

**RIGHTS OF PRISONERS: A COMPARATIVE STUDY OF
SHARĪ‘AH & LAW WITH SPECIAL REFERENCE TO
PAKISTANI STATUTES AND CASE LAW**

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ABSTRACT

Though the essential concept of rights may transform for prisoners however the prison walls do not keep the fundamental rights altogether out. The transformation of concepts of rights though subtracts several liberties however grants certain special rights to the inmates.

This research is an attempt to explore those rights in a thematic way. In this regard, the first category relates to the right to avail ‘alternative strategies to imprisonment’ or ‘non-custodial methods’. These methods are not very popular in Pakistani criminal justice system. The primary reason for this resistant attitude is that the out-dated laws offer extremely weak surveillance and monitoring mechanisms to support these methods/ alternative strategies. Therefore most of the times the system while failing to trust these mechanisms rules out the possibility to employ these strategies. Resultantly the detainee/offender gets affected. Chapter II, III and IV of this research particularly provide a discussion on pre-trial/pre-sentencing, post-trial/sentencing and post-sentencing non-custodial methods respectively.

The second thematic category relates to the ‘rights of reformation of inmates during imprisonment’. In this regard, Chapter V specifically deals with the rights of prisoners captivated under terrorism charges. These prisoners face inequitable attitude not only during the trial but also in post-conviction scenario. This Chapter is a statutory and judicial scrutiny of the matter which provides recommendations to solve the issue. Chapter VI is a thorough discussion on the right of reformation and rehabilitation, the relevant available strategies to ensure this right in Pakistan, their reasons of failure and the suggestions for improvement.

The next category relates to the post-imprisonment rights of ex-prisoners with specific reference to the ‘right of repatriation’. Chapter VII highlights the current statutory position with relation to the ex-prisoners/convicts in Pakistan. It suggests the remedies in the light of English statutory mechanisms to deal with the issue.

Chapter VIII is a comparative study of the modern viewpoint on above-cited rights with the Islamic perspective. This Chapter concludes that the basic concepts of nearly all the modern rights and the rights provided by Sh'ariah to the prisoners are similar. Sometimes the legal procedure lacks with regard to some modern rights however this deficiency might be removed through proper law making. The final Chapter gives the concluding suggestions.

Thus this thesis is not a discussion regarding the provision of basic amenities to the prisoners as their right but it touches some thematic approaches of rights of prisoners starting from the rights of 'detainee prisoners' towards ending upon the rights of 'ex-prisoners'.

AUTHOR'S DECLARATION

I Aisha Tariq, candidate for the award of the Ph.D. degree, declare that the work in this thesis was carried out in accordance with the requirements of the University's Regulations. It has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own. Any views expressed in the thesis are those of the author.

SIGNED: DATE:

LIST OF ABBREVIATIONS

ATA	Anti Terrorism Act, 1997
ATC	Anti Terror Court
CrPC	Code of Criminal Procedure, 1898
EMS	Electronic Monitoring System
EPR	European Prison Rules, 1987
HEC	Higher Education Commission of Pakistan
ICCPR	International Covenant on Civil and Political Rights, 1966
JJSO	Juvenile Justice System Ordinance, 2000
NAB	National Accountability Bureau
NAPA	National Academy for Prison Administration
NJP	National Judicial Policy, 2009
PIO	Preliminary Inquiry Order
PPC	Pakistan Penal Code, 1860
PPR	Pakistan Prison Rules, 1978
R&PD	Reclamation & Probation Department
ROA	Rehabilitation of Offenders Act, 1974 (UK)
UNBP	United Nations Basic Principles for the Treatment of Prisoners, 1990
UNRAJJ	United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985

UNSMR

United Nations Standard Minimum Rules for the
Treatment of Prisoners, 1977

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CHAPTER I

INTRODUCTION TO THE TOPIC

1.1 INTRODUCTION

There are exclusive international law documents accepted by a greater part of world community to guarantee the prisoners' rights.¹ However there still exists a parallel contrary approach. The proponents of this approach believe that a convict voluntarily forfeits his liberties and several rights when he offends the society and consequently surrenders for a punishment that leads to 'civil death of his rights'^{2,3} In theory, no government or enlightened polity can expressly defend this contrary approach towards the rights of prisoners in this modern era of civilization. This is also improbable to draft vivid laws to refute the rights of prisoners especially after the ratification of international documents. Yet in practice, this anti-thesis does exist particularly in under-developed and developing countries. The governments simply keep silence and avoid legislating with regard to protection of human rights of prisoners. Even the legally sanctioned rights carry scores of limitations and preconditions making the prisoners virtually incapable to gain benefit from them. Pakistan is one fine case study in this relation where the factual situation is found existing somewhere in between this proponent and opponent approach.

¹ For example, UN Standard Minimum Rules for the Treatment of Prisoners (1955); Basic Principles for the Treatment of Prisoners (1990); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988); United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (1990).

² Civil death is an old concept that refers to the loss of almost all civil rights by a person due to a conviction for a felony that results in the loss of civil rights. It is being subjected to collateral consequences involving the actual or potential loss of civil rights, disenfranchisement of felons (loss of right to vote), public benefits, and employment opportunities. In England, civil death was a common law punishment, but in the United States, it existed only if authorized by statute. See for details, Gabriel J. Chin, "The New Civil Death: Rethinking Punishment in the Era of Mass Conviction," *UC Davis Legal Studies* 8 (2012): 1789-1833.

³ The opponents of the theory of equal human rights for prisoners contend that society or law has no duty towards a person who commits crime against society or indulges himself in any wrongful activity. He chooses a punishment of "civil death for himself", which leads to forfeiture of his rights. See for details online at, <http://ukip.org/content/latest-news/2701-conjugal-visits-for-prisoners-a-disgrace> (Last accessed: October 28, 2016).

The policy to make a difference between adopting the ‘soft’ and ‘hard’ strategy in dealing with various types of criminals and the impact of use of such policy perhaps has never been explored in a conscious manner by the Pakistani criminal justice system in large. The legislature, law enforcing agencies, the judiciary and the prison administration all work generally according to the theory of deterrence and retribution instead of dealing with a particular crime according to its special nature (A detailed discussion on this point has been made in the later part of the study).

The modern and separate techniques to deal with every particular offense and the variation in sentencing against that every offense to actually reduce the crime and recidivism rates (repetition) are not even familiar notions for the legislature, the judiciary and the executive in Pakistan. The idea that the attitude of delinquents can be mended by granting them their due rights is generally unusual for the Pakistani criminal justice system at large. This research draws attention towards the need of restructuring the conventional method of punishment where imprisonment is destined only for deterrence, incapacitation or retribution of the prisoner. The study instead lays emphasis on the reformation of an offender through rehabilitation during the continuance of his punishment by adopting varied punitive mechanism according to the nature and intensity of the offense committed.

1.2 STRUCTURE OF THE STUDY

This thesis gives an extended meaning to the expression ‘prisoner’. Thus it covers the susceptibility of rights of all, the detainee or under-trial prisoners,⁴ the convicted prisoners and the ex-prisoners. The whole thesis is divided in to four parts excluding the first introductory chapter.

The first part covers the second, third and fourth chapters. In this part, the focus is placed on the utilization of non-custodial or the alternative methods to imprisonment. These

⁴ The under-trial detainees are termed as ‘under-trial prisoners’ under Rule 11 of Pakistan Prison Rules, 1978 (PPR hereinafter).

three chapters explore the reasons of a lesser usage of three core non-custodial methods operational under Pakistani law, i.e. the Bail as pre-trial/pre-sentencing, Probation as sentencing and Parole as post-sentencing non-custodial method. Every chapter gives its own conclusion and suggestive measures.

The second part includes chapters five and six which are about the ‘rights of prisoners during imprisonment’. In chapter five, a detailed and lengthy discussion is made on the ambiguity lying within the definition of ‘terrorism’ as given under Section 6 of the Anti Terrorism Act, 1997 (the ATA hereinafter), its affect on judicial decision making and its impact with regard to the denial of certain rights to terrorist prisoners. Chapter six deals with the prisoners’ right of reformation; this chapter thrashes out statutory, administrative and judicial strategies to reform the prisoners with all their available dimensions, and the flaws existing in these strategies; the study also suggests different remedies to cure these flaws.

The third part, chapter seven is related to the situation of post-imprisonment rights of prisoners in Pakistan. Part four, chapter eight contains a detailed comparison of the rights discussed in previous chapters of the study with the rights of prisoners as given under Islamic criminal justice system (available under Sharī‘ah).

Though all the chapters are connected with each other yet they also present their independent concepts. Therefore separate conclusion with suggestive measures is given at the end of every chapter. However the final chapter presents a brief summary of the findings of the whole thesis.

1.3 LITERATURE REVIEW

In Pakistan, no exclusive statutory and judicial literary exploration of rights of prisoners and their comparison with Islamic legal perspective is available. Though ample work is done on the theories of criminology and confinement but they are not exactly relevant for this research. Most of the existing literature on the rights of prisoners is of a generalized nature

such as, the gender based approach of rights of inmates or the infringements of the right of provision of basic amenities within the prisons. The author could hardly come across any prolific piece of Pakistani literature directly connected to those rights which are discussed in this work except a compilation of jail manual with brief commentary prepared by Dr. Abdul Majeed Aulakh however it does not contain proper references which diminishes its value.⁵Therefore this research mostly relies upon existing Pakistani statutes and case law on prisons. The author also went through a bulk of foreign material to understand the modern ideas of punishment, imprisonment and new concepts of criminal justice system.

A- Alternative to Imprisonment in Comparative Perspective⁶

Ugaljesa Zvakic mentions in his book that alternatives to imprisonment can be of some effective nature. However each and every kind of mechanism cannot be experimented on all convicts. The methods should diverge on subjective bases depending upon different factors such as, the nature of conviction, personal and social circumstances of a particular convict and the norms of society of the convict. Since Pakistan needs to develop some proper law on alternatives to incarceration thus some apposite steps to amend existing law on issue are required to be drafted. The strategies provided in this book can be of some help to Pakistani authorities.

B-Alternative Measures to Imprisonment: Report of the Seventh Conference of Directors of Prison Administrations, Strasbourg⁷

This report mentions that since 1976 evaluations have been concentrated especially on what might be called alternatives which focus on the rehabilitative elements of punishment, e.g., community service, work release and placement in treatment centers. The Report suggests

⁵ Abdul Majeed Aulakh, *Pakistan Uniform Jail Manual, compilation and commentary* (Lahore, Pakistan: Omer Law Book House, 2013).

⁶ Ugaljesa Zvakic.,ed, *Alternative to Imprisonment in Comparative Perspective* (Chicago: Nelson Hall 1994) at 238-256.

⁷ W Rentzmann and J P Robert , *Alternative Measures to Imprisonment* (Report presented at seventh Conference of Directors of Prison Administrations, Council of Europe, Strasbourg, 1986: Doc. CDAP)(85)6: 35

that a solid action should be undertaken in order to give a vital boost to the alternative measures. It is necessary to work out and provide the courts with valid, convincing alternatives to imprisonment which are more than just different sentences for judges to deliver. It must be possible for the courts and prosecuting authorities to satisfy themselves that the alternatives are punitive and are actually enforced. The judge must be certain that he is pronouncing a real sentence that will be put into effect. In this context encouragement should be given to the development of alternatives which can genuinely be followed up in an open environment with a social educational component- such as probation or supervision by a social worker or on the other hand enable society to play a part in the administration of criminal justice-such as work for the benefit of the community. This presupposes that courts have the means of deciding on the penalty in the light of full knowledge of the facts, not only the facts of the offence but also those of the offender's personality and the prospects for his repatriation.

It is therefore essential to widen the enquiries carried out before sentence is passed. Where a prison sentence has been pronounced, ways of carrying it out in an open environment should be encouraged so that its duration can be limited to what the desired deterrent impact requires, and the period of imprisonment can be used for the prisoner's social reintegration. Work for the benefit of the community can be recommended as a substitute for short prison sentences. The effect would be immediate and certain. This report provides very useful suggestions and recommendations.

C-Responding to Prisoner Reentry, Recidivism, and Incarceration of Inmates of Color: A Call to the Communities⁸

The expungement procedure can be used as a tool to reduce incarceration and recidivism and help probationers succeed in their reentry into mainstream society to lead normal life and

⁸ Marbley, Aretha Faye and Ferguson Ralph, "Responding to Prisoner Reentry, Recidivism, and Incarceration of Inmates of Color: A Call to the Communities," *Journal of Black Studies* 35:5 (2005): at 633 - 649

alleviating the burden on taxpayers for maintaining prisoners. The author generally speaks about the mixing up of prisoners of various races and colours at same incarceration centers. It culminates with a call to the African, American and Hispanic communities to partner with the penal system and lawmakers to find solutions to the devastating effects of increasingly high imprisonment, recidivism and prison reentry rates of inmates of color on children, families, and communities. This study is made exclusively in relation to American contemporary situation and major part of it may not be consulted. However, guiding principles are gathered from here.

D- Ironies of Imprisonment⁹

This book is divided into ten chapters. Chapter 8 is about war on terror and the misuses of detention. Welch compares the war on terror with the war on drugs. According to him, “both strategies are intricately linked to race and ethnicity and have produced an array of civil liberties violations compounded by unnecessary incarceration”. After each Chapter Welch has also provided the “end-of-chapter questions”; this part makes the book more useful for the debate. Welch notes the role of the modern prison in the ‘war on terror’. One of the great ironies that have arisen from this war is the increasing visibility of the prison as a place of torture, humiliation and punishment. For an institution whose absence from popular and political consciousness has been built on the twin discourses of invisibility and denial, the abuses inflicted on prisoners at Abu Ghraib, Guantanamo Bay (and the British-run Camp Breadbasket) have cast new light on the punitive discourses that are central to its everyday existence. This may well be the ultimate irony as these institutions have become etched in public consciousness not only as places of detention but also as places that are synonymous with the violent, feudalistic mortification of those held behind their walls. A complete discussion is made on this point in further study.

⁹ Michael Welch, *Ironies of imprisonment* (London:Sage Publications, 2004)

E- A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists¹⁰

Alec Walen maintains in this paper that a unified theory of detention that explains how the suspected terrorists including the prisoners of war can be justified within a liberal tradition that respects the liberty of individuals. He says the suspected terrorists can only be detained if they have committed a crime for which long-term punitive detention is a fitting punishment. The long-term preventive detention of prisoners of terrorism can be justified on the ground that, were such prisoners to escape or be released, they would not be policed in a way that would hold them accountable for their use of force in the future.

He validates the long-term preventive detention of suspected terrorists only in those cases in which they too would be effectively unaccountable for their future actions and does not allow the long-term preventive detention of suspected terrorists simply because they are predicted to pose a threat larger than that of almost all other criminals. This article does not cover all the moral issues; however it poses various questions of vital nature regarding unjustified detentions of suspected terrorists. It speaks about various issues which appropriately account for the need to respect the dignity of human beings.

F- Modeling Terrorism and Political Violence¹¹

This paper introduces some conceptual thoughts to the study of terrorism and provides answers to questions such as can terrorism be studied like other crime phenomena? What are the conceptual and methodological challenges when framing terrorism as crime? What are the consequences of studying a highly politicized object? What makes terrorist violence different from other forms of violence? For this purpose, in the first part of the article a review is

¹⁰ Alec Walen, "A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists," *Maryland Law Review* 70:4(2011): at 871-938. Available online at: <http://digitalcommons.law.umaryland.edu/mlr/vol70/iss4/3>

¹¹ Armbrorst, Andreas, "Modeling Terrorism and Political Violence," *International Relations* 24: 4(2010): 414 - 432

conducted to ascertain what criminologists have contributed to the conception of terrorism. In the second part a model of terrorism is elaborated that depicts the crucial parameters of this form of crime and thereby bypasses some of the existing conceptual difficulties and misconceptions. The writer deduces from the various definitions of terrorism that the singularity of terrorism has something to do with the victim, the purpose and the consequences of violence.

G- Clean Slate: Expanding Expungements and Pardons for Non-violent Federal Offenders¹²

The first part of this research paper argues that individuals who have served their sentences and abided by the law for stipulated period afterwards should be given the opportunity to clear the slates of their criminal histories. Such expungements of criminal convictions for individuals, who demonstrate that they will abide by the law, are likely to reduce the costs of the criminal justice system and improve the lives of ex-prisoners. It examines post-conviction penalties and contemporary recidivism trends. Second, this article investigates the law governing expungements in USA, finding that the doctrines relating to expungements and their applications lack consistency, making it difficult for non-violent offenders to re-enter mainstream society.

The paper argues that simply eliminating post-conviction disabilities would be extremely complex and perhaps not feasible practically or politically. Moreover, the two existing post-conviction remedies, i.e., the pardons and judicial expungements are not designed to, and cannot as a practical matter provide systematic relief from post-conviction disabilities. The writer suggests that there must be some other mechanisms introduced to reduce recidivism.

¹² *Lahny R. Silva*, "Clean Slate: Expanding Expungements and Pardons for Non-violent Federal Offenders," *University of Cincinnati Law Review* 79:1(2010) at 3-52.

H- Huqooq-ul-Sijna Fi-Sharī'ah-al-Islamiyah wa Tatbiqataha Fin Nazmat-ul-Mulkat-ul-Arabiāt-al-Saudia¹³

The *Qur'an* and the *Sunnah* are used as the primary sources of discussion for the portion of Islamic law on prisons. The book, "*Huqooq-ul-Sijna Fi-Sharī'ah-al-Islamiyah wa Tatbiqataha Fin Nazmat-ul-Mulkat-ul-Arabiāt-al-Saudia*" written by Dr. Ahmad Bin Yusuf al-Draiweesh, is though a short book however carries ample knowledge of different aspects of rights of prisoners in Islam. This book is repeatedly consulted and has been referred to understand the Islamic jurisprudence on this topic in this thesis. The book carries various topics such as, the historical background of prisons in Islamic and pre-Islamic era (with special reference to the *Quran*), the alternative sentencing system and various other rights of prisoners as discussed under the Islam law. The study also suggests the methods to incorporate Islamic provisions in modern statutes on prisons. The book is available in Arabic and English languages.

