

The Dilemma of Justice System in Formerly FATA of Pakistan: Challenges and Prospects

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Abstract

In May 2018, the 25th Constitutional Amendment merged the erstwhile Federally Administered Tribal Areas (hereinafter, FATA) with the province of Khyber Pakhtunkhwa, Pakistan. The amendment annulled the Frontier Crimes Regulation (hereinafter, FCR) and all other special laws and administrative arrangements that were once applicable only in the formerly FATA. While the decision has been taken at the highest level to amend the Constitution of Pakistan to abolish the distinct status of FATA and merge the said into Khyber Pakhtunkhwa where each agency is designated as a distinct district. However, the implementation of the decision is surrounded by many legal and administrative challenges, including but not limited to the security situation of the region, particularly in the aftermath of Taliban revolution in Afghanistan and especially the citizen's perceptions regarding the formal justice system, the last being the focus of this paper. To secure a sustainable security, justice, and governance system in Khyber Pakhtunkhwa Merged Districts (hereinafter, KPMD), a well-thought-out plan is required to address not only the constitutional, legal, administrative, and procedural lacunae but also the management of vested interests as well as other related issues, particularly the transformation of informal to formal justice system.

Keywords: Federally Administered Tribal Areas (FATA), Provincially Administered Tribal Areas (PATA), Pakhtunkhwa Merged Districts (KPMD), Frontier Crimes Regulation (FCR), Merger, Jirga

1. Introduction

The erstwhile FATA, spread over 27,220 square kilometres, constituted 3.4 percent of the total land of Pakistan.¹ The population of FATA, according to the last census, is 5,001,676.² Along with a low literacy rate, FATA is economically backward and about 60 percent of its population is living below the national poverty line.³ Under the pre-25th amendment in the Constitution of Pakistan, FATA consisted of seven tribal agencies, i.e., Bajaur (Est: 1973), Mohmand (Est: 1951), Khyber (Est: 1879), Kurram (Est: 1892), Aurakzai (Est: 1973), North Waziristan (Est: 1910), and South Waziristan (Est: 1885), as well as six tribal areas adjoining the settled districts of Peshawar, Kohat, Bannu, Lakki Marwat, D.I. Khan, and Tank.⁴

In view of the 19th century Anglo-Afghan wars, strong influence of the Government of Afghanistan in the autonomous tribal region, and apprehension of a Russian adventure in Afghanistan, the policy of the British Government towards the western part of the empire was mainly focussed on security.⁵ Establishment of the Durand Line in 1893 was thus the foremost step for defining borders between British India and Afghanistan.⁶ The British Government also executed a plan for creating a buffer zone between British India and Afghanistan by establishing a semi-autonomous administrative structure in the tribal areas of Khyber Pakhtunkhwa and Baluchistan, which

¹ Shuja Nawaz, "FATA: A Most Dangerous Place" (2009) Centre for Strategic and International Studies <https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/081218_nawaz_fata_web.pdf> accessed on 11 September 2021.

² Census Report of Pakistan, 2017.

³ Khan Faqir, Bilal Haider and Sumbal Jameel, "Geneses, Causes, and Ramification of Militancy in FATA in the Post 9/11 Scenario," (2017) *Global Political Review (GPR)* Vol. II, No. I.

⁴ Constitution of Pakistan 1973, A 246.

⁵ Ghulam Qadir Khan, "How the British kept the Pakhtuns divided," *Herald*, (27 March 2018). <<https://herald.dawn.com/news/1154053/>> accessed on 1 September 2021.

