

Criminal Law after the 18th Constitutional Amendment: A Critical Review

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Introduction

‘Federalism is legalism’¹ is an obvious statement that captures the essence of federalism. The constitution of Pakistan followed legalism by constitutionally providing for the distribution of legislative competence between the federation and the provinces. The legislative competence and executive authority were then tied up in constitutional terms. To contextualise this abstract conception, it is imperative to trace the roots of constitutional federalism in Pakistan. In terms of constitutional instruments, the Government of India Act of 1935 envisioned² a federal system of governance and divided the legislative powers through three legislative lists³ between the federation and provinces. The three legislative lists dealt with the respective domains of the federation, the provinces, and the shared domain between them, styled as a concurrent sphere. The scheme of the 1935 Act was preserved by the Indian Independence Act 1947⁴ and the 1956 Constitution of the Islamic Republic of Pakistan.⁵ However, the 1962 Constitution deviated from these three legislative lists system. Whilst it continued to uphold a centralised system of governance,⁶ the legislative lists were reduced in number to one.⁷ The ‘three legislative lists’ system was once again revived by the 1972 Interim Constitution,⁸ which distributed the legislative powers on the basis of these lists.⁹ The distribution of legislative powers was once again debated over at the time of writing of the existing 1973 Constitution, wherein the nature of the government was kept federal and centralised;¹⁰ however, the number of legislative lists was reduced from three to two.¹¹

It is pertinent to trace the constitutional history of Pakistan to note how the relations between the federation and the provinces have been governed through the distribution of legislative powers, despite interruptions by successive constitutions. It may also be noted that the distribution of legislative powers affects the functioning of the government because the links of responsibility

¹ A. K. Brohi, *Fundamental Law of Pakistan* (Din Muhammad Press 1958) 209.

² Government of India Act 1935, s 5.

³ Ibid s 100 provided for three legislative lists namely: Federal Legislative List, Concurrent Legislative List, and the Provincial Legislative List.

⁴ The Government of India Act 1947, s 8.

⁵ The Constitution of Islamic Republic of Pakistan 1956, art 1.

⁶ It did not provide for the word ‘Federal’ in the text, but instead used the word ‘Central’ as stated in Article 19 of the Constitution of Pakistan 1962.

⁷ Third Schedule of the Constitution of 1962 refers to exclusive powers of Central Legislature.

⁸ The Interim Constitution of Pakistan 1972, art 2(2).

⁹ Ibid art 138.

¹⁰ The Constitution of Islamic Republic of Pakistan 1973, art 1.

¹¹ Ibid art 142. It entrusts ‘the residuary power’ to legislate with the Provinces in terms of Article 142 (c) of the Constitution.

and authority are drawn accordingly.¹ In 2010, when the Eighteenth Amendment to the 1973 Constitution was passed, it introduced a number of changes in the Constitution—of which, one of the most significant changes pertained to the devolution of powers to the provinces from the federation. For instance, subjects, ministries, and matters to legislate upon were under the federal government’s mandate prior to amendment but were now brought under the provinces’ control. In this context, the Eighteenth Constitutional Amendment² was conspicuous as it abolished the Concurrent Legislative List,³ resulting in the expansion of the provinces’ domains of authority and responsibility. Whilst abolishing the Concurrent Legislative List, the Eighteenth Amendment also amended two substantive constitutional provisions, namely Articles 142 and 143 of the Constitution. This provided for an interoperable scheme, which essentially redefined the relationship between the federation and the provinces in the areas of criminal law, criminal procedure, and evidence law.⁴

Against the aforesaid backdrop, this review first examines the nature of changes brought about by the Eighteenth Amendment within the legislative domain in areas of criminal law, criminal procedure, and evidence law, vis-à-vis the relations between the federation and the provinces. Following the appraisal of the legalese, the review briefly maps out criminal legislation in the post-Eighteenth Amendment setting in select areas by the provinces. Lastly, the review evaluates the extent to which the relevant amendments are compatible with the text and intent of the legislature.

