

THE IMPACT OF DEVOLUTION ON LEGISLATIVE REFORM RELATING TO LAW & ORDER IN PAKISTAN

A Policy Brief on Determining
Legislative Competences after the
18th Constitutional Amendment

Research Society of International Law, Pakistan

in collaboration with the
Konrad Adenauer-Stiftung, Pakistan



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The Impact of Devolution on Legislative Reform relating to Law and Order in Pakistan: A Policy Brief on Determining Legislative Competence after the 18th Constitutional Amendment by the Research Society of International Law, Pakistan in collaboration with Konrad Adenauer Stiftung, Pakistan.

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About RSIL

The Research Society of International Law is a research and policy institution whose mission is to conduct research into the intersection between international law and the Pakistani legal context. RSIL was founded in 1993 by Mr. Ahmer Bilal Soofi, Advocate Supreme Court of Pakistan, and aims to inform policy formulation on a national level through its efforts. The Society is a nonpartisan and apolitical organization, dedicated to examining the critical issues of law - international as well as domestic - with the intention of informing discourse on issues of national importance and effecting positive change in the domestic legal space.

To this end, RSIL engages in academic research, policy analysis and an approach of engagement with policy-makers and stakeholders in the domestic and international politico-legal contexts in order to better articulate meaningful and insightful national positions on these matters.

RSIL is staffed by a team of dedicated researchers and practitioners with a broad spectrum of specializations within international law, whose expertise covers the major policy areas and significant issues arising out of the intersection between the international and domestic legal spaces. The team contributes to the domestic legal policy discourse by conducting research and analysis into the challenges faced, both domestic as well as international, which arise out of the operation of the law.

About Konrad-Adenauer-Stiftung (KAS)

Freedom, justice and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). The KAS is a political foundation, closely associated with the CDU party. As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-Atlantic community of values, the vision of a unified Europe and an orientation towards the social market economy. His intellectual heritage continues to serve both as our aim as well as our obligation today.

In our European and international cooperation efforts we work for people to be able to live self-determined lives in freedom and dignity. We make a contribution underpinned by values to helping Germany meet its growing responsibilities throughout the world. We encourage people to lend a hand in shaping the future along these lines. With more than 70 offices abroad and projects in over 120 countries, we make a unique contribution to the promotion of democracy, the rule of law and a social market economy. To foster peace and freedom we encourage a continuous dialog at the national and international levels as well as the exchange between cultures and religions. Human beings in their distinctive dignity and with their rights and responsibilities are at the heart of our work. We are guided by the conviction that human beings are the starting point in the effort to bring about social justice and democratic freedom while promoting sustainable economic activity. By bringing people together who embrace their responsibilities in society, we develop active networks in the political and economic spheres as well as in society itself. The guidance we provide on the basis of our political know-how and knowledge helps to shape the globalization process along more socially equitable, ecologically sustainable and economically efficient lines.

We cooperate with governmental institutions, political parties, civil society organizations and handpicked elites, building strong partnerships along the way. In particular we seek to intensify political cooperation in the area of development cooperation at the national and international levels on the foundations of our objectives and values. Together with our partners we make a contribution to the creation of an international order that enables every country to develop in freedom and under its own responsibility.

In 2008 the Konrad-Adenauer-Stiftung opened an office in Pakistan. In the field of international cooperation we support strengthening of democracy and rule of law. Moreover, we intend to assist in the development of an economic system that takes into consideration social justice and concern for the environment. The KAS sponsors conferences, seminars and publications of its partners and conducts its own programmes as well.

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List of Abbreviations

ATA	Anti-Terrorism Act 1997
ATC	Anti-Terrorism Courts
APS	Army Public School
CCI	Council of Common Interest
Cr.P.C	Criminal Procedure Code 1898
FATA	Federally Administered Tribal Areas
FC	Frontier Corps
IBO	Intelligence Based Operations
IED	Improvised Explosive Devices
KP	Khyber Pakhtunkhwa
LHC	Lahore High Court
NAB	National Accountability Bureau
NAP	National Action Plan
PATA	Provincially Administered Tribal Areas
PPA	Protection of Pakistan Act 2014
N.W.F.P.	North-West Frontier Province
PML-N	Pakistan Muslim League-N

List of Case-law

Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir and others, PLD 2017 Lahore 489

Noor Daraz Khan v. Federation of Pakistan, PLD 2016 Peshawar 114

Dr. Iftikhar Ahmed, Senior Medical Officer, Abbotabad v. Government of Khyber Pakhtunkhwa, PLD 2016 Peshawar 212

Muhammad Kamran Mullahkhail v. Government of Balochistan, PLD 2012 Balochistan 57

Watan Party v. Federation of Pakistan, PLD 2011 SC 997

Messrs Quetta Textile Mills Ltd. through Chief Executive v. Province of Sindh through Secretary Excise and Taxation, Karachi and another, PLD 2005 Karachi 55

Zafarullah Khan v. Federation of Pakistan,
Writ Petition No. 16244/2002 (Lahore High Court)

Shamas Textile Mills Ltd. and others v. The Province of Punjab and two others,
1999 SCMR 1477

Mian Ejaz Shafi v. the Federation of Pakistan, PLD 1997 Karachi 604

Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs Hyderabad, 1990
CLC 456 [Karachi]

F.B. Ali v. the State, PLD 1975 SC 506

The Province of East Pakistan and others v. Sirajul Haq Patwari and others, PLD 1966
Supreme Court 854

Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi and the Islamic Republic of Pakistan, 1958 PLD 887 SC

President Balochistan High Court Bar Association v. Federation of Pakistan,
2012 SCMR 1958

Prafullah Kumar v. Bank of Commerce Khulna, PLD 1947 P.C. 1

United Provinces v. Atiqua Begum, 1940 FCR. 110

List of Legislation

Anti-Terrorism Act 1997
Anti-Narcotics Force Act 1997
Balochistan Police Act 2011
Code of Criminal Procedure 1898
Code of Criminal Procedure (Amendment) Act 2010
The Constitution of Pakistan 1973- 18th Amendment
The Constitution of Pakistan 1973- 21st Amendment
KP Control of Narcotics Substance Bill 2017
KP Ehtesab Commission Act 2014
Khyber Pakhtunkhwa Probation of Offenders Bill
KP Police Act 2017
National Accountability Ordinance 1999
Probation of Offenders Ordinance 1960
Protection of Pakistan Act 2014
Punjab Police Order (Amendment) Act 2013
Punjab Police Order (Amendment) Ordinance 2017
Sindh National Accountability Ordinance 1999 Repeal Bill
Sindh (Repeal of the Police Order, 2002 and Revival of the Police Act 1861) Act 2011
Qanun-e-Shahadat Order, 1984

PART ONE

Background

In April 2010, the Parliament passed the 18th Amendment to the Constitution of Pakistan. This amendment made wide-ranging changes to approximately 36 percent of Pakistan's Constitution, by amending 102 of its total 280 Articles.¹ The amendment came about in the context of a unified drive by political parties in Pakistan to reverse the constitutional changes made by military dictators in the past and institute civilian-led constitutional reforms.

Ultimately, the Eighteenth Amendment Bill was unanimously approved by Parliament. The political maturity displayed by all political parties during this process represented a historic moment in Pakistan's troubled democratic and constitutional history.

The principal impact of the 18th Amendment has been the institution of a paradigm shift in the structural contours of the State of Pakistan from a heavily centralized to a predominantly decentralized federation.² The legislative intent was to restore Pakistan's constitution to its original intent of a decentralized federation of provinces and reverse the consolidation of powers at the Centre after years of military and autocratic rule.³

The dramatic decentralization of power by virtue of the 18th amendment represented an opportunity for lawmakers to address some of the challenges that arose as a result of the law and order situation prevalent in the country at the time. However, the realignment of roles and responsibilities at the federal and provincial level has created an air of uncertainty especially with regard to the legislative competence of the Provinces. This has resulted in some provincial laws being rendered void by Courts due to their infringement on the competence of the Federation.

This Policy Brief provides a historical perspective to the political dynamics that led to the re-distribution of powers in the backdrop of an unstable and volatile security situation. It highlights the response of the State; both in terms of the success of the launch of counter-militant offensives and the formulation of the National Action Plan as well as the subsequent neglect in its implementation. The Policy Brief considers the neglect in implementation of the National Action Plan in light of the legislative measures that have

1 'Analysis: Five Years of the 18th Constitutional Amendment: Federalist Imperatives on Public Policy and Planning' UNDP http://www.pk.undp.org/content/pakistan/en/home/library/hiv_aids/development-advocate-pakistan-volume-2-issue-1/analysis-five-years-of-the-18th-constitutional-amendment-feder.html

2 Ibid.

3 Anwar Shah "The 18th Constitutional Amendment: Glue or Solvent for Nation Building and Citizenship in Pakistan?" (2012) 17 LJE <http://www.lahoreschoolofeconomics.edu.pk/EconomicsJournal/Journals/Volume%2017/Issue%20SP/16%20Shah%2018th%20Constitutional%20Amendment%20ed%20tcc%2001102012.pdf>

been stalled or declared void as a result of the confusion surrounding the competences of the two legislative tiers; namely the Federation and the Provinces. This has required us to delve into an analysis of the Constitutional framework and alleviate the current confusion regarding the delineation of the legislative lists and determine the subjects relating to law & order which fall within the competences of the Federation and those which fall within the competence of the Provinces. In making this determination, we have also relied on a wide range of case law containing useful judicial pronouncements and interpretations by the superior courts in Pakistan.

This Policy Brief is aimed to serve as a guide for academics, legal practitioners and civil society members on the contours of law and order in Pakistan and the legislative competence related thereto. It is specifically useful for members of the government who are tasked with policy formulation and execution; parliamentarians who are responsible for drafting and approving legislation pertaining to law and order and finally; members of the judiciary and legal community who must interpret and apply the law in conformity with the Constitution.