⁶ Vinay Kaura, "The Durand Line: A British Legacy Plaguering Afghan-Pakistani Relations," *Middle East Institute* (27 June 2017). <<https://www.mei.edu/publications/durand-line-british-legacy-plaguering-afghan-pakistani-relations>> accessed on 1 September 2021.

empowered the local elders to act as a security apparatus for maintaining law and order across the western border and internally.⁷

Initially, the British civil and criminal law was extended to the entire province of the then Punjab, which included the Hazara, Peshawar, Kohat, Banu and D.I. Khan Divisions. However, owing to the law and order situation and growing tendency of crime in the Pashtun region, the British Government promulgated the first ever Frontier Crimes Regulation (FCR) in 1872.⁸ The FCR 1872 was soon repealed but left its footprints for the future legal system of the area.⁹ In 1887, another FCR, known as the Punjab Frontier Crimes Regulation, was promulgated, which was an improved version of the prior FCR, with enhanced punishments, authorizing the council of elders to award sentences of imprisonment up to 7 years.¹⁰ In 1901, the Punjab Frontier Crimes Regulation of 1887 was replaced by the FCR, 1901, providing administrative, legal, judicial, and governance systems for the north-western frontier areas of the Indian empire.¹¹ The FCR worked as an informal justice system for the whole of the region.

The FCR was initially in force in the entire NWFP, Baluchistan, and the tribal belt adjoining both the provinces. It remained as such even after the independence of Pakistan in 1947 and until the establishment of the 'One Unit'¹² and later the Constitution of 1956, which excluded the province of NWFP, with

⁷ Sarfraz Khan, "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia," (2010) *Eurasia Border Review*, vol. 1, No. 1. <http://src-h.slav.hokudai.ac.jp/publictn/eurasia_border_review/no1/06_Khan.pdf> accessed on 2 September 2021

⁸ Muhammad Maqbool Khan Wazir, "FATA under FCR (Frontier Crimes Regulation): An Imperial Black Law," (2009) *Central Asia*, No. 61.

⁹ Benjamin D. Hopkins, "The frontier Crimes Regulation and Frontier Governmentality," (2015) *The Journal of Asian Studies*, Vol. 74, No. 2.

¹⁰ Sarfraz Khan, "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia," (2010) *Eurasia Border Review*, vol. 1, No. 1. <http://src-h.slav.hokudai.ac.jp/publictn/eurasia_border_review/no1/06_Khan.pdf> accessed on 30 August 2021

¹¹ Frontier Crimes Regulation 1901, R 3.

¹² One Unit was the title of a scheme launched by the federal government of Pakistan to merge the four provinces of West Pakistan into one homogenous unit.

certain limitations, from application of the FCR.¹³ The territorial jurisdiction of the FCR was restricted to a limited area. According to the ‘Establishment of West Pakistan Act, 1955’, the tribal areas of Baluchistan and NWFP and the princely states of Amb, Chitral, Dir, and Swat were declared as ‘special areas’ under the direct administrative and legislative control of the Governor General, as it was the case under the colonial administration and the Government of India Acts of 1919 and 1935.¹⁴ The same scheme was adopted in the 1956¹⁵ and 1962¹⁶ Constitutions of Pakistan. However, in the 1962 Constitution of Pakistan, the aforementioned special areas were named as ‘tribal areas’.¹⁷ After the merger of the princely states in the province of NWFP, the interim Constitution of Pakistan, 1972 bifurcated the tribal areas into ‘centrally administered tribal areas’ (which in Article 246 of the Constitution of Pakistan, 1973 was renamed as Federally Administered Tribal Areas) and Provincially Administered Tribal Areas.¹⁸ This is how, the territorial enforcement of FCR was reduced to the formerly FATA. The legal, judicial, and administrative systems, however, remained the same and laws of the federal and provincial legislatures could not be extended to the areas without the assent of the Governor under authority of the President. After the promulgation of the Constitution of 1973, FCR was applicable only to FATA as defined in Article 246. FCR, however, contained an inherent enabling clause whereby the Governor could exempt or include any area from operation of any or all the provisions of FCR.¹⁹

The tribal agencies were headed by the Political Agent who was the representative of the federal government and reported directly to the Governor with whom all executive and judicial powers rested. The Frontier Regions, on the other hand, were headed by the Assistant Political Agents (APAs) while the

¹³ Altaf Ullah, “Governance Reforms in Federally Administered Tribal Areas (FATA) of Pakistan: The Past and Present,” (2015) *Journal of Political Studies*, Vol. 22 Issue 1.

