



CENTRE FOR GOVERNANCE
AND PUBLIC ACCOUNTABILITY

Implementation of 25th Constitutional Amendment Way Forward 2018

Implementation of 25th Constitutional Amendment Way Forward - 2018



Centre for Governance and Public Accountability (CGPA)

Email: info@c-gpa.org

Phone: +92 91 570 19 91

Table of Contents

Background

The 25th constitutional amendment, passed in May 2018, has merged Federally Administered Tribal Areas (FATA) into Khyber Pakhtunkhwa province. The 25th amendment has also merged Provincially Administered Tribal Areas (PATA) in Balochistan and Khyber province in the respective provinces thus extending parliament and respective provincial assemblies jurisdiction to these areas. After 25th constitutional amendment, there are no more tribal areas in Pakistan. The FATA Interim Governance Regulations, notified by the President before assenting the 25th constitutional amendment, has also done away with Frontier Crimes Regulations (FCR). The seven agencies of former FATA are now tribal districts and title of Political Agents changed to Deputy Commissioners.

25th constitutional amendment is the major milestone in the history of Pakistan. It has effectively brought all the tribal areas in the mainstream Pakistan. In other words, 25th amendment is a major step to state building and equal rights for former tribal areas of Pakistan. So far, the merged areas (former FATA) have no formal judicial structure. After 25th constitutional amendment, the judicial structure has to be established from the scratches in these merged areas. Similarly, these merged areas had no representation in any provincial assembly. After merger, 21 provincial assembly members will sit in the Khyber Pakhtunkhwa assembly. Before 25th constitutional amendment, no Act of parliament was applicable in FATA unless the President directed so. After 25th constitutional amendment, all laws enacted by parliament and KP provincial assembly are applicable on these merged areas unless the government through official notification restricts the applicability of laws enacted by parliament and KP provincial assembly. This is the major shift in the post 25th constitutional amendment. All laws require proper implementation mechanisms. How soon the federal and KP government will be able to establish such mechanisms for full implementation of laws in these merged areas is yet to be seen. However, there must be an elaborate mechanism for putting in place such mechanisms.

Pakistan from last two decades underwent turbulent security situation across the provincial demarcation and one thing cannot be undermined that within these security situations legal, constitutional and political reforms are easy to institute when the state is confronted with strategic imperatives. Same is true in its literal sense as far as reforms in former FATA goes. Strategic Imperative to make tribal areas a buffer against the impacts of militancy not only in KP but whole mainland Pakistan was jump started with the US invasion of Afghanistan back in December, 2001.

Pakistan army entered tribal areas in 2002 and in these 16 intervening years transformed the political and socio-economic landscape of the tribal areas. Two of the governments, that were in power during this time, Musharraf's military government and the PPP government tried, their best, to reform, the legal, constitutional and political framework of tribal areas, but, generally, over the years, a lack of concrete legal and political reforms not only kept FATA out of the mainstream but also resulted in exacerbating militancy and extremism in the region. As of today,

thanks to 25th Constitutional Amendment, constitutionally and legally FATA is very much part of KP.

During 70's, the government of Prime Minister Zulfikar Ali Bhutto introduced some development schemes in the tribal region, resulting in the improvement of physical infrastructure and establishment of schools and colleges in FATA. The Federal Ministry of State and Frontier Regions (SAFRON) and the FATA Development Authority were also established. In 1976, Prime Minister Zulfikar Ali Bhutto formed a committee under Gen. Naseerullah Babar. The committee included Hafeez Pirzada, Rafi Raza and Dr. Mubashar Hassan. Its aim was to create a framework that would allow FATA to become a part of NWFP. But once the military coup happened in July 1977, bringing General Zia-ul-Haq into power, reforms in FATA no longer suited the establishment.

Moving forward, in 1996, the Pakistan Peoples Party (PPP) government promulgated Adult Franchise Act for the people of the tribal areas. This was the first real reform aimed at the political empowerment of FATA residents. For the first time in history, the people of FATA were given the right to vote.

The fourth PPP government (2008-2013) was even more proactive in introducing political reforms in the region, primarily because it was operating in a post-US invasion of Afghanistan environment. Since Pakistan's creation political parties were not allowed to engage in any political activity in the tribal belt. The 2011 reforms package allowed political parties to engage in political activity in the tribal areas.

The lifting of curbs on political campaigns in FATA not only allowed political parties to offer their manifestos to the people, they also brought deprived people into the national mainstream. The same PPP government introduced local government structures in tribal areas.

Earlier, the military government of General Musharraf introduced its own reforms in the region aimed at increasing the administrative and judicial capacity of government structures in tribal areas.

In 2002, the military government established FATA secretariat, which in 2006 became the civil secretariat for the implementation of different development projects in the region. Before this, the federal government's development projects had been implemented by the relevant provincial government's departments.

The subsequent PPP government extended the authority of Federal Ombudsman to FATA, allowing the locals to file complaints with the Federal Ombudsman against the decisions of the FATA secretariat. The reforms package introduced by the PPP government in 2011 included the provision for the establishment of a FATA tribunal, which allowed the locals to challenge the



Since Pakistan's creation political parties were not allowed to engage in any political activity in the tribal belt. The 2011 reforms package allowed political parties to engage in political activity in the tribal areas.

judicial decisions of Political Agent, which was the highest judicial authority in the region before these reforms.

In 2011, another vital reform was introduced which was warmly welcomed by the residents of FATA. The reform exempted the elderly and children from arrest under the FCR. A six-member committee on FATA reforms was formed in November 2015 by then Prime Minister Nawaz Sharif under the chairmanship of Sartaj Aziz, Adviser to the Prime Minister on Foreign Affairs, to start working with immediate effect and to propose a concrete way forward for the political mainstreaming of FATA. Other members of the committee included KP Governor Zafar Iqbal Jhagra, Minister for SAFRON Lt. Gen (Retd) Abdul Qadir Baloch, Minister for Law and Justice Zahid Hamid, National Security Adviser Lt. Gen. (Retd) Nasser Khan Janjua and Secretary SAFRON Muhammad Shehzad Arbab.

