

Unraveling the Constitutional Quandary: The Status of FATA Pre-Merger in the 1973 Constitution

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Abstract

This research article delves into the complex legal landscape surrounding the status of the Federally Administered Tribal Areas (FATA) under the Constitution of 1973 in Pakistan. FATA's historical and constitutional position has undergone significant changes, culminating in its merger with Khyber Pakhtunkhwa in 2018. The study meticulously examines the legal and constitutional evolution of FATA and its distinctive administrative framework, which persisted until the merger. The article critically analyzes the various constitutional provisions, amendments, and legal instruments that governed FATA, shedding light on the intricacies and anomalies within the Pakistani legal system. It also explores the challenges and implications of merging FATA with Khyber Pakhtunkhwa and the impact on the region's political, social, and economic landscape. Through an in-depth examination of legislative history and case law, this research seeks to provide a comprehensive understanding of the legal status of FATA before its merger, offering valuable insights into the broader issues of constitutionalism, governance, and the protection of fundamental rights in Pakistan. By revisiting the pre-merger legal framework, this article aims to contribute to the scholarly discussion on constitutional law and governance in Pakistan.

Keywords: *Constitution of 1973, Constitutional status, FATA, Legal framework, Merger.*

1. Introduction

In Pakistan's legal and constitutional framework, the Federally Administered Tribal Areas (FATA) have long had a special and enigmatic position. The wider constitutional modifications that the nation has undergone since its founding had little impact on the status of FATA, which operated as a region with some degree of self-government. There has been a great lot of debate in the legal, political, and academic communities about how FATA was handled—or, to be more precise, how it was left out of the Constitution of 1973. The complex interaction of statutory provisions, historical occurrences, and

political pressures that shaped FATA's constitutional status prior to its 2018 merger with Khyber Pakhtunkhwa is examined in this research study. The colonial past, tribal traditions, and geopolitical factors all play a part in the governing system and legal needs of FATA. Due to the special circumstances surrounding FATA's existence, a region that seemed to be outside the purview of the 1973 Constitution was created. The paper's primary goal is to evaluate and clarify the complex constitutional conundrum that surrounds FATA by looking at how its legal and administrative status has changed and where it fits into the larger constitutional framework. The piece also examines the difficulties it has brought Pakistan's ideas of constitutionalism and administration. Its primary goal is to carefully examine the effects of the merger and any potential future integration of FATA into Khyber Pakhtunkhwa. The FATA residents were not the only ones affected by this crucial development in Pakistan's legal and political landscape; it also sparked more thorough investigations into constitutional revisions and the protection of fundamental rights (Khan, Iqbal, & Ahmad, 2022). This article employs a thorough approach that encompasses historical analysis, a legislative assessment, and case law review in order to achieve these goals. The goal is to provide a detailed understanding of the legal dynamics that supported FATA's unique status and the region's transformation as a result of the merger. This study contributes to the ongoing conversation about Pakistani constitutional law, government, and legal reform. It is a useful resource for academics, decision-makers, and professionals who are interested in these significant and evolving facets of Pakistani politics and law (Fayaz, Gul, & Khattak, 2021).

1. The Constitution of Pakistan 1973

1.1. Articles 1 And 246, Tribal Areas in The Constitution Of 1973

According to Articles 1(2) and 246, FATA is considered part of the federation of Pakistan. It consists of seven political agencies: Khyber, Kurram, Orakzai, Mohmand, Bajuar, North Waziristan, and South Waziristan. Additionally, there are six provincially administered Frontier Regions that are attached to the districts but are separate from the political agencies. These regions are Peshawar, Kohat, Bannu, DI Khan, Tank, and Lakki Marwat. The tribal areas, as per the constitution, refer to regions in Pakistan that were designated as tribal territories prior to the commencement day. The definition is not comprehensive and relies on the assessment of an area's status prior to the starting day. However, several territories, namely PATA and FATA, are explicitly stated as being part of the tribal areas. In the case of *Superintendent Land Customs v. Zewar Khan*, the Supreme Court ruled that it is the responsibility of the state's executive power to determine whether tribal territories are considered part of Pakistan. The courts are obligated to follow the decision made by the executive authority (Muhammad, & Khan, 2022).

