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

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ABSTRACT

In April 2010, the 18th Amendment to the Constitution of Pakistan was passed whereby the Concurrent Legislative List was abolished and with a few additions to the Federal Legislative List, all remaining areas were devolved to the Provinces. This paper looks at the impact of the devolution of powers with regards to legislative reform for law and order in Pakistan. In doing so, it highlights the background to the 18th Amendment especially in terms of Pakistan's commitment towards the law and order situation, the constitutional framework that underpins the 18th Amendment and also the different judicial mechanisms available to reconcile Federal and Provincial legislation relating to law and order.

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.[128] 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.

[128] "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

Ultimately, the Eighteenth Amendment Bill was unanimously approved by Parliament with 292 votes in favour (and none against) in the National Assembly and 90 votes in favour (and none against) in the Senate. 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.[129] 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.[130]

INTRODUCTION

The 18th Amendment constituted a dramatic shift in the alignment of the State, creating considerable confusion regarding the legislative competencies of the Provinces. Nevertheless, the 18th Amendment is a revolutionary instrument as it disposed of the Concurrent Legislative List altogether and reduced some of the competences in the Federal Legislative List by devolving them to the Provinces. Only the Federal Legislative List remained as the exclusive competence of the National Assembly, all other legislative subjects fell within the residual category. However, despite the abolition of the Concurrent Legislative List, the 18th Amendment did create an exceptional category wherein the old category of concurrent legislative powers would remain, namely, criminal law, criminal procedure and evidence.[131]

In order to fully comprehend the impact of the 18th Amendment to the Constitution, it is important to start by analyzing the law and order situation in the country, especially when

[129] ibid (n1) UNDP
[130] Anwar Shah "The 18th Constitutional Amendment: Blue 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%20ttc%2001102012.pdf
[131] Constitution of Pakistan, 1973, Article. 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.'

faced with a volatile security situation and the redistribution of powers between the Federation and the Provinces. This has been a problematic area as there have been a number of provincial laws which have been declared void as a result of confusion regarding their legislative competence. However, there is a wide range of case law that has produced useful judicial pronouncements and interpretations when determining the validity of a provincial law. This analysis will be followed by recommendations that can serve as a guide to counter the challenges that have arisen from the 18th Amendment.

1. LAW AND ORDER SITUATION AT THE TIME OF THE 18TH AMENDMENT

The 18th Amendment came into force in 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 coincided with the largest spike in terrorism incidents in Pakistan's history.

Between the years 2009-2011, there was a total 25442 fatalities including both civilian and terrorist casualties. Although the total rate of fatalities progressively decreased, the number of civilian casualties in 2011 was higher as compared to previous years. Given the state of the country, the 18th Amendment came at a time when law and order was faltering.

During this time, the terrorist conviction rate was dismally low and the State was failing to successfully prosecute terrorists apprehended by military operations. Between the years of 2008-2014, out of a total 7565 alleged terrorists, around 72.4% were acquitted by the Anti-Terrorism Courts.[132]

The situation in Karachi was particularly critical during this time. As a result, in 2011 the Supreme Court of Pakistan took a Suo Moto notice of the law and order situation of the city. The landmark judgment of *Watan Party v. Federation of Pakistan* exposed the failure of the provincial government to deal with the multifaceted nature of violence within the city and

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

the confusion between the federal and provincial government on how to tackle the problem.[133]

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'.[134] It was argued that no amount of kinetic measures, through Rangers or the Army, could provide a long-term solution to a problem inherent in the political processes of the country.[135] The only possible solution was through the advancement of the criminal justice system with better equipped prosecutors and improved forensic techniques. The Court further held that although the executive was primarily charged with the duty to control law and order and to implement fundamental rights within the province, the federation was also responsible to protect every province from both internal disturbances and external aggressions.[136] Thus, the court impressed upon the need for consistency between the provincial and federal government.

