

## Comparative Analysis of the Justice System under Frontier Crimes Regulation vs Formal Justice System in Newly merged districts: Impact in the context of Law and Order

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### Abstract

*In 2018 the Pakistani National Assembly voted 229-1 to unite the Federally Administered Tribal Areas (Ex-FATA) and Khyber Pakhtunkhwa (KP). The Border Crimes Regulation governed the ex-FATA (FCR). The amendment abolished it. After two years of federal oversight, the FCR will be subject to KP assembly laws and Pakistan's constitutions. The judgment has strengthened the prospect of rule of law in a formal justice system in the region, but its execution is plagued by legal and administrative issues. The tendency for the subject community to diminish its loyalty to laws once they are upheld without considering the cultural, historical, and social fabric of any society is one such difficulty. So, it is crucial to understand how Newly Merged Districts (NMDs) residents view the formal justice system and what issues the judiciary, police, prosecution, and others face. This paper compares the Justice System under Frontier Crimes Regulations and Formal Justice System in Newly Merged Districts and its Impact on Law & Order. Transplanting any law without appreciating the cultural, historical, and social fabric of any society or area tends to lose sight of the legislature's intent, aspirations, and expectations, as well as ordinary litigants who bring their private advocacies to court. This study compares the FCR and formal justice systems in NMDs with a focus on issues and problems to address the legal and administrative barriers that hinder access to justice, affect law and order, and contribute to their possible solutions. It also analyzes EX-FATA's status in Pakistan's 1956, 1962, and 1973 constitutions and preempts the challenges faced by the formal justice system in the NMDs, especially in maintaining law and order, and ways to address the legal quagmires resulting from this difficult situation.*

**Key Words:** EX-FATA, FCR, FATA merger, 1973 Constitution, NMDs, British Raj

### Introduction

The Frontier Crimes Regulation (1872/1901) was the legal framework through which the British Empire had to rule over EX-FATA<sup>2</sup>. Pakistan inherited the British system of governance and retained it until May 2018. The EX-FATA is

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<sup>2</sup> Nichols, R. (2013). *The Frontier Crimes Regulation: A History in Documents*. Karachi: Oxford University Press.

considered to be a gateway to India, as all major seven invasions of India happened through the strategically located passes of the Tribal Areas (ex-EX-FATA).<sup>3</sup> The Tribal Areas' geostrategic importance is shown by the fact that it borders Afghanistan, Baluchistan, and the populated areas of the former North-West Frontier Province (NWFP) (now Khyber-Pakhtunkhwa).<sup>4</sup> The two most crucial strategies for instituting reforms in EX-FATA—bringing the area under Pakistani law and removing the British colonial era (1858–1947) legal framework for EX-FATA—would undoubtedly have an impact on the law, politics, economy, and, most significantly, security. Another big concern is whether the region's weak, corrupt administration, which now has all of its key partners opposed to the EX-FATA reforms, will be able to control the change that would result from the repeal of FCR and the introduction of state law. Pursuant to this such public ultimatum, the Pakistani Parliament through an act—the 25<sup>th</sup> Amendment—abolished the FCR, resulting in the union of EX-FATA with Khyber Pakhtunkhwa.<sup>5</sup> the FCR's cruel and oppressive nature as well as its use by the self-styled political administration of the tribal areas and its exclusive tribal agents and maliks, to subjugate the resident of EX-FATA, have long been a demand of numerous stakeholders.<sup>6</sup> A huge quarter of the populace particularly those who believed in the conservatism of primitive approach has opposed the striking out of the FCR. Yet, this cannot be accepted at first glance because the primitive and out-of-date legal framework has been a barrier to mainstreaming EX-FATA and bringing about large-scale development in the region. They expostulate with their bona fide reasons for doing so. It is noteworthy that outside of EX-FATA there has been a louder call for the abolition of the FCR than there has been inside the region. There are a variety of causes for this, from locals' ignorance of contemporary laws and their legal and constitutional rights to their fear of speaking out against the government. But nonetheless, the legal document has importance despite how much it may be criticized, regardless of the reason why there isn't a significant demand for its repeal in EX-FATA. Though it definitely requires significant modifications, its blatant annulment is highly disputed.