1.2. Article 247, Administration of Tribal Areas

According to Article 247, the federal government has the power to govern the Federally Administered Tribal Areas (FATA), while the provincial government has the power to govern the Provincially Administered Tribal Areas (PATA). Regarding tribal regions, the president holds ultimate authority. In the case of PATA, the president has the power to issue directives to the governor, who is obligated to follow them. The laws enacted by parliament or a provincial assembly do not have jurisdiction over the tribal areas, unless the president (in the case of parliament) or the governor with the president's approval (in the case of a provincial assembly) specifically directs so. However, the extended laws may be subject to certain exceptions and modifications as specified in the relevant directive. The president and the Governor, with the president's consent, possess the authority within their respective jurisdictions to establish regulations for the purpose of maintaining peace and promoting effective

governance in tribal regions. The president has the authority to establish regulations for the peace and effective administration of the Federally Administered Tribal Areas (FATA) (Hussain, Khan, & Chandio, 2023). Through a presidential decree, the unique status of tribal areas can be terminated, causing them to no longer be considered as such. However, prior to issuing such an order, the president must gather the opinions of the tribal people, as represented in a Jirga. Unless specifically directed by legislation, neither the Supreme Court nor the High Court has jurisdiction in tribal areas. However, any jurisdiction previously exercised by these courts in tribal areas prior to the commencement date remains unaffected (Khan, 2022).

2. The Executive System of Fata

The Federally Administered Tribal Areas (FATA) is subject to the executive jurisdiction of the federation, as stipulated by article 247(1). In a federation, the president is required to follow the advice of the Federal cabinet or the prime minister. However, according to article 48(2) of the constitution, the president has the authority to make independent decisions on certain matters. Any action taken by the president in his discretion cannot be challenged on any grounds whatsoever. In this case, the president is exempted from his connections with the federal government, as he is explicitly allowed and authorized under article 247(5) to govern and give instructions and regulations for FATA (Javed, Jianxin, & Khan, 2021).

Similarly, Article 105 stipulates that the governor must follow the guidance of the chief minister or their cabinet. However, the governor is also exempted from their interactions with the provincial administration. The governor of the province oversees the administration of FATA under the guidance of the president. The governor's executive responsibilities are carried out according to article 145, which requires the governor to perform specific activities as the president's representative. The governor's precise tasks are explicitly outlined in article 247. This entails a direct connection between the provincial governor and the president, which in turn links them to the federation (Turk, 2021).

3. The Legislation for Fata

The legal framework for the judicial system in the Federally Administered Tribal Areas (FATA) is outlined in article 247(3), 247(4), and 247(5). According to article 247(3), the president has the authority to extend the actions of the parliament to FATA or a specific part of it. The president can also make necessary exceptions and adjustments to the extended act. The constitution lacks detailed elaboration and clarification about the terms "exception" or "modification".

Furthermore, the president has the authority to promulgate rules pertaining to peace and effective governance in the Federally Administered Tribal Areas (FATA) or its specific regions, as stated in article 247(4). The constitution lacks a specific definition for the terms "peace or good governance". The authority to create rules under article 247(4) is contingent upon the jurisdiction of parliament, and in this regard, the provisions of articles 141, 142, and 143, along with the enumerated lists in the fourth schedule, as well as paragraphs 227 and 228, are applicable. These rules govern the legislative authority of parliament. The supplementary regulation can be found in Article 8 and 203 DD. Furthermore, a self-contained law in the form of rules, as authorized by article 247(5), such as the FCR, is employed. The president wields extensive power in all matters and now remains unchallenged by the constitution (Khan, Ijaz, & Saadat, 2021).

3.1.The Jurisdiction of The Supreme Court and The High Court

According to Article 247(7), unless there is a law passed by parliament stating otherwise, both the supreme court and the high court are not allowed to have any authority under the constitution in tribal areas. However, this clause does not affect the jurisdiction that the supreme court or high court had in tribal areas before the commencing day.

Despite the publication of President Order No. 28 of 1970 or Act No. XXVII of 1973, which extended the jurisdiction of the Supreme Court and the High Court to PATA, neither court has authority over FATA. The jurisdiction of the Supreme Court and the High Court has not been extended to any other area as extensively as it has been to FATA. Clause 7 of Article 247 of the 1973 constitution continues to exclude the jurisdiction of the Supreme Court and the High Court in relation to FATA.