¹⁴ The Establishment of West Pakistan Act 1955, S 2(2).

¹⁵ Constitution of Pakistan 1956, A 104.

¹⁶ Constitution of Pakistan 1962, A 223.

¹⁷ *Ibid*, A 242.

¹⁸ Interim Constitution of Pakistan 1972, A 260.

¹⁹ Frontier Crimes Regulation 1901, R 1(3).

Deputy Commissioner of the adjacent district acted as the Political Agent, and thereby head of the law enforcement and adjudication system. For judicial purposes, FATA was divided into protected and non-protected areas. Within the former, the decision of the Jirga [informal justice system] needed endorsement from the Political Agent, while in the case of the latter, justice was administered directly through the local Jirga.²⁰ The decision of the Political Agent could then be appealed to the Commissioner.²¹ As a further matter, the verdict of the Commissioner could be overturned by the Home Secretary of NWFP but in 2011, the FCR Amendment Regulation inserted the provision of the FCR tribunal, which replaced the powers of the Home Secretary.²²

2. Legal (Judicial) Reform Initiatives

The informal justice system in the formerly FATA had so many problems and contradictions with the accepted norms within a universally accepted formal justice system. In 1954, Justice A.R. Cornelius remarked on the need for legal reform in FATA during a hearing for leave to appeal against an order under the FCR. He stated that the proceedings under the FCR were “obnoxious to all recognized modern principles governing the dispensation of justice” and that it would be impossible to preserve public confidence in the fairness of the decisions made under the aforementioned law.²³ His observation on the legal integrity of the FCR was reiterated in 1956 in the case of *Khair Mohammad Khan vs. the Government of West Pakistan*²⁴ when the Lahore High Court held that denial of rights to defence and engagement of the council of elders under the FCR were against the fundamental rights enshrined in the Constitution of Pakistan. In 1957, the High Court of West Pakistan once again, in *Dosso and Others vs. State* held that the provisions of the FCR regarding referral of criminal

²⁰ Röder T.J., Shinwari N.A., “Pakistan: Jirgas Dispensing Justice without State Control” In: Kötter M., Röder T.J., Schuppert G.F., Wolfrum R. (eds) *Non-State Justice Institutions and the Law*, (2015), Palgrave Macmillan, London) 25-54.

²¹ *Frontier Crimes Regulation 1901*, R 48.

²² *Ibid*, R 55A.

²³ *Samundar vs. The Crown* [1954] PLD 228 (FC).

²⁴ *Khair Mohammad Khan vs. Government of WP* [1956] PLD 668 (Lahore).

cases to the Jirga were in violation of Articles 4 and 5 of the 1956 Constitution and were resultantly void of legal effect.²⁵ The same year, in *Khan Abdul Akbar Khan vs. DM Peshawar*,²⁶ the Peshawar Bench of the High Court held that civil references under the FCR were in violation of the Constitution. However, notwithstanding these rulings questioning the veracity of the FCR as a just legal instrument, the Supreme Court of Pakistan in 1958 held that since all laws in force prior to the proclamation of martial law - and the subsequent abrogation of the 1956 Constitution - had been restored, so would be the FCR and accordingly rendered all rulings against the FCR ineffective.²⁷

In 2011, the then President of Pakistan through the Frontier Crimes (Amendment) Regulation introduced certain major structural changes and introduced new provisions in the FCR, for the protection of women, children below 16 years, and elderly above the age of 65 years from arrest and detention under 'collective responsibility'.²⁸ Powers of the political administration regarding arrest and detention under security proceedings for keeping peace were restrained and compliance of the relevant provisions of the Criminal Procedure Code (Cr.P.C.) 1898 were made mandatory.²⁹ The amendment also provided for specific human rights for the people of the tribal belt including the right to bail and compensation for properties acquired by the government.³⁰ Furthermore, the detention of tribal people for an indefinite period was barred and they were given a right to revision before the FATA Tribunal.³¹ The amendment however, also introduced a Qaumi Jirga comprising respected elders and representatives from all tribes for recommendations on exceptionally important issues.³² It further provided for jail inspection by Political Agents,

²⁵ *Dosso vs. State* [1957] PLD 9 (Quetta).

