

PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

Writ Petition No. 2337-P/2019

Suhbat Khan and others

.....Petitioners.

Versus

Kandi Barami Tappa Karna Khel, Malik Din Khel.

.....Respondents.

For the Petitioners: Mr. Sajeed Khan Afridi,
Advocate.

For the Respondents: Mr. Shumail Ahmad Butt, AG.

Date of Hearing: 02.12.2022

JUDGMENT

SYED ARSHAD ALL, J:- This consolidated judgment is directed to dispose of instant petition as well as the connected petitions as adjudication of common questions of law are involved.

2. We have before us four categories of cases. The first category of the cases relates to those matters, which were filed before the erstwhile FATA Tribunal under Section 55-A of the Frontier Crimes Regulation, 1901 (“*FCR*”) and pursuant to the judgment of this Court dated 20.03.2019 passed in Reference No. 01-P/2019, the same were referred to this Court (the detailed list of this category of cases has been provided in Annexure “A” to this Judgment and hereinafter referred to as **First Category of Cases**)

In the second category, we have one case i.e. Khial Gul vs. Khan Gul, who was convicted by the Political Agent vide order and sentence dated 14.12.2016. The said conviction was challenged by Khial Gul before the Commissioner Kohat Division Kohat, however, later, the said appeal was transferred to this court pursuant to the judgment dated 20.03.2019 in Reference No. 01-P/2019 (Hereinafter

referred to as the **Second Category of Cases** and the details whereof are also provided in Annexure “A”).

The third category of cases relates to the matter where the offence was committed prior to the promulgation of the 25th Amendment in the Constitution, however, no final judgment was passed by the trial Court under the FCR though the matter was referred to the Jirga and the Jirga had also given its verdict regarding the guilt or otherwise of the accused. On promulgation of the 25th amendment in the Constitution and pursuant to the judgment of this Court dated 20.03.2019 in Reference No. 01-P/2019 those cases were transferred for adjudication to the regular courts and the regular courts in the majority of cases had acquitted the accused as the prosecution had failed to produce any evidence (Hereinafter referred to as the **Third Category of Cases** the details whereof are also provided in Annexure “A”).

The fourth category is those cases in which the initial trial under Section 8 of the FCR relating to the civil dispute culminated into the final judgment by the Political Agent. They had filed an appeal against the order of the Political Agent, which was transferred to the court of the District Judge pursuant to the judgment of this Court in Reference No. 01-P/2019, and the District Judge had passed an order in those cases, and the orders of the District Judge are now questioned before this Court (Hereinafter referred to as the **Fourth Category of Cases** the details whereof are also provided in Annexure “A”).

3. We have before us for adjudication the legal issue, which cropped up on promulgation of the 25th Amendment in the Constitution through Act No. XXXVII of 2018 dated 05.06.2018. Through the 25th Amendment in the Constitution, inter alia, Article 247 of the Constitution was omitted. Article 247 (3) of the Constitution dealt with the extension of laws passed by Parliament to the Federally Administered Tribal Area (“*FATA*”). The erstwhile Articles

246 & 247 of the Constitution had provided for a legal dispensation in the tribal area. Article 247(4) of the Constitution envisages that the President may, with respect to any matter, make regulations for peace and good government in *FATA* or any part thereof. In view of the above, a good number of laws were extended to the erstwhile FATA and similarly, the President of Pakistan had also made/issued various regulations for maintaining peace in the erstwhile FATA.

The FCR was the governing law relating to resolution of civil as well as criminal dispute among the tribal men within the meaning of Articles 268 and 247 of the Constitution.

4. On the omission of Article 247 of the Constitution, the Parliament has passed no law relating to the pending proceedings in the erstwhile tribal area before the various fora established under FCR. However, the corollary of omission of Article 247 of the Constitution, all the normal laws passed by the Federal and Provincial legislature including the establishment of various courts automatically stood extended to erstwhile FATA as the essential barrier contained in Article 247 *ibid* was removed through 25th amendment Act in the Constitution.

It would be important to note that through Section 34 of the Criminal Law (Amendment) Act, 1963, the FCR except for its application to the tribal area was repealed. However, since under erstwhile Article 247 of the Constitution, the jurisdiction of the superior courts was barred to entertain any matter relating to erstwhile FATA, therefore, the legality of the FCR to the extent of its application to FATA was never examined on the touchstone of the Constitution by the Apex Court. However, it was never considered a good law and, in this regard, the following reference can be borrowed from the judgment of the Apex

Court in the case of **Samundar vs. The Crown** (PLD 1954 SC 228) wherein it was held that:

“The process of decision provided under the Regulation (FCR) is also foreign to justice as administered by the Courts... Decisions of this nature are common enough on the administrative side, but they are obnoxious to all recognized modern principles governing the dispensation of justice. In such circumstances, it is impossible to preserve public confidence in the justness of the decision. That may be of secondary importance to an administrative agency. But it is of permanent importance to a Court of justice.....

