P L D 2019 Supreme Court 218

Present: Mian Saqib Nisar, C.J. and Ijaz ul Ahsan, J

NATIONAL COMMISSION ON STATUS OF WOMEN through Chairperson and others---Petitioners

Versus

GOVERNMENT OF PAKISTAN through Secretary Law and Justice and others---Respondents

Constitution Petition No.24 of 2012 and Civil Petition No.773-P of 2018, decided on 16th January, 2019.

(a) Constitution of Pakistan ---

----Arts.4 & 25---Universal Declaration of Human Rights (UDHR), 1948, Arts. 7 & 8---International Covenant on Civil and Political Rights (ICCPR), 1966, Arts. 2 & 26---Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979, Art.15---'Jirgas', 'panchayats', 'council of elders---Discrimination against women---Lack of access to justice and equality before law---Art.7 & 8 of Universal Declaration of Human Rights (UDHR), 1948, Art.2 & 26 of International Covenant on Civil and Political Rights (ICCPR), 1966, and Art.15 of Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979, placed a responsibility on the State of Pakistan to ensure that all women in Pakistan had access to courts or tribunals, were treated equally before the law and that in civil matters identical legal capacity and opportunities were accorded to them as those accorded to men and they be treated equally in all stages of procedure in courts and tribunals---Access to justice, was both a right in itself and the means of protecting and restoring other basic human rights---Negligible representation of women before jirgas/panchayats which already mirrored a patriarchal and feudal/tribal set-up was a blatant violation of Art.2(1) of the ICCPR which enjoined upon all State Parties the duty to protect the human rights under the ICCPR regardless of social or national origin whereas Art.2(3) thereof particularly emphasized on the provision of an effective legal remedy---When these bodies (council of elders/jirgas/panchayats etc.) posing as the dispensers of justice themselves became the violators of the rights to due process and other human rights under the ICCPR, having no regard of the law, as their word, wisdom and customs alone were law, Art.26 of ICCPR stood completely ignored since in permitting such jirgas/panchayats etc. in some areas while the rest of the country was entitled to seek their legal remedies through the courts of law, unabashed discrimination was allowed on the account of sex, language, religion, national or social origin, property, birth and financial status---Supreme Court directed that jirgahs/panchayats etc. did not operate under the Constitution or any other law whatsoever to the extent that they attempted to adjudicate on civil or criminal matters, however, they may operate within the permissible limits of the law to the extent of acting as arbitration, mediation, negotiation or reconciliation forums between parties involved in a civil dispute who willingly consented to the same; that where tribal or village gatherings were held for purposes of arbitration or

mediation, there should be no doubt that any settlement reached by these council of elders as arbitrators or mediators had no legal force and could only be enforced through courts of law so long as it was with regards to a civil dispute and the parties involved were willing to be bound by it; that even in such arbitrations/mediations/ reconciliation, the representation of women could not be through a male-kin if their rights were involved and they must be allowed an opportunity of personal hearing if they so desired---Petition was disposed of accordingly.

(b) Constitution of Pakistan---

----Arts. 4, 8, 10A, 25 & 175---Universal Declaration of Human Rights (UDHR), 1948, Arts. 7 & 8---International Covenant on Civil and Political Rights (ICCPR), 1966, Arts. 2 & 26---'Jirgas', 'panchayats', 'council of elders', constitutionality of---Law prohibited any person whether as a part of a body or council called a jirga/panchayat etc., or individually, from becoming a community anointed judge or executioner on the pretext of archaic customs---Unchecked operation of informal jirgas/panchayats etc. as courts creating their own barbaric punishments and unguided methods of executing sentences amounted to acquiescence to injustice---Informal jirgas/panchayats on account of having no legal validity, were absolutely unguided in their powers and decision making, often making arbitrary and unjust decisions---Jirgas followed no precedent nor were their decisions subject to any predictability or certainty, and personal knowledge and hearsay became tools for determination of civil rights violations and criminal charges---Impending danger in allowing societal customs to override the law and jurisdiction of courts was unacceptable in a functioning democracy---Any determination by any other body such as jirga/panchayat etc. which was not bound by any legal and codal formalities was against the law enacted by the legislature and the law laid down by the Supreme Court---Parallel adjudicating bodies in the form of jirgas/panchayats etc., impinged upon the principle of separation of powers that was a vital feature of the Constitution [Art.175(3) of the Constitution]---When in the name of preservation of tradition the jirgas/panchayats etc. assumed the powers of a pillar of the State, i.e. the judiciary, they threatened the very foundations of the rule of law---What these bodies in effect preserved was the unfair social constructs in the rural areas where the word and the arbitrary decisions of the elites, and persons of influence were treated as law for and imposed upon the socially and financially weaker parties---No procedural or substantive law dictated the proceedings these bodies conducted or the decisions they issued and the so-called decision-makers themselves were not required to be well versed with the law---In the absence of any legal instrument regulating these jirgas/panchayats etc. the execution of the sentences given by them or the enforcement of the decisions made by them were illegal since those who passed these decisions trespassed the jurisdiction of the legislature and judiciary and those who illegally executed these decisions stepped into the jurisdiction of the executive---Manner in which jirgas/panchayats etc. functioned, they violated the fundamental rights (Arts.4, 8, 10A & 25) guaranteed by the Constitution; firstly, they interfered with the rights of citizens to enjoy equal protection of law and to be treated in accordance with the law due to the fact that they admittedly applied their own customary/tribal/feudal procedures and systems in the proceedings before such