²⁶ *Abdul Akbar Khan vs. DM Peshawar* [1957] PLD 100 (Peshawar).

²⁷ *State vs. Dosso* [1958] PLD 533 (SC).

²⁸ Frontier Crimes Regulation 1901, R 21.

²⁹ *Ibid*, R 40.

³⁰ Farhat Taj, "New FATA Reforms – Good But Insufficient," *Daily Times* (20 August 2011). <<https://dailytimes.com.pk/111076/new-fata-reforms-good-but-insufficient/>> accessed on 11 September 2021

³¹ Frontier Crimes Regulation 1901, R 55A.

³² *Ibid*, R 11-B.

Commissioners, and FCR Tribunals at least twice a year.³³ The purpose of the provision for jail inspection was to hear the grievances of prisoners and to address them in accordance with law and custom. However, in response to rising militancy in the region and to safeguard national security, the federal government passed the Action in Aid of Civil Power Regulation (AACPR) in 2011, which counteracted several of the provisions introduced by the 2011 FCR Amendment Regulation.

Besides the legal, Judicial and Administrative reforms, the Government, over the period had also brought financial reforms in shape of introducing the audit system in the region and political reforms, which started from participation in the presidential elections of 1964, and resulted in the in the extension of Local Government Ordinance 2001 in the year 2002 and enforcement of the principles of adult franchise and subsequently the Political Parties Order of 2002. In 2013, for the first time in its history, general elections were held on a party basis.³⁴ The political reform process in FATA however, was not dissimilar from that of the Malakand division. As seen in the case of the former princely states, the people of FATA were given the right to elect their representatives to the National Assembly and Senate of Pakistan but these representatives did not have the authority to legislate for their region or advocate the cases of their constituencies, and no law could be extended to FATA without the consent of the President.³⁵ The role of the elected representatives in the legislative assemblies was, therefore, only ceremonial.

3. Road to Merger

Since the establishment of the tribal agencies, different laws enacted first by the British Government and later by the Government of Pakistan were intermittently extended to the tribal areas but the said laws were all subject to the supremacy of the FCR and no serious effort was made to bring the tribal areas into the

³³ Ibid, R 58A.

³⁴ Altaf Ullah and Syed Umar Hayat "The Recent Electoral Reforms in Federally Administered Tribal Areas (FATA): An Appraisal" (2017) *Journal of Political Studies*, Vol. 24.

³⁵ Crisis Group, "Pakistan: Countering Militancy in PATA," (15 January, 2013).

mainstream and at par with other parts of the country. In 1956, when formerly NWFP [now Khyber Pakhtunkhwa] and several other tribal areas were brought under the purview of the legal, judicial, and administrative system prevalent throughout the rest of the country, the Government of Pakistan had the opportunity to mainstream FATA as well through a constitutional package but it did not do so and the colonial legacy remained intact. In 1969, another opportunity arose when the princely states of Malakand Division were merged and One Unit was dissolved, but yet again policy makers neglected to bring FATA into the fold.³⁶ Indeed, the government was altogether remiss about bringing FATA into the mainstream and instead seemed to be focused on plans for merging the tribal areas either into the province of formerly NWFP or into a separate province of its own as was desired by the people of the region. From 1973 till its final merger into the province of Khyber Pakhtunkhwa in May 2018, various governments constituted various committees and brought forward different packages for mainstreaming the tribal areas. The Nasir Ullah Babur Committee (1973-1977), which proposed a plan that introduced political, social, and economic reform into the region at first, followed by the formal merger of FATA with NWFP, FATA Reforms Committee (2005) headed by Justice (R) Mian Mohammad Ajmal, suggesting major changes to the FCR, which were accepted by the government and incorporated into the FCR through the Frontier Crimes (Amendment) Regulation, 2011³⁷, Sahibzada Imtiaz Ahmad report (2006) focussed on administrative reforms and improving security situation in the region³⁸, Cabinet Reforms Committee (2008) approving the FCR amendments of 2011, and the resolution of the Provincial Assembly of Khyber

³⁶ Report of the Committee on FATA reforms (2016).

