POST-MERGER GOVERNANCE IN MALAKAND DIVISION:

LESSONS FOR KPMD

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ACKNOWLEDGEMENT

We would like to thank the British High Commission, Islamabad, for sponsoring the study. The views and opinions expressed in this report, however, are our own and do not necessarily represent the views and opinions of the British High Commission.

We would like to express our gratitude to all the interviewees who took time out of their busy schedules for us to hold in-depth discussions in the testing times of the COVID-19 pandemic, as well as the participants of the focus group discussions and the citizen perception survey. We would also like to thank Dr Murad Ali, Assistant Professor, Department of Political Science, University of Malakand, Chakdara, and Dr Sheraz Ali, Assistant Professor, Department of Social and Gender Studies, University of Swat, who made valuable contributions to the report through their inputs.

We thank all the individuals we met during the course of our field research and would like to thank everyone who supported us during our visits to various places in connection with this study. Finally, we would also like to express our gratitude to Saba Imran, Director Programmes at CODE PAKISTAN, for reviewing the final draft of the study.

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LIST OF ACRONYMS

AACPR	Action (in Aid of Civil Powers) Regulation
ACS	Additional Chief Secretary
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
ANP	Awami National Party
APA	Assistant Political Agent
DC	Deputy Commissioner
FATA	Federally Administered Tribal Areas
FCR	Frontier Crimes Regulation
FGD	Focus Group Discussion
FR	Frontier Region
IGR	Interim Governance Regulation
IUCN	International Union for Conservation of Nature
JI	Jamaat-i-Islami
JUI	Jamiat Ulema-i-Islam
KP	Khyber Pakhtunkhwa
KPMD	Khyber Pakhtunkhwa Merged Districts
KPRA	Khyber Pakhtunkhwa Regulatory Authority
MMA	Muttahida Majlis-e-Amal
NFC	National Finance Commission
NSA	National Security Adviser
NWFP	North-West Frontier Province
PA	Political Agent
PATA	Provincially Administered Tribal Areas
PHC	Peshawar High Court
PML	Pakistan Muslim League
PPC	Pakistan Penal Code
PPP	Pakistan People's Party
SAFRON	States and Frontier Regions
SRO	Statutory Regulatory Order
SUV	Sports Utility Vehicle
TNSM	Tehrik-i-Nifaz-i-Shariat-i-Muhammadi

TTP	Tehrik-i-Taliban Pakistan
W.P.	West Pakistan
WB	World Bank

EXECUTIVE SUMMARY

In May 2018, the 25th Constitutional Amendment merged the erstwhile Federally Administered Tribal Areas (FATA) with the province of Khyber Pakhtunkhwa. The 25th Constitutional Amendment annulled the Frontier Crimes Regulation (FCR) and all other special laws and administrative arrangements that were applicable only in FATA. While the decision has been taken at the highest level to amend the Constitution to abolish the distinct status of FATA, the implementation of the decision is a work in progress.

Sustainable governance in KPMD would require addressing the constitutional, legal, administrative, and procedural challenges. In order to do that, there is a need not only to learn from international best practices but to learn from similar past national examples. One such example is provided by the case of the merger of the former princely states of Chitral, Dir, and Swat with the federation of Pakistan. The merger of Malakand Division could provide essential lessons related to short- and long-term impacts on social stability and people's experience of justice.

Given the aforementioned backdrop, this study attempts to identify key challenges and lessons arising from the government's attempts at ensuring good governance in Malakand Division after the merger to assist policymakers and stakeholders responsible for the KPMDs. It evaluates the successes and failures of the Malakand experience, their impact on stability and the citizens' experience of governance.

The study basically addresses two separate but related questions: first, whether the provision of security and justice services in Malakand had an impact on short- and long-term stability, recalling that Malakand descended into periods of Islamic militancy in 1994 and 2007. Second, and separately, the study addresses the impact of the post-merger settlement on people's experience of justice, whether there was any change in how people resolved their grievances, and whether there was any discernible change in the justice outcomes experienced by the people. The study separates these two problem

statements so as to avoid the assumption that enhanced stability leads to better justice outcomes for people.

The study began with a comprehensive literature review of published books, research papers, civil society publications, government notifications, laws enacted and extended to Malakand and Torghar, administrative decisions of the Government of Khyber Pakhtunkhwa, and media reports. The aim of the literature review was to understand the process of the abolition of the princely States of Malakand Division, the establishment of PATA and the merger of Torghar, and the process adopted for institutionalising justice and security apparatus in the region and its similarities and differences with the process adopted for the KPMD merger. Alongside the abovementioned methodology, however, several interviews were conducted with key relevant government/judicial functionaries—such as serving and retired judges and civil servants—to acquire first-hand accounts of the practical issues faced by the state and any technical lacunae in the process adopted for the mergers of Malakand Division and Torghar. In order to find answers to questions related to people's experiences of security and justice outcomes, Focus Group Discussions (FGDs) were also conducted with male and female representatives from the seven districts of Malakand Division, as well as Torghar district, and a citizens' perception survey was conducted among a sample of 30 respondents from each district through locally engaged survey volunteers from each of the target districts. Besides ensuring representation of both male and female respondents, the survey also included respondents from various socioeconomic and educational backgrounds, as well as age groups. The mix of primary and secondary research resulted in some pertinent observations with regard to the case of the merger of the princely states into the province of KP and their relevance to the case of the merger of KPMDs, which are elaborated in great detail in the report. In the following lines, a short summary of the key findings of the study is presented.

The justice system of the princely states of Chitral, Dir, and Swat differed from the justice system of the post-merger Malakand Division in two fundamental ways. One, there was a concentration of power in the hands of the executive flowing from the rulers of those states and an absence of judicial autonomy. Thus, the administration of justice and the element of fairness completely depended upon the personal inclinations of the rulers. It resulted in an absence of due process of law and violation of fundamental

human rights of the citizens. Two, since the power was concentrated in the rulers and their bureaucracies without any questions on their authority, judicial delays were understandably non-existent because the judges did not have to go through a long list of legal texts or worry about the consequences of their decisions if they were found to be in clash with certain provisions. The only red line the judges needed to be careful about crossing was annoying their rulers or personages close to them.

Such a situation gave rise to a post-merger situation in Malakand Division where the general population was neither aware of nor accustomed to the concepts of legally secured fundamental human rights as well as justness and fairness of the judicial process. They were, however, aware of and accustomed to a justice and law enforcement system that was readily accessible, quick, and relatively easy to understand. Therefore, once the princely states were merged into the state of Pakistan to become part of the Malakand Division, the parameters that were used by the local population to judge the new system were the ones that they could relate with, i.e., accessibility, pace, and ease of comprehension, and not the generally accepted parameters of justness of the decisions and fairness of the process.

Instead of working on raising awareness about the generally accepted parameters of justice and making the mainstream justice system responsive and quick, however, the government took the easier alternative course of bringing back authoritarianism into the justice system by introducing legal/administrative provisions that gave judicial powers to the executive for quick administration of justice. This resulted in a hybrid system making the provision of justice in Malakand Division a unique experience different from the rest of Pakistan for its residents. Since the government bent backwards on a number of occasions to make policy changes to suit the perceived local preferences, it created a perception among the local vested interests about the effectiveness of pressure in exacting policy reversals. It led to movements for replacement of the existing justice system in the area with Sharia on more than one occasion. In a mutually reinforcing chain of events, therefore, Malakand Division spiralled into chaos in 1990s and outright challenge to the writ of the state in the latter part of the first decade of the twenty-first century. The pressure of the vested interests in the name of Islam and a dream of resurrection of a justice system that the local population could more readily relate to, thus, played a role in convincing the executive to circumscribe the independence of the judiciary and concentrating more and

more power in their own hands and, at times, letting it go in favour of non-state actors.

At the same time, however, it cannot be denied that the judicial delays and hurdles in access to justice of the common citizens played a key role in convincing them to rally behind the movements that promised them a justice system that would be quick and easily accessible. Nevertheless, the government could ideally address the shortcomings of the judiciary in following the due process of law rather than attempt to circumvent it through vesting excessive judicial powers in the executive. Notwithstanding the shortcomings of the mainstream justice system that led to popular uprisings in Malakand Division, the preference for it over any other system for the provision of security and justice was obvious from our citizen perception survey. One of the reasons for that is that our survey reached out to the women of the area who were almost non-existent in the socio-political dispensations under the princely states or popular movements in the name of Sharia. There is no denying the fact that the mainstream justice system of the country accords safeguards to the vulnerable segments of the society in a way that Rewaj and Islamist systems do not.

Therefore, while introducing a hybrid system including elements of the past and the present that concentrated more power in the executive was the easier choice, it, perhaps, was not the most appropriate. The most appropriate response to the provision of justice in Malakand Division could have been making the mainstream justice system more responsive, accessible, and quick. This, however, is easier said than done. The civil cases take painfully long and often result in criminal litigation owing to the inability of the justice system to deliver justice in time in civil disputes. This is exactly what happened in Malakand Division. The criminal justice system itself is once again facing multiple challenges, such as deficiencies in investigation, coordination between criminal justice actors, access to legal counsel, excessive delays in trials primarily attributed to excessive reliance on witness testimonies and non-production of witnesses, etc. While the list of challenges in terms of addressing judicial delays in long, the solution lies in addressing them instead of bypassing them with the use of executive authority.

The case of the merger of FATA also bears some uncanny similarities with that of the merger of the princely states. One, the merger of FATA with

the province of KP was undertaken without a broad-based consultation with the people of the erstwhile FATA or their public representatives. Two, owing to a sweeping constitutional amendment resulting in the merger, the implementation process requires extensive capacity building of the institutions and confidence building of the citizens through an awareness and social welfare strategy. 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 have already led to violence incidents. Three, the government seems to be inching towards a duality of legal and judicial systems creating optional mechanisms for bypassing independent judiciary through legal instruments like the ADR Bill despite the rulings of the PHC and the Supreme Court against exceptional laws like the IGR. Four, the people of KPMDs are assessing the impact of the mainstream justice system using the pre-merger parameters of access and disposal rather than the generally accepted judicial norms of independence and fairness because of a general lack of legal awareness about the spirit of justice, unfamiliarity with procedural technicalities, and a tendency for cultural and customary practices. Five, implementation of taxation and customs laws has been deferred in KPMDs as well 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. In light of the foregoing, the report presents the following key recommendations:

a. For any future strategy or course of action affecting the public, consultation with relevant stakeholders in the KPMD (including women and other vulnerable segments) is essential. Operationalization of an effective elected local government system could be a key to social inclusion in decision-making processes affecting local populations.

b. The 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.

c. Accountability of government officials through their chains of command needs to be prioritized along with involving communities in a consultative process through their elected representatives on development.

d. There needs to be a greater focus on post-conflict rehabilitation, infrastructure development, education, and employment, including for the women and other vulnerable groups.

e. The KPMDs need to be brought in the tax net not only to offer regional services that are at par with the rest of the province but also to reduce income inequalities in the area. This is something for which advocacy with the local communities needs to be conducted so that taxation may result in better service delivery for the people of the region.

f. Extensive awareness-raising needs to be conducted 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.

g. The government should prioritize the land settlement, addressing the ongoing land disputes and preparation of land records.

h. Both the government and the PHC should develop a mechanism for efficient institutional coordination and ensure that different governmental institutions are complementing each other in service delivery to the citizens.

i. The government needs to ensure the availability of suitable infrastructure and better security situation so that the civil courts are shifted to the respective district and Tehsil headquarters as soon as possible. If practicable, the idea of mobile courts, once introduced in the Peshawar region of KP, be extended to the tribal districts for ensuring speedy and cost-effective justice at the doorsteps.

j. For having a robust and widely acceptable ADR apparatus, the government should conduct the local government election in the tribal districts and build the capacity of elected representatives on contemporary mediation and negotiation methods.

k. The Government should make a work plan for the trial of terror suspects detained under the AACPR by the regular courts of competent jurisdiction and execute gradual withdrawal of the military, repeal of AACPR, and handing over the tribal districts to the civilian law enforcement agencies.

1- See, for instance, CODE PAKISTAN, ICRC, and NACTA, Addressing Overcrowding in Prisons by Reducing Pre-Conviction Detention in Pakistan (May 2018).

INTRODUCTION

In May 2018, the 25th Constitutional Amendment merged the erstwhile Federally Administered Tribal Areas (FATA) with the province of Khyber Pakhtunkhwa. The 25th Constitutional Amendment annulled the Frontier Crimes Regulation (FCR) and all other special laws and administrative arrangements that were applicable only in FATA. In order to fill the legal and administrative gap and facilitate the complicated legal and administrative reform process required for a thorough execution of the merger plan, the President of Pakistan, before the 25th Constitutional Amendment, promulgated an interim regulation called the FATA Interim Governance Regulation, 2018, effective for the transitional period of two years, i.e., until May 30, 2020. The interim regulation provided time to the concerned authorities to come up with mechanisms to replace the FCR with the administrative, judicial, legislative, law enforcement, revenue, and financial systems applicable in Khyber Pakhtunkhwa.

As the transitional period of two years for the FATA Interim Governance Regulation 2018 has already ended, there is a need to ensure that the process of the merger of the Khyber Pakhtunkhwa Merged Districts (KPMD) results in the establishment of security and justice services in KPMD that are fair, equitable, and focused on people's welfare. To secure a sustainable justice, and governance system in 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 around law enforcement institutions like the Levies and Khasadars, as well as other related issues. In order to do that, there is a need not only to learn from international best practices but also from similar past national examples. One such example is provided by the case of the merger of the former princely States of Chitral, Dir, and Swat with the federation of Pakistan. The mergers of Malakand Division and Torghar could provide essential lessons related to short- and long-term impacts on social stability and people's experience of justice.

Given the aforementioned backdrop, this study attempts to drive lessons from the government's attempts in Malakand Division to establish security and

justice services after the merger, and to inform policy makers and stakeholders responsible for the KPMD. It evaluates the successes and failures of the Malakand experience, their impact on stability, and the impact on citizens' experience of justice.

The study basically addresses two separate but related questions: first, whether the provision of justice in Malakand had an impact on short- and long-term stability, recalling that Malakand descended into periods of Islamic militancy in 1994 and 2007. Second, the study addresses the impact of the post-merger settlement on people's experience of security and justice, whether there was any change in how people resolved their grievances and whether there was any discernible change in the justice outcomes experienced by the people. The study separates these two problem statements so as to avoid the assumption that enhanced stability leads to better justice outcomes for people.

While attempting to address the two abovementioned subjects, it yields interesting insights into the similarities and differences in the processes adopted for the Malakand merger in comparison to the KPMD merger and how those were received by citizens in the case of Malakand. It addresses the following general questions:

- What were the legal and law enforcement implications of the shift from the pre-merger security and justice system to Malakand's post-merger security and justice system? What are the similarities/differences with KPMD?

- What challenges did the administration/judiciary face in establishing security and justice service provision in Malakand? What can the KPMD administrators/ judiciary learn from the Malakand experience? How are these challenges relevant to KPMD? What would the Malakand administrators/judiciary do differently, or what would they say to their KPMD counterparts today?

- How did the agreement between the KP government and TNSM in 2008—that subsequently led o the Nizam-i-Adl Regulation—affect the provision of security and justice in Malakand Division? What can we learn from that?

In the context of the impact of the merger of Malakand Division on stability, the study answers the following questions:

- How did the post-merger justice and law enforcement system contribute to security/insecurity, or stability/instability in Malakand/Torghar?

- What measures did the Malakand/Torghar administrators/judiciary adopt to ensure that the roll out of security and justice services did not cause instability, or inflame conflict between stakeholders, and complied with 'do no harm' principles?

- How did stability/instability in Malakand impact on public confidence in State institutions for resolving conflict and providing justice?

- What is the risk of insurgency/militancy (akin to TNSM in Malakand) starting in KPMD? What would be their major demands, and what would be the likely geographic scope?

In the context of the impact of the merger of Malakand Division on people's experience of security and justice, the study answers the following questions:

- How did citizens feel about the security and justice framework set up in Malakand/Torghar? Did it help itizens to resolve grievances? Was the system used?

- How did the Malakand/Torghar security and justice framework sit alongside, or complement/conflict with existing customary practices for dispute resolution?

- How did the post-merger system handle FCR- sanctioned grievance resolutions? What factors influenced a citizen's decision as to whether they pursued their grievance through the formal or customary systems?

- What process did the Malakand/Torghar administrators/judiciary adopt to understand citizens' needs for security and justice services? How did the administrators/judiciary manage public expectations about the in-coming security and justice framework?

- How did the administrators/judiciary take account of

disadvantaged people, or those furthest from State service provision? Did Malakand/Toghar's shift from the pre-merger laws equitably improve justice options and services for all citizens, or did particular groupings benefit disproportionately?

- How did the post-merger judicial and law enforcement capability in Malakand/Torghar impact on the social, political, legal, economic, and security rights of the citizens of the region?
- What challenges did citizens experience in accessing the Malakand/Torghar formal security and justice services?
- Are there any differences between Malakand's various districts with respect to security and justice?

A NOTE ON THE METHODOLOGY

The study began with a comprehensive literature review of published books, research papers, civil society publications, government notifications, laws enacted and extended to Malakand and Torghar, administrative decisions of the Government of Khyber Pakhtunkhwa and media reports. The aim of the literature review was to understand the process of abolition of the princely States of Malakand Division, the establishment of PATA and the merger of Torghar, and the process adopted for institutionalising justice and security apparatus in the region and its similarities and differences with the process adopted for the KPMD merger. Alongside the abovementioned methodology, however, several interviews were conducted with key relevant government/judicial functionaries - such as serving and retired judges, police officers, bureaucrats, and military officers - to acquire first-hand accounts of the practical issues faced by the State and any technical lacunae in the process adopted for the mergers of Malakand Division and Torghar. In order to find answers to questions related to people's experiences of security and justice outcomes, Focus Group Discussions (FGDs) were also conducted with male and female representatives from the seven districts of Malakand Division, as well as Torghar district, and a citizens' perception survey was conducted among a sample of, at least, 30 respondents from each district through locally engaged survey volunteers from each of the target districts. Besides ensuring representation of both male and female respondents, the survey also included respondents from various socioeconomic and educational backgrounds, as well as age groups.

PART I

MERGER OF THE PRINCELY STATES: IMPLICATIONS FOR SECURITY AND JUSTICE PROVISION

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PRE-MERGER POLITICAL/ ADMINISTRATIVE DISPENSATION

Prior to the merger of the region with the NWFP (now Khyber Pakhtunkhwa) province in 1969, the districts constituting Malakand Division were primarily divided into three princely states and the Malakand protected area directly under the control of the provincial government. Whereas the Malakand protected area consisting of the present Malakand District was directly under the control of provincial government, the princely states were largely independent from the influence of the federal and provincial governments and governed by the rulers of the concerned States, with the help of their self-constituted administrative machineries.

Swat

In 1849, the Islamic State of Swat was established by Sayyid Abdul Akbar Shah, who was succeeded by Akhund Abdul Ghaffar, popularly called Saidu Baba (1857 to 1877).[1] From 1878 onwards, the Islamic State of Swat remained in abeyance until 1915 when the Yusufzai State of Swat (1915-1969) was founded after a "Jirga of a section of the right bank Swat valley" ended the rule of the Nawab of Dir and established the princely State of Swat.[2] Spread over an area of about 8,250 square kilometres, the Yusufzai State of Swat consisted of the present districts of Swat, Buner, and Shangla. The State of Swat was recognized as a princely state by the British Government in 1926.[3] While dependent on the British Crown for currency, foreign affairs, telegraph and postal services, it remained independent in all other matters of internal administration.[4]

After the independence of Pakistan in 1947, the State signed an instrument of accession with the dominion of Pakistan, duly accepted by the then Governor General, Mohammad Ali Jinnah on November 24, 1947.[5] With the accession, the State became dependent on the Government of Pakistan on the aforementioned issues but maintained autonomy over its internal administration.

Dir

Dir State was initially established by Akhund Ilyas Baba in the year 1626. Due to internal conflicts and expeditions from the neighbouring territories, including Afghanistan, the rule of Dir State never extended beyond the jurisdiction of Dir. In 1895, Nawab Mohammad Sharif Khan seized the throne with the support of the British forces, but his rule was not formally recognized by the British Government until 1897 when the title of Nawab Bahadur Khan was conferred upon him and Dir was recognized as a princely state.[6]

In 1947, Dir State acceded to Pakistan but retained the status of a princely state until 1969, when it was formally merged into the province of NWFP (now Khyber Pakhtunkhwa). Mohammad Shah Jehan, who ruled the State from 1925 to 1961, was deposed by the military government under General Ayub Khan on October 8, 1960. With his fall from power, the Government of Pakistan started exercising its influence in the internal matters of the State of Dir through a Deputy Commissioner (a civil servant appointed as the head of the administration of a district by the government), who by then was called the prime minister. Mohammad Shah Jehan was succeeded by his son Nawab Mohammad Shah Khisro in 1960, who like his father before him was also deposed by the federal government in June 1967. Subsequently, the State of Dir was declared a tribal agency, operating under the administrative control of the Political Agent in accordance with the FCR of 1901.[7]

Chitral

The princely State of Chitral, which is now known as District Chitral is located in the northwest region of Khyber Pakhtunkhwa, and shares a border with Afghanistan, Gilgit-Baltistan, Swat, Dir, and provides access to Tajikistan through the Afghan Wakhan Corridor. Covering an areas of 14,850 square kilometres, Chitral has a population of 447,362, according to the 2017 national census.[8]

Historically, Chitral has remained a source of contention for different civilizations, such as the Kushan, Gandaharans, the Kalash tribes, Arabs, Iranians, Afghans, and Mongols.[9] The Islamic Raees Dynstay in 1320, and the Katoor dynasty in 1590 were both founded in Chitral, with the latter establishing a strong administrative and financial system in the area. The

Katoor dynasty ruled Chitral until it was merged with Pakistan in 1969.[10] Initially, Chitral was an independent monarchy, but in 1885, the British Government negotiated an alliance with the ruler of Chitral and recognized it as a princely state entitled to sovereign control over its internal administration.[11] A similar arrangement was agreed upon when the state of Chitral acceded to Pakistan in 1947.

1- Fakhrul Islam, "Swat State during 1849-1969: A Historical Perspective" Pakistan Journal of History and Culture, Vol. XXXV, No. I. (2014), available at: http://www.nihcr.edu.pk/Latest_English_Journal/pjhc%2035-1,%20(2014)%20Final%2022.6.15/6%20Swat%20State,%20Fakhar%20ul%20Islam.pdf

2 - Sultan-i-Rome, "Administrative System of the Princely State of Swat," Journal of the Research Society of Pakistan Vol. XXXXIII, No. 2 (2006), 181.

3- Ibid.

4- Ibid.

5- Ibid.

6- Suleman Shahid, Gumnaam Riyasat (The Anonymous State), Urdu (Vol-1)

7- Interview with a former Secretary Law of Khyber Pakhtunkhwa.

8- Official statistics of the Government of Pakistan

9- IUCN, Chitral: A Study in Statescraft (1320-1969), IUCN Pakistan, Sarhad Programme (2004), available at: https://www.iucn.org/ sites/dev/files/import/downloads/chitral_a_study_in_statecraft.pdf

10- Interview with a former Secretary Law of Khyber Pakhtunkhwa.