PART TWO

A Brief Constitutional History of Pakistan and Devolution

Pakistan's Constitutional history has witnessed an oscillation between a federal system of governance to one that was partially unitary in nature and back. The struggle for balancing central powers with those of the federating units (the Provinces and princely states), was one which Pakistan tried to grapple with since its inception.⁴ The 1956 and 1962 Constitutions of Pakistan gave the Center a pre-eminent role with limited provincial autonomy.⁵ In 1954, Prime Minister Muhammad Ali Bogra introduced the 'One Unit' scheme wherein the three Governor's provinces (NWFP, Punjab, and Sindh), one Chief Commissioner's province (Balochistan), and a number of acceding states and tribal areas were merged into a single Province – 'West Pakistan', and the eastern region which comprises modern day Bangladesh became 'East Pakistan'.⁶ In a notable speech in 1954, Prime Minister Bogra stated, "There will be no Bengalis, no Punjabis, no Sindhis, no Pathans, no Balochis, no Bahawalpuris, no Khairpuris. The disappearance of these groups will strengthen the integrity of Pakistan."⁷ Proponents of the 'One Unit' scheme stated it would curb provincial prejudices, reduce administrative waste and expenses, allow for the development of neglected areas, and give greater autonomy to the two newly created Provinces.⁸ However, the scheme elicited strong resentment from the smaller Provinces of N.W.F.P, Balochistan, and Sindh, and was seen as a means to counter-balance the Bengali majority in East Pakistan. This centralization of both legislative and executive powers led Provinces to feel alienated and further destabilized the already volatile political arena in Pakistan. By 1970, General Yahya Khan abandoned the scheme, however, the following year East Pakistan seceded and a new constitutional setup was sought.⁹

The events leading up to the creation of Bangladesh weighed heavily on the drafters of the 1973 Constitution. Devolution was a demand that could no longer be ignored and the Provinces pushed for a more equitable constitutional scheme for the smaller

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- 4 Naazir Mahmood, 'Formation Of One Unit' The News on Sunday (26 July 2015) <<http://tns.thenews.com.pk/formation-of-one-unit/#.WcCJX62B1cw>> accessed 1 November 2017
 - 5 Raza Rumi, 'The 18th Amendment: An Overview, Devolution: Provincial Autonomy and the 18th Amendment' (Jinnah Institute 2015) <<http://jinnah-institute.org/wp-content/uploads/2015/02/Devolution-Report.pdf>> accessed 1 November 2017. p. 14-15
 - 6 'West Pakistan Established As One Unit' Story Of Pakistan (1 June 2003) <<http://storyofpakistan.com/west-pakistan-established-as-one-unit/>> accessed 1 November 2017
 - 7 Prime Minister M.A. Bogra, first official announcement of the 'One Unit' scheme, 22 November 1954.
 - 8 Governor General of Pakistan, Iskander Mirza reasons given to the Constituent Assembly for adopting the 'One Unit' scheme, September 1955.
 - 9 Raza Rumi, 'The 18th Amendment: An Overview, Devolution: Provincial Autonomy and the 18th Amendment' (Jinnah Institute 2015) p. 15

Provinces. The 1973 Constitution was drafted with devolution in mind and through a participatory mechanism. The resultant text of the Constitution was the largest redistribution of legislative and executive competences since Independence.

In terms of legislative powers, the 1973 Constitution envisaged three categories for the allocation of legislative competences between the Federation and the Provinces. The first category – the Federal Legislative List, enumerated all areas in which the Parliament of Pakistan (National Assembly and Senate) would exclusively exercise its legislative powers. The second category was the Concurrent Legislative List, which listed subjects on which both the National Parliament as well as Provincial Assemblies could legislate, with the proviso that Federal laws would take precedence over provincial laws in case of conflict. The final category referred to as residual subjects would entail all other areas of legislation which had not been expressly mentioned in the Federal or Concurrent Legislative Lists. All residual subjects fell within the exclusive legislative competence of the Provinces.

Despite this relative devolution, subsequent federal governments continued to wield considerable power and utilized their pre-eminent position in terms of legislation on concurrent subjects. During the 1990s, successive civilian governments maintained this status quo. With General Musharraf's coup in 1999, concentration of power in the hands of the Chief Executive and subsequently the President was a staple of his government. Nowhere was this more apparent than the highly controversial 17th Amendment to the Constitution passed in 2003 which gave the President powers to dissolve the assemblies. President Musharraf's attempt at instituting local-level government at the District and Tehsil level were mired in problems and were not acceptable to the political class of Pakistan. By the time the 2008 elections came about, all political parties had made comprehensive devolution a priority and the victory of the Pakistan People's Party led to a concerted effort to bring about such reforms.

After the 2008 elections a 26-member Parliamentary Committee, representing members of all major political parties, was established with the mandate of repealing President Musharraf's 17th Amendment to the Constitution. The Committee quickly expanded its mandate to include elements that would enhance good governance, accountability, as well as provincial autonomy.

On 8th April 2010, the Parliament of Pakistan through unanimous votes in both the National Assembly and the Senate passed the 18th Constitutional Amendment. The amendment would be the greatest redistribution of legislative and executive powers since the 1973 Constitution. In total 102 amendments were made to the Constitution. While the complete set of amendments made to the Constitution is outside the scope of this policy brief, the changes in relation to legislative competences will be discussed.

In terms of redistribution of legislative competences, the 18th Amendment may be considered a revolutionary instrument in that it did away with the Concurrent Legislative List altogether and reduced some of the competences in the Federal Legislative List by devolving them to the Provinces. In essence, there now remained only the Federal Legislative List which enumerated subjects exclusively within the legislative competence of the National Assembly of Pakistan. All other legislative subjects would fall in the residual category, i.e. within the exclusive legislative domain of the Provinces.

While the Concurrent Legislative List was abolished, the drafters of the 18th Amendment did create one exceptional category wherein the old scheme of concurrent legislative powers would remain, namely, 'criminal law, criminal procedure, and evidence.'¹⁰ This policy brief aims to examine the various problems and opportunities that have arisen in relation to law and order, the fight against terrorism, and the implementation of the National Action Plan under the legislative scheme outlined in the Constitution of Pakistan as amended by the 18th Amendment.

10 Constitution of the Islamic Republic of Pakistan 1973, art. 142 (b)
'Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.'

PART THREE

Law and Order Situation at the time of the 18th Amendment

The 18th Amendment came into full effect by July 2011 and represented a remarkably short implementation period for an instrument designed to make broad, sweeping changes to the Constitution and governance structures in Pakistan. Interestingly, this period also coincided with the largest spike in terrorism incidents in Pakistan's history.

Between 2009-2011, Pakistan witnessed a huge surge in terrorism. In 2009, there was a dramatic increase in violence with 80 reported suicide attacks and a total of 11,704 fatalities. However, the total number of fatalities also included 8389 terrorists which were a result of Military Operations Black Thunder Storm and Rah-e-Nijat.¹¹

While the number of fatalities in 2009 was considerably higher in comparison to the years 2010 and 2011, it can be seen in Table 1 below that the number of civilian casualties was the highest in the year 2011 with a correspondingly low rate of terrorist/insurgent casualties. As such, the 18th Amendment came into effect at a time when the law & order situation in the country had reached its lowest ebb.

YEAR	CIVILIANS	SECURITY FORCES PERSONAL	TERRORISTS INSURGENTS	TOTAL
2009	2324	991	8389	11704
2010	1796	469	5170	7435
2011	2738	765	2800	6303

Table 1 : *Terrorism Related Fatalities. All data has been taken from the South Asia Terrorism Portal*

During these critical years, the Anti Terrorism Courts (ATCs) established under the Anti-Terrorism Act 1997 witnessed dismally low rates of convictions and the State was unable to translate its military gains into prosecutorial victories. It was found that between the years 2008 and 2014, 5841 out of a total 7565 alleged terrorists were released by the courts. The Table below provides a breakdown of the cases decided by ATCs which highlights the failure of the criminal justice system and the general state machinery.

11 'Fatalities in Terrorist Violence in Pakistan 2003-2017' (SATP 2017)
<http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm>

YEAR	CASES DECIDED		
	ACQUITTED	CONVICTED	TOTAL
2008	517	211	728
	32%	13%	45%
2009	649	235	884
	32%	11%	43%
2010	1048	282	1330
	40%	11%	51%
2011	1210	228	1438
	42%	8%	50%
2012	1300	264	1564
	40%	8%	48%
2013	896	408	1295
	26%	12%	38%
2014 (up to June)	221	105	326
TOTAL	5841	1733	7565
	72.4% of Decided Cases	22.9% of Decided Cases	

Table 2: Cases Decided by ATCs from 2008-2014

LAW & ORDER IN KARACHI

The situation in Karachi during this period was particularly dire and prompted the Supreme Court of Pakistan to take suo moto notice of the law and order situation in the city in 2011. The landmark judgment in *Watan Party v. Federation of Pakistan*¹² exposed the inherent weaknesses of the provincial government in dealing with the multi-faceted nature of the violence wreaking havoc on the city and the confusion between the Federal and Provincial government on how to tackle the situation. According to the Supreme Court, there was “substantial evidence that Karachi has reached the verge of destruction posing a threat to the very stability of Pakistan.”¹³

¹² Watan Party and another v. Federation of Pakistan and others, PLD2011 SC 997

¹³ *ibid.*

It was argued in this case that no amount of application of kinetic means, through Rangers or the Army, could provide a long-term solution for a problem which vested in the political processes of the country.¹⁴ The way forward required an up-gradation of the criminal justice system with better trained prosecutors and improved forensic techniques.

The Court in its judgment also highlighted the lack of cohesion between the Provincial and Federal Government. It was held that while it is the primary duty of the executive authorities to control the law and order situation and implementation of fundamental rights in the Province, the Federation is equally responsible to protect every Province from internal disturbance and external aggression.¹⁵ Therefore, the provincial and federal government have to work in coordination to ensure that disturbances in the Provinces are controlled. It is the provincial and federal government that together owe a duty to the citizens of their Province to ensure that their fundamental rights are protected.¹⁶

VIOLENCE IN BALOCHISTAN

The law and order conditions prevalent in Balochistan during this period also hit a new low and resulted in the President of the Balochistan High Court Bar Association filing a Constitutional Petition in the Supreme Court of Pakistan which sought to enforce the fundamental rights of the citizens of the Province. The capacity constraints of the provincial government and lack of coordination with the federal government was in full display during court proceedings and resulted in a scathing judgment where the Supreme Court went as far as to say that the provincial government had lost its constitutional authority to govern the Province because of violation of fundamental rights of the people of Pakistan.¹⁷

In view of the grievance of the petitioners that no effective steps had been taken by the federal government in relation to the dismal law and order situation in Balochistan, the Court held that it is the responsibility of both the federal and provincial governments to ensure that fundamental rights are enforced in the Province.¹⁸

The judgment highlighted the need for a unified and comprehensive response by the provincial and federal governments to tackle the law and order situation prevalent at the time.

14 *ibid.* at para 37

15 *ibid.* at para 55

16 *ibid.* at para 127

17 *President Balochistan High Court Bar Association v. Federation of Pakistan*, 2012 SCMR 1958

18 *ibid.* at para 49

Dawn News, 'Governor Rule to be Imposed in Balochistan' Dawn (13 January 2013) available at

<<https://www.dawn.com/news/778500>> accessed 8 November 2017; Saleem Shahid 'Apex Court Hearing on Balochistan CJ Speaks of Emergency to Restore Sanity' Dawn (23 May 2012) available at

<<https://www.dawn.com/news/720863>> accessed 8 November 2017.

Dawn News, 'Special Report: Are New Anti-Terror Laws an Exercise in Futility?' (2016) available at

<<https://www.dawn.com/news/1239696>> accessed 7 November 2017.

In the light of these rulings and remarks by the Supreme Court as well as a general feeling that the situation in certain parts of the country was slipping out of control, speculations became rife of drastic constitutional measures such as the imposition of Governor rule in the Provinces, the imposition of emergency or requisitioning the armed forces to act in aid of civil power.¹⁹

THE STATE'S PIECEMEAL COUNTERTERRORISM RESPONSE STRATEGY

The general elections in 2013 saw the Pakistan Muslim League-N (PML-N) sweep to power with a sizable majority in the National Assembly. Eager to appear tough on counter-terrorism and law & order, the federal government promulgated the draconian Protection of Pakistan Act, 2014 ("PPA"). The PPA at the time was hailed by the Government as a panacea for the deteriorating security situation in the country and was scheduled to expire after a period of two years.