I am therefore clearly of the opinion that the proceedings which have been taken in the present cases are not to be regarded as proceedings in justice, but that they are from every point of view to be regarded as proceedings before an administrative agency, specially provided for the settlement of criminal cases, and specifically adapted to the conditions prevailing in frontier districts, at any rate at the time when the Regulation was enacted”.

5. The tribes living in the tribal belt comprising of seven Agencies and six Frontier Regions were, for centuries governed by their traditions and customs, which they inherited from generation to generation, till the British extended the Frontier Crimes Regulations, 1901 to their area. After Independence, FATA continued to be governed by the same law wherein the President of the country was the highest Executive Authority and the Governor of Khyber Pakhtunkhwa (former NWFP) discharged the responsibilities as Agent to the President while exercising powers of Chief Executive relating the tribal belt.

6. The existence of more than one law, in one country with reference to FATA, had often been questioned. Legal reforms were introduced by successive governments. In the year 2011, some reforms were introduced, and in the year 2018, FATA Interim Governance Regulation, 2018 was promulgated (**“Regulation”**). Section 3 of the Regulation repealed the Frontier Crimes Regulation, 1901 (amended in 2011).

7. The vires of the Regulation were challenged before this Court through a constitutional petition No 3098-P of 2018, which was allowed, and the Regulation was declared ultra vires of the Constitution to the extent of allowing Commissioners to act as Judges; Council of Elders deciding the Civil & Criminal matters; Constitution of Quami Jirga; Modified application of Chapter VIII & XLII of the Code for Security; Third Schedule administered area.

8. The judgment of this court was assailed before the Honorable Supreme Court of Pakistan in Civil Petition No 773-P of 2018. The concluding paragraph of the judgment is reproduced as under:-

“In light of the foregoing, Constitution Petition No. 24/2012 is disposed of and Civil Petition No. 773-P/2018 is dismissed as having been withdrawn, with the following observations:-

- i. The operation of jirgas/panchayats etc. violates Pakistan’s international commitments under the UDHR, ICCPR and CEDAW which place a responsibility on the State of Pakistan to ensure that everyone has access to courts or tribunals, are treated equally before the law and in all stages of procedure in courts and tribunals;*
- ii. The manner in which jirgas/panchayats etc. function is violative of Articles 4, 8, 10-A, 25 and 175(3) of the Constitution;*
- iii. Jirgahs/panchayats etc. do not operate under the Constitution or any other law whatsoever to the extent that they attempt to adjudicate on civil or criminal matters; however, they may operate within the permissible limits of the law to the extent of acting arbitration, mediation, negotiation or reconciliation forums between parties involved in a civil dispute who willingly consent to the same;*
- iv. Since no individual or persons in the name of a jirga/panchayat or under any other name can assume the jurisdiction of a civil or criminal court without any lawful authority; any order, decision or a direction issued by any such individual or group of persons is hereby declared illegal and against the spirit of the Constitution;*
- v. The law enforcement agencies all over Pakistan are duty-bound to be vigilant and ensure that if any crime has gone unreported, they of their own accord file FIR(s) with regards to the same and initiate the process of investigation;*

- vi. *If as a consequence of any illegal decision, order, direction or inducement of such self-appointed adjudicatory bodies any crime is committed, the offender as well as the individual or group of persons involved in aiding such jirga/panchayat etc. shall be jointly held responsible for the said offence and must be proceeded against in accordance with the law;*
- vii. *The police must ensure compliance with the general guiding principles laid down in paragraph No. 14 of this judgment and standard operating procedures (SOPs) must be introduced by them within two months from the date of announcement of this judgment which should be circulated throughout the country with a compliance report to be submitted to this Court at the end of the two-month period;*
- viii. *After the 25th Amendment, all the residents of the Province of KPK are similarly placed, there is no rational basis on which the people of FATA can be distinguished from the people of the rest of the province of KPK and thus the application of the FATA Interim Regulation to one part of KPK while the rest of the province enjoys the protection of the provincial laws is absolutely unjustified, grossly discriminatory and in contravention of the fundamental right to equal protection;*
- ix. *On grounds of discrimination which cannot be justified under any reasonable classification and the law laid down in Azizullah Memon's case (supra), the FATA Interim Regulation is declared as ultra vires on the touchstone of Articles 4, 8, 25, 175 and 203 of the Constitution; and*
- x. *The Government of KPK is granted six months from the date of announcement of this judgment for the development of infrastructure or take steps to spread a uniform system of courts of ordinary jurisdiction in KPK, mandating the local law enforcement agencies to ensure that the rule of law is observed by reducing jirgas/panchayats etc. to arbitration forums which may be approached voluntarily by local residents to the extent of civil disputes only”.*