The foundation of comparative study is the fact that the union of the old EX-FATA with Khyber-Pakhtunkhwa is an unusual political move because it was governed for more than a century, including more than 70 years after Pakistan

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<sup>3</sup> Constable, A. G. (1879). Afghanistan: The Present Seat of War, and the Relations of That Country to England. *Journal of the American Geographical Society of New York*, 11, 41-58. doi: <https://doi.org/10.2307/196504>

<sup>4</sup> Gul, I. (2008). Afghanistan Imbroglio: Implications for Pakistan's Tribal Areas. *Policy Perspectives*, 67-85. doi: <https://www.jstor.org/stable/42909534>

<sup>5</sup> Waseem Ahmad Shah. (2019, March 12). Regular courts start functioning in tribal districts. *Dawn*. Retrieved July 8, 2022, from <https://www.dawn.com/news/1469086>

<sup>6</sup> ANNULING FCR, EXTENDING SCP, IHC JURISDICTION TO EX-FATA, RAZA KHAN. October 15, 2017

gained its independence, by-laws from the colonial era. The abolition of FCR from the Malakand Agency is a good, related example. Drawing from the experiences of the people under the formal judicial system and the post-FCR Malakand Division, one is better positioned to put forward recommendations for the successful implementation of a formal judicial system in the NMDs

## **An Overview of Constitutional and Legal status of erstwhile EX-FATA in foregoing Constitutions**

The Tribal Area was treated as a special zone and governed through FCR which was imposed in 1901 by British Raj. For the Tribal Areas to join, Pakistan had to negotiate its own agreements with tribal elders. The tribal maliks acceded to Pakistan on the assurance that the perks and privileges they enjoyed during the Raj would remain the same.<sup>7</sup> Pakistan thus retained the special character of the Tribal Areas under FCR until 2018. There were special provisions about EX-FATA in all three constitutions of Pakistan which were 1956, 1962 and 1973's.

### **1956 Constitution**

Under the 1956 Constitution, the Tribal Areas were referred to as "special areas"<sup>8</sup>. Article 104 extends West Pakistan's Governor's executive authority. Acts of Parliament or the Provincial Assembly could not be applied to the Special Areas without the approval of the Governor, with the prior sanction of the President. Interestingly, superior courts were allowed to exercise jurisdiction over the Special Areas.

### **Constitution of 1962**

Articles 222 and 223 [Centrally Administered Tribal Area (CATA)] of the 1962 Constitution dealt with areas not part of any province; Article 223 (1) barred the application of laws of parliament to the Tribal Areas unless so directed; Under the original 1962 constitution, superior courts enjoyed jurisdiction over the EX-FATA (The Government of West Pakistan, 1968). However, a change to Article 223 (5) of the constitution was made to prevent the judiciary from having authority over Tribal Areas. (Khan S, 2010).

### **Constitution of 1973**

Articles 1, 246 and 247 of Pakistan's 1973 constitution dealt with EX-FATA. Under article 247, the president exercised executive jurisdiction over EX-FATA,

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<sup>7</sup> Khan, A. (2011). EX-FATA: the voice of the unheard – path-dependency and Why History Matters. *Strategic Studies*, 40-74.

<sup>8</sup> Rehman, Z. U. (2014, July 6). Governing Ex-FATA: The big debate. *Dawn*. Retrieved July 7, 2022, from <https://www.dawn.com/news/1117447>

while Article 247 (3) bared the application of acts of parliament to EX-FATA unless President so directed. Similarly, Article 247 (7) barred High Court and Supreme Court from exercising jurisdiction over EX-FATA (1973 Constitution of Pakistan, 2018). However, this legal-administrative edifice of EX-FATA was based on a colonial-era law, the Frontier Crimes Regulation (FCR, henceforth).

### **Delineation of Justice Systems Installed in Erstwhile EX-FATA**

Pakistan's formal legal system was a British inheritance. It was created under British colonial authority and is still moving in the direction set by imperialist forces. The West Pakistan Civil Courts Act and 1908's The Code of Civil Procedure (CPC) served as the foundation for Pakistan's judicial system (Ord. II of 1962). The official court system, however, changes to reflect the evolving situation. As an element of conflict resolution in Malakand, the addition of Nizam-e-Adl courts in 2009 was one of the most recent modifications.<sup>9</sup> The court structure of Pakistan comprises; the Supreme Court of Pakistan, the high courts, the Federal Sharia court, and the district-level judiciary. Till the 25<sup>th</sup> amendment, newly merged districts of EX-FATA were deprived of the Formal Justice system of Pakistan.

### **Enactment of Frontier Crimes Regulation**

Initially, FCR was introduced as the Punjab Frontier Crime Regulation (PFCR) in 1872. It was created as an addition to the India Penal Code. The purpose of the unique legal and administrative code was to boost conviction rates without requiring formal court procedures to be followed.<sup>10</sup> British authorities incorporated local traditions into FCR. For instance, the FCR Committee 1899 highlighted that the traditional Jirga is a tribal assembly that acts in complete agreement. Without a doubt, the primordial institution has been adopted to meet our needs.<sup>11</sup> FCR was truly a combination of western legal principles and traditional Pashtun values, but it was neither a tool of western nor traditional justice nor could it serve as a replacement for either of the two.<sup>12</sup>

### **The Merger of Erstwhile EX-FATA**

FCR was revisited and revised several times. Administrative and development reforms in EX-FATA were, *inter alia*, the schema of the National Action Plan,

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<sup>9</sup> (Naveed, A. S (2015). Understanding the informal justice system: Opportunities and possibilities for legal pluralism in Pakistan