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.[137] The Court clarified that it was the joint responsibility of both the federal and provincial government to ensure the protection of fundamental rights within the province.[138]

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133 Watan Party and another v. Federation of Pakistan and others, PLD 2011 SC 997
134 ibid
135 ibid
136 ibid
137 President Balochistan High Court Bar Association v. Federation of Pakistan, 2012 SCMR 1958
138 President Balochistan High Court Bar Association v. Federation of Pakistan, 2012 SCMR 1958 at para 49
Dawn News, 'Governor Rule to be Imposed in Balochistan' Dawn (13 January 2013) available at <https://www.dawn.com/news/778500>; 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>
Dawn News, 'Special Report: Are New Anti-Terror Laws an Exercise in Futility?' (2016) available at <https://www.dawn.com/news/1239696>

In light of such rulings and given the general atmosphere prevalent within the country, drastic constitutional measures were employed to tackle the law and order situation. This included the imposition of Governor rule in the provinces, imposition of emergency or requisitioning the armed forces to act in aid of civil power.[139]

2. SHORT TERM COUNTER TERRORISM STRATEGY

In 2013, the Pakistan Muslim League-N (PML-N) came to power with a sizable majority in the National Assembly. With the intent to appear tough on counter-terrorism and law and order, the federal government enacted the Protection of Pakistan Act, 2014. Although hailed as a cure-all for the security situation, the Act was fraught with legal defects and administrative failures of the Special Courts established under the Act. By the time the sunset clause of the Act came into effect, the Special Courts under the PPA had not decided a single case.[140]

On the other hand, during 2013-2014, there was a divergence of opinion on the option of dialogue with the militants attacking the State. The Khyber Pakhtunkhwa government believed that the deteriorating law and order situation could only be remedied if the federal government distanced itself from the US-led war on terror and therefore pushed for a negotiated settlement with the Taliban.[141]

In light of the above, it is safe to state that during 2009-2014, Pakistan's response to the deteriorating law and order situation can only be described as a general lack of direction and ineffective policy response.

3. THE STATE'S RENEWED RESOLVE TO FIGHT TERRORISM

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[139] Reema Omer, 'POPA: An Ineffective Law' Dawn (19 July 2016) available at <https://www.dawn.com/news/1271630>

[140] ibid

[141] 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/>

In 2014, Pakistan suffered two devastating terror attacks one on the Jinnah International Airport, Karachi,[142] the other on the Army Public School, Peshawar.[143] As a result, Pakistan initiated two major military operations against militants in the country and also, with joint consensus of all political parties, devised the National Action Plan.

Operation Zarb-e-Azb was launched with the aim of flushing out all local and foreign militants in North Waziristan. This resulted in a significant improvement in the overall security situation, with terror attacks dropping to a six year low since 2008.[144] In 2017, the country faced a resurgence of deadly terrorist attacks.[145] Hence, Zarb-e-Azb was followed by a country-wide operation code-named Radd-ul-Fasaad. The need for military operations proved that institutional measures had failed to tackle extremism in Pakistan. Moreover, despite the acclaimed success of operation Radd-ul-Fassad, critics claim that Operation Zarb-e-Azb did not manage to '*break the back of terrorism in Pakistan, as was intended by the Army*'.[146]

The National Action Plan, devised pursuant to the attack on Army Public School, Peshawar contained twenty points requiring extensive actions and intricate coordination between the Federation and Provinces. Point 20 of NAP called for revamping and reforming the criminal justice system. The low conviction rates of suspected terrorists was evidence of the weak anti-terrorism framework of the State. The investigative and prosecutorial failures by the law enforcement agencies and lack of inter-agency coordination resulted in weak preparation of cases. Therefore, institutional police and judiciary reforms are absolutely necessary for translating military gains into courtroom successes against militants.