11- Ibid.

PRE-MERGER GOVERNANCE, SECURITY, AND JUSTICE

Swat

Among the three princely states, Swat has always been considered the more prosperous and peaceful one with relatively developed infrastructure and access to basic facilities, such as "schools, hospitals, roads and communication systems."[1] The state of "peace and order"[2] in the region has been largely attributed to the influence of the rulers of Swat, whose official title was Wali. Looking back at the reign of the last Wali of Swat, Miangul Jahanzeb (1949-1969), he "sought to build on his father's achievements by providing improved access to higher education, hospital facilities, and modern roads in order to promote economic and social development."[3] Many of these achievements are still remembered by the current-day residents of Swat who speak of the last Wali as an enlightened and progressive ruler who invested resources into improving the area.[4] A senior lawyer from Saidu Sharif, Swat, recalled in an interview that the roads throughout most parts of Swat used to be in such good condition that at the time, he was able visit Mahudand, a small tourist spot beyond Kalam in his own two-wheel drive; a trip that can no longer be made without the use of a four-wheel drive vehicle. He bemoaned the lack of advancement and progression in the region, noting that much of the infrastructure had deteriorated over the years.

Besides the physical infrastructure, there also existed a well-developed system of administration with the Wali as the centre of authority. From 1915 to 1969, a total of three Walis ruled over the princely State of Swat, namely, Abdul Jabbar Shah (1915-1917), Miangul Abdul Wadud (1917-1949), and Miangul Jahanzeb (1949-1969) who was the last Wali. In the absence of proper records detailing the rule of the first Wali, little can be said about his administration, but the subsequent two adopted an organized administrative system. With the internal administration of the State falling outside the jurisdiction of external influences – be it the British Government or the Government of Pakistan - the Wali had absolute and

centralized powers and primogeniture was the accepted principle of succession. The administrative structure of the region was such that the Wali was the supreme head of the State with power over all state departments.[5] The important ministers were the Minister of State, Minister of Finance, and the Commander-in-Chief of the armed forces, all of whom assisted the Wali in the administration of the State. The "Swat State was administratively divided into a number of administrative units called Hakimis and Tahsils"[6] that were governed and managed by Hakims and Tehsildars, respectively. Tehsil was the smallest administrative unit of the state where the appointed Tehsildar possessed executive, judicial, and financial powers. Hakimi was a relatively larger unit in which the Hakim held administrative, judicial, and financial authority. Like all other officials and servants, the Tehsildars and Hakims were appointed by the Wali and answerable to him. As there were no written rules or protocols during the reign of the Wali and the rules in practice depended on the personal whims of these rulers, dismissal from service was very common.[7]

Nonetheless, there was a proper tax and revenue system and all public services were provided and accommodated through a system of taxation.[8] There was a licence renewal fee, road fee, motor vehicle and tanga (cart) fee, and 13.33 percent of all gross products were to be paid in tax. In addition to Ushr (tithe) on crops, "taxes/ushr were applied on milk cows and buffaloes, herds of goat and sheep, orchards, bee-hives, and vegetables."[9] The state also had an efficient judicial system in which all kinds of disputes were resolved in a speedy manner without any court charges except for a small fee to be paid by petitioners.[10] The Wali would appoint Qazis (judges/judicial officers) all over the State at the village, Tehsil, and Hakimi levels so that litigants would have access to justice at their doorsteps and would not have to travel far to reach the courts.[11] There was also a proper mechanism of appeal against a verdict of a lower court. To this end, the Tehsil Qazi would not only deal with the Tehsil level cases but would also hear appeals against the decisions of the village Qazi. Similarly, the Qazi working in every Hakimi acted as higher court of appeal. The most senior court was in the capital of the state, and consisted of a Chief Qazi, as well as other learned scholars of Islamic jurisprudence who would adjudge cases and work as the supreme court of Islamic jurisprudence and the highest court of appeal. A number of interviewees, comprising both serving and retired officials, concurred that the justice system during the reign of the Wali was quick and efficient with

cases resolved expediently while the implementation of verdicts was decisive and sure. Interviewees further agreed that the justice system of the time was judicious and meritorious. One local narrated an incident from 1950, where the son of the Wali of Swat was sentenced to a fine and a demand for a public apology following a complaint of harassment by tourists from Punjab.[12] The overwhelming consensus among the interviewed locals was that the people of Swat were happy and satisfied with the provision of security and justice services under the rule of the Wali.[13]

Dir

Since its inception as a princely state, the administrative structure of Dir was largely dictatorial. All the affairs of state, including security and justice, were under the direct control of the ruler, who was called the Nawab.[14] Due to a deeply-rooted cultural and linguistic kinship, the ruling family maintained strong ties with Afghanistan, which carried on even after Dir acceded to Pakistan. Despite reliance on the Government of Pakistan for its security and economy, the State of Dir continued its use of Afghan currency and exercised limited autonomy in its diplomatic relations with neighbouring Afghanistan.

Although the system of governance of the princely States of Swat and Chitral was also dictatorial, the administrative system of Dir was further characterized by a lack of progressive thinking on the part of the Nawab who was known to be despotic in his methods of controlling the population. The will of the Nawab often took precedence over Sharia[15] and customary law as the ultimate law of the land. He also believed in suppressing his subjects for effective rule, which was evident from his policies, which included a complete ban on education, while health, communication, and infrastructure were neglected all together. The justice system while expeditious was also not focused on the welfare of citizens. However, the severe nature of punishments under his rule ensured that the law and order situation remained under control.[16]

The judicial hierarchy in Dir was such that the highest authority rested with the Nawab while Tehsildars governed the smaller administrative units. Islamic Sharia and local customary law or rewaj, also commonly referred to as Dastur-ul-Aml, were both in practice and it was upon the litigants to decide whether they wanted their cases decided under Sharia or Rewaj.[17] Those who elected to have their cases heard under Sharia law would use Qazi

courts, which were functional at Tehsil and Hakimi level, while those who opted for customary law/rewaj, would use administrative cum judicial tribunals that were presided over by the Tehsildar, Hakim, and Musheer. Under Rewaj, courts had the authority to refer cases to the Jirga (councils of the tribal chiefs).

The States of both Dir and Swat had a written customary code, which was accessible to all the judicial tribunals.[18]

Chitral

Due to the settlement of many and varied civilizations in the region, the social fabric of Chitral has remained quite heterogeneous, and even today, different languages are spoken throughout the district. Among the many languages, Persian, in particular, has a strong history as it was the official language of both the Raees and Katoor dynasties. In the time of the latter, despite a monarchical regime, Chitral was governed by democratic values and had in place a strong administrative, financial, judicial, and law enforcement system. Furthermore, all the major tribes within the region were given representation in the cabinet.

Highly impressed with the arrangements, Lord Curzon (1897-1902) while complimenting the political system of Chitral, remarked:

"Chitral, in fact, had its parliament and democratic constitution. For just as the British House of Commons is an assembly, so in Chitral, the Mehtar, seated on a platform and hedged about with a certain dignity, dispensed justice or law in sight of some hundreds of his subjects, who heard the arguments, watched the process of debate, and by their attitude in the main decided the issue. Such 'durbars' were held on most days of the week in Chitral, very often twice in the day, in the morning and again at night. Justice compels me to add that the speeches in the Mahraka were less long and the general demeanour more decorous than in some western assemblies."[19]

The justice system in Chitral was headed by the Mehtar, who was the ultimate adjudicating authority. Local customs, as well as Islamic Sharia constituted the major substantive and procedural law of the land. A judicial council of 10 members, referred to as Kausal, operated at the federal level with sub-committees at the district and local levels. A parallel Sharia Court system known as Mizan-e-Sharia was also in place, consisting of religious scholars and Islamic jurists. As a result of this collective responsibility, the

crime rate in the State was very low and people in general were law abiding.[20]

Torghar

The security and justice system in pre-merger Torghar was altogether different than that of the princely states. Administratively, it was a sub-division of district Mansehra but neither the laws, nor the security and justice mechanisms in place in Mansehra were extended to Torghar.[21] The area was administered by the Deputy Commissioner of Mansehra with assistance from the Administrator/Tehsildar of Torghar but the positions were purposed to execute the policy and development decisions of the provincial government.[22]

In terms of judicial power, the Deputy Commissioner and Tehsildar had none. Any arising disputes, whether civil or criminal, were resolved by private Jirga under customary law; the verdicts of which were binding on all parties involved. The Jirga also had the power to implement its decisions.[23] More so, Torghar had an effective security and justice system for maintaining law and order, despite the fact that no law enforcement agency had access to the region.[24] According to the locals from Torghar, Jirga decisions on punishments were severe and the process of implementation was so quick that the crime ratio in the area was negligible. In cases of rape or murder, the punishment of the accused by the Jirga was to be killed by the family of the victim, and none among the community would dare to defend or harbour the offender.[25]

1- DK Khattak, The Battle for Pakistan: Militancy and Conflict in the Swat Valley, (Washington DC: New America Foundation, 2010), 1.

2- Ibid.

3- J Fleischner, Governance and Militancy in Pakistan's Swat Valley (Washington DC: Center for Strategic and International Studies, 2011), 2.

4- Interview with a senior lawyer in Saidu Sharif, Swat.

5- Sultan-i-Rome, "Administrative System of the Princely State of Swat," Journal of the Research Society of Pakistan Vol. XXXXIII, No. 2 (2006), 181.

6- Ibid.

7- Interview with a senior lawyer in Saidu Sharif, Swat.

8- Interview with Professor Dr. Sultan-i-Rome, historian, an academician and political commentator from Swat who has written extensively on Swat.

9- S Rome, "Administrative System of the Princely State of Swat," 188.

10- Professor Dr. Sultan-i-Rome stated during an interview that contrary to common perception, there was no free justice as the applicant had to deposit five aanas (One-sixteenth of a Rupee) to lodge an application in the court of Qazi.

11- Sultan-i-Rome, "Judicial System, Judiciary and Justice in Swat: The Swat State Era and Post State Scenario," Journal of the Pakistan Historical Research Society 49: 4 (2001).

12- Focus Group Discussion held in Swat on October 13, 2020.

13- Several interviewees agree that law and order and security was not an issue in Swat and the rest of Malakand at that time because of very strict and dictatorial rule of the rulers.

14- Focus Group Discussion held in Swat on October 13, 2020.

15- Defined as the laws contained in the Holy Quran, traditions of the Holy Prophet, Ijma (consensus) or religious scholars, and Qiyas (opinion of individual religious scholar).

16- Fazlul Haq & Fazlur-Rahman, "The History of Dir Valley Pakistan: From Aryans up to the Arrival of Afghan Pashtuns," Central Asia Journal, 75, 1-11.

17- Altaf Hussain Ashraf, The Story of Swat as Told by the Founder Miangal Abdul Wadud Badshah Sahib to Mohammad Asif Khan, (Eng. Trans) Peshawar, (Pakistan: Ferozsons Ltd, 1963).

18- Interview with a former Secretary Law of Khyber Pakhtunkhwa.

19- "Democratic to the Core!" Chitral Today, March 7, 2013, available at: http://www.chitraltoday.net/2013/05/17/democratic-to-the-core/

20- Interview with a former Secretary Law of Khyber Pakhtunkhwa.

21- Torghar was merged in the Province of Khyber Pakhtunkhwa, by order of the President of Pakistan, dated 27 January, 2011 and given the status of a District.

22- Focus Group Discussion held in Torghar on October 17, 2020.

23- Ibid.

24- Ibid.

25- Ibid.

TRANSFORMATION FROM PRINCELY STATES INTO DISTRICTS

In 1969, the States of Swat and Chitral were abolished and merged into Pakistan under Martial Law Regulation No.1 of 1969. But in the case of Dir, the Government of Pakistan had already started exercising its influence in the State's affairs by 1960 when Nawab Shah Jehan Khan was deposed by the federal government, and an advisory council - comprising a Chief Adviser and 20 members - was constituted for assisting the ruler through W.P. Regulation No.1 of 1960.[1] This regulation required that the Chief Adviser be appointed by the ruler, in consultation with the Governor of West Pakistan, thereby, legally ensuring the influence of the Governor in the administrative affairs of the princely State of Dir.[2] In October 1961, the Pakistan Penal Code (PPC) and FCR, 1901 were extended to the territory of Dir,[3] allowing for a Political Agent, who by then was called the Prime Minister of the State, to exercise administrative powers.[4] Through the W.P. Regulation No.2 of 1967, Dir state was formally declared a tribal agency and the advisory council was abolished. In addition, the Nawab was deposed and kept from exercising any legislative or administrative functions that fell within the competence of the provincial government. Furthermore, all the powers of the Nawab were conferred upon the Political Agent, under the FCR, 1901.[5]

It was later that through W.P. Regulation No.1 of 1969, the powers of the rulers of Swat and Chitral were also withdrawn and conferred upon officers of the province of West Pakistan. Under section 2 of the Regulation, the princely states were renamed "the tribal areas of the former states of Dir, Chitral and Swat."[6] The regulation further provided that all laws, rules, regulation, orders, notifications, and customs backed by the force of law would be applicable to the merged areas until altered, repealed, or amended by the competent authority.[7] More so, all the services and taxes of the states were diverted to the Government of West Pakistan. Through this regulation, the Government of Pakistan effectively abolished the powers of the rulers of the princely states but allowed them to retain special status as a 'tribal area'.[8]

In 1970, through the West Pakistan (Dissolution) Order (P.O.No.1 of 1970), the merged princely states of Malakand division—like many other states in different parts of the country that had been incorporated into Pakistan—were formally declared as part of the province of NWFP. They were converted into smaller administrative units known as districts and put under the administrative authority of the Deputy Commissioner. These districts retained special status under the Interim Constitution of Pakistan, 1972,[9] and later under Article 246(b) of the Constitution of Pakistan, which designated these three districts as the Provincially Administered Tribal Areas (PATA), alongside Torghar and other tribal areas adjoining the Hazara division.[10]

1- Dir (Advisory Council) Regulation, 1960 dated Oct 25, 1960.

2- Ibid., Article 3.

3- Through W.P. Regulation No.2.

4- Dir (Extension of Laws) Regulation, 1961.

5- Dir (Administration) Regulation, 1967.

6- Dir, Swat and Chitral (Administration) Regulation 1969 date Aug 15, 1969.

7- Ibid., Article 7.

8- Sultan-i-Rome, "Tahrik Nifaz-e-Shariat-e-Muhammadi and Democracy: TNSM's Critique of Democracy," Pakistan Vision Vol. 13 No. 2. (2012), available at: http://pu.edu.pk/images/journal/ studies/PDF-FILES/Artical-6_V13_No2_2012.pdf

9- Article 260, Interim Constitution of Pakistan, 1972

10- Khalid Aziz, Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy (RIPORT, 2010); Sultan-i-Rome "Crisis and Reconciliation in Swat," Pakistaniat: A Journal of Pakistan Studies Vol.3, No.1 (2011).

LEGAL AND LAW-ENFORCEMENT IMPLICATIONS OF THE MALAKAND DIVISION MERGER

Where the merger of Torghar in January 2011 resulted in the formal mainstreaming of the Torghar area and was welcomed by the population at large, the Malakand merger created significant legal hurdles that gradually led to a chain of events culminating in insurgency and militancy, with serious implications for the residents of the area and beyond. After the merger, Pakistani laws replaced the old legal system of the princely states but initially the local customs of the states were still allowed to be used for governance.

Under Article 247(2) of the Constitution of Pakistan, the President had the authority to issue directives to the Governor of Khyber Pakhtunkhwa for administrative purposes related to Malakand. Similarly, under Article 247(3), the Khyber Pakhtunkhwa Provincial Assembly had no power to legislate for the area unless the President of Pakistan approved a particular legislation. Thus, on account of the special status under the Constitution of Pakistan, these districts, unlike other districts of the country, were governed by a different set of rules and regulations, which were promulgated by the Governor of Khyber Pakhtunkhwa with the approval of the President of Pakistan.

According to the locals of the Malakand Division, the merger was announced in haste and with ill-preparation, and by following through with its plan in such a manner, the government failed in its responsibility of providing quality services to the people of the region, in terms of legislation, equitable taxation, social welfare, health, education, justice, and law enforcement.[1] Thus, instead of empowering the residents and providing them their due rights, the merger deprived the residents of the area of their constitutional freedoms and rights. Unfortunately, the government failed to realize that exclusion from the equality clause of the Constitution of Pakistan, vis-à-vis provisions about freedoms and rights, could lead to the marginalization of people and increase their sense of alienation. Owing to

such an exclusion from the mainstream, "the rights of the people suffer[ed] and it also allowed] a manipulative government to exploit the people of such areas for foreign policy objectives."[2]

The merger and subsequent promulgation of the NWFP Regulations No.1[3] & 2[4] of 1975 – more commonly referred to as the PATA regulations - also led to the creation of a diarchy, compounding the administrative, security, and law and order situation in the region. While the provincial government had the authority to maintain law and order, it had no power to make and promulgate laws independently for the area under the PATA regulations. The Governor of the province and the President of Pakistan had the ultimate power to approve laws enacted by the provincial government, despite the fact that neither of the two was accountable to the people of the province through the provincial legislature. This created an anomalous situation, particularly in cases where there were differences of opinion between the Governor and the President or the Governor and the provincial government regarding a course of action or policy to be followed.[5]

In this context, a former official of the Khyber Pakhtunkhwa judiciary and an authority on the legal and judicial developments of Malakand noted that "under Article 247 of the Constitution, the Governor was all powerful and no Act of Parliament or the Provincial Assembly was applicable to PATA unless validated by him."[6] He further stated that it was because of this Article that the people in PATA suffered more.

This restriction clause imposed by Article 247 was contradictory to the political reform process that was initiated in August 1970, whereby the National and Provincial Assemblies (Elections) Ordinance 1970 was extended to PATA, allowing candidates from PATA to be elected to the assemblies.[7] In March 1972, the NWFP People's Local Government Ordinance was extended to the former princely states and the Malakand protected area,[8] while in January 1977, Representation of the People Act 1977 was extended to PATA and Torghar. These reforms in policy were, however, useless because the representatives of Malakand Division could neither independently legislate, nor oppose the extension of laws to their own constituencies as they were subservient to the will of the President. Similarly, since no law was extended to the Torghar tribal area, the legislators of the area could not make any legislation for their constituency.

While a different set of legislative rules were imposed on the former

princely states, the repeal of the FCR in 1973, meant they had the same administrative system as was implemented in other part of the province. The Deputy Commissioner was the executive head of the district, reporting to the Commissioner at the divisional level while assisted by the Assistant Commissioners and Tehsildars at the Tehsil level. However, neither the Deputy Commissioner nor the Commissioner were able to implement the authority conferred to them due to resource deficits and a lack of communication between them and the provincial government.

This was demonstrated in the land and property issues that became quite prominent in the region when the revenue department, working under the authority of the Deputy Commissioner and the Commissioner, was unable to resolve land settlements and the demarcation of properties. The legal arrangements on the side of the provincial government were also insufficient for dealing with the property issues arising out of the merger process.[9] This problem of land settlement and determination of rights of the properties only devolved further and contributed to a lot of enhanced and delayed civil litigation.[10] And since the judicial system was neither expeditious nor operating to the satisfaction of the locals, the situation resulted in unrest leading to conflict.[11]

In 1974, the government extended the Customs Act to Malakand to bring the area under prevalent tax and revenue laws. However, when people demonstrated against it, it was withdrawn by the government.

This was the first of many instances that illustrated the government's lack of political will and wherewithal to properly mainstream the merged districts. The same year, the Forest Act of 1927 was extended to PATA and shortly after in 1975, forests were declared as protected property.[12] This too turned into a matter of concern for the general population and invited serious resentment.

As for the areas of law enforcement and criminal investigations, both were equally shrouded in confusion. Despite the extension of the Police Act to Swat, Dir, and Chitral in January 1971, colonial law enforcement apparatuses in the form of levies and scouts were still operational, along with the paramilitary force of the Frontier Constabulary (FC).

Disruption of the judicial system

In 1970, the FCR, 1901 and several additional laws[13] were extended to

the Malakand region via the Tribal Areas (Application of Laws) Regulation, 1970.[14] This regulation resulted in the establishment of the Courts of Sessions and Magistrates but the enforcement of statutory procedural laws alongside conflicting customary law became a major source of legal concern in the region since FCR had inherent prevailing effect over customary laws.[15] The same day, the jurisdiction of the Supreme Court and High Court was extended to the region but only in criminal cases.[16] In January 1973, the FCR was repealed[17] and in the following month, Act No. XXVII of 1973 extended the jurisdiction of the Supreme Court and High Court to PATA.[18] Later in April 1974, a new set of laws[19] were once again extended to PATA, resulting in the establishment of Civil and Revenue Courts.[20] The jurisdiction of the Civil Courts was, however, abridged through the PATA Regulations, which yet again deprived the people of the former princely states of their fundamental rights of equality and equal protection under law as enshrined in Article 25 of the 1973 Constitution of Pakistan.

The PATA Regulations provided for nearly the same procedure for administration of criminal justice and civil dispute resolution as the FCR. Section 3 of Regulation No.1 provided that all offences under the PPC, except Chapters 6, 7, 8, 9, 9-A, 10, and 11 were to be tried by the Jirga and further supplied effect to the regulation, trial by Jirga would not be governed by the Code of Criminal Procedure or the Evidence Act. Instead, the regulation empowered the Deputy Commissioner to take cognizance of the offences and appoint a 5-member Jirga to be headed by an executive officer of the government not below the rank of Tehsildar. The Jirga had to submit its findings of the trial to the Deputy Commissioner who then had the authority to pass judgment. This judgement could be appealed to the Commissioner, whose orders could further be revised by the provincial government through the Home and Tribal Affairs Department. The offences exempted from the application of the regulation were only those against the state, government functionaries, and armed forces.