Critical Analysis

The foreign pieces of literature mention various possible strategies which may be adopted as alternatives to imprisonment. As much as the major portion of these mechanisms is concerned, that is more or less available in Pakistani prison laws such as bail, parole, pardons, alternative fines etc but the procedure for their implementation is erratic. There is no standard available which can ensure the maintenance of surveillance strategies for the convicts subject to alternative measures. The foreign literature in this regard can be a good food for thought but it might not be blindly applied in Pakistani scenario. However, some guiding principles can safely be taken from it.

¹³ Ahmad Bin Yusuf al-Draiweesh, *Huqooq-ul-Sijna Fi-Sharī'ah-al-Islamiyah wa Tatbiqataha Fin Nazmat-ul-Mulkat-ul-Arabiāt-al-Saudia* (2014). The book has been translated in English by Munir Ahmad Mughal, *Rights of Prisoners in Islamic Law and their Modern Applications in the Legal System of the Kingdom of Saudi Arabia* (Forthcoming).

Further, the Pakistani study of crime of terrorism has its own aspects and dimensions which are alien to other regimes and cannot be dealt or studied in the light of foreign experiences. A separate kind of legal study attached to a distinctive psyche is required to be contemplated. The above-cited literature is though insufficient to deal with those elements however it might help to formulate the case of Pakistani prisoners.

1.4 METHODOLOGY

Society keeps evolving and needs new legal amendments for the incidents happening around every time. The gap between the social needs and out-datedness of law always need to be filled to curb the feelings of unfairness in the society. It might be done through new legislation as well as through judicial law making for the reason that the courts have best understanding of contemporary needs of the society. Unfortunately the academicians or legal writers of Pakistan did not discuss the insufficiency and sometimes the unavailability or lesser usage of those several rights of prisoners which are generally well recognized in the civilized world such as, maximum utilization of non-custodial or alternative mechanisms to imprisonment, reformation of prisoner through employing different and novel methods, the rights of ex-prisoners and so on. This research is an endeavor to discuss the situation of these rights firstly in the light of statutes and judicial resources and secondly in the light of Sh'ariah obligations. Therefore the Pakistani prison statutes and pre-decided cases are used as the main reservoir of knowledge. Some of the chapters suggest incorporating new laws or redefining the existing concepts through using model laws of modern regimes. Those parts of study are also pre-dominantly based upon statutory and judicial studies of these regimes. The Islamic perspective is discussed mostly in the light of the *Quran* and the *Sunnah*. Except at few places, this study has mostly used the library-based qualitative research techniques. The approach was investigative, analytical and critical. The relevant international, regional and domestic legislation, courts cases and scholarly literature were studied and reviewed.

1.5 SCOPE OF THE RESEARCH

This research tries to maintain a balance between the opponent and proponent approach on the rights of prisoners to make it a study with the perspective of human rights. Thus it gives due regard to all the connected parties to the criminal justice system, i.e. the prisoner/offender, the victim and the society at large though a greater focus would remain specifically on the rights of prisoners.

There are a number of related topics which might come under discussion when one discusses the ‘rights of prisoners’. These topics may include the legal prohibition of torture and other ill-treatment, extra-legal/judicial executions, the issues in relevance to the death penalty, enforced disappearance of persons/unacknowledged detention, the deplorable conditions of prisons and detention-centers, corporal punishments, guarantees against abuses of the human person, arbitrary arrest and detention and so on. However this research strictly focuses on certain thematic aspects of the rights of prisoners preferably those which have not been discussed earlier in Pakistan with reference to their statutory and judicial features.

1.6 FRAMING OF ISSUES

The study will address the following issues in the chapters mentioned against each:

1. What non-custodial/ alternatives mechanisms to imprisonment are available at pre-trial/pre-sentencing, trial and sentencing and post sentencing stage under existing Pakistani law? How effective these mechanisms are? Is there any need to incorporate some new procedures in this regard and what methods should be followed for this purpose? (Chapter II, III and IV)
2. Why and what specific changes have been introduced in the definition of the offence of ‘terrorism’? How Pakistan’s anti-terrorism judicial jurisprudence evolved and what is its current status? What kind of legal protections are available to safeguard the rights of

prisoners convicted for the crime of terrorism? How the legal and judicial ambiguities lying in the definition of 'terrorism' affect the legal rights of the terrorist prisoners? (Chapter V)

3. What legal, judicial and administrative measures to reform the character of the prisoners are available in Pakistan? How effective these measures are? What are the procedural and legal hurdles involved in the smooth provision of conjugal rights to the prisoners despite of incorporation of Section 545-A in the Pakistan Prison Rules, 1978? Whether all prisoners who have not been given benefit under section 382-B of the Code of Criminal Procedure, 1898 should by a general order be accorded benefit there under? What reformatory measures are available in different legal regimes of the world and how they may be adopted in Pakistani prison system? (Chapter VI)

4. Why and how the expungement laws can be incorporated in Pakistani legal system for the ex-prisoners and what purposes may be attained by bringing them in to the system? (Chapter VII)

5. What rights have been provided to the prisoners by Shari'ah? Is the Pakistani prison law regime compatible with the Shari'ah standards? (Chapter VIII)

PART I

THE RIGHT OF PRISONERS TO AVAIL NON-CUSTODIAL/ALTERNATIVE METHODS TO IMPRISONMENT

INTRODUCTION TO CHAPTER II, III & IV

Prisons punish, but alienate. Community punishes, but reintegrate; boosting their morale; engaging in good deeds for others; and treating themselves and others with the respect they deserve.¹⁴

Throughout the world, a large number of prisoners come from economically and socially disadvantaged backgrounds. Poor quality of life, unemployment, homelessness, broken families, psychological issues, domestic violence and so on so forth are the truth of majority of offenders' lives. Several are convicted for non-violent or minor offences. These variant situations leading to crime need to be addressed with diverse methods rather to throw all the offenders towards incarceration. Captivity can ultimately perpetuate their developed mostly 'by chance' criminal intents. Researchers such as Goffman have pointed out that prisons themselves play the role of 'universities of crime'.¹⁵ This is especially true of Pakistani prisons. Offenders enter the prison having limited criminal acumen; however upon leaving they usually have gained significant additional insight into criminal life as well as a broadened network of criminal contacts. This may in fact lead them to be more inclined to commit crimes than would otherwise have been the case.

To save them from this situation and to change the approach towards crime, the adoption of effective non-custodial or alternative methods to imprisonment is highly encouraged at international level as full or partial substitute of imprisonment. The

¹⁴ Anthony Vass, *Alternative to Prison, Punishment, Custody and the Community* (Sage, London: Sage Contemporary Criminology Series, 1990), 41.

¹⁵ E Goffman *Asylums: Essays on the condition of the Social Situation of Mental Patients and Other Inmates* (Anchor Publishing New York 1961). See also JA Slosar Jr *Prisonization, Friendship, and Leadership* (Lexington Books Lexington MA 1978) 3. He describes the notion of prisoners going through the process of "prisonization" whereby they start to form a completely alternate society from the outside world which involves the taking on in greater or lesser degree of the folkways, mores, customs and general culture of the penitentiary.

employment of a non-custodial method means a decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment. Such decision can be made at any stage of the administration of criminal justice.¹⁶ This is essentially an approval by the court of the fact that the offense, the background reasons leading to that offense, its severity and the personal situation of the accused/offender demands a lesser measure/punishment than an imprisonment.

This system requires from the judicial authority to choose best possible measure out from an available range of non-custodial means possibly to fulfill maximum rehabilitative needs of the offender without disturbing and damaging the protection of the society and interests of the victim. Thus the United Nations Standard Minimum Rules for Non-Custodial Measures, 1990 (The Tokyo Rules hereinafter) entail that “The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.”¹⁷

A range of non-custodial methods catalogued in the Tokyo Rules include verbal sanctions, such as admonition, reprimand and warning, conditional discharge, status penalties, economic sanctions and monetary penalties (containing for example, fines and day-fines, confiscation or an expropriation order, restitution to the victim or a compensation order), suspended or deferred sentence, probation and judicial supervision, community service orders, referral to an attendance centre, house arrest and any other mode of non-institutional treatment or a combination of these measures.¹⁸

¹⁶ See UN doc. ST/CSDHA/22, Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), p. 3.

¹⁷ The Tokyo Rules, Rule 8.1.

¹⁸ Ibid, Rule No. 8.2.

The reasons to adopt non-custodial measures have been defined in Rule 1.5 of the Tokyo Rules that says, “Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.” In particular, the Tokyo Rules classify the non-custodial measures in to three basic categories:

- Pre-trial/pre- sentencing non-custodial measures;¹⁹
- Trial and sentencing non-custodial measures;²⁰
- Post- sentencing non-custodial measures.²¹

In Pakistan, these measures are still less-developed and less-utilized in comparison to custodial mechanisms despite the availability of a range of alternative measures, such as, fines, admonition, reprimand, warning, conditional discharge, monetary penalties, remission and pardon. Some very obvious reasons of the insignificant utilization of these mechanisms include the under-provided trainings of judicial officers for the appropriate issuance of a non-custodial order, lack of attention and interest on the part of the judiciary regarding employment of non-custodial mechanisms, insufficiency of monitoring and surveillance measures, the fear of repetition of crime by the possible beneficiary of a non-custodial order and unacceptability within the general public.

A non-custodial measure is essentially an acknowledgment by the court of the fact that it has properly investigated into the whole circumstance of the offense and the offender and the court is confident about his rehabilitation prospects. In making such decision the court systematically trusts three interrelated activities, i) monitoring and surveillance measures joined to the order, ii) rehabilitation programs offered to the offender, iii)

¹⁹ Ibid, Rule No. 5.

²⁰ Ibid, Rule No. 7.

²¹ Ibid, Rule No. 8.

community involvement to make a non-custodial order successful.²²The reasons sighted in preceding para for poor utilization of non-custodial mechanisms in Pakistan in fact generate from the weaknesses lying in these three interrelated activities.

The majority of states which properly utilize the non-custodial means regularly bring in fresh and innovative monitoring/supervision methods and rehabilitative strategies to make these means a success. They can easily track the beneficiary; thoroughly keep a check at his compliance with defined conditions and every risk posed to his security along with maintaining the safety of the general public through employing appropriate monitoring measures. In furtherance to it they get him engaged in productive rehabilitative programs and community services wherever it is required. However in Pakistan, this particular legal regime had never been restructured. Therefore the few outdated statutes available with reference to non-custodial measures are less-trusted and less-utilized by the courts. Such situation critically deprives the deserving persons from their legal right to get benefit from a non-custodial measure thus it ultimately leads to their incarceration.

Chapter II, III and IV explore the reasons of inefficiency of three significant alternative measures to imprisonment operational in Pakistan i.e. bail as the pre-trial/pre-sentencing non-custodial measure, probation as the trial and sentencing non-custodial measure and parole as the post- sentencing non-custodial measure. These chapters offer remedies for the improvement of the system.

²² Kwadwo Ofori-Dua, Kofi Osei Akuoko, Jonas Asamanin Barnie, John Yaw Kwarteng & John Boulard Forkuo, "Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis Ashanti Region, Ghana," *International Journal of Social Science Studies* 03(2015). (Kwadwo Ofori-Dua and others, "Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis Ashanti Region, Ghana", hereinafter).

CHAPTER II

PRE-TRIAL/ PRE-SENTENCING RIGHT OF BAIL

INTRODUCTION

Bail is one of the most powerful non-custodial tools which the authorities administer very cautiously, taking into account the interests of both parties to the case in particular and the safety of the society in general. To maintain a balance between ‘the personal liberty’ and ‘the investigational power of police’, it is imperative to adopt fresh and innovative monitoring mechanisms to the bail-bonds. In Pakistan, however the system of bail still rests upon a century old conventional monitoring mechanisms, i.e., ‘the personal bonds’, ‘the surety’ and ‘the security’ which are applied unvaryingly against bailable and non-bailable offences and in pre-arrest, post arrest/post-trial matters. A careful study of Pakistani statutory and judicial perspective of bail establishes that there is no supplementary technique opt-able as per the requirements of the case. The most problematical matter is that neither the law sanctions nor the judicial institutions seem persuaded to enforce surveillance strategies directly against the ‘bail-seeker’ (the detainee prisoner). The police and the courts commonly observe the unfavorable effects of underprovided monitoring mechanisms against the bail-bonds thus sometimes they try to fill the gap by imposing some basic conditions with reference to the credentials of the ‘surety’ however such obligations usually turn out to be the cosmetic measures only which substantially carry no productive results. As an upshot, sometimes the complainant is pressed on to bear the loss/prolongation of justified conclusion of the case and at certain times the respondent gets deprived from securing his liberty.

The issue of undersupplied monitoring mechanisms for bail requires serious attention. This chapter is an attempt to establish the need for the insertion of additional/alternative monitoring mechanisms in the system of bail. The first portion of this chapter expounds the

statutory provisions on bail and the pertinent monitoring mechanisms with special stress on their judicial interpretation. The second portion provides a detailed structure of the Indian Code of Criminal Procedure, 1973 (CrPC, 1973 hereinafter) in so far as it relates to the topic of bail; this portion also discusses the Bail Act, 1976 of the UK (the Bail Act, UK hereinafter). This is later suggested that the Pakistani legislature should use these two statutes as model laws to expand and intensify the local monitoring structure of bail. In this regard, the first proposal is to alter, as a minimum, Section 499 of the Code of Criminal Procedure, 1898(the CrPC hereinafter)²³to empower the bail issuing authority to place additional surveillance options generally against the surety and specifically against the bail-seeker/detainee prisoner. Secondly, while discussing the broader spectrum, since Pakistan and India, both countries have drawn from the bail provisions under British India, however afterward India felt the need to amend the law on bail certainly at right time; thus it is easier for the Pakistani legislature to adjust the previously shared law at the pattern of CrPC, 1973 to be benefitted from the Indian efforts made in this regard. Thirdly, it is recommended that the judicial discretion in Pakistan should extend in such manner that it can impose varied conditions against the bail-seeker/detainee prisoner as they are imposed under the English law to safeguard him from the curses of detention; this step will also better protect the rights of the other party to the case and the society at large.

2.1 THE STATUTORY AND JUDICIAL POSITION OF BAIL AND ITS MONITORING MECHANISMS IN PAKISTAN

The pre-trial/pre-sentence detention has particular hazards associated with it, such as, serious vulnerability of physical hurt, abuse of rights, ill-treatment and hindrances faced in access to justice, legal advice and assistance which ultimately results in denial to the right of fair trial. The surroundings in pre-trial detention are often much worse than those of prisons for

²³ The Code of Criminal Procedure, 1898 as amended by Act II of 1997.

convicted prisoners.²⁴ Thus United Nations Standard Minimum Rules for Non-Custodial Measures, 1990 (The Tokyo Rules) stress that, the pre-trial detention should be used as the last option in criminal proceedings, with due care for the investigation of the alleged offence and for the protection of society and the victim.²⁵ In substance, the pre-trial detainees predominantly need to be benefitted by alternative strategies to imprisonment.

Bail has the premier position in the hierarchy of the pre-trial/pre-sentence alternative measures to imprisonment. In Pakistani perspective, it is an established, fashioned and commonly used alternative mechanism to imprisonment. This is generally a pre-trial/post arrest and infrequently a pre-arrest measure invoke-able as a ‘matter of right’ particularly in bailable²⁶ and barely in non-bailable cases.²⁷ The right may be invoked during the continuance of the proceedings also.

The ‘presumption of innocence’ and the ‘preservation of personal liberty’ of the bail-seeker are the operative rationales behind apparently convenient procedures of bail. In view of the fact that the bail-seeker is required merely to cooperate with police or the court for reaching at a fair end of the investigation/ trial, it is judiciously considered unjustified to linger on his arrest or detention without any reasonable explanation.²⁸ However on the other side, it is equally significant to impose reasonable monitoring mechanisms to prevent escape of the bail-seeker and the repetition of offence or to fulfill the other requirements in the interests of justice. Therefore bail is a lien reserved by the justice system essentially to

²⁴ Justice Section, Division for Operations, United Nations Office on Drugs and Crime, Prison Reform and Alternative to Imprisonment, Concept Note (February 2011), 11; see also, Kovandzic ,T, V, and Vieraitis, L, M., *The Effect of County- Level Prison Population Growth on Crime Rates*, Criminology and Public Policy 5 (2006), 213-244.

²⁵ Rule 6.1, The Tokyo Rules.

²⁶ Section 496 CrPC.

²⁷ Section 497 CrPC.

²⁸ For a detailed discussion see, *Nadir Jan vs. The Chairman, NAB and 3 others*, MLD 2018 Karachi 6; *Muhammad Daud and another vs. The State and another*, 2008 SCMR 173; *AsmatUllah vs. The State*, PCrLJ 2004 Peshawar 2023; *Nazeer Ahmad and 2 others vs. The State*, MLD 2003 Karachi 1591; *Muhammad Sharif and others vs. Muhammad Ashiq and others*, MLD 1999 Lahore 676; *Muhammad Ibrahim Haleemi vs. The State*, YLR 1999 Lahore 533.

maintain balance of rights amongst the victim, the society and the bail-seeker/detainee prisoner.²⁹

In Pakistan, a person may be released on bail by the police under Section 169 of the CrPC or by the court under Section 496 and 497 of the same statute. Bail may be secured under Section 499 of the CrPC without surety, with surety and/or on furnishing the required security as an assurance for the future presence of the bail-seeker before the relevant authority.

Section 499 of the CrPC says,

(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

Thus under the law pertinent to bail in Pakistan, only three monitoring mechanisms as discussed under Section 499(1) might be imposed against the person seeking bail whether for a bailable or non-bailable offence or in a matter concerning pre-arrest bail or post-arrest/post-trial bail. A plain reading of the provision divulges that the placement of any other mechanism to monitor the bail-seeker or to ensure his presence before the authority on required date and time is beyond the competence of the police or the court.

Out of these three, under the easiest and simplest method, the police or the court may impose an obligation on the bail-seeker to present the ‘personal bond’ as an assurance of his future presence before the authority. However this process is hardly drawn into by the

²⁹ *Tariq Bashir and 5 others vs. The State*, PLD 1995 SC 34.

authorities and thus is an infrequent surveillance option. In the famous case of *Tariq Bashir and 5 others vs. The State*,³⁰ it was emphasized by the Apex Court that,

We know that many under-trial accused of bailable offences and preventive offences i.e. offences under sections 10, 109 and 110, Cr.P.C. have been sent to be confined in jails for want of surety bonds although they, at the discretion of the Court, could be released on execution by them of bond (personal bond) without surety for their appearance before the Court. We also find that even in petty cases the Courts/subordinate Courts have remanded the accused to jail on their failure to produce sureties with the result that hundreds of under-trial accused who could have easily been released on personal bond are rotting in the jail for a long time. It is, therefore, directed that in bailable cases while remanding the accused to jail on his failure to furnish surety bail bonds, the trial Court shall consider the propriety of his release on execution of personal bond.

