

ISSUES
IN
DEVOLUTION

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SUMMARY

Devolution is need of the hour but the same should be carried out keeping in view the spirit of Federalism and Constitution and having regards for the prevailing circumstances. The system should be self-sustainable instead of providing supra legal support. Let there be no apprehension in any quarter that devolution process is being sabotaged. Rather it should continue in second phase and legal, administrative and financial powers be delegated from the centre, to the Provinces.

Police and Local Government are Provincial subjects and the Provinces should be allowed to legislate keeping in view the Principles of Policy enshrined in the Constitution.

Provincial Government may initiate short-term measures within the parameters of laws and constitution through Executive orders and legislation. A Comprehensive reform package may be worked out for:-

- a) Seeking approval of Federal Government in making amendments/improvements in NWFP LGO 2002 and Police Order 2002. Let us ponder over the question of increase in extra-judicial killings and tribal justice and try to find out honest answers. No effective forum for conflict resolution is available to the masses.
- b) Proposing to the Federal Government amendments in Police Order 2002 and Code of Criminal Procedure (Amendment) Ordinance, 2001.

The vital fact should not be ignored that new system has not kicked off and reforms are required for the benefits of people who are the major stakeholders.

1. Background.

- 1.1. In August 2001 NWFP Local Government Ordinance (LGO), 2001 was promulgated. It is to be noted that in June 2001 National Reconstruction Bureau (NRB) drafted and sent, "The SBNP Local Government (Model) Ordinance 2001" to all the four Provinces with the direction to issue the same as Provincial law. Local Government and Municipal Laws are not uniform in countries having even unitary form of government. In a Federation like Pakistan, having diverse socio-political environment, uniformity of local government laws is always a complicated issue. Diversity of socio-political factors is inherent in a federation.
- 1.2. Police Order 2002 was promulgated by the Federal Government in August 2002. Police Rules are being framed, by the NRB.
- 1.3. Finally on 13th August 2001 the system of Executive Magistracy was abolished through an Ordinance titled as, "Code of Criminal Procedure in (Amendment) Ordinance, 2001".
- 1.4. The quantum and quality of discussion for abolishing, one and half century, old system can be judged from the simple fact that on 13.8.2001 a high level meeting of all the Provinces was held in Islamabad. It was a marathon session with one point agenda whether to retain the Executive Magistracy or otherwise. The meeting decided to abolish it and on the same day Ordinance was issued. Such comprehensive law cannot be issued within half a day.
- 1.5. From August 2001 to December 2002 all proposals to reform the system and remove the bottlenecks were not given serious consideration. Major administrative collapse and the resultant problems faced by the general public, Government officials, Provincial Governments, Federal Department and even the elected representatives of District Governments were termed as initial 'teething problems'. It is true that one and half year is not much time to assess the success, or otherwise, of a new system but

the fact should not be ignored that public administration, all over the world, is run as per time-tested sound principles. The symptoms are too chronic than the teething problems and there is need to make dispassionate analysis and propose remedial measures.

1.6. The Local Government system, for 16 months now, was established and has been managed under all out support extended, by the Provincial and Federal Governments. It has not been subjected to stress and strains of political system and that is too in a Federation. The basic idea was that devolution of powers to districts is only first step and in second phase the administrative, economic, planning and financial powers shall be devolved from the centre to Provinces. While the Provinces have been divested off, whatever little, administrative and financial powers they had the much-needed devolution from Centre to the Provinces never materialised.

2. Constitutional Position

- 2.1. There are two lists of subjects in 1973 Constitution. Federal Legislative List (Part-I) 59 subjects and Part-II (2 subjects) and Concurrent List 47 subjects. Local Government has not been enumerated in any of these two Constitutional Lists. Thus it is residuary power, which entirely belongs to the Provinces.
- 2.2. Framers of 1973 Constitution, very wisely, vested the subject of Local Government in the Provinces keeping in view the prevailing diverse socio-political conditions in the Federating units. Some of the Framers of 1973 Constitution are still alive and in a much better position to clarify and elaborate the intent of Framers in this regard.
- 2.3. To avoid drastic changes or repeal of Local Government Ordinance 2001 Constitutional Protection to Local Government Ordinance 2001 under the Legal Frame Work Order 2002 (LFO-2002) has been given. Under Legal Frame Work Order Section 29 the NWFP Local Government Ordinance 2001 has been included in Schedule Six of 1973 Constitution. Under Article 268 (2) the Laws specified in the sixth schedule shall not be altered, repealed or amended without the previous sanction of the President. In sixth schedule 11 new laws, including Police Order 2002, have been added. Only prior sanction of the president is required for

further legislation with regard to laws enlisted in sixth schedule and advice of the Prime Minister (Cabinet) is binding upon the President.

- 2.4. Under Article 32 of Constitution the State shall encourage local Government Institutions as per Principles of Policy.
- 2.5. Under Section 16 of LFO 2002 the following new article has been inserted after Article 140.

"140 A Local Government. Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments".

- 2.6. It is interesting to note that part IV Article 101 to 140 (Chapter I to Chapter 3) deals with the Provinces (Chapter 3 Article 129-140) pertains to the Provincial Governments. Article 140 deals with the appointment, removal, resignation and duties of Advocate General.

A new or sub-article is always added to the existing one with a view to elaborate and improve existing article. Since there was no original article in 1973 Constitution with regard to the Local Government, apart from Article 32, which is not, strictly speaking, operative part of the Constitution therefore the new article 140-A has been inserted in an unrelated place.