Similarly, Section 3 of Regulation No.2 provided that all civil disputes and disputes between landlords and tenants would be heard and adjudicated upon by the Jirga, except for those cases initiated by or against minors, the mentally retarded, and the government. Application of the Civil Procedure Code and Evidence Act was removed, giving local customs and norms the force of the law using the same procedures provided for in criminal cases. Those cases exempted from application of the regulation were heard and

decided upon by ordinary courts of civil and criminal jurisdiction. These two parallel judicial systems remained popularly in use in PATA until February 24, 1990 when the regulations were set aside by the Peshawar High Court (PHC).[21]

When the question of legal reform in the justice system arose as part of the process of mainstreaming, the society of the region was divided. The social elite, i.e. Khans and Maliks, wanted the PATA regulations to continue for their own vested interests, whereas, the bar associations, some of the political elite, and the political parties—who in response to public resentment—wanted the extension of regular law enforcement and justice mechanisms to the Malakand region. According to a senior lawyer from Swat, society within the former princely states was divided on tribal lines, with the Yousufzai tribe in favour of maintaining the status quo while other minority tribes advocated for progressive change.[22] In light of the dissatisfaction of many in the community, the provincial government commissioned Justice Allah Bakhsh of the PHC, in 1981, to gauge public opinion and furnish a report on the feasibility of the extension of regular laws. On November 15, 1982, he submitted his report before the provincial government. The report, which was never made public, was produced before the PHC during the hearing of Mohammad Irshad's case[23] where the conclusion of the report was alluded to by the PHC in the following words:

"It would, therefore, be in the interest of national integrity that uniform civil and criminal laws are enforced in the District of Dir, Swat and Chitral as well as the Malakand protected area and the entire Division is brought at par with the other parts of the country in the field of administration of justice. The `Riwaj' has outlived its utility and the people of this Division deserve to get rid of the evils of `Riwaj' which were perpetuated during the tyrannical rule of the despotic Nawabs.....It is, therefore, recommended that in view of the real need of the hour and in the interest of national integrity, the PATA Regulations enforced in the District of Dir, Swat and Chitral be replaced by the normal laws of the country and the entire Provincially Administered Tribal Area be brought at par with the other parts of the land."[24]

Indeed, the hasty implementation of the merger and the discriminatory regulations that accompanied it, coupled with "poor governance, weak dispensation of justice and lack of reform to mainstream

the [region]" created serious legal and administrative implications in the administration of justice.[25] This happened primarily because, even though Malakand Division was officially merged with Pakistan, "there was no plan for how it was to be transformed from a princely state where all the power was vested in a ruler to a district working under normal laws."[26] Indeed, the situation was such that "the full writ of the superior courts [did] not prevail and fundamental rights [were] not available. In other words, the region [was] kept as a marginalized part of Pakistan."[27] Many have posited that the religious extremism, rampant insurgency, and subsequent security challenges that emerged in Swat and the rest of the Malakand region were because of "its incomplete merger and integration into Pakistan after the state was merged in 1969."[28]

When the Jirga laws (1969-1990) proved to be a failure, the government incorporated the option of Sharia law in the shape of the Sharia Regulations of 1994, 1999, and 2009. However, these Regulations only had a limited impact; one of the main reasons for this was the hybrid mix of laws i.e. Sharia law, the formal legal system of Pakistan, and Alternative Dispute Resolution (ADR).

The emergence of TNSM

In 1988, a Jirga of local notables met the Chief Minister of NWFP to settle the confusion regarding the legal, judicial, and law enforcement system in place. In response to a divide in opinion between the lawyers and social elite in attendance, one of the Maliks presented a third option for the imposition of Sharia law.[29] On the direction of the Chief Minister, another Jirga was convened by the Commissioner of Malakand, but yet again several of the Maliks called for the imposition of Sharia law. In 1989, all the supporters of Sharia convened a grand Jirga, which was also attended by seven representatives from each of the major political parties of the area.[30] The members of the Jirga forcefully declared their demand for imposing Sharia law throughout the Malakand Division. Maulana Sufi Mohammad, an activist of Jamat-e-Islami (JI), was chosen as the convener of the movement and the members in attendance pledged physical and financial resources to the fulfilment of their agreed upon demand.[31]

The vacuum created by the failure of the government machinery to quickly and efficiently respond to and resolve these issues gave religious groups an opportunity to raise slogans for their demand of a just and

efficient administrative and legal system in the form of Sharia law. Maulana Sufi Muhammad who had been following the situation after his return to Malakand from the Afghan jihad in the late 1980s became even more committed to his religious agenda. To this end, he established the Tehrik-i-Nafaz-i-Shariat-i-Mohammadi (TNSM) or the Movement for the Enforcement of Islamic Laws in 1989 in the lower Dir district. Although the movement remained largely inactive in the early 1990s, the continuing unsatisfactory state of affairs for the provision of justice and security, and the deteriorating law and order situation in the region emboldened the position of TNSM activists.

In 1985, Prime Minister, Muhammad Khan Junejo, lifted the state of emergency imposed on the country by President Zia-ul-Haq, allowing the PATA Regulations to be challenged by litigants before the PHC.[32] In February 1990, the PHC declared these regulations null and void under Articles 8 and 25 of the Constitution of Pakistan.[33] This judgement created a legal vacuum and acted as a catalyst for the TNSM's agenda of imposing Sharia law in the region.

As for the government, rather than utilizing this opportunity to address the grievances of the residents of Malakand regarding their constitutional rights in the Provincial Assembly or Parliament, it challenged the PHC's verdict in the Supreme Court (SC) of Pakistan. On February 12, 1994, the SC upheld the decision of the PHC and declared that "special laws were against the fundamental rights and that Malakand should be governed under normal Pakistani laws."[34] While this was a historic judgement, it was not implemented by the government.[35] According to a retired civil servant, the PHC's verdict on the PATA Regulations provided an ideal opening for the provincial government to extend ordinary laws and/or any other special regulations to the Malakand region in accordance with the wishes of the people. Such a move would have also suppressed the emergence of TNSM, which was gaining popularity day-by-day.[36] By not pursuing the aforementioned, the government lost its chance to rid the region of widely discriminatory laws, to promulgate new laws for Malakand, and to end marginalisation within the region.

But while the government missed this opportunity, the TNSM exploited it to come up with their own demands.[37] The SC's judgement revived TNSM's impetus to overhaul the corrupt, inefficient, and lethargic

justice provision system. The TNSM Chief, Sufi Muhammad, renewed his demand for the implementation of Sharia law and launched a mass protest in Dir on May 9, 1994, which swiftly spread to other parts of the Malakand Division. It was once again an "excellent moment for the province to mainstream the region into Pakistan rather than keep it as a special area."[38] However, the lack of political will and the vested interests of multiple stakeholders resulted in the continuation of the prevalent status quo. In May 1994, Sufi Muhammad called off his weeklong protest against the PPP-led government after being handed a copy of an ordinance signed by the acting Governor of Khyber-Pakhtunkhwa, Khurshid Ali Khan. The ordinance declared the extension of Islamic laws to the whole of Malakand Division with immediate effect.

Not satisfied with the government's initiative towards the effect of the above-mentioned, in November 1994, the TNSM started an armed campaign, occupying a number of government buildings and installations. Traders, smugglers, and even common citizens extended support to Sufi Muhammad as the existing status quo was beneficial to their own personal interests, and they were more concerned with protecting those interests than with any changes in the law governing their region.[39] In the case of the bureaucracy, for example, the "decision of the apex court deprived the executive authorities of a chunk of their judicial powers, [and so] they supported the activities of the TNSM tacitly."[40] Finally, Sufi Muhammad's unabated campaign forced the then PPP-led government to promulgate the specific laws for implementing Sharia law in the Malakand region.[41]

The occasional protests by TNSM activists continued, paralyzing the whole system each time, and eventually leaving the government with no option but to launch a security operation against them in which many TNSM members were arrested. However, after negotiations with the TNSM leadership, the government eventually released all the activists and agreed to their demands for the implementation of Sharia laws and withdrawal of the Customs Act from the Malakand Division.[42] This was not the end of insurgency and instability in Malakand. The Sufi Muhammad-led TNSM continued to play a game of cat and mouse with the government throughout most of the 1990s, but the situation finally came to a head in 2001 when US forces invaded Afghanistan.

Taliban insurgency in malakand and the repercussions for security and justice

The 9/11 incident and the subsequent US-led war against terrorism gave new impetus to TNSM in Malakand and beyond. Once again, TNSM leader, Sufi Muhammad, came to the fore to collect resources in the form of donations and to mobilize thousands of people to fight against the US-led NATO forces in Afghanistan.[43] In the backdrop of the many anti-US demonstrations that were taking place across the country, TNSM called for raising a 'voluntary army' to wage anti-US jihad (holy war) in Afghanistan.[44]

Consequently, in October 2001, an estimated 10,000 people - most of whom were ill-equipped in terms of both weapons and training - were led by Sufi Muhammad across the Pak-Afghan border in a convoy of over 300 vehicles.[45] A majority of these jihadis were either killed in aerial bombardment by US forces or arrested by anti-Taliban militias and detained in their own jails. After losing a large number of his supporters, Sufi Muhammad, along with his son-in-law Maulvi Fazlullah, returned to Pakistan where they were arrested by the security forces and sent to Dera Ismail (DI) Khan Jail. While the TNSM Chief remained in prison, Maulvi Fazlullah was released after serving a 17-month sentence in prison.[46]

Following his release, Maulvi Fazlullah opened an FM radio channel in his native village of Mamdheri[47] to give religious sermons and preach Islamic teachings. He continued to do so peacefully for some time but the rise of militancy and talibanization in FATA had spill-over effects in Malakand as well. As was seen in the case of Sufi Muhammad, the local administration was ineffectual in keeping Fazlullah from operating his illegal radio channel and broadcasting his anti-state narrative. As a result, under the leadership of Fazlullah, the Taliban gradually cemented its position in Swat and the rest of the Malakand Division. They further strengthened their standing in the region during the administration of Muttahida Majlis-e-Amal (MMA), a coalition of religious political parties that governed Khyber Pakhtunkhwa from 2002 to 2007 and were sympathetic to the militants in Swat. In this time, the Taliban expanded its influence beyond the Swat valley to various parts of the Malakand Division and became an integral part of the militant network known as Tehrik-i-Taliban Pakistan (TTP).[48] The liability of the MMA government in the rise of militancy in Swat has been further suggested by the locals of the region itself. In a survey focused on Swat, 75

percent of respondents were of the opinion that the provincial government of MMA in Khyber Pakhtunkhwa was sympathetic towards militants, while 82 percent responded that the provincial government did not effectively fight militancy.[49]

With the passage of time, the TTP began to openly challenge the writ of the State, creating serious law and order, and security challenges for the region. 2008 onwards, the TTP carried out heinous acts of violence to intimidate and terrorize their opponents, government employees, police and law enforcement officers, and the local population. But rather than taking firm and decisive action against the militants, the coalition government led by the ANP and PPP - both of which were secular political parties - made attempts to resolve the issue peacefully through negotiations. After several rounds of talks, the ANP-led government signed a peace deal with the Taliban in March 2009, accepting their demand pertaining to the implementation of the Nizam-e-Adal Regulation,[50] which formally established Sharia law in the Malakand Division.[51] Indeed, it can be argued that the government effectively ceded the control of Swat to the local Taliban faction led by Maulvi Fazlullah.[52]

As it was, the peace deal did not bring any normalcy or stability to the region. On the contrary, it led to the further deterioration of law and order in Swat as the Taliban moved and situated itself in the adjacent district of Buner by April 2009. This move was portrayed by national and international media "as being on the verge of a siege of Islamabad."[53] It was during this post-peace agreement interval that another event occurred, leading to an unprecedented national and international uproar. "A video of a teenage girl being flogged by a Taliban commander emerged and sparked outrage within Pakistan and around the world as a symbol of a situation that had gone out of control."[54] In response to the video, "both the national and international media […] propagated highly against the peace agreement."[55] With each passing day, the situation degenerated and the local population of Swat were left to the mercy of the Taliban militants with the government virtually non-existent.[56]

In May 2009, intense scrutiny and pressure from the international community finally spurred the military into action and they began an intense and decisive security operation against the Taliban militants in Swat. As a result, nearly three million people from Malakand Division were forced to

flee their homes, becoming internally displaced persons (IDPs). This mass exodus led to one of the biggest humanitarian crises in the history of the country. Furthermore, the evacuation was so abrupt that people were unable to make any arrangements in terms of shelter, transport or anything else. The lack of coordination between the civilian government and the military only added to the problem as without the logistical support for evacuation, some people had to walk almost 100 km on foot to reach safety. Others had to walk for several hours across extremely difficult mountainous paths without any water or food to sustain them. For those who were left behind, the days-long curfews and the suspension of electricity and telephone services resulted in miserable conditions where many people were forced to go without power and adequate food or water.[57]

In addition to the state of law and order and of security in the region, the militancy crisis also affected the socio-economic landscape. Prior to the conflict, Swat Valley was "a popular vacation destination known for its great natural beauty, pristine rivers and the Malam Jabba ski resort."[58] The area was "often compared to Switzerland for its natural beauty and picturesque landscape."[59] The thick forests with abundant timber available for construction and furniture, fertile lands and orchards, vibrant tourism sector, and developed service sector ensured that Swat had "a more productive economy than other parts of" of the province.[60] However, this economy was severely and detrimentally affected by Taliban's insurgency as "more than 400 hotels and restaurants were shut down after the militants moved into the district in 2007."[61] Indeed, the militants destroyed 67 hotels completely and partially damaged many others.[62] Soon after, tourism in Swat "ceased entirely because of security concerns."[63] Thus, the once thriving tourist destination and paradise-like valley became a zone for militancy and conflict.

There is no doubt that Taliban regularly targeted government buildings and installations including schools, health facilities, and communication infrastructure such as bridges and telephone lines. In the conflict, hundreds of houses, hotels, shops, and fields of standing crops were destroyed. Infrastructure such as bridges, health facilities, water supply/irrigation schemes, public office buildings, roads, electricity/gas networks, and hundreds of schools were either totally or partially damaged. According to a detailed 2009 post-conflict survey, the militancy crisis cost the Malakand region over one billion US dollars.[64]

The study also found that of the five districts of the Malakand Division (Swat, Buner, Dir Upper, Dir Lower and Shangla), Swat was the most affected in terms of human loss and damage to infrastructure. In fact, of the total 664 destroyed or damaged schools in all the five districts of Malakand, 447 schools were destroyed or damaged in District Swat alone.[65] More so, of the total 63 health facilities fully or partially damaged in Malakand Division, 18 were in District Swat alone. Similarly, out of the total 58 bridges completely destroyed or damaged in Malakand region, 43 were located in Swat, and of the total 1,329 km road segments affected during the conflict, 663 km of roads were in District Swat. From these figures, it is clear that the Malakand region suffered enormously during the Taliban insurgency as the conflict inflicted unprecedented loss on the economy, physical and social infrastructure, tourism, natural resources, and local administration of the area.

Imposition and impact of Sharia regulations

In 1994, the then PPP-led government surrendered to the demands of TNSM under Sufi Muhammad and promulgated the Provincially Administered Tribal Areas (Nifaz-e-Nizam-e-Sharia) Regulation, 1994 (NWFP Regulation No.2 of 1994), followed by the Provincially Administered Tribal Areas (Nifaz-e-Nizam-e- Sharia) Rules, 1994. The regulation entailed nothing more than a change of nomenclature as judges were renamed Qazis and Urdu was declared the official language of the court. The post of Muavin-e-Qazi who would serve as advisers to the judges on matters relating to Sharia was also introduced with the stipulation that it would be filled by the provincial government through a selection process involving the Commissioner.

Maulana Sufi Muhammad, however, was still not satisfied with the newly introduced legislation and wanted a more central role for religious scholars in the judicial system. To this effect, he continued to hold demonstrations, a by-product of which were road blockades, the abduction of government officials, and the violent disruption of law and order, resulting in casualties on both sides. In an effort to placate TNSM activists and in so doing restore law and order in the Malakand Division, the Shari-Nizam-e-Adal Regulation was passed in 1999[66] with the aim of conforming the justice provision system to Islamic law. The regulation shifted the authority for the selection of the Muavin-e-Qazi to the High Court but retained the

controversial provision allowing for the exercise of judicial powers by executive magistrates. The regulation reaffirmed Urdu as the language of the court and the term Qazis for judges.

In 2009, the Shar'i Nizam-e-Adl Regulation replaced the 1999 Regulation as an improved version of previous Shar'i[67] procedural laws. The 2009 Regulation introduced a Shar'i Bench of the High Court in Malakand Division (Swat) known as Dar-ul-Qaza, while the Supreme Court in matters related to Malakand Division was named as Dar-ul-Dar-ul-Qaza. Sharia was declared as the supreme law with prevailing effect over all other laws. The regulation also provided for an optional ADR mechanism and obliged all executive and law enforcement authorities to act in aid and assistance of judicial authorities. The regulation was given overriding effect over all other laws and retained the provision for empowering executive magistrates to try all offences under the PPC, local and special laws, with a sentence of up to three years.

In spite of how strongly the imposition of Sharia was advocated for and welcomed by the locals, it did not bring the expected results for either the government or the public at large. According to experts from the justice sector, the Shar'i system was adopted under specific circumstances that more or less guaranteed a miscarriage of its implementation. The first of these circumstances being that the government used the Shar'i regulations as a tool to appease the TNSM with little to no interest in their success.[68] The second being that the parallel application of Shar'i regulations alongside colonial procedural codes became a major source of judicial delays.[69] The third was the gap between judicial authorities and the litigant public.[70] Fourth, the lack of necessary training and knowledge among judges on the implementation of Shar'i law.[71] Fifth, while the Shar'i regulations provided for ADR, the clause was pretty much neglected. Sixth, the self-serving interests of the elites of the region, which meant they were less concerned with supporting the effective implementation of the Shar'i legal system and more with the personal benefits they could reap from such a system.[72] And the last but not least of these circumstances was that effective governance of the Shar'i legal system required more than just judicial reform, proportional action was needed in connected areas such as law enforcement, criminal investigation, community policing, revenue and land settlement, development, and education to ensure that the overall system worked.[73]

Another reservation against the Shar'i regulations, particularly from the perspective of the lawyers' community, was the existence of the executive magistracy. This was considered a colonial legacy and a violation of the principles of separation of power and independence of the judiciary. For this reason, the provision of the Shar'i Nizam-e-Adl Regulation regarding the functions of executive magistrates has remained under challenge before the PHC in four connected writ petitions. In April 2015, the PHC ruled the judicial powers of the executive magistrates as being in violation of the Constitution and directed the provincial government to modify the regulation in conformity with the constitutional provisions of separation of power within a period of six months.[74] This judgement was, however, appealed before the Supreme Court of Pakistan and its status remains pending to date.

PATA- post 25th Constitutional Amendment

The 25th Amendment to the Constitution of Pakistan not only merged FATA into the province of Khyber Pakhtunkhwa, but also abolished the special status of PATA and extended the jurisdiction of provincial legislature to the region. This was a significant step for extension of democratic rule in PATA, particularly in the post-18th Amendment scenario, which guaranteed provincial autonomy but the PATA region, despite being part of the province of Khyber Pakhtunkhwa, was under the legislative competence of the federation. Technically, after the 25th Amendment, all the federal and provincial laws applicable in the province of Khyber Pakhtunkhwa extended to the PATA region. However, in January 2019, the Provincial Assembly passed an Act (Act No. III of 2019) for continuation of all special laws, regulations, notifications, and by-laws in the erstwhile PATA and by virtue of the said Act, controversial and discriminatory special laws such as the Action (in Aid of Civil Powers) Regulation (AACPR), 2011, and Shar'i Nizam-e-Adl Regulation, 2009, retained effect in the Malakand Division.[78] Act No. III of 2019, along with Act No XXIV of 2019 and the ACCPR, 2011, were challenged in PHC through Writ Petition No.3035-P of 2019 and set aside vide a judgement dated 17th of October 2019.[79] The implementation of the judgement of the PHC, however, has been suspended by the Supreme Court and the appeal of the provincial government is yet to be heard and decided. The future of Levies in Dir and Malakand Districts too is yet to be decided by the provincial government. The government has exempted PATA from payment of all central taxes including customs duty on imported vehicles.

To sum it up, there is no doubt that the merger and subsequent challenges of security and justice provision resulted in a number of unintended repercussions to which the people of Malakand were neither accustomed to nor prepared for. Thus, all these dynamics over a passage of time contributed to the growth of extremism, militancy and insurgency in the region. When militants took control of most areas in Malakand, particularly of Swat and Buner from 2007 to 2009, they made every possible effort to silence their opponents and destroy government infrastructure as well as property such as houses, shops, markets and orchards belonging to local landlords. The rise of militancy and subsequent military operation and its implications for security and justice provision in Malakand are discussed in the following section.

1- Focus Group Discussion in Swat on October 13, 2020.

2- Khalid Aziz, Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy (RIPORT, 2010); Sultan-i-Rome "Crisis and Reconciliation in Swat," Pakistaniat: A Journal of Pakistan Studies Vol.3, No.1 (2011).

3- Came into effect on July 26, 1975.

4- Came into effect on January 1, 1976.

5- Navid Iqbal Khan, "Tehreek-I-Nifaz-I-Shariat-I-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion," Pakistan Journal of History and Culture XXXI, No. 1 (2010); Rome, "Judicial System, Judiciary and Justice in Swat: The Swat State Era and Post State Scenario."

6- Interview with a barrister practicing law in Mingora, Swat.

7- S.R.O. 188(I)/70 dated August 10, 1970

8- Tribal Areas (Application of Local Government Law) Regulation, 1972

9- These legal arrangements were in the shape of the Martial Law Regulations 115, 122, and 123 of 1972, Regulations 2 and 3 of 1974 and President's Orders No. 11 and 12 of 1980.

10- Interview with a serving judge from Khyber Pakhtunkhwa

11- Focus Group Discussion in Swat on October 13, 2020.

12- Notification No. SOFT(FAD)V-168/71(ii), dated 22-12-1975

13- The Evidence Act, 1872, the Code of Criminal Procedure, 1898, the Police Act, 1861, and the PPC, which was already in force in Dir state.

14- Tribal Areas (Application of Laws) Regulation, 1970, effective from January 1, 1971 was the notification passed by the Provincial Government to extend the aforementioned laws to Malakand Division.

15- Section 3, FCR 1901

16- Supreme Court and High Court (Extension of Jurisdiction to Tribal Areas) Order, 1970

17- Frontier Crimes Regulation (Repeal) Regulation, 1973, (Regulation No.1 of 1973)

18- Supreme Court and High Court (Extension of Jurisdiction to Certain Tribal Areas) Act, 1973

19- The Code of Civil procedure, 1908, the W.P. Civil Courts Ordinance, 1962, the Land Revenue Act, 1967, the NWFP Tenancy Act, 1950, and the Arbitration Act, 1940

20- Provincially Administered Tribal Areas (Application of Laws) Regulation, 1974, (Regulation No.1 of 1974)

21- Mohammad Irshad and Others vs Assistant Commissioner Swat and Others, (PLD 1990, Pesh 51)

22- Focus Group Discussion held in Swat on October 13, 2020.

23- Mohammad Irshad and Others vs. Assistant Commissioner Swat and Others, (PLD 1990, Pesh 51)

24- Khalid Aziz, "Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy," 65.

25- Ibid., 66.

26- Ibid., 5.

27- Ibid., 57. As mentioned earlier, this situation existed in the entire Malakand Division and ended only after the passage of the 25th Amendment to the Constitution in 2018.

28- Khalid Aziz, "Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy," 5.

29- Syed Ali Shah, Da Shariat Karwan: Manzal Ba Manzal [Pashto] (1995).

30- Awami National Party (ANP), Pakistan Muslim League (PML), Pakistan People's Party (PPP), Jamaat Islami (JI), and Jamiat Ulema-i-Islam (JUI).

31- Syed Ali Shah, Da Shariat Karwan: Manzal Ba Manzal.

32- Khan, "Tehreek-I-Nifaz-I-Shariat-I-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion"."

33- Ibid.

34- Government of NWFP and Others Vs. Mohammad Irshad and Others. (PLD 1995, Supreme Court 281)

35- Khalid Aziz, "Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy," 59.

36- Interview with Mr. Zubair Shah Khan, Retired Civil Servant

37- Salman Bangash, "Socio-Economic Conditions of Post-Conflict Swat: A Critical Appraisal," Tigah: A Journal of Peace and Development II (2012).

38- Ibid.