9. On 5th June, 2018, through Act No. XXXVII of 2018, twenty-fifth amendment in the Constitution was promulgated which omitted Article 247 of the Constitution, and amended Article 246. Tribal areas of FATA region were merged into the settled area. With this constitutional amendment the judicial system of the country was extended to FATA.

10. Since on omission of Article 247 *ibid* the normal laws stood applicable to the newly merged FATA and criminal as well as civil courts were also established in the said area therefore, this Court felt to provide a forum for the pending legal matter while adjudicating upon a Reference/Suo Moto No. 01-P/2019. The following questions were framed, which reads as under: -

1. *Whether the forums constituted under defunct FCR (Deputy Commissioner FCR, Commissioner FCR and FCR Tribunal) can continue to exercise jurisdiction in respect of the matters pending before the time of 25th Constitutional Amendment judgment of this Court in FGR case (W.P.No.3098-P/2018, Ali Azim Afridi. V. Federation of Pakistan and others, judgment dated 16.01.2019 of august Supreme Court of Pakistan in C. P No.24/2012 (Under Article 184 (3) of the Constitution and C.P. No.773-P of 2018 (Government of Pakistan...V... Ali Azim Afridi and others) and Judgment dated 15.10.2018 of august Supreme Court of Pakistan in Human Rights case No.70788 of 2018?*
2. *Whether the Appellate and Revisional forums (Commissioner FCR and FCR Tribunal) constituted under defunct FCR can continue to retain the jurisdiction over Civil and Criminal Appeals and Civil and Criminal Revisions pending before them after the coming into force of the 25th Constitutional Amendments and the judgment of this Court in FGR case (W.P.No.3098-P/2018, Ali Azim Afridi..V.. Federation of Pakistan and others and judgment of august Supreme Court of Pakistan referred to above?*

11. This Court vide its judgment recorded in Reference No.01-P/2019 on 20.03.2019 has answered the questions, which reads as under:

“The questions No.1 & 2 are interconnected, so taken together for determination & answer. Perusal of record would depict that before (Twenty-fifth amendment) Act, 2018, FATA Interim Governance Regulation, 2018, was promulgated whereby Deputy Commissioners, Additional Deputy Commissioners & Assistant Commissioners have been vested with the powers to act as Judge, in the Tribal Districts & Sub-Divisions, under the Code to try offences under the regulation. Under section-3 of the said regulation, Frontier Crimes Regulation, 1901, was repealed, however, it would be seen that whether by virtue of said section the FCR is expressly repealed or otherwise, especially after the judgment of this Court declaring the portion of IGR, as ultra vires, and in

view of section-6 of General Clauses Act. The reply to this query lies in the ascertainment of the raison detre of the ibid pronouncement. The IGR is violative of the fundamental rights and in particular the right to fair trial guaranteed by the constitution and it would be absurd to imply from the ibid pronouncement that the material part of the IGR is dismantled inclusive of the provision repealing the FCR s.(3) In effect revitalizing the FCR; which indeed is not the intention of the legislature while enacting IGR and on declaration of IGR being ultra vires, the whole superstructure thereof has crumbled to ground inclusive of S.52, thus the FCR stands impliedly repealed for the reasons that the same was restricted in its applicability to FATA, which through (Twenty-fifth constitutional amendment) cease to exist, and thus FATA is now alien to the constitution, the enactment restricted specifically to FATA would through implication stand repealed therefore, s.6 G C A would be applicable.”

Vide Para No.11 of the ibid, judgment all the cases were ordered to be transferred to the regular courts by exercising the powers under Section 24 of Code of Civil Procedure, 1908 and Section 526 of Criminal Procedure Code, 1898.

12. Later, when a good number of cases were transferred to this Court, which were supposed to be decided by erstwhile hierarchy established under the FCR, the Bench hearing one of the cases had requested the Hon’ble Chief Justice to constitute a Larger Bench as the decision of this Court in Reference No. 01-P/2019 had decided the issue in contravention to the mandate of Article 264 of the Constitution.