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

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

144Army Chief inaugurates Wana Cadet College' The Nation (17 September 2015) http://nation.com.pk/17-Sep-2015/army-chiefinaugurates-
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/

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

146 N a z i r Ahma d M i r, 'Operation Radd-ul-Fasaad : Timely, but Unlikely to Succeed' (I D S A , M a rc h 2 0 1 7)
https://idsa.in/idsacomments/operation-radd-ul-fasaad_namir_170317

4. NEED FOR REFORM IN CRIMINAL LAW AND PROCEDURE

The main legal tool for countering terrorism in Pakistan is the Anti-Terrorism Act (ATA) 1997. The Act established special Anti-Terrorism Courts (ATCs) which were delegated the task of dealing with terrorism cases, avoiding inevitable delays in ordinary criminal courts. However, the operation of the ATCs has been criticized for two primary reasons. First, due to its high acquittal rate and second due to case overload and slower disposal. The latter corresponding with the broad definition of terrorism that encompasses a variety of criminal offences.

Another problem with the approach towards fighting terrorism is the lack of modern legislation. The laws applicable to terrorism cases are the 1898 Criminal Procedure Code (Cr.P.C)[147] the 1984 law of evidence[148] and the general penal laws. These laws can only be described as archaic and fail to reflect modern realities of terrorism. Moreover, the police are dedicated adherents of the Cr.P.C and overlook the procedures prescribed under the ATA. Additionally, there is no concerted effort to devise laws and policies to de-radicalize extremism. Events following the APS attack highlighted the failure of the criminal justice system. Consequently, the government enacted the 21st Amendment which established military courts to try certain hard-core terror suspects.

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 effective civilian led response to terrorism in the country. Unfortunately, no meaningful measures have been adopted at the federal or provincial level. As a result, military courts were further extended for a two-year period. Although military courts were set to expire in January 2019, the current government plans to further extend its operation. Failure to implement Point 20 reflects the overall failure in the implementation of the NAP as 12 out of the 20 points have a clear nexus with criminal justice requiring effective and well-functioning institutions for their execution.

[147] Code of Criminal Procedure, 1898, Act V of 1898
[148] Qanun e Shahadat Order, 1984, Act X of 1984

5. POLICY IMPLEMENTATION AND THE 18TH AMENDMENT

Following the 18th Amendment, Article 142 of the Constitution provided both Parliament and Provincial Assemblies with the power to make laws concerning criminal law, criminal procedure and evidence. The Provincial Assembly does not have the exclusive power to legislate over issues of law and order and in case of conflict; the federal law will take precedence.

This has caused considerable confusion regarding law making at the provincial level, especially in relation to police, counter-terrorism, probation parole, sentencing, preventive detention, countering violent extremism etc. The area of Police Reforms has been particularly delayed as Provinces are unsure whether they had the competence to legislate. In the area of probation and parole, the Provinces have the exclusive control over the Reclamation and Probation Departments, but have failed to amend the Federal Probation of Offenders Ordinance 1960 which establishes these departments. Similar problems are faced by the Provincial Counter-Terrorism Departments which are governed by the Federal Anti-Terrorism Act 1997. Although provinces have attempted to push the boundaries of the constitutional provisions, given the inherent uncertainties in the area, reforms remain far off.

The area of law and order is extensive, impacting a range of areas where the provinces exercise executive control. Therefore, executive functions with the corresponding legislative competency to enact reformative laws to improve the functioning of the executive are crucial. Although the past few years have seen a decline in terrorist incidents, this is primarily due to military operations conducted throughout the country. The legal tools implemented to reduce terrorist activity have largely failed to effectively prosecute suspected terrorists. Therefore, it is no surprise that there is fear of resurgence of violence once military actions subsides. Comprehensive reforms of the criminal justice system, criminal law and procedure are necessary for the effective implementation of the National Action Plan.