Despite having this precedent of the Apex Court, the lower courts seem reluctant to apply this particularly lenient mechanism frequently; it is invoked in petty cases only. For the reason that Section 499 of the CrPC is quite narrow in its scope and does not authorize the court to place additional conditions with a bail bond to intensify its strength. Therefore in serious cases the courts remain disinclined to trust merely the personal bond to bail out the person. Instead the courts impose the other two mechanisms, i.e., the surety and the security. At certain times, the bail-seeker remains unable to assemble the required amount of the security or to arrange the surety due to the reasons beyond his control such as, poverty, the arrest made far from his locality (where he could easily request the people of his acquaintance to become his surety or to arrange the amount of security) etc and thus repeatedly requests to the court to revise the sum of security or revisit the decision regarding furnishing sureties; the activity increases the burden of the court and intensifies the frustration of the bail-seeker.³¹ Eventually sometimes the bail-seeker stays behind the bars for

³⁰ *Ibid.*

³¹ See for example, *Tufail Ahmad Khan vs. The State*, YLR 2018 Islamabad 1450; *Khalil Ahmed Soomro and others vs. The State*, PLD 2017 SC 730; *Farhat Hussain Shah and another vs. The State and others*, 2010 SCMR 1986; *Muhammad Aslam vs. The State*, 2002 YLR 1341; *Umar Hayat vs. The State*, 1995 SCMR 1005.

long and waits for the pronouncement of decision on his bail appeal.³²

However the courts usually remain firm for the supply of requisite surety and the security and if it is not furnished according to the stated directions of the court, it is believed that the bail-seeker should automatically presume that his request for grant of bail has been regretted.³³ Thus the courts do not easily alter even these three mechanisms whereas the possibility of the placement of any other method such as imposition of conditions against the bail-seeker etc are considered beyond the scope of Section 499(1) of the CrPC.

While interpreting the ambit of Section 499(1) of the CrPC, the courts are convinced that, firstly, the expression ‘conditioned’ is effective only against the ‘surety’ and its extent cannot be stretched towards the bail-seeker himself; secondly, the ‘conditions’ might be placed only to serve the purpose of securing the attendance of the person released on bail on specified time and place and not for any additional functions. Though the ultimate objective of bail is certainly to secure the required attendance of the bail-seeker however this is peculiar that the other relevant circumstances which might seriously affect the justified conclusion of the investigation or trial are ignored by the courts.

The expression ‘conditioned’ as used for the surety is however construed in broad terms by the courts on the assertion that the bail orders cannot be passed mechanically and the courts have to take into stock the status of sureties, their availability, their presence, their capability of having access to the accused as well as the circumstances which provide a satisfaction to the Court that the order will not be misused for the continuation of an

³² *Fida Hussain vs. The State*, 2018 YLR Karachi (Sukkur Bench) 60; *Muhammad Yunas and others vs. Chairman, National Accountability Bureau and others*, PLD 2015 Sindh 331

³³ *Ali Muhammad vs. The State*, YLR 2018 Sindh 360; *Nadir Jan vs. The Chairman, National Accountability Bureau And 3 Others*, MLD 2018 Sindh 6; *Ms. Muhammadia vs. The State*, YLR 2014 Peshawar 663; *Mst. Shehnaz Bibi vs. The State*, MLD 2005 Peshawar 922 ; *Zulfiqar Ahmed vs. The State and others*, PLD 2001 Lahore 545; *Dilshad Ahmed and others vs. The State*, 2000 NLR 410.

illegality.³⁴ Thus to carry out this objective they sometimes place weird conditions with regard to surety which make the requirement rather tougher to perform for the bail-seeker.

For example, in *Muhammad Ayub vs. Mst. Nasim Akhtar and another*,³⁵ the trial court required that the respondent was to be released on the surety of 'Mehram'(blood relation) alone. However the *Sha'riat* Court of Azad Jammu & Kashmir rejected the condition on the plea that such additional conditions might not be placed. The Supreme Court in appeal endorsed the directions given by the trial Court with regard to surety while observing that, the term 'bail' itself visualizes some control vesting in the surety who makes himself responsible for the appearance of the accused. Therefore principally, the court might place some superadded conditions against or about the surety only, to ensure the future presence of the bail-seeker. Later in 1998, in an appeal of *Afshan Bibi vs. The State*,³⁶ the Supreme Court rejected the orders of the High Court to produce only the father of the petitioner as the surety. The Apex Court observed that the High Court had no authority to issue such orders for granting or rejecting the bail; the requirement is confined only to the production of surety who takes responsibility to present the relevant person on required dates before the court.³⁷ In 2005, in *Mst Shahnaz Bibi vs. The State*,³⁸ and in 2014, in *Mst. Muhammadia vs. The State*,³⁹ while exercising its appellate jurisdiction, the Peshawar High Court endorsed the stipulations issued by the trial Court to produce a blood relation as surety for seeking bail; and that the non-compliance to such stipulation should be assumed as if the bail application had been declined. The issue of putting additional conditions against the surety has been

³⁴ *Ali Muhammad vs. The State*, YLR 2018 Sindh 360; *Nadir Jan vs. The Chairman, National Accountability Bureau And 3 Others*, MLD 2018 Sindh 6.

³⁵ PCrLJ 1984 SC (AJ&K) 160; see also, *Pathani and another vs. Murtaza and 2 others*, PLD 1985 Lahore 512.

³⁶ 1998 SCMR 6.

³⁷ *Hakim Ali Zardari vs. The State*, PLD 1998 SC 1 and *Manzooran Bibi vs. The State*, PCrLJ 1988 Lahore 564 were also decided using the same principle.

³⁸ MLD 2005 Peshawar 922.

³⁹ YLR 2014 Peshawar 663; see also, *Mst. Zahida Khatoon vs. The State*, 1984 SCMR 687; *Mst. Kalsoom vs. Rehmat Ali and another*, PCrLJ 1983 Lahore 1411; *Mst. Nasim Akhtar vs. The State*, PCrLJ 1983 Lahore 1990.

discussed in some later cases as well. In *Muhammad Younis vs. Chairman, National Accountability Bureau*,⁴⁰ the Court defined that since the surety takes the responsibility to ensure future presence of the bail- seeker before the relevant authority, therefore the authority can require particular credentials of the surety.⁴¹ However in a latest case of 2018, the Gilgit Baltistan Chief Court altogether rejected the possibility to make such requirements. The trial Court admitted the lady to bail on the condition that she would arrange sureties either of her husband or of a blood relation mandatorily. Such conditions were termed as harsh and unjustified by the appellate court which incapacitated the lady to get her release. Thus the stipulation was set aside.⁴²

Nevertheless the word ‘conditioned’ used in Section 499(1) is sometimes not accepted as such comprehensive to extend its applicability in unrestricted or restricted terms towards the bail-seeker too through analogy. In a latest case of *Mst. Kousar vs. The State*,⁴³ the Court observed that, “A bare study of Sections 497/498 reveals that no inbuilt provision exists in both these provisions to place certain conditions while granting bail to an accused, the courts think that the imposition of certain conditions would militate against the concept of bail, which is synonymous to liberty and liberty of a person cannot be curtailed.” Whereas Justice Qurban Siddiq Ikram denotes in *Mst. Pathani and another vs. Murtaza and two others*,⁴⁴ that the Court may put extrinsic conditions on the surety while granting the bail but no such stipulation is allowed to be placed against the applicant.

⁴⁰ PLD 2015 Karachi 33. See also, *Muhammad Naveed Shaikh and another vs. The State*, PLD 2013 Karachi 68.

⁴¹ *Muhammad Naveed Shaikh and another vs. The State*, PLD 2013 Karachi 68. See also, *Mst. Muhammadia vs. The State*, YLR 2014 Peshawar 663; *Mst. Shahnaz Bibi vs. The State*, MLD 2005 Peshawar 922.

⁴² *Ms. Kousar vs. The State*, YLR 2018 GBCC 733

⁴³ YLR 2018 GBCC 733. The Peshawar High Court has also recently discussed the issue of precise bail options in *Muhammad Faisal Shah vs. The State and another*, 2018 PHC 1335(Cr.M 76-M of 2016). The Court observed that there are only two modes available to secure bail under the law that is the surety and the security. And these two mechanisms can substitute only one and the other and in not in any other way.

⁴⁴ PLD 1985 Lahore 512.

Thus the judicial forums, in a way, through self-imposed limitations have incapacitated their powers to widen up the scope of Section 499(1) besides the surety towards the bail-seeker too for the imposition of diverse conditions and stipulations as per the demands of a particular case.

The above discussion proves that at several occasions the law and the courts could not reasonably secure the rights of the parties through building up the entire institution of bail upon two or three monitoring mechanisms only. There is no alternative mechanism available to cater those matters where the bail-seeker falls short or completely fails to furnish surety or the security.⁴⁵ The system also does not offer a satisfactory remedy in the situations where the accused jumps off the bail (and this is quite a common practice) and the surety easily gets succeeded to circumvent the responsibility after pleading that the surety had been extended out of sympathy or social pressure and that the surety is poor so the court must not fine him; the court usually being helpless allows the request.⁴⁶ Thus the available monitoring methods can certainly not satisfy the agony of disadvantaged persons in every single and distinct matter. And additional back up measures and alternative surveillance strategies must be supplied in to the system to fill the gaps.

2.2 INDIAN AND ENGLISH PERSPECTIVES ON BAIL AND ITS MONITORING MECHANISMS

A-The Indian Perspective

India and Pakistan got independence from British rule in 1947. Before separation, the Criminal Procedure Code, 1898 drafted by British had been operative in the then sub-continent. Though Pakistan, since after getting independence till date is still using the same

⁴⁵ See for example, *Fida Hussain vs. The State*, 2018 YLR Karachi (Sukkur Bench) 60; *Ghulam Nazik vs. Additional Session Judge and two others*, 2017 YLR 1441; *Muhammad Yunas and others vs. Chairman, National Accountability Bureau and others*, PLD 2015 Sindh 331.

⁴⁶ See for example, *Umer Daraz vs. Judicial Magistrate-IX, Quetta and 2 others*, PLD 2018 Quetta 91; See also, *Ghulam Ali Khashkheli vs. The State*, 2018 YLR 610; *Ali Muhammad and another vs. The State*, YLR 2018 Karachi 360; *Khizar Hayat vs. The State*, PCrLJ 2010 Karachi 1400; *Sher Ali vs. The State*, PCrLJ 2000 Lahore 94; *Zeeshan Kazmi vs. The State*, PLD 1997 SC 406, *Abdul Hafeez vs. The State*, MLD 1993 Lahore 541.

statute without having any substantial change in its chapters relevant to bail; however India brought in major amendments within the provisions of its Criminal Procedure Code dealing with the topic of bail in 1973 (CrPC, 1973 hereinafter). The most important modifications were made through the insertion of the concept of 'conditional bail' and the inclusion of special provision related to 'anticipatory bail'. Sections 436 to 450 of chapter XXXIII of the CrPC, 1973 contain the law relating to bail.

Presently, CrPC, 1973 permits to place the requirement of personal bond, superadded conditions, surety, security or combination of these requirements as monitoring mechanism attached to the bail-bond. Before the promulgation of CrPC, 1973, the power to impose conditions with bail-bonds was though accredited by most of the High Courts however these powers were somehow uncertain.⁴⁷The new amendments made the position of law transparent for the courts regarding imposition of conditions with a bail-bond. At present the conditions are categorized into 'procedural conditions', (such as the condition to furnish surety or security bonds) and 'superadded conditions' (such as, the conditions placed by the court at its discretion in the bail-bond).

In a bailable offence, a person may be discharged from custody on his executing a bond without sureties for his appearance at some future date.⁴⁸ In a non-bailable offence, the police or the court may release a person on bail except if he has been arrested under the charge of heinous offences (as enlisted in the provision itself) or he had been previously convicted on two or more occasions of a non- bailable and cognizable offence,⁴⁹ however he may be granted bail in special circumstances⁵⁰ by any court other than a High Court or Court

⁴⁷ *Rughubar Dayal vs. Emp*, A.I.R. 1933 Oudh 81, 82; *Adkoo Umrao vs. Emp*, I.L.R. 1939 Nag. 170; *Giani Mehar Singh vs. Emp*, I.L.R. (1939) 2 Cal. 42 (A.I.R. 1939 Cal. 714); *Kimat Rai vs. Emp*, A.I.R. 1945 Lab. 215, 216; *Re District Magistrate vs. Agaparmu*, A.I.R. 1949 Mid. 77; *Kamla Pandey vs. The King*, A.I.R. 1949 Cal. 382; *Talab Hussain Case*, (1958) S.C.R. 1227; A.I.R. 1958 S.C. 375; *Mudhukar Pumshanam Case*, A.I.R. 1958 130, 111, 406; *Cf. Mahmoud Muzaffar Case*, A.I.R. 1963 All. 127; *Re Saradamma* A.I.R. 1965 A.P. 444.

⁴⁸ Section 436(1) CrPC, 1973

⁴⁹ Section 437 (1) (ii) CrPC, 1973

⁵⁰ Section 437 (1) (2) (3) CrPC, 1973

of Sessions after the issuance of directions to release him after imposition of any condition which the authority considers necessary for the purposes such as, to ensure that he shall present himself before the authority in accordance with the conditions of the bond, or that “he shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or otherwise in the interests of justice”⁵¹. The bond may stand cancelled on breach of such conditions.⁵²

The legislature first time promulgated through amended CrPC, 1973 the provision with relation to the ‘conditional anticipatory bail’ grantable under Section 438.⁵³ This provision incorporates varied conditions in comparison to Section 437. The High Court or the court of sessions on its satisfaction may grant an anticipatory bail with conditions superadded, for example, that “the person shall make himself available for interrogation by a police officer as and when required or he shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or a condition that the person shall not leave India without the previous permission of the Court or any other such condition as may be imposed under sub- section (3) of section 437”.⁵⁴ The public prosecutor or complainant remains at liberty to move the same court for cancellation or modification of the conditions of bail at any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.⁵⁵ This is important to note here that the power of the other courts under Section 437 and the High

⁵¹ Section 437 (3) (a) (b) (c) CrPC, 1973

⁵² Section 446-A CrPC, 1973. For a detailed discussion, see, *Jonathan Nitin Braday vs. State of West Bengal*, 660 SCC 2008 (also available as, AIR 2008 SCW 6342); *Chuni Lal and others vs. The State of Punjab*, Cri L.J. 4474, 1996 DB; *The State vs. Mahinder Singh*, Cri. L.J. 841, 1994 Delhi.

⁵³ Section 438 (1) CrPC, 1973. *Siddharam Satlingappa Mhetre vs. State of Maharashtra and others*, [(2011) 1 SCC 694.

⁵⁴ Section 438 (2) CrPC, 1973

⁵⁵ *Rakesh vs State*, Criminal Misc.Application No. 4597 of 2011; *Adri Dharan Das vs. State of West Bengal*, AIR 2005 SC 1057; *Chuni Lal and others vs. State of Punjab*, 1996 CRI L.J. 4474 (DB); *Gayaram Mondal vs. State and another*, 1995 Cri L.J. 1730 (Kolkatta High Court); *Joginder Kumar vs. State of UP and others*, 1994 SCC 260.

Courts or the courts of sessions under Section 438 to impose conditions is not confined and the authorized courts can exercise their free discretion to impose every condition falling within the legal parameters including those which are contained in the two Sections.⁵⁶ However the courts while imposing conditions have to exercise their judicial and un-arbitrary discretion considering the facts and circumstances of the case.”⁵⁷

In addition to the conditional bail, the accused may be released on bail after furnishing monetary security or surety under Section 441.⁵⁸ The minute details with relevance to surety bond have been incorporated from Section 441 to Section 450 of CrPC, 1973.

B- The English Perspective

In the UK, a separate statute deals with the matters of bail; this is the Bail Act, 1976 (the Bail Act hereinafter), (mostly read in combination with the ‘Criminal Justice Act, 2003’). Under this law, the bail is grantable to all, the accused, the convict, the one who is in custody of the police or the one for whose arrest the warrants have been issued however with variant conditions.⁵⁹ Such conditions are usually determined by considering the past history of the individual, the pre-sentence report produced by the relevant police officer and the nature of the case.

The bail issuing authority can exercise its powers by placing a single or multiple requirements with bail-bond. The majority of these requirements are place-able directly against the bail-seeker. Thus a more reliable system of bail is maintained. Besides preserving the rights of other party to the case, this range of choices allows better chances to secure bail to the bail-seeker as well.

⁵⁶ See, *Avinash vs. The State*, Bail Application. 35/2014(Laws) (DLH)-2014-7-148); *Omar Usman Chamadia vs. Abdul & Anr*, 234 SCC 2004; *Gavaram Mondal vs. The State*, Cri.L.J. 1730, 1995 Kolkata.

⁵⁷ *Raushan Singh vs. The State of Bihar*, CriL Miscellaneous No.6038 of 2018; *Smt. P Kalpana vs. The State of Telangana*, Cril Petition No.24624 of 2017; *Siddharam Satlingappa Mhetre vs. State of Maharashtra*, Cril Appeal No. 2271 2010; *H.S. Pannu vs. Govt. of N.C.T. of Delhi And Anr*, Crl. Rev. P. No. 744/2006; *Ganesh Raj vs. The State of Rajasthan and others*, 2005 CriLJ 2086, RLW 2005 (2) Raj 1048, 2005 (2) WLC 327; *Gurbaksh Singh Sibbia Etc vs. State of Punjab*, 1980 SCR 383 (also available as 1980 AIR 1632).

⁵⁸ *Hari Kumar Jha vs. State Of Bihar*, Cr.Misc. No.1257 of 2010; *Anirudh Prasad Yadav alias Sadhu Yadav Vs. State of Bihar*, 2006(2) P.L.J.R. 676

⁵⁹ Section 1, The Bail Act.

