

**IMPACT OF THE EIGHTEENTH AMENDMENT ON  
LEGISLATIVE COMPETENCY FOR POLICE  
REFORMS**

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### ABSTRACT

*The Eighteenth Amendment to the Constitution of Pakistan 1973 has been a milestone in the constitutional history of Pakistan as it aimed at strengthening democracy by devolving legislative powers to the provinces. However, even after two decades, there has been confusion in ascertaining the legislative competence for certain subjects. The current study probes into how the Eighteenth Amendment has created confusion regarding the legislative competency for police reforms in Pakistan. The author has analyzed the evolution of police laws in Pakistan by particularly focusing on the Police Act, 1861 and the Police Order, 2002. To further understand the impact of the Eighteenth Amendment on legislative competency, this study provides an in-depth analysis of the historical background of legislative lists in the Constitution of Pakistan. The author has also focused on Articles 142(b) and 143 of the Constitution to determine the legislative competency on the subject of 'police'. This paper also critically evaluates the fundamental constitutional doctrines of 'pith and substance' and 'occupied field' along with landmark judgments to determine under which legislative list the subject of 'police' falls for law-making.*

## INTRODUCTION

The 18<sup>th</sup> amendment to the Constitution of Pakistan, 1973 brought major changes to the structure of Pakistan's institutions by inserting Article 142(b) and 143 in the Constitution. Before the 18<sup>th</sup> amendment was passed to the Constitution, there was only a Federal Legislative List and a Concurrent Legislative List in Pakistan. Both the Provincial and Federal Government had the power to legislate upon the matters mentioned in the concurrent list. In case a conflict arose between the both, then the federal legislative would prevail.

After the 18<sup>th</sup> amendment was passed, the concurrent legislative list got abolished, and certain subjects got devolved to the provincial governments for lawmaking. However, the 18<sup>th</sup> amendment did not expressly touch upon the subject of 'police' by not listing it in the federal legislative list. This gave an idea to the provinces that the subject of 'police' falls within the provincial domain for lawmaking.

Confusion regarding the lawmaking power for the subject of 'police' arises when Article 142(b) of the Constitution is taken into consideration. According to Article 142(b), the lawmaking power on the matters of 'criminal law, criminal procedure and evidence' would come under the domain of Federation and the Provinces concurrently.<sup>1</sup>

The institution of police is of high importance for the maintenance of law and order. Not only does it deal with crime prevention and

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<sup>1</sup> Constitution of Pakistan 1973, art 142(b).

repression, but it also helps in protecting the fundamental rights of citizens. In Pakistan, being it a young democracy, the role of the police is all the more crucial with a major responsibility placed on it with regard to both those functions. However, it has failed to work properly due to various reasons including politicization, corruption, and lack of accountability in the police system.

Moreover, the lack of police reforms has also played a major role in the improper functioning of the police. One of the reasons behind this gap of legislation on police matters is the confusion regarding who has the power to legislate on such matters. There has been a huge shortcoming with respect to new laws being made for police, especially after the passing of the Eighteenth Amendment.

The first part of the article focuses on the evolution of police laws in Pakistan in order to fully understand the impact of the 18<sup>th</sup> constitutional amendment to the law making power with regards to the subject of 'police'. It focuses on how there was a delay in lawmaking with respect to the area of 'police' in Pakistan, and how the lawmaking power kept on shifting between the federation and the provinces.

The second part of the article sheds light on the provincial police laws introduced in Pakistan after the 18<sup>th</sup> amendment was passed, and how the Police Order, 2002 was repealed or amended in each of the provinces of Pakistan.

In the third part of the article, the 18<sup>th</sup> amendment to the Constitution of Pakistan, 1973 and its relevant provisions regarding

the legislative competency for police reforms are discussed in detail. This part focuses on Article 142(b) and Article 143 of the Constitution to understand how the lawmaking power got devolved after the 18<sup>th</sup> amendment, and whether the federation or the provinces shall enjoy lawmaking power with respect to the subject of ‘police’ in Pakistan.

The fourth part of the article will provide a historical background of the legislative power for the subject of ‘police’ in order to shed light on the pattern that has been followed in Pakistan regarding the lawmaking power for police laws. The next part of the article describes the content of the concurrent legislative list and the matters that may fall within the residuary list i.e provincial legislative list. This will help in understanding whether the laws on police should be made by the provincial governments singularly, or whether both the federation and provinces should make the police laws by focusing on the nature of these legislative lists.

In addition to this, the article focuses on various judgments of the superior courts of both Pakistan and India, along with the leading judgment given by the Supreme Court to determine the current status of legislative competency for police reforms in Pakistan.

## **EVOLUTION OF POLICE LAWS IN PAKISTAN**

In order to fully understand the impact of the Eighteenth Amendment on the legislative competence for police reforms, it is

important to analyze the legislative history of Pakistan with respect to the subject of police.

The shortcoming in the area of police laws dates back to the independence of Pakistan and its constitutional history.<sup>2</sup> Pakistan has faced major changes in its constitutional history, which have played a huge role in the lack of legislation being enforced in Pakistan.<sup>3</sup> The 1861 Police Act that was drafted during the British colonial rule in the sub-continent<sup>4</sup> was being followed in Pakistan after independence as a central law after the issuance of the Pakistan (Adaptation of Existing Pakistan Laws) Order.<sup>5</sup> The 1861 Police Act focused on the desire of the British rulers to have an arbitrary rule over the local people by having control over the police.<sup>6</sup> The Act incorporated a system of dual authority over the police during colonial rule in the

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<sup>2</sup> Hassan Abbas, 'Reforming Pakistan's Police and Law Enforcement Infrastructure: Is It Too Flawed to Fix?' (US Institute of Peace, 2011) [www.jstor.org/stable/resrep12443](http://www.jstor.org/stable/resrep12443) accessed 15 December 200..

<sup>3</sup> *ibid.*

<sup>4</sup> Police Act 1861; Police Amendment Act 1895 Act VIII of 1895.