Criminal Law and the Eighteenth Amendment

The Eighteenth Constitutional Amendment was passed after due deliberation.⁵ In calibrating the public policy space through legislation, the abolition of the Concurrent Legislative List led to increased ‘participatory management’⁶ of new subjects, that were consequently included in Part II of the Federal Legislative List.⁷ These counter-weight steps also included rewriting of Article 142(b) which stated that the parliament (*Majlis-e-Shoora*) and a provincial assembly may have the power to make laws relating to criminal law, criminal procedure, and evidence law—leading to

¹ The Rules of Business 1973 drafted under Article 99(2) of the Constitution of Pakistan, further distribute the work of the Federal Government.

² Eighteenth Constitutional Amendment was introduced through the Constitution (Eighteenth Amendment) Act 2010 and made 102 changes in the Constitution.

³ The Constitution (Eighteenth Amendment) Act 2010, s 101 (3).

⁴ Ibid s 49 and 50.

⁵ The Eighteenth Amendment was drafted by Special Committee of the Parliament that renamed itself the Parliamentary Committee on Constitutional Reforms and prepared its Rules of Procedure. ‘Report by the Parliamentary Committee on Constitutional Reforms, 2010’

<http://www.na.gov.pk/uploads/documents/report_constitutional_18th_amend_bill2010_020410_.pdf> accessed 02 November 2020.

⁶ The Implementation Commission on the Eighteenth Amendment in its Report referred to ‘participatory management’ concept that required Council of Common Interests (CCI) to regulate subjects in Part II of the Federal Legislative List. ‘The Report of the Implementation Commission’ <<http://www.ipc.gov.pk/ipc/userfiles1/file/ipcpdfs/Final%20Report%20of%20Implementation%20Commission.pdf>> accessed 07 March 2020.

⁷ The Constitution (Eighteenth Amendment) Act 2010, s 101.

the establishment of a clear relationship between the federation and the provinces in the aforementioned domains.⁸

Apart from this, the Eighteenth Amendment provided for a repugnancy-test through Article 143 which stated that any provincial legislation that would be enacted in the area of legislative competence of the federation would be void, and that the legislation of the federation shall prevail.⁹ The provincial legislatures have a growing propensity to treat the areas of criminal law as exclusive to them despite the key role of the federation in the enforcement of fundamental rights,¹⁰ the functioning of the criminal justice system, the implementation of the anti-terrorism law,¹¹ dealing with 'internal disturbances',¹² the implementation of international treaties¹³ and the constitutional provision of the federal service structure. This approach is not supported by the text of the Eighteenth Amendment and is diametrically opposed to the intention of the legislature.

The classical monopoly on violence by the state is typically exercised by the federation through criminal law and its implementation. To fulfil its constitutional obligation, the federation is required to see that 'the Government of every Province is carried on in accordance with the Provisions of the Constitution.'¹⁴ Conversely, the provinces are under an obligation to use their executive authority 'subject to and limited by'¹⁵ the executive authority of the federation'. While providing autonomy to the provinces of having their own laws, the Eighteenth Amendment also ensures that the powers devolved onto the provinces remain limited and restricted by the federation. Most importantly, this is also clear in the superiority of the federation as established by the Eighteenth Amendment, since any law that stood in contravention of the federal legislature may be deemed to be void, despite being passed later in time. However, the perception of exclusive domain of the provinces in criminal matters has perpetuated over the last decade, and the mapping of legislation in the following selected areas shows this trend.

Criminal Justice System

The areas of legislative competence and executive authority have been made concurrent not only in the domain of criminal law, but also in the ancillary domains of criminal procedure and evidence. The criminal justice system is knit together by legislative instruments such as the Pakistan Penal Code 1860, the Code of Criminal Procedure 1898, and the Qanun-e-Shahadat Order 1984, with legal provisions, procedures, and rules governing criminal law matters and evidentiary requirements stemming from the aforementioned laws. The legal approach adopted by the relevant authorities, after relying on our criminal procedure and rules of evidence must be amended by taking into account the viewpoint of the federation, and the existing federal legislation on the

⁸ Ibid s 49.

⁹ Ibid s 50.

¹⁰ The Constitution of Islamic Republic of Pakistan 1973, art 8 to 28.

¹¹ Pakistan has a federal Anti-Terrorism Act 1997.

¹² The Constitution of Islamic Republic of Pakistan 1973, art 148(3).