However, it remained paralyzed in its application due to glaring legal defects and grossly uneven implementation at the provincial level. The Special Courts established under the Act remained dysfunctional because of delays in notifications by the provincial governments,²⁰ delay in the appointment of judges as well as poor security and lack of staff. By the time the sunset clause under the Act came into effect, the Special Courts under the PPA remained stillborn and not a single case was decided under the Act.²¹

The 2013-2014 period also saw divergence of opinion on the option of dialogue with the militants attacking the State. The provincial government in Khyber-Pakhtunkhwa was firmly in favour of a negotiated settlement with the Taliban and believed the deteriorating law and order situation could only be remedied if the federal government distanced itself from the US-led war on terror.²²

In summary, the State of Pakistan's response to the extraordinary law and order situation existing within its borders during the period between 2009-2014 was characterized by a general lack of direction and ineffective policy responses. The constitutional surgery undertaken by the 18th Amendment coincided with one of the most volatile periods in Pakistan's history and exposed the Provinces to an extraordinary situation for which they were not prepared.

19 Reema Omer, 'POPA: An Ineffective Law' Dawn (19 July 2016) available at <<https://www.dawn.com/news/1271630>> accessed 8th November 2017

20 Ferya Ilyas and Hasan Ali 'K-P govt cannot succeed without national terrorism policy: Khan' The Express Tribune (24 June 2013) <<https://tribune.com.pk/story/567652/provincial-govt-cannot-succeed-in-k-p-without-national-terrorism-policy/>>

21 Reema Omer, 'POPA: An Ineffective Law' Dawn (19 July 2016) available at <<https://www.dawn.com/news/1271630>> accessed 8th November 2017

22 Ferya Ilyas and Hasan Ali 'K-P govt cannot succeed without national terrorism policy: Khan' The Express Tribune (24 June 2013) <<https://tribune.com.pk/story/567652/provincial-govt-cannot-succeed-in-k-p-without-national-terrorism-policy/>>

PART FOUR

The State's Renewed Resolve to Fight Terrorism

The State of Pakistan acquired a renewed resolve to turn the tide against terrorism after the attack on Jinnah International Airport, Karachi²³ in June 2014 which resulted in the formal initiation of military operations against militants residing in North Waziristan Agency in the Federally Administered Tribal Areas ("FATA") and the watershed attack at the Army Public School, Peshawar²⁴ in December 2014. The intervening years since then have witnessed a remarkable reduction in violence in the country. Today, violence from non-state actors has dropped to pre-2004 levels.²⁵

MILITARY OPERATIONS

Zarb-e-Azb

Code-named Zarb-e-Azb (meaning sharp strike/fatal blow), the operation was launched with the objective of comprehensively flushing out all local and foreign militants in North Waziristan. The operation witnessed the involvement of up to 30,000 troops and the use of aerial bombardment by fighter jets, gunship helicopters, artillery shelling, and even armed drones. Zarb-e-Azb resulted in a significant improvement in the overall security situation in the country with terrorist attacks dropping to a six-year low since 2008.²⁶ The Table below provides the figures related to Operation Zarb-e-Azb.²⁷

Terrorists Killed	3500
Hideouts Destroyed	992
Pakistani Army soldiers lost	490
Intelligence based operations (IBOs)	19000

Table 3: *Statistics of Operation up until June 2016*

23 'Gunmen Kill 13 at Karachi Airport' (BBC News, 2014) <<http://www.bbc.com/news/world-asia-27757264>> accessed 16 November 2017.

24 'Taliban Massacre Children at School' (BBC News, 2014) <<http://www.bbc.com/news/world-asia-30491435>> accessed 16 November 2017.

25 'Fatalities in Terrorist Violence in Pakistan 2003-2017' (SATP 2017) <<http://www.satp.org/satporgtp/countries/pakistan/database/casualties.htm>> accessed 7 November 2017.

26 'Army Chief inaugurates Wana Cadet College' The Nation (17 September 2015) <http://nation.com.pk/17-Sep-2015/army-chief-inaugurates-wana-cadet-college>; Mehr Ispahani "Zarb-e-Azb: a shining legacy of Raheel Sharif" Daily Times (14 November 2016) <https://dailytimes.com.pk/46050/zarb-e-azb-a-shining-legacy-of-raheel-sharif/>

27 '490 soldiers, 3500 militants killed Operation Zarb-e-Azb so far: DG ISPR' The Express Tribune (15 June 2016) <https://tribune.com.pk/story/1123356/dg-ispr-addresses-press-conference-afghanistan-pakistan-border-clashes/>

Radd-ul-Fasaad

Operation Zarb-e-Azb was followed by a country-wide operation code-named Radd-ul-Fasaad (meaning elimination of discord) after a resurgence of deadly terrorist incidents in February 2017.²⁸

The launch of this operation highlights the fact that beyond tactical measures, no serious institutional effort had been made to tackle extremism in Pakistan resulting in a recurrence of violence despite the widely acclaimed success of Zarb-e-Azb.

Operation Radd-ul-Fasaad is currently underway and the Table below highlights some of the action that has taken place under the Operation since May 2017.²⁹

DATE	ACTION
09.05.2017	FATA: IBOs conducted; arms and ammunitions, explosives etc. recovered Punjab: IBOs conducted; suspects apprehended
12.05.2017	Major terrorist act averted in Parachinar
20.05.2017	Terrorists hideouts and camps destroyed
04.06.2017	Foiled major terrorist activities in Balochistan
16.06.2017	Major terrorist activity foiled in DG Khan. Recovered huge quantity of weapons from village in North Waziristan Agency
19.06.2017	Joint Op apprehended 20 suspects and weapons from area around Kharian and Sarai Alamgir
20.06.2017	Two terrorists killed at check post near Dewana Baba Ziarat
28.06.2017	Balochistan Liberation Army activist Abdul Rasool and his group surrendered to Security Forces
16.07.2017	FC troops repulsed an attempted terrorist attack on Shoaib Nikka post, Balochistan
31.07.2017	FC Balochistan foiled major terrorist activity by recovering 2000kg explosives
16.08.2017	Punjab Rangers apprehended 7 terrorists and 20 Afghan suspects along with weapons.

28 'At Least 70 Dead As Bomb Rips Through Lal Shahbaz Shrine In Sehwan, Sindh' (DAWN.COM, 2017) <<https://www.dawn.com/news/1315136>> accessed 15 November 2017.

29 Operation Radd-ul-Fasaad, Updates Archives (ISPR) <https://www.ispr.gov.pk/front/main.asp?o=t-radd-ul-fasaad-archive>

26.09.2017	IBOs conducted in areas of Khyber Agency. Cache of arms and ammunition recovered
07.10.2017	Major terrorist activity averted in Balochistan
01.11.2017	IBOs conducted in South Waziristan Agency; arms and ammunition recovered

Despite the action taken under Operation Radd-ul-Fassad, commentators have been skeptical of its success especially since Operation Zarb-e-Azb did not manage to 'break the back of terrorism in Pakistan, as was intended by the Army.'³⁰

POLICY RESPONSE TO TERRORISM: NATIONAL ACTION PLAN

The other watershed moment for Pakistan's counter-terrorism strategy came on 16 December 2014, when the barbaric attack on the Army Public School (APS) in Peshawar resulted in the massacre of 145 people including 132 school children. This ghastly incident rallied the nation against these violent non-state actors like never before, with citizens demanding a swift and decisive response from the state. This led to the government devising a National Action Plan ("NAP") in light of the consensus reached by all political parties at an All Parties Conference on 24 December 2014.

In total, the NAP has twenty action points requiring extensive actions and intricate coordination between the Federation and Provinces. These are provided in the Table below.

ITEM NUMBER	POINT
1	Implementation of death sentence of those convicted in cases of terrorism
2	Special Trial Courts under the supervision of Army
3	Military outfits and armed gangs will not be allowed to operate in the country
4	NACTA, the anti-terrorism institution will be strengthened
5	Strict action against the literature, newspapers and magazines promoting hatred, extremism, sectarianism and intolerance
6	Choking financing for terrorist and terrorist organizations
7	Ensuring against re-emergence of proscribed organizations

30 Nazir Ahmad Mir, 'Operation Radd-ul-Fasaad: Timely, but Unlikely to Succeed' (IDSA, March 2017) https://idsa.in/idsacomments/operation-radd-ul-fasaad_namir_170317

8	Establishing and deploying a dedicated counter-terrorism force
9	Taking effective steps against religious persecution
10	Registration and regulation of religious seminaries
11	Ban on glorification of terrorists and terrorist organizations through print and electronic media
12	Administrative and development reforms in FATA with immediate focus on repatriation of IDPs
13	Communication network of terrorists will be dismantled completely
14	Measures against abuse of internet and social media for terrorism
15	Zero tolerance for militancy in Punjab
16	Ongoing operation in Karachi will be taken to its logical end
17	Balochistan government to be fully empowered for political reconciliation with complete ownership by all stakeholders
18	Dealing firmly with sectarian terrorists
19	Formulation of a comprehensive policy to deal with the issue of Afghan refugees, beginning with registration of all refugees
20	Revamping and reforming the criminal justice system

Table 4: *Twenty Points of the National Action Plan*

Policy Implementation vis a vis Point 20 NAP (Reform of the Criminal Justice System)

The gains of military operations are fragile in the face of a criminal justice system that is found wanting. The implementation of Point 20 of the National Action Plan requires a reform in the criminal justice system. This is necessary to effectively prosecute terrorists and militants who are apprehended during military offensives.

The high rate of acquittal of terrorist suspects pays homage to a systemic weakness in the anti-terrorism framework of the State. At a practical level, law enforcement personnel vitiate cases by committing procedural defects relating to the investigation of cases and the collection of evidence. For individuals captured from designated operation areas, the evidence is difficult, if not impossible, to obtain and produce in Court. In many cases, the issue of chain of custody of evidence becomes a problem whereby valuable information is lost. Furthermore, the lack of inter-agency coordination in terrorism investigation also results in ineffective case preparation. All

these factors together lead to dismally low rates of conviction. Therefore, institutional reforms in the police and judiciary are necessary to ensure that the fight against terrorism is not only limited to the battlefield but is also translated into actual courtroom successes against militants.

The low conviction rates of terrorists and militants is also attributed to the legal framework that pertains to their prosecution. Pakistan's primary legal tool to counter terrorism for the past two decades has been the Anti-Terrorism Act 1997. The ATA's special courts, referred to as Anti-Terrorism Courts (ATCs), were established to reduce the burden on ordinary criminal courts and ensure speedy trials and reduce inordinate delays in the conclusion of cases. However, the performance of these ATCs has been the subject of much criticism for two primary reasons. Firstly, as a result of the high rate of acquittals due to procedural irregularities and secondly, due to the overburdening of the Courts and slow dispensation of justice. The latter corresponding with the broad definition of terrorism provided for in the ATA.

Compounding the problem is the lack of modern legislation to deal with the fight against terrorism that has lasted more than a decade. The primary law on criminal procedure i.e. the Criminal Procedure Code (Cr.P.C)³¹ dates back to 1898; the main law pertaining to evidence was passed in 1984³² and general penal laws in the country are also archaic and do not reflect modern realities of terrorism. Moreover, the Police is deeply rooted in the Cr.P.C culture and fails to use mechanisms provided for in the ATA especially those relating to witness protection and investigation. Adding to the larger problem of radicalization and extremism is the fact that there is no concerted effort to devise a de-radicalization law and policy. In the absence of a framework to de-radicalize extremists, the gains of military offensives become potentially reversible.

The failures of the criminal justice system, as highlighted above, became painfully clear in the aftermath of the APS tragedy. Frustrated with the inordinate delays in trials of terror suspects and their low conviction rates by the civilian courts including the special anti-terrorism courts, the government felt that military courts were a necessity in the prevailing circumstances and this was included as a key element in NAP to try certain 'hard-core' terror suspects.