- 2.7. NWFP Local Government ordinance 2001, like other three Provinces, was promulgated in 2001 and given protection under Article 268(2) Schedule Six. Every prudent mind would vouch for the fact that no law is perfect and continuous amendments are required to improve the laws. While article 140-A, inserted through LFO 2002, makes it mandatory for the Provinces to establish a local Government system through law which, invariably means that further legislation would be required by the Provinces and for every such amendment sanction of the President would be required and that too for a purely Provincial subject. Sooner or later Local Government Ordinances have to be deleted from the sixth schedule so as to follow the true spirit of federalism and 1973 Constitution.
- 2.8. Under Section 26 of LFO 2002 a new Article 270 AA has also been inserted in the Constitution. It validates all laws and orders made from Fourteenth day of October 1999 and the date on which this article comes into force. Under Sub article 3 of Article 270AA, "All Proclamations, President's orders, Ordinances, Chief Executive's Orders, laws, regulations, enactments, notifications, rules, orders or by-laws in force

immediately before the date on which this article comes into force shall continue in force until altered, repealed or amended by the Competent Authority. In the explanation of this Article the Competent Authority has been defined as the appropriate legislature.

- 2.9. Article 270 was framed at the time of promulgation of original Constitution in 1973. The basic spirit was to validate the laws made by the Martial Law Regimes between 1969 and 1971.

Article 270-A was inserted under Eighth Amendment in 1985 to validate the orders, laws promulgated by Martial Law Regime (1977-1985). Article 270 A was validated by the parliament in 1985.

However, under Article 270 AA (3) the legislature can alter, repeal or amend any law or order issued by the Chief Executive. The only requirement, in case of NWFP Local Government Ordinance and Police order 2002, is prior sanction of the President.

3. **NWFP Local Government Ordinance, 2001.**

The Local Government ordinance, 2001 (LGO) does not extend to Cantonment Areas despite claim of NRB to devise and implement new system of Local Government for Cantonment Areas of Pakistan. In some cases the population of these Cantonments has exceeded the towns or Municipal Committees thus these cantonments are still being run under **Cantonment Act, 1924.**

- 3.1 It may be clarified that in the past the Local Governments have played vital role in the development as well as capacity building of locals. Although the new LGO 2001 envisaged more powers for the Local Government, but it is not for the first time that the people have been given Local Governments.
- 3.2 In spite of all legal safeguards, financial, administrative powers and above all political patronage the system has failed to deliver. Instead of fusion it has created more fissures in the society. The whole scheme was devised in such a way, noble intentions notwithstanding, that it has become conflict-based at the very outset. Local Government also became controversial as

close relatives of District/Tehsil Nazims contested elections against candidates of almost all the political parties. The District Governments, were fully involved in politics. Thus the institution of Local Governments came in direct confrontation with the members of Provincial and National assemblies, despite the fact that Local Bodies Elections were held on non-party basis.

3.3 The role of Provincial and National Assembly in the affairs of Districts has been curtailed. No district is self sustainable, keeping in view the narrow taxation base of District Governments, and the Provincial Assemblies would not be sanctioning the budgets/grants for the districts unless the members are given institutional role in the affairs of districts. After all every member of National and Provincial Assembly also represent the people at grass root level and has not been thrust upon the people from the above.

3.4 Another misconception about the Provincial Assemblies and the Parliament is that their main job is to confine their role to legislation only. Little do such exponents of this idea realize that the role of Parliament and Provincial Assemblies is not only to legislate but also to devise economic, social, legal, political and strategic policies. Legislation is one aspect and rather to give effect and legal cover to all such policies as and when required.

3.5 Parliament and Provincial assemblies, being sovereign bodies, can discuss, approve and legislate on all the issues. Nothing can be taken out of the ambit of these highest elected bodies. No one can deny the importance of Local Governments, which is a Constitutional obligation, but there is need to harmonize its relationship with the superior elected institutions instead of placing it in a position of confrontation and as a supra legal and constitutional body.

4. Analysis of NWFP Local Government Ordinance, 2001.

The ordinance issued by Governor NWFP on 13th August, 2001. It is almost true copy of Draft Ordinance sent by NRB.

4.1 Section-2(xvi):- Local Government has been defined which includes a District Government, Zilla Council, TMA/Tehsil Council, Town Municipal Administration and Town Council and a Union Administration and Union Council vide sub-section (XXXIV-XXXVII) Tehsil Municipal Administration, Town Municipal Administration and Union Administration. All these include Tehsil Nazim and officials and employees.

Vide Section-12:- The Local Government has been defined. Section-13 says, "(1) The District Government shall consist of Zilla Nazim and District Administration.

(2) The District Government shall be competent to acquire, hold or transfer any property, moveable and immovable, to enter into Contract and to sue or be sued in its name, through District Coordination Officer". District Administration has not been precisely defined anywhere. Although Section-26 gives structure of District Administration which shall comprise the district offices and other offices.

It is not clear when Municipal, Tehsil, Town and even Union Administration have been defined the vital omission of defining District Administration has only added further confusion to an environment where every single official is not clear about his authority and responsibility.

4.2 Section-23:- External recall of Zilla Nazim.

If in the opinion of the Chief Executive of the Province the continuance of Zilla Nazim is against the public policy or interest of people or is guilty of misconduct, he may move a motion in the Provincial Assembly and the assembly, after providing the Zilla Nazim an opportunity of being heard, may pass a resolution with simple majority and the Nazim shall stand removed.

In case of emergency the Zilla Nazim can be suspended by the Chief Executive but the suspension has to be ratified by the Provincial Assembly with simple majority. Again the Zilla Nazim shall be given an opportunity of being heard by the Provincial Assembly.

It is not clear how a Zilla Nazim would be given an opportunity of being heard by the Provincial Assembly except that he will be addressing the assembly and answering the questions to be raised by the members. Chief Minister must also be there to clarify his position. Thus a Zilla Nazim and the Chief Minister of a Province will be on equal standing while appearing in the Provincial Assembly.

