

Constitutional Flaws: Unrest in Swat 2007-09

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Abstract:

The purpose of this paper is to explore the root cause of terrorism in Swat. It is a case study and qualitative research project. People of Swat suffered heavy human and material losses due to terrorism. The Taliban led by a local cleric; *Maulana Fazlullah* destroyed educational institutions, banned girls' education, and watching television besides slaughtering innocent people. One of the causes of this phenomenon, was a constitutional crisis which prevailed in the region since the merger of Swat in 1969. Successive governments failed to integrate it in the national mainstream. On the contrary, authorities have used it as a laboratory for constitutional experiments-promoting discontent and denial of justice.

Introduction

Swat, one the most picturesque valleys in northwestern Pakistan, suffered colossal human and material losses due to terrorism which

plagued the region in 2007-09. The terrorists led by a local cleric, *Maulana Fazlullah* (real name *Hayatullah*), destroyed educational institutions, health centers, police stations and bridges. More

than four hundred schools were razed to the ground from 2007 to 2011.¹ 70% of them were girls' schools.² The terrorists attacked a school van and critically injured *Malala Yousafzai*, a teen girl. The terrorists wanted to silence her voice for promoting children's education. The terrorists used to kidnap and behead government officials, personnel of law enforcing agencies and local elders to terrorize the public. They dumped dead bodies at Green *Chowk* (square), Mingora. Thus, the Green *Chowk* took the name of *Khooni Chowk* or bloody square. The government held talks with the TNSM leadership, but it proved a futile exercise. The government had no other option but deal the terrorists with an iron hand. The then *Prime Minister*, *Syed Yousaf Raza Gilani* announced launching of operations in Swat in May 2009.³

The unrest displaced 2.3 million people of Swat and its adjoining areas.⁴ The majority of them had to live in camps where temperature at daytime was more than 40 centigrade. There was no proper electricity and water in the camps, causing dehydration especially among children, aged and women. The question arises what caused this terrorism in Swat? Besides other factors, terrorists exploited the legal vacuum as from a legal perspective successive governments failed to integrate the area in the rest of the country.

Merger of Swat

In 1947, at the time of partition of India, there were 4 princely states in Khyber Pakhtunkhwa. These include Amb, Chitral, Dir and Swat. All these 4 princely states joined Pakistan and were

incorporated in the Province of West Pakistan under the Establishment of West Pakistan Act 1955. These states were declared as "Special Areas."⁵ This status was protected in the Constitution of 1956.⁶ The "*Special Areas*" were named as "*Tribal Areas*" under the Constitution of 1962.⁷ These princely states were merged in August 1969 and the West Pakistan Government took direct control. *Major General Rakhman Gul*, the then Acting Administrator Martial Law Zone A, issued a notification to this effect on August 15, 1969. But the dissolution of One Unit in July 1970, the administration of Swat, Dir and Chitral, was handed over to the Northwest Frontier Province (NWFP)-renamed as Khyber Pakhtunkhwa.⁸

Criminal courts were set up in Malakand Division under Tribal Areas Regulation 1970. The next year, a session court was set up for the entire Malakand Division. This followed the back-and-forth approach. The Governor Khyber Pakhtunkhwa, with the prior approval of the President started issuing a series of regulations pertaining to the administrative and judicial matters of these areas. The first regulation was promulgated in 1971 whereby statues which were in force in the rest of the country were extended to Swat, Dir and Chitral. These included the Evidence Act, Arbitration Act, Contract Act, Criminal Procedure Code, Pakistan Penal Code (PPC), Civil Procedure Code (CPC), Civil Courts Ordinance, Suits Evaluation Act, and Transfer of Property Act.

The former princely states in KP plus Malakand Protected Area were declared as the

¹ Asad Hashim, the fight for education in Pakistan's Swat, Aljazeera, October 15, 2012, retrieved July 7, 2022, <https://www.aljazeera.com/features/2012/10/15/the-fight-for-education-in-pakistans-swat>

² Rina Saeed Khan, *Pakistan rebuilds its education network after Taliban are driven out of Swat*, the Guardian, June 22, 2012, retrieved July 7, 2022, <https://www.theguardian.com/global-development/2012/jun/26/pakistan-education-swat-valley-taliban>

³ <http://abidmajeed.com/2017/05/29/management-of-sic-current-idps-swat-as-a-case-study/>

⁴ Najam U Din, *Internal Displacement in Pakistan: Contemporary Challenges* (Lahore: Qasim Press, 2010), 5.

