property belonging to such person without such district when endorsed by the Sessions Judge within whose district such property is situated.

(See detail procedure in Section 88 Cr.PC.)

Section 89 Cr.PC. When such person appears voluntarily or is apprehended and brought before court such property may be restored.

### **2.3     Application of Cr.PC Chapters and FATA.**

Political officers must understand the provisions of these chapters. It is evident from the provisions of Chapter IV that concept of “collective responsibility” is applicable even in Settled Areas.

Every citizen is bound to give information about offences to the Police officer and the Magistrates. Tribals as per agreements, treaties, provisions of Regulation and concept of territorial responsibility are bound to give information about the offences mentioned and also assist the political administration in arrest of criminals.

Same procedure of summons and warrants are applicable to FATA. Political administration is competent to attach property both moveable and immoveable of absconder, under Sections 87, 88 and 89 of Cr.PC.

If the property, to be attached, is situated in settled areas the approval of District and Sessions Judge is required. Political Administration may also do so under Section 21 of Regulation.

### **Section 61.   Application of provision of the Limitation Act of 1908 :-**

***Unless otherwise in this Regulation the provisions of the Limitation Act 1908 (IX of 1908) for filing an appeal, revision and review before the Appellate Authority or the FATA Tribunal shall, mutatis mutandis, apply under this Regulation.***

1. Provisions of the Limitation Act, 1908 shall, mutatis mutandis, apply to proceedings under this Regulation. Provisions of the Limitation Act are applicable to suits, appeal, revision and review before the Appellate Authority or the FATA Tribunal.

Limitation is of utmost importance in civil matters. It is the foremost issue to be settled by the Courts in admitting the suits, appeal, revision, review and other applications. Provisions of CPC shall be followed for all the matters with regard to issue of Limitation. Due to relevancy and importance of limitation the relevant sections of the Limitation Act, 1908 are discussed in detail.

(i) **The Limitation Act, 1908**

Provisions of Limitation Act are applicable to appeals, suits and certain applications to court. The purpose of prescribing limitation period for suits, appeals, both against interim and final orders, review and revision is to put an end to open-ended litigation. Where no specific time has been prescribed in a statute the period prescribed in the First Schedule to the Limitation Act shall apply. Regulation 2011 is applied to FATA having less literacy, non-availability of proper legal advice to common man, difficult terrain, lack of communication, extreme winters in some of the areas, and enmities are some of the factors which may prevent the parties to have recourse to legal remedy on time. Collusion and corruption, among the courts functionaries, may benefit influential party causing damage to the opponents, especially in civil litigation. Such collusion may lead to ex-

parte actions by the courts as a result of fraudulent practices in serving the summons or warrants.

- In some cases limitation is condoned without providing an opportunity of hearing to the opposite party or giving proper reasons.

The spirit of The Limitation Act is to enable the courts to examine the compelling circumstances in condoning the limitation; but at the same time to put an end to unending Litigation.

- In case of suits, applications against interim orders, appeals against interlocutory orders, final appeals and restoration of suits, the Judicial Officer must examine the question of limitation at the outset. While examining the question of admissibility in suits, appeals, and revision issue of limitation is to be settled first. If a case has been instituted within the prescribed time either as per provisions of the statute or limitation period prescribed for a subject in The First Schedule, the Presiding Officer must state so in the interim order. The other issues in admissibility are territorial, pecuniary and subject matter jurisdiction. When a court decides the issue of jurisdiction and takes cognizance, the most important question to be settled is that of limitation. There are instances that officers at the level of District Collector, while deciding and rejecting a Partition appeal, on merit, also added the paragraph as under :-

“Besides the appeal is time barred”

It is a bad judgment. Such an appeal should not have been admitted at the first instance or at the most should have been dismissed in first hearing. The limitation period, as per First Schedule, ranges from thirty days to sixty years as in case of a mortgage for foreclosure, sale and against a mortgage to redeem. Courts are empowered to condone the delay provided sufficient grounds exist. Parties must be heard in condoning the delay in filing a suit, review, revision or appeal and

hearing the application for restoration in case of dismissal for default or ex-parte decree for non-appearance. Some of the grounds in condoning the delay may be:-

(Relevant Sections of The Limitation Act, 1908, and Case Law, are referred in the brackets).

(b) Where Court is closed when period expires (Section 4).

(c) When the applicant satisfies the Court that he has sufficient cause (Section 5)

**(ii) Sufficient Cause:**

- Circumstances beyond the control of the party concerned (PLD2001 SC 355).
- Government is not entitled to any preferential treatment in matter of condonation of delay (2003 MDD).
- Period of limitation shall not impede the enforcement of the right of inheritance (PLD 2005 Lah 578).
- Time in obtaining certified copy (2004 PSC SC(Pak)1823( c ).
- Suo moto power of courts. In suitable cases court, for reasons to be recorded, can Suo moto enlarge time and condone delay (PLD 2005 SC (153).