The first requirement is termed as '*conditional bail*'; under this requirement, the person released without recognizance (surety) must bind himself through some conditions for securing his bail. Certain special conditions (which are virtually very close to the conditional bail granted in India) are imposed with an intention to achieve various purposes,⁶⁰ such as, to secure surrender to custody by the bail-seeker,⁶¹ to ensure that he does not commit an offence in continuance of bail, to stop him from interfering with witnesses or from otherwise obstructing the course of justice whether in relation to himself or to any other person, if he is a child or young person conditions for his own welfare or in his own interest, to secure his presence for the purpose of enabling inquiries or a report to be made to assist the authority in dealing with him for the offence. Such conditions are placed however in proportion to the charge placed against him with a careful consideration for their enforcement.⁶² However while placing conditions or any single condition as a requirement for the grant of bail, the court

⁶⁰ As mentioned under S 3(6) of the Bail Act.

⁶¹ As Section 2 (2) of the Bail Act speaks about, 'surrender to custody' that the authority issuing the bail clearly should mention the date and time of expiration of the period of bail and that when the person is bound to "surrender to custody" means, in relation to a person released on bail, surrendering himself into the custody of the court or of the constable (according to the requirements of the grant of bail) at the time and place for the time being appointed for him to do so. The expression is discussed in detail in (*Home Office vs. Stellato*, [2010] EWCA Civ, 1435; *R (on the application of Wiggins) v Harrow Crown Court* [2005] EWHC 882 (Admin) at [26]; *R v Central Criminal Court, ex p Guney* [1996] AC 616, [1996] 2 All ER 705; *R v Kent Crown Court, ex p Jodka* [1997] 161JP 638, DC; *DPP v Richards* [1998] QB 701, 88 Cr App Rep 97; *R v Evans* [2011] EWCA Crim 2842, [2012] 1 WLR 1192, (2011) 176 JP 139. The crux of these citations is that under Section 2 (2), the person is to present himself before the authority issuing the bail. Failure to surrender without reasonable excuse is an offence under Section 6 (the sentence awarded under this Section is normally in addition to any sentence for the original offence. The concept is elucidated in detail in, *R. vs. Leigh* (Anthony Jason) [2012] EWCA Crim 621. In *R vs. Evann* [2011] EWCA Crim 2842 (*Scott Lennon*), the Court explained, "the Bail Act distinguishes between two situations. The first is where a defendant is on bail but fails without reasonable excuse to 'surrender to custody'. 'Surrender to custody' means by Section 2(2) in this context 'surrendering himself into the custody of the court at the time and place for the time being appointed for him to do so.' The failure to do that is by Section 6 (1) an offence. The offence may be dealt with according to Section 6 (5) either by summary conviction before the magistrates or as if it were a criminal contempt of court." In another case of *R vs. Scott (Casim)* [2007] EWCA Crim 2757, the Court again took strict stance and rejected all the possibilities of delayed arrivals for surrendering to custody. The court was of the opinion that the delays were intolerable for the reason that this was not only the breach of law but rather a reason of serious inconvenience for many people who got affected by the delay.

⁶² See, *R (on the application of the Crown Prosecution Service) v Chorley Justices* [2002] EWHC 2162 (Admin), (2002) Times, 22 October, [2002] All ER (D) 110 (Oct).

should have a genuine and not an imaginary risk for believing that the person may commit an offence after getting released on bail.⁶³

As second requirement, '*supplementary conditions*' might be attached to the bail-bond in furtherance to conditional bail under English law.⁶⁴ These supplementary conditions include '*curfew*' or '*the door step condition*'; the person is required to present himself at his door step if it is necessitated by the bail issuing authority during the hours of the day or night as it has been fixed.⁶⁵ A condition of curfew can further be modified with an additional requirement of '*tagging*' or '*Electronic Monitoring System*' (EMS).⁶⁶ EMS basically informs the police about the possible breach of curfew conditions besides keeping a check against the person. The system ensures that the bail-seeker must not disturb or approach the complainant, co-defendant or witnesses or enter in to some prohibited area (such as the placement of ban on drug addicts to enter in sensitive areas with relation to their charge) etc.⁶⁷ Above and beyond this some other supplementary conditions can also be placed, such as, the condition of residing in a bail or probation hostel,⁶⁸ special suitable conditions pertinent for persons charged under the accusation of murder or drug addiction, condition to surrender passport etc.⁶⁹

⁶³ See, *R (on the application of S) v Crown Court at Winchester* [2013] EWHC 1050 (Admin), [2013] All ER (D) 166 (May).

⁶⁴ The Bail Act, Section 3(6).

⁶⁵ See, *R. vs. Monaghan (Rudie Aaron)*, [2009] EWCA Crim 2699; [2009] 12 WLUK 687; [2010] 2 Cr.App.R. (S.) 50; [2010] Crim. L.R. 322; (2010) 107 (2) L.G.S 17 (CA (Crim Div)); *R (on the application of the Crown Prosecution Service) v Chorley Justices* [2002] EWHC 2162 (Admin), (2002) Times, 22 October, [2002] All ER (D) 110 (Oct).

⁶⁶ The placement of EMS is allowed to the bail issuing authority under Section 3AC of the Bail Act. According to Section 3AA (3), the condition of EMS cannot be imposed on the convict less than 12 years old, and if the defendant is less than 17 and more than 12 years, in case of such defendant there must not be any other charge except the sexual offence or the charge of violent crimes and finally if the bail-seeker is an adult, the charge for a crime punishable with at least 14 years' imprisonment or for imprison-able offences together with a history of conviction under the offences of same intensity while remanded on bail or to local authority accommodation. According to Section 3AB (2), EMS requirement cannot be imposed in other cases where a person aged 17 or above is seeking bail unless the court is of the opinion that without imposing this requirement the bail may not be granted.

⁶⁷ Section 3 (6ZAB) The Bail Act {added by the Criminal Justice and Police Act 2001, S 131 (1)}.

⁶⁸ Section 3 (6ZA) The Bail Act

⁶⁹ EMS or tagging system has recently been introduced in Pakistan for the persons charged under terrorism and for those persons who have been reported for domestic violence. However so far, no data of the practical utilization of EMS is available.

The third requirement relates to furnishing of ‘surety/security’ to secure bail.⁷⁰ The law requires from the surety to provide the details of his financial resources,⁷¹ character,⁷² previous convictions⁷³ and proximity to the person for whom he is to become surety.⁷⁴ An important issue of availability of legal tools against that surety who purposefully helps the bail-seeker to default to surrender to custody has been dealt as an imprison-able crime under the English law;⁷⁵ only becoming the party to such agreement is considered conspiracy by the courts. This is essentially to protect the rights of all parties to the case.⁷⁶

The security might be furnished in the shape of money or some other valuable thing⁷⁷ which may be forfeited in case of failure to surrender to custody unless there appears to have been reasonable cause for that.⁷⁸ The amount of security is determined according to the seriousness and sensitivity of the case.⁷⁹

2.3 CONCLUSIONS

Bail is a powerful non-custodial method which gets strength from the appurtenant monitoring mechanisms. The Pakistani legal system allows to place a century old very few surveillance methods with bail-bonds which are virtually insufficient to fulfill the fundamental purposes of bail.

⁷⁰ Section 3 (4) and Section 3(5) respectively, The Bail Act.

⁷¹ Section 8(1a) The Bail Act.

⁷² Section 8(1b) The Bail Act.

⁷³ *Ibid.*

⁷⁴ Section 8(1c) The Bail Act. The particulars of the surety are intensely taken by the court. In *Birmingham Crown Court, ex parte Rashid Ali*, (1999) 163 JP 145, Kennedy LJ (at p. 147), the court discussed the financial securities and held that it would be taken as a professional irresponsibility on the part of a lawyer if he fails to check the financial soundness of the surety he tendered with regard that if he or she would be able to meet his liability or not. The investigation of the criminal history of the surety is a usual matter of practice for the police. The proper investigation of these facts becomes supporting for the court to ensure the presence of the accused in the court through the strong exercise of influence by the surety and also saves the surety from the hassle of appearing in the court at every hearing. (See, Blackstone’s Criminal Practice 2016, Part D Procedure, Section D7 Bail, Conditions of Bail, Sureties D7.57.)

⁷⁵ Section 9, The Bail Act

⁷⁶ *Shea vs. Winchester Crown Court*, [2013] EWHC 1050 (Admin); [2013] 3 WLUK 463; [2013] Lloyd’s Rep. F.C. 346.

⁷⁷ Section 3 (5), The Bail Act.

⁷⁸ Section 5 (7-9), The Bail Act.

⁷⁹ See, *Mangouras vs. Spain*, (12050/04) (2012) 54 E.H.R.R.25.

India and Pakistan got independence from British rule in 1947. Before separation, the Criminal Procedure Code, 1898 drafted by British had been operative in the then sub-continent. Though Pakistan, since after getting independence till date is still using the same statute without having any substantial change in its chapters relevant to bail; however India brought in major amendments within the provisions of its Criminal Procedure Code substantially to enhance the monitoring and surveillance mechanisms in 1973. Presently, several surveillance methods are available within the Indian legal structure of bail that are being applied on case to case bases. In Pakistan also, a comprehensive statutory mandate to impose conditions and constraints compatible with the particular circumstances of the bail-seeker is imperative to be stocked up with the bail issuing authority to resolve the issue of shortage of monitoring mechanisms. The approachability to variety of monitoring mechanisms would let the authority to lay down alternative options in case if the person fails to arrange one stipulated measure; additionally one surveillance measure can be put to use as a backup support of another. Thus it is suggested that the legislature as a minimum should amend Section 499 of the CrPC in a way that besides the surety, the bail issuing authority can impose direct conditions against the bail-seeker. In a broader spectrum however, the amendments are required within the entire existing law of bail of Pakistan. The Pakistani legislature can easily get benefited from the Indian amendments through which a categorization ofailable and non-ailable offences and pre-arrest, post-arrest and post-trial matters is carried out with reference to the monitoring mechanisms.

The English law on bail is rather much more advanced and sophisticated in comparison to the Indian law on bail. It offers multiple and novel surveillance mechanisms which not only provide better chances to secure bail but also tend to control the possibility of escape of the bail-seeker through employing improved methods. As a matter of fact, for a greater lot of bail-seekers, the simple conditions attached to the bail-bond can prove

sufficient. Nevertheless the persons charged under serious offenses like violence, use of drugs or firearms, terrorism, espionage and so on or those who may possibly become a risk to the preservation of the bail-bond or the habitual offenders, who can happen to be ‘career criminals’ because of the number and severity of their prior convictions might be tied with direct rigorous monitoring mechanisms or should be restricted with supplementary intensive supervision measures such as, electronic monitoring, home confinement, house arrest, curfew, EMS etc. Thus the Pakistani legislature should proceed for adoptable improved mechanisms to amend the law.

CHAPTER III

NON-CUSTODIAL TRIAL AND SENTENCING RIGHT OF

PROBATION

INTRODUCTION

With incarceration system in such a poor state like Pakistan, people should be kept out of prison as much as possible. Alternative sentencing methods are one way of contributing towards this goal and probation is one such method which is unfortunately often overlooked by the courts. This form of punishment has existed in Pakistani law since 1960 through Probation of Offenders Ordinance, and ever since has been praised for still having a punitive element, but not disrupting the family and/or work life of the offender. Courts have since been prompted to use it as much as possible, yet in practice it seems it is only applied very occasionally and aimlessly despite that not only is this economically sound but it also promotes various constitutional rights of the offender.

The research conducted on the system of probation applicable in Pakistan usually indicate the social aspects of the system⁸⁰ or the administrative lacking or the statutory lacunas;⁸¹ but no substantive study has been made with regard to judicial issues floating on the surface of the failure of this non-custodial strategy of punishment in Pakistan. This chapter presents a blend of administrative, statutory and judicial issues pertaining to the system of probation in Pakistan.

⁸⁰ See, Basharat Hussain, “*Social Reintegration of Offenders: The Role of the Probation Service in North West Frontier Province, Pakistan*”; PhD thesis, the University of Hull, UK (November 2009)

⁸¹ See, Crisis Group Asia Reports N° 212, *Reforming Pakistan’s Prison System*, October 2011; International Penal Reform Report, *Probation and Parole System in Pakistan: Assessment and Recommendations for Reform*, October 2012. Available online at, www.penalreform.org; Draft report of Research Society of International Law (RSIL) through AITBAAR presented to the Reclamation and Probation Department, Home & Tribal Affairs Department of Khyber-Pakhtunkhwa, *Effecting Change in Khaebar Pakhtunkhwa’s Probation Regime*, January, 2015. (AITBAAR, “Effecting Change in Khyber-Pakhtunkhwa’s Probation Regime” hereinafter).

According to international standards, while awarding the sentence through employing a non-custodial measure, such as probation, the judge remains obliged to fulfill the needs of justice in compliance with the ‘triangular threshold checks’ given under Rule 8.1 of the United Nations Standard Minimum Rules for Non-custodial Measures, 1990 (the Tokyo Rules) which requires from the authority to keep under consideration the rehabilitative requirements of the offender, the protection of the society and the interests of the victim. However in Pakistan, the probation based decisions discuss the rehabilitation aspect of the offender usually in weird and irrational terms; whereas the aspects of ‘protection of society’ and ‘interests of the victim’ generally remain silent in the judgments. There are a number of reasons operating behind this judicial behavior. First, the law of probation in Pakistan is as old as it was first promulgated in 1960. From then on until the day, the world has made tremendous progress in the field but the Pakistani legislature never put effort to amend probation related statutes to harmonize them with the international standards. ‘Reformation of offender’ is considered as the fundamental *raison d’être* of non-custodial sentencing system but it has not been incorporated as mandatory objective in the relevant statutes. The surveillance and supervision mechanisms placed against the offender which can essentially become the reason of converting probation from a simple penal strategy into a reformatory sentencing measure do not comply with the aforementioned ‘triangular threshold checks’ thus disrupt the judicial reliance on these mechanisms and become one reason to disturb the judgments. Second, the governments have not supported the probation through increase in budgets for its strength. The poverty of Department of Reclamation & Probation (R&PD hereinafter) is badly distressing the working potential of its employees. Under-resourced and under-staffed department eventually fails to execute (even the properly defined) judgments. Third and most important reason is that the judges are not well-versed and well-trained to pronounce a non-custodial sentence like probation in Pakistan. This multi-layered system is

usually un-understandable for the judges. They are fundamentally unaware of the probation as a reformatory sentence, the exact comprehension of reformation, the results originally required from the surveillance mechanisms placed against the probationer and the importance of integration of community service with the probation based sentences.

This chapter will go deep into the study of above-sighted reasons of botch of probation and will suggest some legislative, administrative and judicial amendments of the system of probation in Pakistan to make it operational on maximum level thus to ensure the imprisonment as secondary mode of punishment (applicable in case of failure of probation) for those offenses where the probation can be chosen as the appropriate penalty.

3.1 PROBATION AS A NON-CUSTODIAL SENTENCING SYSTEM IN PAKISTAN

Probation represents a departure from traditional sentencing system. It is a considerate judicial act for alteration of an offender under which the execution of a harsher custodial sentence is suspended and a milder non-custodial sentence is substituted on a very clear understanding that the custodial sentence will be re-imposed if the person being tested fails to honor the terms and conditions of his non-custodial sentencing bond.⁸² During the continuity of bond the offender remains obliged to observe certain moral and legal standards as part of stipulations under the supervision of an assigned probation officer.⁸³

Internationally well acknowledged and trendy sentencing system of probation however could not properly flourish in Pakistan. It is proved unpopular in terms of public perception perhaps because the populace in Pakistan is still focused on sentences being

⁸²See, Beckett Katherine, *Making Crime Pay: Law and Order in Contemporary American Politics* (Oxford, Oxford University Press, 1997); Beckett Katherine, Western Bruce, "Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy," *Punishment & Society* 03 (2001): 43-59; Blomberg Thomas, "Diversion and Accelerated Social Control," *Journal of Criminal Law and Criminology* 68 (1977): 274-282.

⁸³ For a detailed study on the topic see, Carl B. Jr. Klockars, "A Theory of Probation Supervision," *Journal of Criminal Law and Criminology* 63(1972):550-556; Austin James, "Making Imprisonment Unprofitable," *Criminology & Public Policy* 10 (2011): 629-635; Austin James, Krisberg Barry, "Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform," *Journal of Research in Crime and Delinquency* 18 (1981): 165-196; Barker Vanessa, *The Politics of Imprisonment* (Oxford, Oxford University Press 2009).

purely punitive and do not take the time to consider what is to become of prisoners upon release. It is pointed out by the researchers that releasing offenders have social costs which must be weighed against the costs of incarceration.⁸⁴For exemplifying it, they put the argument that if an offender is released and continues to commit crimes, the criminal justice system incurs additional costs related to his arrest, investigation and court proceedings; there are also costs for victims, such as property loss or the need for additional private security. On the other side this is also true that if releasing offenders has its costs, then additional prison construction costs and daily expenditures for keeping offenders in prison are much higher than the social costs of release. The next controversy is over what 'costs' to use in calculations. Researchers differ in what costs they believe are legitimately included and how these elements should be calculated. For example, should the calculations include criminal justice system costs, monetary costs to victims, private security costs, health care expenses, pain and suffering of victims, and risk of death? Should they include tangible and intangible costs to victims, costs to others such as, victim's family and the society and costs of preventing crime? After decisions are made about what social costs to include, the number of crimes prevented by incarceration must be estimated. If each crime has social costs, the problem is to determine how many crimes offenders would commit if they were in the community rather than in prison. All evidences suggest that official statistics do not provide adequate information for these estimates, so researchers have used self-reported data for this purpose. Estimates vary from study to study, and recent findings suggest that the estimates of criminal activity will differ greatly if offenders are given a sentence of probation in combination with community supervision.⁸⁵

⁸⁴ Zedlewski, E.W., Making Confinement Decisions, Washington, D.C.: U.S. Department of Justice, National Institute of Justice, 1987, NCJ 105834.

