



In this Issue

Building political capital to improve democratic entitlements in tribal regions

By Saad Rasool

Reforming the Tribal Areas of Pakistan

Introduction

The demand for extending democracy to the tribal areas of Pakistan is not a new one. Often conflated with terrorism and border-fragility in international news, the Tribal Areas of Pakistan have become a symbol of Islamabad's negligence in building inclusionary structures for a wide swathe of strategically located terrain governed by archaic laws that spark outrage for their brutal, colonial autocracy. Today, given that an operationally patchy National Action Plan dictates the retooling of FATA and PATA policy in order to extend the fight against violent extremism, a high-level FATA reforms initiative from Islamabad finds its agenda in the crosshairs of animated public discourse in Pakistan.

Shrouded in centuries of tribal warfare, rugged terrain, archaic customs, political disenfranchisement and a parallel judicial structure, the Tribal Areas of Pakistan seem frozen in time as a relic of history. After nearly seven decades of independence, the Federally Administered Tribal Areas (FATA), the Pakistan Administered Tribal Areas (PATA), remain outside the circle of constitutional protections, popping up regularly in the news as a flashpoint of terrorism and governance in perpetual crisis.

The Need for Reform

After a decade of militancy and the fight against it, sociopolitical pressures in the Tribal Areas have accentuated fragile fault lines. Despite billions in investments on reconstruction, rehabilitation and development in the Tribal Areas, the trajectory for extending basic social services, fundamental freedoms and political rights has plateaued.

The region continues to demonstrate some of the lowest human development indicators in Pakistan with literacy rates as low as 17 percent overall and as low as 3 percent among women. Infant mortality is recorded to be as high as 87 deaths per 1000 births and just 10 percent of the population has access to 'adequate' sanitation¹. An absence of

representative local and provincial governments and corresponding district administration structures explains, to some extent, the disparity in opportunities and access to public services faced by its citizens.

Over the past decade, repeated military operations in the various agencies of the Tribal Areas have displaced over 1.8 million people. The process of relocation and rehabilitation has been equally hard. While a majority of the displaced population has now moved back, a significant number of displaced families from North and South Waziristan continue to live in temporary camps or with host families across adjoining settled districts of Khyber Pakhtunkhwa.

This mass displacement of families has had an impact on livelihoods and social structures, adding to existing vulnerabilities of the region's inhabitants. Equally significant is the impact of displacement on the relationship between the Tribal Areas and the state.

The very real challenges of ensuring that citizens of the Tribal Areas are provided the very freedoms and public services guaranteed under the Constitution, and that the writ of the state is extended to FATA has necessitated a long overdue reform process – a process that will extend access to justice, health, education, and representative government to the Tribal Areas. The legitimate demand for politically mainstreaming the Tribal Areas has gained renewed impetus as the need for reestablishing a new social contract between its residents and the state has gained velocity.

Constitutional Status of the Tribal Areas

The Constitution of Pakistan in Chapter 3 of Part XII, includes special provisions relating to the governing and management of the “Tribal Areas.” The Constitution stipulates that *“the executive authority of the Federation shall extend to”* FATA, *“and the executive authority of a Province shall extend to”* PATA.

The President of Pakistan, being the repository of State's executive power, may direct the Governor of a Province relating to any part of a Tribal Area as he may deem necessary, and the concerned Governor is duty-bound to abide by his directions.

No act of Parliament is applicable to FATA, and no act of the provincial legislative assembly is applicable to PATA, thereby excluding the legislature unless directed by the relevant executive authority. In the case of FATA, this executive authority rests with the President and in the case of PATA with the Governor of the respective province. The Constitution also allows the President or the Governor to apply any law passed by the legislature to a specified region within the tribal area, subject to exceptions.

Within this constitutional paradigm, the powers of the President go beyond mere regulation and governance of tribal areas. Article 247(6) empowers the President to *“direct that the whole or any part of a Tribal Area shall cease to be Tribal Area”*. As such, the President exercises powers reminiscent of colonial times, with little or no participation from the local people of the concerned Tribal Areas.