Sub-Section-4 of Section-129 says that, "If the Provincial Assembly does not ratify the suspension of the Zilla Nazim, the orders of the Chief Executive of the Province shall cease to have effect".

Rules of Business of Provincial Assembly have to be amended so as to enable a non-member to address the assembly. In case a Provincial Assembly does not ratify the suspension of a Zilla Nazim the Chief Minister, as per conventions, should resign.

- 4.3 Section-28:- As per provisions of this section the DCO shall be Coordinating Head of the District Administration. In the explanation an effort has been made to clarify his position and, at-least, to give this office some semblance of dignity and authority. Contrary to this the powers of Executive District Officers (EDO) have been clearly mentioned.

Under NWFP District Government Rules of Business 2001, framed under Sections 31, 182 and 191 of NWFP LGO 2001, the Zilla Nazim shall be the Head of District Administration and shall be responsible for effective control and management. Under these rules each EDO shall be responsible to Zilla Nazim through the DCO, while EDO shall be head of the office for the purpose of administrative powers in respect of all the decentralized departments grouped under his charge. Even EDOs are more powerful and effective as compared to DCO. Working of District Administration has been explained in Section-30 which, at best, can be termed as vague. It prescribes that in matters of policy and important decisions the DCO shall obtain approval of Zilla Nazim before communicating such matters and decisions to the government. Criteria to

declare an issue as policy matter and important decision becomes the sole prerogative of Zilla Nazim.

Sub-section-4 of Section-30 also prescribes procedure for premature transfer of DCO on complaint of Zilla Nazim. The Provincial Government is obliged to accede to the request of Zilla Nazim within 07 days or may refer the matter to the Local Government Commission. The Local Government Commission shall inquire into the matter and place the findings before the Chief Executive of the Province for such action as he may deem necessary. It is not clear what action will be initiated against the Nazim in case of false accusations with malafide intentions. In case the Local Government Commission concludes in its findings and absolve the DCO of all the charges then smooth working relationship between the DCO and Zilla Nazim shall be more difficult. Another glaring omission can be noticed is Section-132 which deals with, "Functions of the Provincial Local Government Commission".

Vide para (e) of this Section the Commission may enquire into the matters referred to it by the DCO under the provisions of sub-section-3 of Section-28. Section-3 does not exist under Section-28 of NWFP LGO 2001.

In Draft Ordinance of NRB sub-section-3 did exist which is reproduced below:-

"where-in the opinion of District Coordination Officer an order of Zilla Nazim is motivated or unlawful, he may seek recourse in writing to the Local Government Commission with a copy thereof to the Zilla Nazim and the decision of the Commission in the matter shall be final and binding".

Such protection is already available to the District Police Officer under Police Order 2002 vis-a-viz the Zilla Nazim.

It seems that the it was deliberate omission in the ordinance and the DCO has not been given this institutional protection.

As discussed earlier each EDO shall be responsible to the Zilla Nazim through the DCO.

DCO has also been declared as Principal Account Officer but his position has been weakened through subsequent executive orders and directed to comply with the orders of Zilla Nazim.

It seems that, through LGO 2001, new principles of Public Administration have been set. Either the DEO is principal staff officer (PSO) to the Zilla Nazim or he is the Executive Head of the Devolved Departments. At the moment DCO is shouldering responsibility as Head of Devolved Departments while Zilla Nazim is exercising the sole authority.

Under Section 150 the Local Government Elections shall be conducted by the Chief Election Commissioner. Articles 213-221 of 1973 Constitution deals with the Elections and duties of Chief Election Commissioner. Under LFO 2002 Article 218 of the Constitution has been amended and apart from National and Provincial Assemblies, 'Elections of such other public offices as may be specified by law' has been added. While under Article 219 of the Constitution the duties of Commissioner have not been amended and thus holding elections for Local Government is not his Constitutional duty. Powers of Provincial Government under Section 151 of Local Government Ordinance 2001 with regards to delimitation etc are also not clear.

Holding of Local Bodies elections by a Constitutional Authority under the Control of Federal of Government is an infringement of Provincial autonomy.

CONSTITUTIONAL STATUS OF POLICE ORDER 2002

5. Article 70 of the Constitution envisages a Federal Legislative List as well as Concurrent Legislative List. Whatever is residue, beyond these lists, falls within the exclusive legislative powers of the Provinces (PLD 1990 Karachi 402 (F/B)). Establishment and regulation of police has not been mentioned specifically in any of the two Lists as subject except reference made in item 40 of the Federal Legislative List which elaborates extension of the powers and jurisdiction of members of a police force belonging to any Province to any area in another Province, but not so as to enable the Police of one Province to exercise Powers and jurisdiction in another Province without the consent of the Government of that Province. Even in this case the powers of Federal Government to legislate have been restricted and subject to consent of that Province.
- 5.1 Concurrent Legislative List (item 1 and 2) enumerates criminal law, including all matters included in the Pakistan Penal Code and Criminal Procedure. As per provisions of Article 142 the Parliament shall have exclusive power to make law and with respect to any matter in the Federal Legislative List. Parliament and a Provincial Assembly shall have powers to make laws with respect to any matter in the Concurrent Legislative List. Under Article 142(C), 'A Provincial Assembly shall, and Majlis-e-Shura (Parliament) shall not, have powers to make laws with respect to any matter not enumerated in either the Federal List or the Concurrent List'. Under Article 143, the Act of Parliament shall prevail over an Act of Provincial Assembly with respect to any of the matters enumerated in the Concurrent Legislative List.
- 5.2 It is a Constitutional and legal matter whether the Police Order 2002 has to be adopted by the Provinces, mutatis mutandis, notwithstanding the fact that the subject has not been mentioned in the Federal or Concurrent Legislative Lists. Needless to state that all courts, both criminal and civil, are being regulated by the Provinces. Law and order is a subject, which exclusively belongs to Provinces.