⁵ Establishment of West Pakistan Act 1955, accessed July 7, 2022, <https://pakistanlaw.pk/statutes/2536/establishment-of-west-pakistan-act-1955>

⁶ See Article 104 of 1956 constitution.

⁷ See Article 242 of 1962 constitution.

⁸ Province of West Pakistan (Dissolution) Order 1970, <https://pakistanlaw.pk/statutes/6246/province-of-west-pakistan-dissolution-order-1970>, retrieved July 13, 2022.

Provincially Administered Tribal Areas (PATA) in 1972.⁹ The status of PATA was maintained in the constitution of 1973.¹⁰ No doubt, the constitution of 1973 was framed with consultation and consent of leaders of all major parties, but fathers of the constitution could not comprehend the awful consequences viz-a-viz PATA. Despite being legislative bodies, neither the National Assembly nor the Provincial Assembly had the power to extend the existing laws or make new ones for PATA.

The President issued a decree “Supreme Court and the High Court (Extension of Jurisdiction to Tribal Areas) Order 1970.”¹¹ But this order was made ineffective about 3 years later. Article 247 of the 1973 Constitution, prohibited jurisdiction of the Supreme Court and High Court in PATA. It authorized the Governor to promulgate regulations for PATA with prior approval of the President, whenever, needed. This opened a Pandora’s box of difficulties, injustice and finally chaos.

Rules and Regulations during Wali rule

Before merger, *Riwaj* or customary law was practiced in Swat. The ruler, Wali of Swat also used to issue decrees from time to time to deal with day-to-day problems. *Qazis* were deciding cases in accordance with Islamic injunctions and *Riwaj*. Under Tribal Areas Regulation 1970, criminal courts were established in the Malakand Division. The next year, a Session Court was set up for the entire Malakand Division. The jurisdiction of the Supreme Court and High Court was extended to Swat, Dir, Chitral and Malakand Protected Area under the Act XXVII 1973. After a period of about 2 years, the situation was put in reverse gear and black laws were introduced-encouraging criminals, denial of justice and creating resentment in the society.

PATA Regulations

The Governor promulgated PATA Regulations-completely changing the judicial system in

Malakand Division. The PATA Regulation No. 1 & 2 were issued on April 17, 1974, and January 5, 1976, respectively. These regulations provided principles for dealing criminal and civil cases. Then the governor KP issued PATA Regulation No. 111 on April 19, 1976, whereby certain amendments were made in the PATA Regulations-giving judicial powers to local *jirgas* (council of elders) to decide criminal and civil cases. Every *jirga* was to be comprised of 2 or 3 local elders and one administrative officer. Under the new arrangement, the powers of magistrates and civil judges were delegated to *Tehsildars* (local land revenue officials), and *Naib*(Deputy) Tehsildars. Similarly, the functions of District & Session Judges were handed over to the concerned Assistant Commissioner and Deputy Commissioner. But the story did not end there and PATA Regulation No. 4 was promulgated in December 1976, whereby the Malakand protected area was excluded from the *Jirga* System. It was replaced by District Kohistan. Except the armed forces, elections, and currency, *jirgas* had the power to hear and decide cases relating to all other matters.

Judicial powers were entrusted to Executive Officers which is repugnant to Article 175 (3) of the Constitution whereby the Judiciary was to be separated from the Executive within 14 years. The *Jirgas* used to apply *Riwaj* or customary law and *Shariah* (Islamic Laws) in the decision making process. The concerned Deputy Commissioner had final authority but usually delegated it to Assistant Commissioners (ACs) or other subordinate officials, who were also authorized to implement *Jirgas* judgments. Parties to the disputes could appeal to the Divisional Commissioner and the Provincial Home Secretary who usually agree with the *Jirgas* decisions. Either of the parties to the dispute could also file writ petition in the Peshawar High Court or the Supreme Court of Pakistan.¹²

PATA Regulations were not enacted by the Parliament or the Provincial Assembly. In fact,

⁹ See Article 260 of the Interim Constitution 1972,

¹⁰ Article 246 of 1973 constitution.