**(iii) Legal disability.** When a person is a minor or insane (Section 6).

Disability of one of several plaintiffs or applicants.

**(iv) Computation of period of limitation.** Section 12 and Section 7.

Exclusion of time in legal proceedings:- Such as time consumed in obtaining a certified copy. When applicant was prevented in obtaining a copy.

**(v) Exclusion of time of defendant:**

- absence from Pakistan and certain other territories (Section 13)
- Exclusion of time of proceedings bonafide in court without jurisdiction (Section-14)

If applicant is able to establish that he followed the remedy before a wrong forum in good faith with due care and caution, the court may condone such delay under section-5 but filing appeal before wrong forum on account of mistaken advice by itself would not attract Section 9. Delay condoned. (PLD 2000 SC) 94; 1995 SCMR 584 PLD 1977 SC 102 quoted).

Section 15: Exclusion of time during proceedings are suspended.

Section 18: Effect of fraud.

Section 22: Effect of substitution or adding new plaintiff or defendant.

Section 25: Computation of time mentioned in instruments. All instruments shall, for the purpose of this act, be deemed to be made with reference to Gregorian calendar.

Part-IV, Section 26 of Limitation Act, 1908 is relevant to the adjudication related to ownership of land, easement rights of building, use of air, light, way, water course or any water. Such instrument, agreements and easement rights acquired under "Riwaj" due to occupation of possession or traditional use of grazing land, wood collection and rights of water and way. Riwaj is recognized under Section -8 of the amended Regulation in respect to adjudication in civil disputes.



Presiding Officer must consider the First Schedule to The Limitation Act, carefully in computing the time, and condoning the limitation period in cases falling within the provisions of section 25, 26, 27 and section 28 of The Limitation Act, 1908.

**(vi) Admissibility or Rejection With Regard to Limitation**

An order condoning the limitation in a suit, appeal, revision or application for restoration of ex-parte orders or interlocutory orders must be a speaking order and must give full justification, both in case of acceptance or rejection. Judicial officers must be cautious in writing an order with regard to for accepting or rejecting an application. As happens in case of writing a bail order in criminal cases that merits of the case are not discussed and bail order should not discuss and touch issues which may prejudice outcome of the case.

In FATA very limited land record is available (Dawar areas of North Waziristan Agency and Upper Kurram) to determine the issues of partition, demarcation and title etc.

In case of acquisition of right of easement, instrument and enjoyment of servant easement condonation of limitation should not provide an opportunity to any party to claim creating or extinguishing the rights. While condoning delay the party claiming concession must provide sufficient ground for each day to justify the delay.

Section 3 of the Limitation Act, 1908 sets the grounds for institution of suits within prescribed period. Limitation period for various subjects has been prescribed in the First Schedule of The Limitation Act, 1908. Section 5 of this Act deals with the condonation of limitation in appeals, revision and review.

In nutshell delay of each day must be explained.

**Section 62. Power to make rules :-**

***The Governor may make rules to carry out the purposes and objects of this Regulation.***

Governor is competent to approve rules to carry out purposes and objects of this Regulation. There is a need to frame rules in order to further regulate and streamline the proceedings under various sections of this Regulation. It will provide legal cover to proceedings both in civil and criminal matters while explaining the ingredients of various sections need for rules has been discussed.

Regulation is a comprehensive law, encompassing provisions of Cr.PC, CPC, PPC, land revenue Act and other laws. Rules are to be developed to further elaborate and streamline the procedures and also to provide legal cover. Some of the sections of this Regulation, requiring rules, are as under:-

- Section 19.** Record of Political Agent or District Coordination Officer.
- Section 21.** Blockades of hostile or unfriendly tribe.
- Section 23.** Fines on communities where murder or culpable homicide is committed or attempted.
- Section 27.** Power to direct forfeiture.
- Section 32.** Power to direct removed of villages.
- Section 34.** Attachment or demolition of buildings used by robber etc.
- Section 56.** Protection of property rights.
- Section 57.** Power of Political Agent or District Co-ordination Officer to order disposal of certain fines.
- Section 58.** Maintenance of Register.

**Section <sup>(47)</sup> 62-A. Power to make rules for the issue and safe custody of rifles and ammunition and for the imposition and recovery of fines:-**

*(1) The Federal Government may make rules for the issue and safe custody of rifles and ammunition for border village defence, and for the imposition and recovery of fines for any breach of such rules.*

*(2) Fines imposed for a breach of the rules made under this section may be recovered in the manner laid down in Section 386 of the Code of Criminal Procedure, 1898 (Act V of 1898).*

1. Sub Section (1). Federal Government may frame rules for safe custody of rifles and ammunition for border village defence. This practice exists under the Colonial Rule for the border villages of Settled districts bordering Tribal Areas.