In simpler terms, the promise of democracy, fundamental rights and the right to be governed in accordance with free adult franchise – enshrined in the Objectives

Resolution – has been withheld from the people residing in the Tribal Areas. These provisions of the Constitution ensure that the laws and governance structures of the Tribal Areas operate, for the most part, at the discretion of one individual – the President – who the citizens of the Tribal Areas did not (directly) elect.

In virtually all modern democracies, wherever the Constitution empowers a particular office holder with excessive executive authority, a corresponding power to review such executive actions is usually vested in an independent judiciary. However, in the case of the Tribal Areas, the Supreme Court and High Courts cannot exercise jurisdiction in the region unless relevant laws are extended through a special executive order.

This absence of judicial oversight in the Tribal Areas has meant that ordinary citizens continue to be subject to colonial forms of justice, primarily through the archaic *Jirga* system. In cases that involve the state, judicial powers are vested in the executive officers of the state assigned to each Agency.

Only recently, the jurisdiction of regular Courts has been extended to PATA through the enactment of a decree. However, the Superior and Higher Courts are still barred from exercising jurisdiction over FATA, therefore limiting the recourse residents have in seeking constitutionally enforced fundamental rights.

PATA and the Stumbling Reform Process

Formal legislative instruments have historically had no direct applicability in PATA. Soon after promulgation of the 1973 Constitution, the elected government specifically extended some of the procedural and substantive laws to this tribal region, including the Evidence Act, 1872, the Criminal Procedure Code, 1898, and the Pakistan Penal Code, 1860. This meant, that unlike FATA, the provincially administered tribal regions were now governed by the same set of laws and procedures applicable for law and order as the rest of Pakistan.

In the mid-1970s, amidst public protests about forest royalties in the tribal regions, the then government introduced two important legislations – the *PATA Criminal Law (Special Provisions) Regulation, 1975* and the *PATA Civil Procedures (Special Provisions) Regulation, 1975* (referred to as the “**PATA Regulations**”). These legislative instruments provided the local bureaucracy with greater administrative powers for settling disputes by granting judicial powers to each Deputy Commissioner in PATA through which civil and criminal cases could be referred to the local *jirgas*. While *jirgas* continued to be the primary apparatus for dispute resolution, the PATA Regulations created a parallel system of district and sessions judges to decide three kinds of cases: 1) where the government was an interested party; 2) where the interest of minors was involved; and 3) where offences concerned violation of Islamic law and the Hudood Ordinance.

Only a few years after the extension of procedural and substantive laws to PATA, the reforms had been rolled back once again citing the need to maintain law and order. Local incidents and protests as an excuse to vest judicial and greater administrative powers in district administrators.

In the late 1980s, the Peshawar High Court declared the PATA Regulations unconstitutional, discriminatory and repugnant to Article 25 of the Constitution. After a prolonged appeal process, the Supreme Court restored the jurisdiction of the Superior and High Courts to PATA and ensured that decisions reached under any mechanism in PATA could be challenged in the regular courts.

However, PATA's journey towards a constitutional judiciary was once again derailed in the face a violent movement by Tehreek-e-Nifaz-Shariat-e-Mohammadi (TNSM). As a result of the movement, the infamous Nafaz-e-Shariat Regulations were promulgated in the mid-1990s. These regulations made minor changes to the nomenclature of the judiciary (renaming the civil and sessions judges as 'qazi'), while still keeping the process under the appellate jurisdiction of the Peshawar High Court. Disgruntled with these superficial changes, the TNSM continued with its violent campaign for Sharia law across the region, culminating in the promulgation of the Nizam-e-Adl, 1999, which required judges across PATA to consult with religious clerics before rendering any judgment.

The legal framework introduced by Nizam-e-Adl, 1999, continued to be in force until April of 2009, when TNSM (functioning under the umbrella of other banned outfits) struck a deal with the then government of Pakistan, to promulgate the Nizam-e-Adl Regulations, 2009, and enforce Sharia law across Swat and the neighboring PATA areas.

Soon after, the Peshawar High Court declared significant portions of the 2009 regulations to be unconstitutional, specifically those provisions which entrusted executive offices with any judicial powers. The Court directed all pending proceedings before *qazi* courts to be transferred to judicial Magistrates or Sessions Judge of the District. Despite clear directions, the 2009 regulations have not been brought in conformity with the Constitution and no meaningful or conclusive reforms have been implemented by the government.

