IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE CH. IJAZ AHMED
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE KHALIL-UR-REHMAN RAMDAY

Crl. Petition No. 426 of 2009 along with
Crl. Appeal No. 383 of 2009 &
Human Right Case No. 3200-G of 2009
Human Right Case No. 3742-P of 2009
Human Right Case No. 3928-P of 2009
Human Right Case No. 3887-P of 2009
Human Right Case No. 9778-P of 2009

Nazar Hussain (in Crl. P. 426 of 2009)
Lal Muhammad (in Crl. A. 383 of 2009)

... Petitioner/Appellant

VERSUS

The State

... Respondent

For the Petitioner: (in Crl.P. 426 of 2009)	Ch. Afrasiab Khan, ASC.
For the Appellant: (in Crl.A. 383 of 2009)	Mr. Arshad Ali Chaudhry, AOR
Amicus Curiae:	Syed Iftikhar Hussain Gillani, Sr. ASC. Mr. Zulfiqar Khalid Maluka, ASC.
For the State:	Mr. Shah Khawar, D.A.G. Raja Abdul Ghafoor, ASC/AOR (on behalf of A.G. Sindh). Mr. Naveed Akhtar, Addl. A.G. NWFP. Mr. Muhammad Raza, Addl. A.G. Balochistan. Mr. Saeed Yousaf, Addl. A.G. Punjab. Raja Shahid Mehmood, D.P.G. Punjab.
Date of Hearing:	01 & 02.04.2010 (Announced in Open Court on 11.08.2010)

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JUDGMENT

TASSADUQ HUSSAIN JILLANI, J.- While hearing Crl. Petition No. 426 of 2009, a number of questions with regard to powers of the President under Article 45 of the Constitution to grant pardon and reprieve and the policy framed by the Government of Pakistan to grant remissions under the law came up for consideration. Vide order dated 10.09.2009, the Court framed following issues and notices were issued to the Deputy Attorney General and to the Advocate Generals of the four provinces:-

i) Whether under Article 45 of the Constitution of Islamic Republic of Pakistan, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President as held by this Court in ***Abdul Malik & others v. The State & others (PLD 2006 Supreme Court 365)****;*

ii) whether the policy formulated by the Government of Pakistan, Ministry of Interior, dated August, 2009 is in consonance with the judgment delivered by larger bench of this Court in case ***Shah Hussain v. The State (PLD 2009 Supreme Court 460);***

iii) whether the Prison Rules as enumerated are subservient to Article 45 and in case of any conflict between Prison Rules and above-referred judgments as well as special remissions under Article 45 of the Constitution and what would be the legal position of the said Rules; and

iv) whether any classification would be permissible in view of the nature of

> *accusation in case special remission is granted by the President of Pakistan, in view of the provisions as enumerated in Article 25 of the Constitution.*

2. Detailed arguments were addressed by Ch. Afrasiab Khan, ASC, learned counsel for the petitioner, Mr. Arshad Ali Chaudhry, AOR, learned Amicus curie M/s Syed Iftikhar Hussain Gillani, Sr. ASC and Zulfiqar Khalid Maluka, ASC as also by Mr. Shah Khawar, Deputy Attorney General, Raja Abdul Ghafoor, ASC/AOR appearing on behalf of A.G. Sindh, Mr. Naveed Akhtar, Addl. A.G. NWFP, Mr. Muhammad Raza, Addl. A.G. Balochistan, Mr. Saeed Yousaf, Addl. A.G. Punjab and Raja Shahid Mehmood, D.P.G. Punjab.

3. The first issue revolves round Article 45 and has been framed in terms as under:-

> *Whether under Article 45 of the Constitution of Islamic Republic of Pakistan, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President as held by this Court in* ***Abdul Malik & others v. The State & others (PLD 2006 Supreme Court 365)***.

4. The head of the State is vested with similar powers in almost all constitutions of the World as provided in Article 45 of the Constitution of Islamic Republic of Pakistan. The issues of the extent of Presidential power under such a provision, the manner of its exercise and whether it is immune from challenge in a Court has been a subject of

debate both within the country and in jurisdictions across the frontier. Article 45 of the Constitution reads as under: -

> *"The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority."*

5. Every country recognizes and has, therefore, provided for this power to be exercised as an act of grace in proper cases. It is by now well recognized that *"Without such a power of clemency to be exercised by some department or functionary of government, a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgments are always tempered with mercy."* (American Jurisprudence 2nd Edn. Page 5). The philosophy of this special dispensation as per Corpus Juris Secundum (Vol. 67-A) is that, *"The pardoning power is founded on consideration of the public good and is to be exercised on the ground of public welfare, which is the legitimate object of all punishments, will be as well promoted by a suspension as by an execution of the sentences. It may also be used to the end that justice be done by correcting injustice, as where after discovered facts convince the official or board invested with the power that there was not guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law. (1) Acts of leniency by pardon are administered by the executive*

branch of the government in the interest of society and the discipline, education and reformation of the person convicted. (2) A pardon is granted on the theory that the convict has seen the error of his ways, that society will gain nothing by his further confinement and that he will conduct himself in the future as an upright, law-abiding citizen."