<sup>5</sup> Pakistan (Adaptation of Existing Pakistan Laws) Order of 1947, s 3 states: "As from the appointed day, all existing Pakistan Laws shall, until repealed or altered or amended by a competent Legislature or other competent authority, in their application to Pakistan and any part or parts thereof, be subject to the adaptation directed in this Order".

<sup>6</sup>The duties of local police officials prescribed in the 1861 Police Act were limited and basic. The police were required to obey and execute all orders and warrants lawfully issued by any competent authority, collect and communicate intelligence affecting the public peace, prevent the commission of offenses and public nuisance, and detect and bring offenders to justice. In addition, police officers were legally authorized to enter and inspect, without a warrant and for any of the purposes mentioned in the act, places of "resort of loose and disorderly characters," including bars and gaming houses.

sub-continent.<sup>7</sup> The British made law continued to be in force in the sub-continent for 90 years.<sup>8</sup>

Several bills<sup>9</sup> got introduced by both the federal and provincial governments to change the policing powers in Pakistan, but all went in vain.<sup>10</sup> Just like the Britishers, the politicians and civil bureaucracy opposed to having made such amendments to the Police Laws in Pakistan as they wanted to continue having control over police so that they can use them as a tool for fighting their political opponents.<sup>11</sup>

It was not until 2002 when former President Musharraf brought serious police reforms in Pakistan by enforcing the Police Order 2002 that eliminated the dual control of the police that existed since colonial times.<sup>12</sup> The Police Order 2002 focused on organizational and structural problems that hindered the proper functioning of Police in Pakistan. It separated the branches and institutions according to their functions based on experience and training.<sup>13</sup> The Order also

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<sup>7</sup> The Police Act 1861, Act V of 1861.

<sup>8</sup> Repealed by the Police Order of 2002 which came into effect on 14 August 2002.

<sup>9</sup> Human Rights Watch, "This Crooked System", Police Abuse and Reform in Pakistan (HRW 2016) 13.

<sup>10</sup> Ibid.

<sup>11</sup> Paul Petzschmann (2010). *Pakistan Police between Centralization and Devolution* (Norwegian Institute of International Affairs 2010)

<sup>12</sup> Police Order 2002, Chief Executive Order No. 22 of 2002, No.F.2(4)/2002-Pub, Ministry of Law, Justice, Human Rights and Parliamentary Affairs of Pakistan, [http://npb.gov.pk/wp-content/uploads/2014/08/police\\_order\\_2002.pdf](http://npb.gov.pk/wp-content/uploads/2014/08/police_order_2002.pdf) accessed 15 December 2020.

<sup>13</sup> Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, 'Police Organizations in Pakistan' (2010)

[http://www.humanrightsinitiative.org/publications/police/police\\_organisations\\_in\\_pakistan.pdf](http://www.humanrightsinitiative.org/publications/police/police_organisations_in_pakistan.pdf) accessed 15 December 2020; Afzal Shigri, 'Changing Thana Culture' *The News* (17 September 2004)

introduced provisions that would help in making the police more publicly accountable for their actions by establishing grievance redress bodies.<sup>14</sup> The Police Order just like the Police Act of 1861 places the superintendence of provincial police establishments in the hands of provincial governments.<sup>15</sup>

However, the democratic parties did their best to oppose the Order by stating how it was drafted by a non-democratic government, which placed a hurdle for the Order to be enacted in its true spirit.<sup>16</sup> The bureaucrats and political leaders also named the Act as the ‘baby of a military ruler’.<sup>17</sup>

In 2004 and 2006, the Musharraf government faced pressure from the provincial governments and civil bureaucracy to amend the Police Order 2002, thus weakening the improvements that were made to the Order.<sup>18</sup> These amendments curtailed the police officer’s autonomy, and ensured that the decisions were made “*subject to the policy, oversight and guidance [of] the chief minister through the chief secretary and the provincial home secretary.*”<sup>19</sup>

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<http://forumpolicereforms.blogspot.co.uk/2008/03/cahnging-thana-culture.html>

accessed 25 December 2020.

<sup>14</sup> These included Capital City, Provincial, and National Public Safety Commissions (CCPSC, PPSC and NPSCs), a Police Complaints Authority (PCA), and Citizens Police Liaison Committees (CPLC).

<sup>15</sup> Police Order, 2002, art 9(1).

<sup>16</sup> Umbreen Javaid and Muhammad Ramzan, ‘Police Order 2002: A Critique,’ *Journal of Political Studies* (2013) 20, *Journal of Political Studies* 19, 20.

<sup>17</sup> *Ibid.*

<sup>18</sup> Human Rights Watch, “This Crooked System”, *Police Abuse and Reform in Pakistan* (HRW 2016) 15.

<sup>19</sup> International Crisis Group, ‘Reforming Pakistan’s Police’ (2008)

<https://www.crisisgroup.org/asia/south-asia/pakistan/reforming-pakistan%E2%80%99s-police> accessed 15 December 2020.



It wasn't until 2010 when the 18th amendment was made to the Constitution of Pakistan, 1973 that introduced some major changes to the Police Order, 2002. Following the 18th amendment, the provinces started to exercise the power to make their own policing laws.

## **LEGISLATION ON THE SUBJECT OF 'POLICE' AFTER EIGHTEENTH AMENDMENT**

After the Eighteenth Amendment, the Police Order 2002 was being viewed as a provincial matter by the provinces, therefore the provincial governments of all four provinces put an end to the federal nature of the Police Order, 2002 by either making amendments to the Police Order 2002 or by completely repealing the Order and replacing it with new provincial legislation.

Each province has made legislation in the field of 'police' in the following manner. The Research Cell of the Office of the Advocate General of Punjab submitted their opinion to the Home Department that the field of 'police' falls within the legislative competence of the provinces,<sup>20</sup> which helped in the passing of the Punjab Police Order (Amendment) Act 2013.<sup>21</sup>

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<sup>20</sup> Jamal Aziz and Minahil Khan, 'The impact of devolution on legislative reform relating to law and order in Pakistan' (2017) Research Society of International Law, <https://rsilpak.org/wp-content/uploads/2019/01/The-Impact-of-Devolution-on-Legislative-Reform-Relating-to-Law-Order-in-Pakistan.pdf>  
> accessed 15 December 2020.