6. APPLICABLE CONSTITUTIONAL FRAMEWORK

The 18th Amendment made considerable changes to the structure of the Constitution. It abolished the Concurrent Legislative List which gave simultaneous legislative authority to the Federation and the Province. Instead, a few additions were made to the Federal Legislative List and the remaining areas constitute residuary subjects; a Provincial domain.[149] However, despite the abolition of the Concurrent List, under Article 270AA, laws made prior to the 18th Amendment remain in force until expressly amended or repealed.[150] Moreover, according to Article 142(b), power to makes laws pertaining to criminal law, procedure and evidence is retained by the Parliament and the Provincial Assemblies concurrently. Furthermore, under Article 143, where laws have been enacted by both the Federation and Provinces, the federal law will prevail in case of a discrepancy.[151]

The areas of criminal law, procedure and evidence require uniformity due to their impact on the fundamental rights of citizens. A non-uniform approach may result in unequal treatment of citizens in different provinces. Justice Qazi Faez Isa in judgment of the Balochistan High Court held that the Constitution required uniformity of criminal law, Cr.P.C 1898 and evidence in Pakistan leaving provinces to legislate only in respect of such matters not already covered by federal law.[152]

Article 142(b) has created ambiguity regarding the competence to legislate in this area. Consequently, the process of criminal justice reforms has been largely stunted and is often challenged in courts. For example, the Balochistan High Court held that in light of Article

[149] Constitution of Pakistan 1973, Article 142(c): Subject to the Constitution— 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.
[150] Constitution of Pakistan 1973, Article 270AA: 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.
[151] Constitution of Pakistan 1973, Article 143: 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.
[152] Muhammad Kamran Mullahkhail v. Government of Balochistan, PLD 2012 Balochistan 57

143, the promulgation of the Code of Criminal Procedure (Amendment) Act 2010 was *void ab initio*. In light of this judgment, similar amendments made by Sindh may also be challenged.

In another case, an attempt to repeal the National Accountability Ordinance 1999 through the Sindh National Accountability Ordinance 1999 Repeal Bill was challenged in the Sindh High Court. It is claimed that in view of Article 142 and 143, the Sindh Assembly does not have the authority to restrict the jurisdiction of NAB.[153]

In Khyber Pakhtunkhwa, the KP Ehtesab Commission Act 2014 was challenged in the Peshawar High Court on the grounds that the NAB Ordinance 1999 was a federal law, prevailing over provincial law and should be declared ultra-vires the Constitution. The Court stated that both the Parliament and Provincial Assemblies had the power to legislate on the matter provided their laws were in conformity to one another.[154] Similarly, the KP Control of Narcotics Substance Bill 2017 can be challenged as contrary to Article 142(b). The Bill aims to limit the jurisdiction of the Anti-Narcotics Force, established through the federal Anti-Narcotics Force Act 1997.

The ambiguity over provincial legislative competence has resulted in delay to promulgate various essential reforms as well as increased judicial intervention. The above instances highlight the confusion regarding legislative competence years after the 18th Amendment.

7. THE LEGISLATIVE LISTS AND DUE COMPETENCE

There are two categories of law that fall under the ambit of law and order. The first is the criminal law, procedure and evidence, governed by Article 142(b) of the Constitution. The second category concerns all subjects not included in the Federal Legislative List or falling under the category of Article 142(b). This constitutes a vast category of areas that fall under the exclusive domain of provinces.

[153] "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/
[154] Noor Daraz Khan v Federation of Pakistan, PLD 2016 Peshawar 114

As stated before, the 18th Amendment completely abolished the Concurrent Legislative List. The subjects contained in that list now fall in the residual category for the provinces to legislate upon. During the existence of the List, the Federation promulgated laws on the subjects contained therein and took precedence over provincial laws. Following the 18th amendment, these laws can now be repealed or amended by Provincial Assemblies.

One clear challenge to the residual category is establishing what subjects fall within its ambit as it has not been expressly enumerated in the Constitution. This is particularly problematic in the ambit of law and order as it is often difficult to determine what falls under Article 142(b) and what falls in the residual category. Police laws are a prime example of this confusion. Provincially enacted Police laws primarily concern the establishment, structuring and discipline of the Police. But some may also relate to criminal procedure. Each province has legislated its own set of Police laws which either repeal or amend the federal Police Laws.