³⁷ Rahimullah Yusufzai, "Undeserving awarded, deserving ones like Mian Ajmal unrewarded" (29 April 2011) <<https://www.thenews.com.pk/archive/print/319194-undeserving-awarded-deserving-ones-like-mian-ajmal-unrewarded>> accessed on 30 August 2021.

³⁸ FATA Research Centre "Governance Reforms in FATA: A People's Perspective," (1 February 2016). <<https://frc.org.pk/breaking/governance-reforms-in-fata-a-peoples-perspective/>> accessed on 30 August 2021.

Pakhtunkhwa (2012)³⁹ asking for equal rights of the residents of FATA, were some of the steps taken by successive governments for mainstreaming FATA.

Thereafter, the FATA Reforms Commission (2014)⁴⁰ and the Sartaj Aziz's FATA Reforms Committee (2015) in pursuance of the National Action Plan 2014⁴¹ followed by extension of jurisdiction of the High Courts and Supreme Court to the FATA region⁴² were the decisive steps for mainstreaming tribal areas and their merger in the province of Khyber Pakhtunkhwa. Sartaj Aziz's committee which submitted its report to the Prime Minister in August 2016, proposed the complete merger of FATA with the province of Khyber Pakhtunkhwa but in phases over a period of five years preceded by reconstruction and rehabilitation in terrorism-affected areas, socioeconomic development, establishment of local bodies, capacity building of law enforcement agencies, land settlement, extension of the jurisdiction of the PHC and the Supreme Court to FATA, the merger of levies into the provincial police force, and fixation of a three percent share for FATA in the National Finance Commission (hereinafter, NFC) award.⁴³

However, despite this much of discussions and consultations at different level, and many formulae of stage wise mainstreaming, the federal Government decided immediate and total merger of FATA with the province of Khyber Pakhtunkhwa through 25th Constitutional Amendment dated May 30, 2018 with a two-year transitional period.

³⁹ Resolution No 711, adopted by the provincial assembly of Khyber Pakhtunkhwa on 07-05-2012.

⁴⁰ Interim report of the FATA Reforms Commission (2015).

⁴¹ Point 12 of the National Action Plan (2014).

⁴² The Supreme Court and High Court (Extension of Jurisdiction to Federally Administered Tribal Areas) Act, 2018.

⁴³ Report of the committee on FATA reforms, Government of Pakistan (2016).

4. Challenges in Transition

If we examine and compare the formerly FATA merger with the transition of former princely states of Malakand division which remained a source of serious conflict in the entire province for about more than 20 years, we would find the pattern in both the cases, similar.⁴⁴ One of the main reasons for the glitches in this process is the lack of consensus among the common people and the elite on the adoption of the new system and the response of different segments of the community is very different from each other.⁴⁵ Economic empowerment is key to development and social change, whereas, the bulk of population in erstwhile FATA are living below the poverty line. Extension of all Civil Laws to the region would deter their conventional economy and poverty, no doubt, is one major reason of crime and conflict.⁴⁶

Already there are signs of rising tension in the region as several incidents, such as challenges to the decision of the merger before the Supreme Court of Pakistan, the attack on the toll plaza in District Khyber by the tribal people, property disputes among different tribes in Khyber, the stoning of a vehicle belonging to a newly appointed Civil Judge in TSD Darra Adam Khel, and the road blockade in Bajaur agency on the border dispute - demonstrate the frustration of the people of FATA against the manner in which the merger was implemented. Presence of the anti-state elements in some of the tribal areas and anti-establishment sentiments of some of the political groups in the tribal districts and Khyber Pakhtunkhwa are the other contributing factors. Political situation in Afghanistan, particularly after the recent Taliban takeover would also have a serious impact on the law and order and transition in the tribal districts.