<sup>21</sup> Punjab Police Order (Amendment) Act 2013, Act XXI of 2013.

Unlike other provinces, the Balochistan Provincial Assembly was quick to repeal the Police Order, 2002, and introduce its own legislation, the Balochistan Police Act 2011, after the Eighteenth Amendment.<sup>22</sup> Moreover, the said Provincial Act completely repealed the applicability of the Police Order, 2002 in Balochistan.<sup>23</sup>

The KPK Provincial Government came forward with the KPK Police Act 2017 by only repealing the provisions of the Police Order, 2002 that were exclusively related to the provincial legislative field.<sup>24</sup> The Sindh Police Act was introduced in the provincial assembly in the year 2015 and got approved only recently in May 2019.<sup>25</sup> This shows just how slow the lawmaking process has been with regards to the subject of “police” in the province of Sindh. However, the vires of the said provincial act got challenged in the Sindh High Court on the grounds that provincial assemblies don’t have the legislative competency to make laws over the field of ‘police’ as a singular authority.<sup>26</sup> The petitioners also submitted that the Sindh Provincial Assembly does not have the power to repeal or amend a federal law i.e. Police Order 2002.<sup>27</sup>

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<sup>22</sup> Balochistan Police Act 2011, Act no. X of 2011.

<sup>23</sup> Ibid, s 46.

<sup>24</sup> The Khyber Pakhtunkhwa Police Act 2017, KPK Act No. II of 2017.

<sup>25</sup> Mohammad Ali Babakhel, ‘Sindh Police Law’ *Dawn* (12 February 2020) <https://www.dawn.com/news/1533984> accessed 15 December 2020.

<sup>26</sup> *Karamat Ali and others vs. Federation of Pakistan* PLD (2018) Sindh 8.

<sup>27</sup> *ibid.*

## **EIGHTEENTH AMENDMENT AND THE APPLICABLE CONSTITUTIONAL PROVISIONS**

It wasn't until April 2010, when the Parliament passed the Eighteenth Amendment to the Constitution of Pakistan, 1973. The Eighteenth Amendment amended 102 out of 280 Articles of the Constitution of Pakistan,<sup>28</sup> however the principal change that it brought to the State of Pakistan was the abolishment of the concurrent legislative list and the decentralization of the Federation.<sup>29</sup> Therefore, the Eighteenth Amendment changed the heavily centralized structure of the institutions of Pakistan to a decentralized federation that helped in restoring Pakistan's constitution to its original position i.e. a decentralized federation of provinces, which got lost during the autocratic military rule.<sup>30</sup>

The Eighteenth Amendment not only abolished the concurrent legislative list but also reduced the power of the National Assembly to make laws by limiting the Federal Legislative List and devolving the residuary legislative competency on the provincial assemblies.<sup>31</sup>

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<sup>28</sup> Five Years of the 18th Constitutional Amendment: Federalist Imperatives on Public Policy and Planning' (UNDP) [http://www.pk.undp.org/content/pakistan/en/home/librar\\_y/hiv\\_aids/development-advocate-pakistan--volume-2--issue1/analysis--ve-years-of-the-18th-constitutional-amendment--feder.html](http://www.pk.undp.org/content/pakistan/en/home/librar_y/hiv_aids/development-advocate-pakistan--volume-2--issue1/analysis--ve-years-of-the-18th-constitutional-amendment--feder.html) accessed 30 November 2020.

<sup>29</sup> *ibid.*

<sup>30</sup> Anwar Shah 'The 18th Constitutional Amendment: Glue or Solvent for Nation Building and Citizenship in Pakistan?' (2012) 17 LJE 387 <http://lahoreschoolofeconomics.edu.pk/EconomicsJournal/Journals/Volume%2017/Issue%20SP/16%20Shah%2018th%20Constitutional%20Amendment%20ed%20tc%2001102012.pdf>. accessed 15 December 2020.

<sup>31</sup> Constitution of Pakistan 1973, art 141-144.

However, despite abolishing the Concurrent Legislative List, the Eighteenth Amendment inserted Article 142(b) to the Constitution of Pakistan, which states that ‘matters related to criminal law, the criminal procedure and evidence would fall under the concurrent jurisdiction of the federation and the provinces for law-making’.<sup>32</sup> Therefore, the Majlis-e-Shoorah (Parliament) and the Provincial Assemblies can still make laws simultaneously on matters that would be linked with criminal law, criminal procedure and evidence.

Moreover, it is to be noted that under Article 270AA of the Constitution of Pakistan, any law made before the passing of the Eighteenth Amendment shall remain in force, unless it is amended or repealed expressly.<sup>33</sup> In addition to this, Article 143 was inserted to the Constitution of Pakistan through the Eighteenth Amendment, according to which if both the Federation and the Provinces make law on a particular subject, and any provision of the Provincial Act is in contravention to a provision of any Federal Act, then the Act passed by the Federation shall prevail regardless of the fact that it was passed before or after the Act of the Provincial Assembly.<sup>34</sup> Conclusively,

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<sup>32</sup> Constitution of Pakistan 1973, art 142(b).

<sup>33</sup> Constitution of Pakistan 1973, art 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.’

<sup>34</sup> Constitution of Pakistan 1973, art 143: ‘Inconsistency between Federal and Provincial laws.—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

Provincial legislation in contravention with Federal legislation shall be declared void.<sup>35</sup>

In a nutshell, when articles 142(b) and 143 of the Constitution are read together, it becomes clear that both the Federation and the Provinces have the power to make laws on the subjects of ‘criminal law, criminal procedure, and evidence’, however in case there is a collision between a provision of a Federal and Provincial Act, then the provision of the Federal Act shall prevail, and the latter shall be declared void.