According to the Research Cell of the Office of the Advocate General of Punjab, Police is a matter distinct from criminal law and procedure and therefore, clearly falls within the legislative competence of the Provinces. This opinion, submitted to the Home Department, paved the way for the enactment of the Punjab Police Order (Amendment) Act 2013. On the other hand, in *Zafarullah Khan v. Federation of Pakistan*, the Lahore High Court took the opposite view i.e. police laws are primarily relatable to enforcement of criminal law.[155] However, it is important to note that this case was decided before the passing of the 18th Amendment and the court may hold a different opinion today.

The KPK government through its Police Act 2017 adopted a more cautious approach. Section 141 of the Act only repeals the provisions of the federal Police Order that relate to the Provincial Legislative Field, expressly stating that provisions relating to the Federal Legislative Field continue to remain in force. On the other hand, the Balochistan Police Act 2011 completely repeals the application of the Police Order 2002 in the province.[156]

[155]Zafarullah Khan v. Federation of Pakistan, Writ Petition No. 16244/2002 (Lahore High Court)
[156] Balochistan Police Act 2011, sec. 46

Although, establishment and functioning of institutions which enforce law and order fall under the provincial domain, it must be noted that some laws related to such institutions cannot be completely divorced from criminal law, procedure and evidence. For example, certain actions of police officials may amount to criminally punishable crimes. Similarly, laws related to functioning of the police will have an impact on criminal procedure. A more holistic approach is required for effective reforms to be legislated. It is not enough for provinces to be limited to legislate upon restructuring institutions like the Police.

The subject of law and order goes beyond the provisions of Article 142(b). It encompasses criminal law, procedure and evidence as well as the institutions established to maintain it and laws to regulate their operation. Therefore, law and order straddles both federal and provincial legislative competences, although most elements of the overall category fall in the provincial domain.

8. DELINEATING THE LEGISLATIVE LIST

At this point, it is important to define elements that fall under the jurisdiction of Article 142(b) and those that fall in the residual category. The following are definitions based on jurisprudence of the superior judiciary in Pakistan as well as Constitutional commentary by various scholars.

Article 142(b) specifies subjects upon which both the Parliament and the Provincial Assembly may legislate. It includes criminal law, criminal procedure and evidence. According to Black's Law Dictionary, Criminal law is *'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'*.[157]

Perkins & Boyce states that '*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, know to the lawyer as (1) the substantive criminal law, (2) criminal procedure, and (3) special problems in*

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

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…'

Considering the above definitions in relation to Article 142(b), the Parliament and 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 is defined by Black's Law Dictionary as '*the rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated and punished. It includes the protection of accused persons' constitutional rights.*'[158]

The Cr.P.C 1898 provides further guidance on the content of the term criminal procedure. An overview of the headings of the Cr.P.C indicate that procedure include the establishment of criminal courts, their hierarchy, outlining their powers, provisions relating to arrest and detention of accused persons, process to compel persons to appear before court, process of producing documents or moveable property, rules governing the functions and powers of Police, powers and methods of investigation, rights of accused, trial process, provisions of bail, framing of charges, mechanisms for appeal, sentencing procedure, procedure for dealing with special categories of persons, etc.

Evidence, unlike the other two terms, is not limited to the qualifier criminal. It consists of both criminal and civil evidence. Evidence as described by Black's Law Dictionary includes testimony, documents and tangible materials as well as the rules of evidence.[159]

These definitions clarify the elements of subjects that fall under article 142(b). We must now consider what falls under the exclusive domain of provincial legislation by defining the contours of the residual category. After the 18th Amendment, laws that fall under the

[158] Black's Law Dictionary Entry for Criminal Procedure (9th edn, 2009) p. 431.
[159] Black's Law Dictionary Entry for Evidence (9th edn, 2009) p. 635: Evidence, n. (14c) (1) something (including testimony, documents and tangible objects) that tend to prove or disprove the existence of an alleged fact
(2) …
(3) the collective mass of things, esp. Testimony and exhibits, presented before a tribunal in a given dispute
(4) The body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding.

residual category can only be repealed or amended by provinces, even if previously enacted by federal laws. As the category is not expressly enumerated in the Constitution, the constitutional jurisprudence defines the issue by what it does not include rather than what it does include. Therefore, a good starting point would be to exclude items mentioned by the Constitution.