6. The power of pardon enshrined in Article 45 of the Constitution has been subject of comment by this Court in Bhai Khan v. The State (PLD 1992 SC 14) and the view taken was reiterated in a latter judgment in Abdul Malik v. The State (PLD 2006 SC 365). In Bhai Khan *Supra*,, this Court was of the view as follows:-

> *".....it may be stated that the power under Article 45 of the Constitution being a constitutional power, is not subject to any limitations or conditions that may be found in the Pakistan Penal Code or the Code of Criminal Procedure. The exercise of the discretion by the President under Article 45 is to meet at the highest level the requirements of justice and clemency, to afford relief against undue harshness, or serious mistake or miscarriage in the judicial process, apart from specific or special cases where relief is by way of grace alone, as for instance to celebrate an event or when a new President or Prime Minister is installed, where relief or clemency is for the honour of the State.....(Emphasis is supplied).*

7. If a sentence is commuted, it has the effect of substituting the sentence imposed by the court with that of the President or the Federal Government or the Provincial Government as the case may be. It does not, however, wash off the guilt or alter the judgment. If commutation order has

been passed during the pendency of the appeal of the convict, the court can still decide about the guilt or innocence of the accused.

8. In Abdul Malik's case (PLD 2006 SC 365), while affirming the view already taken in Bhai Khan's Supra case, this Court held that being a constitutional dispensation, this cannot be fettered by any legislative Act or instrument. It was observed as follows:-

> *"The power of the President to grant pardon, reprieve or respite and to remit or suspend or commute any sentence is a power which is given to Heads of the States in most of the Constitutions of the world.....*
> *24. the argument that the power of the President to grant pardon, reprieve, respite, remit, or suspend, or commute any sentence is subject to section 402, Cr.P.C. is not tenable and is not only against the constitutional mandate but also the scope of the afore-referred provision, section 402-C, Cr.P.C. reads as under:---*
>
> > *"402-C. Remission or commutation of certain sentences not to be without consent. Notwithstanding anything contained in section 401, section 402, section 402A or section 402B, the Provincial government, the Federal Government or the President shall not, without the consent of the victim or, as the case may be, of the heirs, suspend remit or commute any sentence passed under any section in Chapter XVI of the Pakistan Penal Code."*
>
> *25. It is a settled principle of constitutional interpretation that a provision enshrined in the Constitution shall prevail notwithstanding anything contrary contained in a piece of subordinate legislation."*

9. In the judgments of this Court to which reference has been made in the preceding paragraphs, although it was

held that the powers of the President in terms of Article 45 of the Constitution are unqualified, yet there was no comment on the manner in which the President has to exercise the power i.e. whether on the advice of the Prime Minister or in exercise of his discretionary powers under the Constitution. The manner of the exercise of various powers of the President is spelt out in Article 48 of the Constitution. Article 48(1) provides that in the exercise of his "functions", the President shall act in accordance with advice of the Cabinet (or the Prime Minister). But this is qualified by proviso stipulated therein and to Sub Article (2). A reference at this stage to Article 48 of the Constitution would be in order:-

> "***48. President to act on advice, etc.*** *(1) In the exercise of his functions, the President shall act [on and] in accordance with the advice of the Cabinet, (or the Prime Minister)*
>
> *Provided that [within fifteen days] the President may require the Cabinet or, as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall [within ten days] act in accordance with the advice tendered after such reconsideration.*
>
> *(2) Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so [and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever].*
>
> *(4) The question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister of State shall not be inquired into in, or by, any court, tribunal or other authority.*
>
> *(5) - - - - - - -*
>
> *(6) - - - - - - -*
>
> *(7) - - - - - - - "*

10. In Al-Jehad Trust v. Federation of Pakistan, (PLD 1997 SC 84) the issue of exercise of powers by the President under various provisions of the Constitution came under consideration and this Court held that depending on the manner of exercise of the authority, there are five distinct kind of powers which the President exercises. Those are:-

> *"(i) The Articles under which actions are to be taken in accordance with the advice tendered by the Cabinet or Prime Minister;*
> *(ii) The Articles under which the Prime Minister's advice is required but it will be binding if it is in accordance with the law declared by the Apex Court;*
> *(iii) The Articles which specifically provide for Prime Minister's advice or consultation independent of clause (1) of Article 48, to which Articles, aforesaid Article 48(1) would not be attracted to;*
> *(iv) The Articles under which the President has been given discretionary power and, therefore, he can act without the advice of the Prime Minister by virtue of clause (2) of Article 48;*
> *(v) The nature of the functions/duties/rights provided in certain Articles is such which exclude the application of Article 48(1)."*

11. The powers/actions of the President under Article 45 of the Constitution are part of his "functions" and are to be exercised in accordance with the advice of the Cabinet or the Prime Minister.

12. Sub Article (2) of Article 48 of the Constitution relates to the discretionary powers of President in which he is empowered to act, but there is no reference to the discretion of the President in Article 45 of the Constitution. Thus in the exercise of the powers under the later provision, he has to act

on the advice of the Prime Minister or the Cabinet. The exercise of the power under this provision, therefore, would not fall within the ambit of Article 48(2) of the Constitution.

13. The Rules of Business framed under Article 99 of the Constitution categorize list of cases requiring orders of the President on the advice of the Prime Minister and Item No. 25 pertains to the powers of the President under Article 45 of the Constitution.

14. Even in India, the exercise of the power of the President to grant pardon or reprieve is regulated and has to be on the advice tendered by the Council of Ministers. The analogous provision in the Indian Constitution is Article 72 which, inter alia, stipulates, *"the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence."*

15. In State of Punjab v. Joginder Singh (AIR 1990 SC 1396), it was held that, *"the power under Art. 72 is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433A of Code of Criminal Procedure. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provision and Prison Rules though the power has to be exercised on the advice of Council of Ministers."*

16. In England the power of pardon is a royal prerogative exercised on the advice of Home Secretary. *"it is an executive act, but the Home Secretary is authorized by the Criminal Appeal Act, 1907, to refer a case to the Court of*

Criminal Appeal, either for opinion or for final disposal as if it was an appeal. Ordinarily the power is exercised after sentence when there is some special reason why a sentence shall not be carried out; but a pardon also is available before conviction." (R. V. Boyes (1861) 1 B&S 311).