Government may issue licenses or permits to the villagers, alongwith weapons from the Government stock, for self defense and rendering assistance to the Political administration. Rules may specify procedures and also imposition of fines for any breach of such rules.

**Sub Section 2.** Rules for imposition of fine for violation of these rules.

Such fine may be recovered as per manner laid down in section 386 of Cr.PC.

➤ **Section 386 Cr.PC. warrant for levy of fine.**

Whenever an offender has been sentenced to pay a fine Court passing the sentence may take action for recovery of the fine in either or both of the following ways, that is to say, it may;

- (a) Issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender.
- (b) Issue a warrant to the District Collector / Deputy Commissioner authorizing him to realize the amount by executing according to civil process against the moveable or immoveable property, of both, of the defaulter.

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant.

- 2). The Provincial Government may make rules regarding the manner in which warrants are to be executed.
  - In case of FATA Federal Government will be making such rules under Section 62 A of the Regulation.
- 3). Where the Court issue a warrant to the District Collector / Deputy Commissioner such warrant shall be deemed to be a decree and the Collector to be decree holder within the meaning of CPC.
  - When such fine is to be realized from a person residing in Settled Areas or moving against moveable property, the Courts in FATA may address such warrants to District Collector / Deputy Commissioner of District through the Commissioner.

**Section <sup>(48)</sup> 63.      *Indemnity:- - No suit or other legal proceeding shall lie against any person for anything done, or intended to be done in good faith under this Regulation.***

- This section provides indemnity to Political Officers, Khassadars, Levies, Court Officers and other law enforcement agencies against legal

proceedings, for acts done or intended to be done in good faith under this Regulation.

- Such protection is already available to public servants and the courts under the laws. Chapter IV Pakistan Penal Code (Section 76-106) deals with general exceptions.
- Thus acts done by mistake of facts and not by reason of mistake of law in good faith are protected under the law. (Section 76 PPC). Acts done in pursuant to the judgment or order of Court are also treated as acts done in good faith (section 78PPC).

#### **Section 64. Omitted.**

In FCR, 1901 it was meant for protection for persons acting under Regulation.

## **FIRST SCHEDULE**

### ***PART I --- Powers and functions with which Assistant Political Agents may be vested by Political Agent or District Coordination Officer <sup>(49)</sup>***

- (a) *All or any of the powers and functions of the Political Agent or District Coordination Officer as the case may be and*

*Without prejudice to the generality of the foregoing clause, with the –*

- (i) *power to make orders of reference to Council of Elders under section 8 (1);*
- (i) *power to appoint the members of Council of Elders with the consent of parties under section 8 (2), when an order of reference to a Council of Elders is made under Section 8 (1);*
- (ii) *power to nominate the members of Council of Elders when an order of reference to a council of Elders is made under section 11 (1);*
- (iii) *power to consider and dispose of objections made by the accused or the complainant to the nomination of the members, and after the disposal of the objections, appoint the members of a Council of Elders under section 11 (2) and*
- (iv) *power to take surety bond under section 40.*

- a). Thus APA may exercise all or some of the powers vested in the PA or DCO under this Regulation. APA shall be exercising the powers delegated by the PA or DCO.

b). Powers have been further specified as per provisions of Regulation.

As already discussed and as per section 4 of Regulation, APA can be vested with the powers of Section 30 of the Cr.PC and powers of a Magistrate of the First Class.

Powers of Magistrate Class-I are at Annexure (B).

Section 4(3) specially mentions that every APA shall be deemed as PA or DCO and shall exercise all or any of the powers specified in the First Schedule.

***PART II ----Powers and functions with which Magistrates may be invested by the Governor***

*(a) Power to appoint the members of a Council of Elders with the consent of parties where an order of reference to a Council of Elders is made under Section 8 (1).*

*(b) Power to nominate the members of the Council of Elders when an order of reference to a Council of Elders is made under section 11 (1) ; and*

*Power to consider and dispose of objections made by an accused or the complainant to the nomination of the members, and after disposal of the objections, appoint the members of Council of Elders under section 11 (2).*

Schedule I Part II empowers the Governor to invest the Magistrates with the powers mentioned at (a), (b) and (c).

Needs no further clarification as already discussed in the relevant sections.