gatherings or councils; secondly, the decisions taken by such jirgas/panchayats etc. on the basis of customary/feudal/tribal laws were more often than not detrimental to the life, liberty, body, reputation and property of persons which (decisions) under the Constitution could not be given effect to except in accordance with law, and since the decisions given by such jirgas/panchayats were not bound by any law there was no way to ensure that gross violations of rights were prevented; thirdly, at times they also prevented or hindered persons from doing that which was not prohibited by law and/or compelled them to unwillingly commit actions which the law did not oblige them to do (for instance, hand over to the jirga/panchayat etc., persons that had been summoned or sentenced by it), fourthly with respect to Pakistan's international obligations, the jirgas/panchayats etc. decided the civil rights and obligations of, or criminal charges against a person without a fair trial and in violation of due process, both of which he was entitled to under Art.10-A of the Constitution, and fifthly persons appearing before these jirgas/panchayats etc. were neither treated with equality during the so-called trial nor were they afforded equal protection under the law and there was rampant discrimination on the basis of gender, and status quo---Supreme Court directed that since no individual or persons in the name of a jirga/panchayat or under any other name could 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 was illegal and against the spirit of the Constitution; that jirgahs/panchayats etc. did not operate under the Constitution or any other law whatsoever to the extent that they attempted to adjudicate on civil or criminal matters, however, they may operate within the permissible limits of the law to the extent of acting as arbitration, mediation, negotiation or reconciliation forums between parties involved in a civil dispute who willingly consented to the same; that where tribal or village gatherings were held for purposes of arbitration or mediation, there should be no doubt that any settlement reached by these council of elders as arbitrators or mediators had no legal force and could only be enforced through courts of law so long as it was with regards to a civil dispute and the parties involved were willing to be bound by it; that where any complaints were received with regards to danger to life, liberty or property of a person on account of the decisions of jirgas/panchayats etc., immediate action should be taken by the police by firstly substantiating the veracity of the complaint and then by taking stringent action against all those found to be involved in their convening, operation as well as those aiding in execution of their decisions; that police stations in areas where these jirgas/panchayats etc. were more common should be heavily equipped with human resource and back-up support be readily available in order to deal with large crowds if the need arose; that protection should be provided to the complainants; that confidence of the public in the police and the courts must also be increased and for such purpose the executive should provide for complaint centres or more informal means of approaching them so as to ensure that no one was deterred from seeking aid and protection of the law; that awareness should also be inculcated in the residents of the villages and tribal areas where such jirgas/panchayats etc. were prevalent, regarding their rights under the law as well as the consequences they faced if they were found involved in kangaroo courts in any way; that the print and electronic media and non-profit organizations must also play their part in promoting such awareness for upholding of rule of law---Petition was disposed of accordingly. Arumugam Servai v. State of Tamil Nadu

[(2011) 6 SCC 405); Shakti Vahini v. Union of India and others AIR 2018 SC 1601; Hasnain Akhtar v. Justice of Peace 2015 YLR 2294; Muhammad Younis v. Nazar Ahmed 2013 YLR 139; Malik Muhammad Mumtaz Qadri v. The State PLD 2016 SC 17; District Bar Association Rawalpindi v. Federation of Pakistan PLD 2015 SC 401; Shiekh Riaz-ul-Haq v. Federation of Pakistan 2013 PLC (CS) 1308; Reference No.01 of 2012 PLD 2013 SC 279 and S.M. Waseem Ashraf v. Federation of Pakistan 2013 SCMR 338 ref.

(c) Constitution of Pakistan---

----Art. 4(1)---Right of individuals to be dealt with in accordance with law---Scope---Foreign citizens in Pakistan---Article 4(1) of the Constitution extended the right to enjoy the protection of law to every citizen regardless of where he was---Persons who were not citizens (of Pakistan) were also given said right while they were in Pakistan.

(d) Constitution of Pakistan---

----Arts. 4, 8, 10A & 25---'Jirgas', 'panchayats' and 'council of elders'---Settlement of disputes through honor killings for retribution and compelling women to be wed with out their consent---Such acts violated Art. 4, 10-A & 25 read with Art. 8 of the Constitution which enjoined that no custom in derogation of any fundamental right could prevail under the law.

(e) FATA Interim Governance Regulation, 2018 ---

----Preamble---Constitution of Pakistan, Arts. 4, 8, 25 175 & 203---FATA Interim Governance Regulation, 2018, vires of---Federally Administered Tribal Areas (FATA) were merged in the Province of Khyber Pakhtunkhwa (KPK) through the 25th Amendment to the Constitution---All the residents of the Province of KPK were similarly placed, and there was no rational basis on which the people of FATA could be distinguished from the people of the rest of the province of KPK---Despite now being part of the KPK Province, areas of FATA were subject to an entirely different mode of dispensation of justice i.e. FATA Interim Governance Regulation, 2018, from the rest of the Province making a prima facie case for gross discrimination in violation of Art.25 of the Constitution which guaranteed equality of all persons before the law as well as Art.4 which guaranteed the right to enjoy the protection of law and to be treated in accordance with the law as well as the principles laid down in the judgment of Government of Balochistan v. Azizullah Memon and others (PLD 1993 SC 341)---Supreme Court declared the FATA Interim Governance Regulation, 2018 as ultra vires on the touchstone of Arts. 4, 8, 25, 175 & 203 of the Constitution and directed that the Provincial Government of KPK was granted six months from the date of announcement of present judgment for the development of infrastructure to 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 was observed by reducing jirgas/panchayats etc. to arbitration forums which may be approached voluntarily by local residents to the extent of civil disputes only---Petition for leave to appeal was dismissed as withdrawn accordingly.

Government of Balochistan v. Azizullah Memon and others PLD 1993 SC 341; Samundar v. The Crown PLD 1954 SC 228; Abdul Bari and 2 others v. Director

Livestock PLD 2014 Pesh. 132 and Malik Toti Khan and others v. District Magistrate Sibi and Ziarat PLD 1957 Quetta 1 ref.

(f) Constitution of Pakistan---

----Art. 25---Equality before law---Reasonable classification---Principles---Classification was only permissible under the law where the same had been made on a rational and reasonable basis---Although no singular standard of reasonableness could be deduced for such classification, it must be such that could be justified on an intelligible differentia identifying why the classification/distinction had been made and there must be a rational nexus to the object sought to be achieved by the classification.

Government of Balochistan v. Azizullah Memon and others PLD 1993 SC 341 ref.

Mrs. Khawar Mumtaz, Chairperson NCSW, Sohail Akbar Warraich, Member NCSW and Raja Abdul Ghafoor, Advocate-on-Record for Petitioners (in Const.P.No.24 of 2012).

Abdul Latif Yousafzai, AG, KPK for Petitioners (in C.P. No.773-P of 2018).

Khurram Saeed, Addl. Att.G., Zahid Yousaf Qureshi, Addl.A.G.KPK, Salman Talibuddin, A.G. Sindh, Ayaz Swati, Addl. A.G. Balochistan, Qasim Ali Chohan, Addl.A.G. Punjab, Hamid Shahzad, Law Officer, Women Development Department, Punjab and Ashiq Hussain, Deputy Director Women Development Sindh for Respondents.

Respondent No.1 in person (in C.P. No.773-P/2018)

Date of hearing: 31st December, 2018.

JUDGMENT

MIAN SAQIB NISAR, CJ.-

CONSTITUTION PETITION NO.24 OF 2012:-

The genesis of the issues raised in the instant matter lies in the reality that in today's day and age informal custom-driven parallel legal systems in the form of 'council of elders' or 'kangaroo courts' exist in the tribal areas, particularly in the north of the Province of Khyber Pakhtunkhwa (KPK), and in some rural areas of KPK, Punjab, Sindh and Balochistan. Petitioner No.1, the National Commission on the Status of Women[1] (NCSW) along with the other petitioners who are members of NCSW and human rights activists have filed the present petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution) seeking declarations and directions from this Court on the legality of jirgas/panchayats etc. prevalent in Pakistan, thereby challenging their operation as adjudicating bodies awarding judgments, executing punishments and deciding family, civil, criminal and other disputes. Therefore the key question arising from the instant constitution petition is that whether, to the extent that these informal village or tribal gatherings act as courts in the form of jirgas/panchayats, etc. they

are illegal under the law in place read with the international commitments made by Pakistan under various treaties/conventions?