17. In United States, the President enjoys this power in terms of Article II Sec. 2(1) of the Constitution which mandates that, *"He (the President) shall have the power to grant reprieves and pardons for offences against the United States except in case of impeachment."* On the extent of this power and with reference to precedent case law from U.S., Durga Das Basu says, *"the pardoning power may be exercised by him at any time after the offence has been committed, either before or after trial or conviction; and this power may not be limited by Congress, either as to persons or as to the effect of pardon.*

18. The foregoing survey of the powers of clemency reposed in the Heads of State indicate that the constitution-makers deemed it proper to embed this provision in the constitution so as to place it at a higher pedestal than any other legislative or administrative Act or instrument. However, it needs to be emphasized that all public power which includes the constitutional power is a public trust and has to be exercised bona fidely, for public good and welfare. The considerations for public welfare may, *inter alia,* include discipline, education, reformation and equity. As aptly

commented in 'Corpus Juris Secundum (Vol. 67-A) as follows:-

> *"the pardoning power is founded on considerations of the public good, and is to be exercised on the ground that the public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law."*

19. The question whether being a public power, could it be subjected to judicial review, was considered by the Indian Supreme Court and it held that it was reviewable though on limited grounds. Reference is made to Epuru Sudhakar Vs. Government of A.P. (AIR 2006 SC 3385) & State of Bihar Vs. Madan Lal Jain (AIR 1982 SC 774). However, since it was not a moot point in the instant case, we would not like to dilate upon issue at this stage.

20. This brings us to second issue i.e.

> *"Whether the policy formulated by the Government of Pakistan, Ministry of Interior, dated August, 2009 is in consonance with the judgment delivered by larger bench of this Court in case Shah Hussain v. The State (PLD 2009 Supreme Court 460)."*

21. To appreciate the afore-referred issue, it would be necessary to keep in mind the ratio of the judgment in Shah Hussain's case (PLD 2009 SC 460). This Court in the said case was primarily seized of a matter in which the convict

having been awarded life imprisonment on two counts was though granted the benefit of section 382-B Cr.P.C. by the High Court but it was held that he was not entitled to the remissions granted by the government for the period of detention prior to his conviction (Emphasis is supplied). The High Court in view of section 402-C Cr.P.C. also disallowed remissions of sixty days granted by a general order dated 5.1.2000 issued by the Government of Balochistan and section 401 Cr.P.C. as well as the remissions of one year granted by the President of Pakistan under Article 45 of the Constitution on the eve of Eid-ul-Fitr. The said judgment of the High Court was based on this Court's judgment in Abdul Ali's case (PLD 2005 SC 163), wherein it was held as follows:-

> *"the conviction and sentence of an accused could not be made to run from the date prior to the date of conviction by a competent court although in certain eventualities the execution of sentence of a convict could be postponed. Ordinarily, a conviction commences from the time it is passed. A criminal Court does not possess any power to make a sentence to precede the conviction. In other words, the conviction and sentence cannot be ante-dated."*

22. This Court re-visited this judgment (Abdul Ali *Supra*) in *Shah Hussain's* case ***(Supra)***, and while doing so, it considered a plethora of precedent case law both of this Court and also from abroad and came to the conclusion that refusal by the Court to allow remissions of pre-sentence custody period to convicts who have been granted benefit of Section 382-B Cr.P.C. amounted to deprivation of his liberty and was violative of the fundamental right of 'right to life' enshrined in

Article 9 of the Constitution. The judgment of the High Court refusing the relief (of remissions) in question on the basis of the law laid down in Abdul Ali's case (***Supra***) was thus set aside. It noted with approval the broad principles laid down in several judgments of this Court and specific reference was made in Paras 20 to 25 of the judgment (Shah Hussain's case, PLD 2009 SC 460). The Court also deprecated the denial of remissions to a category of convict / prisoners for the pre-sentence period, as arbitrary, devoid of reasonable classification and declared it violative of Article 25 of the Constitution at page 489 paragraph 39. It observed as follows: -

> ***39.*** *The under-trial prisoners, or criminal prisoners, particularly those who are later convicted of the offence in connection with which they were incarcerated, sooner or later join the ranks of convicted criminal prisoners. It is discriminatory not to treat them at part with their co-prisoners living in the same or similar premises, may be under the same very roof. They are equal before law and are entitled to equal protection of law under Article 25 of the Constitution. If remissions of the pre-sentence period were to be denied to the convicts after they were granted the benefit of section 382-B Cr.P.C., we would be confronted with a situation where remission granted on the eve of Eid would be admissible to a prisoner who was convicted a day before Eid, but not to a person who was convicted a day after Eid, though the two prisoners were on an equal footing two days before Eid, i.e., till then both of them were confined as under-trial prisoners and both of them also got the benefit of section 382-B, Cr.P.C. The classification of 'criminal prisoners' and 'convicted criminal prisoners' qua the admissibility of remissions granted by any authority where the Court has passed an order granting the benefit of section 382-B*