<sup>10</sup> Shah, W. A. (2014, September 8). The black law of FCR continues to evade legislators' attention. Dawn. Retrieved July 6, 2022, from <https://www.dawn.com/news/1130619>

<sup>11</sup> Mahsud, N. H. (2017). EX-FATA, FCR and jirga system. The Frontier Post. Retrieved July 5, 2022, from <https://thefrontierpost.com/ex-FATA-fcr-jirga-system/>

<sup>12</sup> Caroe, O. (1958). The Pathan from 550 BC to AD 1957. London: Oxford University Press.

developed subsequent to the Army Public School attack in 2014. Resultantly, in 2015, a committee was constituted to recommend reforms in EX-FATA, which accorded four options (status quo, separate province, formation of a Gilgit-Baltistan-style council, or merger with Khyber-Pakhtunkhwa), and eventually, the committee was agreed for the merger.<sup>13</sup> In light of the recommendations accorded by the committee, the 25<sup>th</sup> constitutional amendment was passed in 2018.<sup>14</sup> The special status of EX-FATA was abolished and jurisdiction of the Parliament and higher judiciary extended to the area and the Pakistan Penal Code extended to the ex-EX-FATA.<sup>15</sup> But it cannot be said that the insertion of the new system was elementary and acted as a panacea to all the problems prevailing in erstwhile EX-FATA. One of the major concerns is the Government showing lack of will to fulfil its promises. For instance, the federal government had promised the allocation of 3% of shares in the National Finance Commission (NFC),<sup>16</sup> but there is no evidence to suggest the allocation of said fund. In addition, the merger of EX-FATA with Khyber Pakhtunkhwa was a 10-year project,<sup>17</sup> but that timeline was sacrificed on the altar of expedience. Hence, the merger was an unprecedented policy measure but the haste with which it was done and the yet-to-fulfil promises will greatly affect people's trust in the new system.

### **Extension of Formal Justice System to Newly Merged Districts**

The 25<sup>th</sup> Constitutional amendment extended jurisdiction of the formal legal system to the NMDs. Regular courts started working in the erstwhile EX-FATA in February 2019 when the Peshawar High Court posted 28 judicial officers of the district judiciary. The judicial officers for Bajaur started working in Timergara, (Dir Lower District), South Waziristan in Tank District, Kurram, Orakzai in Hangu District, North Waziristan in Bannu District, Mohmand in Charsadda District, and Khyber in Peshawar District.<sup>18</sup> However, there exist tribulations with the new system. The promises made with the people of EX-FATA are yet to be kept. Without denying the fact that the merge of EX-FATA with Khyber-Pakhtunkhwa was hastily done by the power-wielders of Pakistan even disregarding the original

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<sup>13</sup> Aziz, S. (2017, March 8). History of EX-FATA reforms. *The Express Tribune*. Retrieved July 8, 2022, from <https://tribune.com.pk/story/1349941/history-ex-FATA-reforms>

<sup>14</sup> Shah., S. W. (2007). *North-West Frontier Province: History and Politics*. Islamabad: National Institute of Historical & Cultural Centre of Excellence, Quaid-i-Azam University.

<sup>15</sup> Waseem, A. (2018, May 31). President signs KP-Ex-FATA merger bill into law. *Dawn*. Retrieved July 7, 2022, from <https://www.dawn.com/news/1411156>

<sup>16</sup> The report, B. (2017, January 11). Ex-FATA to get Rs90 billion development budget for 10 years: official. *The News*. Retrieved July 15, 2022, from <https://www.thenews.com.pk/print/178303-Ex-FATA-to-get-Rs90-billion-development-budget-for-10-years-official>

<sup>17</sup> Raza, S. I. (2017, March 3). Cabinet approves steps for Ex-FATA's merger with Khyber Pakhtunkhwa. *Dawn*. Retrieved July 15, 2022, from <https://www.dawn.com/news/1318095>

<sup>18</sup> Waseem Ahmad Shah. (2019, March 12). Regular courts start functioning in tribal districts. *Dawn*. Retrieved July 8, 2022, from <https://www.dawn.com/news/1469086>

10-year plan of the Sartaj Aziz's committee. It was clearly stated that the merger was a 10 years plan wherein the first "five-year transition period would be utilised to prepare Ex-FATA for restoration of a durable peace. [...] The federal government will protect the development package till the next 10 years."<sup>19</sup> Moreover, it was promised that 3% of the share in the National Finance Commission would be allocated to the EX-FATA (Report, 2017). Most of these lofty promises are yet to be fulfilled. Overall, the merger was a laudable step but the haste with which it was done (in mere thirteen days) and the yet-to-be-fulfilled promises will greatly undermine people's trust in the new system.