39- Interview with a Barrister from district Swat. Also, according to Navid Iqbal Khan, "Tehreek-i-Nifaz-I-Shariat-I-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion"" 143: "People nearer to Maulana Sufi Muhammad claimed, he was reared by the establishment to counter the influence of JI in Dir District, formerly a stronghold. The then Deputy Commissioner (DC), Habibullah Khan, was blamed for providing funds initially Rs. 3 Lacs from the District Council funds and also administrative support that was extended by him to Maulana Sufi Muhammad. …The PPP provincial president Aftab Ahmad Khan Sherpao was equally responsible when he used the TNSM to abolish the JI stronghold in Dir. For this objective Sherpao strongly supported the TNSM through Dir Deputy Commissioner, Habibullah Khan. Swat Deputy Commissioner Muhammad Javed, also provided possible support to the TNSM".

40- Khan, "Tehreek-i-Nifaz-i-Shariat-i-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion"," 141.

41- These laws were as follows: The Provincially Administered Tribal Areas (Nifaz-e-Nizam-e-Sharia) Regulation, 1994 (NWFP Regulation No.2 of 1994), followed by the Provincially Administered Tribal Areas (Nifaz-e-Nizam-e-Sharia) Rules, 1994, The Shari-Nizam-e-Adal Regulation, 1999 (NWFP Regulation I of 1999), and later the Shar'i Nizam-e-Adl Regulation, 2009.

42- This was mentioned by several interviewees that politicians, members of trade unions, car showroom owners, government employees, timber smugglers and people of other professions supported the TNSM in one way or the other because all stakeholder were against the imposition of the custom act and tax laws.

43- Ahmed Rashid, Descent into Chaos: How the War against Islamic Extremism Is Being Lost in Pakistan, Afghanistan and Central Asia, (London, New York: Allen Lane, 2008).

44- During a protest procession in Mingora in September 2001.

45- Khan, "Tehreek-I-Nifaz-I-Shariat-I-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion"."

46- Ibid.

47- About three kilometres away from Saidu Sharif, the district headquarters of Swat.

48- Khalid Aziz, Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy.

49- Ibid.

50- The Nizam-e-Adal Regulation (Order of Justice) was a controversial Act, passed on April 13, 2009, by Pakistan's central Government.

51- Murad Ali, "Multiple Factors Behind Extremism and Militancy: A Case Study of Swat," Regional Studies XXXIV, No.3 (2016).

52- J Fleischner, Governance and Militancy in Pakistan's Swat Valley, (Washington D.C, Center for Strategic and International Studies, 2011).

53- Ibid.

54- Ibid.

55- Sultan-i-Rome, "Crisis and Reconciliation in Swat," 71.

56- Ali, "Multiple Factors Behind Extremism and Militancy: A Case Study of Swat."

57- For details, see Murad Ali, Aid Effectiveness in Poverty Alleviation in a Post-Conflict, Post-Disaster Situation: A Case Study of District Swat, Pakistan (PSSP Working Paper No. 029), Washington, DC: International Food Policy Research Institute (IFPRI).

58- J Fleischner Governance and Militancy in Pakistan's Swat Valley, 1.

59- Rome, "Crisis and Reconciliation in Swat," 53.

60- International Crisis Group, "Pakistan: Countering Militancy in Fata," Asia Report No.178 (Islamabad: International Crisis Group, 2009), 12.

61- Ibid.

62- F. Khaliq, "Reviving Tourism: Aid Rekindles Hope among Swat Hoteliers," The Express Tribune, January 12, 2011.

63- Post Crisis Needs Assessment, Government of Khyber Pakhtunkhwa and FATA Secretariat (2010), 24. Available at: http://lgkp.gov.pk/wp-content/uploads/2014/03/10.-Consolidated-report-on-the-Post-Crisis-Needs-Assessment-for-KP-and-FA TA.pdf

64- Government of Pakistan, the Asian Development Bank, and World Bank (2009) "Pakistan - Preliminary Damage and Needs Assessment: Immediate Restoration and Medium Term Reconstruction in Crisis Affected Areas," Washington, D.C. : World Bank Group. Available at: http://documents1.worldbank.org/curated/en/492201468067130443/pdf/703280ESW0P12305B00PUBLIC00Pakistan.pdf

65- Ibid.

66- NWFP Regulation I of 1999

67- Shar'i may refer to anything related to Islamic Sharia.

68- Interview with a former Secretary Law of Khyber Pakhtunkhwa

69- Interview with a serving judge from Khyber Pakhtunkhwa.

70- Ibid.

71- Interview with a former Secretary Law of Khyber Pakhtunkhwa.

72- Interview with a Barrister from Swat.

73- Interview with a senior lawyer from Swat.

74- Yousuf Ayub Khan vs. Government, (PLD 2016, Peshawar 57)

75- Khyber Pakhtunkhwa Continuation of Laws in Erstwhile Provincially Administered Tribal Areas Act, 2018.

76- Shabbir Hussain Gigyani Advocate Vs. Government of Khyber Pakhtunkhwa and Others. (W.P. No. 3035 of 2019)

IMPACT OF THE MERGER ON PEOPLE'S EXPERIENCE OF SECURITY AND JUSTICE

The transformation from princely states to a formal mode of governance under the Constitution of Pakistan occurred in a mostly peaceful manner except in the case of Dir where there was some resistance against the merger. However, it was not at all an easy task for the government as the process of merger and amalgamation was one thing and properly mainstreaming these former princely states into formal districts to be governed under formal laws was another matter. Since the legal and administrative changes in the former princely states after their merger were brought about largely without any broad-based consultations with local stakeholders, with the passage of time, the government faced serious post-merger security and justice services provision challenges. The challenges were not only because of lack of consultation with the local stakeholders, but also because of lack of any awareness-raising exercise among the local population about the new system. Therefore, the people of Malakand were not used to this new mode of security and justice system and, on quite a few occasions, forced the government to reverse its policies through street protests and agitation. For instance, as mentioned in the previous section, the government was forced to withdraw the Customs Act after its extension to the area in 1974 following street protests against it. For a variety of reasons, several vested interests were in favour of the existing status quo and did not want a change.[1]

As discussed in the previous section, instead of implementing the constitutional provisions related to security and justice in their letter and spirit in the area, the government introduced a hybrid of local customs and Pakistan's laws. It was done, first, through the FCR and, later, through the PATA Regulations of 1975 and 1976 that prevailed over both the regular civil and criminal justice systems. The PATA regulations shifted the judicial powers to Jirga under the supervision and command of the local bureaucracy. Under the newly promulgated regulations, the government abolished Qazi courts and their powers were handed over to the Tehsildar who used to convene Jirgas of Khans to resolve disputes. However, in stark contrast to

Qazi courts, under the new judicial system, judgments were influenced and cases would linger on for years causing enormous hardships to the litigants. At the same time, the appeal against the Jirga decisions lay with the Deputy Commissioner. Thus, the bureaucracy possessed both executive as well as judicial powers.

Provision of speedy justice to the people was a new challenge after the merger because, unlike the Qazi courts, there was no quick disposal of cases. As one local remarked, the security and justice systems during the princely states regimes were far better than the post-merger security and justice on ground indeed the then justice and security apparatus was speedy and easily accessible to everyone, whereas, the bureaucratic system of the Government of Pakistan brought a gap between the government officials and the common people, which led to a trust-deficit between the two and ultimately anarchy.[2] Even the government itself acknowledged that the local population in Swat initially welcomed the Taliban during the 2nd wave of insurgency in the 2000s because of the less expensive, speedy, and uncomplicated procedure of justice provided by the Taliban.[3] The judicial system established by Maulvi Fazlullah, leader of the Taliban in Swat resolved numerous cases that were pending in the local courts for many years. It is interesting to note that most of these cases pertained to land disputes. According to Rome, the Taliban in Swat "decided cases and disputes quickly without bearing any costs by the parties; solved some age-old disputes and issues; tried to effect conciliation among enemies; and stressed upon women's right to inheritance."[4] The same author remarked during an interview that due to ineffective and weak governance resulting in poor delivery of services, the Taliban filled the vacuum left by inefficient and corrupt local administration.[5]

There is considerable available evidence in the academic literature—also confirmed by a series of informed interviews and focus group discussions at different levels—that post-merger provision of security and justice services was a huge challenge. For example, comparing the judicial system at the time when Swat was a princely state and then the post-state era, Rome argues that "before the merger of Swat state, whether just or unjust, decisions were quick and cheaper…decisions were properly executed and implemented. With the merger, the position took a U-turn."[6] Similarly, according to Zafar, although the lack of economic opportunities "may not have been a main driver of conflict in Swat, the underdeveloped judicial

system and ineffective local government certainly created social cleavages and played a major role in the rise of Tehrik-e-Taliban Pakistan."[7] The author further states that the sluggish pace of judicial proceedings and "long delays in resolving even straight forward civil claims made people nostalgic for the sharia or Islamic system of jurisprudence that had existed prior to the dissolution of the princely state."[8]

There are numerous examples of how people had to wait for years or even decades to get their disputes and cases resolved in the court of law. For example, during an interview, a senior official of the judiciary recalled a particular case when he was serving in Swat as a judge. The official stated that after the merger, cases were delayed for over 20 years. He narrated that a 16-year-old girl's case was finally resolved when she was at the age of 42. He remarked that it took the court 26 years to resolve this particular case.[9] He said that one could imagine how people would trust such a system and how people could be satisfied with such a system of justice provision. The same factor has been mentioned by Fleischner who asserts that "inefficiencies in the judicial system and problems with service delivery progressively degraded the quality of governance to which the people of Swat had become accustomed."[10] It was confirmed by a senior official of the judiciary that given the fact that the residents of Swat were very progressive and people were used to a different model of governance, a different type of system should have been there for Swat.[11] For example, he elaborated that in the case of Swat, the Wali was accessible and justice was cheaper prior to merger but the system of governance after the merger was not responsive to the needs of the local population in Swat. Thus, it means that residents of Swat gradually became frustrated with the prevalent judicial and administrative system because the new mode of governance was worse than the one that existed during the princely state.

A former senior police officer remarked that unfortunately, the government had done no prior homework or preparation on how to peacefully amalgamate the states.[12] After the merger with Pakistan, the area was made into a separate Division, named Malakand Division, under the command of a Commissioner. Similarly, the Deputy Commissioner became the in-charge of the District while the Assistant Commissioners were in charge of the Sub-divisions. As pointed out by a senior official of the judiciary in an interview that once the princely states were abolished, bureaucrats came up and replaced the rulers.[13] However, these bureaucrats

could not deliver like the Wali in the case of Swat because the new government machinery benefited themselves only and these so-called public servants considered themselves above the law, the official added. He said that these bureaucrats exploited the wealthy state of Swat for their own benefits and were not greatly concerned for the welfare of the masses. In other words, the new judicial system retained the lack of independence from the executive from the princely state era but only added an element of delay to the process. Resultantly, these regulations turned the experience of the people with regard to provision of security and justice in Malakand from bad to worse.[14] All this led to huge challenges of provision of security and justice in the post-merger landscape in Malakand.

Jirga/ADR

As mentioned before, the former princely states had a dual system of adjudication, i.e., the Sharia and Rewaj. Rewaj, thus, was an accepted legal norm in the princely states and the people had a tendency of setting their disputes through the localJirga's consisting of elders of their area. The traditional Jirga system was so effective and powerful that whereas in the former tribal area of Torghar, it had the authority to implement and enforce its decisions,[15] in the princely states, the Qazi courts, under the Dastur-ul-Amal provided due respect to the Jirga decisions that helped in the expeditious resolution of disputes according to the will of the people.

A lawyer from Malakand division remarked that the Jirga and informal justice system during the princely states regime was more liberal than the formal system as in the formal judicial system, the right to audience is restricted and is subject to certain limitations, for which reason the people of the area still support the informal justice system. The PATA regulations of 1975 also provided for a similar arrangement of informal justice however, the same being supervised by the bureaucracy was hijacked by the social elites, which resulted in injustice on multiple occasions.[16] Regulation No.1 & 2 of 1975 (Popularly called the PATA Regulations) provided for nearly the same procedure for administration of criminal justice and civil dispute resolution, as was provided by the FCR, however, it imposed certain procedural restrictions and a much closer supervisory jurisdiction, or rather intervention, of public officers in the affairs of Jirga, which was not acceptable to the subjects. During Focus Group discussions, the female participants observed that the post-merger justice system in Malakand

division was a hybrid form of Jirga and FCR, as was the case in FATA but was not accepted by the people due to state intervention in the affairs of Jirga.[17]

The PATA Regulations of 1975 provided a mix of judicial powers in the bureaucracy, local Jirga, and religious scholars of the area and same were misused by relevant authorities and rather than using their newly acquired powers and authority to address the grievances of the local population regarding provision of services and justice, "they used their power to suppress and subjugate the ordinary citizens of the area through subverting the judicial process."[18] The regular judiciary that was concurrently installed in the region, was assigned only a marginal role in the administration of justice while the administrative judges/Jirga courts were mainly focused on their executive functions, which resulted in serious judicial delays and eventually public resentment against the system.[19] Because of external influence upon the Jirga courts, leading to injustice and judicial delays, the civil disputes also started culminating into criminal cases.[20] Thus, rather than improving the situation and mainstreaming the area, the merger gradually increased the frustration of the local population with the prevalent administrative and legal systems.

There is no doubt that Swat and the rest of Malakand Division was alien to extremism, militancy, and lawlessness before its merger. Hence, it is argued that the merger of Malakand with Pakistan created a number of legal, constitutional, and administrative problems that gradually developed frustration among the local population. This resulted in issues such as the lack of good governance, failure in the delivery of services in health and education and lack of further developmental works. According to Khattak: "After the merger of the state of Swat with Pakistan in 1969, there was little further development in the valley. Few, if any, schools were constructed, and the justice system, in which civil and criminal cases alike were delayed for years, caused frustration among the people."[21]

1- In an interview a former senior official of the KP police stated that people's resistance to change was a natural phenomenon and it could be covered only with prior consultative and subsequent confidence building measures, which was missing in the case of Malakand.

2- Focus Group Discussion held in Swat on October 13, 2020.

3- Post Crisis Needs Assessment, Government of Khyber Pakhtunkhwa and FATA Secretariat (2010).

4- Rome, "Crisis and Reconciliation in Swat," 66.

5- Interview with Professor Sultan-i-Rome.

6- Sultan-i-Rome, "Judicial System, Judiciary and Justice in Swat: The Swat State Era and Post State Scenario," Journal of the Pakistan Historical Society 49: 4 (2001), 95.

7- R Zafar "Development and the Battle for Swat," Al-Nakhlah: The Fletcher School Online Journal (2011), 2

8- Ibid.

9- Interview with a serving judicial officer from Khyber Pakhtunkhwa.

10- J Fleischner, Governance and Militancy in Pakistan's Swat Valley, 5.

11- Interview with a serving judicial officer from Khyber Pakhtunkhwa.

12- Interview with a former senior-level police officer hailing from Malakand Division.

13- Interview with a serving judicial officer from Khyber Pakhtunkhwa.

14- Navid Iqbal Khan, "Tehreek-I-Nifaz-I-Shariat-I-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion"," 137.

15- Focus Group Discussion held in Torghar on October 17, 2020.

16- Focus Group Discussion held in Swat on October 13, 2020.

17- Focus Group Discussion held in Swat on October 13, 2020.

18- Khan, "Tehreek-I-Nifaz-I-Shariat-I-Muhammadi in Malakand Division (Khyber Pakhtunkhwa): A Case Study of the Process of "State Inversion"," 63.

19- Khurshid Iqbal and Niaz A. Shah, "Civil Disputes Leading to Crimes: A Baseline Study of Terrorism-Affected North Western Pakistan," Australian Journal of Asian Law (2017)

20- Ibid.

21- Khattak, "The Battle for Pakistan: Militancy and Conflict in the Swat Valley."

QUANTITATIVE SURVEY OF CITIZENS' PERCEPTIONS

Notwithstanding its failings, however, a recent survey conducted by CODE PAKISTAN for this report among a select group of respondents from all seven districts of Malakand Division as well as Torghar district revealed that they were found to be strongly in favour of the conventional legal system of Pakistan.[1]

A clear preference for the existing justice and security system

As shown in Figure 1 below, around half of the respondents expressed their preference for the conventional legal system, followed by preference for the princely states system at 23 per cent. At the same time, there was very little support for the TNSM/Taliban style governance in the region.

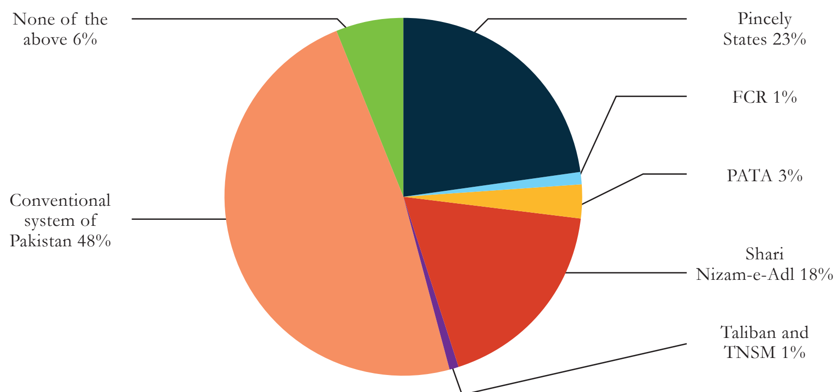

Figure 1: Which regime/System do you think was the best for Malakand division?

As shown in Figure 2 below, preference for the conventional legal system was higher among the female respondents of the survey than the male ones, which shows that the female population of the area, which had limited say in the other legal systems is more inclined toward the conventional legal system than the male population.

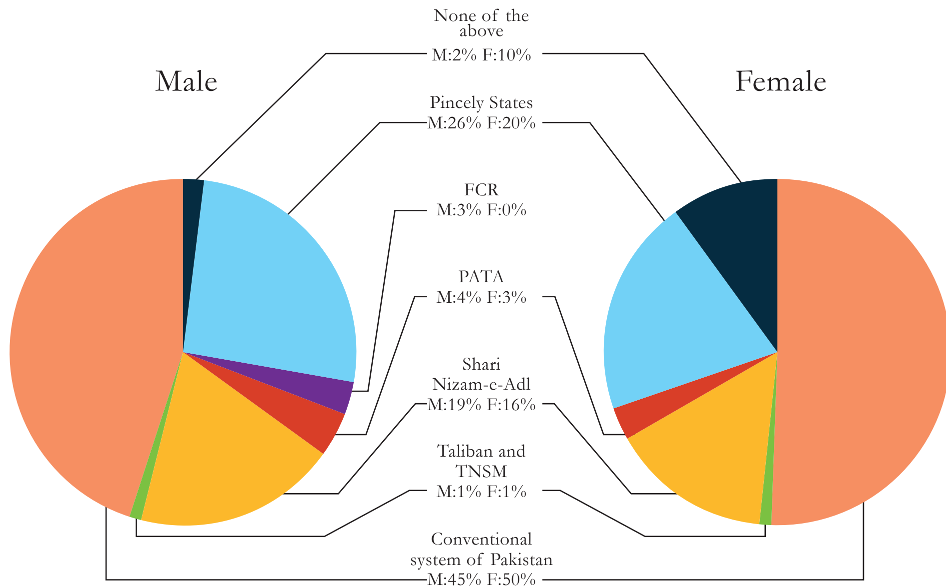

Figure 2: Which regime/System do you think was the best for Malakand division (Male/Female)?

When asked about the reason for their preference for one system or the other, the respondents were largely of the view that a system to be preferred had to be judicious, followed by a preference for cost efficiency. See Figure 3 below for details.

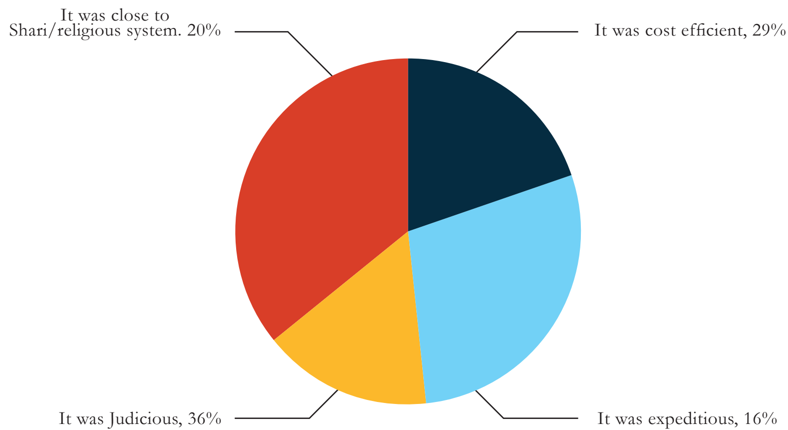

Figure 3: What is the reason of selecting the aforementioned system?

Figure 3 demonstrates that the respondents valued the judiciousness of a system more than any other considerations. At the same time, however, they also valued the cost-efficiency of the legal system. For any system to be acceptable in the eyes of the citizens, therefore, the system has to have these two foremost traits.

Once again, however, there was some dichotomy in the responses of the male and female respondents as the female respondents chose the judiciousness of a system as a higher priority than its expeditiousness (see Figure 4 below). This is also an indication that legal and administrative systems other than the conventional legal and administrative system were all less inclusive and, thus, perceived to be less judicious by the more vulnerable segments of society like the women.

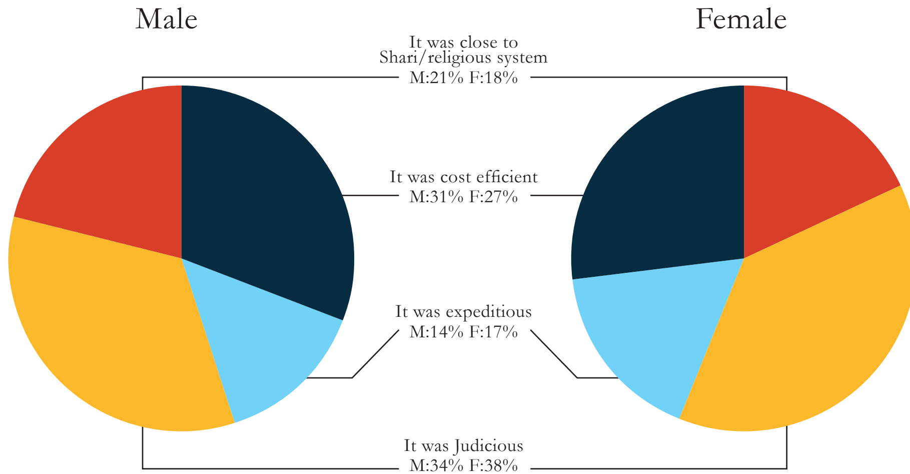

Figure 4: What is the reason of selecting the aforementioned system (Male/Female?

The preference for the existing judicial system in the region was also demonstrated by responses to another similar question about the level of satisfaction with the existing justice and security system in Malakand Division. As shown in Figure 5 below, only 28 per cent of the respondents did not express their satisfaction with the existing justice and security system in Malakand Division. These results show that while the local citizens do have reservations about the existing justice and security system in the area, they have seen worse and want a just system that accords due rights to all the citizens equally, especially the more vulnerable segments of the society i.e. especially the women.