> *Cr.P.C., does not meet the test of 'intelligible differentia' laid down in the case of I.A. Sharwani v. Government of Pakistan (1991 SCMR 1041). The under-trial prisoners getting the benefit of section 382-B, Cr.P.C., cannot be deprived of remissions accruing during their pre-sentence custody period. Article 9 of the Constitution guarantees the right to life of a person and is very much available to a prisoner alongwith certain other fundamental rights, such as to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment, though he is deprived of certain fundamental freedoms like the right to move freely throughout the country or the right to practice a profession, etc., as it was held in the case of D.B.M. Patnaik v. State of A.P. (AIR 1974 SC 2092). Therefore, the protection guaranteed under Article 9 remains available to the under-trial prisoners and they are entitled to the benefit of section 382-B, Cr.P.C., along with remissions if any, granted during their pre-sentence custody period, inasmuch as on account of denial thereof, they would be required to remain in prison for a longer time that warranted and deprived of their liberty."*

23. In the light of the observations quoted in the preceding paragraphs, the Court concluded and directed as follows:-

> *"(1) After the use of word "shall" for the word "may" in section 382-B Cr.P.C., at the time of passing the sentence, it is mandatory for the trial Court to take into consideration the pre-sentence custody period in the light of the principles discussed above;*
> *(2) The refusal to take into consideration the pre-sentence custody period at the time of passing the sentence is illegal inasmuch as if a Court sentences a convict to imprisonment for life, which is the alternate but maximum sentence for the offence of murder, but does not make allowance for the pre-sentence custody period, it would be punishing the convict prisoner with imprisonment for life plus the pre-sentence custody period, that is*

to say, more than the maximum legal punishment;
(3) The convict-prisoners who are granted the benefit of section 382-B Cr.P.C., shall be entitled to remissions granted by any authority in their post-sentence detention or during their pre-sentence detention in connection with such offence. However, the same shall not be available to the convicts of offences under the National Accountability Bureau Ordinance, 1999, Anti-terrorism Act, 1997, the offence of karo kari, etc, where the law itself prohibits the same;
(4) the law laid down in Abdul Malik's case that under Article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President, is hereby reaffirmed."

24. To determine whether the policy framed by the Government of Pakistan, Ministry of Interior in August 2009 is in consonance with the judgment in Shah Hussain's case (***Supra***), a reference to the same would be in order:-

"MOST IMMEDIATE

No. D. 2792/2009-DS (Admn)
Government of Pakistan
Ministry of Interior

Islamabad, the August, 2009

From: *Mehir Malik Khattak,*
Deputy Secretary (Law),

To: *The Registrar,*
Supreme Court of Paksitan,
Islamabad.

Subject: ***GRANT OF REMISSION TO CONVICTS.***

Dear Sir,

Kindly refer to Additional Prosecutor General Punjab letter dated 28.7.2009 on the subject noted above.

2. The President has been, in exercise of his power, under Article 45 of the Constitution, granted special remission in sentences on auspicious occasions of Eidain and Pakistan and Independence Day. However, in the past special remission under Article 45 of the Constitution had been granted at liberal scale. In one case, remission of 1/5th sentence was approved in one go which in case of lifers meant 5 years remission. The duration of remission in sentences was also increased arbitrarily from 2,3 or 6 months to one year.

3. In 2002, the then Government keeping in view the fluctuating discretionary behaviour during different years directed Ministry of Interior to formulate a policy limiting the discretionary. Accordingly, the MOI in consultation with Law & Justice Division and Chief Justice of Pakistan and with the approval of the President formulated the policy comprising of guidelines and remissions as under:-

Guideline

a. *The present restrictive policy may continue. Those who indulge in heinous crimes should not benefit from these remissions. (Emphasis is supplied)*
b. *Solemn occasions on which this remission may be granted should be specified and there should be no deviation from that. Such remissions may be awarded on four occasions during a year i.e. Eid-ul-Fitr, Eid Milad un Nabi, 23rd March and 14th August.*
c. *Mercy petitions against death sentence may be dealt with on individual basis and there should be no general clemency.*
d. *Overcrowding in jails should not be considered a valid ground for special remissions. The indiscriminate practice in the past has at times encouraged crimes, crowding the jails further subsequently.*
e. *Federal and Provincial Governments may continue to exercise their power under the Pakistan Penal Code / The Code of Criminal Procedure / Pakistan Prison Rules 1978 in exercise of their best judgment that genuinely repentant and occasional criminals, who are victim of circumstances, benefit more from these remissions.*

Remission

i. *Special remission of 90 days to the prisoners convicted for life imprisonment except those convicted for murder, espionage, anti-state activities, sectarianism, Zina (Sec10 offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under Sec. 377 PPC), robbery (Sec. 394 PPC), dacoity (Sec. 395-396 PPC), kidnapping/abduction (Sec. 364-A & 365-A), and terrorist acts (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No. XIII of 1999). (**Emphasis is supplied**).*
ii. *Special remission for 45 days to all other convicts except the condemned prisoners and also except those convicted or murder, espionage, subversion, anti-state activities, terrorist act (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No.XIII of 1999), Zina (Sec. 10 offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under Sec. 377 PPC), kidnapping/abduction (Sec. 364-A & 365-A), robbery (Sec. 394 PPC), dacoity (Sec. 395-396 PPC), and those undergoing sentences under the Foreigners Act, 1946.*
iii. *Special remission at sub-paras i&ii above will be admissible provided that the convicts have undergone 2/3rd of their substantive sentence of imprisonment.*
iv. *Total remission to male prisoners who are 65 years of age or above and have undergone at least 1/3rd of their substantive sentence of imprisonment, except those involved in culpable homicide.*
v. *Total remission to female prisoners who are 60 years of age or above and have undergone at least 1/3rd of their sentence of imprisonment except those involved in culpable homicide.*
vi. *Special remission of one year to female prisoners who have accompanying children and are serving sentence of imprisonment for crimes other than culpable homicide.*
vii. *Total remission to juvenile convicts (under 18 years of age) who have served 1/3rd of their substantive sentence except those involved in culpable homicide, terrorist act, as defined in the Anti Terrorism (Second Amendment) Ordinance, 1999 (No. XIII of 1999), Zina (Sec. 10 offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under section 377 PPC) robbery (Sec. 394 PPC), dacoity (Sect. 395-396 PPC), kidnapping/abduction (Sec. 364-A & 365-A) and anti-state activities.*
viii. *Those convicted in cases processed by NAB will not be entitled to any remission.*

