

Position Paper

Police Order 2002

Critical Analysis and Constitutional Debate

December 2015

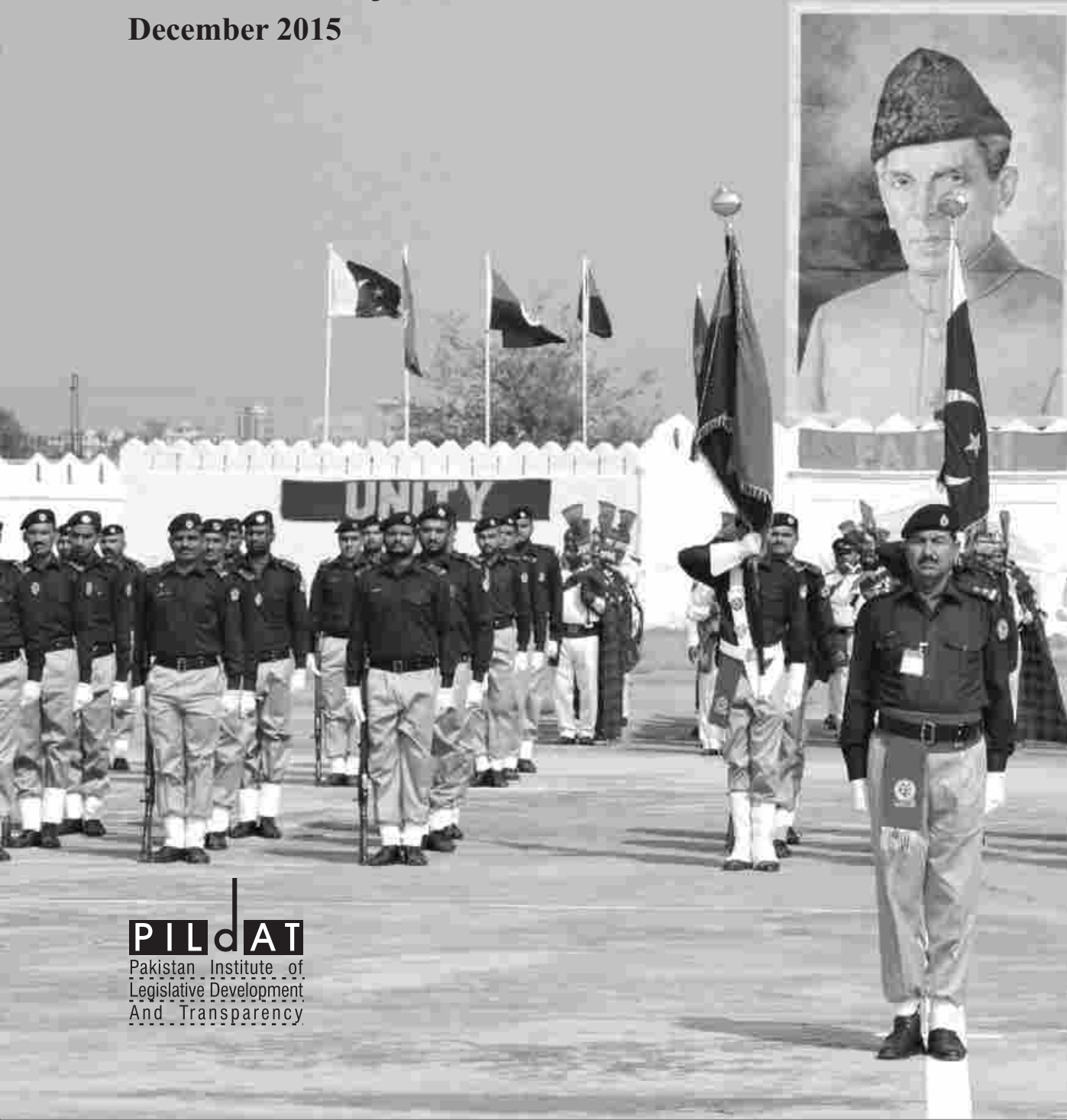


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Preface

PIL DAT has initiated a national and provincial level legislative and policy advocacy effort for reform in the areas of Police, Prosecution and Free Legal Aid in Pakistan. As part of this initiative, PIL DAT has commissioned experts in these three areas to develop position papers for formulating policy reform proposals and ways and means to translate these into reality.