### **Comparative Analysis of FCR with Formal Justice System**

There have been several contradictions between the Laws subjected to Formal Justice Systems and FCR. Getting so much departure from the Formal Laws which actually are influenced by Constitutional and internationally guaranteed norms provides the critics with a reason to critically analyze both. FCR has even been described by Pakistan's Human Rights Commission as "FCR: A Bad Law Nobody Can Defend." section 10 of the FCR prohibits all lower courts in the EX-FATA from hearing cases involving acts that originated there. Also, article 247 of the constitution does not allow higher courts from having jurisdiction over EX-FATA. It implies no legitimate avenue exists for EX-FATA women to assert their legal rights. The reason for comparing the two systems is that the union of the old EX-FATA with Khyber-Pakhtunkhwa is an unusual political move because it was governed by colonial-era law for more than a century, including more than 70 years after Pakistan gained its independence. The abolition of FCR from the Malakand Agency may appear to be a precise plain of reference to analyze both. Drawing from the experiences of the people under the formal judicial system and the post-FCR Malakand Division, one is better positioned to put forward recommendations for the successful implementation of the formal judicial system in the NMDs. Amnesty International outlined the FCR as follows in its 2010 report as "an antiquated and draconian system of limited government with little or no recognition of or respect for human rights, the rule of law, due process, political representation or democratic institutions."<sup>20</sup>

### **Provision of Constitutional Human Rights**

On June 23, 2010, Pakistan ratified the International Covenant on Civil and Political Rights (ICCPR). Pakistan made a number of reservations regarding

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<sup>19</sup> Raza, S. I. (2017, March 3). Cabinet approves steps for Ex-FATA's merger with Khyber Pakhtunkhwa. Dawn. Retrieved July 15, 2022, from <https://www.dawn.com/news/1318095>

<sup>20</sup> FCR's collective responsibility, Gulman S. Afridi Published January 1, 2012

Articles 3, 6, 7, 12, 13, 18, 25, and 50 when ratifying the Covenant.<sup>21</sup> Under pressure from the world community, particularly from European nations, Pakistan removed their objections to the aforementioned articles. Pakistan is now required to implement the Covenant throughout the nation, including in EX-FATA. According to article 50 of ICCPR, all areas of states with a federal system are subject to the Covenant's provisions without any exceptions or restrictions. As a result, Pakistan cannot claim an exception from the Covenant, and it is its responsibility under international law to protect the fundamental rights of those living in EX-FATA.

However, the tribesmen word denied their fundamental rights to equality before the law. it was protected by article 14 of the ICCPR And article 25A of the constitution of Pakistan. so it was difficult to observe the such rule of law under the FCR. a fundamental right of every person, the notion of due process of law and fair play were leaking from a trial conducted under FCR. The accused had no right to be defended by legal counsel, to present material evidence or to cross-examination.<sup>22</sup> Hence principles of *Audi alterm partem* and *Locus standi* were compromised. That is the reason that an ex-parliamentarian Yahya Bakhtiar once asserted the absence of *wakeel* (lawyer), *daleel* (argument) and appeal in the Senate of Pakistan.<sup>23</sup> It provided the residents of ex-EX-FATA with the sufficient motive behind the long cherished demand of striking down FCR was its inhuman and tyrannical nature. People in ex-EX-FATA are not protected from arbitrary arrest because the executive and judicial branches of government were given equal authority. They also had no right to retain legal counsel. Residents of the EX-FATA were also not given the same rights as other Pakistanis to appeal to higher courts to assert their fundamental rights. The EX-FATA region is outside the purview of Pakistan's Supreme Court and high courts, as stated in article 247 of the country's constitution. Because of this, citizens of EX-FATA were unable to defend their constitutional rights. many petitions submitted by tribe members including pretending to have fundamental rights have been rejected by the higher judiciary on the grounds that it is forbidden by the constitution from hearing issues involving EX-FATA.

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<sup>21</sup> Noor Hamid, K., Muhammad, Z., & Sumbul, H. (2016). Frontier Crimes Regulations (FCR), Status of Fundamental Human Rights in EX-FATA and Pakistan's International Obligations. *Global Social Sciences Review*, I(II), 74-97. doi:10.31703/gssr.2016(I-II).06

<sup>22</sup> Ali, M. (2011, December 02). Frontier crimes regulation: Centuries-old law will take time to 'reform'. *The Express Tribune*. Retrieved July 8, 2022, from <https://tribune.com.pk/story/301002/frontier-crimes-regulation-centuries-old-law-will-take-time-to-reform>

<sup>23</sup> Zeb, K., & Ahmed, Z. S. (2019). Structural Violence and Terrorism in the Federally Administered Tribal Areas of Pakistan. *Civil Wars*, 21(1).