The 21st Amendment to the Constitution provided legal cover to the establishment of military courts to try civilian terrorist subjects for a period of two years. During the intervening period, it was envisaged that wide-ranging and comprehensive reforms would take place in the criminal justice system pursuant to Point 20 of NAP, resulting in an effective civilian led response to terrorism in the country.

31 Code of Criminal Procedure, 1898, Act V of 1898

32 Qanun e Shahadat Order, 1984, Act X of 1984

Regrettably, point 20 of NAP remains the most neglected of all action points today.³³ Virtually no meaningful progress has been witnessed on criminal justice reform in the past three years at the federal or provincial level. The lack of tangible results on this front has unfortunately resulted in a further extension of the military courts mandate for a period of two years. The military courts are now set to expire in January 2019.

The failure to initiate meaningful reform vis-à-vis the criminal justice system has been an important factor in the overall weak implementation of the NAP, since 12 of its total 20 points (or 60%) have a clear nexus with criminal justice requiring effective and well-functioning institutions for their execution.

Policy Implementation & the 18th Amendment

While there are many reasons for the poor progress on criminal justice reforms in Pakistan, one of the major impediments to reform is the lack of clarity on distribution of legislative powers between Federation and Provinces on criminal law & procedure following the 18th Amendment. By virtue of Article 142 of the Constitution (as amended by the 18th Amendment), both Parliament and a Provincial Assembly shall have power to make laws with respect to **criminal law, criminal procedure and evidence**.

In other words, while the executive power to deal with issues of law and order is primarily with the Provinces, they do not have a monopoly over the ability to legislate on these issues. The Federation may also legislate in such areas. In fact, under Article 143 of the Constitution, the federal law would take priority in cases where a federal and a provincial law clash.

This has led to immense confusion at the provincial level impacting reform efforts in relation to the police, counter-terrorism, probation, parole, custodial and non-custodial sentencing, preventive detention, countering violent extremism, rehabilitation etc. Police Reform has been particularly delayed in this regard, as the Provinces were unsure whether they had the competence to legislate in this area.

Another area of concern relates to probation and parole wherein the Provinces have executive control over the Reclamation and Probation Departments but, heretofore, have not been able to amend the Federal Probation of Offenders Ordinance 1960 which establishes these departments. Similarly, Provincial Counter-Terrorism Departments are saddled by the Federal Anti-Terrorism Act of 1997, thus preventing any province specific amendments as such.

33 Saad Ahmed Dogar, 'What has NAP achieved so far?' The Express Tribune (30 January 2017) <<https://tribune.com.pk/story/1307640/nap-achieved-far/>>; PILDAT, "Monitor on Implementation of National Action Plan to Counter Terrorism" (May 2017) <http://www.pildat.org/eventsdel.asp?detid=936>; "The NAP also speaks about improving the criminal justice system, but to date progress on this front has been lackadaisical and stagnant." Zeeshan Salahuddin, "Is Pakistan's National Action Plan Actually Working?" The Diplomat (24 December 2016) <<https://thediplomat.com/2016/12/is-pakistans-national-action-plan-actually-working/>>

In certain limited areas, the Provinces have attempted to push the boundaries of the Constitutional provisions yet due to the uncertainty inherent in this particular area, comprehensive reform remains far off.

The subject of law and order is vast in itself and could impact a range of areas in which the Provinces exercise executive control. If the executive function does not coincide with legislative competence to enact laws to improve the functioning of the executive, it can result in serious implications for the country.

Further, while incidences of terrorism have significantly dropped in the past few years, this is primarily attributable to Operation Zarb-e-Azb conducted in the FATA/PATA region. With no substantive improvements in prosecution capabilities in Anti-Terrorism Courts, the PPA's Special Courts never being operationalized, and Military Courts trying only a fraction of the suspected terrorists, there are no grounds to suggest that the legal changes played a role in this reduction in terrorist activity.

There is a fear, however, that the reduction in violence may be temporary and might rebound once kinetic actions subside. Further, the lull in violence should not lead to complacency on the part of the federal and provincial governments and legislatures as many of the successes in the battlefield are lost in Courts. Therefore, unless comprehensive reforms of criminal justice institutions, law and procedure are not undertaken, the effective implementation of the National Action Plan will remain hamstrung.

PART FIVE

Applicable Constitutional Framework

The 18th Amendment has changed the structural contours of the Constitution in Pakistan. The following section considers these changes in the back-drop of the applicable constitutional framework and the legal challenges that arise as a result of the two-tier competence for criminal law, procedure and evidence in Pakistan.

ARTICLE 142 (C)

Concurrency refers to the simultaneous authority of the Federation and Provinces over subjects of mutual importance.³⁴ The Concurrent List scheduled to the Constitution of Pakistan 1973 was abolished as per the 18th Amendment. The Federal Legislative List however remained intact subject to a few additions. Thereafter, the subjects which are not part of the Federal Legislative List constitute residuary subjects and are considered to be in the domain of the Provinces. Article 142 (c) of the Constitution allows the Provincial Assembly to legislate on any matter not contained in the Federal Legislative List by stating that 'a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.'

ARTICLE 270 AA

However, it is crucial to note that despite the abolishment of the Concurrent List, federal statutes continue to hold the field in light of **Article 270AA** which states that:

Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority.

ARTICLE 142 (B)

Moreover, **Article 142 (c)** is subject to **Article 142 (b)** which reads as: '*Subject to the*

34 Amir Goraya, Concurrent List: 1973 Constitution and Recent Political Developments (2010) The forum of Federations Project. Available at <http://webcache.googleusercontent.com/search?q=cache:QxpqyxgYX8QJ:www.civiceducation.org/wp-content/uploads/2010/08/Constitutions-concurrency-current-events.doc+&cd=1&hl=en&ct=clnk&gl=pk>

*Constitution Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to **criminal law, criminal procedure and evidence.***

Prior to the 18th amendment the Concurrent List scheduled to the Constitution contained **criminal law, criminal procedure and evidence** as items 1, 2 and 4 respectively. However, under Article 142(b), legislative competence vis a vis these three subjects is retained by the Federation and Provinces concurrently.

ARTICLE 143

Article 143 of the Constitution operates to resolve repugnancy between Federal and Provincial Statutes. It states:

If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.

A harmonious reading of Article 142(b) and 143 makes it apparent that both the Federation and Provinces can enact legislation pertaining to criminal law, criminal procedure and evidence but that Federal law will prevail in case of a discrepancy. The combined effect of both the Articles is that a 'new criminal concurrent field has been established as far as criminal law, criminal procedure and evidence are concerned'.³⁵

LEGAL CHALLENGES VIS A VIS PROVINCIAL LEGISLATIVE COMPETENCE

The intention for retaining legislative competence for criminal law, criminal procedure and evidence is to ensure uniformity. This was confirmed by Justice Qazi Faez Isa in a judgment of the Balochistan High Court³⁶ wherein it was held that the Constitution required uniformity of criminal laws, Criminal Procedure Code 1898 (Cr.P.C.) and evidence in Pakistan leaving provinces to legislate only in respect of such matters not already covered by federal law.³⁷

The need for uniformity in these areas is crucial because of their impact on the fundamental rights of citizens. This is so because a non-uniform application of criminal law, procedure and evidence may lead to an unequal treatment of individuals in

35 Kamran Adil, "Criminal Law and the Eighteenth Amendment of the Constitution of Pakistan" available at <https://www.academia.edu/13063718/CRIMINAL_LAW_AND_THE_EIGHTEENTH_AMENDMENT_TO_THE_CONSTITUTION_OF_PAKISTAN>

36 Muhammad Kamran Mullahkhail v. Government of Balochistan, PLD2012 Balochistan 57

37 Ibid. at page 93

different provinces which goes against the precept of the fundamental right of equality enshrined in the Constitution.³⁸

The introduction of Article 142(b) has created an ambiguous environment in relation to the said areas bearing in mind that the responsibility for maintenance of law and order vests primarily with the Provinces. This ambiguity stalls the process of criminal justice reform through provincial legislation and exposes such laws to challenge in Courts.

This problem was manifested in the case concerning the promulgation of the Code of Criminal Procedure (Amendment) Act 2010 whereby the Balochistan High Court held that in terms of Article 143 of the Constitution, the amendment was void ab initio. Similar amendments have been made in Sindh which in light of this judgment may also be open to challenge thereby creating hurdles in the criminal justice reform process.

A similar issue arose in the case related to the Sindh National Accountability Ordinance 1999 Repeal Bill wherein the Sindh Assembly passed a Bill for repealing the National Accountability Ordinance 1999 in light of the 18th Amendment. This Bill has been challenged in the Sindh High Court on the grounds that keeping in view the provisions of Article 142 and 143, the Sindh Assembly is not empowered to restrict the jurisdiction of NAB in the Province.³⁹

Furthermore, in Khyber Pakhtunkhwa, the promulgation of the KP Ehtesab Commission Act 2014 was challenged in the Peshawar High Court. It was argued that in view of Article 143 of the Constitution, the NAB Ordinance of 1999, being a federal law, should prevail over provincial law and should be declared ultra-vires of the Constitution. A five-member bench of the Peshawar High Court clarified that both the Parliament and the Provincial Assembly had the powers to legislate on this matter provided that these laws supplemented each other and were not in conflict.⁴⁰

The KP Control of Narcotics Substance Bill 2017 is also illustrative of the uncertainty surrounding the legislative competence of the Federation and Provinces. The Bill aims to limit the jurisdiction of the Anti Narcotics Force which operates under the Anti Narcotics Force Act 1997, a federal statute. The abolished Concurrent List included opium, drugs and medicines and poisons as well as dangerous drugs. Thus, framers of the present Bill believe that as the Concurrent List no longer exists, the Provincial Legislature has the sole competence to legislate on subjects that are not part of the Federal Legislative List. However, this Bill is open to challenge as it is contrary to Article 142(b) since aspects of this law fall within criminal law and procedure.

38 Constitution of Islamic Republic of Pakistan 1973, art. 25

39 "PTI Challenges Repealing of NAB Ordinance" The Express Tribune (16 August 2017) available at <https://tribune.com.pk/story/1482382/pti-challenges-repealing-nab-ordinance/>

40 Noor Daraz Khan v Federation of Pakistan, PLD 2016 Peshawar 114

This confusion regarding legislative competence is also evident from the delay in the promulgation of the Khyber Pakhtunkhwa Probation of Offenders Bill. The Provincial Government was unsure whether it was competent to make legislation in the area of probation of offenders given that the Federal Probation of Offenders Ordinance 1960 was neither devolved to the Provinces under the 18th Amendment nor was it available in the list of adaptation of laws.

The above instances highlight the confusion regarding the legislative competencies of the legislative assemblies years after the passage of the 18th Amendment. This results in stalled legislative action as well as increased judicial interventions exposing provincial laws to challenges in Court as evidenced by the cases above.

PART SIX

The Legislative Lists and Due Competence

The preceding section has highlighted the confusion that has marred legislative reform initiatives which the provincial governments have wished to undertake in the subject of law and order after the 18th Amendment. Next, we attempt to examine the various legal arguments and principles which are the source of the controversy and confusion on this area.

At the outset a distinction must be made between two categories of laws falling under the umbrella of 'law and order'.