¹¹ Waseem Ahmad Shah, *View from the Courtroom: Extension of courts’ jurisdiction to Fata still depends on govt.*, Dawn, April 23, 2018.

¹² International Crisis Group Report No. 242. *Pakistan: Countering Militancy in PATA*, January 15, 2013, retrieved July 19, 2022, <http://www.jstor.org/stable/resrep31977>.

these laws were made by the Home Department to strengthen its position by having maximum power. The *Jirga System* created hurdles in provision of justice and influential persons employed leverage to get decisions of their choice. It promoted corruption, nepotism, and social evils. Highly qualified and trained judicial officers were available but they were trespassed in administering justice. Instead, uneducated and semi-literate members of a Jirga were empowered to decide cases of a complex nature. The *Jirga System* was controlled and administered by the Executive. People of Swat, Dir, Chitral and Kohistan were deprived of judicial protection and are at the mercy of the executive officer.

As the *Jirga System* was not based on justice and equality of all citizens before the law, therefore, justice became a far cry. Delay in access to justice was the prime factor responsible for militancy and extremism in Swat.¹³ The Jirga System created anomalies. PATA Regulations resulted in introduction of the dual system of justice and thus placed people of Malakand Division in disadvantageous position as compared to their compatriots in other parts of Pakistan. The *Jirga System* did not gain public confidence - protests were staged demanding an end to the system and introduction of the laws as enforced in the rest of the country. But the government did not heed. The *Jirga System* failed to redress public grievances, therefore, the affected people sought to approach superior courts to get justice.

Decisions of Superior Courts

5 identical petitions to seek justice were filed in Peshawar High Court by frustrated parties from Swat, Shangla and Dir. On 24th Feb. 1990, a 3 member division bench comprising *Justice Fazli Ellahi Khan*, *Justice Nazir Ahmad Bhatti* and *Justice Qazi Muhammad Jamil* gave a unanimous decision, declaring PATA Regulations ultra vires and against Article 25 of the constitutional which stipulates that all citizens are equal before law and are entitled to equal protection of law.¹⁴ The court directed that the accused persons

should be tried by the civil courts as Jirgas did not have the jurisdiction to hear the cases.

Instead of implementing the court's verdict, the Khyber Pakhtunkhwa government challenged it in the Supreme Court of Pakistan. On February 24, 1994, a 5-member bench of the Supreme Court comprising *Justice Nasim Hasan Shah*, *Justice Shafiur Rahman*, *Justice Saad Saood Jan*, *Muhammad Afzal Lone* and *Justice Saleem Akhtar*, unanimously dismissed the appeal. It directed the government to introduce proper judicial system in PATA to provide justice to the people. But the government adopted delay tactics and did not take any practical step in this connection.

TNSM

The inaction of the government created a legal vacuum which was exploited by the *Tehreek-e-Nafaz-e-Shariat-e-Mohammadi* (TNSM), the extremist organization headed by Sufi Muhammad. No laws and no courts mean 'might is right.' In other words, the law of jungle will prevail. The TNSM gave momentum to its activities and blocked the Swat-Peshawar highway at Malakand Pass in May 1994. Workers of TNSM erected tents on the road and Malakand Division remained cut off from the rest of the country for 5 days: 11-16 May. The government accepted the TNSM's demand to avoid bloodshed and the then Acting Governor Khurshid Ali Khan announced introduction of *Shariah* in Malakand Division on 16th May 1994. The demonstrators at Malakand dispersed peacefully. However, an armed clash took place between TNSM workers and police personnel at Babaji Kandao in Buner District which resulted in the killing and injuring of 12 people.