4. Since then the above policy has been enforced. However, in 2007, on the direction of Honourable Sindh High Court provisions regarding remission at sub-para viii above were deleted.

Yours faithfully,

(Mehir Malik Khattak)
Deputy Secretary
Tele:9203851"

25. The moot point in Shah Hussain's case (supra) was the judgment of the High Court wherein certain convicts/prisoners though granted the benefit of section 382-B Cr.P.C., but were refused remissions for the period preceding their date of conviction. [The High Court had relied on a judgment of this Court in Haji Abdul Ali v. Haji Bismillah (PLD 2005 SC 163)]. This Court in Shah Hussain supra case partly endorsed the policy and the classification made therein in so far as it was backed by law by observing, *"However the same (remissions) shall not be available to the convicts of offences under the National Accountability Bureau Ordinance, 1999, Anti-terrorism Act, 1997, the offence of Karo Kari, etc., where the law itself prohibits that."* It was not brought to the notice of this Court in Shah Hussain's case (PLD 2009 SC 460) that section 10(d) of the NAB Ordinance had been declared ultra vires by a full Bench of the Karachi High Court (PLD 2007 Kar 139). So the observation made qua inclusion of convicts under the NAB Ordinance be treated as *per incuriam*. In terms of the policy framed by the Ministry of Interior, Government of Pakistan, certain parameters/guidelines have been laid down for the grant of remissions under Article 45 of the Constitution. A class of convicts / prisoners have been excluded who are accused of "heinous offences" in the paragraph of "remissions" in the

policy letter reproduced in paragraph 24 above. The expression "heinous offences" has further been elaborated in the succeeding para i.e. that such remission would be available to those prisoners convicted for life imprisonment except those convicted for murder, espionage, anti-stage activities, sectarianism, Zina (sec10 offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under Sec. 377 PPC), robbery (Sec. 394 PPC), dacoity (Sec. 395-396 PPC), kidnapping/abduction (Sec.364-A & 365-A), and terrorist acts (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No. XIII of 1999)). An analysis of the afore-referred exclusions and the classification would show that the same are based on reasonable differentia and it is neither individual specific nor arbitrary. The classification made and denial of remissions to a class of convicts / prisoners is either backed by law or rule or there is an objective criterion. A breakup of the classification, the law or rules which may back this classification or the nature of heinousness of offence is given as follows: -

Sr. No.	**Class of prisoners / convicts excluded**	**Reason**
1.	Murder	It is a heinous offence
2. 3.	Espionage, Anti-State activities	Rule 214-A of the Prisons Rules mandates as follows: - ***214.A***. – *No person who is convicted for espionage or anti-state activities shall be entitled to ordinary or special remission unless other-wise directed by the Provincial Government.*

4.	Secretarianism	**21F. Remission.** – Notwithstanding anything contained in any law or prison rule for the time being in force, no remission in any sentence shall be allowed to person who is convicted and sentenced for any offence under this Act.
5.	Zina/Rape	Section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Though this provision has since been repealed (by Act VI of 2006), but a similar provision has been inserted through section 375 and 376 in PPC. It is a heinous offence.
6. 7.	Dacoity (Sec 395-396 PPC) Kidnapping/ abduction	These are heinous offences.
8.	Anti Terrorism Act	**21F. Remission.** – Notwithstanding anything contained in any law or prison rule for the time being in force, no remission in any sentence shall be allowed to person who is convicted and sentenced for any offence under this Act.

26. The afore-referred chart indicates that the policy of remissions under consideration is neither arbitrary or discriminatory and is rather based on an intelligible differentia which is permissible and is therefore, not violative of Article 25 of the Constitution and the law laid down by this Court.

27. The third issue relates to the nature of the power of the competent authority under the Prison Rules for the

grant of remissions in juxtaposition to the powers of remissions under Article 45 and the issue framed is:

> *"Whether the Prison Rules as enumerated are subservient to Article 45 and in case of any conflict between Prison Rules and above-referred judgments as well as special remissions under Article 45 of the Constitution and what would be the legal position of the said Rules".*

28. As explained in the preceding paragraphs, the pardoning powers of President under Article 45 of the Constitution are part of constitutional scheme and cannot be circumscribed by any subordinate legislation or executive instrument. In the event of conflict between the two, the former has to prevail. The policy of shortening of sentences through remissions is founded on the salutary principle of criminal justice i.e. that the purpose of punishment is both deterrent and remedial or reformative and that the convict be released by granting remission in sentence. Striking a healthy balance among these considerations has been one of the recurrent themes in the evolution of justice system. In 'Salmond on Jurisprudence' (12th Edition by P.J. Fitzgerald) the author in Chapter 15 dealt with the purpose of criminal justice/punishment as under:-