- i) The first category consists of criminal law, criminal procedure, and evidence. This category is governed by Article 142(b) of the Constitution and grants legislative competence to both the federal and provincial legislatures. In situations where a provincial statute and a federal statute are in conflict, the provisions of the federal statute will prevail over the provincial statute under Article 143.
- ii) The second category concerns all those subjects which do not fall within the Federal Legislative list nor within the category of criminal law, criminal procedure, and evidence (Art. 142(b)). This residual category is the exclusive legislative domain of the Provinces. Since law and order is a wide category it may include legislation which does not relate to criminal law, criminal procedure, and evidence. An example may be laws relating to prisons or correctional services. These are a distinct category from criminal law and procedure.

It is worthy of note that the 18th Amendment abolished the entire Concurrent Legislative List (for which both the federal and provincial could legislate), and most of the subjects contained in this list fell into the residual category for the Provinces to legislate upon. During the existence of the Concurrent Legislative List the Federal Government had made laws in this regard which would have primacy over any provincial Law on this subject. After the 18th Amendment, since these subjects have fallen in the residual category, now only the provincial governments can repeal, replace, or amend these laws, even Federal laws on the subject (as per Article 270AA).

THE CONTENT OF THE RESIDUAL CATEGORY

While the legal position of subjects falling within the residual category is clear, the challenge which arises is clearly establishing what is the content of the residual category, as this category is not expressly enumerated in the Constitution.

This is especially problematic in relation to issues of law and order as the boundary between what falls under Article 142(b) and what falls in the residual category is not always easy to determine. An example which has been subject to much debate are Police laws. Police Laws enacted by the Provinces deal with the establishment, structuring, and discipline of the Police but may also relate to criminal procedure and may have certain criminal and disciplinary elements as well. It is not always clear whether Police laws fall within the ambit of Article 142(b) relating to criminal law, criminal procedure and evidence or whether the establishment of Police departments are a residual matter. The Provinces seem to have interpreted Article 142(b) in different ways, however, all of them have demonstrated their competence to legislate on the subject of police by enacting legislation which either repeals and replaces or amends the Federal Police Laws. Examples of such laws include:

Khyber-Pakhtunkhwa	KP Police Act 2017
Punjab	Punjab Order (Amendment) Ordinance 2017 Punjab Police Order (Amendment) Act 2013
Balochistan	Balochistan Police Act 2011
Sindh	Sindh (Repeal of the Police Order, 2002 and Revival of the Police Act, 1861) Act, 2011

Table 5: *Provincial Amendments in Police Laws*

This view is supported by the Research Cell of the Office of the Advocate General of Punjab which in an opinion to the Home Department regarding whether the Province had competence to legislate on Police matters, stated that Police was a matter distinct from criminal law and procedure and therefore, clearly fell within the legislative competence of the Provinces. This opinion paved the way for the eventual enactment of the Punjab Police Order (Amendment) Act 2013.

However, there is a school of thought which favors the opposing view, i.e. police law is primarily relatable to the enforcement of criminal law. This was held to be the case by the Lahore High Court in *Zafarullah Khan v. Federation of Pakistan* when interpreting the Police Order, 2002.⁴¹ It is crucial to note that this case was decided before the 18th Amendment came into effect and may be distinguishable on its merits today. Nevertheless, the matter is not entirely settled even today and divergences in approaches can be found between the Provinces.

The Khyber-Pakhtunkhwa government has adopted a cautious approach in its new Police Act 2017. Although the Act repeals the application of the Police Order 2002 (a Federal Law) in KP province, Section 141 of the 2017 Act only repeals those provisions of

⁴¹ *Zafarullah Khan v. Federation of Pakistan*, Writ Petition No. 16244/2002 (Lahore High Court)

the Police Order which relate to the “Provincial Legislative Field” and explicitly states that all provisions of the Police Order which relate to the “Federal Legislative Field” shall continue to remain in force.

On the other hand, the Balochistan government in enacting the Balochistan Police Act 2011 did not display any such caution and repealed the application of the Police Order 2002 to the Province in its entirety.⁴²

The subject of law and order must be construed wider than the provisions enumerated in Article 142(b) namely, criminal law, criminal procedure, and evidence. Law and order also includes the institutions established to maintain it, the laws relating to their functioning, the procedures by which they operate, etc. Through this reasoning we see that law and order as a subject or category straddles both the federal and provincial legislative competences, as alluded to in Article 142(b), however, certain elements of the overall category fall within the exclusive domain of the Provinces.

By looking at the practice of Provinces in relation to the Police and other such categories (Prosecution departments, Probation departments, etc.), it would seem that establishment, structuring, functioning, and operation of institutions which enforce law and order falls squarely within the legislative competence of the Provinces (the residual category). It is to be noted, however, that laws relating to such institutions cannot be completely divorced from the criminal law, procedure, or evidence mentioned in Article 142(b). Police laws would, if not directly, at least tangentially, relate to criminal law as certain actions by Police officials would amount to criminally punishable crimes. Similarly, Police laws, in so far as they relate to the functioning of the Police, may have an impact on criminal procedure. What is important to note is that the Provinces would not be able to effectively legislate on Police reforms if they were limited to only restructuring of the Police. Comprehensive reforms require a holistic approach to the subject and cannot be compartmentalized as would seem to be the case on a strict interpretation of Article 142(b) of the Constitution.

The disparate approaches between the Provinces in the subject of Police law provides a classical example of the confusion that arises when determining the content of subjects in the residual legislative category which have a nexus with law and order. The following section will provide legal guidelines which aim to alleviate some of these confusions.

42 Balochistan Police Act 2011, sec. 46

PART SEVEN

Delineating the Legislative Lists

To bring clarity to the provisions of the Constitution which deal with law and order it is imperative to clearly define what constitutes elements falling in the concurrent jurisdiction of Article 142(b) – criminal law, criminal procedure, and evidence, and what falls within the residual category. The following is an attempt at providing such definition based on the jurisprudence of the superior judiciary in Pakistan as well as Constitutional commentary by various scholars.

THE CONTENT OF ARTICLE 142(B)

Article 142(b), reproduced below, defines the subjects upon which both the Parliament as well as a Provincial Assembly may legislate:

(b) Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.

Criminal Law

It is necessary to define the contours of this Constitutional provision. The basic definition may be determined through a perusal of Black's Law Dictionary. In the 9th edition the entry for criminal law is reproduced below:

criminal law. (18c) The body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders. Also termed penal law.

"The criminal law represents the pathology of civilization." Morris R. Cohen, *Reason and Law* 70 (1961).

"Often the term 'criminal law' is used to include all that is involved in 'the administration of criminal justice' in the broadest sense. As so employed it embraces three different fields, known to the lawyer as (1) the substantive criminal law, (2) criminal procedure, and (3) special problems in the administration and enforcement of criminal justice.... The phrase 'criminal law' is more commonly used to include only that part of the general field known as the substantive criminal law" Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 1, 5 (3d ed. 1982)⁴³

From this definition, as noted in the quote from Perkins and Boyce, we can focus on the more commonly used definition of criminal law as being 'substantive criminal law'. From

⁴³ Black's Law Dictionary Entry for Criminal Law (9th edn, 2009) p. 431.

the initial entry this would mean that we would discount from the definition elements of criminal procedure, as this will be discussed below in any case. Criminal law is, therefore, “the body of law defining offences against the community at large...and establishing punishments for convicted offenders.”

In relation to Article 142(b), both the Parliament as well as the Provincial Assembly may enact laws which create and define offences against the community at large and establish punishments for those convicted of such offences.

Criminal Procedure

The next element of Article 142(b) is 'criminal procedure'. Black's Law Dictionary defines criminal procedure as:

criminal procedure. (18c) The rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated, and punished. It includes the protection of accused persons' constitutional rights.⁴⁴

This definition covers broadly the various elements of criminal procedure but needs to be elaborated further. The Pakistan Code of Criminal Procedure, 1898 (Cr.P.C.) provides further guidance as to the content of the term 'criminal procedure'. A brief perusal of the headings of the Cr.P.C. indicate that procedure may include the establishing of criminal courts and their hierarchy, outlining the powers of the courts, provisions relating to arrests and detention of accused persons, process by which to compel appearance of person before a court, process by which to produce documents or moveable property, rules regarding the functioning and powers of the Police, powers and methods of investigation, rights of accused persons, how a trial is to be conducted, provisions relating to bail, the framing of charges, mechanisms to appeal verdicts, the mode of taking and recording evidence, how sentences are to be executed, how sentences may be suspended, remitted, or commuted, how to deal with special categories of persons, etc.

Evidence

The third element of Article 142(b) is 'evidence'. It should be noted, however, that unlike the previous two terms, evidence is not limited by the qualifier 'criminal' and, therefore, both civil and criminal evidence would fall within its ambit. Evidence can be defined as:

evidence, n. (14c) **1.** Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact <the bloody glove is the key piece of evidence for the prosecution>.

2. . . .

3. The collective mass of things, esp. testimony and exhibits, presented before a tribunal in a given dispute <the evidence will show that the defendant breached the contract>.

44 Black's Law Dictionary Entry for Criminal Procedure (9th edn, 2009) p. 431.

4. The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding <under the rules of evidence, the witness's statement is inadmissible hearsay that is not subject to any exception>. Also termed (in sense 4) rules of evidence.⁴⁵

In the definitions provided by the Black's Law Dictionary, evidence includes the 'testimony, documents, and tangible' materials as well as the rules of evidence – the laws regulating the admissibility and standard of evidence. These elements would all fall within the category of 'evidence' which may be legislated upon by either the Parliament or a Provincial Assembly.

Given these definitions, we can understand better what falls within the scope of Article 142(b). The elements of the subjects falling within this category can be legislated upon by both the federal and provincial legislatures, with the proviso that a Federal law would prevail over a Provincial law. However, to determine what falls exclusively in the domain of the Provinces we must define the contours of the residual category.

THE CONTENT OF THE RESIDUAL CATEGORY: LAW AND ORDER

Having broadly defined the contours of criminal law, criminal procedure, and evidence, it would be useful to give content to the residual category which is the exclusive domain of the Provincial Assemblies. It is to be noted, that laws, whether federal or provincial, if they fall in the residual category may be amended, repealed, or replaced only by the Provincial Assemblies even in the case of previously enacted federal laws covering the subject.⁴⁶ After the 18th Amendment, the Federation has no competence to legislate on matters which fall within the residual category.⁴⁷

Unlike Article 142(b), the residual category is not expressly enumerated in the Constitution. The Constitutional jurisprudence on the issues makes it a catch-all category which is defined by what it does not include, rather than what it does include. Therefore, to determine the content of the residual category we must begin by excluding items from it as mentioned in the Constitution.

45 Black's Law Dictionary Entry for Evidence (9th edn, 2009) p. 635

46 Constitution of Pakistan 1973, Article 270AA (6): "Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority." – Jurisprudence reveals that the competent authority for altering laws which have not been included in the Federal Legislative List are the Provincial Assemblies – 2016 PLD 114 Pesh. Para.17.

47 Constitution of Pakistan 1973, Article 142(c): "Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.

THE FEDERAL LEGISLATIVE LIST: THE EXCLUSIVE DOMAIN OF PARLIAMENT

Article 142(a) states that, “Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List.” Therefore, by examining the Federal Legislative List we may exclude items from the residual category for which the Provincial Assemblies are exclusively competent to legislate upon.