## **HISTORICAL BACKGROUND OF LEGISLATIVE LISTS IN PAKISTAN**

In the recent judgment of *Pakistan International Freight Forwarders v Province of Sindh and another*,<sup>36</sup> the matter of division of legislative power in a federal system came up. This gave a chance to the bench to discuss the historical background of legislative lists in Pakistan.<sup>37</sup> A Federal state consisting of the provinces and the state,

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(Parliament) is competent to enact, or to any provision of any existing law with respect to any of the matters enumerated in the Concurrent Legislative List, then the Act of Majlis-e-Shoora (Parliament), whether passed before or after the Act of the Provincial Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.’

<sup>35</sup> *ibid.*

<sup>36</sup> *Pakistan International Freight Forwarders v. Province of Sindh and another* PTD (2017) 1.

<sup>37</sup> *Ibid*, pp.21-24, para. 29.

and the provisions regarding the distribution of legislative powers are envisaged under the constitution of the state.<sup>38</sup>

The Government of India Act, 1935<sup>39</sup> (hereinafter referred to as “GOIA”) set up a federal system for British India and was also the first constitution for the dominions of Pakistan and India.<sup>40</sup> The GOIA and its legislative lists were based on the constitutions for the dominions of Canada and Australia.<sup>41</sup> The GOIA had three legislative lists in its Seventh Schedule, one of which was exclusive to the federation, the second to the provinces, and the third was concurrent, which means that both the center or union, and the states can make laws together regarding matters mentioned in the concurrent legislative list.<sup>42</sup> It is to be noted that at that time, matters related to ‘police’ were included in the provincial legislative list, and not the concurrent legislative list.<sup>43</sup> Whereas, matters related to ‘criminal law’ and ‘criminal procedure’ were referred to in the concurrent list.<sup>44</sup> Moreover, section 104 of the GOIA stated that all the matters which are not allocated in any of the three legislative lists would be known as ‘residual powers of legislation’ and would be distributed to either the Federation or the Provinces by the Governor-General.<sup>45</sup> The same

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<sup>38</sup> *ibid*, para.28.

<sup>39</sup> Government of India Act 1935.

<sup>40</sup> Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: The University of Michigan Press 2003).

<sup>41</sup> *Pakistan International Freight Forwarders v. Province of Sindh and another* PTD (2017) 1, para. 28.

<sup>42</sup> Government of India Act 1935, List III, Concurrent Legislative List.

<sup>43</sup> *Ibid*, Entry no. 3, List II, Provincial Legislative List, Seventh Schedule.

<sup>44</sup> *Ibid*, Entry no. 1-2, List III, Concurrent Legislative List, Seventh Schedule.

<sup>45</sup> Government of India Act of 1935, s 104.

was incorporated in the 1956 and 1962 Constitutions of Pakistan as well as in the Indian Constitution.<sup>46</sup>

The only change brought to the lawmaking powers in Pakistan was in the 1973 Constitution where there were only two legislative lists i.e. the federal and concurrent legislative lists. Prior to the Eighteenth Amendment, legislation on the police force was governed under entry no. 1 and 2 of the concurrent list i.e. criminal law and criminal procedure.<sup>47</sup> Furthermore, police matters were also referred to in entry no. 16 of the concurrent list, but only for specified purposes, according to which both the federation and provinces would make laws on areas related to ‘police’ concurrently.<sup>48</sup>

After the Eighteenth Amendment, the concurrent legislative list got abolished, and the entries of the federal legislative list got limited, leaving the residual matters within the power of provincial assemblies for law-making.

Therefore, in Pakistan there has been a consistent pattern where the provincial assemblies have always had legislative competence on matters pertaining to ‘police’: any matter that was not listed in either the federal or concurrent list before the Eighteenth Amendment, or that is now not listed in the federal list after it, would fall within the domain of the provinces,<sup>49</sup> i.e. residual category for legislation.

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<sup>46</sup> Constitution of Pakistan 1956, art 109; Constitution of Pakistan, 1962, art 132.

<sup>47</sup> Constitution of Pakistan 1973, Entry no.1-2, Concurrent Legislative List, Fourth Schedule.

<sup>48</sup> *ibid*, Entry no.16.

<sup>49</sup> Constitution of Pakistan 1973, art 142.

## DEFINING THE CONTENTS OF THE CONCURRENT LIST

In order to analyze what matters would fall under the concurrent list for lawmaking, it has become important to define the subjects that fall within the ambit of Article 142(b) i.e. criminal law, criminal procedure, and evidence.

According to Black's Law Dictionary, criminal law is defined as "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 called penal law."<sup>50</sup> According to a judgment of the British Privy Council, "criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state."<sup>51</sup>

The Black's Law Dictionary has further defined the criminal procedure as "the rules governing the mechanisms under which crimes are investigated, prosecuted, adjudicated, and punished. It includes the protection of accused persons' constitutional rights."<sup>52</sup>

Unlike criminal law and criminal procedure, the scope of 'evidence' is not limited to criminal matters only and extends to both civil and criminal evidence. The term 'evidence' has been defined in

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<sup>50</sup> Black's Law Dictionary Entry for Criminal Law (9th edn, 2009), p.431.

<sup>51</sup> *The Proprietary Articles Trade Association and others v The Attorney-General of Canada and others* [1931] UKPC 11, [1931] AC 310.

<sup>52</sup> Black's Law Dictionary Entry for Criminal Procedure (9th edn, 2009), p.431.



the Black's Law Dictionary as something that includes testimony, documents, and tangible materials.<sup>53</sup>

These definitions mentioned here have clarified the contents of Article 142(b) of the Constitution of Pakistan and will help navigate what matters would fall under the concurrent legislative list for the Federation and Provinces to legislate upon simultaneously.