The announcement about enforcement of *Sharia* was made in a hurry and without homework. Its main objective was just to gain time. The government did not realize that lack of the judicial system would further worsen the situation. The Governor's statement did not prove lasting, and in November 1994 the situation once again deteriorated. The TNSM created law and

¹³ Justine Fleischner, "Governance and militancy in Swat Valley", Center for Strategic and International Studies, October 2011, retrieved July 19, 2022, http://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/111014_Fleischner_SwatValley.pdf

¹⁴ PLD, Vol. 42 (1990), Peshawar, 51-62.

order situations by organizing protests to press its demand. On 3rd November, TNSM workers detained *Badiuzzaman Khan*, a member of the KP Assembly belonging to the PPP as hostage in Mingora. He was made hostage in a local hotel for 8 hours and then killed. On the very next day, TNSM activists occupied the Saidu Airport and the Ayub Bridge. Miscreants also attacked government offices in *Kabbal* making 45 people hostages. They included the District and Session Judge, Senior Civil Judge, and Extra-Assistant Commissioner. So, the government deployed the *Frontier Corps* in Swat to restore law and order. After 2 days, the *Frontier Corps* headed by *Major General Fazal Ghafoor* launched a counter offensive and regained control over the Saidu Airport, the Ayub Bridge and rescued the hostages. 20 people were killed and 40 injured during exchange of fire between personnel of the Frontier Corps and the terrorists.

Agreement with TNSM

Negotiations were resumed between the TNSM leadership and the KP government. Provincial Secretary Law, *Saleem Khan* and *Maulana Sufi Muhammad* signed an agreement for introduction of *Shariah* in Malakand Division and District Kohistan. PATA *Nifaz-e-Nizam-e-Shariah Regulation* was promulgated on November 14, 1994. Under *Nifaz-e-Nizam-e-Shariah Regulation 1994*, *Sahirah Laws* were introduced nominally by redesignating judicial officers. The District & Sessions Judges were named as *Zila Qazi* or District Judge. Similarly, the Additional District & Session Judges were to be called *Izafi Zila Qazi*.

These superficial changes could not satisfy Sufi Muhammad who accused the government of taking no interest in implementation of *Shariah*. He met with *President Leghari* and Chief Minister Sardar Mehtab Ahmad Khan Abbasi. After these meetings, the government constituted a commission headed by Mufti Muhammad Idress advocate to expediate the implementation of *Shariah* laws. The commission held meetings with prominent religious figures in Swat, Dir, Indus Kohistan and Chitral from August 1997 to February 1998. After these consultations, the

commission gave its recommendations to the KP Government. The government issued a fresh notification, the *Shari Nizam-e-Adl Rules* on April 15, 1999. The notification put legal restrictions on judges - to consult and seek guidance from religious scholars and clerics.

The unfortunate terrorist attacks in the USA on September 11, 2001, and the US invasion of Afghanistan to topple the Taliban regime, encouraged TNSM leadership to intensify their activities and agenda by provoking and exploiting religious sentiments of people in KP in general and Swat in particular. Sufi Muhammad went to Afghanistan along with his thousands of followers to fight the US troops. The majority of them perished in US airstrikes. Sufi Muhammad escaped unhurt and entered Pakistani territory via Kurram. He was put behind the bar. His son-in-law, *Maulvi Fazlullah* became Ameer of TNSM. He was able to win public sympathy through his emotional speeches delivered regularly via an illegal FM radio station. The siege of *Lal Masjid* (Red Mosque) in July 2007 infuriated *Maulvi Fazlullah* and he formed an alliance with the *Tehrik-i-Taliban Pakistan* (TTP).

Swat was once again put on fire in 2007. The situation became more complicated and terrible when workers of the Swat Chapter of the TTP took control of Swat. The militants also entered Buner District in April 2009 and threatened to penetrate into Swabi, Tor Ghar and Mansehra Districts. The ANP government tried its level best to avoid bloodshed, therefore, instead of use of force, it preferred seeking a negotiated solution to the crisis. Talks were held with the TTP Swat Chapter leadership, and the government agreed to remove grievances of *Maulvi Fazlullah* and his subordinates. But critics say that the government surrendered before the TTP Swat Chapter.