> *"Deterrence acts on the motives of the offender, actual or potential; disablement consists primarily in physical restraint. Reformation, by contrast, seeks to bring about a change in the offender's character itself so as to reclaim him as a useful member of society. Whereas deterrence looks primarily at the potential criminal outside the dock, reformation aims at the actual offender before the bench. In this century increasing weight has been attached to this aspect. Less frequent use of imprisonment, the abandonment*

> *of short sentences, the attempt to use prison as a training rather than a pure punishment, and the greater employment of probation, parole, and suspended sentences are evidence of this general trend. At the same time, there has been growing concern to investigate the causes of crime and the effects of penal treatment.....The reformative element must not be overlooked but it must not be allowed to assume undue prominence. How much prominence it may be allowed, is a question of time, place and circumstance."*

29. The Remissions Rules framed under the Prisons Act are primarily based on the reformative principle. In terms of section 59 of the Prison Act 1894, the Provincial Government is empowered to make rules consistent with the provisions of the Act. Till the break up of the One Unit, the grant of remissions was being regulated by the West Pakistan Prisons (Remissions and Sentences) Rules 1965. However, after the creation of four Provinces, the Government decided to issue a Jail Manual to be followed in all the four Provinces. As the prisons Department was a Provincial subject, the Federal Government in a meeting of the Inspector Generals of Prisons/Directors of Prisons of all the provinces held on 12th of April, 1976, advised the provincial governments to adopt the Draft Manual as Rules to bring about uniformity in this domain. With previous sanction of the Federal Government, the Jail Manual was adopted to be called the Pakistan Prison Rules. Chapter 6 of those Rules pertains to the grant of remissions. The Chapter comprises of Rules defining certain expressions: explaining the remission system (Rule 199), classifies the nature of remissions i.e. ordinary or special

(Rule 200), cases in which no ordinary remission is earned (Rule 201) and exclusion of persons from grant of remissions if he/she is convicted of an offence after admission into a prison (Rule 202). Rule 140 lays down that imprisonment for life will mean 25 years rigorous imprisonment and every life prisoner shall undergo a minimum of 15 years of substantive sentence of imprisonment. It also stipulates that the cases of lifers shall be referred to the Provincial Government after they have served out 15 years of substantive imprisonment for consideration with reference to section 401 of the Code of Criminal Procedure. Rule 215 provides for remissions on account of education. Similarly, Rule 216 is relatable to special remissions to be granted by the Superintendent of Prisons, Inspector General of Police, Provincial Government and Federal Government. The law on remissions both in Pakistan and India puts a limit on the total remissions that can be availed of by a convict undergoing life sentence. Rule 217 of Pakistan Prison Rules reads as follows: -

> *"Rule 217.—(i) The total remission, both ordinary and special awarded to a prisoner under these Rules (other than remission for donating blood awarded under rule 212, surgical sterilization under rule 213 and for passing an examination under rule 215) shall not exceed one-third of his sentence:*
> *Provided that Government may, on the recommendation of the Inspector-General, grant remissions beyond the one-third limit in very exceptional and deserving cases.*
> *(ii) Remission, both ordinary and special, earned by a lifer convict shall be so much that a sentence of imprisonment for life is not shortened to a period of imprisonment less than 15 years."*

30. Sub-rule (ii) of Rule 217 in Pakistan Prison Rules reproduced in the preceding para is almost similar in import to section 433-A of the Indian Criminal Procedure Code which is as follows:-

> *"**433-A. Restriction on powers of remission or commutation in certain cases.**----Notwithstanding anything contained in Sec. 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Sec. 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."*

31. In Indian Prisons Rules, there was no provision similar to Sub-rule II of Rule 217 reproduced in para 26 above. The issue of conflict between the Prisons Rules and Section 433-A Cr.P.C stipulating that a person undergoing life sentence (punishable with capital punishment) should not be released until he had served out fourteen years of imprisonment, came up for consideration before the Indian Supreme Court (1980 Cr.LJ 1440) & it upheld the later provision and declared that "the remission rules and like provision stand excluded so far as lifers punished for capital offense are concerned."

32. In Maru Ram v. Union of India [(1981) 1 SCC 107], the Court refused to read down Section 433-A to give overriding effect to the Remission Rules of the State. The Court ruled that,

"Remission Rules and like provisions stand excluded so far as 'lifers' punished for capital offences are concerned. Remissions by way of reward or otherwise cannot cut down the sentence awarded by the court except under Section 432 of the Code or in exercise of constitutional power under Article 72/161 of the Constitution. Remission cannot detract from the quantum and quality of the judicial sentence except to the extent permitted by Section 432 of the Code, subject of course to Section 433-A, or where the clemency power under the Constitution is invoked.....

Section 302, IPC or other like offence fixes the sentence to be life imprisonment and 14 years' imprisonment under Section 433-A is never heavier than life term. Remission vests no right to release when sentence is life imprisonment. No greater punishment is inflicted by Section 433-A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14-year jail life, since a life sentence is a sentence for life.....

There is an initial presumption of constitutionality of a legislation. Unless one reaches far beyond unwisdom to absurdity, irrationality, colourability and the like, the court must keep its hands off.