### **DEFINING CONTENTS OF THE RESIDUAL CATEGORY**

After going over the definitions of the subjects included in the concurrent list, it is important to also define the content of the residual category on which the Provincial assemblies can make laws. Article 142(c) was also inserted to the Constitution of Pakistan through the Eighteenth Amendment, which is in relation to the 'residual category of law-making powers'. According to Article 142(c), only the provincial assemblies shall have the power to make laws on matters that are not enlisted in the Federal Legislative List, therefore they fall within the 'residual category' on which only the provinces can legislate as a singular authority.<sup>54</sup> Therefore, anything that is not included in the Federal Legislative List, and that would not be covered by the subjects of the Concurrent List defined under Article 142(b)

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<sup>53</sup> Black's Law Dictionary Entry for Evidence (9th edn, 2009), p.635.

<sup>54</sup> Constitution of Pakistan 1973, art 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.'

would be within the powers of the Provincial Assemblies to legislate upon.

## **JUDICIAL INTERPRETATION ON LEGISLATIVE COMPETENCY FOR POLICE REFORMS**

It has become important to analyze the interpretation of the Superior Judiciary of Pakistan over this matter to reach a final decision regarding the legislative competency for police reforms. The Lahore High Court held in *Zafarullah Khan v. Federation of Pakistan*<sup>55</sup> that police law is related to the enforcement of criminal law, therefore the subject of ‘police’ would fall under the Concurrent Legislative List. However, this judgment was passed before the Eighteenth Amendment, so the views achieved later can be different. Despite this judgment making it clear that both the federation and provinces must make laws on the subject of ‘police’ concurrently, all the provinces enacted their own Police Acts by making major changes to the Police Order, 2002 as a singular authority as described in Chapter II of this paper.

The problem started to arise when the validity of such Provincial Acts started to get challenged in the courts.<sup>56</sup> There have been multiple cases brought before the Superior Judiciary of Pakistan to

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<sup>55</sup> *Zafarullah Khan v. Federation of Pakistan* Writ Petition No. 16244/2002 (Lahore High Court).

<sup>56</sup> Validity of the Sindh Police Act got challenged in *Karamat Ali and others v Federation of Pakistan* PLD (2018) SINDH 8.

decide on the validity of certain statutory instruments by focusing on the legislative competence described under Articles 141-144 of the Constitution following the Eighteenth Amendment. For example, the Sindh National Accountability Ordinance 1999 Repeal Bill was introduced by the Sindh Provincial Assembly,<sup>57</sup> which got challenged in the Sindh High Court since the Sindh Assembly does not have the legislative competency to repeal a federal law.<sup>58</sup> Furthermore, in another case of the Peshawar High Court,<sup>59</sup> the KP Ehtesab Commission Act 2014 (hereinafter referred to as “KP Act”)<sup>60</sup> got challenged on the grounds that the NAB Ordinance 1999 is a federal law that had already satisfied the doctrine of the occupied field in relation with Article 143 of the Constitution, therefore it would prevail over the KP Act that would be ultra-vires to the Constitution being a provincial law. However, a five member bench declared that both the Parliament and the Provincial Assembly had the powers to legislate on the matter provided that these laws were not in conflict with each other.<sup>61</sup> Many more cases of the same nature have been brought before the Superior Judiciary of Pakistan, and the confusion regarding legislative competence was prevalent after the Eighteenth Amendment. However, after analyzing these cases, it has been found

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<sup>57</sup> Haseeb Bhatti, ‘Sindh's National Accountability Ordinance Repeal Act challenged in apex court’ *Dawn* (11 August 2017) <https://www.dawn.com/news/1350775> accessed 15 December 2020.

<sup>58</sup> News Desk, ‘PTI Challenges Repealing of NAB Ordinance’ *The Express Tribune* (16 August 2017) <https://tribune.com.pk/story/1482382/pti-challenges-repealing-nab-ordinance/> accessed 15 December 2020.

<sup>59</sup> *Noor Daraz Khan v. Federation of Pakistan*, PLD (2016) Peshawar 114.

<sup>60</sup> Khyber Pakhtunkhwa Ehtesab Commission Act 2014, Act No I of 2014.

<sup>61</sup> *Noor Daraz Khan v Federation of Pakistan* PLD (2016) Peshawar 114.

that the courts seem to rely on certain constitutional doctrines and principles in their judgments to determine the legislative competency over a certain subject, which are also crucial for understanding under what domain the field of 'police' falls for lawmaking.

### 1. The Doctrine of Pith and Substance

When it comes to determining under which category i.e. Federal or Provincial, a certain subject for law-making falls, the Superior Judiciary often relies on the doctrine of 'pith and substance'.<sup>62</sup> Pith means the 'true nature' or 'essence of something',<sup>63</sup> while substance denotes the 'most essential part of something'.<sup>64</sup> Therefore, the doctrine of pith and substance focuses on the real subject matter instead of the incidental effects of something when determining the legislative competence of a certain subject.

The object of this doctrine is to eliminate the absolute encroachment of a legislative list by focusing on the 'substance' of the enactment and determining under which legislative category the particular subject falls in. Thus, the doctrine of pith and substance is used to determine the legislative competency with regards to a particular subject by looking into the 'substance' of the relevant enactment. The court simply focuses on the words of the legislation

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<sup>62</sup> *Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs Hyderabad* CLC (1990) Karachi 456 ; *Mian Ejaz Sha v. Federation of Pakistan* PLD (1997) Karachi 604.

<sup>63</sup> K. Ankita Rao, Shelal Lodhi Rajput, 'Doctrine of Pith and - 'The' Metaphor' (2020) 7 IJRAR 948 <http://www.ijrar.org/IJRAR2001996.pdf> accessed 15 December 2020.