13. Before proceeding further, we would first refer to the mechanism of dispute resolution both; civil and criminal under the FCR. Chapter III of the FCR deals with the resolution of civil disputes, adjudication, and sentencing of crimes. According to Section 8 of the FCR in case of a civil dispute between various persons which may likely cause a breach of Peace in the area, the Political Agent or the District Coordination Officer, on receipt of any such complaint, would refer the matter to the Council of Elders, the members whereof

to be nominated with the consent of the parties, who shall inquire the matter and record their findings by Riway of the locality. On receipt of finding of the Council of Elders, the Political Agent or the District Coordination Officer could pass a decree in accordance with the findings of the majority of the Council of Elders or would remand the case to the Council of Elders for further inquiry and findings, if so required. (See section 8 of FCR)

14. Similarly, where any offence was committed within the territorial limits of erstwhile FATA, the Political Agent or the District Coordination Officer would take cognizance in the matter and on the arrest of the accused, the question of guilt or innocence of the accused would be referred to the Council of Elders for its findings, who after holding necessary inquiry and hearing the parties would submit its finding to the Political Agent or the District Coordination Officer, as the case may be. On receipt of the findings of the Council of Elders, the Political Agent or the District Coordination Officer, as the case may be, would pass an order in accordance with the findings of the majority of the Council of Elders or remand the case to the Council of Elders for further inquiry and findings. (See section 11 of FCR)

15. Chapter-VI of the FCR deals with the appeal and revision. Under Section 48 of the FCR, an appeal would lie to the Commissioner or Additional Commissioner, if authorized so by the Governor, from any decision given, decree or sentence passed or order made by the Political Agent or the District Coordination Officer under the Regulation and the order of Commissioner or Additional Commissioner could be challenged before the FATA Tribunal established under Section 55-A FCR.

16. Under FCR for the trial of an offence; **the proceedings were trifurcated into three stages** i.e. first cognizance of offence and reference to the jirga, and second inquiry and trial by the jirga which inter alia includes

recording the statement of the parties and collection of evidence, and to recommend its findings to the Political Agent or Deputy Commissioner, and thirdly, the order (concurrence) of the Deputy Commissioner/Political Agent upon the guilt or otherwise of the accused. As stated above, the order of the Political Agent could be challenged before the next higher authority. Similar was the position in the matter of trying a civil dispute. Therefore, the question arises as to what extent the repeal of FCR would affect the pending trial.

17. The trifurcated proceedings before the erstwhile forum included procedural as well as substantive law regulating the rights of the parties in that legal dispensation. Though through 25th amendment in the Constitution, Article 247 was omitted, however as far as its consequence in terms of Article 264 is concerned, we are conscious of the legal proposition that the effect of omission of any law has a similar meaning that of repeal; repeal and omissions are not distinct terms rather they are expression used by the legislature to achieve the same object, where the legislature wanted to abrogate and annul an entire/whole statute, it adhered to the word repeal but where a particular provision or part of the statute was to be rescinded, abrogated, annulled expressions omitted or deleted was used. *Muhammad Tariq Badr vs. National Bank of Pakistan* (2013 SCMR 314).

18. No doubt after 25th amendment in the Constitution, the Frontier Crimes Regulation, 1901 stands repealed, however despite the repeal of law even in absence of re-enactment the subject of repealed law, it is trite that the pending actions before any legal forum would continue under the repealed law. Exception to this rule is amendment of omission of procedure law followed by re-enactment which may provide a different forum for adjudication of substantive rights of the parties accruing of the repealed law. Similarly, it is one of the general rules of construction that if the rights and

procedure are both altered but rights accrued under the repealed enactment are saved, then in the absence of an intention to the contrary expressed or necessarily implied in the new statute, it will be proper to interpret the intention of the legislature to be that the old procedure will subsist for the enforcement of the saved rights. (N.S Bindra Interpretation of Statutes, 9th Edition).

19. The effect of repeal whether the subject of repealed law is reenacted or not has been provided under Article 264 of the Constitution, which, thus, would be relevant to the present controversy. Article 264 of the Constitution reads as under:

Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the constitution, -

- a. revives anything not in force or existing at the time at which the repeal takes effect;
- b. affects the previous operation of the law or anything duly done or suffered under the law;
- c. affects any right, privilege, obligation or liability acquired, accrued or incurred under the law;
- d. affects any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or
- e. affects any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed.