Shariah Nizam-e-Adl Regulation 2009

Governor Owais Ahmed Ghani issued *Shariah Nizam-e-Adl Regulation* on April 16, 2009 to establish courts in Malakand. *President Asif Ali Zardari* gave his assent to the regulation after parliamentary approval 3 days earlier.¹⁵ By this regulation, appellate or revisional (Court Dar-ul-Qaza) or a bench of Pe-

¹⁵ Fazal Khaliq, *Nizam-e-Adl Regulation: Top Sharia court set up in Swat*, The Express Tribune, January 19, 2011.

shawar High Court was established in Swat under Clause (4) of the Article 198 of the constitution. Similarly, the authority of the Supreme Court, (*Dar-ul-Qaza*), was extended for final appeal in pursuance of Clause (2) of Article 183 of the Constitution. Clause 7 of the Regulation says that in each District or protected area, there shall be a District Magistrate, Additional District Magistrates, Sub Divisional Magistrates, and other Executive Magistrates as the Government may deem necessary to appoint. Magistrates were named as *Qazis* (judges) who would discharge their responsibility and exercise their power according to *Shariah*.

The Regulation provided for the establishment of courts of Executive Magistrate including District Magistrate which was against Article 2-A, 175(3) and 203 of the 1973 Constitution. Entrusting judicial powers to executive officers is against the Principles of Justice which generated anxiety among members of civil society and lawyers. Therefore, *Yousaf Ayub*, District *Nazim Haripur*, *Hazrat Usman* Advocate and Barrister *Adnan Khan* of Swat, and *Faheem Aftab* Advocate of Batkhela filed separate petitions in Peshawar High Court pleading that entrusting judicial powers to executive officers is contrary to the Constitution, therefore, it should be abolished.

Verdict of Peshawar High Court

A 2 member bench of Peshawar High Court comprises *Mr. Justice Qaiser Rashid Khan* and *Mr. Justice Waqar Ahmad Seth*, gave a verdict on April 29, 2015. The PHC directed the government to make the Regulation in conformity with the Constitution within 6 months. But the government did not move.

An Uncertain Future

The National Assembly passed the 25th Amendment in May 2018 to integrate PATA with Khyber Pakhtunkhwa. Article 247 was omitted from the Constitution. But the Khyber Pakhtunkhwa Government wanted maintenance of the status quo. Therefore, it enacted the Continuation of Laws in Erstwhile PATA Act 2018 so that

the existing laws in former PATA remain in force for an indefinite period unless altered, repealed, or amended by the competent authority.¹⁶ The act revived the Executive Magistracy System. The Peshawar High Court on October 17, 2019, declared the act unconstitutional. The court observed that Erstwhile PATA Act deprived people of their basic rights. Ironically, the Federal and Khyber Pakhtunkhwa governments challenged this decision in the Supreme Court the same month.¹⁷ The Supreme Court has yet to decide the case. Two kinds of courts are functioning in the area - Civil Courts and Magistrate Courts. This is against the essence of democracy, human rights, and justice.

Conclusion

Despite passage of more than 5 decades of the merger of Swat, Dir and Chitral, successive governments failed to integrate it in the mainstream of judicial system as practiced in the rest of the country. Regulations were issued from time to time which created resentment among people of Swat. The system enhanced public grievances due to the ad hoc nature of the regulations. Different laws were introduced on experimental bases and no effort was made to seek a durable solution to the crisis. The *Jirga System* was initiated in the 1970s to resolve disputes according to *Riwaj*. It was then replaced with *Shariah* to appease TNSM leadership. Great hopes were pinned with the 25th Constitutional Amendment. It was a great leap forward to integrate PATA in Khyber Pakhtunkhwa and put the judicial system on the right track. But unfortunately, the administrative machinery does not want to let loose its control over judicial matter, therefore, the Continuation of Laws in Erstwhile PATA Act 2018 was passed by the Provincial Assembly. The Peshawar High Court declared the act invalid. But the government adopted delay tactics and challenged the Peshawar High Court decision in the Supreme Court of Pakistan. The matter is pending in the court since 2019. It is difficult to say that when the court will initiate hearing of the case to decide it once for all.

¹⁶ Notification of Khyber Pakhtunkhwa Assembly, January 10, 2019, retrieved July 24, 2022, <https://www.pakp.gov.pk/wp-content/uploads/TheKP-Continuation-of-Earstwhile-PATA-Act-2018.pdf>

¹⁷ Civil Petition No. 1564/2020, Supreme Court of Pakistan, visited July 22, 2022, https://www.supreme-court.gov.pk/downloads_judgements/c.p._1564_2020.pdf