⁸⁵ Sentencing and Corrections in the 21st Century: Setting the Stage for the Future Doris Layton Mackenzie Director and Professor Evaluation Research Group Department of Criminology and Criminal Justice University of Maryland College Park, MD. July 2001, 8-9. The authors used Federal funds provided by the U.S. Department of Justice and prepared the final report. This report has not been published by the U.S. Department

A number of factors speak in favour of probation in this regard and against the likely public perception backlash. First, the crimes for which probation may be imposed are usually minor or less harmful and as such, the offenders will for the most part be petty, first time offenders but nevertheless with the potential for rehabilitation and reform which this measure correctly seeks to target. Second, in probation instead of having to go into prison for one or two years for a minor offence of some kind and having to lose whatever employment the offender might have; the employment status remains as it is that does not drop offender's ability to provide livelihood for his family together with protecting his dignity. Certainly, in the light of the current economic climate of Pakistan, it could be argued that any measure that keeps people in jobs, contributing to the economy and enabling them to take care of their family and themselves should be praised and implemented as much as possible. At the end of the sentence, the offender should come out more rehabilitated and less institutionalized (in prison) and less likely to reoffend than would have been the case if having been subjected to a normal custodial sentence.⁸⁶

Nevertheless apart from the perceptions relating to public opinion, there are a number of legal, judicial and administrative reasons behind the un-productivity of law of probation in Pakistan. These reasons are one by one discussed below.

3.1.1 THE STATUTORY PERSPECTIVE OF PROBATION

In Pakistan, probation is primarily operated through the Probation of Offenders Ordinance, 1960 (the Ordinance hereinafter)⁸⁷ and West Pakistan Probation of Offenders Rules, 1961 (the Rules hereinafter). A few supplementary provisions to probation, specifically applicable in

of Justice. To provide better customer service, NCJRS has made this Federally funded grant final report available electronically in addition to traditional paper copies. (*Doris Layton Mackenzie* hereinafter); for a detailed discussion see also, MacKenzie, D.L., K. Browning, and S. Skroban, et al., "The Impact of Probation on the Criminal Activities of Offenders," *Journal of Research in Crime and Delinquency* 36 (4) (1999).

⁸⁶ For a detailed discussion on the topic see, Rossouw, H. (2010) *Alternatives to Traditional Sentencing Methods- The Efficacy and Constitutionality of Periodic Imprisonment in South Africa*, 9th ed. (Ireland: COLR, 2010), 10-26 (Rossouw, *Alternatives to Traditional Sentencing Methods hereinafter*); See also, SS Terblanche *The Guide to Sentencing in South Africa* (Butterworths Durban 1999), 179.

⁸⁷ Probation of Offenders Ordinance, 1960 (Ordinance No. XLV of 1960).

the cases of juvenile offenders are incorporated under Juvenile Justice System Ordinance, 2000⁸⁸ (JJSO hereinafter).⁸⁹ Nevertheless the Ordinance and the Rules are used as parent guiding law in the matters falling under the ambit of the JJSO too. This research will only consider probation as it may apply in general terms.

Section 4 and 5 of the Ordinance provides three methods to grant non-custodial sentences. The first method is discussed in Section 4 where the court can make an ‘order of discharge’ for the offender after only due admonition, without inflicting any kind of punishment.⁹⁰ Such offender however should have not been previously convicted and is now convicted for an offence punishable with imprisonment of not more than two years. While issuing such order, the court takes regard to the age, previous character, antecedents or physical or mental condition of the offender, the nature of the offence and any other extenuating circumstances attending to the commission of the offence.⁹¹

Whereas in second case, which is also discussed under Section 4, the court may similarly make an order of discharge of the offender subject to the condition that he enters into a bond, with or without sureties, for committing no offence and keeping good behavior during the period mentioned by the court not exceeding from one year.⁹² In case of breach of these conditions, the discharge can be cancelled by the court resulting in to incarceration.⁹³

In third case, under Section 5, the court, after considering circumstances of the offence and the character of the offender,⁹⁴(except if the offender falls under the exclusion category)⁹⁵instead of sentencing the person at once may make an order of probational release

⁸⁸ Juvenile Justice System Ordinance, 2000 (XXII of 2000).

⁸⁹ JJSO, Section 11.

⁹⁰ The Ordinance, Section 4 (1).

⁹¹ Ibid.

⁹² Ibid, Section 4 (1) (b).

⁹³ Ibid, Section 4 (3).

⁹⁴ The cases now dealt under Section 5 of the Ordinance were previously handled through the application of Section 562 of CrPC. The said Section had been repealed after the promulgation of Ordinance.

⁹⁵ Section 5 (1) of the Ordinance says, “Where a Court by which-

for the offender. Such order will require him to remain under the supervision of a probation officer for the length of this order which must not be less than one year or more than three years. The probationer stands bound by a conditional bond, with or without sureties, “to commit no offence and to keep peace and be of good behavior during the period of the bond and to appear and receive sentence if called upon to do so during that period.”⁹⁶The court may also attach a few more conditions with the order which it considers necessary for preventing the repetition of same offence or other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.⁹⁷Such conditions may be varied, altered or super-added on the application of the probationer, or of the probation officer or at court’s own motion.⁹⁸

The law allows the court to place three types of supervision mechanisms against a probationer including, a) supervision by a probation officer, b) conditional probation-bond, c) superadded surety requirement with conditional probation-bond. These jointly linked mechanisms are used to support the smooth application of each other.

A- The Supervision of Probationer by the Probation Officer

The probation officer is appointed as principle supervisor of the probationer substantially to maintain a system of directions. He performs his duties under the province-wise domain of Department of Probation & Reclamation (R&PD hereinafter) which is an attached body of

(a) any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Pakistan Penal Code (Act XLV of 1860), or under sections 216-A, 328, 382, 387,388, 389, 392, 393, 397, 398, 399, 401, 402, 455 or 458 of that Code, or an offence punishable with death or transportation for life, or

(b) any female person is convicted of any offence other than an offence punishable with death.”

The offences listed down under Section 5(1)(a) include, Chapter VI - offences against the state, Chapter VII - offences relating to the Army, Navy and Air Force, offence of *Zina* Ordinance 1979- offences of rape, adultery and fornication Offence of *Qazf* Ordinance 1979 - offence of false accusation of *zina* (rape)216-A- Penalty for harboring robbers or dacoits, 328- Exposure and abandonment of child under twelve years by parent or person having care of it, 382 - theft after preparation made for causing death, hurt or restraint in order to commit the theft, 387 - 389 -Provisions relating to extortion 392-402 Provisions relating to robbery and dacoity or belonging to a gang of thieves, 455 - house-trespass or house-breaking after preparation for hurt or assault, 458- house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint.”

⁹⁶ The Ordinance, Section 5 (1) (b).

⁹⁷ Ibid, Section 5 (2).

⁹⁸ Ibid, Section 10.

the Home Department. He becomes a bridge between the department, the probationers and the court/prison authorities as the case may be. He is responsible for multiple pre-sentencing and post-sentencing tasks. For example, at pre-sentencing stage, during the trial, he may be assigned the duty to prepare a preliminary inquiry regarding the character, antecedents, home surroundings and other matters of like nature of the offender. The court has discretion to postpone the pronouncement of its final orders until the submission of this report by the probation officer however it is not mandatory for the court to depend upon or make this report a part of its final orders.⁹⁹ In many prominent foreign jurisdictions including the UK, Australia and South Africa, the pre-sentencing input forms the backbone of a non-custodial sentence. Such pre-sentencing input reports are prepared by the probation service basically to assist the judicial decision making at the sentencing stage.¹⁰⁰ It enables the court to rely on the expertise of the probation department in determining the risk that offender poses to the community and delineate the terms of the probationary sentence accordingly.¹⁰¹ This report is not only helpful to gather the information with regard to making a decision to put an offender on probation or not but it has also been found helpful where the court is considering whether any other form of sentence might divert the offender from crime. The report may also be helpful for the court's assessment of culpability of the offender. However this is a routine matter for the courts in Pakistan that they do not either order or wait for the preparation of these important preliminary inquiries. There are various reasons for this skip. As a practical requirement, such report must contain recommendations from the probation officer regarding the duration of probation and specific conditions that ought to be imposed on the probationer for his/her betterment. Since no such substantive data is required under the law therefore the courts do not wait for submission of these reports by the probation officers. Secondly, the

⁹⁹ Rule 18(1) talks about this preliminary enquiry conduct-able by the probation officer but the Ordinance does not mandate or require such input from the probation department.

¹⁰⁰ Fasihuddin, Jianhong Liu, Susyan Jou. BFill Heberton ed. *Criminology and Criminal Justice System in Pakistan, Handbook of Asian criminology* (New York: Springer Publishers 2013), 247-282.

¹⁰¹ AITBAAR, "Effecting Change in Khyber-Pakhtunkhwa's Probation Regime": 75-76, Supra note 81.

relevant R&PDs are gravely deficient in the required human resource and other facilities to make such reports efficiently and on prompt bases. Thus the courts by and large try to avoid giving instructions for such presentations.

At post-sentencing stage, the probation officer performs the duties, such as, conducting frequent and scheduled ‘visits’ to/from the probationer essentially to carry out the reformatory needs of the offender.¹⁰²He is required to put endeavors to improve the character of the probationer through exercising the mandate to advice, assist and befriend him and instigate him to improve his conduct during these visits.¹⁰³He is also believed to advance the offender’s general living conditions through finding him suitable employment.¹⁰⁴Probation officer should also encourage him to take help of any recognized agency for his welfare and general well-being and to take advantage of the social, recreational and educational facilities which such agencies might provide.

Principally these ‘visits’ should be utilized as an effective tool of reformation and a purposeful mean to curb the recidivist phenomena of the offender nevertheless they are usually taken as not more than a formality by the probation officer and the probationer. The sessions carried out upon every visit are meant only for general counseling and advices which are entirely governed by the discretion and personal assessment of the probation officer; he himself decides about his behavior to be maintained during such visits and the method to advice, assist and befriend the offender in question.¹⁰⁵It happens because the (provincial) R&PDs generally arrange no expert training programs to educate the probation officer and the probationer regarding the fundamentals executable between them throughout the meetings. The training received by the probation officers can be employed only to guarantee the observance of conditions of probation-bond by the probationer; other than this they have

¹⁰² The Ordinance, section 13(a); the Rules, rule 10 (a).

¹⁰³ The Ordinance, section 13(d) and The Rules, rule 10 (c) (d).

¹⁰⁴ Ibid.

¹⁰⁵The fact was revealed by several serving probation officers in their interviews conducted by the author during March 20 to April 17, 2016.

no qualified skills to make arrangements and plans for post-sentence rehabilitation and reintegration of the probationer.¹⁰⁶

The dearth of training courses makes the probation officers professionally non-proficient. The untrained officers cannot perform well according to their profile and position solely with theoretical knowledge extracted from formal education.¹⁰⁷The international standards also require that, “before entering the duty, staff should be given training that includes instruction on the nature of non-custodial measures, the purposes of supervision and the various modalities of the application of non-custodial measures.”¹⁰⁸However such training requirement has not been incorporated by the relevant statutes to enhance and improve the skills of the probation officer. Moreover the R&P Departments also lack their own systemic and specialized training arrangements for their staff. Brief sessions on initial understanding of duties of probation officers are though held at the National Academy for Prison Administration (NAPA), Lahore, however this Academy is fundamentally responsible for training of prison personnel.¹⁰⁹The probation staff and prison staff have altogether different rather conflicting duties therefore these beginner sessions lay disconcerting affects on the probation officers.

The particular non-perceptiveness of probation officer and the probationer to carry out the technical requirements of law becomes another critical point with regard to execution of a probation bond. For instance, the probation officer is though duty bound to explain the terms and conditions of the probation order to the probationer, and to look into the requirement that he observes the conditions and if he deems necessary, he issues warnings as an endeavor to ensure the adherence of conditions by the probationer.¹¹⁰However practically neither the

¹⁰⁶ Ibid, March 12, 2016.

¹⁰⁷ This is a requirement under rule 7 of the Rules.

¹⁰⁸ The Tokyo Rules, rule 16.2.

¹⁰⁹ International Crisis Group, “Reforming Pakistan’s Prison System,” *Asia Report No, 212, 12 October 2011*(Islamabad, 2011): 5.

¹¹⁰ The Ordinance, section 13(b) and the Rules, rule 10 (a).

probation officer nor the probationers usually have knowledge about the importance of such conditions which are placed as a supervisory mechanism in the probation order; this is because these conditions are approximately in all the cases remain the same with no substantial change with relevance to the individual apt supervision of the probationer.

Human and technical resource management is another area of greater concern to revolutionize the understanding of responsibilities of the probation officers. Though the previous few years, because of the directives issued from the forum of the National Judicial Policy, 2009, saw an increase in the number of probationers yet this amplification of figures is hard to sustain due to shortage of corresponding human and technical resources on the part of R&PDs.¹¹¹

For example, currently there are total 97 officers working at R&PD, Punjab. They include 1 director, 5 deputy directors, 14 assistant directors, 55 male probation officers, 2 female probation officers, 15 male parole officers and 5 female parole officers. In Sindh, there are 645 probationers with 25 male and 1 female probation officers to supervise them. In Balochistan there are 70 probationers with 2 probation officers. Whereas in KPK, 26 officers are working in R&PD including 1 director, 1 deputy director, 17 probation officers (with 4 more seats to be filled) and 6 female probation officers (with 1 more seat to be filled) and 1 parole officer (with 1 more seat to be filled).¹¹² In all four provinces, the number of probation officers is exceptionally low in comparison to the probationers. This situation creates doubts over the supply of requisite treatment to every individual probationer by his supervising probation officer. No matter how dedicated the relevant probation officer is, he cannot perform nicely with excessive load.

¹¹¹ There were 38,219 offenders released by invoking the provisions of the Ordinance, 1960 by the courts only in the financial year 2011-12. In the year 2013-14, this number of probationers decreased and reached at 23,379 including 22,974 male, 300 female, 105 juvenile. (A province-wise data collected from R&P Departments of Pakistan through telephonic interviews during June to July 2015.

¹¹² http://directorate_of_prob.kp.gov.pk/page/contacts (last accessed: April 1, 2016).

The understaffed R&PDs are also under-equipped and under-resourced in all four provinces. The essential facilities to continue the supervision of a probationer, such as, sufficient ways of transportation for probation officers to visit probationers, computer systems to systemize the relevant data of the offenders, the provision of latest surveillance devices and requisite training skills to handle them, installation of telephone facility, internet, photocopy and fax in the field offices, suitable office accommodation and field offices for director are yet to be resourced.¹¹³ This is also not viable to maintain the register, diary, book, order or entries on regular bases without the provision of required resources. The probation officers have limited wherewithal to keep check over the probationer for the observance of conditions of the bond or for drafting and submitting the report of a probationer (as one officer usually deals with hundreds of probationers simultaneously under his supervision¹¹⁴). Such few means of training and equipment are certainly enough to defeat the surveillance capabilities of a probation officer.

Releasing an offender (though convicted with a minor offense) without placing him under some type of treatment to reform and rehabilitate him seems irrational. This is certainly an essential measure to curb his recidivist tendencies and is equally important for his reintegration in to the society and definitely crucial to complete the process of probation. Research shows that supervision alone does not help offenders to change nor the personal and social skills needed to persuade the people to revolutionize their behavior can be readily engineered however supervision along with good reformation programs might perform these

¹¹³ Directorate of Reclamation & Probation, *Annual Report, KPK* July 2013-June 2014: 38-40. (*Annual Report, KPK* hereinafter)

¹¹⁴ Editorial, "One probation officer for 347 released by courts," *The News* (Lahore), September 16, 2011. Available online at, <https://www.thenews.com.pk/archive/print/321784-one-probation-officer-for-347-released-by-courts> (last accessed: September 08, 2016).

tasks.¹¹⁵ Nevertheless in Pakistani scenario such specialized treatment procedures are also unavailable.

B- The Conditions attached to the Probation Bond

Offenders sentenced to probation are required to adhere to certain conditions of supervision. If they violate these conditions, even without committing a new crime, they can suffer revocation of the probation and face a subsequent term in prison. Such violations are called ‘technical violations’. A higher percentage of probationers failing to complete sentencing through probation is that who commits technical violations. Similar to other regimes, in Pakistani law too, the breach of probation conditions by the probationer is taken very seriously.¹¹⁶ It can lead to supply of summons to the probationer and his sureties at the first step and in more severe cases, warrants of arrest may also be issued by the court. These violations increasingly contribute to the growth in prison time served.¹¹⁷

Section 4 and 5 of the Ordinance discuss these conditions as second monitoring method placed against the probationer. In this regard, Form B and C annexed to the Rules bring up conditions to be observed by the probationer. The three conditions of ‘Form B’ bind the probationer to keep peace and good behavior during the continuation of probation-bond; whereas ‘Form C’ supplies an extensive list of conditions to be observed by the probationer as part of his particular probation-bond. The court can modify the conditions specifically provided by Form C under Section 10. In addition to these conditions, the court can also place supplementary conditions at its own discretion under Section 5(2) which is supported by Rule 21(2).

However the courts usually do not bother to change the formatted conditions. They generally remain basic in nature and identical in character for every probationer without the

¹¹⁵Kwadwo Ofori-Dua and others, “Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis Ashanti Region, Ghana”, *Supra* note 22 at 16.

¹¹⁶ The Ordinance, section 7.

¹¹⁷ *Doris Layton Mackenzie*, 26-27, *Supra* note 85.

transportation of any substantive alteration. Prima facie the principle that these conditions should hit the inner criminal inclination and instinct of the subject is neglected by the courts; this neglect substantially damages the aspects of reformation of character of the probationer through the choice of right direction of treatment.¹¹⁸ Similar to the other complexities (discussed in the previous portion), the absence of pre-sentence input proves one of the biggest impediment for courts in the placement of match-able conditions to the culpability of the offender, his given circumstances, aptitude and the nature of the offense.¹¹⁹

The responsibility of interpretation of ‘breach’ and ‘method of execution’ of a particular condition is fundamentally upon the probation officer who decides it according to his own perceptive and without any clear directives. Mostly overburdened, untrained and unfamiliar (with their professional requirements) probation officers are also unacquainted of the principle that consequence of breach of condition must be distinctive in accordance to seriousness of violation. And that the distinction should be made between ‘re-offending’ and ‘technical violation of a conditions’. For example, if many probationers are sent to prison because they are violating the conditions, rather than for re-offending, in that case it is understandable that the conditions need reconsideration.¹²⁰ Various reasons for breach of a condition also need to be taken in to contemplation, for instance, incorrect targeting (here targeting refers to careful selection of offenders eligible for non-custodial sentence) or excessively strict or soft or complicated conditions applied against a probationer.