## **Right of Self Determination**

Article 1 of the ICCPR states that everyone has the right to self-determination. Undoubtedly, the original purpose of this article was to recognize the autonomy of colonized people. The International Court of Justice used its definition, which reads "as the need to pay regard to the freely expressed will of people," in its analysis of the self-determination principle in the Western Sahara case, but why?<sup>24</sup> the Preamble of Pakistan's 1973 Constitution declares that "The state shall exercise its powers and authority through the chosen representatives of the people." Similarly to this, Pakistan's constitution's Article 32 stipulates that the state must support locally elected governments. Given the concepts of self-rule and self-determination, it is impossible to agree that residents of EX-FATA were deprived of the right to self-determination. The constitution's Article 247 forbade the legislature, which in reality represents the people's will, from exercising its authority over EX-FATA. Consequently, the EX-FATA lawmakers decided on an animal to pass legislation on behalf of their constituents.

. For instance, the parliament has passed various laws to safeguard women from assaults with acids, forced marriage, child marriage, harassment, and honour killing, but these laws did not extend to EX-FATA. The constitution gives the federal government (President) authority over the former FATA. Without much consultation with elected officials, the president had the authority to enact laws for the region. For instance, in 2011 without any debate in the assembly or with the tribal legislative body, president Asif Ali Zardari issued the actions in Aid of the Civil Power Regulation, at the request of the security establishment. Contrary to this rule, the legislature strongly condemned the Pakistan Protection Bill, which was of a similar type, and the administration was forced to submit a number of revisions before the assembly could approve it. But, only one person was mandated to choose the fate of the EX-FATA population. governor of Khyber Pakhtunkhwa served as the president's manager. Because they were not answerable to the legislative body of its people, the president and governor enjoyed unprecedented control over EX-FATA.

## **Collective Responsibility**

Frontier Crimes Regulation (FCR), a primitive legal framework, places a strong emphasis on political agents who control the executive, law enforcement branches and judiciary of the government. The concept of Collective Responsibility has historically been termed as "*Draconian Law*" or *Kangaroo courts*" By reserving the FCR, Pakistan has preferred the unequal and separate treatment of residents of Ex-FATA. Section 21 of FCR enunciates the collective responsibility and the blockading of the entire tribe. The clause's Subsection A permits the seizure of any

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<sup>24</sup> ibid



or all of a tribe's members, as well as any or all of their property, wherever they may be found, in response to an offence committed by one or more tribe members. Hence, the use of collective punishment ignores individual responsibility and lumps innocent people in with the guilty.

On the contrary, there is individual responsibility under the formal justice system, which is the norm in all civilized societies.

### **Gender Equality before Law**

Article 3 of the ICCPR, guarantees both genders the provision of political and civil rights. Civil and criminal cases could be referred to a local Jirga under Sections 8 and 11 of the FCR. There were no women present in this jirga. This means that even situations involving violations of women's modesty were brought to the attention of the political administration and were decided by the council of elders, consisting of men and excluded women from voting. Because of this, Mariam Bibi, the founder of Khwendo Kor (Pushto; Sister's house) and former member of the National Council on Status of Women, claims that EX-FATA should allow women to participate in Loya Jirga since they can do so much in Afghanistan.<sup>25</sup>

Another example is section 30 of the FCR, which imposes penalties on married women who, against their will, engage in sexual relations with men other than their husbands and who are the subject of a complaint in this regard from their husband or any other person who was caring for her at the time of the offence. She will receive a five-year sentence, a fine, or a combination of the two. On the other hand, Formal Justice System imposes a bilateral liability for sexual intercourse under section 498-B of the Pakistan Penal Code, 1860. Even while it was claimed that the FCR clause had never been put into operation by the administration, the very fact that this section of the Regulation still exists shows how society views women.

Another problem that was left unresolved by FCR was the practice of settling disputes by handing daughters to the offended family, which became illegal in Pakistan with the adoption of the Protection of Women Ordinance in 2006. All of Pakistan's provinces were mandated by the Supreme Court of that country in 2012 to prevent Jirgas from carrying out this vile act.<sup>26</sup> The harsh custom of handing girls to rivals as payment for settling disputes has frequently been observed in tribal cultures. The FCR offered no legal protection to put an end to this immoral behaviour. Similarly to this, FCR did not adequately address the violations against women and lacked nuance when it came to the various forms of violence against women. To protect women from assaults on their property, domestic violence, harassment, forced marriages, and honour killings, for instance, the parliament has passed a number of laws. But EX-FATA is exempt from all of these laws. It implies

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<sup>25</sup> Human Rights Commission of Pakistan (Peshawar Chapter). (2005). FCR: A Bad Law Nobody Can Defend. Retrieved June 5, 2015

<sup>26</sup> *ibid*

that the FCR does not provide women with any safeguard or reprieve because it represents the exercise of state power. The men can access some legal options and go to court to defend their legal rights in the rest of the country.

FCR's Section 10 prohibits all lower courts on EX-FATA from hearing cases involving acts that originated there. Due to article 247 of the constitution, higher courts had no jurisdiction over EX-FATA. It implies that there was no legitimate avenue for EX-FATA women to assert their legal rights.