May 2018 would be, remembered as an important turning point in the constitutional history of Pakistan as a landmark 25th Constitutional Amendment was passed by both the houses of the parliament and subsequently, assented to by, the President of Pakistan. Consequently, paved the way for FATA merger into KP. The full legislative authority of the parliament over FATA region has been established and FATA has been given 21 seats in the KP Assembly, including 16 general, for women and one reserved for non-Muslims “provided that elections to the aforesaid seats shall be held within one year after the general elections 2018,” according to the Act.¹

FATA is no more and there is all together new administrative, judicial as well as political setup envisioned for the area and for the purpose of this study it is pertinent to analyze these proposed changes and to provide, way forward in order to realize this vision into reality.

¹ Section 6 (1A) Constitution (Thirty-first Amendment) Act, 2018

25th Constitutional Amendment Act 2018

After almost 17 reports commissioned by consecutive governments at different levels, the high-powered FATA Reforms Committee was the last one constituted by the then Prime Minister Nawaz Sharif in November 2015 “to propose a concrete way forward for the political mainstreaming of FATA areas.” Mr. Sartaj Aziz headed the committee with total six members. The committee members visited all seven tribal agencies (now tribal districts) and held deliberation over mainstreaming FATA. The committee presented its report and proposed FATA merger with Khyber Pakhtunkhwa. Despite broader consensus in support of mainstreaming through merger with Khyber Pakhtunkhwa, with the exceptions of two political parties, the process got delayed and there was general consideration that the processes were postponed till after the 2018 elections.

Suddenly, the process revived after a meeting of the National Security Committee by the end of May 2018. The National Assembly, Senate and provincial assembly passed the 25th constitutional amendment, providing for the merger of FATA with KP.

The 25th Constitutional Amendment Act amended many Articles of constitution of Pakistan, paving the way for FATA and KP merger. Article 1 of the Constitution was amended to omit FATA as separate entity in the overall geographical territories of Pakistan. The Act also amends Articles 51, which specifies the number of seats allocated to each of the federating units in the national and provincial assemblies. The number of seats in the National Assembly has been reduced to 336 from 342, since the areas comprising former FATA will have six seats now. Formally, erstwhile FATA had 12 NA seats. Likewise, Article 59 was amended reducing the Senate seats from 104 to 96 members, as FATA will no longer have separate representation of eight Senate seats.

Similarly, word FATA has been, omitted from Article 62 of the Constitution. Moreover, by amending Article 106 now, the KP assembly will have 145 seats, including 115 general, 26 reserved for women and 4 for minorities. Erstwhile FATA will be represented by having 21 seats in the KP Assembly, including 16 general, 4 for women and 1 reserved for non-Muslims "provided that elections to the aforesaid seats shall be held within one year after the general elections 2018", according to the Act. Articles 155 has also been, amended and word FATA, has been, omitted. According to the Act, Article 246 has been, modified to reflect the merger of tribal areas with their respective provinces while 247 has been, omitted.

	Federal Legislative Powers	Senate Seats for Former FATA	Provincial Assembly Seats for Former FATA in KP Assembly	Provincial Legislative Powers	NA Seats in Former FATA	Superior Courts Jurisdiction	KP Assembly Seats

	Federal Legislative Powers	Senate Seats for Former FATA	Provincial Assembly Seats for Former FATA in KP Assembly	Provincial Legislative Powers	NA Seats in Former FATA	Superior Courts Jurisdiction	KP Assembly Seats
Pre-25 th Const. Amendment	President	8	0	President	12	Nil in former FATA	124
Post 25 th Const. Amendment	Parliament	0	21 (16 general, 4 reserved for women, 1 minority)	No more FATA and PATA	7 (KP NA Seats Increased from 48 to 55)	As rest in KP	145 (General seats increased from 99 to 115)

What does this entail?

Pakistan came into being in 1947. Full constitutional provisions were not extended to special areas, princely states or tribal areas in Pakistan. While princely states were annexed and constitutional provisions were extended, FATA remained under the draconian Frontier Crimes Regulations with no rights of recourse to superior judiciary or meaningful representation in parliament. Therefore, the 25th constitutional amendment, merging Khyber Pakhtunkhwa and FATA, is a landmark in Pakistan's history.

Erstwhile FATA has an area spread over 10,510 square miles, and inhabiting more than five million people, FATA's merger has opened the door to numerous possible political, socio-economic, and legal spaces for erstwhile FATA. The overall implications for the state building of Pakistan are also manifold. As far as political implications are concerned, previously citizens belonging to erstwhile FATA were largely left out from mainstream political activities. No provincial representation was allotted to these areas. Now with the merger in place, they can actively participate in the political decision-making and can exercise their constitutional right to elect their own representatives. In reality, political representatives would account for greater control, and ensure proper implementation of initiatives of social development for the tribal population.

The political and economic advantages will also tilt in favour of process that is more inclusive, owing to provincial representation and extending the jurisdiction of parliament to the erstwhile tribal areas. An increase in provincial allocation to KP under the forthcoming National Financial Commission (NFC) award is expected though not clearly defined as yet.

Most importantly, the merger with KP would mean more financial autonomy for the people living in these areas. A strengthened political structure at the grassroots level along with reasonable financial autonomy, subject to appropriate utilization, is likely to trigger socio-economic development in tribal areas, something that has been gravely missing. The provision of

basic necessities such as; quality education, affordable health, and economic opportunity to make a respectable living, etc, will make way for prosperous lives of the common tribal man, and simultaneously help in blocking the road leading to extremism, and thereafter, terrorism.

The extension of judicial set up to the tribal areas is also a long awaited step, which would instigate the passage to establishing the rule of law, formal justice system, rather than any others, in its true essence. Provision of speedy and timely justice to this neglected part of the country will surely abate the anti-state public grievances, and serve to uphold the basic human rights standards, neglected till date.

Lastly, FATA largely remained out of reach of formal judicial system. This has created a vacuum with no mechanism for legally enforceable rights. This vacuum has also caused imperfection for economic truncations, contracts and other legally enforceable agreements. Similarly, the areas remained in the limelight, and at the core of the global war on terror, and have been labelled by international powers, particularly by the US, as the epicenter of violent terrorism and extremism. Now the big question is, how the 25th constitutional amendment will empower inhabitants of these merged areas and how the amendment will bring economic, social and political development in these areas.