2. Learned counsel for the petitioners relied upon the cases of Mst. Shazia v. Station House Officer and others (PCr.LJ 2004 Karachi 1523), Mst. Rahmat Bibi and another v. Station House Officer, Karan Sharif (PLD 2016 Sindh 268) and Government of Balochistan v. Azzizullah Memon (PLD 1993 SC 341) to contend that jirgas have been declared illegal by the Courts. Reference was also made to a research report titled "Women, Violence and Jirgas - Consensus and Impunity in Pakistan"[2] (the Report) prepared by NCSW and certain recommendations were placed before this Court. The crux of the petitioners' arguments is as follows:--

i. The existence of these parallel bodies or kangaroo courts deprives the individuals involved therein of their right to enjoy their right to life, liberty and justice and equal protection of the law and the right to be treated in accordance with the law thereby constituting a violation of Articles 4, 8, 9, 10-A, 14, 25, 34 and 37 of the Constitution;

ii. Efforts should be made by the State (under its obligations under Articles 33 and 37 of the Constitution) and its three pillars to eliminate the patriarchal and inhuman practices in jirgas, panchayats and other similar bodies the decisions of which, as reflected in pages 22 to 33 of the Report, are largely based on punishments wherein the women of the community are either traded as compensation or subjected to humiliating punishments for the crimes/offences of their male kin thereby constituting a violation of Article 25 of the Constitution;

iii. Jirgas/panchayats etc. reinforce unfair social norms by implementing the decisions of notable elderly men of the village or tribe on its socially and financially weaker members (women and the impoverished); such bodies convene in village gatherings to resolve disputes between parties where as a matter of culture and tradition, women are a rare sight and if involved in a dispute are usually being represented by their male kin which again is a violation of the right to due process and equality under Articles 10-A and 25 of the Constitution; and

iv. In light of the above mentioned widely prevalent circumstances in the rural and tribal areas, the internationally recognized principles of 'due process of law' and the 'right of access to justice to all' enshrined in different

international treaties to which Pakistan is a signatory have been completely violated.

The petitioners (in the constitution petition) have sought the following relief:-

i. Jirga/panchayats etc., in the country ought to be declared illegal, unlawful, inhumane and grossly violative of the fundamental right to dignity;

ii. In light of the violation of Articles 4, 8, 9, 10-A, 14, 25, 34 and 37 of the Constitution, jirgas/panchayats etc., be declared unconstitutional and ultra vires for assuming the powers of courts;

iii. Actions, proceedings, and orders of any jirga/panchayat etc., be declared as void and action be taken against those who have participated in such illegal activities; and

iv. The respondents be directed to frame, amend and implement constitutional provisions and penal laws relating to illegal practices of jirga/panchayats etc.

3. The learned Deputy Attorney General present in Court and the learned Additional Advocates General of Punjab, Balochistan, Sindh and KPK unanimously submitted that although efforts are being made by their respective Provincial Governments to eliminate any patriarchal practices prevailing in the Provinces, they are willing to extend any further support required to curb the illegal practices of honor killings, vanni, swara, karo kari, etc., that are not only violative of the fundamental rights of women under the Constitution but are also against the basic human rights guaranteed under the international conventions that Pakistan is signatory to in this regard, particularly the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[3]

4. No objection was raised as to the maintainability of the instant constitutional petition under Article 184(3) of the Constitution. Even otherwise, it fulfils the two-fold requirement in the Article ibid in that it involves a question of public importance with regards to the enforcement of the fundamental rights under the Constitution as substantiated in various judgments of this Court.[4] In Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 923) it was held that "The Courts are obliged to exercise their powers and jurisdiction to secure the rights of the citizens against arbitrary violations".

Thus the question of maintainability stands decided.

5. To answer the question involved, it is worthy to note at the very outset that the various terms, i.e. 'jirga', 'panchayat' and 'faislo', generally describe village or tribal gatherings, a common feature whereof is that one or more elderly men convene in order to settle a dispute of criminal or civil nature. While the terms used to refer to such gatherings may differ, to the extent that these act as an archaic form of informal courts that the rest of the world has long abandoned, they usurp the jurisdiction of ordinary courts of law. However it is essential to clarify that although, through the constitution petition, a general declaration with regards to the legality of informal courts such jirgas/panchayats etc. is being sought, there are

certain customary and traditional sentiments attached to such terms and practices which do not necessarily involve the holding of parallel courts but instead entail a gathering of village elders to resolve a dispute which can within the permissible limits of the law be settled outside of courts. Therefore, nothing in this opinion should be construed in a manner that any stigma or ill-feeling is attached to the term jirga or panchayat which may operate within the permissible limits of the law as outlined hereinabove to the extent of acting as arbitration, mediation, negotiation or reconciliation bodies/councils.

6. Adverting to international law on the subject, it is pertinent to note that Pakistan is a signatory to the Universal Declaration of Human Rights (UDHR) since 1948, Articles 7 and 8 whereof are relevant which provide as under:-

> "7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
>
> 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."
>
> [Emphasis supplied]

In 2008, Pakistan became a signatory to the International Covenant on Civil and Political Rights (ICCPR), Articles 2 and 26 whereof provide for equal protection for all under the law and are reproduced below for ease of reference:-

> "Article 2 of the ICCPR:
>
> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities,

or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[Emphasis supplied]

From the above it is clear that the customarily negligible representation of women before such councils which already mirror a patriarchal and feudal/tribal set-up (a group of elderly men who subject financially weaker parties as well as the socially handicapped gender to arbitrary decisions) is a blatant violation of Article 2(1) of the ICCPR which enjoins upon all State Parties the duty to protect the human rights under the ICCPR regardless of social or national origin whereas Article 2(3) thereof particularly emphasizes on the provision of an effective legal remedy. When these bodies posing as the dispensers of justice (council of elders/jirgas/panchayats etc.) themselves become the violators of the rights to due process and other human rights under the ICCPR, having no regard of the law as their word, wisdom and customs alone are law, Article 26 thereof stands completely ignored since in permitting such jirgas/panchayats etc. in some areas while the rest of the country is entitled to seek their legal remedies through the courts of law, we allow unabashed discrimination on the account of sex, language, religion, national or social origin, property, birth and financial status. Together, Articles 2 and 26 of the ICCPR and Articles 7 and 8 of the UDHR, emphasize the importance of access to justice, which is both a right in itself and the means of protecting and restoring other basic human rights. The unchecked operation of these informal jirgas/panchayats etc. as courts creating their own barbaric punishments and unguided methods of executing sentences (as evidenced in the Report), amounts to acquiescence to injustice. The emphasis on the equal protection of law in these Articles reflects that if the State succeeds to protect the rights of only that segment of the society that is aware of their rights and is not victim to the chains of primitive culture and patriarchal tradition as opposed to affording such protection to the whole society, then it has failed in this duty in entirety. For the deprivation of one person's rights cannot be justified by the lack of his or her own comprehension of those rights; it is the duty of the State to

be conscious and vigilant of such rights on behalf of all the citizens whose rights it is obligated to protect under the Constitution and its international commitments.