### **Right to Freedom of Movement**

The provision of the right to freedom of movement to every citizen is required by Article 11 of the ICCPR and Article 15 of Pakistan's constitution. In contrast, the FCR gave the government the authority to order anyone to live somewhere to which the Regulation did not apply if the Political Agent thought that individual to be a dangerously fanatic, a member of a frontier tribe with no apparent means of subsistence, unable to give a satisfactory account of himself, or involved in blood feuds. The mandatory requirement of "*Rahdari*" (the authorization for visiting a certain village) was yet another factor opposing internationally mandated constitutional legal standards. According to this system, people who live in the same tribal agency and who have been stationed in the region of EX-FATA needed to present a permission certificate in order to visit a tribal agency. They had to explain to the authorities why they were visiting and how long they planned to stay there in order to obtain permission. The application of this law was so strict that even if for deceased person's body needed to be transported they are for burial, heirs of the deceased person had to acquire formal permission from the authorities, along with information about the people who would be accompanying the body.

### **Patriarchy in FCR compromising free consent in Marriage**

Silence of a Law about a certain issue implies providing the liberation to do an act. FCR was silent about the standards of marriage or responsibilities and the rights of spouses. Because of the male-dominated nature of tribal communities, women have never enjoyed the same status as men. However, the FCR makes no mention of this issue whatsoever. Every day, nuptials without the partners' agreement, particularly among girls, come into existence, but this law does not provide them with any recourse. Women find it much harder than men to end a marriage when the law is in place.

Articles 23(3) and (4) of the ICCPR, which state that no marriage should be valid without the free and informed consent of both parties and that states parties to the convention guarantee that spouses have equal rights and responsibilities, prohibit this practice. This practice is against those rules. Similar to this, according to Muslim Personal Law, marriage or Nikkah is a religious legal compact that normalizes the sexual relationship between man and woman. It needs the consent

of spouses. Similarly, unlike FCR, the subjects of the Formal Justice System also enjoy the provisions of dissolution of marriage, Institutional way to claim maintenance and Mahr. On the other hand, Honour killing, swara and baddal (revenge) were common practices where women were killed, or given away to settle disputes which have never been redressed by FCR.

### Separation of Powers

FCR's system of government did not distinguish between the executive and judicial branches of government, in contravention of Article 175 of the Pakistani Constitution. The political administration eventually impacted the fundamental rights of tribal people as a result of the combination of two distinct and separate roles in the same hands.<sup>27</sup> Under Section 40 of the FCR, the PA could ask any person or tribe for the provision of a surety bond for good conduct. If the PA's good sense did not get satisfied with surety bonds, he may use his power to arrest a person(s) for two extendable by two or more years. As a result, article 9 of the ICCPR's guarantee against unlawful imprisonment did not apply to the tribal people. In violation of article 15 of Pakistan's Constitution, which protects freedom of movement, section 21 of the FCR allows Political Agents to prohibit all members of a tribe, subtribe, or clan from entering settled areas of Pakistan (all portions of the nation).

### Miscellaneous Procedural Contradictions

**Table 1.** Below is the table illustrating some contradictions in the Laws subject to Formal Justice System and FCR;

S. No	Formal Judicial System	Frontier Crimes Regulation
1	Hearing before Court	Hearing before Jirga
2	Judgment announced by courts	Judgement announcement by the PA/DC
3	Separation of judiciary from the executive	Political administration act as prosecutor as well as judge
4	Bail is the right of the accused	No concept of bail.
5	Individual responsibility	Collective Responsibility
6	Comprehensive Appellate Mechanism	Lack of appellate Mechanism
7	Production of witnesses and pieces of evidence	No such mechanism provided
8	Judges are independent of Executive	Jirga members work under the influence of the Executive

<sup>27</sup> Ahmad, I. (2021, June 18). From FCR to ADR. The News. Retrieved July 8, 2022, from <https://www.thenews.com.pk/print/851077-from-fcr-to-adr>

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9	Rigid Accountability	Least accountability or No accountability
10	Capital punishment	No Capital punishment

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### **Impacts of the two systems on Law and Order**

FCR was considered to be an instrument of administration, not of governing, as the British Empire took the tribespeople as colonial objects, not even subjects.<sup>28</sup> That means that the Tribal Areas were administered rather than governed (for the benefit of the people). The colonial state and its policies took precedence over all other considerations. The Tribal Areas had got the status of "buffer to a buffer" (Afghanistan).<sup>29</sup> It was included in the colonial suzerainty in the name of "independent" tribal territory but excluded from the colonial judiciary.<sup>30</sup> In the words of Olaf Caroe, the British Empire did not want to absorb the Tribal Areas but only to extend its authority and exclude that of the Amir of Afghanistan.<sup>31</sup>