Mainstreaming FATA with interim governance Regulation²

The federal government has notified FATA Interim Governance Regulation, 2018, repealing the colonial-era Frontier Crimes Regulations (FCR), declaring tribal agencies as tribal districts and changing the nomenclature of political agents to that of deputy commissioners as a prelude to the tribal regions' merger with Khyber Pakhtunkhwa.

Promulgated on May 31st after it got assented by President Mamnoon Hussain, the FATA regulation, aimed at providing "system of administration of justice, maintenance of peace and good governance in the Federally Administered Tribal Areas and repeal of the Frontier Crimes Regulation, 1901".³ The regulation "has come into force at once".⁴

Erstwhile seven tribal agencies will now be, called tribal districts and existing tehsils and six Frontier regions will be termed subdivisions

Parliament has already passed the 25th Constitutional Amendment to merge FATA and KP. The regulation seeks to provide an interim arrangement for interim period, replacing Frontier Crimes Regulation, often referred to as the 'black law' that with this regulation now stands repealed.

The erstwhile seven tribal agencies will now be, called tribal districts and the existing tehsils and six Frontier regions will be termed subdivisions. In addition, the nomenclature of the political agents, who administer the hitherto tribal region, has been, changed, as they will be, called deputy commissioners. Likewise, the additional political agent will be termed additional deputy commissioner and the assistant political agent will be, called assistant commissioner.

The interim regulation, empowers the governor, to confer the powers of district magistrate, on the deputy commissioners as provided for in the Code of Criminal Procedure, 1898 and the assistant commissioners, the power of magistrate of first class "in any tribal district of tribal subdivision in the whole or any part thereof, where all or any of the provisions of this regulation are for the time being in force."

Judicial structure

Civil reference

As per section 8 of the regulation, the deputy commissioners will have the powers to refer all matters of civil disputes to a Council of Elders for settlement, for fact finding in accordance with the Rewaj, within 15 days of the dispute referral, which shall give its findings within 90 days. The council shall be nominated by the deputy commissioner, whose names will be

² Ismail Khan Updated May 31, 2018 *Published in Dawn, May 31st, 2018*

³ Preamble of the FATA interim Governance Regulation, 2018

⁴ Section 1 Ibid

communicated to the parties in dispute for any objection to the names included in the council. The deputy commissioner shall appoint members of the council to adjudicate the matter after giving due consideration to the objections so raised. Upon receiving findings of the council, the deputy commissioner shall decide the legal issues and pass a decree in accordance with the findings of a majority of the council members. However, under section 10 of the regulation, No civil court has jurisdiction to challenge the legality of any decision taken under section 8 explained earlier.

Criminal reference

Under Section 11 of the regulation, in case of an offence, a case shall be, registered and the suspect shall be produced before the judge i.e. an assistant commissioner designated by the governor to adjudicate criminal matters in each tribal district and vested with the requisite powers under the CrPC within 24 hours of suspect's arrest. The judge shall make an order in writing referring the matter to the Council of Elders, to be appointed within 10 days from the date of arrest, for fact finding. The council after holding necessary inquiry and hearing the parties and witnesses will submit its findings to the judge. In criminal matters, under section 11(2) the judge shall communicate the names of the members of Council of Elders to the accused person and the complainant, and nominate the council after hearing from the two sides and disposing complaints.

The judge shall, after receiving the findings from the Council of Elders, pass an order in accordance with the findings of the majority of Council of Elders and applicable law.

Qaumi Jirga

In addition, under section 13 of the regulation, the deputy commissioner may also take cognisance of any offence or civil dispute in exceptional circumstances, if so recommended by the Qaumi Jirga of a tribal district in the interest of justice and public peace.

Appeal

Under Section 39 of the regulation an appeal shall lie to the commissioner or additional commissioner, if authorized so by the governor, within 30 days from the date of any decision given, decree or sentence passed, or order made by the deputy commissioner or the judge so appointed under the interim regulation. The appellate authority shall dispose of the appeal within 60 days. An appeal against the order of the appellate authority can be filed before the Peshawar High Court within 30 days of such order.

Administered area

According to the interim regulation, the governor may from time to time declare by notification any area in FATA an administered area. He may also appoint a date on which the provisions of the interim regulation shall cease to apply on the 'Administered Area' and to be replaced by 119 mainstream Pakistani laws.

Analysis of Interim Governance Regulations

While people are celebrating FATA's merger with KP, there are quite a few voices of caution and dissent about the Interim Governance Regulation that need to be elaborated.

The reason for issuing this interim order approved prior to the 25th Amendment seemed to be able to have a transitional system, without any input from the parliament. This can be amended or even replaced by the new provincial assembly of Khyber Pakhtunkhwa. However, it will remain enforced till new legislation.

The fascia of mainstreaming Federally Administered Tribal Areas (FATA) stands revealed as the interim regulations seems to go against the basic human rights. The current regulations are not conducive for ordinary citizens as justice will be provided by a council of elders handpicked by the DC and with no women members. The DC also has powers to pardon any accomplices when they become prosecution witnesses. Local government do not even figure in the regulation, he said. There is this dimension of depriving the freedom of people to own private property as the regulation forbids people from building new villages or walled enclosures and anything within 120 yards of the Centre of a road without prior permission.

The regulations, divulged glaring inconsistencies as proposed by a committee chaired by Sartaj Aziz. The system would be in effect until FATA merges with Khyber-Pakhtunkhwa. While it repeals the Frontier Crimes Regulations (FCR), it grants unnerving discretion to the authorities in dispensing justice. The interim law, exercised in addition to the temporary structure assumed by provincial and federal authorities, extends the jurisdiction of the Supreme Court and High Court, provisions of the Code of Criminal Procedure, 1898 pertaining to security and the provision of bonds, and enforces 119 laws in the tribal areas. However, it would not be out of context to say that on ground nothing significant has changed. People of the area would be, thronged by the miseries of the FCR like provisions in the form of Interim Governance Regulation.