Deterrence is a valid punitive component of sentencing. So a measure of minimum incarceration of 14 years envisaged in Section 433-A for the gravest class of crimes like murder cannot be castigated as so outrageous as to be utterly arbitrary and violative of rational classification between lifers and lifers and as so blatantly barbarous as to be irrational enough to be struck down as ultra vires. Time has not, perhaps, come to exclude deterrence and even public denunciation altogether. Even the submission that no penal alibi justifies a prisoner being kept behind the bars if by his conduct, attainments and proven normalization, he has become fit to be a free citizen, cannot spell unconstitutionality. Though the uniform infliction of a 14-year minimum on the transformed and the unkempt is an unkind disregard for redemption inside prison to overcome the constitutional hurdle much more material, research results and specialist reports, are needed. Even for correctional therapy a long hospitalization in prison may be needed.

> *The classification of persons included under Section 433-A is not based on an irrational differentia unrelated to the punitive end of social defence. The classification cannot be castigated as one capricious enough to attract the lethal consequence of Article 13 read with Article 14."*

In State of Punjab and others v. Joginder Singh and others [(1990) 2 Supreme Court Cases 661], the afore-referred view was reiterated and it was held as under:-

> *"Remissions schemes are introduced to ensure prison discipline and good behaviour and not to upset sentences; if the sentence is of imprisonment for life, ordinarily the convict has to pass the remainder of his life in prison but remissions and commutation are granted in exercise of power under Sections 432 and 433, CrPC carving out an exception in the category of those convicts who have already enjoyed the generosity of executive power on the commutation of death sentence to one of life imprisonment. Even in such cases Section 433-A of the Code or the executive instruction of 1976 does not insist that the convict pass the remainder of his life in prison but merely insists that he shall have served time for at least 14 years. In the case of other 'lifers' the insistence under the 1971 amendment is that he should have a period of at least 8 ½ years of incarceration before release. The 1976 amendment was possibly introduced to make the remission scheme consistent with Section 433-A of the Code. Since Section 433-A is prospective, so also would be the 1971 and 1976 amendments."*

33. The power granted to the President of Pakistan under Article 45 of the Constitution is unfettered by any subordinate legislation. This being a constitutional dispensation, the remissions, reprieve or pardon granted under this shall prevail in the event of a conflict between the rules and an order passed under Article 45. This is in line

with this Courts judgment in *Abdul Malik's* case which stands reiterated by this Court in Shah Hussain v. The State (PLD 2009 SC 460). In the latter judgment, it was held as follows:-

> *"(4) The law laid down in Abdul Malik's case that under Article 45 of the Constitution, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President, is hereby reaffirmed."*

34. The fourth point mooted is about the question of 'reasonable' classification for the grant of remissions and the precise formulation is

> *"Whether any classification would be permissible in view of the nature of accusation in case special remission is granted by the President of Pakistan, in view of the provisions as enumerated in Article 25 of the Constitution".*

35. The issue of classification with reference to Article 25 of the Constitution has been a subject of comment of this Court. Some of those judgments are:-

(i) Jibendra Kishore Achharyya Chudhry v. Provincie of East Paksitan (PLD 1957 SC 9).

(ii) Waris Meah v. State (PLD 1957 SC 157).

(iii) Bazal Ahmed Ayyubi v. The West Pakistan Province (PLD 1957 Lah. 388).

(iv) Zain Noorani v. Secretary of National Assembly of Paksitan (PLD 1957 Kar. 1).

(v) Malik M. Usman v. State (PLD 1965 Lah. 229).

(vi) East and West Steamship v. Pakistan (PLD 1958 SC 41).

(vii) F.B. Ali's case (PLD 1957 SC 506).

(viii) Fauji Foundation's case (PLD 1983 SC 457).

(ix) I.A. Suherwani's case (1991 SCMR 1041).

(x) Abdul Wali Khan's case (PLD 1976 SC 57).

(xi) Aziz Begum's case (PLD 1999 SC 899)

(xii) Shirin Munir and others v. Government of Punajb (PLD 1990 SC 295).

36. In a rather instructive judgment in the case Govt. of Baluchistan v. Azizullh Memon (PLD 1993 SC 341), this Court laid down the following guidelines with regard to import of Article 25 and permissible classification:-

(i) That equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

(ii) That reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;

(iii) That different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;

(iv) That no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;

(v) That a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reasons for it, but classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

(vi) That equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) That in order to make a classification reasonable, it should be based;

(a) On an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) That the differentia must have rational nexus to the object sought to be achieved by such classification."

37. The Court further observed that,

> *"Permissible classification is allowed provided the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and such classification and differentia must be on rational relation to the objects sought to be achieved by the Act. There should be a nexus between the classification and the objects of the Act. This principle symbolizes that persons or things similarly situated cannot be distinguished or discriminated while making or applying the law. It has to be applied equally to persons situated similarly and in the same situation. Any law made or action taken in violation of these principles is liable to be struck down. If the law clothes any statutory authority or functionary with unguided and arbitrary power enabling it to administer in a discriminatory manner, such law will violate equality clause. Thus, the substantive and procedural law and action taken under it can be challenged as violative of Articles 8 and 25."*