<sup>64</sup> *Ibid.*

along with the background and circumstances related to it, instead of being concerned with the efficacy of law.<sup>65</sup> The doctrine of pith and substance was developed in the Canadian case of *Cushing v. Dupuy* in which the court relied on this doctrine to determine under which head of power a certain enactment falls in.<sup>66</sup>

## 2. Doctrine of Pith and Substance in the Indian Context

The doctrine of pith and substance later became the basis of several landmark judgments in India<sup>67</sup> and is supported by Article 246 of the Indian Constitution.<sup>68</sup> The doctrine was first used in the case of *State of Bombay v. F.N Balsara* in which the Supreme Court held that the doctrine is to be applied to determine in which legislative list a certain enactment falls based on its true essence.<sup>69</sup> In another case *State of Rajasthan v. G. Chawla*, the doctrine of pith and substance was used to resolve the confusion regarding whether the state or the central government has the power to legislate on public interest matters.<sup>70</sup> Moreover, the court opined in *Atiabari Tea Co. Ltd v. State of Assam* that ‘where there is the encroachment of powers to legislate, the doctrine can be applied; else the doctrine is of no use’.<sup>71</sup>

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<sup>65</sup> *Ward v. Canada (Attorney General)* (2002) SCC 17.

<sup>66</sup> *Cushing v. Dupuy* [1880] UKPC 22.

<sup>67</sup> *Karamat Ali and others v Federation of Pakistan* PLD (2018) Sindh 8.

<sup>68</sup> Constitution of India 1949, art 246.

<sup>69</sup> *State of Bombay and Another v. F.N. Balsara*, AIR (1951) SC 318.

<sup>70</sup> *State of Rajasthan v. G. Chawla*, AIR (1959) SC 544.

<sup>71</sup> *Atiabari tea co. ltd. v. State of Assam*, AIR 1961 SC 232.

### 3. Doctrine of Pith and Substance in Pakistan

The doctrine of pith and substance has been relied upon in several cases in Pakistan including *Mian Ejaz Shah v. Federation of Pakistan*<sup>72</sup> and *Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi*.<sup>73</sup> In the latter, it was held that in order to determine the pith and substance, the Courts need to consider the following:

1. The whole scheme of distribution of powers between the Federation and the Provinces;
2. The object of the legislation and its effects.<sup>74</sup>

### 4. Doctrine of Occupied Field

The doctrine of occupied field is another important doctrine that the courts rely upon for determining the validity of provisions whenever there is a conflict between two statutes. According to this doctrine, whenever a new law is being put forward regarding a particular field on which a law already exists, then the latter will be declared void on the basis that the 'field' has already been 'occupied'. It is also linked with the doctrine of pith and substance, and is applied in order to avoid any conflict arising between the law making powers of the Majlis-e-Shoorah (Parliament) and the Provincial Assemblies. The doctrine of occupied field is closely related with the concurrent legislative list envisaged in the Constitution of Pakistan. Therefore, in

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<sup>72</sup> PLD (1997) Karachi 604.

<sup>73</sup> PLD (1958) Karachi 887.

<sup>74</sup> Ibid.

instances where a Federal Act already exists on a particular subject, then the new provincial legislation will be declared void by relying on the doctrine of occupied field.

### **CURRENT STATUS OF LEGISLATIVE COMPETENCE IN THE FIELD OF POLICE**

In order to understand the current status of legislative competency over the subject of police, it is necessary to analyze the impugned judgment of the Sindh High Court in which the validity of the Sindh Police Act was challenged on the grounds that the Sindh Provincial Assembly does not have the power to make police laws. In this case, the Sindh High Court decided that the Police Order, 2002 was rightly repealed by the Sindh Provincial Assembly, and that the Sindh Police Act is the current law on the subject of ‘police’ in the province of Sindh. Therefore, it was found in this judgment that the provincial government has the power to make laws with respect to the subject of ‘police’ and that the Police Order, 2002 is a provincial law.

The petitioners were of the view that the Police Order, 2002 was a federal law in pith and substance, and would fall within the concurrent legislative list for lawmaking. The Advocate General Sindh while making his arguments in *Karamat Ali and others v Federation of Pakistan*<sup>75</sup> relied on the passages of *Inspector General of Police Punjab and others v. Mushtaq Ahmed Warraich and others*,

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<sup>75</sup> *Karamat Ali and others v Federation of Pakistan* PLD (2018) Sindh 8, para.9.

<sup>76</sup> in which the Supreme Court held that the “Police Act fell within the provincial domain as ‘police’ was within the legislative competence of the Provincial Legislature”.<sup>77</sup>

The Sindh High Court held that the Police Order, 2002 in its pith and substance is a provincial legislation, therefore the Sindh Provincial Assembly has the legislative competency to repeal the Police Order, 2002 and replace it with another legislation i.e. Police Act, 1861, which is to be called the Sindh (Repeal of the Police Order, 2002 and Revival of the Police Act, 1861) Act, 2011.<sup>78</sup>

The judgment by the Sindh High Court held that after the Eighteenth Amendment to the Constitution of Pakistan the legislative powers were redistributed between the Federation and the Provinces.<sup>79</sup> Therefore, the legislative competency in relation to the field of “police” fell within the domain of the provincial assemblies exclusively since it was not enumerated in the federal legislative list, thus would be covered under the residual category for law-making.<sup>80</sup> According to the Sindh High Court, even though Article 142(b) of the Constitution confers jurisdiction on the Parliament and Provincial Assemblies related to criminal law, criminal procedure, and evidence, this article does not extend to the field of “police”.<sup>81</sup> Therefore the

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<sup>76</sup> PLD 1985 SC 159.

<sup>77</sup> Ibid, p. 178.

<sup>78</sup> *Karamat Ali and others vs. Federation of Pakistan* PLD (2018) Sindh 8.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.



National Assembly does not have the legislative jurisdiction to make laws with respect to the subject of “police”.<sup>82</sup>

However, a review petition was filed in the Supreme Court against this judgment, following which recently, a three-judge bench headed by former Chief Justice Mian Saqib Nisar held on January 21, 2019, that police law is a ‘concurrent subject’, thus both the Federation and Provinces will make laws on it together.<sup>83</sup> In a six-page order issued by Justice Bandial, the Supreme Court held that the Sindh High Court had failed to consider the primary function of police that is the ‘maintenance of law and order’; when excluding police force from the domain of Article 142(b) of the Constitution. It must be noted that the maintenance of public order is a ‘functional purpose’ of the police according to the Police Act, 1861. Therefore, in order to meet the Rule of Law under the Constitution of Pakistan, it is necessary for the police to offer their services with respect to the “prevention, detection and investigation of crime and the prosecution and punishment of criminal offenders in a society”.<sup>84</sup> When this function of the police is read in relation with Article 142(b) of the Constitution and the meanings of the subjects of the concurrent list are focused on, it becomes apparent that the matter of police would fall within the ambit

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<sup>82</sup> Ibid.