Article 142(a) of the Constitution states that only the Parliament has the exclusive power to make laws with respect to matters in the Federal Legislative List. The List is found in the Fourth Schedule to the Constitution and is divided into two parts. Part I lists 53 competences on which the Parliament can legislate. It is a wide array of areas and includes *inter alia* matters relating to defense of Pakistan, taxation, elections, fisheries, international treaties and conventions, export of opium, nuclear energy, migration etc.

Part II enumerates a further 18 areas where the Parliament can legislate. However, under Article 152, the Council of Common Interests (CCI), 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 those areas. Therefore, Part II of the list allows some provincial say in areas like railways, oil and minerals, industry, electricity, ports, census, legal, medical and other professions, etc. Thus, only the Parliament can legislate on matters of criminal law in these areas. The Province can only influence legislation through their Chief Minister in the CII. Excluding the matters specified in the Federal Legislative List, better clarifies the content of the residual category. Hence, all matter and offences related to those matters fall under the residual category.

The list of matters to fall under the residual category can only be limited by one's imagination. However, for the purpose of delimiting the area of law and order, there are two primary means of determining its substantive content. The first are matters that previously fell under the Concurrent Legislative List. The second means is by referring to the State Legislative List of the Indian Constitution. In India, States can only legislate on matters listed in the State Legislative List; the residual matters are left for the Central Government. Given that India and Pakistan share a similar legal heritage, this is a useful approach.

The Concurrent Legislative List contained 48 entries. Once abolished, most of the entries on the list now fall under the residual category. Only three particular entries have been included in the Federal Legislative List, while entries related to criminal law, procedure and evidence are now governed by Article 142(b). Examples of matters falling under the residual category, concerning law and order include, but are not limited to, actionable wrongs, prisoners, preventive detention, arms and ammunition, explosives, opium, environmental protection, newspapers, printing presses, etc.

These entries constitute the domain of provincial legislation. It must be noted that some of the categories cannot be regulated without elements of Article 142(b) being a significant component. Matters concerning explosives or opium are just some examples that will require some form of penal sanction or procedural and evidential element in their legislation. Thus, the Provincial Assembly, while exercising its exclusive domain, will have to borrow from their powers under Article 142(b). Although Article 142(b) empowers provincial legislation, there is a problem in case of pre-existing federal law. Under Article 143, in case of conflict between federal and provincial laws, the federal law is to take precedence, rendering the provincial law null and void.

As stated above, the Constitution of India, 1949 can also serve as a reference point for determining what falls under the residual category. Subjects that fall under the Indian State Legislative List can constitute subjects that fall under the Residual Legislative List of Pakistan. These subjects include, but are not limited to, establishment of public order, police, prisoners, reformatories, borstal institutions and other similar institutions.

Defining the contours of criminal law, procedure and evidence under Article 142(b) and determining the content of the residual category helps to eliminate the confusion regarding the legislative competence of Provinces, especially in regards to law and order. The following section will provide an overview of the judicial scrutiny subjected to the distribution of powers between the Federation and Provinces.

9. JUDICIAL INTERPRETATION

The superior judiciary has, on multiple occasions, scrutinized the validity of statutory instruments by attempting to outline the boundaries of legislative competence as set out in Articles 141-144 of the Constitution. Following the 18th Amendment, litigation challenging the validity of laws and subordinate legislation has increased considerably.