20. The basic principle of law is that when a statute is repealed, everything stands obliterated except the pending proceedings. The effect of Article 264 of the Constitution was discussed in the case of **Muhammad Arif vs. State** (1993 SCMR 1589) as follows:

“It is evident that there is judicial consensus that where a law is repealed, it will not inter alia affect any investigations, legal proceedings or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the law had not been repealed. This is so, inter alia, because of section 6 of the General Clauses Act, 1897 (which corresponds to section 4 of the West Pakistan General Clauses Act, 1956), in the absence of any contrary intention manifested in the relevant statute. Since the General Clauses Act is not applicable to the Constitution, the above provision has been incorporated therein in the form of Article 264.”

21. Section 6 of the General Clauses Act, 1897 is pari materia to Article 264 of the Constitution. Indian Supreme Court in the case of **Neena Aneja vs Jai Prakash Associates Ltd.**, (AIR 2021 SC 1441) explained different clauses of Section 6 of the General Clauses Act, by observing that:

“63. Section 6 of the General Clauses Act provides governing principles with regard to the impact of the repeal of a central statute or regulation. These governing principles are to apply, "unless a different intention appears". Clause(c) of Section 6 inter alia stipulates that a repeal would not affect “any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed”. The right to pursue a validly instituted consumer complaint under the Act of 1986 is a right which has accrued under the law which was repealed. Clause (e) of Section 6 stipulates that the repeal will not affect, inter alia, any "legal proceeding or remedy" in respect of any such right...as aforesaid". Any such legal proceedings may be continued as if the repealing legislation had not been passed. Clause (c) of Section 6 has the effect of preserving the right which has accrued. Clause (e) ensures that a legal proceeding which has been initiated to protect or enforce "such right" will not be affected and that it can be continued as if the repealing legislation has not been enacted. The expression such a right in clause (e) evidently means the right which has been adverted to in clause (c). The plain consequence of clause (c) and clause (e), when read together is two- fold: first, the right which has accrued on the date of the institution of the consumer complaint under the Act of 1986 (the repealing law) is preserved; and second, the enforcement of the right through the instrument of a legal proceeding or remedy will not be affected by the repeal.

64. Having stated the above position, we need to harmonize it with the principle that the right to a forum is not an accrued right, as discussed in Part C of this judgment. Simply put, while Section 6(e) of the General Clauses Act protects the pending legal proceedings for the enforcement of an accrued right from the effect of a repeal, this does not mean that the legal proceedings at a particular forum are saved from the effects from the repeal. The question whether the pending legal proceedings are required to be transferred to the newly created forum by virtue of the repeal would still persist. As discussed, this Court in *New India Assurance(supra)* and *Maria Christina(supra)* has held that forum is a matter pertaining to procedural law and therefore the litigant has to pursue the legal proceedings at the forum created by the repealing act, unless a contrary intention appears. This principle would also apply to pending proceedings, as observed in *Ramesh Kumar Soni (supra)*, *Hitendra Kumar Thakur (supra)* and *Sudhir G Angur(supra)*. In this backdrop, what is relevant to ascertain is whether a contrary intent to the general rule of retrospectivity has been expressed under the Act of 2019 to continue the proceedings at the older forum.

65. Now, in considering the expression of intent in the repealing enactment in the present case, it is apparent that there is no express language indicating that all pending cases would stand transferred to the fora created by the Act of 2019 by applying its newly prescribed pecuniary limits. In deducing whether there is a contrary intent, the legislative scheme and procedural history may provide a relevant insight into the intention of the legislature.”

In the above case in view of the hardship of the litigants the pending proceedings were not transferred to the courts created under the new law.

22. The question here arises as to what would be the effect of the repeal of FCR on the pending proceedings before the fora established under the erstwhile FCR. We are not dealing with the issue for the first time as the effect of repeal of FCR on the pending cases already came under discussion before this Court as well as other High Courts and even before the Apex Court.

23. The matter of repeal of FCR was specifically discussed by the High Court of West Pakistan in Full Bench judgment in the case of **Sardar Nawab Haji Muhammad Khan Versus Additional Commissioner and others (PLD**

1964 Lahore 401) and it was held that the repeal will not affect the proceedings instituted before the passing of the repealing act. The relevant excerpt from the judgment is reproduced here for ready reference:

“11. The other reason for holding the West Pakistan Criminal Law (Amendment) Act, 1963, to be irrelevant for our present purposes is that even if the Act had come into force in the Quetta and Kalat Divisions, the Regulation being thereupon repealed, the present petitions, having been instituted before the passing of the Act, would not have been affected, their continuation being one of the ordinary incidents of the repeal of an enactment.”