In the case of Piao Gul vs The State, the trial for the offense took place in Peshawar under the supervision of the political agent. However, the judgment was pronounced in Jamrud, which is a special area. The Honorable Chief Justice A.R. Cornelius, who wrote the judgment, differentiated this case from Dosso's case. He stated that since all the proceedings in Dosso's case occurred in special areas, whereas in the current case the proceedings took place in Peshawar, the High Court could exercise jurisdiction over the matter. In the case of Sar Khan vs The State, a person was exhausted, found guilty, and incarcerated within the territorial jurisdiction of the Peshawar High Court under section 11 of the FCR for committing an offense in the tribal area. The ruling stated that the high court has the authority, under article 98 of the Constitution of Pakistan 1962, to review the appropriateness and legality of all actions taken within its territories, regardless of whether the offense was committed outside its territorial jurisdiction (Zeb, & Ahmed, 2019).

In the case of Superintendent, Land Custom, Torkham (Khyber Agency) vs Zewar Khan, the Supreme Court ruled that even though a truck carrying goods without customs duty was seized in a tribal area, it was brought to Peshawar, which fell within the court's territorial jurisdiction. Therefore, it was justified for the high court to issue a writ to the relevant authorities within their jurisdiction to release the seized truck. This is because the order had to be executed within the geographical boundaries of the high court. Furthermore, it was determined that if an order of the high court was intended to be enforced in a territory beyond the jurisdiction of the high court, the issue of the writ being not maintainable would emerge.

In light of the rulings by the Supreme Court in the cases of Piao Gul and Sar Khan, the Peshawar High Court, in the case of Abdur Rehman and others vs The State, determined that it has the authority to review the legality and appropriateness of any order or action taken within its jurisdiction, even if it pertains to an incident that occurred in the tribal area.

In the case of Malik Noor Badshah vs Deputy Commissioner, Kohat, it was determined that the high court has the authority to issue a writ of habeas corpus to investigate the legality of the imprisonment of any individual held in a prison within its jurisdiction, even if the authority for the imprisonment and the offense committed occurred outside that jurisdiction.

In the case of Muhammad Sadiq vs Government of Pakistan, it was determined that the authority of the higher courts should not be easily disregarded. The exclusion of jurisdiction would only apply to matters that are specifically related to the tribal areas. The clause that limits jurisdiction cannot be

interpreted in a way that excludes the authority of the superior court when any part of the case occurs or any significant action is taken outside the tribal areas, and when it affects the life, freedom, or property of a citizen. Therefore, the jurisdiction of the superior court was upheld.

In the case of *Nabi Bakhsh and others vs The State*, it was determined that if there is a disagreement among partners in a partnership business and the agreement was made in a settled area, the jurisdiction for resolving the dispute lies in the settled area. This is true even if one of the parties originally belongs to a tribal area. However, in the case of *Haji Saleem Khan and others vs Commissioner FCR Kohat*, a division bench of the Peshawar high court held a different opinion. They stated that the exclusion of jurisdiction of the high court under article 247 (7) of the constitution of the Islamic Republic of Pakistan is absolute, regardless of the fact that the officer who made the disputed decision was in the settled area for administrative reasons (Rahim, A., Sharif Ullah, Umar, Ullah , & Khan, 2023).

The case of *Quam Bagash vs Quam Turi* established that when examining the legislative history of the high courts and their jurisdiction in relation to President's Order No 28 of 1970 or Act XXVI of 1973, along with Article 246 of the Constitution of 1973 and the impact of Article 247(7), it was concluded. The phrase "in relation to tribal areas" was also examined and determined that if a dispute regarding land located in tribal areas or criminal offenses occurring within the territorial areas under their jurisdiction, and the parties involved decided to settle the matter within the tribal areas, the Peshawar High Court would not have jurisdiction over the case. In the case of *Haji Ghulam Sarwar against Pir Akhbar Din*, the Peshawar High Court referred to previous cases such as *Piao Gul*, *Sar Khan*, *Zewar Khan*, *Abdu Rahman*, *Muhammad Sadiq*, and *Nabi Bukhsh*. The court reached a decision based on these cases.

The petitioners in this case are from a settled area, and the dispute seems to arise from a business transaction that took place in Peshawar. While nothing happened between the parties in the tribal areas, one of the parties is from there. According to Article 247(7) of the Constitution, this court's jurisdiction would not be excluded. Under Article 199 of the Constitution of the Islamic Republic of Pakistan, this court has the authority to examine the matter and safeguard the rights of the state's citizens as guaranteed by the constitution. The court's role is to ensure that citizens residing within its territorial jurisdiction are treated in accordance with the law and not otherwise (Mukhtar, 2016).

In the case of *Shoukat Khan Vs Assistant Political Agent Landi Kotal*, it was established that the proper course of action for challenging an order or proceeding is to first seek remedy within the legal hierarchy, rather than approaching a different platform for redress of grievances. This principle is based on the recognized concept of administration of justice.