¹³ Entries 3, 32, 56, and 59 of the Part I of the Federal Legislative List in the Constitution of Islamic Republic of Pakistan

¹⁴ The Constitution of Islamic Republic of Pakistan 1973, art 148(3).

¹⁵ Ibid art 137.

subject. Instead, the federation is limiting itself to the Islamabad Capital Territory alone.¹⁶ The provinces, under the garb of the Eighteenth Amendment, have tried to occupy the legislative field relating to the criminal justice system by amending multiple laws without paying heed to the prevalent federal criminal procedure and evidence laws.¹⁷ The purpose of the Eighteenth Amendment was not to create a legislative divide between the two systems of governance, but in fact for the federation to compliment laws passed and created by the provinces and vice versa. The aim of the amendment was to allow space to provinces to legislate on certain subjects that may be specific to their provincial mandate and territory. However, at the same time, these legislative acts and activities were to follow the true letter and spirit of the bigger picture under which the federal laws are enacted. In the instance that provinces deviate from the main objective of the constitutional amendment and make decisions without considering the powers and authorities possessed by the federation, the provinces will soon face a conflict between the federal and provincial law and policy.

National Accountability Law

The National Accountability Bureau (NAB) is an autonomous entity under the federal law.¹⁸ Nonetheless, the Sindh Provincial Assembly passed the National Accountability Ordinance 1999 and the Sindh Repeal Act 2017, which aim to repeal the federal legislation to the extent of the province of Sindh. The enactment has a long preamble that contains recitals echoing reasons for the repeal of the federal anti-corruption law to the extent of Sindh. This legislation has previously also been challenged by Pakistan Tehreek-e-Insaaf in 2017.¹⁹ Such legislation, in total disregard of Article 143, is technically void, but the declaration regarding repugnancy has to be obtained from a court of law.

Terrorism and National Security

The law of terrorism is covered under the Anti-Terrorism Act 1997 (ATA), a federal legislation.²⁰ However, the implementation of the law is being done by both federal and provincial organisations.²¹ The ATA is essential in the context of national security. The requirements of the Financial Action Task Force (FATF) can only be met by joint working of the federation and the

¹⁶ The draft Zainab Alert, Response and Recovery Act 2020, in its Section 1(2), limits its scope of application to the Islamabad Capital Territory (ICT) only. Likewise, the Federation enacted the ICT Protection of Children Act 2018 limiting it to the ICT only.

¹⁷ For example, Sindh has introduced the Code of Criminal Procedure (Sindh Amendment) Act 2017 that has added Section 156-C requiring that DNA samples be sent to laboratories recognised by the Government of Sindh. Likewise, Punjab has introduced the Punjab Sentencing Act 2019 that affects the anti-terrorism sentencing by providing aggravating factors in terrorism cases. Similarly, KP has enacted the KP Control of Narcotics Substances Act 2019 despite the prevalent federal legislation styled as the Control of Narcotic Substances Act 1997. Balochistan, on its part, also amended the Code of Criminal Procedure (Balochistan Amendment) Act 2010, which in total disregard of Article 175 of the Constitution, entrusted the executive with judicial powers.

¹⁸ The National Accountability Ordinance 1999.

¹⁹ Staff Reporter, 'PTI challenges Sindh's accountability law in SHC' (*Dawn*, 16 August 2017) <https://epaper.dawn.com/DetailImage.php?StoryImage=16_08_2017_016_004> accessed 20 December 2020.

²⁰ The Anti-Terrorism Act 1997.

²¹ At the federal level, the Federal Investigation Agency and at the provincial level, the Counter-Terrorism Departments of the provinces implement the law.

provinces.²² The anti-terrorism law provides for linkages with international law²³ and other federal legislation.²⁴ In order to see their implementation, the concurrent nature of criminal laws, procedure and evidence have to be adhered to. At the same time, the primacy of the executive authority of the federation must be appreciated in terms of Article 137 of the Constitution.

Police Laws

All the provinces, after the Eighteenth Amendment and notwithstanding Article 143 of the Constitution, treated the domain of ‘police’ as exclusive provincial remit. They enacted their own police laws, with Sindh being the first province to do so. It enacted a police law,²⁵ which became contentious on the eve of the transfer of the Inspector General of Police (IGP) in 2016.²⁶ The difference of opinion on the appointment of the IGP was then challenged in the Sindh High Court²⁷ and later in the Supreme Court of Pakistan.²⁸ The Supreme Court of Pakistan found ‘police’ to be a ‘concurrent’ subject.²⁹ The subsequent rounds of litigation resulted in the enactment of a new police law,³⁰ which is again under challenge to the extent of removal of the IGP and transfer of officers of Police Service of Pakistan (PSP)³¹ cadre.