The question of repeal of Frontier Crimes Regulation also came up for discussion before the Honorable Supreme Court of Pakistan in the case of **Sona and another Versus the State (PLD 1970 Supreme Court 264)**. The Larger Bench of the august Apex Court held that Section 6 of the General Clauses Act of 1897 which applies to Central Acts or Regulations is also in the same term and language. One of the effects of the repeal is that it shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act or Regulation had not been passed. It is, therefore, quite clear that all the investigations or proceedings which are contemplated are to continue as if the Repealing Act or Regulation had not been passed. On this language it is quite clear that the trial of criminal cases has to be in accordance with rules of procedure in force at the commencement of the trial and the same procedure has to be followed.

24. A similar situation also arose before this Court when a similar law i.e. Regulation No. II of 1994 providing for a similar legal dispensation in the erstwhile PATA was repealed, a reference was filed before this Court relating to the

effect of such repeal on the pending matters when admittedly the normal law of the land including the establishment of Courts were also extended to the PATA. A reference was filed before this Court in the case of **Abdul Samad vs. Paimda Muhammad** (PLD 1997 Peshawar 3) seeking guidance on the point that as to whether the cases pending before forums set up under (repealed) Regulation of 1975 were required to be transferred to Courts established under Regulation II of 1994, and whether the District Judge would be competent to hear appeal against judgments of Deputy Commissioners passed under repealed Regulation of 1975. It was held that:

“8. Section 11 of N.-W.F.P., Regulation II of 1994 is a legitimate and valid provision of law which has been made by competent authority of making laws for PATA N.-W. F. P. Section 11 of N.-W. F. P. Regulation No. 11 of 1994 is para materia with section 6 of the General Clauses Act and almost in the same language as used in the said section 6. The Balochistan High Court has held that whereas in the event of enactment found repugnant or inconsistent with the provisions of Constitution of struck down, consequences are analogous to repeal and such laws, remain operative till finalization of pending proceedings. The PATA N.-W.F.P. Regulation I of 1975 and PATA Regulation II of 1975 were repealed by N.-W. F. P. Regulation II of 1994 with effect from 12th day-of February, 1994. The provisions of section 11 of N.-W.F.P. Regulation II of 1994 does not provide transfer of appeals and revisions pending hearing before forums under PATA N.-W.F.P. Regulations I and II of 1975 and rightly so. The appellate and revisional forums under PATA N.-W.F.P. Regulations I and II of 1975 cannot be equated to the forums of appeals and revisions under the Civil Procedure Code, 1908 and the Code of Criminal Procedure, 1898. A fortiori a criminal appeal or revision is governed by the Code of Criminal Procedure, Pakistan Penal Code and other criminal laws. The civil, appellate and revisional Courts are governed by the Code of Civil Procedure, Civil Courts Ordinance, 1962, Court Fees Act, Suits Valuation Act and other connected and relevant -laws read with generally the Qanun-e-Shahadat. A party in appeal or revision before the forums under PATA N.-W.F.P., Regulations I and II of 1975 cannot choose to withdraw the same and then file the appeal or revision in ordinary civil and criminal Courts on his choosing without sanction of the law and procedure and neither the ordinary Courts having jurisdiction of appeal and revision can exercise jurisdiction in such like cases brought before them.

9. The formulated Point No. 1 is answered to the effect that appeals or petitions pending under the repealed PATA N.-W.F.P. Regulation I of 1975 and PATA N.-W.F.P. Regulation II of 1975 will be heard and decided by the forums under the said Regulation II notwithstanding the repeal of the Regulations by N.-W.F.P. Regulation No.II of 1994 and would not stand transferred to the Courts established under N.-W.F.P. Regulation II of 1994. The answer to Point No.2 is that the Courts established under N.-W.F.P. Regulation II of 1994 including the District and Sessions Judges would be competent to hear appeals against the judgments of Deputy Commissioners passed under PATA N.-W.F.P. Regulation I of 1975 and PATA N.-W.F.P. Regulation II of 1975. Consequently, the pending cases before the trial forums under the PATA N.-W.F.P. Regulation I of 1975 and PATA N.-W.F.P. Regulation II of 1975 are to be transferred to the appropriate Courts of ordinary jurisdiction, civil and criminal, for trial of the cases and judgment thereupon under the law and procedure applicable to the cases under N.-W.F.P. Regulation II of 1994. The Reference of the learned Additional District Judge under section 113 of C.P.C. is also answered accordingly.