Very recently, in March 2018, the Supreme Court of Pakistan held that the Sindh Assembly was competent to enact the Sindh (Repeal of Police Order, 2002 and Revival of the Police Act, 1861) Act, 2011 by repealing the Police Order 2002 which had been passed at the Federal level. Subsequently, however, a review petition was filed at the Supreme Court which purports that the Supreme Court failed to consider that the Sindh Assembly is repealing a federal law to the extent of its application to Sindh. There are many such cases that have been heard by the Superior Judiciary in Pakistan especially after devolution. The body of case law has resulted in the emergence of certain interpretational doctrines and principles.

9.1 Doctrine of Pith and Substance

The superior judiciary often relies on the doctrine of '*pith and substance*' in order to determine which of the two legislative lists a contested statutory instrument falls under, i.e. Federal or Residual legislative categories. The doctrine is particularly relevant to the provisions of Article 142(b) which explicitly fall under the competence of both federal and provincial legislature. This is because under Article 143, where there is a conflict between concurrent legislations by the Province and the Federation, the federal will 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). The doctrine has been invoked in several notable cases, including *Sapphire Textile Mills v. Collector of Central Excise and Land Customs Hyderabad,*[160] *Mian Ejaz Shah v.*

[160] Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs Hyderabad, 1990 CLC 456 [Karachi]: *"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 operation… Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is it true nature and character to be found. If*

Federation of Pakistan[161] and even by the Supreme Court in *Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi.*[162] In the latter case, the Supreme Court held that when considering a statutory instrument, the Courts are required to examine the object of the legislation as well as its effect.

An example of the practical application of the doctrine was the amendments to the federal Police Order 2002, proposed by the Punjab Government. The Office of the Advocate General of Punjab opined that Police was a matter distinct from criminal law and procedure. As such the Punjab Assembly was well within its the legislative competence since, in pith and substance, it related to the governance and functioning of the Police and only touched on criminal law and procedure incidentally.

9.2 Principle of Incidental Encroachment

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

In *The Province of East Pakistan v. Sirajul Haq Patwari*[163] the court held that validity of a laws made by various legislatures are to be accepted as fact and prevail unless their operation is frustrated by rules such as pith and substance, occupied field and incidental encroachment.

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these questions could not be asked, much beneficent legislation would be stilled at birth, and many of the subjects entrusted to Provincial legislation could never effectively be dealt with."

161 Mian Ejaz Shafi v. Federation of Pakistan, PLD 1997 Karachi 604: *"[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".*

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

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

The Court held 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 Federal Legislature. In another case, the Court clarified 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. field not legislated upon by the Federation.[164] The Supreme Court has stated that it would be erroneous to invoke the doctrine where there is no competition between the federal and provincial legislation, merely because the provincial law encroaches upon a matter in the Federal Legislative List.[165]

This doctrine is particularly relevant in light of Article 142(b) which empowers both the federal and provincial legislature to enact laws on criminal law, procedure and evidence. A practical example of this is the Police Act 2017, enacted by the KPK Assembly.[166] Section 141(2) of the Act states that provisions of the federal Police Order 2002 which relate to the Federal Legislative List shall remain in force. 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 federal law.

9.3 Doctrine of Occupied Field and Principles of Repugnancy and Paramountcy

The doctrine of occupied field is associated with the larger doctrine of pith and substance. This doctrine applies the principles of repugnancy and paramountcy in order to avoid any conflict between federal and provincial laws. According to this doctrine, where concurrent federal and provincial laws have been enacted and there exists a conflict between the two, then the provincial law will to that extent be repugnant and void.[167] According to the principle of paramountcy, 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

[164] Messrs Quetta Textile Mills Ltd. through Chief Executive v. Province of Sindh through Secretary Excise and Taxation, Karachi and another, PLD 2005 Karachi 55
[165] Shamas Textile Mills Ltd. and others v. The Province of Punjab and two others, 1999 SCMR 1477
[166] Khyber Pakhtunkhwa Police Act 2017, Act No. II of 2017
[167] Dr. Iftikhar Ahmed, Senior Medical Officer, Abbotabad v. Government of Khyber Pakhtunkhwa, PLD 2016 Peshawar 212

incompatible with the spirit of the federal law, thereby frustrating or undermining the independence of a federal enactment.