7. With regard to the discrimination faced by women in jirgas/panchayats etc., Article 15 of CEDAW is relevant:-

Article 15 of CEDAW:

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."

[Emphasis supplied]

The foregoing Articles of UDHR, ICCPR and CEDAW places a responsibility on the State of Pakistan to ensure that all women in Pakistan have access to courts or tribunals, are treated equally before the law and that in civil matters identical legal capacity and opportunities are accorded to them as those accorded to men and they be treated equally in all stages of procedure in courts and tribunals. From the contents of the Report and the admitted modes of operation of the jirgas/panchayats

etc. there remains no doubt as to the flagrant violation of Pakistan's international commitments.

8. Adverting to the Constitution, Articles 4, 8, 10-A, 25 and 175 thereof are pertinent which read as follows:-

"Article 4: Right of individuals to be dealt with in accordance with law, etc.

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular:-

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do."

Article 8. Laws inconsistent with or in derogation of fundamental rights to be void.

(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void."

Article 10A. Right to fair trial:

For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

25. Equality of citizens.

(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

175. Establishment and Jurisdiction of Courts.

(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.

Explanation

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within

fourteen years from the commencing day."

[Emphasis supplied]

Informal jirgas/panchayats etc. on account of having no legal validity, are absolutely unguided in their powers and decision making, often making arbitrary and unjust decisions as reflected in the Report. Article 4(1) of the Constitution goes further than Article 2 of the ICCPR by extending the right to enjoy the protection of law to every citizen regardless of where he is. Furthermore, persons who are not citizens are also given this right while they are in Pakistan. The value placed by the Constitution on the inalienability of this right to protection of the law for all can be gauged from the fact that this right is further extended to every other person for the time being within Pakistan. Article 4(2)(a) to (c) of the Constitution provides for the specific right to protection from any detrimental action with regards to life, liberty, body, reputation or property and ensures that no person is compelled to do anything or forbidden from any action unless the law specifically provides for the same. Another inalienable right is found in Article 10-A of the Constitution which states that each person be accorded a fair trial and due process for the determination of any civil right or violation thereof or determination of any criminal charge against a person. Article 25 supra provides for equality of both genders before the law and equal protection of the law. In general, honor killings for retribution of the patriarchal concept of honor or compelling women to be wed without their consent as a means of settling disputes is hit by Articles 4, 10-A and 25 read with Article 8 of the Constitution which enjoins that no custom in derogation of any fundamental right can prevail under the law.

9. A perusal of the Report reflects substantial violations of the fundamental rights reproduced above; even otherwise none of the Advocates General of the Provinces objected to the purported facts in the Report or the claims in the concise statement of the petitioners. While the noted fundamental rights guaranteed under the Constitution sufficiently embody the rights of equality before the law and access to courts and the right to an effective judicial remedy for the violation of the fundamental rights, it is clear from the facts and documents before us that in terms of its practical implementation the benefit has remained limited to mostly the urban population or where tribal/village culture does not have its strongholds. This excludes a significant percentage of women and men from the inalienable right of access to justice and even where the local residents do not wish to abandon their traditional jirga/panchayat etc. culture, it is the task of the executive and the legislature to ensure that the trichotomy of power is maintained and courts of law alone are responsible for dispensation of justice as per Article 175(3) supra. Even otherwise under Article 2(2) of the ICCPR, Pakistan is obligated to bring its laws in consonance with the ICCPR, which obligation is unqualified and of immediate effect as "A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State."[5] Thus all necessary steps must be taken by the State of Pakistan to ensure inter alia the right

to be treated equally by the law without any discrimination, regardless of the geographical location, language or local customs of the citizens of Pakistan.

10. At this junction it would be worthy to note that the learned High Court of Sindh in Shazia Bibi's case (supra) has fittingly pointed out the reasons why the operation of parallel kangaroo courts/council of elders is a violation of the principles of natural justice, due process and fair trial:-

> "37. Generally speaking apart from the Supreme Court and High Court, there are two types of Courts: (1) Criminal Courts
>
> (2) Civil Courts. The Cr.P.C. governs procedure of trial of Criminal Courts. Whereas the C.P.C governs the procedure of trial of Civil Courts. The Courts created under any enactment of law are only authorized to deal with the matters mentioned therein and the persons to be tried. No other authority is empowered to decide such disputes or punish any offenders. A perusal of the Cr.P.C. reveals that it provides machinery for the punishment and prevention of offenses against sustentative criminal law. The object of Cr.P.C. is to ensure that an accused person gets a full and fair trial along with certain well established and well understood lines that accord with notions of natural justice.
>
> 38. In Jirgas no specific procedure is followed. It is the whim and choice of the Jirga people to adopt any procedure even if it is detrimental to any party. Neither the principles of natural justice are followed nor well-recognized rules of evidence are adhered to. They are free to pass a verdict on personal knowledge or hearsay. It is noticed that in Jirgas they only settle the disputes but do not do justice according to the law. At the conclusion of proceedings, the decisions are announced in the shape of punishment, fine or compensation. All the above acts are the functions of Courts of Law. No other authority or person has power to settle the disputes of cases except by the Courts of law or other authorities created under the statute and punish any person. The functions, which are exclusively to be performed by Courts of law, are being performed by the Jirgas thereby usurping the powers of Courts. As such the Jirgas are parallel Judicial System which by themselves are unlawful and illegal, therefore, any law do not protect them. Furthermore, no appeal is filed against the decisions of Jirgas are final which is also against the principle of natural justice."
>
> [Emphasis supplied]

The above extract amply elaborates on the dangers of tolerating the functioning of these parallel courts, stating that all that the judiciary/courts of law stand for is at stake if bodies such as jirgas/panchayats etc. are allowed to operate/function whimsically, arbitrarily and without due regard of any process of determination of fact, responsibility or guilt. Not only are principles of natural justice at bay but these jirgas etc. follow no precedent nor are their decisions subject to any predictability or certainty, and personal knowledge and hearsay become tools for determination of civil rights violations and criminal charges. The impending danger in allowing societal customs to override the law and jurisdiction of courts is

unacceptable in a functioning democracy and as the ultimate court of dispensation of justice, this Court is duty-bound to eliminate them and reducing them to mere arbitration councils if the parties involved in a civil dispute, willingly agree to arbitration through the council of certain elders of the village or tribe.