FATA and the Vestiges of Colonialism

Under the Constitution of Pakistan, FATA, the semi-autonomous tribal region on the North-West border between Pakistan and Afghanistan –including seven different tribal agencies, and six frontier regions –is directly governed under the President of Pakistan's executive authority through a special set of laws called the Frontier Crimes Regulations (FCR). The FCR, which came into force on the 24th of April, 1901, is a legislative instrument that attempts to provide a legal, judicial, administrative, and governance framework to FATA territories.

The philosophy and scope of the FCR can perhaps best be understood by the fact that the FCR finds its origins in the notorious *Murderous Outrages Act, 1867*, enacted by the colonial rulers of a (then) united India. Specifically, the Murderous Outrages Act and its subsequent amendment was devised to counter the opposition of Pashtuns to the British Raj.

Today, under the FCR, crimes committed by an individual can result in collective punishment for the family or tribe members. It allows non-traditional/parallel judicial structures (*jirgas*) to determine guilt and determine punishment in civil and criminal matters. 'Trial' before such extra-judicial *jirgas* does not provide the full measure of

constitutional protections to the litigating parties. Suspected offenders can be apprehended at the behest of the Federal Government, even by their own tribal leaders, without any requirement for specifying the offence or presenting evidence against the accused. In these circumstances, the entire ambit of 'Fundamental Rights' – including the right to be dealt with in accordance with the law, security of person, safeguards for arrest and detention, protection against double jeopardy or self-incrimination, the inviolability of the dignity of man, freedom of movement, protection of property rights, and the equality of citizens– are frequently denied to residents of FATA.

In 2011, the President of Pakistan enacted the first set of noteworthy amendments to the FCR, through the Frontier Crimes (Amendment) Regulation which constitute the most significant and far-reaching alterations to the archaic structure of FCR. These include:

- Protection of women, children below the age of 16, and citizens above the age of 65, from collective responsibility, arrest and detention²;
- Prohibition against arresting an entire tribe under the collective responsibility sections³;
- Fixed time limit for the disposal of cases;
- Provision for independent appeal process⁴;
- Strengthening of the FATA tribunal⁵;
- Provision for bail;
- Induction of jail inspections;
- Reference to council of elders and *Qaumi Jirga*⁶;
- Forfeiture of public salary for being involved in a crime⁷;
- Checks on arbitrary powers of arrest⁸;
- Punishment and compensation for false prosecution⁹;
- No deprivation of property rights without adequate compensation¹⁰;
- Audit of political agent funds by the Auditor General of Pakistan¹¹;

Recent Reform Proposals

Despite their rating as a bold attempt in introducing much needed reform, the 2011 Amendments have failed to mainstream FATA, specifically with regard to constitutional and political rights of its residents. In its aftermath, a fresh and much needed debate for 'mainstreaming' FATA and PATA has erupted across the political spectrum.

As a result, the incumbent government has established the FATA Reforms Commission which has submitted its interim report to the Prime Minister in August of 2016. Over the past few years, other committees and initiatives, including the "Political Parties Joint Committee on FATA Reforms", have made their respective contributions to the narrative on reform in the Tribal Areas. In summary, these recommendations include:

- Peace in FATA should be guaranteed
- Article 247 of the Constitution should be amended
- Local bodies elections should be held in FATA
- Development projects should be increased
- The future status of FATA should be decided by its people
- Media should be provided greater access to FATA

- The Jirga system should be made more democratic and independent
- Actions in Aid of Civil Power Regulation should be abolished
- Executive and judicial powers should be separated in FATA
- Citizens should not be deprived of property; inheritance law should be extended
- Civil armed forces (*khasadar* and *levies*) should be strengthened and professionalized

These initiatives and reform proposals have, in a rather disparate and disconnected manner, presented a number of proposals for ‘mainstreaming’ the Tribal Areas. For example, the FATA Commission has recommended that Agency Councils and a Governor’s Council be established throughout FATA, with partial representation of people. The FATA Commission has argued that instituting such councils, for an interim 2-year period, will lead to a smooth and sustainable transition of FATA into Pakistan’s regular democratic paradigm. The FATA Commission has also argued, perhaps fallaciously, that such councils, even though mainly staffed by unelected senior bureaucrats, will “*strengthen the link between the people of FATA and the State*”.