The doctrine of repugnancy is attracted in case of a direct conflict between federal and provincial law.[168] This was confirmed by the Peshawar High Court in the case concerning the KP Ehtesab Commission Act 2014 in the presence of the National Accountability Bureau Ordinance 1999; a federal law. The Court stated that 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.

An example of the practical manifestation of repugnancy is the case where amendments made under the Code of Criminal Procedure (Balochistan Amendment) Act 2010 were challenged on the grounds of Article 143. The court held the changes to be void as Balochistan had sought to specifically undo the changes made to the Cr.P.C by the Federation.[169]

10. JUDICIAL EMPHASIS ON HARMONIOUS INTERPRETATION

Given the influx of litigation post the 18th Amendment, the superior judiciary has opted for a more pragmatic and mature approach towards cases relating to 18 Amendment, ensuring harmonious interpretation and upholding the principles of cooperative federalism. In the case concerning the Khyber Pakhtunkhwa Ehtesab Commission Act 2014 the Peshawar High Court laid down guidelines on the operation of Article 143 and emphasized that its provisions should only be relied upon as a last resort. According to the Court, 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. The Court cautioned that the power to strike down or declare a legislative enactment void should be exercised only where there is no other alternative. Instead, every effort should be made to reconcile the two laws in order to avoid striking it down. Moreover, the principle of

[168] Noor Daraz Khan v. Federation of Pakistan, PLD 2016 Peshawar 114
[169] Muhammad Kamran Mullahkhail v. Government of Balochistan, PLD 2012 Quetta 57

repugnancy was not attracted where federal and provincial laws simultaneously operated in a supplemental role.

Recently, the Lahore High Court in *Punjab Higher Education Commission v. Dr. Aurangzeb Alamgir*[170] stated that according to the principle of cooperative federalism, powers are divided between the federal government and the provinces. The court was of the opinion that the 18th Amendment itself makes room for cooperativeness and coordination between governments in case of overlap. The Court also noted that the Constitution itself provides for cooperative federalism under Part V, the creation of the Council of Common Interest being a prime example.

According to the Court, since the principle is an intrinsic part of the Constitution, it forms a powerful interpretative tool for courts to apply in cases of legislative overlap. Areas limited by the Article 142 can also be accorded a more workable and compliant interpretation, rendering the application of Article 143 as a last resort. The court emphasized on the need for cooperation between the two forms of legislatures. It held that the role of federal law is to provide uniform minimum standards, leaving provinces to supplement these standards under the principle of cooperative federalism. This case is an example of the judiciary's attempt to ensure cooperation between the federation and province.

RECOMMENDATIONS

The 18th Amendment sought to create a participatory federation. In light of the above, it is clear that following the Amendment, there has been considerable confusion with regards to legislative competencies, more so on the subject of law and order. The following recommendations aim to provide measures 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 doctrine of pith and substance should be employed by legislators. First it should be determined what the law in substance relates to which should then be tallied with the Federal

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

Legislative List to determine where its competence lies. In case of incidental encroachment upon federal matters, legislatures should adopt the approach taken in the KP Police Act 2016 which states that all the provisions of the federally legislated Police Order relating to the Federal Legislative List shall continue to remain in force.

More clarity should be accorded to Article 142(b), in order to determine when the Federation and Provinces can operate in unison to create laws. Both the Parliament and the Provincial Assemblies should enact laws and policies in accordance with the legal definitions of criminal law, criminal procedure and evidence as mentioned above.

The Residual List must be clearly defined. This can be achieved by deducting all areas enumerated in the Federal Legislative List. as mentioned above, all areas under the abolished Concurrent List were evolved to the provinces with the exception of a few. These areas now fall within the Residual List. Moreover, the Constitution of India, 1949 can be used as a reference 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.

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.