In 2011, Balochistan was the second province to enact a new police law.³² It revived the colonial era Police Act 1861 which was challenged in the Balochistan High Court and the IGP was given powers to transfer/post PSP officers till the finalisation of the rules.³³ The next was Punjab, which adopted the Police Order 2002 and amended it in 2013³⁴ and again in 2017.³⁵ Finally, Khyber Pakhtunkhwa (KP) also enacted its own police law.³⁶

Owing to the significance of the subject, the Police Reforms Committee Report 2019 proposed a model police law after discussing the constitutionality of police laws in Pakistan.³⁷ The

²² Imran Mukhtar, ‘Provinces asked to block terror financing’ (*The Nation*, 07 July 2019) <<https://nation.com.pk/07-Jul-2019/provinces-asked-to-block-terror-financing>> accessed 20 December 2020.

²³ The Anti-Terrorism (Amendment) Act 2013 through its Section 14 inserted the Fifth Schedule which contained a list of nine international treaties that relate to terrorism.

²⁴ The Anti-Money Laundering Act 2010; Foreign Exchange Regulation Act 1947.

²⁵ The Sindh (Repeal of the Police Order 2002 and Revival of the Police Act 1861) Act 2011.

²⁶ Imtiaz Ali, ‘Sindh Govt. sends IG police ‘on leave’’ (*Dawn*, 19 December 2016) <<https://www.dawn.com/news/1303248>> accessed 20 December 2020.

²⁷ *Karamat Ali v Federation of Pakistan* PLD 2018 Sindh 8.

²⁸ Hasnaat Malik, ‘SC declares ‘police’ to be concurrent legislative subject’ (*The Express Tribune*, 31 January 2019) <<https://tribune.com.pk/story/1900578/sc-declares-police-concurrent-legislative-subject>> accessed 20 December 2020.

²⁹ *The Province of Sindh through Chief Secretary v Shehri Citizen for Better Environment (CBE)* (Civil Appeal No. 148 to 150 of 2018 in the Supreme Court of Pakistan).

³⁰ The Sindh (Repeal of the Police Act 1861 and the Revival of the Police Order 2002) Act 2019.

³¹ Jamal Khrushid, ‘Sindh govt’s transfer of police officers illegal: SHC’ (*The News*, 30 January 2020) <<https://www.thenews.com.pk/print/606367-sindh-govt-s-transfers-of-police-officers-illegal-shc>> accessed 20 December 2020.

³² The Balochistan Police Act 2011.

³³ *Wazir Khan Nasar v the Secretary, Establishment Division and others* (Civil Miscellaneous Application No. 112 of 2018 in Writ Petition No. 48 of 2013).

³⁴ The Punjab Police Order (Amendment) Act 2013.

³⁵ The Punjab Police Order (Amendment) Act 2017.

³⁶ The Khyber Pakhtunkhwa Police Act 2017.

³⁷ Law and Justice Commission of Pakistan, ‘Police Reforms Committee Report’ (2019).

role of the federation became central in the appointment of the Inspector Generals of Police (IGPs) in different provincial police departments. The courts have also generally shown deference to the federation on the touchstone of Articles 142(b), 143, and 240 of the Constitution. However, the court order cannot substitute the federation's will to lead the provinces, and to provide a federalist interpretation to the constitutional provisions introduced through the Eighteenth Amendment.

Conclusion

The Eighteenth Amendment, while abolishing the Concurrent Legislative List, devolved powers onto the provinces as is evident through Articles 142 (b) and 143 of the Constitution. The role of the federation in the enforcement of fundamental rights, in promulgation of a uniform police law, management of internal disturbances, and in use of its executive authority in collaboration with the provinces has been kept intact, against popular perception that the federation has no role in the law and order of the provinces. Nevertheless, it is worth noticing that the responsibility of the state insofar as the aforementioned areas are concerned is shared between the federation and the provinces.