As now the President has approved the FATA merger bill, the KP government has the power to abolish the interim law whenever it wants. Until then, the agencies will have to deal with more of the same.

Conversion of Titles

The seven agencies, Bajaur, Khyber, Kurram, Mohmand, Orakzai, and North and South Waziristan, have been retitled as 'tribal districts', while existing tehsils and Frontier Regions (FR) have been declared as sub-divisions. Political Agents (PA) are re-designated as Deputy Commissioners (DC), while Additional and Assistant Political Agents (APA/PA) turned into Additional and Assistant Commissioner Officers (AAC/AC). Assistant Commissioners will also have the powers of a magistrate. The FATA Secretariat has been given the powers to re-designate other posts. This shows that only nomenclature has changed, rest is the same.

Power Anatomy

The Act allows Deputy and Assistant Commissioners to play judge, jury and executioner by authorizing them as district and first class magistrates, respectively. Commissioners can transfer cases to a council of elders, appointed by a DC and presided over by an AC, who in turn would be considered as a judge by the governor, upon the request of one or both parties. Civil disputes that threaten peace can be assigned to the council of elders or a 'qaumi jirga' so as to reach resolutions in accordance with tribal customs. In criminal references, the same shall pass orders in accordance with the findings of the majority of the council of elders. Where the system allows parties to voice apprehension in the selection of the council, it also grants the DC the power to dismiss those reservations. Decrees penned by DC or the appellate authority shall be considered "final settlement", carrying the same weight as a civil court verdict, but no civil or criminal court shall have the jurisdiction to question the legality of the decision. Inherently, this whole change is deceptive and just an eye wash as the similar powers were enjoyed by Political Agents (PA) and Assistant Political Agents (APAs) under the previous dispensation regulated under FCR.

Punishment redefined

The interim system provides some relief to offenders by limiting the conditions of a life sentence to 14 years of rigorous imprisonment. Arrests without warrants are legalized in situations where there is a reason to 'believe' the suspect has committed or attempted to commit a crime under Section 496(a) of the Pakistan Penal Code (PPC). Similarly, a person found carrying arms in a manner deemed 'suspicious' or with intent to using it unlawfully or evading arrest shall be liable to be fined and arrested, with the ammunition being confiscated. The law outlines executing of sureties or bonds for a person likely to commit a wrongful act that 'may' disrupt peace. A person who fails to submit sureties is liable to be, detained until the amount is paid or the period outlined in the surety expires. The assertion that a person cannot be, prosecuted or punished for the same offence more than once is contradicted by the allowance for a DC to start fresh proceedings against a person who has finished prison term for failure to submit security, but is deemed a 'habitual' or 'hardened' criminal.

The regulations grant DCs full authority for the forfeiture of assets of those 'believed' to have colluded or committed serious offences – defined as crimes punishable with imprisonment for more than three years. Any property suspected to be in use for criminal acts or harboring offenders, can be sealed, disposed or transferred to the Government of Pakistan if the owner or the tribe fails to organize the surrender of the suspects. The DC has also been, given the authority to issue show-cause notices to complainants if accusations are found to be of malicious intent or otherwise falsified. The appellant may be liable to pay fines as compensation to the victim.

The Prerogative

The DC has the authority to pardon accomplices directly or indirectly involved in all crimes short of murder, as long as the accomplices agree to become prosecution witnesses.

The decision to release an accused arrested for a non-bailable crime is a prerogative granted to the DC. The regulation states that if a DC finds no reasonable ground to believe that the offence is non-bailable; the accused can be, released on bail with or without sureties for appearance. However, the suspect can be, re-arrested on the directions of the FATA Tribunal or the appellate authority. A review of the verdict passed by the DC or judge can be, challenged in a high court within 30 days.

Contending uprising

The interim set-up calls for restricting access of those suspected of conveying 'hostility' towards the state. The DC can order arrests and seal the property of an entire tribe, or sections of it, for indulging in 'anti-state' activities.

Post-Merger Challenges and Way Forward

25th Constitutional Amendment has been passed and as of now, areas defined as FATA have been constitutionally merged into KP. The merger has huge administrative as well as financial implications. The area has lacked behind in almost all development indicators and requires huge financial and administrative commitment both from Federal as well as from Provincial governments in order to implement the merger because a constitutional amendment can only provide a policy direction; it is the implementation stage of the policy that will be troublesome.

No one can deny the need for an interim arrangement as the merger was simply impossible in one day, or in a very short time. A lot of work has to be done. This merger will ensure that the judiciary, bureaucracy, and all other relevant state organs will be able to function in the region and hence ensure a wave of transformation from within. This has been long overdue as it would allow the people of the region to attain a similar social status as their provincial brethren.

The basic objectives of the Fata merger have been three. First, to provide a legal structure to the people of FATA similar to the rest of the citizens living in Pakistan as the available structure was not only inhuman but also draconian. Second is to plug the political vacuum, which existed in FATA whereby there was no representation of the people in the legislative corridors. Thirdly, to provide efficient administrative structure, this has been retrogressive and extremely inefficient to look after the basic needs of the residents of the region and to ensure that the region would be, developed and reach at par with rest of the country. As mentioned earlier all these objectives to become reality would require huge financial commitments not only from the Federal government but also from the KP government over the period, therefore it is imperative to discuss the financial implication of the merger under the separate heading in this study.

As the objectives have been stated, there is dire need to firstly priorities the needs to achieve these objectives and secondly analyze the steps required for realizing those needs and finally to provide a way forward to achieve the ultimate goal of merger. The following text would provide the insights of steps already taken by different quarter and also highlight what is needed in the near future.

Establishment of Judicial System

Setting up of judicial system in FATA will take around a year as the government has to appoint judges.⁵ The Peshawar High Court has given a complete plan, to the Khyber Pakhtunkhwa government, for the extension of the judicial system after Federally Administered Tribal Areas (FATA) has been, merged with KP, replacing the colonial law of the Frontier Crimes Regulation of 1901.