ANALYSIS OF POLICE ORDER 2002

6. Police Order 2002 promulgated through an Ordinance and given Constitutional Protection under Sixth Schedule (Article 168(2)). Any law given in the Sixth Schedule cannot be amended or repealed without the prior sanction of the President. Detail Constitutional position has already been discussed in the preceding paragraphs.
- 6.1 A detail analysis of Police Order 2002 indicates that in fact no devolution of powers has taken place. SHOs were already enjoying immense and brutal powers under Cr.P.C, PPC and number of other laws. More legal powers have been concentrated in the District Police Officer (DPO) and these include even regulation of some civil and municipal functions. While unbridled administrative and financial powers have been given to the Provincial Police Officer.
- 6.2 It is the responsibility which has been dispersed among so many forums – all exercising general control. In fact the actual accountability, if any, still lies within the Police. It would take months, and probably years, to get materialize the action against negligent police officers and the purposeful action would get lost somewhere in the maze of forums ranging from DPSC, PPSC, NPSC, Provincial Police Complaint Authority, National Police Complaint Authority, District Nazim, District Assembly, Provincial Government, Provincial Assembly, National Assembly, Federal Government, District Criminal Justice Coordination Committee, Judicial Inquiries, Judiciary and the Police Department itself.
- 6.3 Keeping in view the urgency and promptness of actions Law & order and police functions are on day-to-day basis. Such forums and Commissions can serve better as for as post-facto and remedial measures are concerned but would be having hardly any effective control and role as far as preventive and current steps are concerned.

6.4 As a matter of fact the whole purpose of this exercise was to avoid misuse of powers by the Police. But only Police Act 1861 and Police rules, 1934 have been replaced. In fact Police Act 1861 was quite sketchy piece of legislation and details were worked out in exhaustive three volumes Police Rules, 1934. Police Act 1861 and Police Rules 1934 were meant to regulate the working of police. This Act and Rules also prescribed role of District Magistrate besides powers given to him under the Code of Criminal Procedure and other laws. Misuse of powers by the Police under brutal laws has always been a cause of concern for the common people. Police Act 1861 and Police Rules 1934, being colonial legacy, have been repealed. Role of Executive Magistracy and District Magistrate has been erased from Code of Criminal Procedure. We witnessed little discussion over the main issue that Police Act 1861 was not the only colonial legacy. Otherwise also it was not a substantive but regulatory law. Any law to regulate a force is meant for its internal control, training and providing legal cover to it.

6.5 Now police has been armed with new powers, including some of the civil and municipal functions, with general and dispersed control of various Commissions. None of the brutal colonial laws such as Code of Criminal Procedure 1872, Pakistan Penal Code 1862 and Evidence Act 1861 have been changed besides score of other century old laws. The police under Police Order 2002 would be executing the same centuries old colonial laws. If Police Act 1861 was formulated with a colonial mindset and interest, the other laws empowering the Police to take cognizance of every subject under the sun, were not framed for the welfare of people of sub-tenant either. Apart from Police Act 1861 or Police Order 2002 these decadent laws vest enormous powers in Police which are usually misused.

6.6 Section 2 - Definitions

Negligence, mis-conduct, corruption and corrupt practices not defined and not included.

- 6.7 Section 3 - Attitude and responsibilities of police towards the public.
More of qualitative and general nature. Not tangible. No punishment prescribed for violations.
- 6.8 Section 4 - Duties of Police.
Duties/obligations intermixed with powers. Failure to perform duties is quite distinct from failure to exercise powers. There can be an error of judgment while exercising powers but duties are always clearly laid out.
- 6.9 Under Section-4(1) power to enter any public place without warrant on reliable information would be grossly misused. It would give great leverage to police to misuse it with malafide intentions and infringe upon honour and privacy of citizens. Police has been made the sole judge to decide and in case of non-recovery of illegal weapons etc or suspect persons no punishment has been prescribed.
- 6.10 SECTION 6-8 deals with Constitution of Police. The Government shall maintain separate Police establishment for every general Police area on functional basis. Under Section 18 (3) the Head of Investigation in a District shall not be below the rank of Superintendent of Police and shall be responsible to his own hierarchy subject to general control of the District Police Officer.

While on one hand the Investigation was separated and Government asked to allocate more resources for fresh recruitments, transport and equipment which have been done to some extent. But the purpose of separating the Investigation from watch and ward has been nullified by giving the general control to District Police Officer over the Investigation. Since the DPO shall be responsible to Zila Nazim therefore the Interference in impartial investigation cannot be ruled out.

- 6.11 SECTION 9 Superintendence of Police shall vest in appropriate Government. Under sub-section (2) such powers shall be exercised as to ensure that Police performs its duties efficiently and strictly in accordance with the law.

It seems that while drafting the law the Superintendence over Police to the Provincial Government was delegated as a favour and then binding the Government to 'behave' while dealing with the Police. It is an unnecessary addition as every Government is otherwise bound to act according to law and the legislature and Judiciary is very much there to watch.

- 6.12 SECTION 11 Posting of Provincial Police Officer:-

Provincial Government is bound to select one of the Police officer from a panel given by the National Police Safety Commission. The Choice of Provincial Government is limited under Section 12 of Police order 2002. (P.O.2002). The tenure of PPO shall be three years period but, after approval of Provincial Public Safety Commission, can be transferred for unsatisfactory performance of duties. It is to be noted that the Provincial Government can only transfer such an officer after approval of the Provincial Safety Commission and that is the maximum punishment which a Provincial Government can recommend.