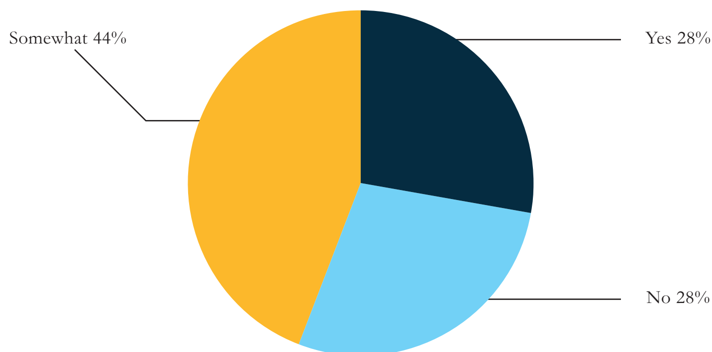

Figure 5: Are you satisfied with the present justice and security system of Malakand Division?

There is not a great deal of difference of opinion among the male and female respondents of the survey on the aforementioned question.[2]

Similarly, to another analogous question with regard to the suitability of the existing justice and security system of the area to the standards of justice of the citizens, most of them responded in the affirmative. See Figure 6 below.

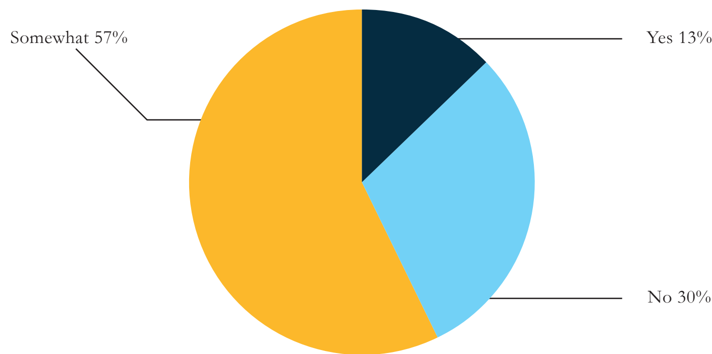

Figure 6: Is the present judicial system of the area suitable to your standards of justice provision?

It is pertinent to note, however, that the level of approval of the present judicial system of Malakand Division was slightly lower among the female respondents. This alludes to the prevalent perception among the female respondents that even though they prefer the conventional legal and administrative system over the other forms of governance structures, they still find it more deficient in provision of justice to them than the male respondents (see Figure 7 below).

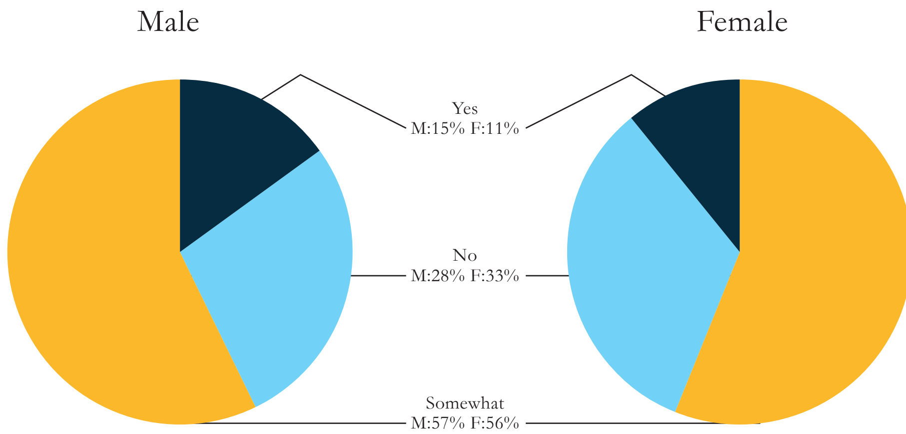

Figure 7: Is the present judicial system of the area suitable to your standards of justice provision?

Figure 8 below further demonstrates that the respondents not only considered the existing justice system fairer and suitable to their standards of justice provision than the rest but also considered it fairly accessible.

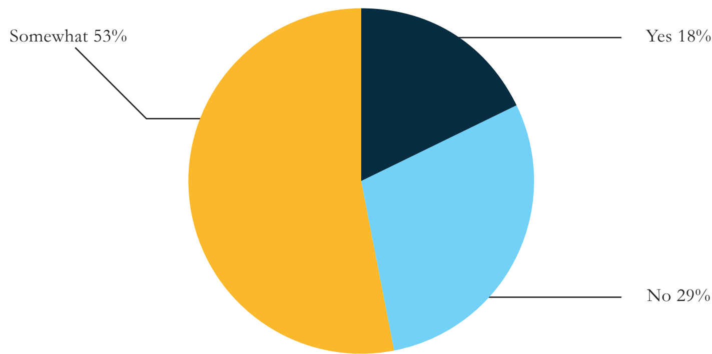

Figure 8: Do you feel like the post-merger legal and security system is easily accessible?

We will have to consider the caveat here, though, that most of the respondents of this survey were from the middle- and upper middle-classes and might not represent the true sentiments about the accessibility of the system to the more vulnerable segments of the society, such as the economically underprivileged among them. It is quite interesting to note that the female respondents of the survey, who constituted half of the sample,

rated the post-merger security and justice system in Malakand Division as more easily accessible than the male respondents. Perhaps, the reason for this is that the female respondents, when comparing this system with the other forms of the justice systems they had experienced in the area, found it far more easily accessible than the male residents of the area (see Figure 9 below).

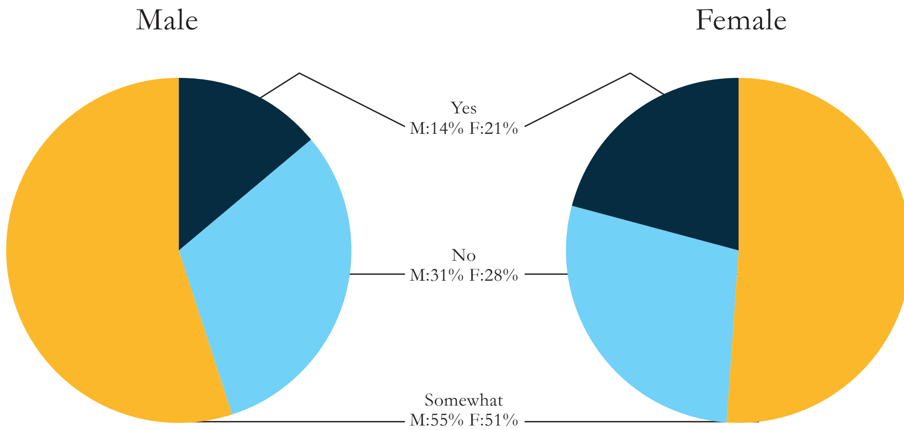

Figure 9: Do you feel like the post-merger legal and security system is easily accessible?

Figures 10 below, further demonstrates that the approval rating for the existing judicial system in the region is quite high, with only 24 per cent of the respondents expressing their complete disapproval of the system. The rest of the respondents either expressed full or partial approval for it.

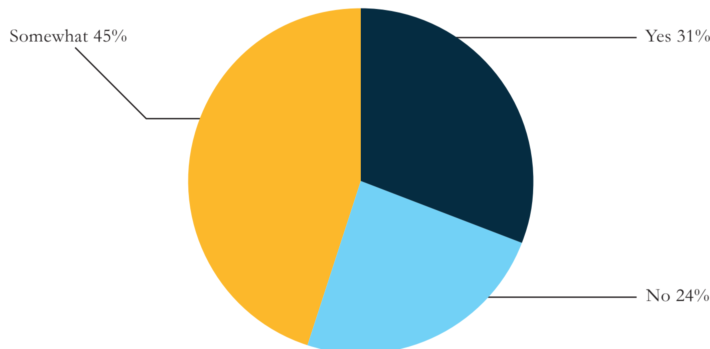

Figure 10: Do you generally approve of the post-merger changes in Malakand/Torghar?

There was not a great difference in perceptions between the male and female respondents when it came to approval of the existing judicial system in the region with the female respondents expressing only one higher percentage point approval than the male respondents.

Similarly, as shown in Figure 11 below, an overwhelming 55 per cent of the respondents reported that the post-merger security and justice system had had a positive impact on the society.

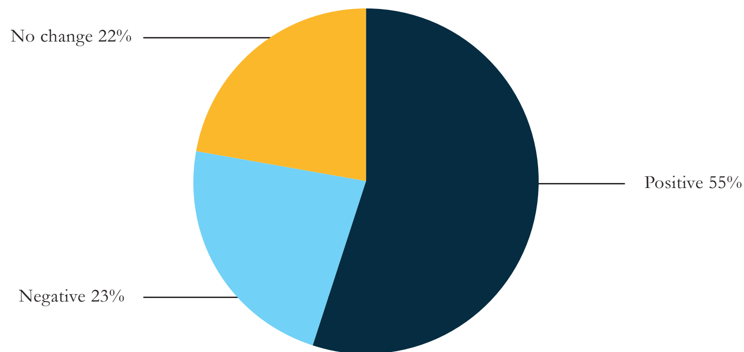

Figure 11: How has the merger impacted your society?

Once again, as shown in Figure 12 below, the positive perception regarding the impact of the post-merger security and justice provision in Malakand Division was higher among the female respondents of the survey than the male ones. This is a clear indication that the post-merger security and justice system of Malakand Division has a higher approval among the female respondents of the survey.

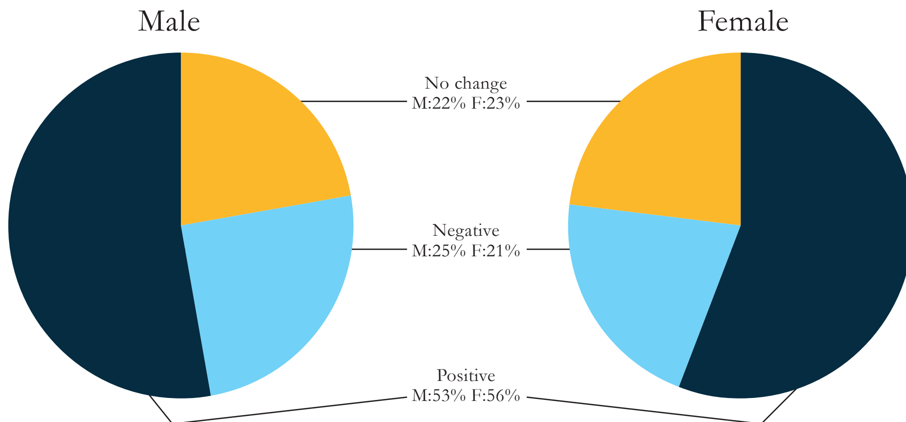

Figure 12: How has the merger impacted your society?

All the aforementioned responses indicate that while several security and justice systems were tested in the area, the preference for the existing judicial system remains quite high despite its multiple failings at various levels. These findings are quite revealing and indicative of the misplaced preferences of the government in the past by virtue of introduction of a hybrid justice system in the area that tried to incorporate elements of Sharia and Rewaj in it. The end outcome of such an approach was that the element of independence and fairness was lost and confusion prevailed among the masses. These results indicate that instead of accommodating the wishes of certain vested interests, the government could have been better advised to introduce the constitutional justice system in the area.

Safety concerns regarding the txisting security and justice system

Curiously, however, the respondents of the survey did express their apprehensions about their sense of safety and security under the existing security and justice system in FATA. As shown in Figure 13 below, the respondents were largely of the view that the existing security and justice system in the area did not necessarily make them feel safe. This apprehension could have its root in the violent history of the area, which more or less proved that the existing system—though preferred for its judiciousness—was susceptible to attacks by various hues of opponents, such as the local vested interests, the clergy, and Islamist militants. The perceptions of the male and female respondents to this question were quite similar.

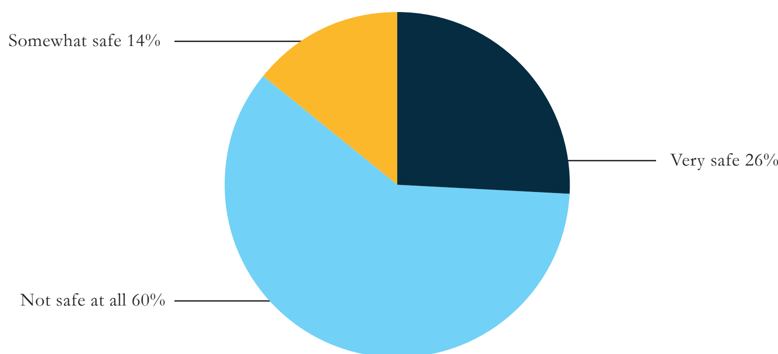

Figure 13: How safe does the current security framework in Malakand make you feel?

Lack of preference for TNSM

Moreover, as shown in Figure 14 below, nearly half of the respondents of the survey were of the view that the people of Malakand Division initially welcomed the TNSM in the area primarily because they played the religious card, while another 14 per cent believed that they felt more secure under them, perhaps, from the militant Islamists themselves more than anyone else.

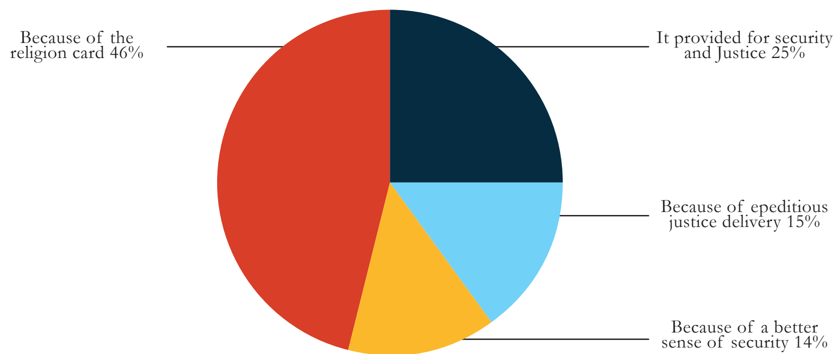

Figure 14: Why a large number of population of Malakand Division welcomed the TNSM regime?

As shown in Figure 15 below, the perception of sense of security under the Taliban regime was much lower among the female population of the area than among the male population. The perception about expeditiousness of justice under the Taliban was also lower among the female respondents of the survey than the male one.

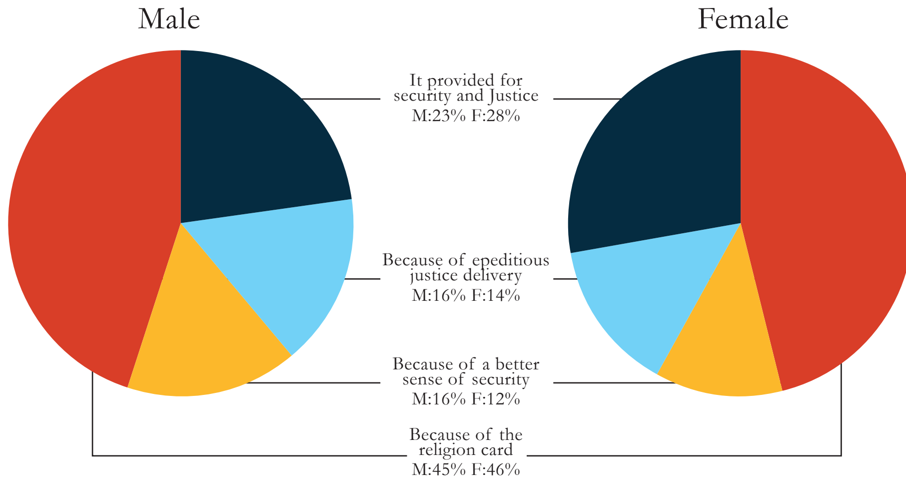

Figure 15: Why the large number of population of Malakand Division welcomed the TNSM regime?

As shown in Figure 16 below, there was a considerable disagreement among the respondents over the endogenous and exogenous causes of the rise of militancy in the area. While 25 per cent of the respondents believed that the happenings across the border in Afghanistan played a role in it, a total of 41 per cent blamed it on the failure of the justice system and bad governance, while another 23 per cent held all these factors responsible for it. The responses of the male and female respondents to this question were more or less similar, though.

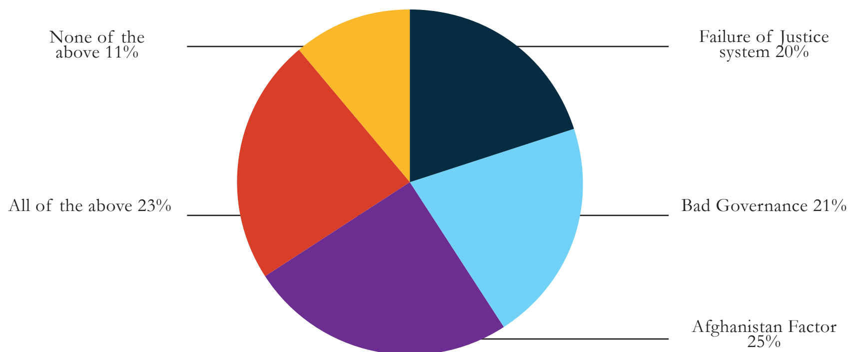

Figure 16: What in your view was the reason of emergence of TNSM and Taliban in the area?

Little preference for customary practices

It was also interesting to note that while there appeared to be little appetite among the respondents of the survey for a legal system ostensibly based on Islamic laws, there was also little inclination among them about the need for incorporation of customary practices into the existing judicial system. As shown in Figure 17 below, only 28 per cent of the respondents were of the view that customary practices were not adequately represented in the post-merger justice system and felt the need for their incorporation. The rest of the respondents were either of the view that whatever was there in the system was enough or there was no need for it in the legal system.

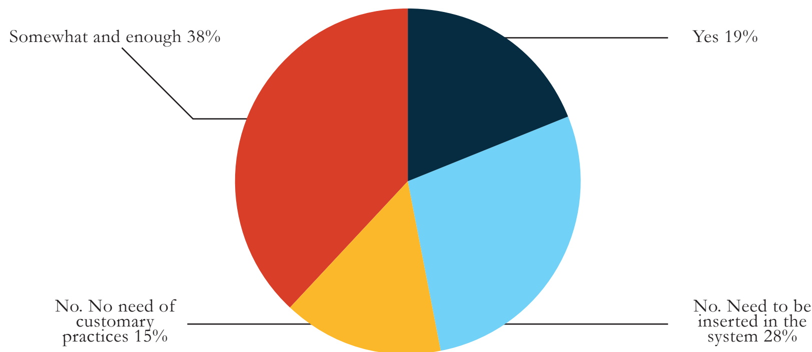

Figure 17: Do you feel like your customary practices are respected in the post-merger legal system?

As shown in Figure 18 below, however, there was a bit of a difference between the responses of the male and female respondents to this question of the survey. A higher percentage of the female respondents said that customary practices were respected in the post-merger legal system. In addition, a lower percentage of the female respondents expressed a need for insertion of customary practices into the legal and judicial system of the area.

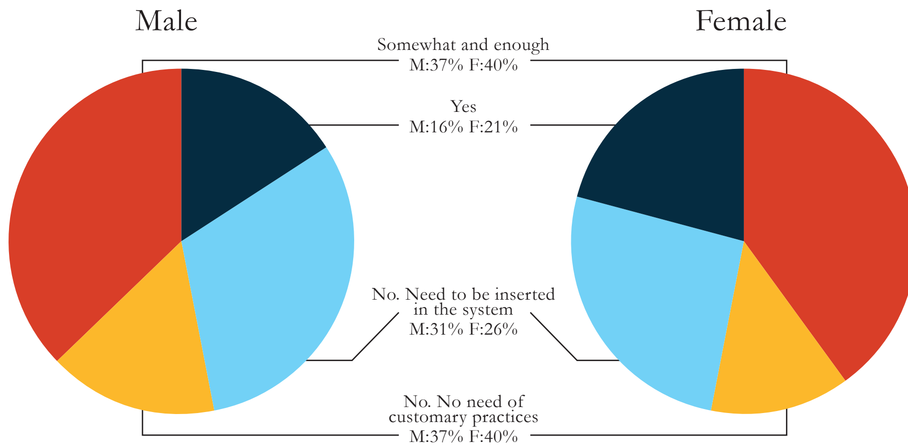

Figure 18: Do you feel like your customary practices are respected in the post-merger legal system?

1- For details about the survey, its methodology, and the composition of the respondents, please refer to Annex I.

2- For details, see please refer to Annex 1.

PART II

MERGER OF FATA: SIMILARITIES AND DIFFERENCES WITH THE CASE OF THE PRINCELY STATES

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DEMOGRAPHY OF KPMD

The erstwhile FATA, spread over 27,220 square kilometres constituted 3.4 percent of the total land of Pakistan.[1] According to the 2017 census report, the population of FATA 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-amendment 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 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 Balochistan. This empowered the local elders to act as a security apparatus for maintaining law and order across the western border and internally.[7]

1- http://fata.gov.pk/Global.php?iId=35&fId=2&pId=32&mId=13

2- Census Report of Pakistan, 2017

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

4- Article 246, Constitution of Pakistan, 1973.

5- Ghulam Qadir Khan, "How the British kept the Pakhtuns divided," Herald, March 27, 2018, available at: https://herald.dawn.com/ news/1154053

6- Vinay Kaura "The Durand Line: A British Legacy Plaguing Afghan-Pakistani Relations," Middle East Institute, June 27, 2017), available at: https://www.mei.edu/publications/durand-line-british-legacy-plaguing-afghan-pakistani-relations

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

PROMULGATION OF FCR

Initially, the British civil and criminal law was extended to the entire province of 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 in 1872.[1] The FCR 1872 was soon repealed but left its footprints for the future legal system of the area.[2] 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.[3] 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.[4]

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'[5] and later the Constitution of 1956, which excluded the province of NWFP, with certain limitations, from application of the FCR.[6] According to the 'Establishment of West Pakistan Act, 1955', the tribal areas of Balochistan 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.[7] The same scheme was adopted in the 1956[8] and 1962[9] Constitutions of Pakistan. However, in the 1962 Constitution of Pakistan, the aforementioned special areas were named as 'tribal areas'.[10] 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.[11] 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.[12]

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

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

3- Sarfraz Khan, "Special Status of Tribal Areas (FATA): An Artificial Imperial Construct Bleeding Asia," Eurasia Border Review, vol. 1, No. 1. (2010), available at: http://src-h.slav.hokudai.ac.jp/ publictn/eurasia_border_review/no1/06_Khan.pdf

4- Regulation No. 3, Dated 24 April, 1901

5- 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.

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

7- Section 2(2) of the Establishment of West Pakistan Act, 1955.

8- Article 104, Constitution of Pakistan, 1956.

9- Article 223, Constitution of Pakistan, 1962.

10- Article 242 of the constitution of Pakistan, 1962.

11- Article 260 of the Interim Constitution, 1972.

12- Article 1(3) Frontier Crimes Regulation, 1901.

ADMINISTRATIVE STRUCTURE OF FATA: POST INDEPENDENCE

Administratively, FATA remained under the direct authority of the President of Pakistan with the Governor of Khyber Pakhtunkhwa tasked with exercising the delegated authority of the President. The provincial Chief Minister, Cabinet, and National Assembly had no influence in the matters of FATA, while the provincial bureaucracy had the power to exercise authority on behalf of the federation until such time as the establishment of a separate FATA Secretariat, which happened in 2006. The overall administrative control of FATA at federal level was with the Ministry of States and Frontier Regions (SAFRON) while the FATA Secretariat, once established, was responsible for planning, implementing, and monitoring development activities in the region. The Additional Chief Secretary (ACS) FATA was the administrative head of the FATA Secretariat, reporting to the Governor of Khyber Pakhtunkhwa (previously NWFP) through the Chief Secretary.