The main purpose of the FCR was to protect the interests of the British rulers and counter the opposition of Pashtuns to their rule. After independence, KP and Balochistan got rid of the FCR

⁵ [Akhtar Amin](#) June 3, 2018

gradually, but FATA remained its only hostage. After the merger and extension of jurisdiction of the Peshawar High Court (PHC) and Supreme Court, tribesmen have got the right to challenge local decisions in superior courts, a right they were deprived of under the controversial law of FCR.

The PHC has already forwarded the proposed plan to the government about the requirement of 52 judges and ministerial staff. The PHC has given an estimated cost of Rs13870.024 million for infrastructure; including establishment of judicial complexes in the tribal agencies⁶ According to the document, Rs.9528 million is required for the establishment of seven judicial complexes at tehsil level in all the tribal agencies and Rs4341 million is needed for building seven judicial complexes at the district level in the agencies. As per the document forwarded to the provincial government, the PHC has asked for the appointment of seven District and Sessions Judges (BPS-21) for each tribal agency — Kurram, Bajaur, Mohmand, Khyber, South Waziristan, North Waziristan and Orakzai.

Similarly, the high court requires appointment of 14 Additional District and Sessions Judges (BPS-20) in the agencies along with 24 civil judges. It also requires ministerial staff with the judges, including superintendents, assistants, and others, which comes to about 301 personnel for the District and Sessions judges and 492 for civil judges. This complete setting up of the judicial system in FATA would take about 10 to 14 months.⁷

⁶ Muhammad Zubair, media protocol officer to the PHC Chief Justice.

⁷ Ibid

Political Changes

While to their fondness, retaining their own traditional and local system of governance, the tribal people of Pakistan have been begging their share of representation at national level, though, through a faulty system of election. For the fifty years after independence, only their Maliks (Tribal Chief) were allowed to reach National Assembly and that too elected by the other maliks only. Ironically, where there is no representation for the Tribal areas at the Provincial level, there exists a mocking anomaly with their political representation at the National level. The members of FATA in National Assembly and the Senate are integral part of the legislature. They also occasionally hold Federal Ministries and they make and break governments by the power of their votes. But, the laws that they are party to make, have nothing to do with the areas they represent.

It is to one's utter disbelief how people of the area enthusiastically participated in the elections in 2013. Astonishing and positive aspect observed was the record voters' turnout. All major political parties participated in the election and carried out their activities freely. The most remarkable side of the election was the record voters' turnout. This really showed that there is political awareness among the people and they are no more naïve like the past. According to an estimate in 2013 elections voters' turnout in FATA was 37%.⁸

The merger of FATA with KP would bring the tribal areas under the control of the provincial government of the neighboring KP province. The government's reform plan sets a five-year timeline for the legal and administrative integration and synchronization of various departments of FATA with KP. The territory of FATA will get new seats and representation in the KP Provincial Assembly and will elect its provincial representatives in elections to be held in May, 2019, along with its current representation in the National Assembly. KP currently has 43 seats in the National Assembly, by adding 12 FATA seats will increase its representation to 55 out of 272 directly elected seats. However, FATA will lose its distinct Senate members and be represented instead by Senate members whose seats are designated for KP and who are responsible for the larger, merged province. With the merger, the number of KP Provincial Assembly members will also increase, after new constituencies are drawn based on the 2017 national census. FATA has been given 21 seats in the KP Assembly, including 16 general, 2 for women and one reserved for non-Muslims "provided that elections to the aforesaid seats shall be held within one year after the general elections 2018," according to the Act.⁹

⁸ "Election in Fata: A Special Report", A special report on general elections in Fata published by the Shaheed Bhutto Foundation (SBF) on May 16 and later updated on June 6, 2013, available at<<http://www.slideshare.net/fatanews/special-reportapril elections-2013-in-fata>>.

⁹ Section 6 (1A) Constitution (Thirty-first Amendment) Act, 2018

Administrative Changes

Former FATA was divided into two administrative categories: protected areas are regions under the direct control of the government, while non-protected areas are administered indirectly through local tribes. Each tribal agency was administered by a political agent (PA), assisted by a number of assistant political agents (APA), Tehsildars (administrative head of a tehsil) and Naib Tehsildars (Deputy Tehsildar), as well as members from various local police (Khassadars) and security forces (levies, scouts). As part of his administrative functions, the Political Agent oversees the working of line departments and service providers. He was responsible for handling inter-tribal disputes over boundaries or the use of natural resources, and for regulating the trade in natural resources with other agencies or the settled areas. The political agent played a supervisory role for development projects and chaired an agency development sub-committee, comprising of various government officials, to recommend proposals and approve development projects. He also served as project coordinator for rural development schemes.

An FR was administered by the District Coordination Officer (DCO) of the respective settled district, who exercised the same powers in an FR as the Political Agent (PA) does in a tribal agency. Interference in local matters is kept to a minimum. The tribes regulate their own affairs in accordance with customary rules and unwritten codes, characterized by collective responsibility for the actions of individual tribe members and territorial responsibility for the area under their control. The government functions through local-level tribal intermediaries, the maliks (representatives of the tribes) and lungi holders (representatives of sub-tribes or clans), who are influential members of their respective clan or tribe.¹⁰

All civil and criminal cases in FATA are decided under the Frontier Crimes Regulation 1901 by a jirga (council of elders). Residents of the tribal areas may, however, approach the apex courts (Supreme Court of Pakistan and Peshawar High Court) with a constitutional writ challenging a decision issued under the 1901 Regulation.

As part of the merger, the administrative units of KP would change as a result of the drawing of new districts and subdivisions. After the passage of 25th Constitutional Amendment the number of districts in KP stands at 33 as all seven former agencies and FR regions have become part of KP. Consequent, the seven agencies, Bajaur, Khyber, Kurram, Mohmand, Orakzai, and North and South Waziristan, have been retitled as 'tribal districts', while existing tehsils and Frontier Regions (FR) have been declared as sub-divisions.