- 6.13 SECTION 15 PPO may post a City Police or District Police Officer

after Consultation with the Government. Provincial Government has been given the status of just a Consultee vis-a-viz PPO. So Competent Authority and a subordinate officer are equal Consultees. PO 2002 is silent about the scope and extent of consultation. It is not clear whether the PPO shall seek approval of Government or just consult it. Under Section 15 (3) a District or City Police Officer may be transferred before normal tenure of three years on grounds, such as inefficiency and ineffectiveness, with the concurrence of Zila Nazim and DPSC after he has been heard in person by DPSC. It is not clear who will be initiating the transfer of Police Officer,

Provincial Government or PPO. What if Zila Nazim & DPSC do not concur with each-other.

6.14 Framers of Police Order 2002 would have done great favour by differentiating between inefficiency and ineffectiveness. Police officers should feel free as for as misconduct and corruption are concerned because both these offences have not been made punishable any where in the Police order.

6.15 SECTION 17 (1). Provincial Government can only post a DIG, SSP and DSP after consultation with the PPO. Again Chief Minister must consult and seek concurrence of PPO.

6.16 Under Section 17 (2) PPO shall post SSP, SP and DSP in general Police area.

Chief Minister of a Province is not free to post or transfer PPO without NPSC and PPSC but PPO is not bound to consult these Commissions. Posts of DSP and SHO have always been considered controversial due to alleged political interference and patronage. All these posts have been placed at the will of Police Department and the Provincial Government, DPSC and PPSC would be having no role to play.

SECTION 18(3). Federal and Provincial Governments have sanctioned substantial grants for recruitment of additional Police and purchase of equipment for separate Investigation Police. Again the Head of Investigation has been placed under general control of the District Police Officer.

6.17 SECTION 33. DPO shall be responsible to Zila Nazim for Law & Order. The Zila Nazim is responsible to the Provincial Government but no institutional link has been provided between the Home Department and the District Governments under the LGO 2001 and PO 2002.

6.18 DPSC(SECTION 37-48),PPSC (SECTION 73-84)AND NPSC (SECTION 85-96).

Functions of all these Commissions are too general in nature. In most of the cases these are mere recommendatory bodies. These Commissions have more obligations to act as facilitators for Police without having specific powers to act against the delinquent Police Officers/Officials.

6.19 PROVINCIAL POLICE COMPLAINT AUTHORITY (PCA)SECTION 104-107.

PCA has not been authorized to take action under criminal law such as registration of cases against the delinquent Police Officials. A Provincial body with no presence in the districts. PAC can only recommend action against delinquent Police Officials.

6.20 CRIMINAL JUSTICE COORDINATION COMMITTEE.

Section 109-110. Headed by the District and Sessions Judge with vague functions. A toothless body. For example one of its functions is to promote understanding, cooperation and coordination in the administration of the criminal justice. This forum should be made more powerful.

6.21 OFFENCES & PUNISHMENTS. (SECTION 138-145).

Most of the Municipal functions and powers have been vested in the Police.

6.22 MAINTENANCE OF POLICE DIARY AT A POLICE STATION (SECTION 167)

Only District and Sessions Judge has been empowered to call for and inspect such diary. PPO and other Police Officers have been given concession of delegating their powers to their subordinates while the District and Sessions Judge has not been considered a fit person to delegate his powers to Additional Judges and Judicial Magistrates. District and Sessions Judge would not be in a position to exercise this power effectively throughout a district.

6.23 POWER TO AMEND.

Section 184 is reproduced below. 'Without prejudice to the power of Federal Government to amend this order, any Provincial Government may, with the prior approval of Chief Executive of the Islamic Republic of Pakistan, amend, vary or modify any provision of this ordinance relating to the Province on the basis of its specific requirements and circumstances.'

Thus the Provincial Government is Competent to amend Police Order 2002. Only prior approval of Prime Minister of Pakistan is required. Except NPSC rest of the bodies such as PPSC, PCA, DPSC and most of the other functions are related to the Province, therefore, the Provincial Government can, with the prior approval of Chief Executive, legislate with regard to these provisions of Police Order 2002.

7. CODE OF CRIMINAL PROCEDURE (AMENDMENT)
ORDINANCE 2001.

Under Article 70 (4) Code of criminal Procedure falls in Concurrent Legislative List (item 2).

Under Article 142 (b) both the Parliament and a Provincial Assembly have powers to make laws with respect to any matter in the Concurrent Legislative List. As per provisions of Article 143 the Act of Parliament shall prevail and the Act of Provincial Assembly shall, to the extent of the repugnancy, be void.

- 7.1 Code of Criminal Procedure (Amendment) Ordinance was promulgated on August 13, 2001 by the President of Pakistan. Under this Ordinance Executive Magistracy including the posts of SDM and DM were abolished and amendments were made in the Code of Criminal Procedure 1898 accordingly.

Under Section 26 of LFO 2002 a new Article 270 AA was added to the Constitution which envisages the validation of all laws made between 12th October 1999 and the date on which Article 270 AA comes into force. However, under Article 270 AA (3) all laws made shall continue in force until altered, repealed or amended by competent authority which means legislature. Thus the Cr.P.C (Amendment) Ordinance 2001 has been validated under LFO 2001 and the Parliament, with simple majority, can amend this Ordinance.

- 7.2 Under Section 12 of Cr.P.C the Provincial Government may appoint as many persons as it thinks fit to be Magistrates of first, second or third class in any district.

Under Section 14 of Cr.P.C the Provincial Government may, on the recommendations of High Court, confer upon any person (including a former Executive Magistrate) all or any of the powers conferred or

conferrable by or under this code on a Judicial Magistrate in respect to particular cases or to particular classes of cases, Such persons shall be called Special Judicial Magistrates.

Under Section 29 of Cr.P.C any offence under any other law, when no court is mentioned in this behalf in such law, can be tried by such court if it is a court other than a court of Magistrate.

- 7.3 It is evident from Constitutional and legal position that the Provincial Government is Competent to confer Magisterial powers on any person under Section 12 or 14 of Cr.P.C for trial of all local and special laws. For conferring such Magisterial powers no amendments in the Code of Criminal Procedure are required.