The Federal Legislative List is found in the Fourth Schedule to the Constitution and is divided into two parts (See **Annex 1** of this Policy Brief for the complete Federal Legislative List):

Part I of the List enumerates 53⁴⁸ competences in which Parliament has exclusive competence to legislate. Part II of the List enumerates a further 18⁴⁹ areas falling within Parliament’s competence, however, by virtue of Article 154, the Council of Common Interests, a body comprising the Prime Minister, the Chief Ministers of the Provinces, and three members of the Federal Government, is required to formulate and regulate policy on these matters. This translates into some level of provincial say in matters listed in Part II of the Federal Legislative List.

In relation to Law and Order, Part I of the Legislative List through entry no. 56 grants Parliament the competence to legislate on any offences in relation to the 53 items mentioned in Part 1. This is a wide array of areas and include inter alia matters relating to defence of Pakistan, taxation, elections, fisheries, international treaties and conventions, the export of opium, aircraft, maritime shipping, nuclear energy, post and telegraphs, migration, nationality, among others.

Similarly, Part II at entry no. 15 grants similar powers to Parliament in relation to all items enumerated in the List. Part II includes entries such as railways, oil and minerals, industry, electricity, ports, census, legal, medical and other professions, etc.

What is evident from this is that only the Parliament of Pakistan may legislate on matters of criminal law, in these areas. No Provincial Assembly can legislate on these areas as they fall categorically outside their legislative competence. However, matters which fall in Part II of the Legislative List can be influenced by the Provinces through their Chief Ministers sitting in the Council of Common Interest (CII). By excluding all items enumerated in the Federal Legislative List we can now gain a better understanding of what the residual category contains. All other items, as well as offences which relate to these items, would fall within the residual category, the exclusive domain of Provincial Assemblies. This now gives us a better idea of the contours of the residual category.

48 It is to be noted that since the 18th Amendment to the Constitution made certain omissions and insertions to the Federal Legislative List the numbering is not always consecutive.

49 It is to be noted that the numbering of the items on the list is inaccurate and two items are numbered 13.

THE CONTENT OF THE RESIDUAL LEGISLATIVE CATEGORY

While the list of items which fall within the residual category is extensive and would only be limited by one's imagination, there are two primary means of determining its substantive content for our purposes of delimiting the area of law and order.

- i. The first is by looking at categories in the erstwhile Concurrent List which have now been omitted altogether, i.e. have now been included in the residual category.
- ii. The second means is by referring to Indian Constitutional categories contained in their State legislative list. In India, the situation is reversed in comparison to Pakistan, i.e. the States (provinces) can only legislate on items expressly listed in the State Legislative Lists, all residual matters are given to the Central (federal) Government. As India shares similarities with Pakistan in terms of its legal heritage and Constitution, this would be a useful tool to colour the content of the residual category in Pakistan.

These will now be explained below in more detail.

THE OMITTED CONCURRENT LEGISLATIVE LIST

The erstwhile Concurrent Legislative List contained 48 entries (See **Annex 2** of this Policy Brief for the complete Concurrent Legislative List). While most of these entries were moved to the residual category through the abolishment of the entire list, three particular entries were inserted into the Federal Legislative List.⁵⁰ Furthermore, entries number 1, 2, and 4 of the Concurrent List related to criminal law, criminal procedure, and evidence, respectively. These categories were shifted to Article 142(b), discussed above, and remain an area where both the Parliament and the Provincial Assemblies can legislate. However, the numerous instances which fell into the residual category through the abolishment of the List are useful for our purposes. Some entries of relevance to law and order include:

Entry no. 12 – Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in the Federal Legislative List.

Entry no. 13 – Removal of Prisoners and accused persons from one Province to another Province.

Entry no. 14 – Preventive detention for reasons connected with the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subject to such detention.

Entry no. 17 – Arms, firearms, and ammunition.

⁵⁰ These included Entry 29. Boilers (so far as they relate to nuclear energy), Entry 34. Electricity, and Entry 43. Legal, Medical, and other Professions.

Entry no. 18 – Explosives.

Entry no. 19 – Opium, so far as regards cultivation and manufacture.

Entry no. 23 – Mental illness and mental retardation, including places for the reception or treatment of the mentally ill and mentally retarded.

Entry no. 24 – Environmental pollution and ecology.

Entry no. 33 – Mechanically propelled vehicles.

Entry no. 35 – Newspapers, books and printing presses.

Entry no. 41 – Production, censorship and exhibition of cinematograph films.

As we can definitively determine that these entries, after the 18th Amendment, are of a residual nature, we can begin to piece together the parameters of this category. The aforementioned categories are significant and some categories cannot be effectively regulated without elements of criminal law, criminal procedure and evidence being a significant component. Entry no. 18 – Explosives is a clear example, as is Entry no. 19 – Opium, so far as regards cultivation and manufacture. In fact, all the categories enumerated above that are now part of the residual category must have some penal sanction, or procedural elements or evidential elements included in legislation dealing with them. Therefore, the Provinces, while empowered to enact legislation in this category would have to also borrow from their powers under Article 142(b) to enact the penal sanctions, criminal procedure, and evidence.

While Article 142(b) does indeed empower the Provinces to legislate in such matters, there is the problem of pre-existing federal laws already occupying these fields. Article 143 gives primacy to federal Laws and, therefore, a provincial law inconsistent with federal law would be null and void, at least to the extent of the inconsistency. The following section deals with how, the judiciary has evolved its jurisprudence to resolve any conflict between Federal and Provincial laws, and applied Article 143. The jurisprudence is fascinating and gives hope to explaining the true nature of the relationship between federal and provincial Laws in the domain of criminal law, criminal procedure, and evidence.

POWERS OF THE STATES IN THE INDIAN CONSTITUTION: THE STATE LEGISLATIVE LIST

Furthermore, the Constitution of India, 1949 can be used as a reference point to determine which areas fall within the residual legislative list of Pakistan. As mentioned above, the States in India can only legislate on topics found in the State Legislative List [List II of Schedule VII of the Constitution of India]. Therefore, it can be inferred that the subjects reflected in India's State Legislative List can also constitute subjects that fall within the Residual Legislative List of Pakistan, which are therefore within the purview of the Provinces. Subjects that are included in the State Legislative List of India include, but are not limited to:

Entry no.1: Public Order (but not including the use of any naval, military, or air

force or any other armed force of the Union or any other force to the control of the Union or of any contingent or unit thereof) in aid of it.

Entry no. 2: Police (including railway and village police) subject to the provisions of entry 2A⁵¹ of List I [Union List].

Entry no. 4: Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

Entry no. 51: Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-

(b) Opium, other narcotic drugs and narcotics.

Entry no. 64: Offences against laws with respect to any of the matters in this List.

In light of the above, it can be assumed that the establishment of public order, police, prisoners, reformatories, borstal institutions and other institutions of a like nature all fall within the residual legislative list of Pakistan, which is the sole legislative competence of the provinces under Article 142 (c).

Therefore, by defining the contours of criminal law, procedure and evidence and by identifying areas which fall exclusively within the residual legislative list the disparate approaches adopted by the provinces can be removed. This exercise will further eliminate any confusion relating to subjects within the residual list which have a nexus with law and order. Provinces, while empowered to enact legislation in the residual category also have to borrow from their powers under Article 142(b) to enact the penal sanctions, criminal procedure, and evidence.

The following section provides an overview of the judicial scrutiny and debate that the distribution of powers between the Federation and Provinces has been subject to and also sheds light on certain interpretational doctrines and principles that have emerged as a result.

51 Constitution of India 1949, Seventh Schedule, List II, Entry 2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

PART EIGHT

Judicial Interpretation

The distribution of legislative powers between the Federation and Provinces has been the subject of judicial scrutiny and debate even prior to the passing of the 18th Amendment. The superior judiciary has been approached time and again for determining the validity of many statutory instruments and in making this assessment, the courts have attempted to delineate the boundaries of legislative competence as set out in Articles 141-144 of the Constitution. Litigation on this front has increased in recent years as the validity of several laws and subordinate legislation has been challenged due to the confusion created by the 18th Amendment. As a result, certain interpretational doctrines and principles have emerged from a substantial body of case law relating to this area.

The following section will provide an overview of some of the major interpretational doctrines developed by the superior judiciary in Pakistan in determining legislative competence, especially after the 18th Amendment. This Policy Brief will then rely on the superior judiciary's reasoning and interpretation to provide recommendations and policy guidance on the legislative competence of the Federation and Provinces vis-à-vis specific subjects relating to law and order.

THE DOCTRINE OF 'PITH & SUBSTANCE'

The superior judiciary in Pakistan has often relied on the doctrine of 'pith & substance' when determining the constitutional validity of various legal instruments. Prior to the 18th Amendment, this principle was relied on by the courts in determining which of the three legislative lists a contested statutory instrument fell under, i.e. Federal, Concurrent or Residual. Following the 18th Amendment, the same principles have been applied and remain applicable vis-à-vis the Federal and Residual legislative categories.

In *Sapphire Textile Mills v. Collector of Central Excise and Land Customs Hyderabad*⁵² the Court held:

*“When the question is whether any impugned Act is within any one of the three Lists, or in none at all, it is the duty of the Court to consider the Act as a whole and decide **whether in pith and substance**, the Act is with respect to a particular category or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation⁵³. . . **Subjects must still overlap and where they do the question must be asked what in pith***

52 *Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs Hyderabad*, 1990 CLC 456 [Karachi]

53 Referring to *United Provinces v. Atiqua Begum*, 1940 FCR. 110 and *F.B. Ali s. the State*, PLD 1975 SC 506

and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficial legislation would be stilled at birth, and many of the subjects entrusted to Provincial legislation could never effectively be dealt with.”⁵⁴

This principle was also invoked by the Karachi High Court in *Mian Ejaz Shafi v. Federation of Pakistan*,⁵⁵ where the Court declared:

*“[t]o determine the Constitutional validity of an Act, its pith and substance should be considered... That is, it must be ascertained whether the impugned legislation is directly in respect of the subject covered by any particular Article of the Constitution or touches the said Article only incidentally or directly. If it be found that the legislation is in substance one on a matter which has been assigned to the Legislature, there can be no question of its validity even though it might incidentally infringe on matters beyond its competence.”*⁵⁶

In *Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi*⁵⁷ the Supreme Court asserted that the Courts are required to examine the object of the legislation as well as its effect, stating:

*“[i]t is beyond question that when an enactment **apparently relates to subjects which are within the competence of two Legislatures** then, in order to determine the question of the validity of the legislation it is the pith and substance of the impugned legislation that is to be looked to. It is clear too that in order to determine the pith and substance **we first consider the whole scheme of the distribution of powers as between the Centre and the Provinces, and we then look to the object of the legislation as well as its effect.**”*

The doctrine of pith and substance is particularly relevant in the context of criminal law, criminal procedure and law of evidence which, after the 18th Amendment, are the only subjects on which explicit competence has been given by the Constitution to more than one legislature. This is because where the Province and Federation legislate concurrently and there is a conflict, Article 143 comes into operation whereby federal law must prevail. Thus, the onus lies on the Province to ensure that the law in pith and substance does not relate to the corpus of Article 142(b) in order to avoid a potential conflict.