This Position Paper is an attempt to provide a fact-based discourse on the powers of Federal and Provincial Assemblies that empower and legislate on policing. It analyses case studies of international and regional frameworks, identifies strengths and weaknesses, highlights implementation issues of Police Order 2002 in Pakistan and presents a set of policy recommendations along with opinions of prominent legal experts in the paper.

Acknowledgments

The Position Paper on **Police Order 2002: Critical Analysis and Constitutional Debate** has been authored by **Mr. Muhammad Ali Nekokara**, Former Senior Superintendent of Police (SSP). It is published by PIL DAT under the Reforms in Police, Prosecution and Free Legal Aid Services project for which it has received support from the Development Alternatives Inc. (DAI) under the Enhanced Democratic Accountability and Civic Engagement (EDACE) project.

Disclaimer

All opinions expressed in this position paper are those of the author and do not necessarily represent the views of PIL DAT and Development Alternatives Inc. (DAI)

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ABOUT THE AUTHOR



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Mr. Nekokara holds a Master's degree in Public Administration from the Harvard Kennedy School of Government, USA and a Master's degree in Criminal Justice Policy from the London School of Economics, UK.

Executive Summary

This position paper analyses strengths and weaknesses of the Police Order (hereinafter referred to as “PO 2002”). The PO 2002, in attempting to democratise the police, provides for, inter alia:

- i. Civilian oversight through Federal, Provincial and District Public Safety Commissions (Articles 37-96);
- ii. Reduction of role of the political executive in transfer postings of the police officers including head of police forces (Articles 11, 12, 13, 15 and 17);
- iii. Community policing through Citizen Police Liaison Committees (Article 168); and,
- iv. External accountability through Police Complaints Authorities (Articles 97-108) and Public Safety Commissions.

The weakness of PO 2002, inter alia, revolves around feeble regulation of the discretion of the authorities, weak political balance in the civilian oversight bodies.

It is argued that while PO 2002 incorporates democratic police strategies crucial for democratic police reforms, its implementation has been piecemeal due to resistance from political executive, bureaucracy and repeated amendments. The support of political executive, leadership of senior police officers and the criminal justice system, along side the organised support of civil society and media are critical to implement democratic police reforms. Reasons for poor implementation include lack of involvement of stakeholders, frequent amendments to PO 2002 and, importantly, the constitutional status of PO 2002 post the 18th Amendment.

The discussion then proceeds to the issues raised by the Constitution (Eighteenth Amendment) Act, 2010 (the “18th Amendment”) regarding the constitutional status of PO 2002 and legality of the powers of the Federal and the Provincial legislatures to legislate on the police. Advocates of provincial autonomy argue that the competent authority for repealing or amending PO 2002 after the 18th Amendment is the Provincial Assembly. Balochistan and Sindh have thus repealed PO 2002 and unfortunately gone back to the authoritarian, repressive and exploitative 19th century law, Police Act 1861. Islamabad Capital Territory and special territories such as Gilgit-Baltistan and Azad Jammu & Kashmir continue to be governed under Police Act 1861 as before. Khyber Pakhtunkhwa and Punjab are, however, following the PO 2002 with some amendments.

The paper then makes a comparison of PO 2002 with the Draft Sindh Police Bill 2014 and highlights some important provisions in the latter, which are absent in PO 2002. This comparison is followed by a brief analysis of regional and international experiences.

The paper concludes with recommendations for amending the PO 2002 in light of the on-ground operational challenges since its implementation, and also keeping in view regional and international examples in police governance to enhance police capacity and external support for police.