8.

A VIABLE ADMINISTRATIVE SET UP

The main dilemma of whole devolution exercise is that the proposals sent by the Provinces were rejected without much debate. Police Order 2002 was prepared by a group of Police Officers and no input, whatsoever, was incorporated from the District Administration, Local Government, lawyers and even the judiciary.

8.1 Police order 2002 has been drafted in a way that it ensures little or no judicial, and executive control over the Police. While the powers have been concentrated, including some of the Municipal functions, within the Police hierarchy the accountability has been dispersed among multi forums all having general control with no specific powers.

8.2 Both Local Government and Police are Provincial subjects. Police order 2002 promulgated by the Federal Government and placed in the sixth schedule of the constitution. No law placed in sixth schedule can be amended without prior sanction of the President of Pakistan.

Under Section 184 of Police Order 2002 the Provincial Government may make amendments with the prior approval of Chief Executive of Pakistan which means Prime Minister of Pakistan. Thus double, both legal and constitutional, protection has been given to the Police Order 2002.

8.3 Similarly LGO 2001, a Provincial subject and law, has been placed in sixth Schedule of the Constitution. It means that a Provincial Government can promulgate the law but cannot vary or modify it without the prior approval of the President of Pakistan. It invariably means that the Provincial Governments, even for minor amendments, have to seek permission from the Federal Government.

8.4 Code of Criminal Procedure (Amendment) Ordinance 2001 is a subject of Concurrent List and it has been validated under the LFO 2002. Executive Magistracy was abolished through this Ordinance but corresponding amendments have not been made in other laws such as Local and Special laws. It may be mentioned that the Deputy/Commissioners/DMs were exercising powers under about 324 laws/statutes. The main argument

against Executive Magistracy was that both executive and judicial powers were vested in one person. Most of the powers, exercised by the former Executive Magistracy, were of the quasi-judicial, regulatory and administrative nature and were vested in the SDM/DM in the capacity of Coordinators and administrators. Now some of these powers have been vested in the judiciary while in case of many laws there is a complete vacuum. It seems that all energies were directed against demolition of certain offices and little or no effort has been made to reform the laws and procedures. If exercising of judicial powers, and many were of quasi-judicial and regulatory nature, by the Executive Magistracy was construed as mis-carriage of justice then the delegation of administrative and regulatory powers to the judiciary is even more objectionable. Instances are not uncommon that, in the past one and half year, we have witnessed judicial Magistrates and Sessions Judges holding meetings with the transporters and shopkeepers. Exercise of such powers by the judiciary, without having skills, administrative experience and access to extra-judicial information, would definitely drag the judiciary into controversies.

- 8.5 All the three issues will be discussed in context of making improvements through executive measures without making legal and constitutional amendments and in long term with legal and constitutional amendments.

9. LOCAL GOVERNMENT ORDINANCE 2002.

9.1 SHORT TERM MEASURES.

These are the measures which the Provincial Government can initiate through Executive orders, amending Local Government Rules framed under Section 31, 182 and 191 and enactment of byelaws under Section 192 of LGO 2001.

- (a) The Zila Nazim working as Political Head of District Government but he has been made defacto and dejure Head of District Administration also. While EDO is exercising specified executive powers the DCO has been reduced to the status of personal staff officer to the Zila Nazim.
- (b) DCO should be declared as Head of District Administration and to also coordinate working of Police and act as Focal person for the District.
- (c) All the EDOs are responsible to the Zila Nazim through the DCO. They should be made responsible to the DCO/District Administration.
- (d) District Administration should be clearly defined as under.
"District Administration shall comprise of DCO and Group of offices as per Part C and Part D of First Schedule of LGO 2001' including Police. It shall be headed by DCO".
- (e) The District Administration shall be responsible to Zila Nazim and the District Assembly.
- (f) District Government comprising of Zila Nazim and District Administration should be made responsible to Zila Assembly for District functions.
- (g) DCO should also be declared as representative of Provincial Government. He will be responsible to the Provincial Government/Cabinet for implementation of Provincial and Federal policies.

(h) DCO can be declared as Focal person under Section 4(1) and (2) of LGO 2001 by amending the NWFP District Rules of Business 2001. The Provincial Government can assign certain functions to the DCO, including supervision of Law & Order under Section 128 so as to prevent any grave threat to public peace and handle emergencies. The only requirement is to issue direction to the District Government through the concerned Zila Nazim and in case of failure of Zila Nazim to comply with such direction the Chief Executive may require the Chief Secretary to direct IGP and the DCO to take such actions as the situation may necessitate.

During past 16 months the Provincial Government has convened many such meetings of Zila Nazims and also issued directives but the law & order situation has not improved. The Provincial Government may, as per provisions of Section 130, require the District Government to perform any special task which requires funds beyond the budgetary provisions, the Government shall provide necessary resources.

- (i) All DSRs and special reports, including law & order, be initiated by the DCO and he shall keep inform the Zila Nazim. DPO and Special Branch should regularly inform the DCO and Zila Nazim.
- (j) Crisis Management Centers under the supervision of DCO be established in all the Districts.
- (k) Zila Nazim to initiate only general performance report of DCO which shall be given due consideration by the Provincial Government. ACR of DCO be initiated by the Home Secretary and ACS to be countersigned by the Chief Secretary. It should cover the following aspects.
 - (i) Recovery of District Government and Provincial dues.
 - (ii) Handling of emergencies.
 - (iii) Improvement in service delivery.
 - (iv) Developmental works.
- (l) Shortage of Ministerial staff be met and DCO Office fully equipped to collect and analyze the information.

- (m) Revenue Department should continue to work independently as judicial work is involved but institutional link at the DCO level be established so as to enable the DCO to handle emergencies and also help in conflict resolution.