Much like the recommendations made by the FATA Commission, the Political Parties Joint Committee on FATA Reforms has argued that the introduction of a workable elected local government structure is key to mainstreaming the tribal belt. This committee has called for a greater allocation of development funds, and an increased media access across the tribal belt. Based on their experiences in the Tribal Areas, representatives have argued that the *jirga* system must be made more democratic and independent, and that the civilian law enforcement forces (*khasadar* and *levies*) must be strengthened to meet the evolving challenge of terrorism.

However, a number of leading stakeholders in FATA, including tribal elders and “maliks” represented in the FATA Grand Alliance, have consistently rejected earlier reform proposals. These tribal elders, often motivated by the need to maintain their power, have called for greater inclusion during the consultative process of reform committees. However, despite reservations, the same body of tribal elders continue to support changes in FCR and greater political representation for FATA.

Despite the momentum and political capital for reform, there seems to be no real consensus in Islamabad on the future status of FATA and PATA. While the general drift of the recommendations is towards a merger of the Tribal Areas into the province of Khyber Pakhtunkhwa, there is still no roadmap or timeline for such a transition.

The people of FATA and PATA do not enjoy ‘equality’ of rights that compare to other citizens of Pakistan, neither do they possess a measure of freedom that is commensurate with modern standards of democracy, nor do they exercise control over their governance structure or the laws under which they are forced to shape their daily lives.

Recommendations

Any reform of the political dispensation of the tribal regions, especially to improve democratic entitlements, must incorporate the following aspects:

- i. Fundamental rights of the residents of the Tribal Areas, including the right to freely

- participate in a transparent electoral process must be safeguarded;
- ii. The quintessential democratic ideal of representative government, devolved in accordance with the Constitutional mandate, must be extended to the Tribal Areas;
 - iii. People of the Tribal Areas must be guaranteed their proportionate share in the Federal budget as well as institutions of the Federal and Provincial Governments;
 - iv. The Tribal Area must be given autonomy in terms of democratic governance as well as legislative and executive authority, for a participatory governance model.

Based on these broad principles, the following key areas of reform need to be implemented forthwith:

1. Developing of a national narrative

The first and foremost step, in any concerted reform effort for the Tribal Areas, is the development of a deliberate narrative concerning the future of Tribal Areas. For now, as is apparent from the incongruent set of recommendations made by different committees, there is no consensus as to what precisely should be the goals of the reform process, and what roadmap must be followed in pursuit thereof.

In this regard, it is the responsibility of public office-holders to reach out to relevant stakeholders from the Tribal Areas to identify concrete goals and timelines. Thereafter, a national consensus, through political initiatives and media awareness, must be forged in order to achieve these common goals.

2. Recognition of the constitutional status

There needs to be a clear stance in terms of the future constitutional status of the Tribal Areas. Keeping in mind the underlying principles of representative democracy and a 'Federal Republic' in Pakistan, the recommended course of action would be to either merge the Tribal Areas within the Khyber Pakhtunkhwa, or to instead grant this region complete and independent provincial status (similar to the step taken for Gilgit-Baltistan).

From a constitutional perspective, either of these can be done at the behest of the President of Pakistan. In exercise of this power, the President must change the status of the Tribal Areas and in line with our constitutional imperatives.

3. Constitutional amendment

For any substantial democratic or legal change to come to the Tribal Areas, it is important that a constitutional amendment be passed. Specifically, Article 246 and 247 must either be repealed, or amended in a manner that includes the Tribal Areas as regular parts of Pakistan. This would, without any further tweaks to the legal structure, extend the entire ambit of fundamental democratic rights to the Tribal Areas, and afford them constitutional recourse to courts. At the very least, amendments can ensure that the jurisdiction of the national/provincial legislatures extend to the Tribal Areas.