In majority cases, the offenders commit technical violations which prove severe. There is little reason to believe that offenders who receive probation commit more crimes, let alone more technical violations. The unusual control over offenders which does not match

¹¹⁸ Kwadwo Ofori-Dua and others, “Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis Ashanti Region, Ghana”, *Supra* note 22 at 16.

¹¹⁹ J. E. Hall Williams, “Report of the Interdepartmental Committee on the Business of the Criminal courts,” *The Modern Law Review* 24 (1961): 360-365.

¹²⁰ Kwadwo Ofori-Dua and others, “Prison without Walls: Perception about Community Service as an Alternative to Imprisonment in Kumasi Metropolis Ashanti Region, Ghana”, *Supra* note 22 at 16.

with their offense related instinct increases the probability of technical violations. This is, most likely, a reason for the increase in the proportion of offenders admitted to prison as probation violators.

C- The Surety Requirement Attached to the Probation Bond

The surety is a back-up security measure in addition to supervision by the probation officer and conditions attached to the probation bond. This mechanism ensures the future obligation of probationer to abide by the conditions and that the probationer will stay peaceful under the supervision of the probation officer. And in case of any kind of neglect, the sureties remain responsible. Section 122, 406-A, 514, 514-A, 514-B and 515 of the Code of Criminal Procedure, 1898,¹²¹(the CrPC hereinafter) so far as may be, apply in the case of sureties and bonds taken under the Ordinance.¹²² These provisions deal with, the precautions to be taken before accepting a particular person as surety and the situations where the surety bond might be forfeited or the procedures in case of death or insolvency of the surety. That means the court should be vigilant in case of requiring a surety bond for the issuance of probation orders and in case of default of the surety in any given manner, the court must ask for the replacement on urgent bases as a backup surveillance measure.

3.1.2 THE JUDICIAL PERSPECTIVE OF PROBATION

A survey of decided cases show that similar to the Pakistani statutes on probation, the judiciary also generally remained disinclined to explain the apt mode and mechanism of rehabilitation of offender attainable through probation. The majority of probation orders genuinely fail to spot several important aspects of a non-custodial sentencing system, such as, the mechanism to activate all surveillance measures to decriminalize the probationer with better supply of risk management, the mode of execution of a probation bond, the significance of fusion of a probation order with community sentencing strategies in a way in

¹²¹ The Code of Criminal Procedure, 1898 as amended by Act 2 of 1997.

¹²² The Ordinance, section 9.

which offender should acknowledge his offense and can get himself engaged in a process of rehabilitation. The reason behind all these happenings is that the judges lack basic understanding of how measures like probation work in practice. This makes them even less likely to grant these orders.

The courts put a lot of emphasis on rehabilitation of offender in their orders of probation. For example, in the case of *Inspector General of Police, Punjab, Lahore vs. Mahmood Ikram*,¹²³ the Supreme Court explained that,

It may be seen that primary object of enacting law regarding probation was to provide reformatory measures and retrieve the amateur offenders who are neither involved for committing heinous offences nor those connected with moral turpitude; thereby making genuine attempt of restraining them from repetition of crime and ensuring their useful rehabilitation as honest, industrious and law abiding citizens within the purview of section 5(2) of 'the Ordinance'. Thus, a Court trying the case has been empowered to exercise discretion in suitable cases so that 'First Offenders' may be saved from indignity of incarceration and becoming obdurate criminal by preventing their association with hardened guilty persons and thereby keep them from unhealthy influence of jail life. It is noticeable that section 11(2) of 'the Ordinance' clearly mentions about wiping away the stigma of conviction, which could create future impediments or hazards of such offender while making efforts to rehabilitate himself thus providing a shield from social sickness, or his rejection in the society on the ground of past conviction.

Nevertheless it seems that the courts are usually unacquainted of true sense of the expressions, 'reformation' and 'rehabilitation'. Such as, in *Zulfiqar Abbas vs. The State*,¹²⁴ the accused, a first time offender, was sentenced to imprisonment by the trial court. The decision got reversed by the appellate court and instead he was sent on probation. The Court elaborated its reversal; it was said that, "out of two options, i.e. the punishment and the reformation; the Court chose the latter one so that the convict might change himself." The Court neglected the fact that probation is also a punishment though of a non-custodial nature

¹²³ 1988 SCMR 765.

¹²⁴ PCrLJ 2007 Karachi 306.

coupled with a few ingredients which have better chances to reform the offender in comparison to a custodial sentence (though those ingredients were missed out by the Court). The Court further pointed out that the reformation and rehabilitation of offender is the keynote of the law of probation. And that this statute provides a chance of restoration from crime to less serious offenders in a way that they might become useful and self-reliant members of the society. The judgment however nowhere explained the modus operandi for such occurrences.

Similar verdicts were issued by the Sindh High Court in 2007 in *Jashanlal and another vs. The State*,¹²⁵ *Wazir and 4 others vs. The State*,¹²⁶ *Zafar Iqbal and 3 others vs. The State*,¹²⁷ *Zulfiqar Abbas vs. The State*¹²⁸ and *Nindo Alias Nizamuddin and 4 others vs. The State*.¹²⁹ Justice Rehmat Hussain Jaffery, who wrote all these judgments, invoked same grounds with identical language to justify the probationary verdicts. For example, at the very start of *Jashanlal's case*, the Court observed (same kind of observations were made by the Court in other aforementioned cases too) that,

...the probation would help in reforming accused, because if accused were sent to jail, then they would be mixed up with hardened criminals and their future might be damaged. If accused were sent on probation then society would be benefited as accused during period of probation would not commit any similar offence or other offence and society, in circumstances would feel safe at the hands of accused.

The opinion formed by the Court seems open ended. It leaves an impression that the incarceration can in no way reform an offender; only probation can do this. Whereas factually the probation, alone, is not that mechanical to reform the subject; a few other essentials, such as, proper training programs to rehabilitate the offender, the community services particularly ordered in context of offense committed to make the offender realize the guilt of his felony

¹²⁵ YLR 2007 Karachi 303.

¹²⁶ PLD 2007 Karachi 113.

¹²⁷ PCr.LJ 2007 Karachi 130.

¹²⁸ PCr.LJ 2007 Karachi 306.

¹²⁹ PLD 2007 Karachi 123.

must be attached to it. Probation by itself is not the cure of all bad intents and prison solely is not responsible for nourishing the phenomenon of recidivism. No one can declare that the probationer would certainly not commit another offence during the pendency of his probation. Moreover, the community cannot automatically feel safe in the hands of the probationer; it needs solid arrangements to ensure such state of mind.

Another connected complication is that the monitoring mechanisms do not respond to the accurate requirements with reference to offense and reformation of a probationer. Courts exercise their discretion to include ‘suitable cases’ to award sentence through probation, such as, for those who have excessive and serious domestic responsibilities,¹³⁰ or for showing compassion for the accused who was the sole bread winner of the family,¹³¹ or they issue probation order out of sympathy while considering the old age¹³² or tender age¹³³ of the offender. These cases might be included within the purview of ‘suitability’ however the issue arises where the courts do not incorporate within their judgments even those general principles which must float on the surface of a non-custodial order, i.e. the rehabilitative requirements of the offender, the protection of the society and the interests of the victim.¹³⁴ To integrate these principles, the courts have to tailor the monitoring/surveillance measures accordingly and make the offender aware of the reasons and requirements of the issuance of non-custodial sentence in favor of him.

For instance, in *Mst. Anwari vs. The State*,¹³⁵ the petitioner was a 15 years old girl convicted by the trial court for mixing up poison in her husband’s meal (which was not proved fatal). The High Court while keeping her age and gender in mind suspended 3 and

¹³⁰ See for example, *Reham Din vs. The State*, PLD 1985 Quetta 272; *The State vs. Shah Mahmood*, PLD 1976 Peshawar 26.

¹³¹ See for example, *Khalid Alias Goga vs. The State*, PCrLJ 1971 Lahore 1313

¹³² See for example, *Zahoor Din vs. The State*, PCrLJ 1993 Lahore 388

¹³³ See for example, *Anti-Narcotics Force through Assistant Director, ANF, Multan vs. The State and others*, PCrLJ 2016 Lahore 953.

¹³⁴ As it is required by Rule 8.1 of The Tokyo Rules.

¹³⁵ PCr.LJ 1968 Lahore 457.

half years imprisonment awarded by the trial court and put her on one year probation under the supervision of the probation officer in conventional terms along-with a surety bond for abiding by the condition that she would commit no offence during the period of the continuation of probation. In another case of *Muhammad Jamil and another vs. The State*,¹³⁶ the Lahore High Court issued the probation orders of two offenders charged for committing rape of a 10 years old girl. The Court, in view of tender age (13 years at the time of happening of crime) of the offenders, sent them on probation after placing the standard conditions. These orders however did not contain the particular mechanism adopted in the monitoring measures to meet the special rehabilitative needs of the offenders.

The author thoroughly surveyed the judgments pronounced since the promulgation of the law on probation in Pakistan and found that the courts have been consistently following the same position since 1960 to 2014. However in 2014, in *Ghulam Dastagir and 3 others vs. The State*,¹³⁷ Justice Qazi Faez Esa tried to incorporate nearly all fundamental ingredients of a non-custodial sentence like probation. He discussed the security mechanisms placed against a probation order, their requisite purposes, contemplated needs of a properly employed surveillance measure and the importance of joining community service with a non-custodial sentence.

As per the facts of the case, the accused were convicted for hunting two female markhors (screw horn goat) and were initially sentenced with imprisonment for six months and fine by the magistrate. However the Sessions Court in appeal reduced the sentence of imprisonment for ten days only. The High Court in exercise of revision jurisdiction maintained punishment of six months imprisonment imposed by the magistrate and set aside the order of the Sessions Court to such extent that in addition to imprisonment, the accused were put also on probation for one year.

¹³⁶ PCr.LJ 1970 Lahore 252.

¹³⁷ PLD 2014 Quetta 100.

During the proceedings of the case, the Court issued the notices to the Advocate General (AG) and Prosecutor General (PG) to address the issue, whether on passing a probation order, a condition could be imposed on convict to render ‘community service’. Both officials were also asked to brief the Court on the question of mechanism of carrying out the duties of a probation officer. On first question the AG and the PG stated that, “to the best of their knowledge, no court in Pakistan had required an offender placed under probation to render community service, however, the law does not forbid the same.” On second question their response was that the probationers were basically meant only to periodically visit the office of the probation officer.

The Court summed up its discussion by compiling its observations on both replies at once. It was of the view that the Ordinance and the Rules were promulgated in 1960 and 1961 respectively, when there was no concept of community service orders and hence the law did not mention the concept specifically. Nonetheless the Court is empowered under Section 5 (2) to impose those conditions on offender as in the opinion of the court may be necessary for securing supervision of the offender and which could prevent a repetition of the same offence or a commission of other offences and for rehabilitating the offender in a way that he may prove himself as an honest, industrious and law-abiding citizen. “Hence the condition imposed on offender for paying back the society through the orders of community service does not offend the real spirit of the conditions as discussed in Section 5 (2) of the Ordinance.”

The Court had further two questions under consideration; whether the petitioners would be rehabilitated through periodically marking their attendance before their probation officers or this purpose could be better served through serving the community. The Court opted for the latter course to achieve the goal of rehabilitation and reformation of the offender. Therefore the probation bond required the offenders “to render community service

of planting twenty five trees each and to take care of them throughout the period of their probation (such pattern of community service was opted by the offenders themselves). While considering the particular area of community service, i.e. the planting of trees as unknown for the particular probation officer, the Court also directed to avail expertise of an agricultural expert.

The judgment was an exception in Pakistani judicial history of probation to define this particular sentence, its objectives, the community service and how all these expressions may be connected with the final goal of rehabilitation and reformation of offender and that how he may be transformed in to an industrious part of society. Though this judgment gave a direction to other judges to incorporate some general rules in probation orders passed by them, such as, the purpose of rehabilitation and reformation of a less-serious offender can be achieved through adopting non-custodial sentencing measures like probation however the sentence should carry effective monitoring mechanisms and for that the courts are needed to make Section 5(2) operational. Additionally, there is a need of joining the community sentencing with community service to sensitize the society for non-custodial sentences.

Nevertheless this is not as much as necessary; similar to other branches involved, the judiciary rather especially, need to be work-shopped and taught the purpose of and need for the branches of restorative justice. In this way, judicial officers will be able to reacquaint themselves with probation as well and thus be much more likely to actually make use of it when handing out sentences in the future. This will ensure the necessary protection of the rights and interests of the victim, the accused and the community.¹³⁸

3.2 CONCLUSION AND RECOMMENDATIONS

The sentencing methods should survive a constitutional challenge and if any particular sentencing method promotes any right then it should be celebrated. Probation orders are

¹³⁸ Rossouw, *Alternatives to Traditional Sentencing Methods*, 7-8. Supra note 86

intended to be constructive and positive. They help to retain the constitutional right of dignity and self esteem of the offender without disrupting his family unit; he may retain his employment, can continue his education and so forth. On the other side, the state saves expenses of keeping the offender incarcerated and which also help in preventing overcrowding of prisons. The offender does not risk exposure to undesirable elements in jail instead pays back to society for his wrongdoing and puts effort towards developing a sense of social responsibility.

However placement of a few raw conditions and engagement with formality of the supervision by a probation officer cannot mechanically transform an offender and accomplish aforementioned objectives. This is an incomplete and underdone legal/judicial solution employed on the name of non-custodial sentence. It strongly entails complimentary procedures attached to such conditions and supervision. For that purpose the courts must tailor the basic supervision mechanisms for probationers in true spirit of a non-custodial sentence which is to rehabilitate and reform the first time offender in a way that he can serve the society/community. Hence the conditions of the probation bond might be customized in every case along-with stipulating some community works by keeping the particular needs and interests of the probationer in mind whereas the probation officer should thus assist him.

However for making it realistic, first, there must be some arrangement of apposite training programs for all concerned i.e. the judicial officers responsible to issue such orders, probation officers to make them aware of those methods and strategies which can positively influence the probationer towards the reformation and rehabilitation and for the probationers to understand the genuine strength of a non-custodial community sentence.

For this purpose this research proposes substantive alterations in Probation Ordinance and its complimentary Rules. Some suggestions have targeted the administrative departments

responsible to run the institution of probation. These proposals are significantly based on the Tokyo Rules.

A- Proposals for Statutory Alterations

- 1- The definitions as discussed under Section 1 of the Ordinance and Rule 2 of the Rules must incorporate the word 'Community Sentence'. It is recommended to rename the 'Probation Orders' as 'Community (Service) Rehabilitation Order' to make it more specific and clear for all segments of the society and particularly for the stake-holders.
- 2- The 'Conditional Discharge' discussed under Section 4 (b) must incorporate the requirement of attendance of a rehabilitative program suggested by the court for the dischargee to restrain his criminal intents.
- 3- The conditions as discussed for the issuance for probation order under first proviso of Section 5 (b) must be left in the hands of the court issuing the particular orders. This part of provision should be amended to make the court responsible to address the particular nature of offence committed by the potential probationer. This amendment will also assist the court to define the suitable rehabilitation program for the probationer and the determination of particular area of community service where he is ordered to serve during the probation period.
- 4- Section 7 must differentiate between 'technical violation of condition' and the 'commission of new offence during the probation period' with reference to consequences. A technical violation of condition of trivial nature must not change the nature of sentencing, that is, to convert it from non-custodial sentence to custodial sentence. The consequence of serious breach of condition should also be left at the discretion of the court exercisable in the light of recommendations given by the probation officer. However a new offense might lead to imprisonment.

- 5- The duties of the probation officer need to be revisited in the light of necessity of rehabilitation and reformation of the offender. The term 'visit' as discussed under Section 7 (a) must give an elaborated meaning of 'visit' to the probation officer by the probationer. Section 7 (d) should incorporate the words 'for reformation'. Rule 10 must also be amended with the particular spirit of requirement of reformation and rehabilitation joined to a non-custodial community based sentence.
- 6- The probationer must also be able to report a complaint against the probation officer. Such complaint procedures may be incorporated under Rule 17 as an added responsibility of the 'Case Committee'.
- 7- The requirement of 'preliminary enquiries', given under rule 18 must be carried out by the court compulsorily and subsequently the probationer might, on priority bases, be given under the supervision of the same probation officer who conducted such enquiry in to the matter.
- 8- The 'community service orders', must be discussed as an integral part of the probation order, under a separate newly added provision discussing the issuance and execution procedure of such order in detail.

B- Proposals for Administrative and Judicial Alterations

- 1- An 'information management system' must be devised to keep the records and data of probationers with relevant probation officer and R&PD.
- 2- The budgets of provincial R&PDs must be enhanced to meet the necessities with regard to improvement of human resource and infrastructure. This is a mandatory pre-requisite to strengthen the surveillance mechanisms with relation to probation.
- 3- The said departments should request to increase their personnel in a structured way by dividing the duties in persons of various official profiles to make the institutions efficient. The new portfolios which may be introduced can be assessment officer, case

management officer, reporting officers, compliance and surveillance officer, intelligence service, support staff, court related staff and program staff.

- 4- The probation officers must get professional trainings immediately after their induction and must also be engaged in refresher courses on periodical bases.
- 5- The respective R&PDs should be responsible to arrange variety of programs such as, probationers' awareness programs about the probation order and community sentence, probationers' reformation and rehabilitation programs and community awareness programs on community oriented sentences, etc.
- 6- Community involvement is essential for the successful supervision (because community contacts are a good source of important information on offenders which helps the supervision process) and accomplishment of community sentence. Therefore the community sensitization is essential.
- 7- And as foremost requirement, the judges must be trained to issue non-custodial orders thus they can exactly touch the aims of such orders.

This is important to make probation more strengthened as a non-custodial sentencing mean primarily to save maximum prisoners from the curse of imprisonment. For this purpose, this system should be more clear and understandable for the court, the probationer and the probation officer.