A practical application of this doctrine after the passage of the 18th amendment was witnessed when the Punjab Government proposed amendments to the federally

54 Referring to *Prafullah Kumar v. Bank of Commerce Khulna*, PLD 1947 P.C.1

55 *Mian Ejaz Shafi v. Federation of Pakistan*, PLD 1997 Karachi 604

56 Referring to N. S. Bindra, in his book *Interpretation of Statutes*, 7th Edition, at page 977

57 *Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi and the Islamic Republic of Pakistan*, PLD 1958 Karachi 887

legislated Police Order 2002. The Office of the Advocate General of Punjab opined that Police was a matter distinct from criminal law & procedure. Therefore, it was argued that the proposed provincial law was within the legislative competence of the Punjab Assembly since, in pith and substance, it related to the governance and functioning of the Police and only touched upon criminal law and procedure incidentally.

PRINCIPLE OF INCIDENTAL ENCROACHMENT

The principle of incidental encroachment is a judicial tool employed by the judiciary in Pakistan to reduce the space for conflict between federal and provincial laws and ensure harmonious interpretation. It is an ancillary principle of the larger doctrine of pith and substance. According to this doctrine, the validity of a piece of legislation cannot be called into question if its substance incidentally infringes on matters beyond its competence.

It was held in the case of *The Province of East Pakistan v. Sirajul Haq Patwari*⁵⁸ that the validity of laws made by the various Legislatures is not to be tested by reference to the powers derived from the provisions of the Constitution, as a theoretical proposition, but rather is to be accepted as fact and is to prevail unless its operation is frustrated by accepted rules such as pith and substance, occupied field and incidental encroachment. It was held in this case that a Legislature making incidental and necessary encroachments on the exclusive powers of another Legislature could rely on this doctrine to save the law unless the field is already occupied by Central/Federal legislation.

It has further been clarified by the Courts that provincial law will be fully valid if, in relation to the incidental encroachment upon a 'forbidden' field, it has only impinged upon the unoccupied portion of the field; i.e. to say that the field has not been legislated upon by the Federation.⁵⁹

As per the Supreme Court of Pakistan, it would be erroneous to invoke the doctrine of incidental encroachment where there is no competition between federal legislation and provincial Legislation, merely because the provincial law encroaches upon a matter in the Federal Legislative List.⁶⁰

This principle becomes relevant in light of Article 142(b) whereby the Federation and Provinces can both legislate on matters pertaining to criminal law, criminal procedure and evidence. This was practically followed by the Khyber Pakhtunkhwa Assembly which passed its Police Act in 2017.⁶¹ As per Sec 141(2) of the Act, the provisions of the

58 The Province of East Pakistan and others v. Sirajul Haq Patwari and others, PLD 1966 Supreme Court 854

59 Messrs Quetta Textile Mills Ltd. through Chief Executive v. Province of Sindh through Secretary Excise and Taxation, Karachi and another, PLD 2005 Karachi 55

60 Shamas Textile Mills Ltd. and others v. The Province of Punjab and two others, 1999 SCMR 1477

61 Khyber Pakhtunkhwa Police Act 2017, Act No. 11 of 2017

federally legislated Police Order 2002 that relate to the Federal Legislative List are to continue to remain in force despite the passage of the provincial Act. Therefore, the Act may incidentally encroach upon a matter that may relate to Article 142(b) but will not be void if that point of law has not been covered by the Police Order 2002.

DOCTRINE OF OCCUPIED FIELD AND PRINCIPLES OF REPUGNANCY AND PARAMOUNTCY

The doctrine of occupied field is concomitant to the larger doctrine of pith and substance and is aimed at avoiding conflict between central and provincial laws by application of the principles of repugnancy and paramountcy. Under this doctrine, where both a federal and provincial legislature is competent to legislate on the same subject and obedience to provincial legislation would not be possible without disobeying the federal law, then the provincial law to that extent would be repugnant and void.⁶² This principle is given Constitutional expression in Pakistan through Article 143.

The doctrine operates on the principle of paramountcy, which is based on the notion that a provincial law must yield to a federal law where (a) compliance with both laws is impossible or (b) where compliance with a provincial law would be incompatible with the spirit of the federal law, thereby frustrating or undermining the independence of a federal enactment.

The doctrine of occupied field operates to avoid a conflict between federal and provincial laws. Where such a conflict does arise, the doctrine of repugnancy is attracted. But repugnancy only arises if there is a direct conflict between two (federal & provincial) laws.⁶³ This was confirmed by the Peshawar High Court in the case concerning the enactment of the KP Ehtesab Commission Act 2014 in the presence of the Federally legislated National Accountability Bureau Ordinance 1999. It was held by the Court that both the Federation and Province can legislate on matters pertaining to Article 142(b) and both laws can co-exist where the provincial law does not conflict with the federal law. The test of repugnancy is that there be a direct conflict between two laws and the repugnancy must exist in fact and not merely on possibility. Since the KP Ehtesab Commission Act 2014 does not contravene principles of the NAB Ordinance, it was held to be legal and valid.⁶⁴

A practical manifestation of repugnancy can be seen in the case where the changes made under the Code of Criminal Procedure (Balochistan Amendment) Act 2010 were judicially challenged on the grounds of Article 143.⁶⁵ It was held that the province of Balochistan sought to specifically undo the changes made to the Cr.P.C. by the

62 Dr. Iftikhar Ahmed, Senior Medical Officer, Abbotabad v. Government of Khyber Pakhtunkhwa, PLD 2016 Peshawar 212

63 Noor Daraz Khan v. Federation of Pakistan, PLD 2016 Peshawar 114

64 Ibid.

65 Muhammad Kamran Mullahkhail v. Government of Balochistan, PLD 2012 Quetta 57

Federation and therefore the changes made were void because of the repugnancy between the federal and provincial law.

JUDICIAL EMPHASIS ON HARMONIOUS INTERPRETATION

The sudden constitutional surgery carried out by the 18th Amendment sent shockwaves throughout the system of governance in Pakistan. Its immediate aftermath was marred by a period of considerable uncertainty and anxiety between a broad range of stakeholders at the federal and provincial level and resulted in considerable litigation. In this regard, it is encouraging to note that the superior judiciary in Pakistan has adopted a pragmatic and mature approach in interpretation of cases relating to the 18th Amendment. The overall focus, especially in recent years, appears to be towards harmonious interpretation and upholding the principles of cooperative federalism.

The expansive and dynamic interpretation given to Article 143 of the Constitution by the Courts was seen in the case regarding the Khyber Pakhtunkhwa Ehtesab Commission Act 2014 where the Peshawar High Court laid down guidelines on the operation of Article 143 of the Constitution and emphasized that its provisions should only be relied upon as a last resort. The Court stated that laws should only be struck down by courts where the legislature does not have the competence, and where the law leads to the abridgement of fundamental rights enshrined in the Constitution. Furthermore, the Bench held that courts have the duty to uphold the Constitution as a superior law but the power to strike down or a declare a legislative enactment void *should be exercised with caution, and only where there is no other alternative.*

Furthermore, it was noted that where a federal law and a provincial law can simultaneously operate in a supplemental role, *the question of repugnancy does not arise.* There should be a presumption in favour of the validity of the law and every effort should be made to reconcile the two laws in order to avoid striking it down. It was in light of this that the Court held the rationale for application of Article 143 was not attracted in this case and that the National Accountability Ordinance 1999 and the Khyber Pakhtunkhwa Ehtesab Commission Act 2014 could co-exist because of their complementary nature.

The Principle of Cooperative Federalism

Another example of judicial dynamism is the recent judgment of the Lahore High Court (LHC) in *Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir*.⁶⁶ The Chief Justice of the Lahore High Court, Justice Syed Mansoor Ali Shah, expounded on the principle of cooperative federalism and harmonious interpretation to ensure functional co-existence between federal and provincial laws.

66 Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir and others, PLD 2017 Lahore 489

According to the LHC, the principle of cooperative federalism is a form of federalism where powers are divided between the Central/Federal government and the Provinces. Cooperative federalism focuses and operates on the partnership between the different levels and tiers of government. As per the Court's reasoning in this case, the 18th Amendment makes room for cooperativeness and coordination between governments to deal with situations where there is an overlap in competence.

The principle of cooperative federalism has also found favour internationally and the Supreme Court of Canada also acknowledges and employs this principle. The Supreme Court of Canada has rejected rigid formalism and favours accommodating cooperative intergovernmental efforts to challenge complex issues that could not be allocated to specific heads of power.

The Court noted that the principle of cooperative federalism is also embedded in Pakistan's constitutional architecture under Part V of the Constitution which deals with the distribution of legislative powers and the administrative relations between the Federation and Provinces. Chapter V also contains provisions relating to the Council of Common Interest (CCI) which serves as the fulcrum of cooperative federalism under our Constitution. The Court went on to note that since cooperative federalism is an intrinsic part of our constitutional design, it should be used as an effective and potent interpretative tool by the courts. Where there is an overlap in legislative space between the Federation and Provinces, the limits of exclusivity set down in Article 142 of the Constitution should be purposively interpreted. Courts must favour functional co-existence of the federal and provincial statutes in cases where there is a vertical sharing or overlap of legislative powers. Cooperative federalism flowing through the Constitution helps prevail over and dilute the exclusivity of Article 142 into a more workable and constitutionally compliant inclusivity - giving both the legislatures space to co-exist. Only in cases of irreconcilable inconsistency between the Federal and Provincial statutes, will Article 143 provide a solution, and that too as a last recourse.

The Court noted that the Constitution is not a straitjacket, but a "breathing document, that is alive and living" and emphasized the need for partnership between different levels of government to provide effective public service for the nation.⁶⁷ Importantly, the Court rejected the suggestion that federal law must demand uniformity in all situations. Rather, the role of the federal law is to provide uniform minimum standards. The Provinces were free to supplement these standards under the principle of cooperative federalism.

This judgment of the LHC is particularly useful in the context of devolution and represents an important attempt by the judiciary to provide clarity on complex issues after the 18th Amendment in a pragmatic and dynamic manner. It recognizes that the

67 Ibid.at para 21

solutions to the myriad of challenges facing the State of Pakistan today requires the federal, provincial and local governments to interact cooperatively, collectively and pragmatically rather than relying on rigid formalism and making policies in isolation of each other. It is hoped that the judgment will pave the way for better cooperation between the Federation and Provinces in Pakistan and purposive interpretation by the superior courts in similar cases in the future.

POLICY GUIDANCE

In light of the judgments above it becomes evident that the 18th Amendment aims towards creating a participatory federation. Principally important in this regard is the use of the various doctrines developed by the Courts. It is also apparent from the preceding chapters that the subject of law and order is wider than the provisions of Article 142 (b) and includes the institutions established to maintain it as well as the laws governing their functioning and standards of procedure.

To counter some of the challenges that have arisen as a result of the 18th Amendment especially with regard to criminal law, criminal procedure and evidence under the larger umbrella of law and order, the following recommendations are proposed.

- Use of the Doctrine of Pith and Substance

The doctrine of pith and substance as developed by the Courts should be employed when drafting laws. In order to ascertain the legislative competence for a particular subject, legislators should first determine what the law in substance relates to. The substance of the law should then be tallied with the Federal Legislative List to determine where its competence lies. Where the law incidentally encroaches upon a federal matter, guidance should be taken from the KP Police Act 2016 wherein under Section 141 it is specified that all the provisions of the federally legislated Police Order relating to the Federal Legislative List shall continue to remain in force.