<sup>83</sup> Hasnaat Mailk, ‘Larger SC bench may rule on Police Status’, *Express Tribune* (2 Feb. 2019) <https://tribune.com.pk/story/1902083/larger-sc-bench-may-rule-police-status> accessed 15 December 2020.

<sup>84</sup> Ibid, para.4.

of Article 142(b), and the Federation along with the Provinces shall have concurrent authority over it for lawmaking.<sup>85</sup>

Justice Bandial in an attempt to form a link between Article 142(b) and the subject of police also focused on how the FIA exercises police powers concurrently with the Provincial police.<sup>86</sup> Reliance was also made to article 240 of the Constitution that defines an “All Pakistan Service”, which is a service common to the Federation and the Provinces.<sup>87</sup> It is pertinent to note that the “Police Service of Pakistan” falls under the category of an All Pakistan Service, and such officers are in the service of the Federation and are also working for the Provincial Government.

According to the Police Service of Pakistan (Composition, Cadre, and Seniority) Rules 1985 (hereinafter referred to as “PSP Rules”),<sup>88</sup> the appointment and terms of service of police officers will be decided by the Federal and Provincial Government through consultations.<sup>89</sup> Therefore, following the obligations laid down under the PSP Rules and an Agreement dated 19.09.1993 between both the Federation and the Provinces, the Provincial Government cannot unilaterally make laws on the subject of ‘police’. Therefore, when analyzing the functions of the police, it is crucial to note that some functions would fall under Article 142(b) of concurrent legislative power, while the

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Police Service of Pakistan (Composition, Cadre and Seniority) Rules 1985.

<sup>89</sup> Ibid, s 7.

other functions as described within Article 240 of the Constitution falls under the executive authority of the Federal Government.

Justice Bandial also held that “For securing integrity, competence, diligence in and accountability for police performance, the federation may consider framing a law setting out uniform criteria of appointment on sector cadre posts, their independence of operation, the security of tenure, performance assessment and accountability of incompetence, negligence or dishonesty.”<sup>90</sup> Therefore, the Federation and the Provinces will have to collaborate when it comes to appointments, transfers of police senior cadre posts, and situations in relation to crime prevention, detection, investigation, prosecution, and punishment of criminal offenders; thereby declaring the subject of ‘police’ within the concurrent list for lawmaking. It must be noted that the Supreme Court did not give detailed comments on the doctrine of pith and substance and the doctrine of occupied field while making this order. A detailed judgment is yet to be released for the said case.

The court can apply the doctrine of pith and substance in order to determine whether a said provision by its nature should fall within the domain of the federal or provincial government or both. Moreover, the doctrine of the occupied field can help the court in establishing which law should prevail. In case a federal law already exists on a said subject, and a new provincial law on the same subject is

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<sup>90</sup> *ibid*, para 9.

introduced, and there is conflict between the two, then the former shall prevail.

According to the order passed by the Supreme Court of Pakistan, the subject of 'police' falls within the domain of the concurrent legislative list. Both the federation and the provinces will have the power to make laws concurrently. It must be noted that by applying the doctrines of pith and substance, and the doctrine of the occupied field, any confusion regarding the validity of a law in case of conflict can be resolved easily. There are certain areas of police laws on which there must exist a uniform set of rules, and they must be the same throughout Pakistan.

## CONCLUSION

The Eighteenth Amendment was a huge step towards building a strong federation in Pakistan and provided a chance for Pakistan to strengthen its parliamentary system. However, the uncertainty regarding the legislative competencies especially in relation to police led to hindrance in the maintenance of law and order, and the protection of fundamental rights in Pakistan. The provinces had themselves assumed that the subject of 'police' falls within the residual category of the Provincial Legislative List as the matter was not expressly enumerated in the Federal List after the Eighteenth Amendment. However, problems started to arise when the validity of such Provincial Acts started to get challenged in the courts. One such major example is that of the Sindh Police Act, 2011 that got

challenged in the Sindh High Court on the grounds that the Sindh Provincial Assembly does not have the legislative competency to repeal the Police Order, 2002 and replace it with the Sindh Police Act, 2011. The Sindh High Court held that the legislative competency on the subject of 'police' falls within the authority of the Provincial Assemblies; however, this decision got challenged in the Supreme Court. The three judge bench held that the law making power on the subject of 'police' falls under Concurrent Legislative List, therefore both the Federation and the Provinces shall make police laws simultaneously, and in case of discrepancy between them, the Federal Act shall prevail, while the Provincial Act will be declared void.

## **Bibliography**

### **Legislation**

1. Balochistan Police Act 2011, Act no. X of 2011
2. Constitution of India 1949
3. Constitution of Pakistan 1956
4. Constitution of Pakistan 1973
5. Constitution of Pakistan, 1962
6. Government of India Act 1935
7. Khyber Pakhtunkhwa Ehtesab Commission Act 2014, Act No I of 2014
8. Pakistan (Adaptation of Existing Pakistan Laws) Order of 1947
9. Police Act 1861; Police Amendment Act 1895 Act VIII of 1895
10. Police Order 2002
11. Police Service of Pakistan (Composition, Cadre and Seniority) Rules 1985
12. Punjab Police Order (Amendment) Act 2013, Act XXI of 2013.
13. The Khyber Pakhtunkhwa Police Act 2017, KPK Act No. II of 2017
14. The Police Act 1861, Act V of 1861