Introduction

Police Order 2002 (PO 2002) has been perhaps the most progressive democratic police legislation introduced in South Asia. It replaced the Police Act 1861 with the primary objective to reform the police in such a way that it could “function according to the Constitution, law, and democratic aspirations of the people of Pakistan”. It aims to create a police service, which is “professional, service-oriented and accountable to the people”; it envisages a police service, which is also efficient in prevention and detection of crime as well as maintenance of public order.

Analysis of Police Order 2002

Salient Features

The salient features of PO 2002, inter alia, include:

1. **Civilian oversight** through Federal, Provincial and District Public Safety Commissions (Articles 37-96),
2. **Reduction of role of the political executive** in transfer and postings of the police officers including head of police forces (Articles 11, 12, 13, 15 and 17),
3. **Community policing** through Citizen Police Liaison Committees (Article 168),
4. **External accountability** through Police Complaints Authorities (Articles 97-108) and Public Safety Commissions.

It also abolished dual control over police by removing the general control and direction of the Magistrate (Articles 10 and 16) on policing functions. Besides, it provided for functional specialisation into branches, divisions, bureaus and sections.

Weaknesses

1. PO 2002 is weak in regulating the discretion and managing the performance of the authorities, which invariably affects the implementation of the PO 2002. For example, CJCCs constituted at the district level under the PO 2002 are working at the discretion of the respective District & Session Judges but are not supervised mandatorily by the Chief Justices of the respective High Courts.
2. The discretion in transfer/postings with the IGP and the regional and district police commanders also need to be regulated through broader internal consultations and reviews to make it more transparent, considered and fair.
3. Selection panels for civilian oversight bodies also need to be reviewed to improve political balance.
4. PO 2002 also lacks focus on peculiar needs of urban policing such as efficient and swift law and order handling. Big cities, such as, Karachi, Lahore, Faisalabad and Rawalpindi face complex and frequent law and order situations and are in need of more efficient and professional response from police.

Implementation Status

Some parts of the PO 2002 witnessed some progress in *implementation* such as separation of investigation functions (Article 18) carried out largely in major urban centres, punishments for offenses by police officers (Articles 156, 157, 158), constitution of CJCC at the district level (Articles 109-111). However, most of the structures, which were critical to develop a democratic police such as safety commissions, complaint authorities and citizen police liaison committees were either not introduced or half-heartedly established and intentionally kept dormant through repeated amendments in PO 2002. Provisions regarding selection and tenure of Inspector General of Police (IGP) were also violated thus compromising on political neutrality and efficiency of police.

Reasons for Poor Implementation

The main factors hindering effective implementation of PO 2002 include:

1. Lack of Engagement with Stakeholders

Popular political parties who were legitimately the most important stakeholders were not fully engaged in making of PO 2002. Resultantly, the political parties looked at the PO 2002 as a product of a military dictator imposed on them in an undemocratic manner and hence were emotionally disconnected from otherwise a democratic document. There is lack of wider political and civic engagement, dialogue and basic consensus on governance structure of police. This results in lack of ownership at critical levels of politics and society, which consequently hampers mobilization of public support for democratic police reforms and governance structure.

2. Amendments (2004-07) in PO 2002

PO 2002 was subjected to massive amendments through Amendment Ordinance 2004 and was re-promulgated number of times. The amendments were carried out to increase the powers of the political executive. The Supreme Court in its famous judgment on July 31, 2009 directed that all the ordinances protected under the Provisional Constitution Order 2007 were to be laid before the Parliament for validation but the Parliament never passed the Amendment Ordinance 2004 as an Act of Parliament resultantly the PO 2002 was restored in its original form.