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.

As for the Frontier Regions, they were headed by the Assistant Political Agents (APAs) while the Deputy Commissioner of the adjacent district acted as the Political Agent, and thereby head of the law enforcement system, which was sustained through the Levies, Khasadars, and Scouts. Both the Political Agent and the APA were assisted by the Tehsildars and Naib Tehsildars. The tribal elders or Maliks also assisted the Political Agent in administrative and judicial matters, which included maintaining the peace and control of crimes through the Jirga.

For judicial purposes, FATA was divided into protected and non-protected areas. Within the former, the decision of the Jirga needed endorsement from the Political Agent, while in the case of the latter, justice was administered directly through the local Jirga.[1] The decision of the Political Agent could then be appealed to the Commissioner.[2] 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.[3]

Legal reform initiatives

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.[4] 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[5] 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. And then once again in 1957, the High Court of West Pakistan in Dosso and Others vs. State submitted that the provisions of the FCR regarding referral of criminal cases to the Jirga were in violation of Articles 4 and 5 of the 1956 Constitution[6] and were resultantly void of legal effect and inoperative, even in the special areas.[7] The same year, in Khan Abdul Akbar Khan vs. DM Peshawar,[8] the Peshawar Bench of the High Court held that civil references under the FCR were in violation of
the Constitution.

Notwithstanding the many rulings questioning the veracity of the FCR as a just legal instrument, in 1958 the Supreme Court 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 as well. In doing so, the Supreme Court rendered all rulings against the FCR ineffective.[9]

Frontier crimes (amendment) regulation, 2011

Several minor amendments have been made to the FCR over the years[10] but it was not until 2011 that major structural changes were incorporated into the law by then President, Asif Ali Zardari, nearly 110 years after it was first promulgated.[11] The FCR Amendment Regulation, 2011 amended almost all the clauses of the FCR,[12] introducing new provisions for the protection of women, children below 16 years, and elderly above the age of 65 years from arrest and

detention under 'collective responsibility'.[13] 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.[14] 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.[15] Furthermore, the detention of tribal people for an indefinite period was barred and they were given a right to revision before the FATA Tribunal.[16] The amendment also introduced a Qaumi Jirga comprising respected elders and representatives from all tribes for recommendations on exceptionally important issues.[17] It further provided for jail inspection by Political Agents, Commissioners, and FCR Tribunals at least twice a year.[18] 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.

In addition to the abovementioned legal and judicial reforms introduced through the FCR Amendment Regulation of 2011, the government also promulgated several financial regulations, which introduced the process of audit and declared all state funds auditable by the Auditor General of Pakistan. These newly introduced procedures improved financial transparency, bringing past executive and financial irregularities in development projects to the attention of the federal government.

However, in response to rising militancy in the region and to safeguard national security, the federal government passed the AACPR in 2011, which counteracted several of the provisions introduced by the 2011 FCR Amendment Regulation in exceptional circumstances by authorizing military authorities to arrest and detain any person, seize immoveable properties, and seize the belongings of persons based on evidence or suspicion of involvement in terrorist activities.

Political reforms

In 1964, the Presidential Elections Act was introduced and extended to the tribal areas, allowing the Electoral College of FATA to vote in the presidential elections in the following year. In 1973, the Constitution of Pakistan granted FATA representation in the National Assembly and Senate of Pakistan.[19] Members of the National Assembly, however, were elected through limited franchise and only the tribal Maliks had the right to cast votes and choose their members for the Majlis-e-Shura (parliament).

Amendment to the Electoral Rolls (FATA) Order of 1975 in 1996 and extension of the Representation of Peoples Act of 1976 to FATA in 1997 provided universal adult franchise to the tribal region. For the purpose of the general elections of 1997, all voters from FATA were granted exemption from production of ID cards at the time of issuance of ballot papers. And in 2002, the Local Government Ordinance 2001 was extended to FATA but the system still could not work. Then in 2011, the Political Parties Order of 2002 was extended to FATA and finally in 2013 for the first time in the history of the region, general elections were held on a party basis.[20]

The political reform process in FATA 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. The role of the elected representatives in the legislative assemblies was, therefore, only ceremonial.

Resolution of the provincial assembly of Khyber Pakhtunkhwa

In 2012, the Provincial Assembly of Khyber Pakhtunkhwa passed a resolution that recommended to the President of Pakistan that the people of FATA should be treated equally and at par with all other citizens of Pakistan. The Provincial Assembly further resolved to extend the jurisdiction of the High Courts and the Supreme Court to the FATA region, and submitted that instead of the FCR Tribunal, the regular judicial system should be extended to the region. The Provincial Assembly also demanded the representation of the people of FATA in the Khyber Pakhtunkhwa Provincial Assembly.[21]

1- http://fata.gov.pk/Global.php?iId=29&fid=2&pId=25&mId=13

2- Section 48, FCR 1901.

3- Section 55-A, FCR 1901.

4- Samundar vs. The Crown (PLD 1954 FC 228).

5- Khair Mohammad Khan vs. Government of WP (PLD 1956 Lahore 668)

6- Article 4(1): Any existing law, or any custom or usage having the force of law, in so far as it is inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.(2) The State shall not make any law which takes or abridges the rights conferred by this Part, and any law in contravention of this clause shall, to the extent of such contravention, be void.(3) Nothing in this Article shall apply to any law relating to the members of the Armed Forces, or the Forces charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them. Article 5(1): All citizens are equal before law and are entitled to equal protection of law. (2) No person shall be deprived of life or liberty save in accordance with law.

7- Dosso vs. State (PLD 1957 Quetta 9).

8- Abdul Akbar Khan vs. DM Peshawar (PLD 1957 Pesh 100).

9- State vs. Dosso (PLD 1958 SC 533).

10- The FCR was previously amended in the years 1928, 1937, 1938, 1947, 1962, 1963, 1995, 1997, 1998, and 2000.

11- Mohammad Hamid Hussain, "Frontier Crimes Regulation: A case study of Reforms Process," TIGAH Vol. 1 (2012).

12- The regulation omitted sections 6, 15, 16, 17, 18, 35, 46, 49, and 59 and inserted new sections 11A, 11B, 55A, 55AA, 55AAA, 58A and 64A in the FCR.

14- Section 40, Frontier Crimes Regulation, 1901.

15- Farhat Taj, "New FATA Reforms – Good But Insufficient," Daily Times (August 20, 2011), available at: https://dailytimes.com.pk/111076/new-fata-reforms-good-but-insufficient/

16- Section 55-A, Frontier Crimes Regulation, 1901.

17- Section 11-B, Frontier Crimes Regulation, 1901.

18- Section 58-A, Frontier Crimes Regulation, 1901.

19- Articles 51 & 59 of the Constitution of Pakistan, 1973.

20- Altaf Ullah and Syed Umar Hayat "The Recent Electoral Reforms in Federally Administered Tribal Areas (FATA): An Appraisal" Journal of Political Studies, Vol. 24, Issue 2 (2017).

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

THE PROCESS OF MAINSTREAMING AND REPORTS OF VARIOUS COMMITTEES

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 mainstream and at par with other parts of the country.

In 1956, when NWFP 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. 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.[1] 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 NWFP or into a separate province of its own as was desired by the people of the region.

However, from time to time, the attention of the government would return to FATA and various committees would be constituted to formulate proposals for bringing FATA into the mainstream in a manner that was both convenient and largely acceptable. The strategies formulated by these different committees for mainstreaming FATA and their eventual bearing, if any, will be discussed in the following sections.

Naseerullah Babur Committee

During the regime of the PPP government (1973-1977), then Prime Minister, Zulfikar Ali Bhutto, constituted a committee headed by retired General Naseerullah Babar who at the time was the Governor of NWFP.[2] The committee was given the task of creating a framework for coalescing FATA into the province of NWFP. Accordingly, a plan was proposed that introduced

political, social, and economic reform into the region at first, followed by the formal merger of FATA with NWFP. The reforms entailed universal adult franchise, representation in the NWFP Assembly, right to education, infrastructural development, and enhancement of an annual developmental budget. These reforms were then to be trailed by scrapping the FCR and merging FATA with NWFP. However, the plan could not be executed due to the military coup of July 1977.[3]

Fcr Reforms Committee (2005)

In April 2005, the Governor of NWFP constituted a 12-member FATA Reforms Committee for recommending amendments in the FCR in consultation with the general public of FATA. The committee was headed by retired Justice Mian Mohammad Ajmal, a former Chief Justice of the PHC, and included senior serving and retired civil servants, political leaders, lawyers, and tribal elders. The committee presented its elaborate report to the Governor in 2008, suggesting major changes to the FCR, which was still in force at the time. Almost ninety percent of the recommendations proposed by Mian Ajmal's report were accepted by the government and incorporated into the FCR through the Frontier Crimes (Amendment) Regulation, 2011.[4]

Sahibzada Imtiaz Ahmad's Report (2006)

In April 2006, a task force under Sahibzada Imtiaz Ahmad - who was appointed as the Adviser to the Prime minister on FATA Affairs at the time - was constituted by the government and entrusted with designing a reform package for the administrative structure and development of the region.[5] The task force submitted its report to the then President, Pervez Musharraf; highlighting in its findings that the security situation in FATA had linkages with the weak governance of the region. The task force recommended the establishment of a FATA Development Authority and strengthening of the FATA Secretariat to fast-track the development of the area. The committee further proposed a coordination network and integrated effort between the federal and provincial governments and FATA Secretariat. The committee held that piecemeal reforms were not sustainable and suggested the constitution of a high-level commission for planning a well-thought-out strategy for addressing the security situation in FATA. The report, however, did not go far enough in providing a comprehensive reform package and neglected to mention any recommendations regarding the constitutional provisions of FATA.

Cabinet Reforms Committee (2008)

Constituted by the PPP-led government in 2008, the cabinet reforms committee comprised senior parliamentarians from FATA and Khyber Pakhtunkhwa, and was chaired by the then Law Minister, Farooq H. Nayek. The committee reviewed the recommendations of the FCR Reforms Committee (2005) and recommended major structural changes in the FCR, 1901. The committee also proposed that instead of FCR, the amended law be named as the Federally Administered Tribal Areas (FATA) Regulation, 2008. The committee recommended the establishment of an appellate court at each agency level, an FCR Tribunal at the provincial level, and the withdrawal of the powers of the Political Agent to appoint Jirga members for resolution of disputes. The committee further proposed the exemption of women, children, and aged persons from collective responsibility, and taking arrests and detentions under the purview of the constitutional provisions for preventive detention.

Fata Reforms Commission (2014)

In May 2014, the then Governor of Khyber Pakhtunkhwa constituted the FATA Reforms Commission. Ejaz Ahmad Qureshi, the former Chief Secretary of Khyber Pakhtunkhwa, was the Chairman of the Commission, which included 3 other members. The commission was given an undertaking that involved the following features: setting of strategic objectives in line with the aspirations of the people of FATA, identifying key areas for reform, devising an action plan for realizing the strategic objectives, ensuring sustainability of the reform process, institutional development, good governance, and border management.

According to the interim report of the commission that was published in 2015, the vision of the commission was "to transform FATA into a nationally integrated, socio-economically developed, politically empowered, and well governed region of Pakistan, where people [could] live peacefully, have access to basic human rights and needs, and contribute positively towards a stable and prosperous Pakistan."[6]

After consultations with relevant stakeholders, the commission submitted its interim report to the Governor of Khyber Pakhtunkhwa in April 2015. The report furnished recommendations for reform in various segments such as law enforcement, rehabilitation and development, law and justice, local governance, economy, governance, and institutional framework.[7] It proposed

the establishment of Agency and Frontier Regions Councils, observing that the councils could bridge the gap between government and non-state actors. The commission also proposed the establishment of an apex committee for coordination of civil-military operations in the tribal areas.[8]

Fata Reforms Committee (2016)

In 2014, the National Action Plan (NAP) was introduced with its provision for administrative and development reforms in FATA.[9] Not long after, the federal government set up a committee in November 2015 led by Sartaj Aziz, the then Adviser to the Prime Minister on Foreign Affairs. Members of the committee also included the Federal Law Minister, the Federal Minister for SAFRON, the Governor of Khyber Pakhtunkhwa, the National Security Adviser (NSA), and the Secretary SAFRON. The committee was assigned the task of proposing a concrete way forward for the political mainstreaming of FATA. The committee visited all the tribal agencies and frontier regions and held consultations with all relevant stakeholders, including the tribal Maliks and elders, representatives of all the political parties, traders, the media, and the youth. The committee submitted its report to the Prime Minister in August 2016, proposing the complete merger of FATA with the province of Khyber Pakhtunkhwa but in phases over a period of five years.

The committee concluded that the government needed to initiate the process for reconstruction and rehabilitation in terrorism-affected areas, followed by socioeconomic development, establishment of local bodies, capacity building of law enforcement agencies, land settlement, replacement of the FCR by the Rewaj Act, and the complete merger of the province. The committee further recommended 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 NFC award.[10] The committee also devised an implementation mechanism and suggested the formation of a cabinet-level committee for oversight of implementation, as well as a reform unit at the Ministry of SAFRON, and a Directorate of Transition and Reforms at the FATA Secretariat. It was proposed that the Prime Minister should personally preside over the review meetings of the cabinet-level committee.

The recommendations of the FATA Reforms Committee were challenged by the Maliks from the tribal area before the Supreme Court of Pakistan but no decision could be reached on the matter until the eventual merger of FATA with the province of Khyber Pakhtunkhwa.

National Implementation Committee (2017)

In January 2017, the federal government decided to merge FATA with the province of Khyber Pakhtunkhwa after approval from the Cabinet, and of the necessary legal and constitutional legislation. Following this decision, the federal Cabinet approved a comprehensive reform package for FATA in March 2017, and in the subsequent month, converted the FATA Reforms Committee into the National Implementation Committee for FATA Reform; the members of which included the Corps Commander of Peshawar, the Chief Minister of Khyber Pakhtunkhwa, and the Chief Secretary of Khyber Pakhtunkhwa. On December 27, 2017, the Cabinet granted retroactive approval to reconstitute the committee - as per the recommendations of the FATA Reforms Committee (2016) – with the Chief of Army Staff (COAS) and the Prime Minister as member and chairman respectively.

On December 18, 2017, the National Implementation Committee on FATA Reforms took the final decision on the implementation of the merger of FATA with the province of Khyber Pakhtunkhwa, entailing the establishment of regular administrative and judicial systems and the repeal of the FCR over a transitional period of five years. The committee also agreed on the election of members from FATA to the Provincial Assembly of Khyber Pakhtunkhwa in the general elections of 2017. A little more than a year later,[11] the federal cabinet agreed to expedite the FATA merger process and the transitional period was shortened to two years.

On May 22, 2018, the proposed 25th Constitutional Amendment was presented and approved by the federal cabinet before being presented to the National Assembly. The Bill was passed by the National Assembly on May 24 and then again a day later by the Senate with a two-thirds majority, as per the requirements for a constitutional amendment by the law.[12] On May 27, the Bill was passed by the Provincial Assembly of Khyber Pakhtunkhwa, once again with a two-thirds majority,[13] and by May 30, the Bill was signed by the President of Pakistan.

Despite lengthy consultations and numerous proposals by experts, the process of the merger and the 25th Constitutional Amendment were rejected by the people of FATA, and more specifically by the social and political elite, and members of the parliament on various grounds. In the case of the FATA Rewaj Bill, it was brought forward by the Ministry of SAFRON before the National Assembly in May 2017 but the tribal leaders, politicians, youth, and

representatives of the civil society disapproved the Bill on account of its similarity to the FCR. Not long after, the Bill was rejected by the Standing Committee of the National Assembly.

As for the 25th Constitutional Amendment, it was challenged by a group of locals from FATA before the Supreme Court of Pakistan on the grounds that it was passed without the consensus of the overall FATA population; the case is yet to be heard by the apex court. Indeed, the FATA merger has received wide-scale criticism from the general public of the region owing to the fact that out of a population of seven million people, a meagre 250 were consulted on the merger.[14] A retired civil servant who had served extensively in the FATA and the provincial government of Khyber Pakhtunkhwa remarked that the merger was announced and implemented in haste and the relevant stakeholders were not taken in confidence. He commented that at least the elected representatives of the people of FATA must have been consulted and taken in confidence.[15] Furthermore, despite the intended phase-wise strategy for the implementation of the merger - that would have allowed policymakers to make the necessary pre-merger arrangements and given the population of the region time to adapt on a gradual basis - its actual execution was arguably sudden and hasty.[16]

Nevertheless, experts from the security sector hold a different opinion. They consider the immediate merger of FATA as the most viable option, as the phase-wise merger would have allowed a space to the anti-merger elements and external stakeholders to topple the process of mainstreaming.[17]

Judicial Enforcement of Fundamental Rights

Through Presidential Order No.11,[18] the jurisdiction of the superior courts was extended to FATA in 1961 but taken back again by the 1962 Constitution of Pakistan.[19] Whereas, the tribal areas of the Quetta Division and the Dir, Swat, Chitral, and Malakand protected areas (provincial tribal areas of Khyber Pakhtunkhwa—then called NWFP) were brought under the jurisdiction of the High Court and Supreme Court through Act II of 1964[20] and Presidential Order 29 of 1970,[21] respectively. FATA was excluded from the jurisdiction of the constitutional courts both under Article 260(7) of the Interim Constitution of 1973 and Article 247(7) of the 1973 Constitution of Pakistan, unless specifically enacted by the parliament.

Therefore, until the promulgation of the Supreme Court and High Court (Extension of Jurisdiction to Federally Administered Tribal Areas) Act in April

2018, judicial enforcement of fundamental rights within the territories of FATA remained a serious legal challenge, even though the region was recognized as part of Pakistan in the Constitution, and as such, entitled to all fundamental rights enshrined therein.

1- Report of the Committee on FATA reforms (2016).

2- Committee members also included Hafeez Pirzada, Rafi Raza, and Mubashar Hassan.

3- "Naseerullah Babar calls for political reforms in Fata," The News (April 4, 2008), available at: https://www.thenews.com.pk/ archive/print/103913-naseerullah-babar-calls-for-political-reforms-in-fata

4- "Undeserving awarded, deserving ones like Mian Ajmal unrewarded," The News (April 29, 2011), available at: https://www.thenews.com.pk/archive/print/319194-undeserving-awarded-deserving-ones-like-mian-ajmal-unrewarded

5- FATA Research Centre "Governance Reforms in FATA: A People's Perspective," (February 1, 2016), available at: https://frc.org.pk/ breaking/governance-reforms-in-fata-a-peoples-perspective/

6- Interim Report of the FATA Reforms Commission, (2015).

7- Ibid.

8- Ibid.

9- Point 12-NAP, 2014.

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

11- On December 27, 2018.

12- Article 239 (1&2) of the Constitution of Pakistan, 1973.

13- Article 239 (4) of the Constitution of Pakistan, 1973.

14- Focus Group Discussion held in Swat on October 13, 2020.

15- Interview with a retired civil servant of the Pakistan Administrative Services.

16- Focus Group Discussion held in Swat on October 13, 2020.

17- Interviews with a senior-level police officer serving in Khyber Pakhtunkhwa Police and a former civil servant serving in Khyber Pakhtunkhwa.

18- Special Areas (Restoration of Jurisdiction) order, 1961.

19- Article 223(5) of the Constitution of Pakistan, 1962.

20- Tribal areas (Restoration of Jurisdiction) Act, 1964.

21- Supreme Court and High Court (Extension of Jurisdiction to tribal areas) Order, 1970.

25TH CONSTITUTIONAL AMENDMENT 2018

Through the 25th Constitutional Amendment, Articles 1, 51, 59, 62, 106, 155, and 246 of the Constitution of Pakistan were amended while Article 247 was altogether omitted. The following are the salient features arising from the 25th Constitutional Amendment of 2018:

- The special status conferred upon FATA and PATA was withdrawn, while FATA was merged with the province of Khyber Pakhtunkhwa.
- The executive authority previously exercised by the Governor of Khyber Pakhtunkhwa in respect to FATA under Article 247 of the Constitution was suspended and shifted to the Provincial Cabinet of Khyber Pakhtunkhwa.
- All provincial and federal laws applicable to the province of Khyber Pakhtunkhwa were technically xtended. However, by virtue of Section 6 of the Interim Governance Regulation, 2018, the said regulation could override all other laws.
- National Assembly seats for the province of Khyber Pakhtunkhwa were increased to 45 while the seats for FATA in both the National Assembly and Senate were abolished. This clause, however, was held applicable on subsequent general elections.
- The strength of the Provincial Assembly of Khyber Pakhtunkhwa was increased to 145, which included 16 general, 4 female, and 1 minority seat for the erstwhile FATA.
- The legislative powers of the President and Governor Khyber of Pakhtunkhwa with regard to FATA and PATA were withdrawn.

Interim Governance Regulation (IGR) 2018

Promulgated on May 28, 2018, the Interim Governance Regulation (IGR) provided for a provisional structure of governance, law enforcement, and

justice administration to oversee the transitional period of FATA's merger with Khyber Pakhtunkhwa, which was allotted the timeframe of two years. 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. Among other things, the regulation declared tribal agencies as tribal districts and existing tehsils as tribal sub-divisions.[1] It further repealed the FCR[2] and changed the nomenclature of Political Agent and Assistant Political Agent to Deputy Commissioner and Assistant Commissioner,[3] allowing both titles to retain the same powers and functions as assigned to them under the FCR. The Deputy Commissioner was given the judicial power of both a magistrate and a judge[4] and had the authority to tender pardon[5] and refer matters to the council of elders[6] and/or Qaumi Jirga.[7] The council of elders, appointed by the Deputy Commissioner had the same powers and functions as were provided in the FCR, while the Governor had the authority to declare any area of FATA as an administered area.[8] The IGR was also similar to the 1975 PATA Regulations in that it provided a corresponding judicial mechanism, conferring concurrent jurisdiction of adjudication upon bureaucracy, tribal Jirga and the judges.

However, in reviewing the IGR, the Peshawar High Court and the Supreme Court of Pakistan pronounced the regulation to be unconstitutional. According to a retired civil servant from South Waziristan agency, the supreme court had misperceived the credibility of the Jirga system as provided by the IGR and previously the FCR and confused the same with the Panchayat and Jirga systems prevalent in Punjab and Sindh. He was of the view that since the prior was legally sanctioned and enjoyed the popular will of the citizens, the Supreme Court must have taken notice of this fact and heard the case of FATA on its own merits, separate from the other cases.[9]

Supreme Court Judgment on IGR, 2018

The IGR was challenged by a FATA-based lawyer before the Peshawar High Court (PHC) in Writ Petition No.3098-P/2018. Subsequently, on October 30, 2018, the PHC declared the regulation null and void to the extent of the judicial powers conferred upon the Commissioners, Deputy Commissioners, Assistant Commissioners, Council of Elders, and Qaumi Jirga. Similarly, the authority of the Governor to declare any area as 'administered area' was also declared null and void. In the same judgement, the PHC directed the establishment of regular courts within thirty days on the basis of the constitutional principles of separation of power and independence of judiciary.[1]

The judgement of the PHC was later challenged in the Supreme Court of Pakistan[11] but on January 16, 2019, it was decided that the PHC ruling would be upheld. The major observations and findings of the Supreme Court of Pakistan on the case were as follows:[12]

1. In light of the 25th Constitutional Amendment, the people of the FATA region were similarly placed to the people Khyber Pakhtunkhwa and could not be distinguished from the other on any rational ground.