⁴⁴ Navid Iqbal Khan, *"Tehreek-i-Nifaz-i-Shariat-i-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of State Inversion"*, (2010), Pakistan Journal of History and Culture, Vol.XXXI, No.1, 131-158.

⁴⁵ Wajeeha Malik & Shakeeb Asrar, "Post-Merger Inaction in FATA: Expectations vs. Reality", (10 July, 2019), Southasianvoices.org, <<https://southasianvoices.org/post-merger-inaction-in-fata-expectations-vs-reality>>accessed on 10 September, 2021.

⁴⁶ William Avis, "Drivers of conflict in the Swat Valley, Pakistan", (2016), GSDRC, Helpdesk research Project.

The Government, before the 25th Constitutional amendment, promulgated on May 28, 2018, the Interim Governance Regulation (IGR), which provided for a provisional structure of governance, law enforcement, and justice administration to oversee the transitional period of FATA's merger with Khyber Pakhtunkhwa. With the exception of certain provisions, the regulation retained almost the same scheme of governance and adjudication as was provided in the defunct FCR, 1901. The IGR repealed the FCR⁴⁷ and changed the nomenclature of Political Agent and Assistant Political Agent to Deputy Commissioner and Assistant Commissioner,⁴⁸ but allowing both titles to retain the same powers and functions as were assigned to them under the FCR. The Deputy Commissioner was given the judicial power of both a magistrate and a judge⁴⁹ and had the authority to tender pardon⁵⁰ and refer matters to the council of elders⁵¹ and/or Qaumi Jirga.⁵² This step of the Government was a replication of the PATA Regulations of 1975, and intended establishing a hybrid governance and adjudication system, which, in the case of PATA had culminated into serious legal confusions and ultimately leading to militant movement in the region. This confusion; however, was addressed by the Supreme Court of Pakistan in Writ Petition No.3098-P/2018 wherein the Judicial provisions of IGR and establishment of a parallel legal regime were over ruled and the Government was directed to establish a uniform judicial system in the region.⁵³ Now, this decision tilted very much in favour transforming from informal to more formal justice system in the region.

There is no denying the fact that the merger of FATA in the province of Khyber Pakhtunkhwa was done in a short period of time with little time for planning the transition. Therefore, post-merger administration in tribal districts is facing multiple challenges in terms of the management of human resource, capacity of the available human resource, finances, coordination among the state

⁴⁷ Interim Governance Regulation 2018, R 3.

⁴⁸ Ibid, R 5.

⁴⁹ Ibid, R 7.

⁵⁰ Ibid, R 9.

⁵¹ Ibid, R 10 & 13.

⁵² Ibid, R 15.

⁵³ *National Commission on status of Women Vs Government of Pakistan* [2019] PLD 218 (SC).

institutions, engagement of the civilian population, basic development indicators such as health, education, security, employment, taxation, human rights status, and most importantly the will of people for their voluntary submission before the law. Slow pace of infrastructure development due to financial constraints and provision of municipal services are identified as some other administrative challenges. The legal and justice sector too is facing certain challenges in terms of securing public confidence, including the very real dilemma of producing judgements to the satisfaction of people in peculiar circumstance where there is neither a proper revenue record nor capable and well trained investigation agencies.⁵⁴

Due to lack of infrastructure in the district and tehsil headquarters, and the uncertain security situation in the region, some of the district courts are functioning in the settled adjacent districts rather than the concerned agency headquarters. While those inside the agency too are at distance due to tough geographical conditions. The general population in tribal areas is widely accustomed to a cost effective Jirga system [informal justice system] at the local levels and quick dispute resolution at the door steps.⁵⁵ This distance and cost factor thus is one challenge for securing the confidence and trust of local population in the mainstream judicial system.