The tool used to extend the authority of the British Empire was the FCR, which was imposed by the British Empire "under the pretext of maintenance of law and order". In other words, the maintenance of the law and order in tribal areas was of supreme importance in the British geo-political calculus. Hence, the FCR provided for non-governed spaces by excluding the so-called "autonomous" areas from the jurisdiction of the colonial state. On the contrary, in the formal justice system, the law applies to every part of the country. In the formal justice system, space for tribal and family disputes and enmities is narrowed down as the new system provides for the trial of any kind of civil and criminal cases. Judge A.R. Cornelius once asserted that the FCR procedures were in violation of all widely established contemporary criteria governing the administration of justice, making it difficult to preserve public confidence in the impartiality of the decisions made under the foregoing Legislation.<sup>32</sup>

Nevertheless, there exists another perspective that defends the system of justice under FCR-especially the FCR jirga. Rehmat Khan Mahsud, a former senior police officer, in an interview with the researcher contended that under FCR, the Jirga elders were well versed in the Riway and issues of ex-FATA, which is why the Jirga delivered justice and resolved issues in a much quicker manner than the formal justice system. Another factor for the successful operation of the Jirga system was that the reputation of the tribal elders was at stake. The clients were

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<sup>28</sup> Hopkins, B. (2015). The Frontier Crimes Regulation and Frontier Governmentality. *The Journal of Asian Studies*, 74(2), 369-389. Retrieved from <https://www.jstor.org/stable/43553589>

<sup>29</sup> Elliot, M.-G. J. (1968). *The Frontier, 1839-1947*. London: Cassell & Company Ltd.

<sup>30</sup> *supra* note Hophkins.

<sup>31</sup> Caroe, O. (1958). *The Pathan from 550 BC to AD 1957*. London: Oxford University Press.

<sup>32</sup> The Supreme Court of Pakistan. (1975, September 12). *Pakistani Law*. Retrieved July 8, 2022, from [Pakistan.law.pk: https://pakistanlaw.pk/case\\_judgements/158964/f-b-ali-versus-the-state](https://pakistanlaw.pk/case_judgements/158964/f-b-ali-versus-the-state)

either their cousins, relatives, villagers or fellow tribesmen. Besides this favourable view, the FCR Jirga was considered to be a tool in the hands of the government. Dr Rasool Bukhsh Rais notes that:

"The role of the Deputy Commissioner that they created in this region and also in other regions of the subcontinent was, he was a political executive, he was a magistrate, he was a judge and he was even a proposer of law and of course the representative of the imperial rule. So, when it came to, particularly, law and order in these tribal regions where the trouble is these days and where FCR is applied, they compromised their own notions of modernity, they compromised their own notions of justice, they also compromised their own notion of legitimate punishment."<sup>33</sup>

So, trust in government will increase once the formal judicial system is fully and effectively operational, which will ultimately reduce some of the longstanding grievances of the people of the NMDs.

### **Challenges in the Implementation of the Formal Justice System**

A huge quarter of the populace particularly those who believed in the conservatism of the primitive approach has opposed the striking out of the FCR. They expostulate with their *Bona fide* reasons to so argue, but this cannot be accepted *prima facie* because the Primitive and outdated Legal Framework has been a stumbling block in mainstreaming EX-FATA and bringing large-scale development in the region. There are different reasons for that ranging from the unfamiliarity of Locals with modern-day Laws and their constitutional and legal rights, to fear of the authorities speaking according to their conscience. Owing to the reluctance of tribesmen in getting acclimated to the newly inserted justice system, the Government may face a wide range of challenges, a few of which are the following.

### **Challenges for Courts and Revenue Departments**

One of the most daunting challenges faced by courts is the undocumented land and collective ownership (*nikat*) of the land in the NMDs. Generally, the property is the major cause of family, intra- and inter-tribal disputes, while the courts go by evidence and/or record. Thus, undocumented land is a major challenge for courts to settle land-related disputes, which, *prima facie*, would seriously impede the working of the formal judicial system. The land settlement would be key to addressing some of the land-related issues. Another problem is the large number of pending cases in the both provincial and federal judiciary and the number of cases will grow when people of the merged districts start taking their cases to courts.

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<sup>33</sup> Rais, R.B. (2013). Frontier Crimes Regulation: A History in Documents. Book Launch Ceremony, Islamabad.

## **Challenges for the Police**

It is a well-established fact that levies and *Khasadars* were by no means modern policing institutions, so their merger with the regular police of Pakhtunkhwa will pose a serious challenge to registering, investigating, prosecuting crimes and getting criminals punished in the NMDs. On top of that, the new police force is untrained, underfunded, and unaware of the Weberian model of bureaucracy (merit, efficiency, hierarchy). Endemic corruption erodes people's confidence in law enforcement agencies.

## **The Challenge to Common Man**

One of the challenges with the newly established system relates to common men's unfamiliarity with modern-day Laws and their constitutional and legal rights, to fear of the authorities to speak according to their conscience. Due to their unwillingness in getting acclimated to the newly inserted justice system, the Government may face a wide range of challenges e.g. Public disobedience.