11. The same is the position taken against such 'communal courts' in the Indian jurisdiction. In similar less-developed regions of India, the activities of the informal adjudicating bodies commonly known as panchayats or khap panchayats which are not codified in any law, have been declared to be illegal where they act as courts and overstep the boundaries laid down by the law as held in Arumugam Servai v. State of Tamil Nadu [(2011) 6 SCC 405], where the Indian Supreme Court opined that:-

> 12. We have in recent years heard of "Khap Panchayats" (known as "Katta Panchayats" in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh case[6], there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudalminded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.
>
> [Emphasis supplied]

Moreover, in a recent judgment reported as Shakti Vahini v. Union of India and others (AIR 2018 SC 1601) the Indian Supreme Court introduced preventative, remedial and punitive measures to eradicate any khap panchayat wherein honor killings have been ordered with regards to intercaste or inter-religious marriages, on the grounds that:-

> "39. The violation of the constitutional rights is the fulcrum of the issue. The protection of rights is pivotal. Though there has been constant social advancement, yet the problem of honour killing persists in the same way as history had seen in 1750 BC under the Code of Hammurabi. The people involved in such crimes become totally oblivious of the fact that they cannot tread an illegal path, break the law and offer justification with some kind of moral philosophy of their own. They forget that the law of the land requires that the same should be shown implicit obedience and profound obeisance. The human rights of a daughter, brother, sister or son are not mortgaged to the so-called or so-understood honour of the family or clan or the collective. The act of honour killing puts the Rule of law in a catastrophic crisis.
>
> 41. If there is offence committed by one because of some penal law, that has to be decided as per law which is called determination of criminality. It does not recognize any space for informal institutions for delivery of justice. It is

so since a polity governed by 'Rule of Law' only accepts determination of rights and violation thereof by the formal institutions set up for dealing with such situations. It has to be constantly borne in mind that Rule of law as a concept is meant to have order in a society. It respects human rights. Therefore, the Khap Panchayat or any Panchayat of any nomenclature cannot create a dent in exercise of the said right.

47. The 'Khap Panchayats' or such assembly should not take the law into their hands and further cannot assume the character of the law implementing agency, for that authority has not been conferred upon them under any law. Law has to be allowed to sustain by the law enforcement agencies. For example, when a crime under Indian Penal Code is committed, an assembly of people cannot impose the punishment. They have no authority. They are entitled to lodge a FIR or inform the police. They may also facilitate so that the Accused is dealt with in accordance with law. But, by putting forth a stand that they are spreading awareness, they really can neither affect others' fundamental rights nor cover up their own illegal acts. It is simply not permissible. In fact, it has to be condemned as an act abhorrent to law and, therefore, it has to stop. Their activities are to be stopped in entirety. There is no other alternative. What is illegal cannot commend recognition or acceptance."

[Emphasis supplied]

12. In this milieu, it is evident that in order to eradicate the menace of jirgas/panchayats etc. in Pakistan as well, stringent and immediate action needs to be taken to the extent that they assume the power to adjudicate on criminal or civil disputes without being guided by any law and sometimes even without reasoned evidence or hearing the accused. Additionally, the legislature and the executive should consider strict disciplinary action against the law enforcement officers who are found to have been negligent in preventing the convening or executions of decisions of jirgas/panchayats etc. despite having knowledge of the same. When in the name of preservation of tradition these jirgas/panchayats etc. assume the powers of a pillar of the State, i.e. the judiciary, they threaten the very foundations of the rule of law. What these bodies in effect preserve is the unfair social constructs in the rural areas where the word and the arbitrary decisions of the elites, waderas, chaudhries, and persons of influence are treated as law for and imposed upon the socially and financially weaker parties. No procedural or substantive law dictates the proceedings these bodies conduct or the decisions they issue and these so-called decision-makers themselves are not required to be well versed with the law. Moreover, in the absence of any legal instrument regulating these jirgas/panchayats etc. the execution of the sentences given by them or the enforcement of the decisions made by them are illegal since those who pass these decisions trespass the jurisdiction of the legislature and judiciary and those who illegally execute these decisions step into the jurisdiction of the executive. Serious concern in this

regard was also expressed by the Lahore High Court in Hasnain Akhtar v. Justice of Peace (2015 YLR 2294) wherein it held that:-

> " the law of the land does not countenance/approve of deciding criminal cases through the intercession of the Punchayats/Arbitration Councils. Even otherwise, it is tantamount to bypassing and short-cutting the procedure provided for under the law."

In another judgment of the Lahore High Court passed in Muhammad Younis v. Nazar Ahmed (2013 YLR 139) it was held that the "so-called Punchayat has no legal sanctity to declare anyone guilty or innocent". Hence, unless these jirgas/panchayats etc., are acting strictly in the capacity of arbitrators, mediators or conciliators and not as courts they must be rooted out by the law enforcement agencies and the executive.

13. In light of the above case-law and Pakistan's international obligations and those contained in the Constitution, it is clear that the manner in which jirgas/panchayats etc. function, they violate the fundamental rights guaranteed by the Constitution in the following ways: they interfere with the rights of citizens to enjoy equal protection of law and to be treated in accordance with the law due to the fact that they admittedly apply their own customary/tribal/feudal procedures and systems in the proceedings before such gatherings or councils; the decisions taken by such jirgas/panchayats etc. on the basis of customary/feudal/tribal laws are more often than not detrimental to the life, liberty, body, reputation and property of persons which (decisions) under the Constitution cannot give effect to except in accordance with law; and since the decisions given by such jirgas/panchayats are not bound by any law there is no way to ensure that gross violations of rights are prevented; additionally at times they also prevent or hinder persons from doing that which is not prohibited by law and/or compels them to unwillingly commit actions which the law does not oblige them to do (for instance, hand over to the jirga/panchayat etc., persons that have been summoned or sentenced by it). Furthermore, as mentioned above with respect to Pakistan's international obligations, the jirgas/panchayats etc. decide the civil rights and obligations of, or criminal charges against a person without a fair trial and in violation of due process, both of which he is entitled to under Article 10-A of the Constitution. Moreover, Article 25 of the Constitution which is in consonance with the principles of equality in Articles of the UDHR, ICCPR and CEDAW mentioned above, is also being flouted as the persons appearing before these jirgas/panchayats etc. are neither treated with equality during the so-called trial nor are they afforded equal protection under the law and there is rampant discrimination on the basis of gender, and status quo. All these features of jirgas/panchayats etc. are also in blatant contravention of the established law laid down by this Court, particularly in Malik Muhammad Mumtaz Qadri v. The State (PLD 2016 SC 17) wherein it was held that:-

> "The law of the land does not permit an individual to arrogate unto himself the roles of a complainant, prosecutor, judge and executioner."