3. 18th Amendment and New Challenge for Democratic Police Reforms

Post 18th Amendment the constitutional context of police laws has changed and the provinces considered it “legal” to promulgate their own police laws. Punjab and KPK more or less retained PO 2002 despite its halfhearted implementation whereas Sindh and Balochistan government disregarding their constitutional responsibilities to democratize police reverted to 150 years old repressive colonial legislation. In relation to this, the Supreme Court of Pakistan has observed as under:

“Even in the case of the Police Order 2002, it is discouraging to note that after the passage of the 18th Amendment, the provinces of Sindh and Balochistan abandoned the Police Order 2002 and shifted to a policing regime which is reminiscent of colonial times where the police was used to keep the 'natives' on a tight leash.”

The Supreme Court of Pakistan has directed the Attorney General and the Governments of Sindh and Balochistan to move their submissions to enable it to “examine the constitutionality of the policing regime established by the Police Act 1861. This report should, *inter alia*, state whether these policing statutes allow the constitution and organization of a politically independent police force which is consistent with the **protection of the fundamental rights of citizens.**”¹

1. Ibid

Constitutional Debate on the Powers of the Federal and Provincial Legislatures to Legislate on Police Governance Structure

The 18th Amendment abolished the Concurrent List, with the effect that the matters originally on the Concurrent List, which included policing and law and order, became exclusively the legislative domains of the Provincial Assemblies. The advocates of provincial autonomy, therefore, argue that PO 2002 can be repealed or amended by the Provincial Assemblies.

Constitutional Aspect: Powers of the Parliament and the Provincial Assemblies to legislate on police laws

Mr. Shahid Hamid (Legal Expert Opinion)

Article 270AA(2) inserted into the Constitution by the 18th Amendment Act 2010 provides that all Chief Executive's Orders made between 12.10.1999 and 31.10.2003 shall continue in force until amended by the competent authority. The competent authority is defined as meaning the appropriate legislature.

Article 142(b) provides that both Parliament and a Provincial Assembly shall have powers to make laws in respect of criminal law, criminal procedure and evidence. Article 143 provides that in case of inconsistency between an Act of Parliament and an Act of a Provincial Assembly the former shall prevail.

The question is whether the PO 2002 falls within the ambit of either criminal law or criminal procedure. The constitutionality, or otherwise, of the Acts passed by the Provincial Assemblies repealing or amending the Police Order will no doubt be finally determined by the Supreme Court in the aforementioned proceedings. Even if the Supreme Court ultimately concludes that matters falling within the purview of the (whole of the) PO 2002 are part of criminal law or criminal procedure and that therefore the competent authority/appropriate legislature is Parliament, the Provincial Assemblies can nevertheless, in terms of Article 142(b) of the Constitution, pass laws not inconsistent with the provisions of the PO 2002.

Another possibility is that the Supreme Court may declare parts of the PO 2002 as falling with the subject matter of criminal law or criminal procedure. If this were to happen the provisions of the aforesaid Chapters would continue to be covered by the PO 2002 whereas Provincial Assemblies would be at liberty to amend other provisions relating to, say, constitution and organization of the police, responsibilities of the head of the District Police, District Public and Safety commissions, etc.

However, the 18th Amendment, while abolishing the Concurrent List, also simultaneously amended Article 142 (b) of the Constitution of Pakistan, 1973 to empower both the Parliament and the Provincial Assemblies to legislate on matters relating to “criminal law, criminal procedure and evidence.” It has been held by the superior courts that PO 2002 /police law is primarily relatable to the enforcement of the criminal law. Lahore High Court has held that:

This country is being run by a written constitution. Criminal law is included in concurrent list in Part-II of the 4th Schedule to the Constitution of Islamic Republic of Pakistan. The Police Order 2002 primarily is relatable to the enforcement of the criminal law and policing, therefore, it would squarely fall within the said list.²

Article 143 of the Constitution provides that in case of inconsistency between Federal and Provincial laws, Federal law will prevail. It is, therefore, argued by many that the PO 2002 falls within the ambit of “criminal law” under Article 142(b) of the Constitution and Provincial Assemblies can only pass laws not inconsistent with the PO 2002.