9.2 REGIONAL COORDINATION

There is visible lack of hierarchical arrangement at supervisory level to deal with issues arising out of Inter-Districts and Districts-FATA disputes.

DCOs of Six FRs and the districts bordering Tribal Agencies are experiencing administrative problems. Administrative and Coordination problems are being experienced by the Provincial Heads of Attached Departments and Secretaries.

NWFP has certain geographic and legal peculiarities such as existence of PATA and FATA. There were only 12 districts right upto 1985. Since then the number has doubled. The new districts were not carved out strictly adhering to the Principles of geographic demarcation, administrative justification and tribal division. The District Departments have not been fully established. Example Tank, Lakki, Shangla, Upper Dir, Hangu, Swabi, Buner, Haripur and Battagram. There are land disputes and conflict over distribution of assets. Coordination with Tribal Agencies is possible only through Home Department and newly created Governor's FATA Secretariat.

Provincial Heads of Federal Departments like PESCO, PTCL and Sui northern are showing less response to DCOs. Conflict resolution among the districts is a big problem. Apart from allegations and counter allegations between the District Governments, Police and Political Administration the law and order situation specialty in bordering districts of Tribal Areas has deteriorated.

- 9.4 It would be appropriate to Designate and appoint the following Regional Heads or Regional Coordinators.

1. Southern Zone. Headquarters Bannu.
2. Peshawar Valley H.Q. Peshawar.
3. Hazara HQ. Abbottabad.
4. Malakand H.Q. Mingora.
5. Kohat H.Q. Kohat.

The Regional Coordinators may be nominated as Co-opted members of PDWP and Local Government Commission.

They can also be assigned the task to supervise recoveries of Provincial Government.

9.5 CONSTITUTIONAL AND LEGAL AMENDMENTS.

As discussed earlier Local Government is purely a Provincial subject. Any artificial and supra-constitutional protection may not prove a guarantee of sustainability of Local Government. A system can only survive if it is based on sound logical, legal and social principles and having the support of the masses.

Resorting to any other means would only result in political polarization and resentment among the Federating Units.

NWFP Local Government Ordinance has been given protection under, Schedule sixth of the Constitution and thus for any amendment prior sanction of the president is required.

No law is perfect and continuous changes are required so as to suit the requirements.

9.6 Some of the legal and administrative lacunae have already been discussed in the preceding paras. The enlistment of Sections is by no means exhaustive. The Provincial Government may prepare a package of Administrative and legal reforms with in-built mechanism for minor

changes/amendments in future so as to avoid seeking approval for every single amendment.

9.7 The Local Government Elections should be organized by the Provincial Election Authority and not Election Commission of Pakistan. Amendments should also be made to include and make all Senators, MPAs and MNA of District as non-voting members of District Assembly. This would ensure fusion and also ensure subsequent support in the Provincial Assembly.

9.8 Let there be no apprehension that Provincial Governments cannot be trusted to deal with the District Governments. Such mistrust and centralization of legal and constitutional powers with regard to a Provincial subject would only result in stalemate and ultimate failure of system. We should not adopt wrong means to achieve the right ends.

POLICE ORDER 2002

Constitutional position, legal and administrative problems arising out of implementation of Police Order 2002 has been discussed in the preceding paras. This Ordinance has been given triple protection under schedule six (Article-268(3), Article 270AA for validation of laws and again under 184 of Police Order 2002 whereby Provincial Government has been bound down to seek prior approval of the Chief Executive of Pakistan.

As discussed police is a Provincial subject and administration of criminal justice is the responsibility of Provincial Government. The fact require further discussion whether Provincial Police can be governed under Federal law unless it is adopted by the provinces.

2. Police Act-2002 has been promulgated to regulate the functions of police but it has been given shape of substantive and civil law by incorporating municipal and even civil functions. These provisions give unfettered powers to police.

3. Improvement in Police Act can bring some improvement in the performance of police but the real change can only be brought by making the police more accountable to legislature and Judicial coupled with civil administrative control. All these three controls have been very shrewdly diluted in the police order 2002.

No specific role for the judiciary has been provided. The role of provincial assembly has been confined to sanctioning Budget for the police albeit without effective control over its working. The entire Provincial Government and the Assembly has been pressed into action to act as mere facilitator for the police. It may be concluded that while the Police will be working under the Provincial Government but without effective control of Provincial Government over its affairs.

4. While police order 2002 has been promulgated with a view to modernize the Police and make it people friendly more brutal powers have been given to the police under this order.

Besides Executive Magistracy abolished and some of the Magisterial powers under sections 127-133 for dispersing unlawful assembly have also been given to the Police. Police has also been empowered to command the Armed Forces to disperse such unlawful assembly.

There is need to examine the powers vested in the Police under decadent and Colonial Laws such as Pakistan Penal Code 1860, Code of Criminal Procedure 1898 and Evidence Act 1872 besides numerous other substantive laws.

Much hue and cry was raised against Colonial Police Act 1861 and, comparatively new, Police Rules 1934 but no effort has been made to modify these procedural and substantive laws and to make it more human friendly.

5. Keeping in view the peculiar geographic and socio-political environment of NWFP the Provincial Government may prepare a reforms package for seeking approval of Prime Minister of Pakistan for making suitable amendments in the Police Order 2002.

The following aspects of police order require amendments so as to give:-

- a) Effective legislative and administrative control to the Provincial Government.
- b) And to amend, repeal and vary provisions which are against the fundamental rights, public policy and dignity of people.

These chapters/sections require amendments so as to ensure objectives cited above (a&b), besides shortcomings already pointed out in the preceding paragraphs.