After the passage of FATA Interim Governance Regulation 2018, Political Agents (PA) are re-designated as Deputy Commissioners (DC), while Additional and Assistant Political Agents (APA) turned into Additional and Assistant Commissioner Officers (AAC/AC). Assistant Commissioners will also have the powers of a magistrate.¹¹ The FATA Secretariat has been

¹⁰ Naved Ahmed Shinwari, CAMP - undated

¹¹ Section 5 FATA Interim Governance Regulation, 2018

given the powers to re-designate other posts. Under the regulation only nomenclature has been changed, rest is retained as was under FCR 1901.

Role of Ministry of SAFRON and FATA Secretariat

Before the passage of the 25th Constitutional Amendment, according to the government's official rules of business, the responsibility for the "overall administrative and political control of FATA" falls under the federal ministry of States and Frontier Regions (SAFRON). While SAFRON, as a federal ministry, is answerable to the elected prime minister and national assembly, it is virtually irrelevant in policy implementation or execution in FATA and acts primarily as a conduit for routing federal funds.

Ministry has 6 functional wings:

- Admin/Finance Wing
- Afghan Refugees Wing
- Coordination Wing
- FATA Wing
- Former Acceding/Merged States of Pakistan Wing
- IT Wing

After passage of the 25th Constitutional Amendment the role of ministry of SAFRON as far as FATA is concerned is more in sight and has been abolished. KP Government for all legal and technical purposes is now responsible to handle, spend and utilize all the funds related to FATA. There are also rumors circled around in corridors of power that the biggest hurdle in the way of implementing reforms in FATA was the Ministry of SAFRON and its child, the FATA secretariat. No stone was left unturned by the two bodies to delay the process as much as possible. And it is for the obvious reasons that where else would you find a place to dispense development funds worth Rs120 billion? However, time would determine how things unfold and how much role this ministry would retain and how much it would surrender.

FATA Secretariat

Until 2002, decisions related to development planning in the tribal areas were taken by the FATA section of the, then N.W.F.P Planning & Development (P&D) Department, and implemented by government line departments. In that year, FATA Secretariat (FS) headed by Secretary FATA was set up. In 2006, the Civil Secretariat FATA with an Additional Chief Secretary, four Secretaries and over ten directorates were established to take over the decision-making functions. In April 2012, the FATA Secretariat was restructured with addition of 'Production and Livelihood Development Department' and 'Social Sectors Department'. Besides that, the reporting line of the directorates was also rearranged.

The Governor's Secretariat of Khyber Pakhtunkhwa plays a coordinating role between the Federal and Provincial Government and the FATA Secretariat.

The six departments of FATA Secretariat are as follows:

1. Administration, Infrastructure & Coordination Department
2. Finance Department
3. Law & Order Department
4. Planning & Development Department
5. Production & Livelihood Development Department.
6. Social Sectors Department

FATA Secretariat is providing services to the people of FATA through its directorates attached to these departments. FATA Disaster Management Authority (FDMA) and Directorate of Projects (DoP) have functional independence but report through Law & Order and P&D Departments, respectively.

The services provided by the line directorates include;

- Health
- Education
- Forestry
- Fisheries
- Irrigation
- Livestock & Dairy Development
- Minerals & Technical Education
- Agriculture
- Sports
- Social Welfare
- Roads and other infrastructure development

Fate of the FATA secretariat would not be, different as to the role of Ministry of SAFRON after passage of the 25th Constitutional Amendment. All six departments should, legally be merged into the respective provincial departments of KP. Similarly, all line directorates should be, merged into their respective provincial departments. Moreover, this administrative merger should not take more time as many affairs, of the Tribal Areas were already, managed by different departments of KP. The governor was the chief executive of KP and the FATA secretariat operated under an additional chief secretary whose boss was the chief secretary of KP. All the line departments of FATA were run by officers from line departments of KP, most bureaucrats deployed in FATA were from the provincial administrative cadre of KP. Even the electricity in FATA did not come from the national grid, but instead from the Peshawar Electric Supply Corporation (PESCO).

Role of Governor KP

Governor of KP holds a very special status within the power structure of former FATA. After 18th Constitution amendment, the offices of the Governors and President have become ceremonial. The position of the Khyber Pakhtunkhwa governor was different from other three provinces because of his role in the Federally Administered Tribal Areas (FATA).

Under Article 247 (now omitted), FATA had status different from rest of the country and under an executive order the KP Governor has been empowered to act as an Agent of the President in relation to tribal area. The office of the Governor KP carried a lot of charm and attraction because of Article 247. Unlike elected chief executives, there is no fixed tenure for chief executive of Fata.

The KP governor has the responsibility to govern sensitive, troubled and most under developed area. He has to oversee law and order, governance and development schemes through the civil secretariat, its line departments and political agents in every tribal agency.

After the passage of 25th Constitutional Amendment, the role of Governor legally should also be, abolished. However, under FATA Interim Governance Regulation, 2018 his role has been retained. It is yet to be, seen how he influence the governance and development regime in the region but he would definitely influence administration of justice mechanism in the region.

The economics of mainstreaming FATA

Former FATA has not had the opportunity to develop its institutional capacity with respect to resource management. Without these tools and the proper budgetary resources, the territory is still overwhelmingly dependent on the federal government to close its development gap. Unfortunately, the federal government has not responded well to FATA's needs in the past. FATA has been a low development priority of the federal government and the region has not received adequate funds for development programs. Until 2001, FATA received less than 1 billion rupees. By FY 2008, the federal government increased FATA's development budget to 12.9 billion rupees. FATA's dependency on the federal government for its development resource allocation reinforces a top-down decision-making process that fosters patronage networks and clientelism. Development projects are implemented in an ad-hoc fashion. This process largely benefits the influential or politically active segments of tribal society while depriving the population at-large from socio-economic progress. Impact and sustainability have been noticeably absent in nearly every project implemented in the tribal areas.

So far federal government had not provided any economic guarantees for implementing the development strategy for these areas after the 25th Constitutional Amendment whereby FATA has been merged into KP. It has failed to specify generation for the provision of finances for the agencies and increases dependency on the National Finance Commission (NFC) award, which the provinces might [not] agree to, but will take a lot of time, hence creating hurdles in the implementation of merger.

There was an allocation of Rs10 billion for development in the budget presented by the outgoing federal government, which seems sufficient for the interim period, but given the needs [of the area] for drastic development, such an amount seems insufficient [for a full fiscal year].