CHAPTER IV
PAROLE AS A POST-SENTENCING NON-CUSTODIAL MEASURE IN
PAKISTAN

INTRODUCTION

In substance, the law of parole is very near to the law of probation. They both serve the purpose of community rehabilitation and reintegration of the offenders.¹³⁹ However a probation order allows the offender to serve his sentence without being incarcerated whereas in parole, the eligible prisoners can secure a pre-time release from the prison and passes the remaining term of his sentence through community integration. Thus the sentence of probation and its revocation in case of any breach is issued by the judiciary while the executive branch delegates its powers to the Secretary Home to release eligible prisoners on a parole license as well as to revoke this license.¹⁴⁰ Nonetheless the department of R&P is responsible for the maintenance of surveillance of both, the probationers and the parolees through probation officers and parole officer respectively.¹⁴¹

In practice, the circumstances are different. In Pakistan, the prevalent understanding on the grant of parole is that it might be approved only in urgent situations such as to see a (close relative) patient, to attend funeral of some family member etc. However the importance of original purpose of parole, that is to allow an early release to the deserving prisoners for their reintegration is found highlighted in very few and rare cases. The question, whether those cases generally fulfill the required criterion or not, is another issue.

¹³⁹ See, Edith N. Burleigh, "Probation and Parole," *Journal of Criminal Law & Criminology* 3 (1922): 320-329.

¹⁴⁰ Good Conduct Prisoners Probation Release Act, 1926, Section 2.

¹⁴¹ See for detailed study, *Annual Report*, KPK, Supra note 113.

This Chapter will explain the statutory perspective of parole as post-conviction non-custodial methodology existing in Pakistan with special reference to its weak surveillance measures. The case law is hardly available on this particular area of alternative sentencing system owing to the reason that the powers to award and refuse the parole have been granted solely to the executive branch and judicial offices do not often intervene in exercise of such powers. However a few references of those cases have been cited where though parole was not the substantive issue nevertheless the courts discussed it as a critical matter connected to the case.

4.1 THE STATUTORY PERSPECTIVE OF PAROLE IN PAKISTAN

In Pakistan, the Good Conduct Prisoner's Probational Release Act, 1926(The Act, 1926 hereinafter) and its procedural rules named Good Conduct Prisoner's Probational Release Rules, 1927(The Rules, 1927 hereinafter) deal with the cases of parole. The Act, 1926 provides the general understanding of the law however the detailed procedure of issuance of parole license has been discussed under the Rules, 1927. Whereas the Executive Orders on Parole, 1934 (Executive Orders, 1934 hereinafter) is the exclusive law to manage the supervision of parolees by the parole officers.

The parole licenses may be issued in two ways, for 'short term parole' (temporary parole) and for 'long term parole' (regular parole). Short term parole is granted on the personal request of the prisoners usually in crisis situations by the Home Department directly through the Home Secretary whereas long term parole is granted by the Home Department through relevant Provincial R&PD. To select and recommend the names of eligible prisoners for long term or regular parole, the AD and the parole officers are authorized to visit the jails.¹⁴²In addition to it the AD can consider the names of eligible prisoners for parole on the application of the prisoner, his relatives or friends or at the recommendation of the Jail

¹⁴² See, *Annual Report*, KPK, 29, Supra note 113.

Superintendent.¹⁴³For long term parole the decision may be made in favour of those prisoners whose conduct appears to be mended and it is expected that they would lead a constructive and productive life after this conditioned release.¹⁴⁴A list of such prisoners is forwarded to the relevant Provincial Government through the Director, R&PD with his recommendation for their release under the Act, 1926. The Government may thereupon permit all or any of such prisoners to be released on conditional license under Section 2 of the Act, 1926.

As a matter of law, extended powers are given in the hands of the AD of R&PD under Rule 5 of the Rules, 1927 where the AD is generally responsible for the supervision, direction and control of all prisoners released under the Act.¹⁴⁵However he delegates such duties specifically to the parole officers working under his direct control¹⁴⁶ who perform their statutory tasks under the Executive Orders, 1934.

After getting released from the prison on long term parole, the parolees should be employed with employers approved by the R&PD on fixed wages or may otherwise be kept engaged in suitable trades and healthier environment during the remaining portion of their term of sentence under the supervision of parole officer. Parole officer is generally responsible for the conduct, discipline and due observance of the conditions of license of all the prisoners placed under his authority. He reports any breach of conditions of a license by a parolee to the AD.¹⁴⁷ Under Rule 7 (read with Section 6 of the Act), the license may also be revoked either on the report of a parole officer or if the AD himself finds any prisoner of being guilty of a breach of conditions of his license or considers him unfit to be allowed to remain at large under the license; the matter is reported through AD to Director R&PD upon which the government may revoke his license.¹⁴⁸If any offender escapes from the supervision

¹⁴³ The Executive Orders, 1934, Order 7.

¹⁴⁴ The Rules, 1927, Rule 4.

¹⁴⁵ Ibid, Rule 5 (a).

¹⁴⁶ Ibid, Rule 5 (b) and 6 (a).

¹⁴⁷ The Rules, 1927, Rule 6 (c).

¹⁴⁸ Ibid, Rule 7 (a).

or authority of the responsible persons (as mentioned in Section 2), or after the revocation of the license under Section 6 fails to return to the prison from which he was released without a lawful excuse, he becomes liable to punishment.¹⁴⁹

4.2 THE REALISTIC SCENERIO

In Pakistan, the parole is usually understood as a mechanism through which a prisoner can avail a temporary license of release granted by the competent authority; or in other words the common man is aware only of the 'short time or temporary parole'. This belief has been strengthened with the passage of time because the 'long term' paroles though principally should be granted to the eligible prisoners but are usually neither approved on justified and impartial grounds nor do a proportionate number of prisoners get authorization to enjoy this right. There are many causes of this deplorable plight.

The authority to choose eligible offenders for parole through conducting visits of the prisons is practically the supreme power vested in the hands of the officers of the R&PD. However this department is facing a serious shortage of human resource. Parole is relatively more neglected area than the probation. Here the deficiencies with regard to training, provision of human resource, technical faculties are relatively acute. In many districts, the probation officers are performing the duties of parole officers too. They are already occupied with their principal post; additional duties of a parole officer are hard to perform.¹⁵⁰ Thus the department cannot carry out the visits to prisons to choose eligible prisoners for parole on regular basis. Irregular visits create a gap of proper co-ordination between the prison management and the parole officers.¹⁵¹ Consequently many eligible and deserving offenders remain deprived of their legal right of release on parole.

A rather greater complexity is found in the fact that the executive branch exercises unfettered powers in granting and revoking the parole license. The process is not subject to

¹⁴⁹ Section 7 of the Act, 1926

¹⁵⁰ See, *Annual Report*, KPK, 29-30, Supra note 113.

¹⁵¹ *Ibid*, 31.

any kind of complaint procedures. The 'long term parole', basically meant to be a reformatory strategy is run under complete discretionary powers of the officers which are sometimes exercised coercively and ineffectively. The research says that the professionals responsible for rehabilitation should be able to demonstrate how they effectively changed offenders otherwise the authority and autonomy of those officials in establishing the length of sentences should be severely restricted.¹⁵² Since in Pakistan, there is no legal or administrative tool to make the relevant officials responsible to prove the facts with relation to improvement of character of a particular prisoner due to multiple reasons such as, here no proper reformatory programs are being offered to the prisoners, the few strategies which are applied by the administration on the name of reformation are either totally unavailable at certain places or are inappropriate or are conducted in such bad manner that they do not create any material difference. Secondly there are no pre-release mechanisms imposed against a prisoner to determine his level of rehabilitation and the consequential capacity to pass his remaining sentence within society with a positive attitude. Thus the wide discretion is sometimes used in disparity and unfairly in the parole release system. The prisoners usually claim that the system discriminates between offenders; those who become successful to develop better relations with officials get the paroles however the right is denied to offenders who challenge prison conditions.¹⁵³

In furtherance to it, the 'short term' parole decisions are by and large taken under political motivations. The evidences show that, in mostly cases the benefit of short term parole goes to the political prisoners.¹⁵⁴ It is observed that the 'long term' parole is also issued

¹⁵² *Doris Layton Mackenzie*, 8-9, Supra note 85.

¹⁵³ *Ibid.*

¹⁵⁴ for instance, Ms. Benazir Bhutto got a release on parole on September 09, 1981 for participating in her sister's wedding; Mr. Asif Ali Zardari, the husband of former Prime Minister Benazir Bhutto, took the benefit of parole provisions quite a few times; on November 13, 2002 for the funeral prayers of his deceased mother(according to a news agency Zardari's release on parole came at a time when there are reports that the top PPP leaders are negotiating with the government to secure his release in return for their cooperation in the formation of a broad-based government. PPP sources say that they are demanding the government release Zardari unconditionally and withdraw corruption cases against their leader Benazir, who is living in exile., this

for those who have political affiliations. For example, during 2002 to 2007, the Sindh Home Department issued 193 parole orders of fully convicted prisoners and 35 of under-trial prisoners (who mostly had political associations) from various prisons of the province.¹⁵⁵ There were 68 registered cases of heinous crimes including murder, attempt to murder, police encounter, kidnapping, riots and possession of illegal weapons in 16 different police stations of Karachi against these 35 under-trial prisoners. 2 cases of these parolees were pending in the Anti-Terrorism Courts. Many of these under-trial parolees had absconded to foreign countries whereas a few of them had already died. Initially temporarily issued parole orders were later converted in to regular parole orders by the Home Department. In the next step, these under-trial parolees were pronounced ‘missing’ by the Police.

Serious illegalities and breach of law was committed in granting these orders. The basic statutory requirement for parole, i.e. the offender should have served a specific mandatory part of his sentence, was ignored. The issuance of release orders through parole of an under-trial prisoner is equivalent to running a parallel justice system which is an illegal act.¹⁵⁶ However irregular exercise of powers is a usual act with reference to parole licenses for the executive branch. Because administration is sole authority to grant or refuse the parole for prisoners therefore neither their decisions are confronted in the courts nor do the courts usually try to intervene in such cases. This above-referred case proves the extreme arbitrary style of decision making of administration for grant of parole orders. This is one of

time he was arrested on November 05, 1996 (for details, see, <http://gulfnnews.com/news/uae/general/zardari-gets-parole-after-mother-dies-1.403231>) then got another three day parole to participate in the rituals of his mother on December 05, 2002 which was later converted into 15 days parole to spend his Eid holidays out of prison bounds.

As another episode of Political licensing on Parole is linked to three jailed senior leaders of the MQM who were gone released on Parole license on January 20, 1997; Farooq Sattar, a key leader of the MQM and former mayor of Karachi, in jail since April 1994 facing 78 criminal cases with pending trial; Senator Nasreen Jalil; and senator Aftab Sheikh. The releases were made in advance of the February general elections.

¹⁵⁵ *Suo Moto Case No. 16 of 2011* (Implementation proceedings of judgment of Supreme Court reported as PLD 2011 SC 997).

¹⁵⁶ Observations made by the judges in the *Suo Moto Case No. 16 of 2011*.

the very few reported cases of gross negligence rather illegality committed by the administration in awarding parole.

4.3 CONCLUSION AND SUGGESTIVE MEASURES

Since the procedure of grant and refusal of parole is exclusively dealt by the executive through prison administration and relevant provincial R&PDs. Hence as a general rule the judiciary has no mandate to intervene in exercise of such powers of the executive. It is suggested therefore to devise a complaint authority for receiving and addressing the complaints and grievances of the eligible but deprived offenders. Such authority should maintain check and balance on the arbitrary use of powers by the administration.

In furtherance to it, the issue of improvement of faculties of relevant R& PDs should be seriously taken up. The technical and human resource must be such enhanced that it can suitably cover the eligible prisoners. Thus instead of constructing new buildings for prisons, more focus should be placed on alternative strategies especially by increasing employment opportunities for probation and parole staff.

PART II

THE RIGHTS OF REFORMATION DURING IMPRISONMENT

CHAPTER V

**THE RIGHTS OF TERRORIST PRISONERS UNDER THE ANTI
TERROR LEGAL REGIME OF PAKISTAN**

INTRODUCTION

Terrorism, one of the most fashioned words of this century, has been tried to be defined by international and national law makers, researchers, jurists, legal practitioners and judges. But they all neither collectively (at an international level) nor individually (at domestic level) could reach at a clear point of consensus to exactly define the expression, ‘terrorism’. Pakistan too, despite being one of the most terrorism affected countries in the world, is still endeavoring to reach at a comprehensive definition of the term just like several other states.

Though in Pakistan, the statutory coverage to terrorism had already been given through the Suppression of Terrorist Activities (Special Courts) Act, 1975, the Special Courts for Speedy Trial Ordinance, 1987, the Terrorist-Affected Areas (Special Courts) Ordinance, 1990 and the Terrorist-Affected Areas (Special Courts) Act, 1992. However these laws were promulgated only to provide legal clothing to the special courts for taking up the infrequent cases of terrorism. Nevertheless the state had been facing the shortage of a detailed and sufficient anti-terror law. The Anti Terrorism Act, 1997(ATA)¹⁵⁷ came prima-facie to remove this deficiency.¹⁵⁸ Currently the anti-terror legal regime of Pakistan is governed by the ATA. However this statute has its own serious flaws which have been to some extent addressed by

¹⁵⁷ Anti-Terrorism Act, 1997, Act No. XXVII of 1997.

¹⁵⁸ A detailed discussion is offered by, Shabbana Fayyaz, “Responding to Terrorism, Pakistan’s Anti-Terrorism Laws,” *Pakistan Institute for Peace Studies, South Asia Net* (2008): 4-5 (Shabbana Fayyaz, “Responding to Terrorism” hereinafter); Dr. Khursheed Iqbal, “Defining ‘Terrorism’ in Pakistan’s Anti-Terrorism Law—A Jurisprudential Analysis in the context of International Law and Certain Domestic Jurisdictions,” *The Khyber Pakhtunkhwa Judicial Academy, Peshawar* (2015).

the legal fraternity in Pakistan.¹⁵⁹ However the matter that how these flaws affect the legal rights and fundamental legal guarantees of a person charged under the anti-terror law has not been pondered thoroughly. Therefore the first segment of this chapter maintains that the broad definition of ‘terrorism’ given in the ATA generates several tight spots regarding the apt determination of the ambit and scope of the law. The wide-ranging definition gives birth to certain ambiguities which sometimes allow this especially constituted statute (to deal with the cases of terrorism) to partly cover the scope of the regular penal law, Pakistan Penal Code (PPC hereinafter).¹⁶⁰ This overlapping of statutes usually lets the investigation agencies and parties to easily intricate the case in such a way that the court gets muddled in settling the question of jurisdiction first and later proceeds with the original case. During this course, sometimes the especially constituted Anti Terrorism Courts (ATCs) willfully and at certain times due to circumstances even usurp the role of the Sessions Courts. This whole activity practically over-involves the particularly constituted ATCs in routine cases and thereby defeats their *raison d’être*.¹⁶¹ Thus the judiciary, despite of promulgation of a detailed and exclusive law to deal with terrorism, is still stuck with the question whether to brand an offense a common crime or an act of terrorism? The second segment of this chapter asserts that this lacking to determine an appropriate definition of the expression ‘terrorism’ consequently affects the human rights of the persons at pre-trial, trial and post-trial/post sentencing stage in numerous ways. This part specifically explores the post-sentencing human rights scenario for those who are branded and convicted as ‘terrorist prisoners’. In the

¹⁵⁹ See for details, A Report by the Research Society of International Law with support from American Bar Association Rule of Law Initiative, *Human Rights and Pakistan’s Counter-terrorism Legislative Landscape*, January 2017; Naeem Ahmad, *Combating Terrorism: Pakistan’s Anti-Terrorism Legislation in the Post-9/11 Scenario*, Journal of the Research Society of Pakistan, 2015. Online available at, http://pu.edu.pk/images/journal/history/PDF-FILES/9.%20Naeem%20%20Ahmad_v52_2_15.pdf ; Report by Justice Project, Pakistan and Reprieve, *Terror on Death Row*, 2014; Shabbana Fayyaz, “Responding to Terrorism” *Supra* note 158.

¹⁶⁰ Pakistan Penal Code (Act XLV of 1860).

¹⁶¹ Afzal Ali Shigri, “A flawed Anti-Terrorism Law,” *Daily Dawn, Pakistan*, December 23, 2016. Available online at, <http://www.dawn.com/news/1303938> (last accessed: March 18, 2017). (Afzal Ali Shigri, “A flawed Anti-Terrorism Law”, hereinafter.)

end, this chapter suggests that the anti-terror regime must not be separated from rest of the other criminal matters; the provisions relating to anti-terror issues must also be incorporated within PPC through inclusion of a separate chapter instead of having a full fledged statute to deal with such cases. In addition to it the legislature should include the requirement of having nexus of the actor with some organization to prove an act as terrorism along-with other four existing statutory components, i.e. mens-rea, design, actus-reus and fear and intimidation. Further it is recommended that the legislature should allow a certain very important rights to this category of prisoners to ensure their peaceful reintegration in to the society after completion of their sentences because finally (if they have not been condemned to death by the court of law) they will become part of the society.

5.1 PERPLEXITY TO DETERMINE THE SCOPE OF TERRORISM

5.1.1 STATUTORY SCOPE

The preamble of the ATA describes its ambit as, “an Act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences”. However the law does not properly supply a key to unlock the fundamental expressions, such as, ‘heinous offences’ in terms of its particular use under this law; this term except as given in the preamble has not been otherwise defined in the whole Act which has widened its scope in an extremely multifarious manner. The word ‘sectarian’ is used in the statute at several places such as under Section 2(u) and (v) and Section 6(1)(C) whereas Section 8 specifically discusses the prohibition of those ‘acts’ which are intended or they are likely to stir up sectarian hatred. Nevertheless no special criterion is discussed in either of these instances which can establish a unique nexus between ‘the act’ and the terrorism. Hence almost every sectarian criminal activity is included in the ambit of the ATA.

The specific definition of ‘terrorism’ is however given in Section 6. Sub-section 6(1) says,

In this Act, ‘terrorism’ means the use or threat of action where:

- (a) The action falls within the meaning of sub-section (2). And (b), the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or (c), the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies. Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.