The 18th Amendment does not, *ipso facto*, repeal or render ineffective the provisions of PO 2002 in view of Article 270AA(6) of the Constitution, which states that notwithstanding the omission of the Concurrent List by the 18th Amendment, all laws with respect to any of the matters enumerated in the said List (including Orders) in force in Pakistan or any part thereof, immediately before the commencement of the 18th Amendment, shall continue to remain in force until altered, repealed or amended by “the competent authority.”

The 18th Amendment abolished the Concurrent List, with the effect that the matters originally on the Concurrent List, which included policing and law & order, became exclusively the legislative domains of the Provincial Assemblies. The advocates of provincial autonomy, therefore, argue that PO 2002 can be repealed or amended by the Provincial Assemblies

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The Supreme Court of Pakistan shall ultimately and conclusively determine whether “the competent authority” shall be, exclusively, the Provincial Assemblies or the Parliament with the restricted power of the Provincial Assemblies to only pass laws not inconsistent with PO 2002.

Parliament became empowered to amend all 30 laws included in the Sixth Schedule, without prior sanction of the President.

Barrister Irum Ali (Opinion)

The provincial-federal debate on policing legislation in light of the Constitution (Eighteenth Amendment) Act 2010 has attracted much attention in many spheres. One opinion suggests that, with the deletion of the Concurrent List (Part II, Fourth Schedule) the legislative power on policing has been automatically transferred to the provinces.

In view of Article 270AA(6) of the Constitution, PO 2002 shall continue to remain in force until altered, repealed or amended by “the competent authority” i.e. the Parliament and the Provincial Assemblies in view of Article 142(b) of the Constitution. The deletion of Sixth Schedule under the 18th Amendment and consequently of Police Order at entry no. 35 of Sixth Schedule does not mean that the PO 2002 has been deleted from the constitution. It only meant that the Parliament became empowered to amend all 30 laws included in the Sixth Schedule, without prior sanction of the President.

Article 142 read together with Article 143 (b) reveals that the Federal legislature couldn't be prevented from performing one of its basic functions regardless of any constitutional amendment. Article 143 expressly states that in the event of any conflict and/or contradiction between federal and provincial laws, the former will take precedence.

While PO 2002 is the law in Punjab and Khyber Pakhtunkhwa with some amendments however Sindh and Balochistan have reverted back to the Police Act of 1861. Supreme Court has asked the provincial governments of Sindh and Balochistan and the Attorney General of Pakistan to file their comments so that the Supreme Court can examine the legality of the repeal of PO 2002 in Sindh or Balochistan.

By this interpretation, while the provincial legislatures have been empowered with authority to legislate on certain areas, the matter of policing, which relates to

state security and 'criminal matters' (as mentioned in the deleted Concurrent List), remains within the ambit of Federal law. Any conflict and/or contradiction must be resolved with reference to the PO 2002. In this respect, the repeals and amendments carried out by the provinces may be deemed 'ultra vires' in the case of any contradictions with the federal law. This situation can be resolved either by an enactment by Parliament on this matter or by a clear direction of the Supreme Court to resolve the confusion.

Draft Sindh Police Bill 2014: Some Useful Suggestions

The Pakistan Forum for Democratic Policing, under the supervision of Justice (r) Nasir Aslam Zahid and in collaboration with Legal Aid Office, has drafted the **Draft Sindh Police Bill 2014 (the “Draft Sindh Police Law”)**² which seeks to repeal the Police Act 1861. A comparative analysis of Police Order 2002 and the Draft Sindh Police Law indicates that while PO 2002 provides a more clear structure for oversight and external police accountability, there are some important suggestions in the Sindh Draft Police Law that may be useful for democratic police reforms. These are, with no corresponding provisions in the PO 2002, as follows:

1. The **Draft Sindh Police Law** recognizes, in its **preamble**, the need to **de-politicise police**.
2. In Article 12 (1), in an effort to address the number deficit in police, the Draft Sindh Police Law requires the Government to maintain a **minimum ratio of one constable to 250 citizens** keeping in view the international standards (Article 12 (1)).
3. Responding to some of the peculiar needs of urban policing its Article 7 (1) provides that in metropolitan area with more population and complex law and order problems, a **Metropolitan Police System** having more expertise, unitary nature, lawful power and responsibility should be established. In areas having Metropolitan police system the **Commissioner** may exercise all or any of the powers vested under this Act or the Code of Criminal Procedure, 1898, or any other laws subject to the terms and conditions as may be fixed by the Government (Article 7 (5)).
4. **Women:** It requires (i) women representation in Sindh police to be not less than 10% of the total

2. The Draft Sindh Police Bill 2014 accessed on November 5, 2015, available at [http://rozan.org/sites/default/files/Police%20act%20draft%20bill%20\(Sindh\)%20Edited%20Draft.pdf](http://rozan.org/sites/default/files/Police%20act%20draft%20bill%20(Sindh)%20Edited%20Draft.pdf)

- police force employed in the province; (ii) proper facilities and child-care at every police station; (iii) equal opportunity; (iv) gender neutrality while make promotions and appointments amongst its ranks and cadre (Article120); (v) special measures to be taken for appointment of Women Police Officers and Inspectors in Police Training Institutions (Article21 (5)) and to cater their needs like residence, day care, pick and drop and a conducive environment (Article12(6)).
5. It provides for an **emergency response system** that the Government may establish for each area-a well-equipped Control Room with adequate communication facilities, dedicated network of patrol vehicles and other necessary facilities (Article117).
 6. It further requires **police image building**. In this regard the Deputy Superintendent of Police shall appoint a Community Outreach Officer of the Rank not lower than ASI who shall organize community outreach and liaison event or any other confidence building measures to reach out to general public (Article 121).
 7. The Draft Sindh Police Law further gives the right to the public to **receive a receipt** acknowledging the complaint given by him/her and to know the stage of the Police action or investigation in respect of the complaint (Article 28(5)).
- b) **Police Establishment Committee:** Article 32 of India Act provides for Police Establishment Committee to make the decisions of the transfer/postings up to the rank of Deputy Superintendents of Police more transparent, inclusive and considered.
 - c) **Report Torture and Corruption:** Article 96 of Kerala Act makes the police officers liable to report corruption and torture.
 - d) **Protection of action taken in good faith:**
 - i. Article 69 of India Act gives protection to acts of police officers done, in good faith and requires a report or the sanction of the authorities for prosecuting a police officer.
 - ii. Article 113 of Kerala Act also provides protection of action taken in good faith —“*No suit, prosecution or other legal proceedings shall lie against the Government or any Police officer or any public servant duly appointed or authorized under this Act for anything done or intended to be done in good faith in the due discharge of official duties under the provisions of this Act. No court shall take cognizance of any offence under this Act and alleged against police officer except with the prior permission of the Government.*”
 - e) **Police Associations:** Article 109 of Kerala Act allows for formation of Police Associations

2. England

Association of Chief of Police Officers (“ACPO”) in England and Wales has assumed the role of a policy making and lobbying body appointing a full time secretariat and establishing a number of policy committees each chaired by a chief constable “to promote collective 'national' voice on policing issues.”⁵ Unfortunately in Pakistan like other developing democracies the right to voice independent opinions is construed as indiscipline and labeled as 'trade union like activity'.

Regional and International Experiences

It is important to learn from the Regional and International experiences in pursuing democratic police reforms:

1. India

Some provisions of Punjab Police Act 2007 (India Act)³ and Kerala Police Act 2011 (Kerala Act)⁴ will be useful to consider while reviewing PO 2002 to improve police response, decision making in postings, check deviance and provide due protection to police officers which is badly lacking in the prevailing environment.