4. Repeal of the FCR

The FCR, being a draconian relic of our colonial past, must be repealed immediately. Instead, our procedural and substantive laws, as applicable elsewhere in Pakistan, must be brought into force in the Tribal Areas.

5. Recourse to an independent judiciary

With a repeal (or amendment) of Article 247 of the Constitution, jurisdiction of district and superior Courts will naturally extend to the Tribal Areas, under the command and reach of the Constitution. An independent judiciary, which allows citizens the right to approach the courts for enforcement of their fundamental rights, will immediately infuse a greater sense of democracy across the Tribal Areas.

6. Elected government and devolution

In light of the letter and spirit of the Constitution (as applicable across Pakistan, except the Tribal Areas), FATA must be afforded the three-tiered governance model: Federal Government; Provincial Government; and Local Government.

The ideal of devolved governance must be extended to the Tribal Areas, along with the power to levy and collect taxes. In this regard, at least immediately, local councils should be established at Agency, Tehsil, and Union Council level.

Following the long-overdue national census, constituencies and electoral roles in the Tribal Areas must be delimited and finalized by the Election Commission of Pakistan. Also, determination of election disputes must be done by the Election Commission, instead of any alternative arrangement (e.g. political agents).

7. Party-based elections

Per established jurisprudence of the Supreme Court of Pakistan, specifically, the right to form political parties and contest on partisan basis is one that must be extended, mutatis mutandis, to the region and people of the Tribal Areas.

In fidelity to this constitutional ideal, the right to participate in party-based elections, for all tiers of government, must be extended to the Tribal Areas.

8. Minorities and women quota

Special protection and quotas for religious minorities and women must be instituted within the governance structure of Tribal Areas while establishing affirmative action quotas at all levels of Federal and Provincial government. This would help break-down the cultural boundaries between the Tribal Areas and the rest of Pakistan; while encouraging the citizens of region to adopt a larger degree of inclusiveness.

9. Budgetary allocation

Tribal Areas have consistently been recorded as one of the poorest regions of Pakistan, with substandard infrastructure and development facilities. In order to compensate for past wrongs, it is imperative that Tribal Areas be allocated a larger share of development budget, so as to better integrate the people of Tribal Areas into mainstream Pakistani culture.

10. Law and order

Law and order continues to be the primary crippling factor in the Tribal Areas. The deplorable law and order affects all sectors of social, cultural and infrastructural growth in the region. While the ongoing 'war on terror' is likely to last its course

(in light of the larger geo-political turmoil), political measures must be taken to develop and improve the civilian law-enforcement apparatus – especially the Police, khasadar and levies.

Conclusion

Pakistan must summon the courage to accept and articulate the truth: that the State of Pakistan has treated the Tribal Areas in a discriminatory manner. Interim-measures and empty rhetoric that promise to ‘phase-in’ democracy and fundamental rights to the people of our Tribal Areas has been nothing more than a convenient excuse over the years. It belies the underlying truth that we have not yet mustered the necessary political resolve to extend the promise of democratic freedoms to this mountainous belt. It is therefore essential to embrace the fullest promise of democracy and constitutionalism all across Pakistan and include the people of Tribal Areas into the fold of the freedoms and protection of fundamental rights enshrined in our Constitution.

References

- ¹ FATA Sustainable Development Plan 2007-2015, Civil Secretariat, KPK Government. http://urban.unhabitat.org.pk/Portals/0/Portal_Contents/FATA/Landi%20Kotal/FATA%20Sustainable%20Dev%20Plan%202007-2015.pdf
- ² Section 21(c)(3) and Section 22(d) of the 2011 Amendment.
- ³ Section 21, *ibid.* Post the 2011 Amendment, male members must be arrested first, followed by the sub-tribe and then by other sections of the tribe.
- ⁴ Sections 4, 5 and 48, *ibid.* Appeals to be heard by Commission, and a dedicated Additional Commissioner.
- ⁵ Section 55A and 55AA, *ibid.*
- ⁶ Section 12(a), *ibid.*
- ⁷ Section 26, *ibid.*
- ⁸ Section 40A, *ibid.*
- ⁹ Section 55AAA, *ibid.*
- ¹⁰ Section 56, *ibid.*
- ¹¹ Section 58p(2), *ibid.*