Therefore, the law prohibits any person whether as a part of a body or council called a jirga/panchayat etc., or individually, from becoming a community anointed

judge or executioner on the pretext of archaic customs; the law in Pakistan allows this role to specific individuals who are required to have adequate knowledge and experience of understanding, interpretation and implementing the law (judges and law enforcement agents respectively). The law places several procedural and legal chains on a judge when adjudicating on the rights, liabilities and/or criminal charges on a person, and it is only after this process of finding of facts and determination of right/liability/charge under the law that a judicial decision is arrived at, as provided in the judgment of The Province of East Pakistan and others v. MD Mehdi Ali Khan and others (PLD 1959 SC 387):-

> "The determination of every right or liability claimed or asserted in a legal proceeding depends upon the ascertainment of facts and the application of the law to the facts so found. It is a normal feature of the judicial process first to discover the facts and then to determine what rights and liabilities follow from application of the law to the facts found."

Hence any determination by any other body such as jirga/panchayat etc. which is obviously not bound by the above legal and codal formalities is against the law enacted by the legislature and the law laid down by this Court. Finally, it is pertinent to note that these parallel adjudicating bodies in the form of jirgas/panchayats etc., impinge upon the principle of separation of powers that is a vital feature of our Constitution [Article 175(3) thereof] as per the cases such as District Bar Association, Rawalpindi v. Federation of Pakistan (PLD 2015 SC 401), Shiekh Riaz-ul-Haq v. Federation of Pakistan 2013 (PLC(CS) 1308), Reference No.01 of 2012 (PLD 2013 SC 279); and the existence of such jirgas/panchayats etc. which operate according to their own concept of so-called 'laws' is also in direct contravention of sub-Articles 175(1) and (2) of the Constitution which only allow for those bodies to operate as courts which have so been empowered or given the authority to operate under the Constitution or any other law. The question of the constitutionality and legality of allowing jirgas/panchayats, etc. to infringe on the jurisdiction of courts of law in determining civil rights or liabilities or determining guilt or criminal charges can be answered with the judgments of this Court which have unambiguously held that even courts established under the law may not adjudicate on a matter unless the jurisdiction to adjudicate on the same has been categorically granted to it under some law. In this regard, the following extract from the case of S.M. Waseem Ashraf v. Federation of Pakistan (2013 SCMR 338) is pertinent which reads as under:-

> " it may be mentioned that according to Article 175(2) of the Constitution it is unambiguously clear that a bar, and a prohibition has been placed that "No" Court in Pakistan shall exercise any jurisdiction in any matter brought before it until and unless, such jurisdiction has been conferred upon it by the Constitution itself or under any law. The word "save" appearing in the Sub-Article has clear connotation of the word "except" for the purpose of construing the above, meaning thereby that "No" Court shall have the jurisdiction except as has been conferred upon it by the Constitution and/or law. It is a settled law that any forum or court, which, if lacks jurisdiction

adjudicates and decides a matter, such decision etc. shall be void and of no legal effect."

Obviously then, when the law has been construed to have such strictly prescribed jurisdictional limits for courts of law, there remains no doubt in our minds that bodies such as jirgas/panchayats etc. cannot be allowed to adjudicate on any civil or criminal matters when neither have they been established under the law nor do they derive the jurisdiction to hear civil and criminal cases under the law. In such background, it is hereby categorically stated that the jirgas/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, as mentioned earlier, they may act as arbitration, mediation, negotiation or reconciliation forums between parties who willingly consent to the same.

14. Before parting with this aspect of the judgment, we deem it expedient to point out that it is the duty of the public at large to ensure that all crimes are reported to the police, however, where a crime goes unreported then due vigilance should be shown by the concerned local police station which is duty-bound to ensure that they on their own accord file first investigation reports in this regard as are filed in cases of unlicensed arms and ammunition and narcotics. Where any complaints are received with regards to danger to life, liberty or property of a person on account of the decisions of jirgas/panchayats etc., immediate action should be taken by the police by firstly substantiating the veracity of the complaint and then by taking stringent action against all those found to be involved in their convening, operation as well as those aiding in execution of their decisions. Police stations in areas where these jirgas/panchayats etc. are more common should be heavily equipped with human resource and back-up support be readily available in order to deal with large crowds if the need arises. Accordingly, protection should be provided to the complainants. Confidence of the public in the police and the courts must also be increased and for such purpose the executive should provide for complaint centres or more informal means of approaching them so as to ensure that no one is deterred from seeking aid and protection of the law. Awareness should also be inculcated in the residents of the villages and tribal areas where such jirgas/panchayats etc. are prevalent, regarding their rights under the law as well as the consequences they face if they are found involved in these kangaroo courts in any way. The print and electronic media and non-profit organizations must also play their part in promoting such awareness for upholding of rule of law. At the risk of repetition it must be clarified that it is not the term 'panchayat' or 'jirga' etc., which is illegal but the act of them posing as courts and usurping the powers of a court of law which is illegal. There is no cavil to a form of informal alternate dispute resolution through these bodies for civil disputes where all parties involved are willing participants who seek an amicable resolution through a settlement within the permissible limits of the law. In fact, the Study on Informal Justice System in Pakistan - Evaluation Report[7] presents a comprehensive roadmap to utilize these jirgas/panchayats, etc. as mediation, arbitration and reconciliation centres. However, where tribal or village gatherings are held for purposes of arbitration or mediation, there should be no doubt that any settlement reached by these council of elders as arbitrators or mediators has no legal force and can only

be enforced through courts of law so long as it is with regards to a civil dispute and the parties involved are willing to be bound by it. It goes without saying that even in such arbitrations/mediations/ reconciliation, the representation of women cannot be through a male-kin if their rights are involved and they must be allowed an opportunity of personal hearing if they so desire.

CIVIL PETITION NO.773-P/2018:-

15. This petition has been filed by the Government of KPK challenging the impugned judgment dated 30.10.2018 passed by the learned Peshawar High Court declaring the FATA Interim Governance Regulation 2018 (FATA Interim Regulation) as ultra vires to the "extent of allowing the Commissioners to act as Judges; Council of Elders deciding Civil and Criminal matters; Constitution of Qaumi Jirga; Modified applications of Chapters VIII and XLII of the Code of Security; Third Schedule; administered area, and after one month from the date of judgment, any decision of Civil or Criminal nature would be void ab inito". The substance of the respondents' (writ petitioners) claim also partly echoes the same concerns regarding the issue of parallel courts and thus they and the petitioners in the constitution petition claim that the Council of Elders constituted under the FATA Interim Regulation and Qaumi Jirgas recognized therein create in the tribal areas of Pakistan an entirely different structure for adjudication with regards to civil disputes and criminal cases, which act parallel to courts within the territories of Pakistan and should be declared as unconstitutional and unlawful; that all civil and criminal matters within the territories of Pakistan, in light of Article 175 of the Constitution which requires the separation of judiciary and executive, be adjudicated upon by the judiciary alone and any other formal or informal, legal or illegal bodies that pose as or attempt to act as courts in such regard be declared illegal and against the spirit of the Constitution and the relevant authorities be directed to ensure the elimination for the same.