The tribal people are neither aware of the substantive and procedural laws, nor accustomed to the concepts of legally secured fundamental human rights as well as justness and fairness of the judicial process. They, on the basis of their tendency towards cultural and customary practices would judge the effectiveness of the new system on the parameters of accessibility, pace, cost, and ease of comprehension and the pre-merger parameters of access and disposal, rather than the actual spirit of Civil law and Justice. The formal legal system with its delays arising from procedural technicalities may not reflect well

⁵⁴ Syed Akhtar Ali Shah, Saima Parveen and Jehanzeb Khalil, *"Governance Challenges in Mainstreaming of Federally Administered Tribal Areas into Khyber Pakhtunkhwa"*, (2019), FWU Journal of Social Sciences, Summer 2019, Vol,13, No.1, 131-145.

⁵⁵ Ibid.

in comparison to the expeditious and judicious remedies provided by the informal justice system of Sharia and customary law, which the people of the region are inherently inclined towards.⁵⁶

Owing to a sweeping constitutional amendment resulting in the merger, the implementation process of the merger is quite rushed without adequate capacity building of the institutions and confidence building of the citizens through an awareness and social welfare strategy.⁵⁷ The decision to defer tackling issues pertaining to land settlement, property, and natural resources until after the merger has only exacerbated the overall situation and increased resentment among the locals. The problem of KPMDs is further compounded by the fact that most of the revenue record is not documented. Disputes involving inadequacy of land records, determination of boundaries and land settlement have already led to incidents of violence.

The government seems to be inching towards a duality of legal and judicial systems creating optional mechanisms for bypassing independent judiciary through legal instruments initially through IGR and recently through the ADR Act which has a potential room for restoration of authoritarianism and influence of the executives in the Judicial process i.e. dispute resolution through ADR.

Institutional coordination is a prerequisite for the success of a good governance system but majority of the people believe and open source data reveals that in the case of FATA, there is serious coordination gap between the government departments, particularly between the judiciary, police and district administration.⁵⁸ Judicial powers of the executive officers under the FCR is a source of contention and the deputy commissioners in such situation could

⁵⁶ Ibid.

⁵⁷ Kriti. M. Shah, "Too Little, Too Late: The Mainstreaming of Pakistan's Tribal Regions" (June 2018), ORF Occasional Paper < https://www.orfonline.org/wp-content/uploads/2018/06/ORF_Occasional_Paper_157_FATA.pdf > accessed on 13 September, 2021.

⁵⁸ UNDP, "FATA Governance Project", (2018), <<https://info.undp.org/docs/pdc/Documents/PAK/Project%20Document%20-%20NEW%20FATA%20Governance%20Project%202018.docx>> accessed on 10 September, 2021.

contribute to the failure of judiciary, so as to replace the mainstream judicial system and instigate the people for revival of the FCR model.

Judiciary is facing yet another technical issue of the lack of availability of evidences of the required standard. The reason being, non-availability of land records and registration of documents. Among the territories of erstwhile FATA, only the tribal district of Kurram and some parts of North Waziristan have hitherto maintained land settlement records from the colonial era. In Kurram, the land settlements date back to 1905 and 1943, requiring updates to the records. Similarly, in North Waziristan, the settlement process was initiated in 1898 but it could not be completed.⁵⁹ This remains a bone of contention for both the administrative and justice machinery in determining property rights as well as collection of revenue against the landed properties. On the criminal side, the capacity of police to investigate and the level of awareness of common men on the standard criminal procedures was a challenging aspect. As a matter of policy the government has merged the levies and khassadars in the regular police who are too good in operations, community policing, raids, and arrests but being neither highly educated nor trained in investigation and record maintenance, they were incompetent for investigation of cases, particularly the contemporary investigation techniques and scientific and forensic evidences. Incompetence and failure of the investigation agency, resulting in miscarriage of justice would ultimately have adverse reflection on the performance of judiciary.