2. The promulgation of the IGR in one part of the province while the other part was governed by regular provincial law was not justified. In fact, it was discriminatory and a contravention of the fundamental right of equality before law and equal protection of law.

3. The interim regulation was inconsistent with the rovisions contained in Articles 4, 8, 25, 175, and 203 of the Constitution and were, therefore, declared null and void.

4. The operation of Jirgas and Panchayats was not only contradictory to the international commitments of Pakistan under the UDHR, ICCPR, and CEDAW but also in violation of Articles 4, 8, 10-A, 25, and 175(3) of the Constitution of Pakistan, 1973.

5. The Government of Khyber Pakhtunkhwa was granted six months for the development of infrastructure and establishment of a uniform judicial system, for instructing the local law enforcement to ensure observance of the rule of law, and for the replacement of the Jirga system with statutory arbitration only in civil cases.

1- Section 4, Interim Governance Regulation, 2018.

2- Section 3, Interim Governance Regulation, 2018.

3- Section 5, Interim Governance Regulation, 2018.

4- Section 7, Interim Governance Regulation, 2018.

5- Section 9, Interim Governance Regulation, 2018.

6- Sections 10 & 13, Interim Governance Regulation, 2018.

7- Section 15, Interim Governance Regulation, 2018.

8- Section 48, Interim Governance Regulation, 2018.

9- Interview with a retired civil servant from the Pakistan Administrative Services.

10- Ali Azeem Afridi v. Federation of Pakistan. W.P.No. 3098-P/2018.

11- Through Civil Petition No.773/P of 2018.

12- PLD 2019, Supreme Court 218.

ADMINISTRATION POST-25TH CONSTITUTIONAL AMENDMENT

Pursuant to the adoption of the 25th Constitutional Amendment and the IGR, the provincial government issued a notification on June 8, 2018, for the abolition of the office of the Political Agent and the establishment of the office of the Deputy Commissioner in all tribal districts.[1] Following another notification passed on 19th of July, 2018, the composition of the administrative divisions of Malakand, Peshawar, Kohat, Bannu, and D.I. Khan was rescheduled and the tribal districts of Khyber Pakhtunkhwa were merged with the adjacent divisions.

The provincial government further decided to abolish the FATA Secretariat. However, while some of the directorates of the FATA Secretariat, i.e., health, education, planning and development (P&D), law and order, social welfare, zakat and ushr, and population were immediately abolished, others are still functioning. These functioning directorates were to report under a dual system to both the concerned director FATA and the secretariat of the provincial government. At the same time, supervision of development in the erstwhile FATA was placed under the purview of the Chief Minister of Khyber Pakhtunkhwa who appointed an Additional Chief Secretary (Development), Special Secretary to the Chief Minister, and Special Secretaries Merged Districts to important departments, including finance, planning, and local government, with the responsibility to look after the affairs of the merged districts and report back to him through the Chief Secretary. The Chief Minister also appointed a focal person and political coordinator to liaise with the people from a political standpoint.

On 4th of September, 2018, the Prime Minister established a task force for the identification of impediments and for the facilitation of the FATA merger. The Adviser to the Prime Minister on Establishment was designated as the convener of the task force. Subsequently, in February 2019, the Governor of Khyber Pakhtunkhwa constituted another four-member Advisory Board for formulating recommendations on the issues arising from the FATA merger.[2]

Although a retired civil servant, who was a member of the board too, referred to the constitution of board as a step in the right direction with the aim to act as a bridge between the government and tribal people to identify post-merger administrative challenges and formulate recommendations,[3] it was challenged in the PHC and its operation was suspended.[4]

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 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.[5] Slow pace of infrastructure development due to financial constraints and provision of municipal services are identified as some other administrative challenges.[6]

While some senior-level officers argue that the full transition to the mainstream legal and judicial system is the right decision,[7] for sustainability of the governance system, the provincial government is required to ensure the availability and positioning of robust, perpetually responsive, and meticulously responsible administrative machinery. The existing administrative machinery needs to be transformed from a mechanism of oppression to an apparatus of service and utility, to the satisfaction of the tribal people.[8]

The locals are also not satisfied with the post-conflict rehabilitation process and they have multiple grievances against the government. Experts believe that before the complete merger of FATA, the government had to bring social change by way of education and economic opportunities at the doorsteps and which would have resulted in an automatic merger. After extension of the mainstream laws, the locals of tribal areas are deprived of their traditional sources of income necessitating their economic uplift is essential for establishing the writ of state. Experts believe that if the grievances of the people are not addressed expeditiously and as a top priority, anti-state elements may start growing.[9]

In May 2018, the government made the announcement to continue immunity from tax liability for the people of FATA for a period of 5 years. The Economic Coordination Committee of the Cabinet, in its meeting dated 31st of

May 2018, decided to maintain the exemptions from income tax, withholding tax, federal sales tax, and excise duties and allowed non-custom paid vehicles in FATA and PATA for a period of 5 years, ending on 30th of June 2023.[10] This exemption was later notified by the Federal Board of Revenue (FBR) vide Statutory Regulatory Orders (SROs) dated 5th of October 2018.[11] Similarly, in March 2019, the Khyber Pakhtunkhwa Revenue Authority (KPRA) also granted exemption from sales tax to the erstwhile FATA and PATA.[12]

Tax exemption however, is very crucial, particularly in terms of service delivery. During the focus group discussion in Malakand, participants were of the view that exemption from taxes was a major hindrance in the development process. Extension of the tax regime to the tribal areas was essential for ensuring state's ownership of the region and focus on service delivery and major development indicators.[13]

Establishment of civil courts

Subsequent to the Supreme Court's directive of 16th of January, 2019, the provincial government (vide its notification dated 29th of January, 2019) declared all tribal districts as sessions divisions and all frontier regions as sub-divisions to the sessions divisions of the adjacent districts.[14] In the following month,[15] the provincial government sanctioned 907 positions for the judicial staff, which included 52 seats for judges who would be appointed by the High Court for the establishment of civil courts in the tribal districts.[16] On February 25, 2019, the PHC appointed 7 District and Sessions Judges,[17] 14 Additional District and Sessions Judges (2 in each tribal district),[18] and 7 Senior Civil Judges[19] in the tribal districts.

However, due to lack of infrastructure in the district and tehsil headquarters, and the uncertain security situation in the region, it was decided that the district courts would function in the settled adjacent district rather than the agency headquarters.[20] On May 29, 2019, Civil Judges were appointed to the tribal districts and tehsil sub-divisions of the frontier regions but with the stipulation that they would not be functioning from their permanent seat until told otherwise by way of notification.[21] Very recently, the district courts of the tribal districts of Bajaur, Mohmand, and Kurram were shifted to the tribal district headquarters while the others continue to function from outside the tribal districts.

Whereas, in the case of the Malakand merger, confusion regarding the

judicial system prevailed over decades, the same situation in the tribal district was resolved swiftly by the timely interference of the superior judiciary. However, it is yet to be determined whether the Civil Courts can succeed in establishing a uniform and satisfactory judicial system. There are still a number of challenges facing the judiciary in securing public confidence, including the very real dilemma of producing judgements to the satisfaction of people without proper revenue record or capable investigation agencies.[22] Additionally, the formal legal system with its delays arising from procedural technicalities may not reflect well 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.[23]

As noted by the serving and retired government officers including judges from the province of Khyber Pakhtunkhwa, the people of FATA are traditionally accustomed to the informal justice system, which provides twice and cost-effective remedies at their doorsteps. The civil courts established in the tribal districts are situated at a distance from the native towns and using the existing procedural codes that provide susceptible to judicial delays, contrary to the expectations of the people of FATA.[24] Thus, instead of extending all the mainstream procedural laws at once, it was appropriate to introduce and develop a hybrid model containing both the formal and informal judicial mechanisms (ADR) simultaneously.[25] The traditional Jirga system was believed to have failed during the conflict situation and there were reports that the Jirga members were involved in corrupt practices but this issue could be resolved through reform in the Jirga system.[26]

Institutional coordination is a prerequisite for the success of a good governance system but the majority of expert believe that in the case of FATA, there is a serious coordination gap between government departments, particularly between the judiciary, police and district administration as was the case in Malakand. Judicial powers of the executive officers under the FCR are also a source of contention as the deputy commissioners in such situation could contribute to the failure of judiciary.[27]

The judiciary, according to experts from the justice sector, was facing another technical issue of the lack of availability of evidences much as land records and registration of documents. The capacity of police to investigate and the level of public awareness of the standard criminal procedures was also a challenge.[28]

Law enforcement

In October 2018, the Khyber Pakhtunkhwa law enforcement prepared a scheme for policing the tribal districts. As part of this scheme, they planned to establish 13 police lines, 95 police stations and 190 police posts in the entire tribal region, accommodating 45,000 police personnel.[29] In March 2019, the provincial government set up 25 police stations in the merged areas,[30] and followed with two ordinances promulgated by the Governor of Khyber Pakhtunkhwa[31] for regulating the Khasadar and levies forces in the tribal areas. In the same month, the Central Police Office in Peshawar appointed District Police Officers (DPO) in all the tribal districts under the Khyber Pakhtunkhwa Police Act, 2017.[32] Then in April 2019, the Chief Minister of Khyber Pakhtunkhwa announced the regularization of 16,053 personnel of the Khasadar force, and 11,918 personnel of the levies force, along with their merger into the Khyber Pakhtunkhwa police force.[33]

In September 2019, the Provincial Assembly passed two additional laws[34] that aimed to reconstitute, regulate, and maintain the levies and Khasadar forces in the tribal districts, as well as confer parallel powers of the police upon both forces under the Khyber Pakhtunkhwa Police Act. Under the two laws, the DPOs of the tribal districts were given the authority of commandants over the Levies and Khasadar forces. The laws further provided for the absorption of around 28,000 personnel from the Levies and Khasadar forces into the police in accordance with a set of rules and procedures prescribed by the government. But given the below standard of educational qualification of the recruits in the Khasadar and the Levies force, there have been serious concerns regarding their capacity to perform the dual roles of operation and investigation as required of the Khyber Pakhtunkhwa police.

The transition to the police force has, nevertheless, pleased the Levies and Khasadar personnel as their meagre salaries and non-existent fringe benefits were augmented by transitioning to the salary structure of the police under the Police Act. They do lack the necessary skills required for policing such as crime investigation and legal provisions, notwithstanding the fact that they had learnt a lot from their active engagement in the war on terror.[35] To overcome the physical, technical, and educational deficiencies of certain personnel of the Levies and Khasadars, they were given the option to nominate their children or other relatives who fulfilled the relevant criteria, for appointment at their place.[36] Similarly, the officials who were either under suspension or under enquiry due to

professional negligence or misconduct, had also been deprived of regularization.[37]

Getting the Levies and Khasadars to effectively function as police officers also requires additional qualifications, such as investigation and awareness of the relevant laws. As one senior-level police officer admitted that while the Levies and Khasadars were neither highly educated nor trained in investigation and record maintenance, they were good in operations, community policing, raids, and arrests.[38] To overcome the challenge of transforming the militias into an effective police force, the provincial government has come up with several initiatives. To improve the investigative skills of the newly merged police officials, officers from the adjacent settled districts in the same division have been appointed as their supervisors, trainers, and mentors to provide them with on-the-job training.[39] Additionally, besides six-months of basic training in police training schools for the newly merged officials, several retired police officers have also been appointed as mentors at each of the 25 police stations in the KPMDs to provide continuous on-the-job training to the existing staff.[40] So far, however, only 5,000 have been trained and handed over back to their respective districts and another 7,500 were scheduled to be trained in the second cycle.[41] Recruitment of an additional 3,000 police personnel in accordance with the criteria laid down in the KP Police Act 2017 and the Police Rules 1934, is also on the cards to augment the capacity of the police in KPMDs. The KPMD police however, is lacking in female officers and except for the Kurram district, there is no formal women facilitation centre in any tribal district.[42]

On the issue of security and law enforcement, the opinions of the experts were divided. Experts from the police service favoured a crime control model and maintained that the restorative justice model was a contributing factor in the previous law and order situation conversely. Experts from other sectors believed that the restorative justice model was better in terms of reflecting the will of the local population. According to a serving police officer, the police was in control of law and order in the entire FATA except for a small portion of the Waziristan and Khyber Districts. In view of the region support of tribal youth for mainstreaming, there was no chance of any conflict situation, as it happened in the Malakand.[43]

Counter insurgency operations

While extensive anti-terrorism efforts were successful in eliminating the threat of militancy in FATA,[44] there have still been sporadic episodes of terrorist

activity in the remote tribal areas, particularly North and South Waziristan, in the post-merger era. Keeping this in view, the government preserved the powers of the military, under the AACPR, for conducting military operations against potential security threats in the tribal districts. The government did so by passing the Khyber Pakhtunkhwa Continuation of Laws in Erstwhile Federally Administered Tribal Areas Act of 2019,[45] which provided that the AACPR and all other laws in force in the erstwhile FATA prior to the 25th Amendment would retain legal force until altered or repealed by the competent authority. The FCR and IGR were, however, excluded from this clause.[46]

A similar law was passed in January 2019 for the erstwhile PATA to empower the military to conduct operations against insurgents, seize properties, and arrest and detain suspects of terrorism.

The Continuation of Laws Acts and the AACPR have been adjudged as null and void by the PHC through a judgment dated, October 17, 2019.[47] However, the judgment of the PHC has been suspended by the Supreme Court of Pakistan and the appeal is still awaiting a final hearing.

AACPR, according to experts from the justice sector is still a matter of concern for the local population as well as the legal fraternity across the merged districts. They believe that after successful military operations and enforcement of the writ of the state, the government, instead of continuing with the conflict paradigm, had to focus on the post-conflict rehabilitation, trials of the detainees under the AACPR and repeal of the AACPR. Presence of the military in the tribal area and operation of AACPR was displayed the impression that the conflict situation still exist.

Elections to the provincial assemblies

In January 2019, the Election Commission of Pakistan (ECP) passed a notification for the interim delimitation of the Provincial Assembly constituencies in tribal districts,[48] which was later finalized through an additional notification on March 4, 2019. In the subsequent month, the ECP appointed District Returning Officers and Returning Officers for the general as well as reserved seats' elections of the tribal districts,[49] following which elections for 16 general seats were notified to be held on July 2, 2019.[50] According to the final list of contesting candidates, a total of 297 candidates contested election for 16 general seats of the provincial assemblies.[51] In January 2020, two newly elected MPAs from the tribal districts joined the provincial cabinet.

Land settlement

Among the territories of 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.

In 2015, the FATA Secretariat initiated a project for mapping and preparing digital land records in FATA through the Graphic Information System (GIS),[52] but the process was halted some time back. Digitization of land record was also initiated in few other districts of the province of Khyber Pakhtunkhwa but not completed in either of the districts.[53] Nevertheless, the importance of land settlement was re-prioritized by the FATA Reforms Committee in 2016 so as to avoid conflicts and an increase in the crime rate.

According to the participants of the FGDs conducted in Malakand, issues concerning the settlement of land, forests, and natural resources should have been resolved prior to the merger. They added that leaving these matters unattended had resulted in multiple tribal conflicts, law and order situations, and lengthy lawsuits, which were still pending even fifty years after the merger. It was to avoid these very situations that Sartaj Aziz's plan for the unrolling of the FATA merger, prioritized arrangements for land settlement and distribution of resources in advance of the merger itself.[54]

During an informal discussion, a tribal elder from Khyber Agency stated that prior to the 25th Constitutional Amendment, the government through Political Agents could easily have settled land disputes through the Jirga system. However, since Jirgas had been declared unconstitutional, that was no longer an option as even tribal jirgas would not be able to settle boundaries and distribute properties among the tribes and families. He was of the view that the resulting situation would pose a serious law enforcement challenge for the government in the near future.

Pertinently enough, in the near past, several demarcation and border settlement issues had arisen between tribesmen, including the dispute of Mohmand and Bajaur districts in April 2020, resulting in protests and a blockade of the Peshawar-Bajaur road that was lifted a week later,[55] disputes over coal mines in Darra Adam Khel and land disputes between tribes in Waziristan and Khyber Agency.[56] These disputes were mainly due to the non-availability of land

records. In the case of the Bajaur-Mohmand dispute, the Chief Minister formed a 10-members committee for the resolution of the dispute, the final decision of which is still pending.[57] In the other cases too, locals have appealed to the government for the constitution of a Jirga for resolving matters.

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7- Interview with a senior-level police officer in Peshawar.

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9- Interview with a lawyer and retired judge from the Khyber Pakhtunkhwa.

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11- SRO No. 1212(1)/2018 and 1213(1)/2018 dated October 5, 2018.

12- Notification No. KPRA/GN/2019/534-38 dated March 15, 2019.

13 - Interview with a lawyer and retired judge from Khyber Pakhtunkhwa.

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15- On February 13, 2019.

16- Notification No. BO-II/FD/3/SNE/PHC/2018-19 of the Finance department, dated 13-02-19.

17- Notification No. 3311-3460/Admn 0f the Registrar Peshawar High Court, dated 25-02-2019.

18- Notification No. 3461-3611/Admn 0f the Registrar Peshawar High Court, dated 25-02-2019.

19- Notification No. 3612-3762/Admn 0f the Registrar Peshawar High Court, dated 25-02-2019.

20- Khyber at Hayatabad (Peshawar), Mohmand at Shabqadar (Charsadda), Bajaur at Timergara (Lower Dir), Kurram at Thall (Hangu), Aurakzai at Hangu, North Waziristan at Bannu and South Waziristan at Tank.

21- Notification No. 11499-11675/Admn of the Registrar Peshawar High Court, dated 29-05-2019.

22- Noted by participants during a focus group discussion in Malakand.

23- According to a Judge serving in KPMDs.

24- Interview with a serving judge from KPMDs.

25- Ibid.

26- Interview with a retired civil servant from the Pakistan Administrative Services.

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34- The Khyber Pakhtunkhwa Levies Force Act, 2019, and the Khyber Pakhtunkhwa Khasadar Force Act, 2019

35- Interview with a senior-level police officer.

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PART III

CONCLUSION

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SIMILARITIES AND DIFFERENCES IN THE CASES OF MALAKAND AND KPMD

In the case of the princely states, the change was introduced overnight and the assimilation challenges resulting from the newly constituted legal, judicial, security, and administrative systems culminated in wide-scale conflict that persisted for decades and left a lasting impression in the memories of its residents. One of the main reasons for the glitches in this process was the lack of consensus among the common people and the elite on the adoption of the new system. In the same vein, when the merger of FATA with the province of Khyber Pakhtunkhwa was announced, the response of the public was very different from that of the social and political elite. Whereas, in the context of Malakand, the elite favoured the merger and the public resisted it, in Torghar and FATA, the situation was the other way round. Personal interests and ulterior motives were the deciding and dividing factors.

Another main reason for public grievance and conflict in the post-merger reality of Malakand was found to be the abruptness in the implementation of the process and the lack of any groundwork in leading up to it, in terms of building the capacity and confidence of the citizens and devising a sustainable governance and social welfare strategy. Indeed, 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. In the case of Malakand, litigation over lands that were mainly owned by the states or the rulers are still pending in various courts, even fifty years after the merger. As for the KPMDs, there are no land records in the region except in parts of Kurram, which increases the possibility of prolonged civil litigation over lands and the consequential criminal case work.

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 Khyber agency by

the tribal people, 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. The phase-wise plan for the merger of FATA over a period of five years as was suggested by the FATA Reforms Committee (2016) would have been a far more effective approach for this undertaking as it would have allowed for prior essential arrangements and a suitably sufficient adjustment period. Unfortunately, the plan was ignored and the same process was adopted as was for the merger of Malakand
and Torghar.

In terms of the legal and judicial system, Malakand and KPMD have both been subjected to the challenges arising from dual systems of justice. In the matter of the former, the FCR provided for the implementation of regular civil laws alongside Jirga laws, while KPMD also had a similar system in place under the IGR, which was later voided by the High Court and the Supreme Court on grounds that it was unconstitutional. The experience of the people of both regions to the prevalent legal and judicial systems has also been quite similar on issues regarding the lack of legal awareness, procedural technicalities, judicial delays, dominant role of the lawyers in formal judicial system, non-availability of adequate alternative measures, and a tendency for cultural and customary practices.

Due to the application of Sharia law alongside customary laws in the former princely states and the influence of TNSM's Islamist movement thereafter, the people of Malakand have shown a marked preference for the substantive and procedural elements of Sharia law. The people of FATA, on the contrary, have always leaned towards cultural customary practices and the tribal Jirga for dispute settlement. For this reason, the Provincial Government introduced the Khyber Pakhtunkhwa Alternative Dispute Resolution Bill in 2020, which was approved by the Provincial Cabinet in November 2020 and presented before the Provincial Assembly in the subsequent month. The ADR bill apparently is designed for the entire province of Khyber Pakhtunkhwa but will be more relevant to the situation in KPMD in view of the experiences and expectations of the tribesmen. However, the legal community is strongly opposed to the bill on the ground that it empowers the executives to choose the mediators and refer matters for ADR, which by implication, authorise the executives to take cognizance of

judicial matters. Given the opposition to the Bill, there is a likely possibility that it may meet the same end as the Shar'i Nizam-e-Adl Regulations did in Malakand.

With regard to the system of law enforcement and police investigation in FATA, many of the provisions correspond with the structure prevalent in the princely states, more specifically, in the Dir and Malakand protected area. However, while the provincial government introduced a dual system comprising the police and levies in the princely states, the levies and Khasadars in KPMD have been merged into the formal police force. This has raised some serious concerns in terms of capacity as according to the levies and Khasadar recruitment rules, there is no qualification of educational requirements for Khasadars, while the levies force allows for the appointment of candidates whose educational qualification is below the metric level. This means that a majority of the newly merged police officials in KPMD are either uneducated or their qualification is distinctly below that of their peers in the provincial police. More so, since the Khyber Pakhtunkhwa police are required to perform the dual roles of operation and investigation according to the Police Act of 2017, the lack of qualification of the KPMD police force could present a serious challenge for law enforcement and investigation.

The provincial government in the case of Malakand, made multiple attempts to extend taxation and customs laws to the region but was unable to execute the policy decisions due to resistance from the locals. Nevertheless, the elite class remained the prime beneficiary of the amnesty. A similar approach has been adopted in the case of KPMDs where tax amnesty was initially granted for a period of five years and there is every likelihood of extension of this period for another five years. Immunity from tax on one hand contribute to the economic imbalance among the elites and under-privileged members of the community and on the other hand would affect the service delivery and development process by the state.

The similarities in the social, cultural, political, geographic and economic backgrounds of the FATA and PATA regions cannot be argued against, and the parallels in the overall experience of the mergers in these two regions are also undeniable. Therefore, it is imperative that the lessons taken from the merger of the Malakand Division be given due significance in navigating the more recent merger of FATA with Khyber Pakhtunkhwa.