## Case Law

15. *Atiabari tea co. ltd. v. State of Assam*, AIR 1961 SC 232
16. *Cushing v. Dupuy* [1880] UKPC 22
17. *Inspector General of Police Punjab and others v. Mushtaq Ahmed Warraich and others* PLD (1985) SC 159
18. *Karamat Ali and others vs. Federation of Pakistan* PLD (2018) Sindh 8
19. *Mian Ejaz Sha v. Federation of Pakistan* PLD (1997) Karachi 604
20. *Noor Daraz Khan v. Federation of Pakistan*, PLD (2016) Peshawar 114
21. *Pakistan International Freight Forwarders v. Province of Sindh and another* PTD (2017) 1
22. *Progress of Pakistan Co. Ltd v. Registrar Joint Stock Companies Karachi* PLD (1958) Karachi 887
23. *Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs Hyderabad* CLC (1990) Karachi 456
24. *State of Bombay and Another v. F.N. Balsara*, AIR (1951) SC 318
25. *State of Rajasthan v. G. Chawla*, AIR (1959) SC 544
26. *The Proprietary Articles Trade Association and others v The Attorney-General of Canada and others* [1931] UKPC 11, [1931] AC 310
27. *Ward v. Canada (Attorney General)* (2002) SCC 17
28. *Zafarullah Khan v. Federation of Pakistan* Writ Petition No. 16244/2002 (Lahore High Court)

## Secondary Sources

### Books and Journal Articles

29. Afzal Shigri, 'Changing Thana Culture' *The News* (17 September 2004)  
<http://forumpoliceforms.blogspot.co.uk/2008/03/cahnging-thana-culture.html> accessed 25 Dec 2020
30. Anwar Shah 'The 18th Constitutional Amendment: Glue or Solvent for Nation Building and Citizenship in Pakistan?' (2012) 17 LJE 387  
<http://lahoreschoolofeconomics.edu.pk/EconomicsJournal/Journals/Volume%2017/Issue%20SP/16%20Shah%2018th%20Constitutional%20Amendment%20ed%20tc%2001102012.pdf>. accessed 15 Dec 2020
31. Black's Law Dictionary Entry for Criminal Law (9th edn, 2009)
32. Black's Law Dictionary Entry for Criminal Procedure (9th edn, 2009)
33. Black's Law Dictionary Entry for Evidence (9th edn, 2009)
34. Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, 'Police Organizations in Pakistan' (2010)  
[http://www.humanrightsinitiative.org/publications/police/police\\_organisations\\_in\\_pakistan.pdf](http://www.humanrightsinitiative.org/publications/police/police_organisations_in_pakistan.pdf) accessed 15 Dec 2020
35. Five Years of the 18th Constitutional Amendment: Federalist Imperatives on Public Policy and Planning' (UNDP)  
<http://www.pk.undp.org/content/pakistan/en/home/librar>



- [y/hiv\\_aids/development-advocate\\_\\_\\_\\_\\_pakistan--volume-2--issue1/analysis--ve-years-of-the-18th-constitutional-amendment--feder.html](#) accessed 30 Nov 2020
36. Haseeb Bhatti, 'Sindh's National Accountability Ordinance Repeal Act challenged in apex court' *Dawn* (11 August 2017) <https://www.dawn.com/news/1350775> accessed 15 Dec 2020
37. Hasnaat Mailk, 'Larger SC bench may rule on Police Status', *Express Tribune* (2 Feb. 2019) <https://tribune.com.pk/story/1902083/larger-sc-bench-may-rule-police-status> accessed 15 Dec 2020
38. Hassan Abbas, 'Reforming Pakistan's Police and Law Enforcement Infrastructure: Is It Too Flawed to Fix?' (US Institute of Peace, 2011) [www.jstor.org/stable/resrep12443](http://www.jstor.org/stable/resrep12443) accessed 15 Dec 2020
39. Human Rights Watch, "This Crooked System", Police Abuse and Reform in Pakistan (HRW 2016)
40. International Crisis Group, 'Reforming Pakistan's Police' (2008) <https://www.crisisgroup.org/asia/south-asia/pakistan/reforming-pakistan%E2%80%99s-police> accessed 15 Dec 2020
41. Jamal Aziz and Minahil Khan, 'The impact of devolution on legislative reform relating to law and order in Pakistan' (2017) Research Society of International Law <https://rsilpak.org/wp-content/uploads/2019/01/The-Impact-of-Devolution-on-Legislative-Reform-Relating-to-Law-Order-in-Pakistan.pdf> accessed 15 Dec 2020

42. K. Ankita Rao, Shelal Lodhi Rajput, 'Doctrine of Pith and -  
'The' Metaphor' (2020) 7 IJRAR 948  
<http://www.ijrar.org/IJRAR2001996.pdf> accessed 15 Dec  
2020
43. Mohammad Ali Babakhel, 'Sindh Police Law' *Dawn* (12  
February 2020) <https://www.dawn.com/news/1533984>  
accessed 15 Dec 2020
44. Nasser Hussain, *The Jurisprudence of Emergency:  
Colonialism and the Rule of Law* (Ann Arbor: The  
University of Michigan Press 2003)
45. News Desk, 'PTI Challenges Repealing of NAB Ordinance'  
*The Express Tribune* (16 August 2017) [https://tribune.  
com.pk/story/1482382/pti-challenges-repealing-nab-  
ordinance/](https://tribune.com.pk/story/1482382/pti-challenges-repealing-nab-ordinance/) accessed 15 Dec 2020
46. Paul Petzschmann (2010). *Pakistan Police between  
Centralization and Devolution* (Norwegian Institute of  
International Affairs 2010)
47. Police Order 2002, Chief Executive Order No. 22 of 2002,  
No.F.2(4)/2002-Pub, Ministry of Law, Justice, Human  
Rights and Parliamentary Affairs of Pakistan,  
[http://npb.gov.pk/wp-  
content/uploads/2014/08/police\\_order\\_2002.pdf](http://npb.gov.pk/wp-content/uploads/2014/08/police_order_2002.pdf) accessed 15  
Dec 2020
48. Umbreen Javaid and Muhammad Ramzan, 'Police Order  
2002: A Critique,' *Journal of Political Studies*' (2013) 20  
*Journal of Political Studeies*19.