In another ruling, the case of *Dilawar Khan vs Political Agent Khyber Agency* established that in order for the FCR (Frontier Crimes Regulation) to have jurisdiction, it is necessary for at least one of the parties involved to belong to a frontier tribe. Additionally, there must be a dispute that has the potential to result in violence or disruption of peace, as stated in section 8 of the FCR. If one of the parties involved in the dispute is from the tribal areas, and the dispute is of a civil nature, and the business transaction took place in a settled area without any involvement from the parties in the tribal area, then the appropriate course of action would be to approach the regular civil courts within whose territorial jurisdiction the cause of action arose. In the same vein, if a crime is committed in a populated region, an individual who is found guilty of the offense cannot be apprehended or detained inside that area and sent to trial by political authorities under the Frontier Crimes Regulation (FCR).

Nevertheless, the superior court judgements mentioned above do not provide answers to specific questions. Consequently, the matter of jurisdiction has been brought up for examination due to two main challenges: (a) questioning the suspension and revival of fundamental rights during a specific period under the FCR, and (b) contesting the trial of a case registered under the FCR in tribal areas but conducted in settled areas or where the accused is being held. The FCR includes provisions that establish collective and territorial duties, granting political authorities power over established regions. (d) The authority to prolong a specific legislation. (e) The jurisdiction of the FCR's courts to handle cases related to Hudood laws. (f) Disputes arising from elections. (g) Matters of a general nature, among others (Ahmed, 2021).

3.2.The Jurisdiction of The Wafaqi Mohtasib Excluded In FATA

The Wafaqi Mohtasib institution operates by President Order No. 1 of 1983, specifically Article 270 A (6) of the Constitution. This order ensures the preservation of the institution's constitutional status, which is equal to that of the Constitution itself for the purpose of making amendments. FATA was excluded according to section 31(3) of the aforementioned order, as stated in notification no 57/104(15) ML-IB/CMLA dated 13-08-1984 (Rabbi, & Badshah, (2018).

4. FCR's Courts and Hudood Offences

The Federal Shari'at Court, in the aforementioned cases of Amir vs The State, Ms Yasmeen vs The State, and Sajjid Hussain and two others vs The State, as well as the appellate bench of the Supreme Court in the case of Sajjid Hussain and two others vs The State, determined that the jurisdiction of the Federal Shari'at Court extends to FATA (Federally Administered Tribal Areas), and that the courts operating under the FCR (Frontier Crimes Regulation) have no authority to try cases registered under the Hudood laws.

In the case of Said Amir vs The State, it was determined that the prohibition (Enforcement of Hudood) order of 1979 was issued as a presidential order and does not fall under the scope and definition of an act of parliament that necessitates the president's direction for its implementation in the Federally Administered Tribal Areas (FATA), as outlined in article 247(3) of the 1973 constitution. However, according to article 1(2), the president's order 4 of 1979 has been extended to apply to the entire country of Pakistan, which includes FATA. Therefore, the prohibition (Enforcement of Hudood) order of 1979 has been prolonged and implemented in FATA.

In the case of Ms. Yaseen versus The State, it is said that according to article 29 of the President's Order IV of 1979, the order has been granted superior authority above any other currently applicable law in the country. This includes the Frontier Crimes Regulation (FCR) in force in the Federally Administered Tribal Areas (FATA) (Tanguay-Renaud, 2002).

In the case of Sajjid Hussain and two others vs The State, a full court of the Federal Shari'at Court determined that, according to article 203-DD of the constitution of Pakistan of 1973, the federal Shari'at court has the authority to review the decisions made by any criminal courts regarding the implementation of Hudood laws.

In the case of Sajjid Husain and two others vs The State, the appellate bench of the Supreme Court of Pakistan determined that clause (7) of article 247 of the constitution of 1973 does not apply to the Federal Shari'at Court. This is because the clause specifically refers to the Supreme Court and the High

Court, excluding the Federal Shari'at Court. Anything that is not explicitly mentioned in the language used cannot be considered or included based on any principles of interpretation. Therefore, it can be concluded that the prohibition (Enforcement of Hudood) order 1979 is applicable to FATA and supersedes the provisions of the FCR in prohibition cases. The trial of prohibition cases will be carried out according to the criminal procedure code. Any appeal against conviction and sentences will be made to the Federal Shari'at Court instead of the commissioner. Additionally, the constitution has granted exclusive revisional and other jurisdiction to the Federal Shari'at Court in Hudood cases.