16. At the very outset of the hearing the learned Advocate General for KPK states under instructions that there is no cavil to the unconstitutionality of the provisions of the FATA Interim Regulation and he does not wish to press the petition provided that a reasonable time of six months is granted to the Government of KPK to develop the required infrastructure, facilities and ancillary superstructure for courts of law in the area previously referred to as the Federally Administered Tribal Areas (FATA). The learned Deputy Attorney General, present in Court pursuant to the notice issued, conceded to the above statement of the Advocate General, KPK. Be that as it may, in view of the important question of law involved, this Court deems it expedient to make certain observations in this regard.

17. The FATA Interim Regulation was promulgated by the former President Mr. Mamnoon Hussain on 29.05.2018 after which on 30.05.2018, Article 247(7) of the Constitution was omitted vide the Constitution (25th Amendment) Act, 2018 (25th Amendment) and through an amendment in sub-Article (c) and the insertion of sub-Article (d) to Article 246 thereof, the areas defined as FATA as per Article 246(c) of the Constitution were merged with the Province of KPK. According to the preamble of the FATA Interim Regulation, it is intended to be an interim system of administration of justice, maintenance of peace and good governance in FATA

however, after the inclusion of FATA in the Province of KPK through the 25th Amendment after two days of the issuance of the Regulation, we are now faced with a situation where these newly added areas to the Province of KPK despite being part of the Province are subject to an entirely different mode of dispensation of justice from the rest of the Province making a prima facie case for discrimination in violation of Article 25 of the Constitution which guarantees equality of all persons before the law as well as Article 4 which guarantees the right to enjoy the protection of law and to be treated in accordance with the law as well as the principles laid down in the judgment of Government of Balochistan v. Azizullah Memon and others (PLD 1993 SC 341) as elaborated hereafter.

18. According to the respondents (writ petitioners), in many ways, the so-called interim dispute settlement system in the FATA Interim Regulation is a continuation of the obsolete means of settlement of disputes under the Frontier Crimes Regulation, 1901 (FCR). Prior to the omission of Article 247(7)[8] of the Constitution the jurisdiction of this Court and High Courts was expressly excluded with regards to any matter in relation to the Tribal Areas which included FATA as is evident from the language of the said constitutional provision:-

> "Article 247: Administration of Tribal Areas.
>
> (7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Majlis-e-Shoora (Parliament) by law otherwise provides:
>
> Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day."
>
> [Emphasis supplied]

Therefore, in deference to the above constitutional provision, no legislative instrument with regards to FATA including the FCR was ever examined on the touchstone of the Constitution by any superior court even though this Court had at several occasions expressed its opinion with regards to the lack of access to justice in the FATA area prominent amongst which are the observations of Justice A. R. Cornelius in Samundar v. The Crown (PLD 1954 SC 228) wherein he 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."

[Emphasis supplied]

The same opinion was held by Justice Abdul Rashid (the then Chief Justice of Pakistan) in Samundar's case (supra) in the following words:-

"It is to be noticed that under Section 11 of the Regulation [the FCR] a particular official namely, the Deputy Commissioner is authorized to refer a case to the Council of Elders so that it may after making enquiries, such as may be necessary, submit its findings to the Deputy Commissioner, who thereupon, if he accepts the finding of guilt can convict and pass a proper sentence (Section 12) subject to revision by the Commissioner (Section 50): It is evident that an order of the above nature cannot be regarded as having been made judicially by a court of law."

[Emphasis supplied]

Thus as early as 1954 this Court was of the opinion that proceedings under the FCR were in no manner regarded as proceedings by a court of law or proceedings in justice, but were merely administrative proceedings having no similitude to the modern principles of dispensation of justice. The observations of Justice Cornelius in particular reflect that this Court was aware of the consequences that such a system would have on public confidence in the justice system and expressed his fear in this regard, nevertheless the constitutional bar to judicial review of the provisions of FCR under Article 247(7) of the Constitution prevented this Court from holding such legislation to be against the fundamental rights of the FATA people having no or at best limited access to any judicial remedy. The same opinion has been expressed more recently in a judgment of the learned Peshawar High Court in the case of Abdul Bari and 2 others v. Director Livestock (PLD 2014 Peshawar 132) wherein it was held that:-

48. Under the FCR, citizens are deprived of the right to appeal, right to legal representation and the right to present reasoned evidence. Besides collective punishment is provided in clause 21 of FCR, which is imposed on anyone in the tribal areas for a crime committed by him or her relative, spouse, or even any other person from the same tribe and area. The political agent or his deputy, the assistant political agent, enjoys unbridled powers both executive and judicial. There is no regulatory mechanism to check misuse of power by the political agent which often results in serious human rights violations. The suspects are tried by a tribal jirga or Council which submits its recommendations regarding conviction or acquittal to the political agent. The political agent makes a decision regarding conviction or acquittal and is not bound by the jirga's recommendations. The orders of the political agent

cannot be challenged before the higher courts. In effect, there is virtually no separation of the judiciary from the executive in the FATA.

[Emphasis supplied]

It is evident from the foregoing judgments that the means of dispute resolution under the FCR was already recognized as redundant and there was an increasing need to drastically change the same in order to bring it in consonance with the ordinary courts of law which is in contravention of the principle of separation of powers (enshrined in Article 175 of the Constitution and in the general scheme of the Constitution) and any anticipated legislative change was expected to remove these anomalies. However, no substantial legislative change in this regard was seen even in the FATA Interim Regulation until the 25th Amendment wherein FATA was made part of the Province of KPK and Article 247(7) of the Constitution was omitted.

19. One immediate consequence of the omission of Article 247(7) ibid apart from the merger of FATA with the Province of KPK is that Azizullah Memon's case (supra) becomes squarely applicable to the discriminatory treatment being faced by residents of FATA in terms of access to justice, wherein a similar legal instrument, namely the Criminal Law (Special Provisions) Ordinance, 1968 (Ordinance of 1968) was declared to be void by this Court in the noted judgment, holding it to be in conflict with Articles 4, 8, 9, 25, 175 and 203 of the Constitution in the following words:-

"In cases of violation of fundamental rights the superior Courts are empowered to issue direction to the Federal Government or the Provincial Government to bring the law in conformity with fundamental rights and/or enforce law and issue notification in that regard. The State as defined in Article-87 is bound to discharge its Constitutional obligations. In case of failure even the legislature and executive can be directed to initiate legislative measures to bring law in conformity with the fundamental rights."