10. Before parting with this judgment, it will not be out of place to mention that valuable rights have accrued to the parties whose cases have been decided by the trial forums under PATA N.-W.F.P. Regulation I of 1975 and PATA N.-W.F.P. Regulation II of 1975. If any appeal and revision is to be decided by the hierarchy of the forums under the said Regulations then it will decide the matter according to the law and procedure applicable under the said Regulations and in case any of the forum under the said Regulations decide to remand the case to the trial forums for trial, then the case will be tried by the forums of ordinary criminal and civil jurisdiction. It is also relevant to mention that PATA N.-W.F.P. Regulation I of 1975 and PATA N.-W.F.P. Regulation II of 1975 were acted upon and judgments delivered under the same for about 20 years and this Court in its Constitutional jurisdiction passed orders from time to time in regulating the procedure of the forums under the said Regulations in accordance with law and procedure applicable in the cases under the PATA N.-W.F.P. Regulation I of and PATA N.-W.F.P. Regulation II of 1975.

25. In the aforesaid trifurcated legal dispensation, it is thus, obvious after considering the aforesaid judgments that all pending proceedings which had commenced under the repealed law (FCR) before the same forum would continue under the same legal dispensation and should not be

transferred to the normal Courts which were altogether established under a different law. Similarly, the law is settled that filing of an appeal is a statutory right and is not a matter of course, meaning thereby that unless provided by law, no Court has any jurisdiction to entertain an appeal against the decision of a forum though the said forum is subordinate to the said Court. With profound respect, the Courts have no jurisdiction to confer upon any forum a right of appeal which indeed is a domain of the law-maker i.e. the appropriate legislation. The outcome of the aforesaid discussion would be that notwithstanding the repeal of Article 247 of the Constitution and the corollary of the said omission despite the fact that the FCR which had the force of law in terms of Article 247 and 268 of the Constitution, the said repeal would not affect any investigation, legal proceedings or remedy in respect of any such right which would continue to be available to the aggrieved party. **Ibrahim vs. Muhammad Hussain (PLD 1975 SC 457), Habib Bank Limited vs. The State and 06 others (1993 SCMR 1853), Government of the Punjab vs. Abdur Rehman (2022 SCMR 25).**

26. In the present case, we have to yet draw a distinction between the matters which though were initiated prior to the 25th amendment in the Constitution, omitting Article 247 *ibid* under the FCR but had not culminated into the final judgment i.e. to say when any inquiry or trial in the trifurcated system had commenced, the jirga was constituted, which had inquired the matter, however, a final judgment/order was not announced by the Political Agent/Deputy Commissioner. Essentially, under the erstwhile dispensation any matter whether civil or criminal was to be inquired and investigated by a jirga/Council of Elders, and the Political Agent or Deputy Commissioner had very less jurisdiction to interfere in the findings of the jirga as the said findings could not be substituted by the Deputy Commissioner rather if he was of the opinion that the matter requires further

probe he could send back it to the jirga for further probe. It was held by the Apex Court in the case of *National Commission on the status of women vs. Government of Pakistan through Secretary Law and Justice* (PLD 2019 SC 218) referred above that the manner in which jirga/panchayat functions in any system is violative of Articles 4, 8, 10-A, 25 and 175(3) of the Constitution. Therefore, any system which provides for resolution of the matter through jirga system after pronouncement of the judgment of the Apex Court ibid (16.01.2019) cannot be allowed to further proceed with the matter more particularly in the circumstances when the law of the land establishing a normal investigation/inquiry/trial stands extended to the erstwhile FATA.

27. Indeed, it is settled law that the matters relating to investigation/inquiry/trial/receiving of evidence are procedural and a new legal dispensation on the eve of omission/replacement of old legal dispensation may operate retrospectively. Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties' pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus; a statute purporting to transfer jurisdiction over certain causes of action may operate retrospectively. This is what is meant by saying that a change of forum by a law is retrospective being a matter of procedure only. Nevertheless, it must be pointed out that if in this process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favourably incline towards giving effect to such procedural statutes retroactively. *Malik Gul Hassan & Co Versus Allied*

Bank of Pakistan (1996 SCMR 237) *Adrian Afzal v. Capt. Sher Afzal* (PLD 1969 SC 187). *Ch. Safdar Ali v. Malik Ikram Elahi and another* (1969 SCMR 166), *Muhammad Abdullah v. Imdad Ali* (1972 SCMR 173), *Bashir.v. Wazir Ali* (1987 SCMR 978), *Mst. Nighat Yasmin v. N.B. of Pak.* (PLD 1988 SC 391) and *Yusuf Ali Khan v. Hongkong & Shanghai Banking Corporation, Karachi* (1994 SCMR 1007).