38. In Saleem Raza Vs. The State (PLD 2007 Karachi 139), convict under the NAB Ordinance had challenged *inter alia* challenged the *vires* of Section 10(d) of the NAB Ordinance which mandated that convict under the NAB Ordinance "*shall not be entitled to any remission in his sentences*". The precise contention was that the said provision was discriminatory and violative of Article 25 of the Constitution. A Full Bench of the Sindh High Court relying on precedent case law of this Court came to the conclusion that class legislation was forbidden; that permissible classification is allowed provided it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and such classification and differentia must have relation with the

object sought to be achieved by the Act. Any law made or action taken in violation of these principles was liable to be struck down. Keeping this principle in mind, the Court held that a comparative examination of provisions contained in NAB Ordinance and Prevention of Corruption Act, 1947, indicated that those provisions were substantially the same and there was no difference in the offences of criminal misconduct contained in Section 5 of the Prevention of Corruption Act, 1947, and corrupt practices defined in Section 9 of the NAB Ordinance. Notwithstanding this similarity in substantive law, if an accused is convicted by a Court other than Accountability Court, the convict is entitled to earn remissions while the NAB convict for the commission of the same offences under similar set of circumstances was deprived of the remission on account of section 10(d) of the NAB Ordinance. The Court, therefore, found this provision to be *ultra vires* of the equality clause of the Constitution because: -

(i) There is no intelligible differentia distinguishing one group of persons from other group of persons and thus there was no reasonable classification permissible under the law merely on the basis of change of forum the classification could not be held to be permissible as reasonable because such classification was not based on any real and substantial distinction.

(ii) Where the "State itself does not make any classification of persons or things" and leaves it to the discretion of the Government or any authority to select and classify persons or things without laying down any principle or policy to guide the authority in the exercise of discretion, or a law is made by the State, whereby certain persons or group of persons are discriminated without any rational and reasonable

> classification and leaving the other groups of the same class, the denial of benefit, privilege or right to one group of persons and allowing the other group of persons would certainly be a discrimination between the persons or things similarly situated and consequently shall be void on account of the provisions contained in Article 25(1) of the Constitution read with Article 8 thereof. (*Emphasis is supplied*).

(iii) A test of permissible classification is that the differentia must have rational nexus to the object sought to be achieved by such classification. The object of the law has no nexus with the classification under Section 10(d) of the NAB Ordinance.

39. The Court did not comment on the *vires* of a similar provision in Anti Terrorism Act as the same was not under challenge but merely observed as follows:-

> "We will make a tentative observation to the effect that the object of enacting Anti Terrorism Act, 1997, is entirely different from the object sought to be achieved through the enactment of NAB ordinance and the provision in every law is to be considered on its own merits with reference to the particular law under consideration."

40. However, the Court declared following provisions as *intra vires*:-

i) "Sub Section 1 of Section 401 Cr.P.C which stipulates that the "Provincial Government shall have no power to suspend or remit any sentence awarded to an offender under Chapter XVI of the PPC, if an offence has been committed by him in the name or on the pretext of Karo Kari, Siah Kari or similar other customs or practices.

ii) Rule 201(a) of the Prisons Rules as *intra vires* because there is a reasonable and rationale classification specifying a class of persons and still leaving the discretion for the Federal or Provincial Government and Competent Authority in the said provision. It is provided that "notwithstanding anything contained in these rules, a person convicted under the charge of espionage / Anti State activities

shall not be entitled to ordinary and special remission unless Federal Government or Provincial Government or competent authority makes a specific order in writing in this behalf.

iii) Rule 214-A of the Prisons Rules as it only deprived those "convicts of special remission or on premature release on parole if they are sentenced for drug / narcotics offences. The Court found that the remissions were not being denied on account of mere forum of trial but on account of commission of offences pertaining to drugs and narcotics."

41. It has been a consistent view of this Court that classification is permissible provided the same is backed by law, rules or is based on reasonable differentia. For the exercise of authority under Article 45 of the Constitution, classification of convicts on the basis of accusation is permissible as the President may, *inter alia,* like to grant remissions to those who are not accused of heinous offences and may refuse it to those accused of serious or terrorism related offences. In the remission policy under consideration (see para 23 above), a class of convicts involved in "heinous crimes" have been excluded from the benefit of remissions. As explained in paragraphs 24 & 25, most of these exclusions are backed by law, rule or an intelligible differentia. The classification is reasonable and applies equally to convicts/prisoners similarly placed. This differentia is not hit by equality clause of the Constitution.

42. In Government of A.P. and others v. M.T. Khan [(2004) 1 Supreme Court Cases 616], the Indian Supreme Court was called upon to consider the question of

classification of accused for purposes of remissions under similar provisions of its Constitution. The Court held that:-

> *"It was considered expedient that the power is to be exercised in respect to a particular category of prisoners. The Government had full freedom in doing that and even excluding a category of persons which it thinks expedient to exclude. To extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some, they need not do it for all, as long as there is no insidious discrimination involved. In the case at hand it was not only due to lack of power, but also because of conscious decision to exclude in the background of what it considered to be lack of authority, and in our view no exception could be taken to the same, legitimately."*

43. A classification made by the competent authority on the basis of intelligible differentia qua accusations/nature of offences or on the basis of law or rules reflecting the same, is permissible and would not be derogatory to the Constitution.

44. The issues framed by this Court having been answered, the Human Right Case Nos. 3200-G of 2009, 3742-P of 2009, 3928-P of 2009, 3887-P of 2009 and 9778-P of 2009 stand disposed of, whereas the main petition (Crl. Petition No. 426 0of 2009) and Crl. Appeal No. 383 of 2009 be fixed before appropriate Bench after obtaining orders from the Hon'ble Chief Justice.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

(Mr. Justice Ch. Ijaz Ahmed has since been retired.

JUDGE

JUDGE

JUDGE

Announced in Open Court on
the of August, 2010.

JUDGE

ISLAMABAD, THE
Khurram Anees P.S./*

APPROVED FOR REPORTING"