- i) Section-2:- Negligence, misconduct, corruption and corrupt practices may be defined.
- ii) Power to enter into any public place without warrant may be repealed.
- iii) Section-6-8:- General control of DPO over Investigation Police may not be given.
- iv) Section 11-15:- Posting of PPO, DPO and DIG should be the sole prerogative of the Chief Executive of the Province. For law and order Chief Executive is responsible to the Federal Government, Provincial Assembly and above all to the electorate and the history. He must have authority to effectively shoulder the responsibility. NPSC, DPSC and PPSC are accountable to none. Supervisory role of DPSC, PPSC and PCA may continue for effective monitoring of police performance.

The Provincial Government and the Chief Executive should not be reduced to the status of equal consultee vis-a-viz the PPO/Inspector General of Police, NWFP but must act as the Competent Authority.

- v) Section 37-48(DPSC) and Sections 73-84 (PPSC) Provincial Bodies and may be given more specific role such as checking of Police stations, registration of FIR and also to check others misuse of powers by the police.
- vi) Section 109-110:- Judicial Control:- Criminal Justice Coordination Committee under the Chairmanship of District & Sessions Judge may be given specific powers to take action against the delinquent police officials. All the Judicial Magistrates be empowered to check the Police Station and Police Diaries under Section-167.
- vii) Federal Government may be requested to make constitutional amendment with regard to exclusion of Police Order 2002 from Schedule six of the Constitution and empower Provinces to

modify the Police Act and frame Police Rules on the basis of specific requirements and circumstances.

CODE OF CRIMINAL PROCEDURE (AMENDMENT) ORDINANCE 2001

It is a subject of concurrent list of the Constitution so the Provincial Assembly can legislate to the extent that such legislation must not be repugnant to the Federal Legislation.

Under this ordinance drastic amendments have been made and Executive Magistracy including SDM/DM abolished.

It is pointed out that SDM/DM and Executive Magistrates were exercising magisterial powers conferred under the Cr.P.C. But there are numerous other laws where the word 'Deputy Commissioner, appears for which no alternate arrangements have been made. The Executive powers of Deputy Commissioner as specified in various statutes have not been delegated to the DCO. Thus there is great vacuum. None of the powers of DC/DM/SDM have been repealed rather the same have been dispersed among other officers including Sessions Judge and Police. No, so called, repressive laws being exercised by the Executive Magistracy have been modified or repealed.

District Administration/District Governments feel hamstrung due to lack of an enforcement mechanism. Provision of legal and administrative support to various functionaries of District Government is not available. There are problems in conflict resolution crisis Management and rehabilitation. As per amended Cr.P.C. Magisterial powers under Sections 127-132 have been given to the Police with regard to use of force to deal with an unlawful assembly.

Quasi-judicial powers under Sections 145-148 with regard to land disputes and Executive Powers for Public nuisance (Sections 133-143) vested in the judiciary.

Even Prevention of Offences (Section 106-126) are being exercised by the judiciary. In the absence of extra-judicial knowledge, intelligence reports lack of communication with the public, judiciary is bound to rely on Police reports and to accede to their request.

Powers under MPO have been centralized and given to Home Secretary. Action under MPO is of urgent nature and it is difficult for the Home Secretary to verify the information given by the Police through other sources as it would result in inordinate delays.

Trial of Special and Local Laws has come to standstill and even authentic data is not available because District-wise compilation of court fines used to be done by the D.C. Office.

One example of Public hardships is quoted to highlight the gravity of problem. Supreme Court of Pakistan banned the Student Unions and also ordered that every student seeking admission in an Educational Institution must give an undertaking to be attested by the Magistrate. Judicial Magistrates, in the absence of Institutional knowledge, are reluctant to attest such undertakings.

Exercise of powers under Local and Special Laws requires extensive knowledge, skills and experience and, at times, may lead to controversies which the judiciary can hardly afford.

Cr.PC. amended ordinance has not been placed in Schedule six of the constitution and the Federal Government can legislate without resorting to constitutional amendments.

SHORT TERM MEASURES

The Provincial Government is Competent to appoint as many persons as it thinks to be Magistrates of the first, second or third class in any district. Such persons may exercise all or any of the powers which they may respectively be invested under this Code (Section 12 Cr.PC).

Under Section 14 the Provincial Government may, on the recommendations of the High Court, confer upon any person (including a former Executive Magistrate) all or any of the powers under this code in respect to particular cases or to particular classes of cases in any local area. Such Magistrates shall be subordinate to Sessions Judge (Section 17).

Under Section 29 of Cr.PC such Magistrates can be appointed for trial of cases under other laws.

The Provincial Government may confer Magisterial powers upon Revenue offices under overall administrative control of DCO or DRO and Judicial control of District & Sessions Judge.

If High Court does not agree to make recommendations under Section 14 Cr.PC such powers can be conferred under Section 12 Cr.PC. The following powers can be conferred upon such Magistrates.

- i) Proclamation and attachment (Section 87-89).
- ii) Of Security for keeping the peace and for good behaviour. (Sections 106-107)
- iii) Public Nuisance (Sections 133-143)

These are mostly Municipal functions and of immense importance and help to the District Governments.

iv. **SECTION 145-148.**

These are of urgent nature functions and closely related to Land Settlements developmental works and land disputes.

v. Bail (496-502).

Bail is an executive matter and not a judicial proceeding as defined in Section 4(m) of Cr.PC.

vi. Weights and measures.

vii. Powers to try all the offences punishable upto three years imprisonment under Local and Special laws.

➤ The Provincial Government can declare DRO as Chief Magistrate through an Executive order.

➤ **LONG TERM MEASURES.**

The Federal Government may be requested to amend the Cr.PC with a view to provide magisterial cover for Police actions under Section 127-132 with regard to dispersal of unlawful assemblies, raids, searches etc. Few amendments would also be required in Police order 2002 with a view to assign certain functions to Magistrates.