## **Quick Fix and Long-run Reforms**

There is no denying the fact that the merger of EX-FATA with Khyber Pakhtunkhwa was hastily done by the power-wielders of Pakistan even disregarding the original 10-year plan of the Sartaj Aziz's committee. It was clearly stated that the merger was a 10-plan wherein the first "the five-year transition period would be utilised to prepare Ex-FATA for restoration of a durable peace. [...] The federal government will protect the development package till the next 10 years." (Raza, 2017). Moreover, it was promised that a "three per cent share in the National Finance Commission would also be allocated" to ex-EX-FATA (Report, 2017). Most of these lofty promises are yet to be fulfilled. Overall, the merger was a laudable step but the haste with which it was done (in mere thirteen days) and the yet-to-be-fulfilled promises will greatly undermine people's trust in the new system.

## **Recommendations**

- i. It is a known fact that the multiplicity of laws produces perplexity and affects efficiency (delivery of public goods). The uniformity of laws in the NMDs is therefore imperative. Once merged with Khyber-Pakhtunkhwa, there is now little room for laws like the ALDS or the Action-in-Aid of Civil Power.
- ii. A reserved share in the National Finance Commission promised to ex-FATA needs to be allocated in full and in a timely manner, as transplanting a new institutional set-up will need massive financial resources. Any delay will badly affect the positive vibe created by the formal judicial system in the NMDs. The role of the federal government will still be important so it has to

- play a proactive role in bringing the people of ex-FATA to par with the rest of Pakistan.
- iii. Training of the police force needs to be prioritized as a formal judicial cannot operate without a trained and well-functioning police system. Also, a strong and well-funded police force will play a key role maintain law and order in the NMDs without any help from other state institutions.
  - iv. Meritocracy (the right man for the right job) will play a pivotal role in the real mainstreaming of the people of ex-FATA. A rigorous selection mechanism for state functionaries is of utmost importance. Once selected on merit, an efficiency-based system can be ensured then.
  - v. The people of ex-FATA were used to quick, although controversial, dispensation of justice, it is the need of the hour that an efficient, honest judicial set-up is put in place where people get easy access and where justice is seen to be done.
  - vi. There is no denying that no system can work without a rigorous system of checks and balances. One of the flaws in the FCR was the concentration of powers in the office of the PA. The new system must ensure proper checks and balances.
  - vii. Almost all issues are political in nature and therefore in need of political solutions. Non-political solutions bring chaos. The emphasis of the new system must be on dialogue and reconciliation.
  - viii. For the peaceful resolution of issues, democracy provides the best platform. So, every effort needs to be made to provide an enabling environment for democracy to flourish.
  - ix. Last but not least, public awareness programmes need to be initiated as soon as possible as the people of ex-FATA were kept in the dark for too long.

## Conclusion

The FCR appeared to the Public as well as to the legislating body as a primitive and outdated Legal Framework which should either be subjected to improvement or replaced by the Laws evenly applied across the country. That's the reason that several efforts of the amendment have been made to replace those provisions of FCR which are repugnant to the norms and standards of Constitutional Fundamental rights.<sup>34</sup> Examples include the years 1928, 1937, 1938, 1947, 1962, 1963, 1995, 1997, 1998, and 2000 when the FCR of 1901 was modified. These changes were modest in size and character. President Asif Ali Zardari passed the amendments in 2011 that actually had a substantial legal consequence. These revisions reduced the collective duty provision's application and left women,

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<sup>34</sup> Noor Hamid Khan Mahsud., Mian Saeed Ahmad., Wasai. (). Frontier Crimes Regulation (FCR): From Introduction to Abolition. *Global Political Review*, VI(I), 109-120. doi: [https://doi.org/10.31703/gpr.\(VI-I\).10](https://doi.org/10.31703/gpr.(VI-I).10)

children under 16, and males over 65 outside of its coverage. Still, the constitutionality of FATA and its status as an integral part of Pakistan was the bone of contention which was institutionally appreciated on Thursday 24 May 2018, passed a historical constitutional amendment rubber-stamping and highly appealed merger of the FATA with KP. The said amendment also repealed Frontier Crimes Regulation in FATA. This Paper has delineated a comparative analysis between Laws under Formal Justice System and FCR and the challenges arising out of those contradictions. The solutions suggested, *inter alia*, included the introduction of a formal justice system in erstwhile EX-FATA. However, Analysts have cautioned that the expansion of a number of Pakistani laws and other regulatory frameworks could cause complications and concerns among the tribal community, which would then create a situation like the Swat region when it was unexpectedly incorporated into Pakistan in 1969. The merger plan is an ambitious move that deserves to be commended compared to earlier reform endeavours. The suggested reform package includes the mainstreaming's political, legal, administrative, social, security, and economic components, though. Among the enormous responsibilities that demand significant resources, strong commitments from the government, and above all, great patience and perseverance in the face of numerous problems and difficulties, are extending legal and economic regulatory frameworks to NMDs and ensuring improved rule of law.