- a) **Special Security Zones:** Article 33 of India Act provides for Internal Security Scheme and Article 34 of the same Act provides for creation of Special Security Zones as and when required by the

3. The Punjab Police Act, 2007 accessed on November 16, 2015 at <http://www.batalapolice.com/pact2007.pdf?ckattempt=1>

4. The Keral Police Act, 2011 accessed on November 16, 2015 at http://www.humanrightsinitiative.org/programs/aj/police/india/initiatives/state_govt/kerala_police_act_eng_2011.pdf

5. Trevor Jones, The governance and accountability of policing, Handbook of Policing, Edited by Tim Newburn, Willan Publishing, 2007.

Recommendations for Legislatures

1. **Broader and inclusive debate** on governance structure of Police is absolutely essential before moving forward on police reforms and its governance structure. All stakeholders including political parties, police and other actors of criminal justice system, media and civil society must be consulted to understand the needs of the people and relevant institutions vis a vis the governance model of police.
2. **Implement critical democratic provisions** of PO 2002 and immediately establish:
 - i. **Bipartisan Public Safety Commissions** to introduce civilian oversight over police;
 - ii. **Police Complaints Authorities** to make external accountability of police more effective;
 - iii. **Citizen Police Liaison Committee (CPLC)**. Article 168 of PO 2002 says that the “government may establish CPLC...” It needs to be made mandatory rather than optional.
3. **Implement** Article 12 of PO 2002 regarding **Selection and Tenure of IG** to promote merit based appointment and provide due space to the IGP. This will, help in measuring the performance of the IGP, and make the police responsive and accountable.
4. Amend PO 2002 to provide for constitution of **Police Establishment Board** consisting of senior police officers to assist IGP and recommend postings, transfers and promotions of the police officers below the rank of the Deputy/Assistant Superintendent of Police to make more considered and transparent decisions on transfers and postings.
5. **Provincial Criminal Justice Coordination Committee (CJCC)**: It is important to constitute a CJCC at the provincial level which shall include the Chief Justice of the High Court as its chairperson and the, IG Police, Secretary Home, Secretary Law, Secretary Prosecution and Vice Chairman Punjab Bar Council as its members. This provincial CJCC will a) evaluate performance of the CJCCs of the districts, b) review laws and policies, think strategically and c) propose measures for improvement in criminal justice and to reduce existing disconnect amongst the members of the criminal justice system. A Federal Criminal Justice Coordination Committee may also be constituted headed by the Supreme Court in case the Supreme Court decides that the Police Laws, including PO 2002, also come within domain of the Federal legislature.
6. Amend Articles 13, 15 & 17 of the PO 2002 to **empower IGs to post Regional, City, and District Police Chiefs**. This will align the police with its commander and improve police efficiency.
7. Amend Article 77 of PO 2002 to *include Leader of the Opposition of the provincial Assembly instead of the Governor* to nominate members for the **Selection Panel for independent members of the Provincial Public Safety Commission** along with the Chief Minister. This will make the selection panel more democratic and inclusive and potentially more impartial as the Governor is often from the ruling party. Likewise, Article 89 of PO 2002 may also be *amended to include Leader of the Opposition instead of the President* to nominate members along with the representative of the Prime Minister for the **Selection Panel for independent members of the National Public Safety Commission** under the supervision of the Chief Justice of the Supreme Court.
8. Amend PO 2002 to make the **police officers liable to report acts of torture and corruption**.
9. Amend Articles 172 and 173 of PO 2002 to **provide protection to acts of police officers done in good faith** during duty. This is critical to motivate and raise the morale of police.
10. Amend PO 2002 to provide for the establishment of **Special Security Zones** to better meet the challenges of militancy and terrorism in the country.
11. **Police Commissionerate** as it exists in big cities of India and Bangladesh needs to be introduced in Pakistan, with police commissioners having executive powers for law & order. In areas having Metropolitan police system the Commissioner may exercise powers vested in a magistrate for handling law and order situations as decided by the government.



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