28. We have noticed that the third category of the cases was seriously affected by the judgment of this Court in Reference No. 01-P/2019 dated 20.03.2019. As evident from record that though the said cases were transferred to the regular courts for adjudication but in this regard, neither any proper investigation was conducted by the investigation agency nor a complete challan was submitted in the manner provided under Section 173 Cr.P.C. What exactly happened in majority of those cases, that the cases which were being inquired by the jirga/Council of Elders were placed before the regular courts for adjudication where there was neither any report of Investigation Officer nor the list of witnesses were before the Court. The trial Court on a number of occasions had directed the Public Prosecutor to produce evidence, however, when admittedly, nobody had collected evidence then obviously no evidence could be produced before the Court. **It would have surely served the requirements of fair trial if, other than jirga decision, police had independently investigated the cases.** Since as observed by this Court in the preceding para that in **view** of the judgment of the Apex Court in the case of *National Commission on the status of women vs. Government of Pakistan through Secretary Law and Justice* (PLD 2019 SC 218) no credence can be given to the proceedings conducted by jirga/panchayat and the inquiry and investigation being a procedural matter for which regular police agency is now working under the merged area, therefore, in such peculiar circumstances it is the requirement

of natural justice that these matters are investigated by the regular police and after completion of investigation, the matter be placed before the court of competent jurisdiction through the office of District Public Prosecutor. However, in certain cases re-investigation may be a futile exercise. The law is settled that the reinvestigation may be conducted to unearth the truth where the fairness, rectitude and impartiality demands but there are certain conditions and limitations which may include the visible defects in the first investigation or flaws in the final report detected subsequently or the first investigation is unsatisfactory for many reasons including non-availability of the evidence or the successful induction of false evidence during the investigation or the corrupt behavior of the police officer. Reliance in this respect can be placed on *Bahadur Khan vs. Muhammad Azam* (2006 SCMR 373), *Atta Muhammad vs. Inspector General of Police, West Pakistan, Lahore* PLD 1965 (W.P) Lahore 734 and *Zeeshan Mustafa Lashari V. The Province of Sindh* (2016 YLR Note 37). We are of the opinion that defect, if any, in the investigation can be determined by the respective Benches. We, therefore, leave it to the respective Benches to consider the matters on case-to-case basis. Similarly, pursuant to the judgment of this Court in Reference No. 01-P/2019 dated 20.03.2019, if any proceeding has culminated into final judgment passed by this Court cannot be re-opened under the doctrine of past & closed transaction. Furthermore, if pursuant to the aforesaid judgment of this Court, any case was remanded to the regular trial court by this Court and the regular trial court has recorded verdict in the same and the said judgment is impugned before this Court through any proceedings, it would be the appropriate Bench of this Court to decide the same without being prejudiced by the findings in this case.

29. In view of the above, we have reached at the conclusion that notwithstanding the omission of Article 247 ibid as a result whereof the FCR also stood repealed the legal

proceedings or remedy in respect of any such a right would continue under the legal dispensation provided under FCR except the proceedings of jirga/Council of Elders in the same mode and manner as provided under the repealed FCR. Hence, we dispose of the instant petition and the connected matters in the following manner.

- i. *The case of the first category shall be transferred to the FATA Tribunal which was established under Section 55-A of the FCR and in this regard, the Provincial Government shall constitute and notify FATA Tribunal for adjudication of the said cases as well as other cases which would arise out of the judgment of the Commissioner or other fora as stated in this judgment.*
- ii. *The case of second category i.e. Cr.A. No. 401-P/2019 titled “Khiyal Gul vs. Inzar Gul and another” shall also be transferred to the Commissioner Kohat Division Kohat for adjudication under FCR and in this regard, the Provincial Government will also notify the office of Commissioner under the enabling provision of FCR .*
- iii. *The third category of cases shall be placed before the respective Benches for determination on its own merits. If deemed essential, the respective Bench may refer the case/proceedings to the District Public Prosecutor of the respective Districts/merged area, who will thoroughly examine the record, may refer the case for reinvestigation to the concerned Police Station with direction to reinvestigate the matter and thereafter submit a complete challan before the competent court of law under Section 173 of Criminal Procedure Code.*
- iv. *The cases relating to civil disputes which did not culminate into final judgment, were pending before the Political Agents, and were transferred to the regular courts in view of Reference No 01-P/2019 decided on 20.03.2019 shall remain pending with the respective Courts. However, the judgments/decrees passed by the District Judges/Additional District*

Judges in the fourth category of the cases are accordingly set aside and the appeals which were transferred to the said Courts will be sent back to the relevant forum (Commissioner FCR) for adjudication under the FCR.

ANNOUNCED.
02.12.2022

Judge

Judge

Judge

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