Lessons learnt for KPMDs

There are a number of valid lessons that can be learned from the merger of the Malakand Division, especially pertaining to the provision of security and justice. First and foremost, the merger took place under military regime and as such, there were neither any prior consultations with relevant stakeholders in Malakand, nor were there any discussions on the issue in the Provincial Assembly of Khyber Pakhtunkhwa. Hence, the overlying impression among most people of Malakand was that the merger was imposed on them, driven by the vested interests of powerful civil-military bureaucracy and disgruntled local elements.

Second, it took the government a very long time to eliminate the discriminatory clause 247 of the Constitution and the PATA regulations. While the region was merged with Pakistan in 1969, it was kept marginalized for nearly five decades. It was not until 2018 that the special status was finally removed through the 25th Constitutional Amendment. A former senior official from law enforcement aptly referred to the merger as a 'fire and forget' situation for the government in that once the government abolished the princely states in Malakand, it never made any sincere effort to address the vacuum created by the sudden change in the governance structure from a one-man rule to a formal government system.[1] Although various committees were formed from time to time to come up with feasible recommendations for the implementation of the merger, these recommendations were never executed in their intended letter and spirit. It can, therefore, be inferred from the situation that the government took too long and wasted innumerable opportunities to bring the Malakand region into the mainstream, creating severe security and justice challenges in the process.

Third, the findings of this study clearly illustrate that the provision of security and justice services worsened considerably in the post-merger environment. While the Qazi courts of the un-merged princely states were expeditious and accessible to the people, post-merger justice services have been characterized by unprecedented delays in the resolution of disputes and provision of justice. The severity of the situation was such that according to a survey conducted in Swat, seventy-eight percent respondents were of the opinion that a majority of people joined the militants to get their disputes resolved and their grievances addressed.[2]

Fourth, the governance and overall administrative and bureaucratic

set up in Pakistan leaves much to be desired. Prior to the merger of Malakand, the governance structure in the regions of Swat and Chitral, while strict and undemocratic, ensured people access to basic services. This changed once the government machinery replaced the rulers of the region and brought with it a surplus of issues ranging from corruption and mismanagement to nepotism and favouritism. Indeed, as pointed out by one of the interviewees, good governance and an efficient and caring administration is the solution to the myriad of issues relating to security and justice that have plagued Malakand post-merger.[3] Therefore, a very pertinent lesson to take from the Malakand case is that if the prevalent system of bad governance in the KPMDs is not addressed carefully and efficiently, the region may potentially regress to a situation of instability as was experienced by Malakand.

Fifth, the merger of FATA has burdened the province of Khyber Pakhtunkhwa with the additional expense of an area that is exempted from tax and as such does not significantly contribute to the national exchequer. There is a common perception among the people of Malakand, which was also verified during this research, that the exemption of taxes has deprioritized development work in the region, leading to a sense of deprivation and resentment against the state. The case of FATA is not different from Malakand.

Sixth, capacity building of the citizens was highlighted as a material point for success in the new system. According to the research, the residents of FATA are mainly self-employed within the local weapons and narcotic industry. However, following the extension of regular laws, those industries would be locked down resulting in what could be large-scale un-employment, which would build frustration among the citizens and potentially lead to increased crime and conflict in the region. Moreover, as seen from the previous conflicts in the regions of FATA and PATA, the majority of the recruits for militants came from among the un-employed citizens.

Seventh, awareness-raising of citizens is equally important. In the case of Malakand, the people were accustomed to laws of a tribal and customary nature, and the abrupt change in the system was not welcomed by the population at large. Similarly, the people of FATA are also used to a mixed system of common and civil law that allows for tribal and cultural sensitivities. As it is, the newly extended civil law of the state offers very

limited recognition to customary and cultural practices and, in fact, condemns several of the practices that have been followed by tribal people for centuries.

Eighth, as noted by participants in the group discussions, the role of vulnerable groups is significant to creating public opinion. Women, in particular need to be empowered as the Pashtun tribal culture is not supportive of emboldening their women. The merger of Malakand gave the previously oppressed women of the region the opportunity to participate in the political, social and economic processes of their communities. Similar opportunities should be cultivated for women in the KPMDs through the provision of equal access to relevant resources.

Ninth, the lack of land records in the Malakand region has resulted in enhanced and protracted litigation, often culminating in criminal cases of murder or attempted murder. Litigation cases from the 1970s are still pending to date due to the non-availability of land records.

Tenth, the reform initiatives undertaken in the Malakand Division were primarily legal in nature and did not sufficiently focus on the administrative and structural reform needed for the implementation of the said legal reforms. As a result, the government has time and again been forced to suspend implementation of legal changes due to the lack of administrative capacity to enforce them. The key lesson being that all sectors of governance need to be developed in complement of each other to support effective reform.

Last but not least, despite the shortcomings of the mainstream legal system, the people of the tribal districts believe it to be more just than parallel legal systems in terms of its application on all segments of society, including women and other vulnerable persons. It is usually the vested interests of a select few that oppose the full imposition of the mainstream legal and judicial system in these areas, and adversely influence public perceptions regarding the aforementioned system. Therefore, the need is not only to address the existing shortcomings of the constitutional security and justice system of Pakistan but also to initiate concerted awareness-raising campaigns among the public, to make the governance system more transparent through access to information, and to ensure a clear separation of powers between the executive and judicial branches of the country.

1- Interview with a former senior-level police officer hailing from Malakand Division.

2- Aziz, "Swat: The Main Causes of the Breakdown of Governance and the Rise of Militancy."

3- Interview with Sultan-i-Rome.

RECOMMENDATIONS

In view of the key lessons learnt from the comparative study of the Malakand and FATA merger and the implication for security and justice provision services in the prior case, we recommend the following:.

a. For any future strategy or course of action affecting the public, consultation with relevant stakeholders in the KPMD (including women and other vulnerable segments) is essential. Operationalization of an effective elected local government system could be a key to social inclusion in decision-making processes affecting local populations.

b. The 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.

c. Accountability of government officials throughtheir chains of command needs to be prioritized along with involving communities in a consultative process through their elected representatives on development.

d. There needs to be a greater focus on post-conflict rehabilitation, infrastructure development, education, and employment, including for the women and other vulnerable groups.

e. The KPMDs need to be brought in the tax net not only to offer regional services that are at par with the rest of the province but also to reduce income inequalities in the area. This is something for which advocacy with the local communities needs to be conducted so that taxation may result in better service delivery for the people of the region.

f. Extensive awareness-raising needs to be conducted 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.

g. The government should prioritize the land settlement, addressing the ongoing land disputes and preparation of land records.

h. Both the government and the PHC should develop a mechanism for efficient institutional coordination and ensure that different governmental institutions are complementing each other in service delivery to the citizens.

i. The government needs to ensure the availability of suitable infrastructure and better security situation so that the civil courts are shifted to the respective district and Tehsil headquarters as soon as possible. If practicable, the idea of mobile courts, once introduced in the Peshawar region of KP, be extended to the tribal districts for ensuring
speedy and cost-effective justice at the doorsteps.

j. For having a robust and widely acceptable ADR apparatus, the government should conduct the local

k. government election in the tribal districts and build the capacity of elected representatives on contemporary mediation and negotiation methods.

l. The Government should make a work plan for the trial of terror suspects detained under the AACPR by the regular courts of competent jurisdiction and execute gradual withdrawal of the military, repeal of AACPR, and handing over the tribal districts to the civilian law enforcement agencies.

PART IV

ANNEXES

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ANNEX I: METHODOLOGY OF THE CITIZENS' PERCEPTION SURVEY

Methodology

This study set out to address two separate, but related problems: first, whether the provision of security and justice services in Malakand and Torghar had an impact on short and long-term stability, recalling that Malakand especially descended into periods of Islamic militancy in 1994 and 2007. Second, the impact of the post-merger settlement on people's experience of security and justice, whether there was any change in how people resolved their grievances, and whether there was any discernible change in the justice outcomes experienced by people. The first part was addressed by the study through a review of the available open source published books, research papers, civil society publications, government notifications, laws enacted and extended to Malakand and Torghar, administrative decisions of the Government of KP and media reports. To address the latter problem, two separate Focus Group Discussions (FGDs) were conducted with male and female representatives from the seven districts of Malakand Division as well as another FGD with representatives of Torghar district, whose case is slightly different from that of Malakand Division districts. Based on the findings of the literature review and the findings of the FGDs, a structured questionnaire was developed for a quantitative perception survey about the pre- and post-merger security and justice provision in Malakand Division and Torghar. The survey was be conducted among a sample of at least 30 respondents from each district under study through locally engaged survey volunteers from each of the target districts who were given a training on conducting the survey by a master trainer before conducting the survey in their districts. The survey forms were filled by the surveyors after obtaining responses from the respondents verbally. There were two main reason for adopting this approach: one, we had among our target groups respondents who could not read or write; two, we have observed that when the survey forms are handed out even to the literate respondents, they

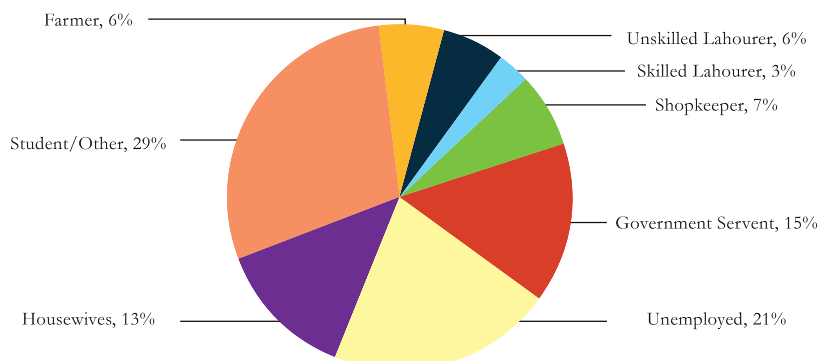
either find it hard to comprehend the questions accurately or fill the forms out without much thought. Besides ensuring representation of both male and female respondents, the survey also included respondents from various socioeconomic and educational backgrounds as well as age groups. All engagements were conducted in Urdu and/or local languages.

Composition of respondents

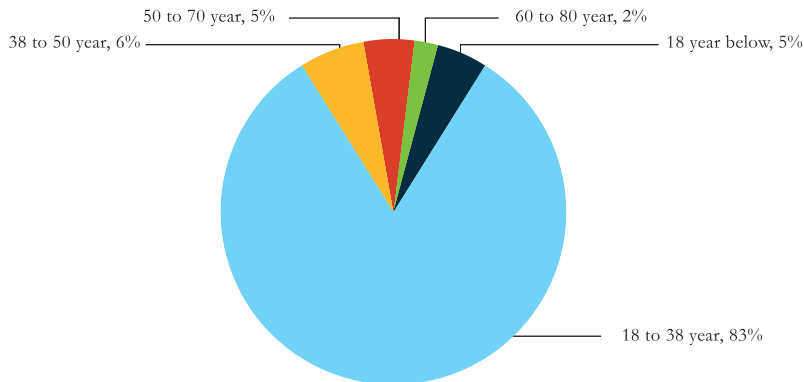
CODE PAKISTAN conducted a citizens' perception survey among a total of 240 selected respondents from the seven districts of Malakand Division as well as Torghar district. We interviewed a total of 30 respondents from each of the seven districts of Malakand Division, i.e., Buner, Chitral, Dir Lower, Dir Upper, Malakand, Shangla, and Swat, as well as Torghar. To have a gender-balance in the perspectives, about half of our interviewed respondents were male while half were female. We tried our level best to reach out to relatively better-informed respondents (including female respondents) in the socio-culturally backward target districts and ensured representation from the various Tehsils (sub-districts) of each district among the respondents.

We not only ensured geographical representation of various regions but also a good gender-balance of 52 per cent male and 48 per cent female among respondents. While a predominant 83 per cent of the respondents were between the ages of 18 and 35 years, owing to this age group's level of education and awareness as well as its future relevance, we also included 5 per cent respondents below 18 years of age, 6 per cent between ages 35 and 50, 5 per cent between ages 50 and 60, and 2 per cent of ages above 60 years. The figure below explains the mix of various age groups among the respondents of the survey:

Occupation-wise composition of respondents



Age-wise composition of respondents

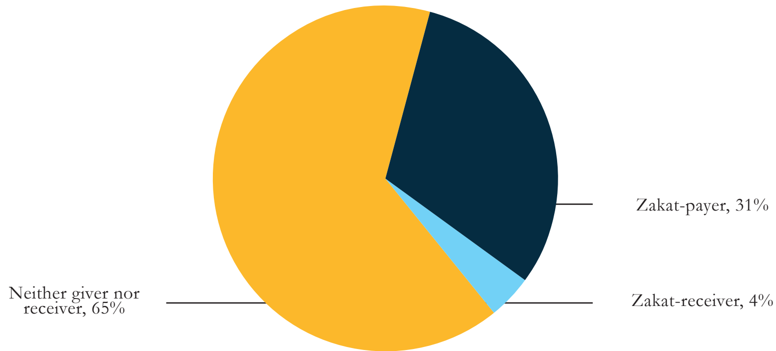


The respondents of the survey also included a mix of various occupational groups, as well as a large number of students (represented in the 'others' category). 6 per cent of our respondents were farmers, 6 per cent of our respondents were unskilled labourers, 3 per cent of our respondents were skilled labourers, 7 per cent of our respondents were shopkeepers, 15 per cent of our respondents were government servants, 21 per cent of our respondents were unemployed, 13 per cent of our respondents were housewives, and 29 per cent of our respondents were in the 'others' category mostly including students. The figure below explains the mix of various occupational groups among the respondents of the survey:

The respondents of the survey came from different economic backgrounds. Some were from well-to-do families while others were from among the underserved communities. Since questions about the economic wellbeing of individuals are generally relative and respondents find it hard to answer them, we had devised a strategy to ask the respondents whether they gave Zakat (the annual Islamic charity that only the well-to-do households give), received it, or neither gave nor received it. Answers to this question enabled us to divide the respondents into three broad categories of Zakat Givers (Upper Middle to Upper Class), Zakat Receivers (Economically Vulnerably Households), and Neither Zakat Givers Nor Zakat Receivers (Lower Middle Class). Based on these broad categories, 31 per cent of our respondents were from upper middle to upper class, 4 per cent of our respondents were from economically vulnerable households, and 65 per cent of our respondents were from lower middle class.

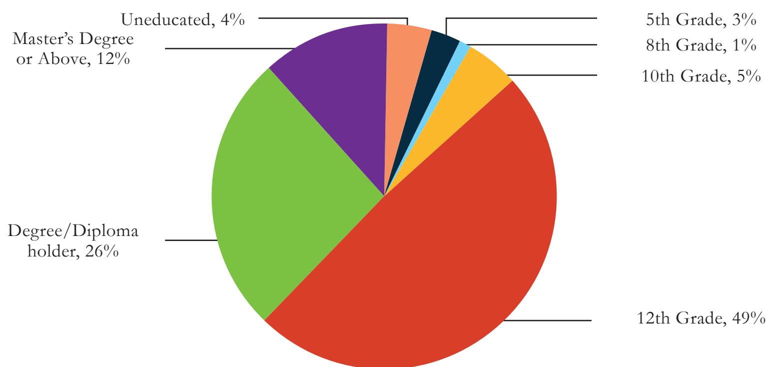
The figure below explains the mix of various occupational groups among the respondents of the survey:

Socioeconomic status-wise composition of respondents



We also ensured a mix of various educational-level groups among the respondents of the survey. 4 per cent of our respondents had no formal education, 3 per cent of our respondents had acquired education up to primary level (5th Grade), 1 per cent of our respondents had acquired education up to middle level (8th Grade), 5 per cent of our respondents had acquired education up to matriculation (10th Grade), 49 per cent of our respondents had acquired education up to higher secondary level (12th Grade), 26 per cent of our respondents were diploma/degree holders, and 12 per cent of our respondents had acquired a Master's Degree or higher qualification. The figure below explains the mix of various occupational groups among the respondents of the survey:

Education-wise composition of respondents



Questions

Our survey forms attached to the report as Annex II had a total of 15 questions related to the public perceptions regarding the provision of security and justice system in Malakand Division before and after the merger of the former princely states into the state of Pakistan as districts. We started ascertaining the overall level of understanding of the respondent about the provision of security and justice in the target districts before and after the merger and followed them with questions about various aspects of it.

We included general as well as specific structured (close-ended) questions about the perceptions of the target group with regard to the provision of security and justice system during the era of the princely states and after the merger of the states into the province of Khyber Pakhtunkhwa (then NWFP). There were questions about public perceptions with regard to the merger of the princely states with Pakistan, the provision of security and justice in the post-merger Provincially-Administered Tribal Areas (PATA), the causes of the rise of extremist movements like the Tehreek-i-Nifaz-i-Shariat-i-Muhammadi (TNSM), and the legal significance of custom (Rewaj). Please refer to Annex II for the survey questionnaire.

1- Sample of survey questionnaire in English language attached as Annex II (the actual survey questionnaire was translated into Urdu).

ANNEX II: SAMPLE OF QUESTIONNAIRE FOR THE CITIZENS PERCEPTION SURVEY

PROFILE:

NAME (Optional):

DISTRICT AND TEHSIL:

- o Buner
    - o Buner/Daggar
    - o Gagra
    - o Khado Khel
    - o Mandanr
- o Chitral
    - o Chitral
    - o Mastuj
- o Lower Dir
    - o Timergara
    - o Adenzai
    - o Lal Qilla
    - o Samar Bagh
- o Malakand
    - o Swat Ranizai
    - o Sam Ranizai
- o Shangla
    - o Alpuri
    - o Besham
    - o Puran

- Swat
  - Babuzai
  - Barikot
  - Kabal
  - Matta
  - Khwaza Khela
  - Charbagh
  - Behrain
- Upper Dir
  - Dir
  - Shringal
  - Wari

GENDER:

- Female
- Male

AGE:

- Less than 18
- 18 to 35
- 35 to 50
- 50 to 60
- 60 to 70
- Over 70

OCCUPATION:

- Farmer
- Unskilled Laborer
- Skilled Laborer (carpenter, electrician, plumber, etc.)
- Shopkeeper
- Government Service
- Unemployed
- Housewife
- Other (Please specify):

ECONOMIC STATUS:

- Zakat giver

- o Zakat receiver
- o Neither

EDUCATION:

- o No formal education
- o Up to Primary Level (Passed 5th Grade)
- o Up to Middle Level (Passed 8th Grade)
- o Up to High Level (Passed 10th Grade)
- o Up to Higher Secondary Level (Passed 12th Grade)
- o Diploma/Degree holder
- o Master's Degree or higher qualification

QUESTION FOR THE CITIZENS:

1. Have you witnessed or heard about the Security and Justice system of the Princely states in Malakand Division?

   - o Yes
   - o No
   - o Somewhat

2. Do you think the merger of princely states of 1969 in the Province of NWFP (Now KPK) was rightly done at the right time?

   - o Yes
   - o No
   - o Somewhat

3. Are you satisfied with the merger plan of PATA and FATA as announced and executed in May 2018?

   - o Yes
   - o No
   - o Somewhat

4. Which regime/System do you think was the best for Malakand division?

   - o Princely States
   - o FCR
   - o PATA
   - o Shari Nizam-e-Adl
   - o Taliban and TNSM

- o Conventional system of Pakistan
- o None of the above

5. What is the reason of selecting the aforementioned system?

- o It was cost efficient
- o It was expeditious
- o It was Judicious
- o It was close to Shari/religious system

6. What in your view was the reason of emergence of TNSM and Taliban in the area?

- o Failure of Justice system
- o Bad Governance
- o Afghanistan Factor
- o All of the above
- o None of the above

7. Are you aware of what legal system is operative in Malakand currently (post-merger)?

- o Yes
- o No
- o Somewhat

8. Are you satisfied with the present justice and security system of Malakand Division?

- o Yes
- o No
- o Somewhat

9. How safe does the current security framework in Malakand make you feel?

- o Very safe
- o Not safe at all
- o Somewhat safe

10. Is the present judicial system of the area suitable to your standards of justice provision?

- o Yes
- o No

- o Somewhat

11. Why the large number of population of Malakand Division welcomed the TNSM regime?

- o It provided for security and justice
- o Because of expeditious justice delivery.
- o Because of a better sense of security
- o Because of the religion card

12. Do you feel like the post-merger legal and security system is easily accessible?

- o Yes
- o No
- o Somewhat

13. Do you feel like your customary practices are respected in the post-merger legal system?

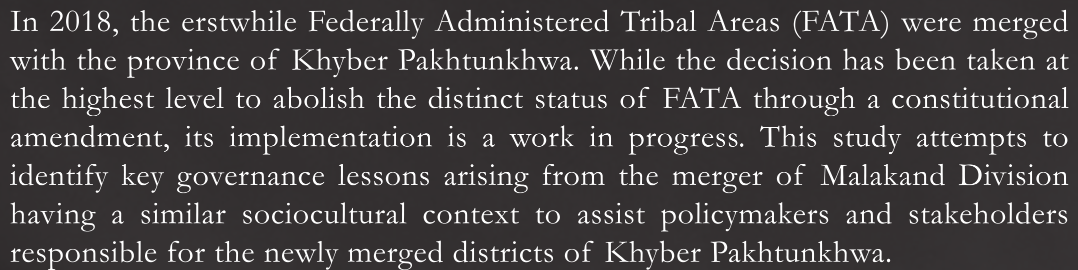
- o Yes
- o No. Need to be inserted in the system
- o No. No need of the customary practices
- o Somewhat and enough

14. Do you generally approve of the post-merger changes in Malakand/Torghar?

- o Yes
- o No
- o Somewhat

15. How has the merger has impacted your society?

- o Positively
- o Negatively
- o No change



In 2018, the erstwhile Federally Administered Tribal Areas (FATA) were merged with the province of Khyber Pakhtunkhwa. While the decision has been taken at the highest level to abolish the distinct status of FATA through a constitutional amendment, its implementation is a work in progress. This study attempts to identify key governance lessons arising from the merger of Malakand Division having a similar sociocultural context to assist policymakers and stakeholders responsible for the newly merged districts of Khyber Pakhtunkhwa.

About the Authors

Dilawar Khan is the Founder of CODE PAKISTAN, an Islamabad-based not-for-profit think-tank established in May 2014. A lawyer by training, he has over 19 years of work experience in legal and policy domains.

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Acknowledgement

We would like to thank the British High Commission, Islamabad, for sponsoring the study. The views and opinions expressed in this report, however, are our own and do not necessarily represent the views and opinions of the British High Commission.

We would like to express our gratitude to all the interviewees who took time out of their busy schedules for us to hold in-depth discussions in the testing times of the COVID-19 pandemic, as well as the participants of the focus group discussions and the citizen perception survey. We would also like to thank Dr Murad Ali, Assistant Professor, Department of Political Science, University of Malakand, Chakdara, and Dr Sheraz Ali, Assistant Professor, Department of Social and Gender Studies, University of Swat, who made valuable contributions to the report through their inputs.

We thank all the individuals we met during the course of our field research and would like to thank everyone who supported us during our visits to various places in connection with this study. Finally, we would also like to express our gratitude to Saba Imran, Director Programmes at CODE PAKISTAN, for reviewing the final draft of the study.