- Defining the Corpus of Criminal Law, Criminal Procedure and Evidence

The corpus of Article 142 (b) has to be determined to clearly identify where the Federation and Provinces can operate in unison to create laws.

a. Criminal Law

As mentioned in Part 7 of this Policy Brief, criminal law is, 'the body of law defining offences against the community at large...and establishing punishments for convicted offenders.' In relation to Article 142(b), both the Parliament as well as the Provincial Assembly may enact laws which create and define offences against the community at large and establish punishments for those convicted of such offences.

b. Criminal Procedure

As per what has been discussed above in Part 7, procedure may include the establishing of criminal courts and their hierarchy, outlining the powers of the courts, provisions

relating to arrests and detention of accused persons, process by which to compel appearance of person before a court, process by which to produce documents or moveable property, rules regarding the functioning and powers of the Police, powers and methods of investigation, rights of accused persons, how a trial is to be conducted, provisions relating to bail, the framing of charges, mechanisms to appeal verdicts, the mode of taking and recording evidence, how sentences are to be executed, how sentences may be suspended, remitted, or commuted, how to deal with special categories of persons, etc.

c. Evidence

Evidence includes the 'testimony, documents, and tangible' materials as well as the rules of evidence – the laws regulating the admissibility and standard of evidence. These elements would all fall within the category of 'evidence' which may be legislated upon by either the Parliament or a Provincial Assembly.

- Identification of the Residual List

When it comes to areas that fall under the Residual List which have a nexus with law and order, Provinces have adopted a disparate approach. Therefore, it is necessary to clearly define which areas fall within the Residual list by conducting a deductive exercise. First, in order to ascertain the scope of the Residual List it is useful to eliminate all the areas stipulated in the Federal Legislative List. Secondly, all the areas that were explicitly mentioned in the abolished Concurrent List have devolved to the Provinces with the exception of a few. Therefore, those areas now fall within the Residual List. Lastly, the Constitution of India, 1949 can be used as a reference point to determine which areas fall within the residual legislative list of Pakistan by relying on the areas that are enumerated in India's State Legislative List. This exercise will provide clarity on the exact scope of the residual list.

- Harmonious Interpretation of Law

When interpreting laws, Courts should adopt a purposive approach and look at laws in concomitance. Laws should not be struck down in the absence of a conflict simply because they encroach upon another legislative field. Moreover, provincial statutes should specify that the law be interpreted harmoniously with Federal law and where a conflict arises Federal law should prevail.

ANNEXES

ANNEX 1

Fourth Schedule to the Constitution of the Islamic Republic of Pakistan

Federal Legislative List

PART I

1. The defence of the Federation or any part thereof in peace or war; the military, naval and air forces of the Federation and any other armed forces raised or maintained by the Federation; any armed forces which are not forces of the Federation but are attached to or operating with any of the Armed Forces of the Federation including civil armed forces; Federal Intelligence Bureau; preventive detention for reasons of State connected with defence, external affairs, or the security of Pakistan or any part thereof; person subjected to such detention; industries declared by Federal law to be necessary for the purpose of defence or for the prosecution of war.
2. Military, naval and air force works; local self- government in cantonment areas, the constitution and powers within such areas of cantonment authorities, the regulation of house accommodation in such areas, and the delimitation of such areas.
3. External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan.
4. Nationality, citizenship and naturalization.
5. Migration from or into, or settlement in, a Province or the Federal Capital.
6. Admission into, and emigration and expulsion from, Pakistan including in relation thereto the regulation of the movements in Pakistan of persons not domiciled in Pakistan; pilgrimages to places beyond Pakistan.
7. Posts and telegraphs, including telephones, wireless, broadcasting and other like forms of communications; Post Office Saving Bank.
8. Currency, coinage and legal tender.
9. Foreign exchange; cheques, bills of exchange, promissory notes and other like instruments.
10. Public debt of the Federation, including the borrowing of money on the security of the Federal Consolidated Fund; foreign loans and foreign aid.
11. Federal Public Services and Federal Public Service Commission.
12. Federal Pensions, that is to say, pensions payable by the Federation or out of the Federal Consolidated Fund.
13. Federal Ombudsmen.
14. Administrative Courts and Tribunals for Federal subjects.

15. Libraries, museums, and similar institutions controlled or financed by the Federation.
16. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.
17. Education as respects Pakistani students in foreign countries and foreign students in Pakistan.
18. Nuclear energy, including:-
 - (a) mineral resources necessary for the generation of nuclear energy;
 - (b) the production of nuclear fuels and the generation and use of nuclear energy, and
 - (c) ionizing radiations; and
 - (d) boilers.
19. Port quarantine, seamen's and marine hospitals and hospitals connected with port quarantine.
20. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.
22. Aircraft and air navigation; the provision of aerodromes; regulation and organization of air traffic and of aerodromes.
23. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.
24. Carriage of passengers and goods by sea or by air.
25. Copyright, inventions, designs, trademarks and merchandise marks.
26. Opium so far as regards sale for export.
27. Import and export across customs frontiers as deemed by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan.
28. State Bank of Pakistan; banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Province and carrying on business only within that Province.
29. The law of insurance, except as respects insurance undertaken by a Province, and the regulation of the conduct of insurance business, except as respects business undertaken by a Province, Government insurance, except so far as undertaken by a Province by virtue of any matter within the legislative competence of the Provincial Assembly.
30. Stock exchanges and future markets with objects and business not confined to one Province.
31. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Province and carrying on business only within that Province, or cooperative societies, and of corporations, whether trading or not, with objects not confined to a Province, but not including universities.
32. International treaties, conventions and agreements and International arbitration.

34. National highways and strategic roads.
35. Federal surveys including geological surveys and Federal meteorological organizations.
36. Fishing and fisheries beyond territorial waters.
37. Works, lands and buildings vested in, or in the possession of Government for the purposes of the Federation (not being military, naval or air force works), but, as regards property situate in a Province, subject always to Provincial legislation, save in so far as Federal law otherwise provides.
39. Establishment of standards of weights and measures.
41. Elections to the office of President, to the National Assembly, the Senate and the Provincial Assemblies; Chief Election Commissioner and Election Commissions.
42. The salaries, allowances and privileges of the President, Speaker and Deputy Speaker of the National Assembly, Chairman and Deputy Chairman of the Senate, Prime Minister, Federal Minister, Ministers of State, the salaries, allowances and privileges of the members of the Senate and the National Assembly, and the punishment of persons who refuse to give evidence or produce documents before committees thereof.
43. Duties of customs, including export duties.
44. Duties of exercise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.
47. Taxes on income other than agricultural income;
48. Taxes on corporations.
49. Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed, except sales tax on services.
50. Taxes on the capital value of the assets, not including taxes on immovable property.
51. Taxes on mineral oil, natural gas and minerals for use in generation of nuclear energy.
52. Taxes and duties on the production capacity of any plant, machinery, undertaking, establishment or installation in lieu of any one or more of them.
53. Terminal taxes on goods or passengers carried by railway, sea or air; taxes on their fares and freights.
54. Fees in respect of any of the matters in this Part, but not including fees taken in any court.
55. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.
56. Offences against laws with respect to any of the matters in this Part.
57. Inquiries and statistics for the purposes of any of the matters in this Part.
58. Matters which under the Constitution are within the legislative competence of Majlis- e-Shoora (Parliament) or relate to the Federation.
59. Matters incidental or ancillary to any matter enumerated in this Part.

PART II

1. Railways.
2. Mineral oil and natural gas; liquids and substances declared by Federal law to be dangerously inflammable.
3. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest; institutions, establishments, bodies and corporations administered or managed by the Federal Government immediately before the commencing day, including the 782[Pakistan Water and Power Development Authority and the Pakistan Industrial Development Corporation] 782; all undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation.
4. Electricity.
5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of port authorities therein.
6. All regulatory authorities established under a Federal law.
7. National planning and national economic coordination including planning and coordination of scientific and technological research.
8. Supervision and management of public debt.
9. Census.
10. Extension of the powers and jurisdiction of members of a police force belonging to any Province to any area in another Province, but not so as to enable the police of one Province to exercise powers and jurisdiction in another Province without the consent of the Government of that Province; extension of the powers and jurisdiction of a police force belonging to any Province to railway areas outside that Province.
11. Legal, medical and other professions.
12. Standards in institutions for higher education and research, scientific and technical institutions.
13. Inter-provincial matters and co-ordination.
13. Council of Common Interests.
14. Fees in respect of any of the matters in this Part but not including fees taken in any court.
15. Offences against laws with respect to any of the matters in this Parts.
16. Inquiries and statistics for the purposes of any of the matters in this Part.
17. Matters incidental or ancillary to any matter enumerated in this Part.

ANNEX 2

Concurrent Legislative List (now omitted)

1. Criminal law, including all matters included in the Pakistan Penal Code on the commencing day, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List and excluding the use of naval, military and air forces in aid of civil power.
2. Criminal procedure, including all matters included in the Code of Criminal Procedure, on the commencing day.
3. Civil procedure, including the law of limitation and all matters included in the Code of Civil Procedure on the commencing day, the recovery in a Province or the Federal Capital of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.
4. Evidence and oath; recognition of laws, public acts and records of judicial proceedings.
5. Marriage and divorce; infants and minors; adoption.
6. Wills, intestacy and succession, save as regards agricultural land.
7. Bankruptcy and insolvency, administrators- general and official trustees.
8. Arbitration.
9. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
10. Trusts and trustees.
11. Transfer of property other than agriculture land, registration of deeds and documents.
12. Actionable wrongs, save in so far as included in laws with respect to any of the matters specified in the Federal Legislative List.
13. Removal of prisoners and accused persons from one Province to another Province.
14. Preventive detention for reasons connected with the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
15. Persons subjected to preventive detention under Federal authority.
16. Measures to combat certain offences committed in connection with matters concerning the Federal and Provincial Governments and the establishment of a police force for that purpose.
17. Arms, firearms and ammunition.
18. Explosives.
19. Opium, so far as regards cultivation and manufacture.
20. Drugs and medicines.
21. Poisons and dangerous drugs.
22. Prevention of the extension from one Province to another of infectious or contagious diseases or pests affecting men, animals or plants.

23. Mental illness and mental retardation, including places for the reception or treatment of the mentally ill and mentally retarded.
24. Environmental pollution and ecology.
25. Population planning and social welfare.
26. Welfare of labor; conditions of labor, provident funds; employer's liability and workmen's compensation, health insurance including invalidity pensions, old age pensions.
27. Trade unions; industrial and labor disputes.
28. The setting up and carrying on of labor exchanges, employment information bureaus and training establishments.
29. Boilers.
30. Regulation of labor and safety in mines, factories and oil- fields.
31. Unemployment insurance.
32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways.
33. Mechanically propelled vehicles.
34. Electricity.
35. Newspapers, books and printing presses.
36. Evacuee property.
37. Ancient and historical monuments, archaeological sites and remains.
38. Curriculum, syllabus, planning, policy, centres of excellence and standards of education.
39. Islamic education.
40. Zakat.
41. Production, censorship and exhibition of cinematograph films.
42. Tourism.
43. Legal medical and other professions.
- 43A. Auqaf.
44. Fees in respect of any of the matters in this List, but not including fees taken in any court.
45. Inquiries and statistics for the purpose of any of the matters in this List.
46. Offences against laws with respect to any of the matters in this List; jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in this List.
47. Matters incidental or ancillary to any matter enumerated in this List.