## THE SECOND SCHEDULE

### {SEE SECTION 3 (3), 13 (C) AND 40 (5)}

- <sup>(50)</sup>1. *Any offence punishable under any of the following sections of the Pakistan Penal Code, namely sections 121, 121-A, 122, 123, 124-A, 125, 126, 127, 131, 144, 148, 150, 193, 194, 195, 196, 201, 211, 212, 216, 216-A, 295-B, 302, 304, 307, 308, 324, 325, 326, 328, 354, 363, 364, 365, 365-A, 366, 367, 368, 369, 376, 377, 379, 380, 381, 382, 386, 387, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 411, 412, 413, 414, 427, 428, 429, 435, 436, 440, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 489-B, 489-C, 494, 495 and 496-A.*
2. *Any offence punishable under section 29 and 30 of this Regulation.*
3. *Any offence punishable under any of the provision of the Custom Act, 1969 (Act No.IV of 1969).*
4. *Any offence punishable under the prohibition (Enforcement of Hadd) Order 1979 (President's Order No.4 of 1979).*
5. *Any offence punishable under any of the provisions of the Employment of Children Act 1991 (V of 1991).*
6. *Any offence punishable under the Control of Narcotics Substances Act 1997 (XXV of 1997).*
7. *Abetment of any of the offences aforesaid.*
8. *Attempt to commit any of the offences aforesaid which are not themselves expressed to be attempts to commit offences.*



## THE THIRD SCHEDULE

### {See Section I (3)}

*Federally Administered Tribal Areas include; <sup>(51)</sup>*

- (i). Tribal Area, adjoining Peshawar District.*
- (ii). Tribal Area, adjoining Kohat District;*
- (iii). Tribal Area, adjoining Bannu District;*
- (iv). Tribal Area, adjoining Dera Ismail Khan District;*
- (v). Tribal Area, adjoining Lakki Marwat District;*
- (vi). Tribal Area, adjoining Tank District;*
- (vii). Bajaur Agency;*
- (viii). Orakzai Agency;*
- (ix). Mohmand Agency;*
- (x). Khyber Agency;*
- (xi). Kurram Agency;*
- (xii). North Waziristan Agency;*
- (xiii). South Waziristan Agency.*

FCR, 1901 Sub Section (3) of Section 1 specifies the areas to which Regulation extended. The areas were mentioned in the Third Schedule to the FCR. The Third Schedule refers to Section 1(3) of Regulation but Section (3) talks of General

Amendment, Regulation IV of 1901 whereas the words, “Deputy Commissioner” and the “District Magistrate” have been replaced with the words, “Political Agent” or “District Coordination Officer” or “Assistant Political Agent”. In fact it is Section 2[4(3)]

- Political officers to study the Custom Act, 1969, Prohibition (Enforcement of Hadd) Order, 1979, Employment of Children Act, 1991, Control of Narcotic Substances Act, 1997,

To understand the definition of offences, mentioned in clause I of the Second Schedule, in depth study of PPC is required. Magistrate should understand what constitutes offence of theft (378 PPC) Extortion (Section 383 PPC), and dacoity (Section 391); just to name a few sections.

Similarly Schedule II to the Code of Criminal Procedure explains Section wise offence, cognizable or non-cognizable , bailable , non bailable, compoundable or not, punishment under the PPC and the competency of court for trial.

In administration of criminal justice, provisions and principles of Cr.PC, with necessary changes wherever required, shall apply. From summons , to security proceedings, public peace, inquiries, investigation, charge evidence, judgment, punishment of, both, imprisonment and fine , bail and appeals the procedures, as laid down in Cr.PC, are equally applicable to FATA. Contrary to widely held belief, Regulation hardly empowers the courts in FATA to act in an arbitrary manner.

- Adjudication in civil matters is more complicated than the administration of criminal justice. At every step question of law is involved. Some of the civil concepts have been briefly discussed.
- Both in case of Cr.PC and CPC essential references have been made so as to facilitate the Judicial officers to find out relevant concepts and sections of law.

## **Annexure I**

### **Errata List and proposed amendments.**

- Section 22. Explanation. Numbered as (2). May be deleted. Explanation is not given numbers.
- To correct the word 'hearing' as 'hear in'.
- Section 40. Security for keeping place.  
Section 40 (5). To add 'and' in the second line before the word, "for".
- Section 45. Word 'chapter' appearing in the second last line may be substituted with; "Section" there are no chapters in Regulation while the same were there in the FCR, 1901.
- Section 55A [4(a)]. To add com (,) after the word, "person" and before the word, "be".
- 55 A [4(d)]. To replace the word, "trail" with the word "trial".

### **Suggestion list**

#### **Section 1.**

- The Sub Section 1 and 2 appeared first may be substituted with (i) and (ii) so that to remove ambiguity and facilitate making reference to Sub Section.
- The numbering (1, 2) of Sub Section 1 may also be substituted with alphabet (a,b.)
- Sub Section (b). 'namely' appearing after substituted, may be deleted.
- Section 12 Reference actually made to Section 11 [3(a)] wrongly mentioned as clause (9) of Sub Section 3. Not clear which sub Section (3). There is no clause (9) anywhere in the Regulation. Otherwise also reference is always made to Section and not the sub section. May be corrected as "Section 11[3(a)]".