The ordinance is a unique statute, and its provisions have been designed to supersede all other relevant laws. Any provision in another legislation that does not comply with the terms of this ordinance would be rendered ineffective. Therefore, section 30 of the FCR, which is the only part addressing adultery, conflicts with the Hudood laws and is therefore obsolete and inoperative.

It is well established that the Federal Shari'at Court has authority over FATA and appeals in Hudood cases should be made to the Federal Shari'at Court rather than the commissioner or the FCRs court. However, there is a question regarding the competence of the FCR courts to hear and decide Hudood cases. If they are not competent, then what is the alternative? On one hand, the Federal Shari'at Court has ruled in the case of *Said Amir vs The State* (PLD 1990 FSC 28) that authorities working under FCR are not competent to handle Hudood cases. On the other hand, the constitution prohibits the jurisdiction of ordinary courts in FATA (Abbasi, 2021).

Furthermore, it should be noted that according to a case in the Federal Shariat Court (*Ms Yasmeen vs The State* PLD 1994 FSC 4), an additional district is considered a criminal court and the deputy commissioner is regarded as an additional district magistrate. This court is competent to hear and decide matters related to Hudood laws. Therefore, the question arises as to whether the Jirga procedure used by the FCRs court, which is different from the criminal procedure code, is legal for the trial of Hudood cases. In another case (*Federal Shariat Court, Sayed Amir vs The State* PLD 1990 FSC 28), it was held that the trial of Hudood cases should be conducted in the criminal procedure court. This implies that conducting the trial of prohibition cases through the council of elders by the FCR's court is unlawful, and as a result, the cases are being initiated in the improper venue. The council of elders, operating under the FCR, was deemed unconstitutional by the Supreme Court of Pakistan in the case of *Mazhar Elahi versus The Federation of Pakistan*. The Federal Shariat Court (FCR) lacks jurisdiction to handle Hudood disputes according to the FCR. Conversely, the ordinary courts are prohibited from exercising jurisdiction by Article 247(7) of the constitution. The tradition of honor killing, known as "Suara," where girls are given in marriage to resolve longstanding disagreements between competing families, as well as child marriage and forced marriages without the consent of females, are still prevalent, especially in the underdeveloped tribal regions along the Afghan border. These fundamental human rights violations continue to persist and be practiced in FATA. The Muslim Marriage Act of 1939, The Muslim Family Law Ordinance of 1961, and other Pakistani laws pertaining to women and family affairs do not apply to FATA. Furthermore, the FCR does not include any laws on the rights of Khulah (divorce through court), recovery of dower, support, and inheritance. It is worth noting that FCR courts lack an institution for the registration of nikhanama marriages (Abbasi, 2021).

5. Conclusion

Under the Pakistani Constitution of 1973, the Federally Administered Tribal Areas (FATA) had a complicated and shifting constitutional status that was characterized by legal quirks and historical

complexities. The goal of this study was to shed light on this unique constitutional conundrum and the significant effects of the merger that occurred in 2018. It is evident from a detailed examination of the historical context, legislative developments, and legal precedents that the FATA was a distinct region with a distinctive system of governance. Tribal customs, colonial history, and geopolitical considerations all had a role in the territory's unique legal status. The legal and administrative landscape of the region underwent a dramatic upheaval as a result of the merging of FATA with Khyber Pakhtunkhwa. The transition presented major challenges in addition to the opportunity for improved access to justice, increased economic growth, and stronger political representation for the people of FATA. In order to complete the integration process, it was necessary to carefully navigate through complex legal and administrative issues, including land reforms, the enlargement of fundamental rights, and the adaptation of legal institutions to the new situations.

In the end, the union of Khyber Pakhtunkhwa and FATA marks a significant development in Pakistan's legal and political history. This indicates the country's commitment to righting historical wrongs, extending constitutional safeguards to underserved groups, and promoting local development. However, the full implementation of these constitutional and legal changes, as well as the removal of the political and socioeconomic barriers the recently combined territory faced, will be an ongoing project. The goal of this study is to improve understanding of the constitutional issues and legal dynamics relating to FATA's position prior to the merger, as well as the effects of this historic development. We hope that this analysis of the constitutional development in FATA will continue to enlighten and inspire discussions on constitutionalism, governance, and the protection of fundamental rights in Pakistan and elsewhere. In order to make sure that the merger's obligations are kept, it is essential to carefully monitor and evaluate the developments in the integration of FATA (Federally Administered Tribal Areas).

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