The National Economic Council in its meeting in May 2018 has decided to have a 10-year development plan worth Rs1 trillion for the new districts. This figure is same which the government and leaders of other political parties continued to refer to the elusive 100 billion-a-year figure for FATA that has been tossed around in the corridors of the federal government for at least the past three years. The 100 billion figure was first announced on the floor of the National Assembly in 2015 by the then Finance Minister Ishaq Dar in his 2015-16 budget speech. He boldly claimed that 100 billion rupees had been set aside in the budget for the rehabilitation of Temporarily Displaced Persons (TDPs). Three years on, that money was never spent and revisions were made to the budget line.

In 2016, on the insistence of FATA parliamentarians pushing for reforms, the FATA reforms committee, which was set up by then Prime Minister Nawaz Sharif and led by Sartaj Aziz, was tasked with compiling a report about the best way forward. The committee subsequently recommended that FATA be given its three-percent share in the NFC Award for the next 10 years among other benefits. Based on budget figures at the time, this three percent came to about the same 100 billion.

However, it soon became evident that neither the major political parties¹² that controlled the provinces at the time nor the federal government were willing to give up any share of theirs for FATA. And so, the message was changed once again and the voices were back to the 100-billion-a-year figure.

Where that money would come from was now the big question. Hence, another year passed while none of the necessary development or rehabilitation work could have done, primarily because none of the provincial governments or federal government was willing to commit the necessary funds.

With an impasse over the allocation of necessary funds to FATA, the government went ahead with the merger without the initially agreed upon interim period or having first brought FATA on par with adjacent districts in Khyber Pakhtunkhwa. Again, the elusive 100-billion promise has been made without detailing where exactly these funds will come from.

Recent Government Commitments:

The National Economic Council of Federal government of Pakistan has proposed a 10-year plan to develop FATA. The 10-year plan would spread over three phases, first two phases of three year each, followed by a four-year final phase. The total estimated budget for the plan is Rs1 trillion. It has been committed that Rs200 billion would be spent in the first year. 30pc (Rs300bn) of the funds will be spent through local bodies. The elections for local bodies will be, held in October 2018. Of the remaining Rs700bn, about Rs10bn would be, spent on Urban Development to make its key urban centres livable for the educated youth with job and business opportunities. Another Rs120bn have been, proposed for water sector development and constructions of small dams, besides another Rs20bn for small irrigation schemes, putting the total for water sector and agriculture at Rs140bn. The energy sector will get Rs50bn for schemes like solar and wind projects. Coupled with another Rs50bn for industrial development based on indigenous strengths and specialties.

On behalf of the federal government, former Prime Minister Shahid Khaqan Abbasi, has committed a 43pc (Rs430bn) share in 10 years from the federal pool. This would be a remarkable, almost four times higher, increase over the current Rs10bn going annually into the tribal areas with loose oversight in the absence of strong audits and checks and balances. With provincial governments on board, 50pc of the funds for the first three years, have already been pledged to kick-start development.¹³

With national political consensus, it is now the responsibility of the KP government to ensure that the funds allocated for development of its western districts are not spent anywhere else.

¹² — Pakistan Tehreek-i-Insaf's Khyber Pakhtunkhwa government, Pakistan Peoples Party's Sindh government and Pakistan Muslim League-Nawaz-controlled Punjab —

¹³ "There is a national consensus on the plan. There was no opposition for funding but over the phases and percentages," Mr Aziz said, adding the provinces would contribute to the fund.

Under this decision and since the federal planning commission will release funds for the Rs1tr development plan, it would ensure through institutional requirements that the KP government stays on course.¹⁴

Since the FATA Bill was passed in such a rushed manner right at the end, there are a number of very serious concerns that have arisen. Sticking to the theme of development, a few days ago, the Khyber Pakhtunkhwa chief secretary raised concerns that without any legal cover or written guarantees from the federal government, it is likely that the next government does not deliver on the verbal commitment of the outgoing federal government in providing funds to FATA.

This would mean that there is a possibility that Khyber Pakhtunkhwa would have the responsibility of developing FATA and doing the necessary rehabilitation work from its own funds. Khyber Pakhtunkhwa is already at loggerheads with the federal government over its hydel royalty, and the FATA development fund might be another major thorn added to the list. This is especially likely to be the case if the provincial government in Khyber Pakhtunkhwa and the federal government are formed by different political parties, which historically has been the case more often than not. The fear that is now looming around is whether FATA get its share of funds necessary for reconstruction and bringing it at par to adjacent districts. Even if the funds are transferred to the Khyber Pakhtunkhwa government in terms of larger share in the NFC Award, (which in reality is not possible) then are there any guarantees that FATA will receive the requisite funds for its development or are those funds likely to be diverted to more prosperous and influential districts of the province, as has been the case previously. With the issue of the merger no longer there as a bargaining chip to ensure development funds, the people of FATA are once again left to the mercy of policymakers at the federal level for getting their due share of development funds.¹⁵

¹⁴ *Published in Dawn, The Business and Finance Weekly, June 4th, 2018*

¹⁵ *Published in Dawn, EOS, June 10th, 2018*

Some Ancillary Issues

It is apprehended that scuttling Article 247 would have implication, which would not only have an adverse effect on FATA, but would also make it difficult to hold up the Action in Aid of Civil Power, and the tax amnesty provided to the area.



Tax exemptions and other incentives for the next five years to facilitate integration:

- Exemption of income tax on profits and gains of existing businesses conducted for a period of five years and registered with the FBR by 30th September 2018.
- Exemption from sales tax to the retailers to facilitate the general consumers.
- Domestic electricity consumers will be exempt from sales tax on domestic consumption.
- Federal Excise Act 2005 shall replace the erstwhile Central Excise Act 1944.
- Non-custom paid vehicles will be allowed to be used in the former Fata/Pata region till 30th June 2023. These vehicles will not be allowed to cross over to other areas of the country.
- Exemption from all withholding taxes, except on salary.
- Any person seeking to set up new industrial undertaking will be exempt from Income Tax subject to prior approval of the ECC.