It was held that in light of the precedent laid down by this Court, there is unanimity in the view that class legislation is forbidden and whereas reasonable classification for purposes of legislation is permissible, such classification must be founded on intelligible differentia and there should be a nexus between the classification and the objects of the legal instrument holding that persons or things similarly situated cannot be distinguished or discriminated while making or applying the law. The relevant paragraph reads as under:-

" Thus, where the statutory functionary acts mala fide or in a partial, unjust, oppressive or discriminatory manner, his action can be challenged for violation of equality clause of the Constitution. In F.B. Ali's case PLD 1975 SC 506 the challenge to amendments in Pakistan Army Act and Ordinance IV of 1967 was made inter alia as violative of equality clause of 1962 Constitution. This Court repelled it on the basis of principles laid down in Waris Meah's case and observed that in this case if the Foreign Exchange Regulation Act had set up a Tribunal of exclusive jurisdiction, with a procedure different from the Code of Criminal Procedure, the challenge

would not have succeeded as the offenders under the Foreign Exchange Regulation could validly and reasonably be considered a different class from the offenders under the ordinary law. Fauji Foundation's case PLD 1983 SC 457 ruled that legislation in regard to an individual can be made provided it is not discriminatory. In I.A. Sherwani's case 1991 SCMR 1041 after considering the judgments in F.B. Ali's case PLD 1975 SC 506, Abdul Wali Khan's case PLD 1976 SC 57, Aziz Begum's case PLD 1990 SC 899,-Shirin Munir and others v. Government of Punjab PLD 1990 SC 295 and several judgments of the Supreme Court of India, the following principles were deduced.

i. that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

ii. that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;

iii. that different laws can validly be enacted for different sexes, persons in different age group, persons having different financial standings, and persons accused of heinous crimes;

iv. that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;

v. that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

vi. that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

vii. that in order to make a classification reasonable, it should be based---

a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

b) that the differentia must have rational nexus to the object sought to be achieved by such classification."

[Emphasis Supplied]

It is manifest from the above principles that classification is only permissible under the law where the same has been made on a rational and reasonable basis and although no singular standard of reasonableness can be deduced for such classification, it must be such that can be justified on an intelligible differentia identifying why the classification/distinction has been made and there must be a rational nexus to the object sought to be achieved by the classification. 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. Whether they be residents of FATA on one hand or of Peshawar or Mardan, etc. on the other, they cannot be discriminated against and any classification between them despite being residents of the same province, with no obvious or reasonably deducible distinction between them, will be arbitrary and against the recognized principles of natural justice and the rule of law. Thus, with the merger of FATA in the Province of KPK, by applying the ratio of Azizullah Memon's case (supra), it becomes expedient to ensure that all the residents of the Province of KPK (including the people of the erstwhile FATA) do not face any discrimination of the basis of their residential location and are accorded equal protection of the law, and their right to fair trial, access to courts and due process are secured. Nevertheless, it may be pointed out that as admitted in paragraph No.16 of Azizullah Memon's case (supra), courts of law had already been established in every district of Balochistan and in this background it was more practical to expect a uniform system of administration of justice in the entire Province. In contrast, in courts of law are yet to be established in the erstwhile FATA for which both infrastructure and human resource needs to be developed and for this a certain time-frame may be required, as has already been requested for by the Government of KPK. However, the practical difficulties in enforcing the fundamental rights guaranteed under the Constitution cannot serve as enough reason to deprive the people of the erstwhile FATA from benefiting from such rights. At best, a reasonable time may be granted to the Government of KPK to ensure that courts of law are available in all parts of erstwhile FATA and that the laws applicable to the rest of KPK are made equally applicable to them.

20. On grounds of discrimination which cannot be justified under any reasonable classification and the law laid down in Azizullah Memon's case (supra), we hereby hold that the FATA Interim Regulation as a whole is declared as ultra vires on the touchstone of Articles 4, 8, 25, 175 and 203 of the Constitution. The omission of Article 247(7) from the Constitution through the 25th Amendment is indeed a constitutional victory, however, this long-awaited change in the Constitution needs to immediately be reflected in the legal instruments governing the administration of justice in the erstwhile FATA. In recognizing the handicaps of adaptability of the local residents of FATA it must also be acknowledged that neither has the legislature nor the executive made any efforts to increase awareness or acceptability of courts of law in FATA for the past seventy years when the lack of adequate judicial remedies had been pointed out by the judiciary as far back as 1954. If even today, the legislature and the executive fall shy of their duty to provide these people with the same system of administration of justice as in place in the rest of the country then as guardians of the fundamental rights of the citizens of Pakistan, this Court must step in and direct that adequate measures be taken on ground level to ensure that not only are courts of law put in place, but the faith, trust and belief of these people is built up with regards to these courts and enough awareness is spread so that they approach the doors of justice as frequently and as

confidently as any other residents of KPK. As aptly held in this context by this Court in Azizullah Memon's case (supra):-

> "The law should have real nexus with the object. It is not sufficient to decorate the act by making provisions which may seemingly look like complying with the demands of justice as required by the Constitution but the effective and operative provision may in application be violative of these provisions."

Quoting the words of wisdom of the then Chief Justice of the Balochistan High Court, Justice S. A. Rahman who, when faced with a similar situation of having to strike down a similar law on the touchstone of the fundamental rights guaranteed under the Constitution in Malik Toti Khan and others v. District Magistrate Sibi and Ziarat (PLD 1957 Quetta 1), held that:-

> "I recognize that this decision may cause difficulties to the administration in Balochistan area where I understand that a sufficient number of judicial tribunals does not exist nor is adequate machinery for police investigation of criminal cases in existence. Such considerations, however, would be irrelevant when we are adjudicating on the effects of fundamental rights guaranteed by the Constitution. The remedy lies obviously with the legislature or with the executive authorities who can make good the deficiencies of the administration. The argument of inconvenience, cannot be allowed to override the Constitutional provisions guaranteeing fundamental rights to all citizens of Pakistan."

We are sanguine that the argument of inconvenience will not be adopted by the legislature or executive in enforcing the fundamental rights of the people of FATA and realizing their right to access to justice thereby reinforcing equality before the law for all. Since time has been sought by the Province of KPK for development of infrastructure, six months are granted from the date of announcement of this judgment. The Federal and Provincial Governments are directed to 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.

CONCLUSION:-[9]

21. 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 as 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 to 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.

MWA/N-1/S Order accordingly.

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