Due to sporadic episodes of terrorist activities in the remote tribal areas, in the post-merger era, the provincial government, despite the mainstreaming and extension of all civil laws have still retained the discriminatory and controversial legal paradigm related to the conflict situation and re-enforced the AACPR in merged tribal districts. The mainstream judicial system on the other hand is debarred from entertaining any question under the AACPR. The locals believe it

⁵⁹ Iftikhar Firdous, "Land records in FATA: Property rights to be recorded within 4 years," *The Express Tribune*, (June 24, 2016) <<https://tribune.com.pk/story/1129601/land-records-fata-property-rights-recorded-within-4-years>> accessed on 11 September, 2021.

a step against their equal status and treatment according to law and, which promotes their dissatisfaction over the post conflict rehabilitation and creates an anti-judicial sentiment in the public at large.

The implementation of taxation and customs laws has been deferred in KPMDs, owing to resistance from vested interests. It fails imagination that a backward geographical area with high income inequalities is exempted from taxes, thus, reinforcing the inequalities and eventually a conflict situation.

5. Conclusion

In the case of transition from informal to formal justice and governance system in the formerly FATA and former princely states of Khyber Pakhtunkhwa, an overnight constitutional change, without any prior home-work and capacity building resulted in poor governance, weak dispensation of justice, legal vacuum and failure of the government machinery to quickly and efficiently respond to the grievances of the citizens, which gave an impetus to the religious groups to raise slogans for their demand of a just and efficient administrative and legal system in the form of Sharia law and the movement ultimately culminated into a serious wave of militancy and terrorism.

To secure a sustainable security, justice, and governance system in KPMD, there was a need to design well-thought-out plan to address not only the constitutional, legal, administrative, and procedural lacunae but also the management of vested interests as well as other related issues. In order to do that, there was a need not only to learn from international best practices but also from the similar past national examples. Phase wise merger of FATA after building capacity of the stakeholders and necessary institutional development was thus a comparatively much appropriate option. However, notwithstanding the steps already taken, for sustainability of the governance system, the provincial government is required to ensure the availability and positioning of robust, perpetually responsive, and meticulously responsible legal, judicial and administrative machinery. The

existing machinery needs to be transformed from a mechanism of oppression to an apparatus of service and utility, to the satisfaction of the tribal people.

Inclusion of all segments of the community in decision and policy making (including women and other vulnerable segments) is key to greater public trust and confidence in the system. Vesting of judicial powers in the executive for the purposes of simplifying and expediting the judicial process is detrimental not only to the independence of justice but also to peace and harmony. Therefore, an effective separation of powers between the executive and judicial branches of the government needs to be ensured. Similarly, there is a need of extensive awareness-raising throughout KPMDs for people from all walks of life, including the vulnerable segments of the society, to build their capacity and raise awareness on the nature and significance of the newly extended laws, judicial mechanisms, and the mainstream land record and revenue system.

Regularization of colonial model of security apparatus and their conversion to regular police is encouraging for economic and social reasons but they need proper training on contemporary policing and investigation techniques, so as to make the criminal justice system responsive and up to the public expectations. The tribals being accustomed to quick response under the informal justice system are expecting the same hence, expeditious disposal of the civil disputes is yet another key to gaining the public confidence and for that matter, the civil justice system including the land records need to be streamlined. We have witnessed in the case of Malakand division that one of the main reasons of militancy and demands for implementation of Sharia by Tehreek-e-Nifaz-e-Shariat-e-Mohammadi (TNSM) in the recent past was the uncertain legal and judicial system in the post-merger era. There is no doubt that the socio-economic, cultural, political and geographical dynamics of both the formerly FATA and PATA are almost similar and if the judicial system in the merged districts was not expeditiously responsive, uncertain, not easily accessible, and delayed, there is every possibility of another conflict situation in the region and mass movement in search of the alternatives.

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