Tax Amnesty for FATA

The Economic Coordination Committee (ECC) of the Cabinet approved tax exemptions¹⁶ and other incentives for the next five years for the people of FATA after the landmark 25th Constitutional Amendment. The ECC approved following tax exemptions and other incentives for the next five years for the people of erstwhile FATA and PATA including exempting of income tax on profits and gains of existing businesses conducted by individuals for a period of five years. These businesses however need to be registered with FBR by 30th September 2018.

It has also exempted the respective areas from sales tax to the retailers to facilitate the general consumers. Similarly, domestic consumers of electricity would be, exempted from sales tax on domestic consumption of electricity. Federal Excise Act 2005 shall replace the erstwhile Central Excise Act 1944. Non-customs paid vehicles would be allowed to be used for a period of five years ending on 30th June 2023. However, these vehicles will not be, allowed to cross over to other areas of the country. On the expiry of the five years' relaxation period, the vehicles would be, regularized on payment of leviable duty and taxes. The ECC has also approved exemption

¹⁶ Thursday May 31, 2018

from all withholding taxes, except on salary. Any person seeking to set up new industrial undertaking is granted exemption from Income Tax subject to prior approval of the ECC. However, all these have not, been backed by any substantive legal code. Past experience of Federal Government's imposition of Custom's law PATA in March 2016, area who prior to the imposition enjoyed exemption on customs duty left bad taste sparked protests across Malakand division and Kohistan District. Eventually government had to take the decision back. There is all likelihood that further down the line after five years the government would meet the same fate as it faced in 2016. However, this could take positive route if in trade-off the federal government were to launch a few mega projects of development and actually execute them within the stipulated time frame and then use them as bargaining chip.

There is another problematic dimension to this Tax Amnesty scheme, which, needs to be addressed as well. After the general elections which are supposed to be held in May, 2019 in FATA, representatives from FATA would be sitting in the provincial Assembly. Situation might emerge where an MPA from may be Mardan would ask for the same treatment for his district and might not agree to continue with this amnesty. In this situation there is likely hood that public representatives would fight among each other especially when majority is paying duties and taxes.

Actions (in Aid of Civil Power) Regulations, 2011

The AACPR *Actions (in Aid of Civil Power) Regulations, 2011* has provoked strong reactions both within Pakistan as well as among the international community. Yet that has not changed the public perception of AACPR that it is particularly against individual and human rights and gives

The Regulations violate Article 10(2) of the Pakistan Constitution and Article 9 of the ICCPR. The Pakistani Constitution requires that every arrested or detained person be brought before a magistrate within a period of 24 hours of the arrest or released; and Article 9(4) of the ICCPR provides all detained persons with the right to access a court to challenge the lawfulness of his or her or detention pursuant to habeas corpus or similar

the armed forces the license to act with impunity and commit human rights violations without any accountability. Certain clear cases of human rights violations have only strengthened the widespread perception that the AACPR is for the protection of armed forces personnel and thus encourages human rights violations. A more sensitive approach towards the alleged human right violations would have served to prevent such a perception from taking root.

It must be noted that the AACPR comes into effect and the Armed Forces can be called for action in aid of civil power under article 245(1) of the Constitution of Islamic Republic of Pakistan 1973 by the federal government. In effect, this means that in the particular area, the normal functioning of the government has broken down. That is why the army is brought in to

restore normalcy.

It is evident from the cursory look into the provisions of the AACPR, that just like FCR these are in blatant violation of various articles of the Constitution, which fall under the category of fundamental rights, to name a few: Article 4 (right of individual to be dealt with in accordance with the law), Article 9 (security of person), Article 10 (safeguards as to arrest and detention), Article 13 (protection against double jeopardy, self-incrimination), Article 14 (inviolability of dignity of man, prohibition of torture for the purpose extracting evidence), Article 24 (protection of property rights), and Article 25 (equality of citizens). All these guarantees are also part of the international treaties including ICCPR, UNCAT and ICESCR, which Pakistan is bound to implement in all the territories included in it or under its control or direct influence.

Consequent to the passage of the 25th Constitutional Amendment Act 2018 whereby Article 247 has been omitted, people of former FATA still face the implications under AACPR as this piece of legislation still holds its footings in these areas unless Federal Government by the Act of Parliament repeals this law in the best interest of the people of the area and to implement 25th Constitutional Amendment in true letter and spirit.

Way Forward

Post-Merger scenario requires huge commitment from the incoming government setup at both federal level as well as KP provincial level. These commitments require securing financial as well as administrative steps to be taken. First and foremost is establishing fully functional judicial system to not only ensure protection of fundamental rights but also to establish justice system as available in other parts of KP. It also requires extension of all laws, which are, enacted in KP. Second most important step is the strengthening of political setup which would start from holding local government elections. Local party-based elections are required as part of the reform process under the new FATA Local Government Regulations. Deadline for holding local government elections has been, fixed as October 2018. This will aid in the devolvement and transfer of power to the grassroots level, which in the long run will not only empower FATA people but also help in establishing the full authority of the state and contribute to the effective implementation of the reforms as well as development of the area. Thirdly, there is dire need of introducing modern policing as available in settled districts of KP to ensure law and order in the area. Fourthly, for smooth sailing of the merger agenda a comprehensive mechanism is required for socio economic development of the area, which requires inclusive debate not only from elected representatives from the area in KP Assembly but also in the National Assembly. These developments cannot be, realized until financial commitments are materialized and executed in appropriate, manner. As mentioned earlier this requires huge financial resources, for which, the incoming government needs to come up with the formula to generate money, especially the focus needs to be to re-negotiate National Finance Commission award. Some specific tasks are:

Judicial Setup:

- Extension of Courts; Lower courts, High Court and Supreme Court
- Extension of Laws like RTI, RTS
- Property rights

Political Setup

- Establishment of Local Government System
- Holding General Election

Policing

- Establishing modern Policing System
- Trainings and equipment

Socio Economic Development

- Need Based Assessment
- Securing Proper Resources/ Money



CGPA

**CENTRE FOR GOVERNANCE
AND PUBLIC ACCOUNTABILITY**