Sub-section 6(2) further lists down fourteen different actions or threat of actions to include under the definition of ‘terrorism’. While joining the two sub-sections, i.e. sub-section 6(1) and 6(2), it is comprehended that the first sub-section pinpoints a few decisive factors to term a crime as ‘terrorism’; firstly, ‘intimidation’ and ‘fear’ are described as two key factors to make the first sub-section operational. Therefore if the actions falling within the meaning of sub-section 2 are leaving the effect of ‘intimidation’ and ‘fear’ in the minds of any segment of the society as mentioned in sub-section 6(1)(b)(c), those actions are fit to fall under the definition of ‘terrorism’. Several crimes enlisted under sub-section 6(2) of the ATA also have been discussed in PPC under the heads of, ‘offences affecting human body’ (chapter XVI) ‘crime against property’ (chapter XVII) and ‘hijacking’ (chapter XVII). ‘Intimidation’ and ‘fear’ are the integral parts of these crimes too and certainly leave their impact on at least a specific section of the society. The obvious difference between the ‘acts’ falling under the ambit of sub-section 6(2) of the ATA and the crimes discussed in aforementioned chapters of PPC, lies in the terrorizing affect of ‘intimidation’ and ‘fear’ at particularly those segments of society as discussed under sub-section 6(1). Therefore these two terms actually have a subjective affect. To avoid the subjectivity of these two terms, the statute has not itself defined their meticulous affect with relation to this Section so that the ‘act of terrorism’ might be distinguished from a ‘regular crime’ on the basis of that particular

description. This deficiency of explanation provides all reasons to interpret these terms as broadly as possible; sometimes even covering the scope of PPC too.

The second important factor to determine the ambit of the ATA provisions is, ‘design’ as defined in sub-section 6(1)(b). The third factor is, ‘purpose’, i.e. the mens-rea behind commission of the ‘act’ as given in sub-section 6(1) (c). The second factor is in fact the part and parcel of the third factor or it might be termed as first step to move towards the factor of mens-rea. This is that to prove the factor of mens-rea, this is essential to first demonstrate the factor of designing the particular crime in a manner through which the specific mens-rea behind commission of the crime can accomplish. The fourth factor is ‘actus-reus’ which has been mentioned under sub-section 6(2). Principally this fourth factor of actus-reus connected to terrorism should not be established in absence of the first factor of ‘fear and intimidation’ that specifically leave the effect of ‘terror’ in the minds of common people. However the judicial practices show that the ‘act of terrorism’ can be constituted when either all four factors are available or sometimes the existence of only one factor is also sufficient to form such act. This single decisive factor can be the ‘purpose or mens-rea’ alone or sometimes even the ‘actus-reus’ singly can place the criminal act within the ambit of the ATA.

Sub-section 6(3) then says, “The use or threat of use of any action falling within sub-section (2) which involves the use of fire-arms, explosives or any other weapon is terrorism, whether or not sub-section 1 (c) is satisfied.” The definition of ‘fire-arms’ and ‘explosives’ is given under Section 2(f)¹⁶² and (g)¹⁶³ and ‘weapon’ is defined in Section 2(bb)¹⁶⁴. Section 1

¹⁶² Section 2(f) says, “explosives means any bomb, grenade, dynamite, or explosive, substance capable of causing any injury to any person or damage to any property an includes any explosive substance as defined in the Explosives Act, 1884(IV of 1884)”

¹⁶³Section 2(g) says, “fire-arms ” means any or all types and gauges of handguns, rifles and shotguns, whether automatic, semi-automatic or bolt action, and shall include all other fire-arms as defined in Arms Ordinance 1965 (W.P. Ordinance XX of 1965)

¹⁶⁴ Section 2(bb) says, “weapon” means any item which can be used to injure or cause bodily harm, and includes any type of fire-arm, explosive, sword, dagger, knuckle-duster, stengun, bomb, grenade, rocket launcher, mortar or any chemical, biological thing which can be used for causing injury, hurt, harm or destruction of person or property, and includes “illicit arms” as defined in the Surrender Illicit Arms Act. 1991 (XXI of 1991); and

of the Terrorism Act, 2000, UK (TA) was the source of inspiration in drafting the definition of terrorism for the ATA. Sub-section 1(3) of TA includes the use of firearms or explosives to carry out specific actions, under the definition of terrorism. However the UK has an effective control over the usage of firearms, explosives and other weapons but the situation is different in Pakistan. There is rampant proliferation of every type of illegal weapons and one cannot imagine the commission of violent action without the use of firearms. The borrowed definition should have been amended at this point while keeping the local context under consideration which is actually very specific in nature however it was not considered. Thus the ATA can be applied to almost 99% of violent offences in Pakistan now.¹⁶⁵ Resultantly regular crimes of abduction, kidnapping for ransom, killings for personal enmities etc, which are otherwise though ‘heinous offences’ nevertheless are not always carried out for spreading terror are freely dealt under this Act.¹⁶⁶ Besides these complexities, by making the conditions of sub-section 6(1)(c)¹⁶⁷ optional for classifying a crime as an act of terrorism, the ATA has opened up a new Pandora box of cases for the courts by dragging its scope towards the regular criminal cases. It is this severe lacuna that has enabled the authorities and common people to misuse the legislation to the extent that even the routine misdemeanors are now registered under the ATA.

5.1.2 JUDICIAL SCOPE

In the preliminary post-inception phase of the ATA, the courts, as a principle used the Act in immensely restricted manner; perhaps because, firstly, the judicial offices were especially careful for the apt application of this exceptional law and secondly, because the scope of the law had not expanded too much. The Supreme Court observed in 1998 in *Mehram Ali Alias*

¹⁶⁵ Afzal Ali Shigri, “A flawed Anti-Terrorism Law”, Supra note 161.

¹⁶⁶ Tariq Pervaiz and Mahwish, “An Appraisal of Pakistan’s Anti Terrorism Act”, United Nations Institute of Peace (Islamabad, 2015). Available online at, <https://www.usip.org/sites/default/files/SR377-An-Appraisal-of-Pakistan%E2%80%99s-Anti-Terrorism-Act.pdf> (last accessed: November 2015).

¹⁶⁷ Section 6(1)(c) says, “In this Act. “terrorism” means the use or threat of action where: The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause.”

Yawar Ali vs. Federation of Pakistan and 4 others,¹⁶⁸ that the especially constituted courts under the ATA had limited jurisdiction for trial of persons charged with commission of terrorist acts only in those areas where declaration of intent had been issued by the Federal Government under Section 3 of the said Act (Section 3 got omitted in 2001). During this phase the crimes committed to satisfy individual motives or personal vendetta could not be subjected to the scope of the ATA. Thus the assertion made by the courts to exclude excessive litigation through the usage of this Act could worth. For example, the Lahore High Court while dealing with an appeal against the decision of the ATC gave a narrow interpretation of the law by excluding the crime of Karokari (honor killing) from the ambit of the ATA in *Naureen vs. Additional Sessions Judge, Attock and another*.¹⁶⁹ It was declared that,

A court is not entitled to read words into an act of the legislature unless a clear reason for it is to be found within the four corners of the Act itself. Its duty is neither to add to, nor to take from a statute anything unless there are good grounds for thinking that the legislature intended something which it has failed precisely to express.¹⁷⁰

In 2001, in the case of *Bashir Ahmad vs. Naveed Iqbal and 7 others*¹⁷¹ where the accused killed his wife through burning her by sprinkling spirit on her person, the Supreme Court observed that the offence committed was certainly most heinous in nature but it did not mean that it did qualify to be a terrorist act under Section 6,7 and 8 or the schedule to the ATA and if an offence included in the schedule has no nexus with the above sections, in that event the inclusion of such an offence under the scope of the ATA would be ultra-vires.

¹⁶⁸ PLD 1998 SC 1445. The same citation is also available at PLD 1998 SC 347.

¹⁶⁹ PLD 1998 Lahore 275; see also *Faisal Iqbal vs. The State*, PLD 1998 Lahore 371.

¹⁷⁰ The High Court explained the principles of interpretation as discussed in Maxwell on interpretation of Statutes in these words, “the penal statutes are to be accorded strict construction in accordance with golden rule of *litte-legis* and that ordinarily courts are not authorized to supply omissions left by legislature. Although in exceptional circumstances, the court may fill up the gap if it is found that on account of omission, the underlying objective of legislature will be frustrated and statute will become wholly unworkable.” For a detailed discussion see also, *Zahid Pervaiz vs. Special Judge, Special Court No.1 for Anti Terrorism Bahawalpur and another*, YLR 1999 Lahore 1716; *Dad Muhammad Khan vs. Bassa*, PLD 1965(W.P) Lahore 77.

¹⁷¹ P L D 2001 Supreme Court 521

However this vigilant behavior suddenly was forced to take a paradigm shift in post 9/11 phase when Pakistan joined the USA as an ally in war against terror. Though a terrifying reactionary wave of terrorism came into sight all through Pakistan after this alliance but it did not set a cautious attitude for the legislature, law enforcement agencies and the people at large; instead the ATA was invaded with new amendments after the occurrence of every new criminal incident. Resultantly terrorism happened to establishing as a tool of exploitation in the hands of the police and the parties to a particular case. Therefore especially after 2001, as a matter of conscientiousness the judicial jurisprudence on terrorism started to get more crystallized. The courts though tried to maintain difference between a regular criminal act and an act leading to terrorism however could not fully succeed, primarily because of statutory lacunas. Nevertheless the judiciary based its decisions on four decisive factors as given in Section 6 for the inclusion or exclusion of a particular case from the ambit of the ATA. The judicial point of view on these four factors is one by one discussed below.

A- Factor of 'Purpose'

The statute though places the factor of purpose or (as it is interpreted by the courts) mens-rea or intention behind the commission of a criminal act at a later status yet it has been included as one of the crucial factors to term a crime as terrorism under sub-section 6(1). Most recurrently the courts have relied upon this one particular factor to seek jurisdiction under the ATA in both the pre 9/11 and the post 9/11 scenario. But every era has its own special circumstances which led the direction of the findings of the courts towards the factor of 'purpose'.

For example, in early time, such as, in the case of *Muhammad Afzal and others vs. S.H.O and others*,¹⁷² in 1999, the Court required the proof of mens-rea to differentiate the regular crimes from the acts of terrorism owing to the fact that the criminal acts defined by

¹⁷²1999 PCrLJ 929 Lahore.

Section 6 of the ATA are offences under many other penal statutes too, hence these ordinary penal offences can only be categorized as terrorism when they are coupled with the mens rea, intention, aim or objective as embodied in the definition of the ATA. In 2001, in *Bashir Ahmad vs. Naveed Iqbal*,¹⁷³ the Supreme Court again categorically declared the establishment of purpose or mens-rea as the decisive factor to determine the jurisdiction under the ATA. *Mehram Ali vs. Federation of Pakistan*¹⁷⁴ which emphasized the importance of motive for constituting the offence of terrorism was quoted as authority in *Bashir Ahmad's Case*. Nevertheless this is notable that all these judgments derived support from the very first definition of terrorism given by the ATA which was later repealed. This definition required the use of bombs, dynamite or other explosive substances as an essential ingredient for concluding the commission of the said offence; thus making the circumstances completely plain for the court to determine the particularity of 'mens-rea' of the offender. The use of the said substances no longer remained a necessary ingredient of the offences given under subsection 6(2) of the ATA after repeal. Therefore the previous easy practice to establish a nexus between the act done and to find out the essentials required under the law to determine the particular purpose behind the commission of the criminal act turned down and the new definition brought a plethora of complicated situations along with it.

In 2003, *Mazhar vs. The State*,¹⁷⁵ referred to this change of legislative intent brought about by the Anti-Terrorism (Amendment) Ordinance, 2001¹⁷⁶ which had also replaced the term 'terrorist act' with the word 'terrorism' in Section 6. This judgment established the principle that, only because a criminal act is falling within the ambit of the schedules of the ATA cannot determine the jurisdiction of the ATC instead a clear proof of purpose to commit terrorism was required to invoke such jurisdiction as specified in the amended Section 6. The

¹⁷³ PLD 2001 SC 521.

¹⁷⁴ PLD 1998 SC 1445.

¹⁷⁵ PLD 2003 Lahore 267.

¹⁷⁶ Ordinance No. XXXIX of 2001.

judgment of this phase of changed legislative intent considered the purpose as a significant factor to prove the commission of terrorism besides it treated the impact of the overt acts and surrounding circumstances as an indication of the object of the crime. This was because the new definition had broadened the ambit and scope of the law by replacing the requirement of proving the use of particular types of arsenal to constitute an act of terrorism with the use of general type of explosives and firearms.

In 2003, in *State through Advocate General vs. Muhammad Shafiq*,¹⁷⁷ the Supreme Court, gave a new direction to the scenario where it virtually bypassed the scope of the PPC. This time the cases of 'personal vendetta' were declared as the subject matter of the ATA. For this purpose though the threshold was that the incident should have otherwise fulfilled the standards set by the ATA, i.e. a) the act was to cause panic, fear, terror and instability in any section of the society, b) the act was intentional, purposeful, designed and accompanied by the mens-rea to commit terrorism on the part of the accused, c) the incident was falling under the ambit of the scheduled offences of the ATA; as the Court did not establish a nexus among all three requirements therefore this threshold turned out to be extremely perplexing in essence. The first requirement was such broad that could include all crimes, in one way or another, under the ambit of the ATA especially when the acts were related to personal enmities. The second requirement established no clear nexus between the mens-rea behind a criminal act committed out of personal feud and the terrorism except that such act could leave the fear and insecurity in the minds of the general public. The third pre-requisite was also vague in nature because nearly all the acts which are described as terrorism under the ATA are also the subject matter of the PPC as regular crimes. The legal deficiencies lying within this judgment were however tried to be removed in 2004. In *Basharat Ali vs. the Special*

¹⁷⁷ PLD 2003 SC 224.

Judge, Anti-Terrorism Court II, Gujranwala,¹⁷⁸ the Lahore High Court also dealt with a case of personal vendetta. Justice Asif Saeed Khosa while excluding this particular class of cases from the ambit of the ATA elaborated the requirement of ‘intent’ to prove ‘terrorism’ in rather clear words by relating its nexus with the design of the crime committed. He explained,

Every crime, no matter what its magnitude or extent is, creates some sort of fear and insecurity in some section of the society but every felony or misdemeanor cannot be branded or termed as terrorism. Thus, the real test to determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act.

Here the principle was developed that the ‘relevant ideology’ behind the commission of the particular act should be explored to find out the mens-rea which could distinguish a common criminal from a terrorist. The judgment established that, both the regular criminal and a terrorist can commit the same act however with an unlike ideology and intent. Terrorist is mostly unaware of his targets whereas criminal usually pinpoints his aims. Therefore the results of the acts of both offenders can differ in nature. For that reason the criminal and terrorist are dealt under different laws. The Court discussed that the fear and insecurity in the society which results as a byproduct or an unintended consequence of a private crime falls outside the pale of the offence of terrorism under the ATA. It is only when such a reaction by the public and consequence on society is intended by the perpetrator of the offence that an offence of terrorism can, prima facie, be said to have been committed. It was held in this case that because a private blood feud had precipitated the occurrence, therefore, the case fell outside the purview of the ATA.

This was though a precise and clear interpretation however this judgment was overruled in appeal by the Supreme Court in *Mirza Shaukat Baig and others vs. Shahid Jamil and others*¹⁷⁹ in a very strict language and the findings of the *State through Advocate General*

¹⁷⁸ PLD 2004 Lahore 199.

¹⁷⁹ PLD 2005 SC 530.

vs. Muhammad Shafiq,¹⁸⁰ for the inclusion of personal enmity within the scope of the ATA were upheld by the Supreme Court. While giving its observation that, “The language as employed in the section is unambiguous, plain and simple which hardly requires any scholarly interpretation and is capable enough to meet all kinds of terrorism.” in *Mirza Shaukat Baig Case*, the Supreme Court intentionally or unintentionally overlooked the fact that the High Court actually interpreted the expression, ‘terrorism’ and in the light of this interpretation, defined the ambit and scope of Section 6 and the particular acts which could fall within this ambit. Thus the actual determinable point was to what extent the court could stretch the expression ‘terrorism’ in the context of Section 6. The Court further opined that this is the ‘action’ and not the ‘intention behind that action’ which is the entire essence of Section 6 and which creates a difference between regular crime and the terrorism. The Court said that,

The language as employed in the section is unambiguous, plain and simple which hardly requires any scholarly interpretation and is capable enough to meet all kinds of terrorism. It is an exhaustive section and does not revolve around the word “designed to” as used in section 6(1)(b) of the Act or mens rea but the key word, in our opinion is "action" on the basis whereof it can be adjudged as to whether the alleged offence falls within the scope of section 6 of the Act or otherwise? The significance and the import of word "action" cannot be minimized and requires interpretation in a broader prospective which aspect of the matter has been ignored by the learned High Court and the scholarly interpretation as made in the judgment impugned has no nexus with the provisions as contained in section 6 of the Act, the ground realities, objects and reasons, the dictums laid down by this Court and is also not in consonance with the well entrenched principles of interpretation of criminal statutes...

The same ‘action’ based approach continued for a long time. In 2012, the Supreme Court again extended an identical verdict though without any jurisprudential reasons (discussed later). However *Basharat Ali Case* was used as an authority in later cases. In 2016, the Supreme Court issued the ruling in *Shahbaz Khan Alias Tippu and others vs. Special*

¹⁸⁰ PLD 2003 SC 224.

*Judge, Anti Terrorism Court No. 3, Lahore and others.*¹⁸¹ A good jurisprudential discussion on the concept of mens-rea was made in this case. Here the principle was leveled that the basic difference of mens-rea between a criminal and a terrorist is of the ‘purpose’; a criminal might be inspired of a number of purposes however the mens-rea of a terrorist “is not inspired by profit motives, or private revenge, but usually by some form of public ideal, however perverted.” Thus apart from the obvious acts of the accused, the injuries caused by him or consequences ensuing from his actions and the surrounding circumstances of the case all are relevant to ascertain the design of the crime committed and the intention or mens-rea that instigated to the offender to commit that crime. It was observed in this case that intention is presumed when the nature of the act committed and the circumstances in which it is committed are reasonably susceptible to one interpretation. In such event, the rule of evidence that the natural and inevitable consequences of a person’s act are deemed to have been intended by him is applicable. The judgment was overall a jurisprudential piece of explanation to determine the right direction of ‘mens-rea’ to conclude about an act either it is connected to a regular crime or terrorism.

B- Factor of ‘Design’

The term ‘design’ is usually interpreted by the higher judiciary while associating it with ‘mens-rea’. Even in those few cases where the courts categorically discuss ‘design’ as a separately provable vital aspect of the case, it is viewed that ‘design’ ultimately meets the ‘mens-rea’ working in background of the commission of a particular act. Thus sometimes the presence of mens-rea might be proved through finding out the relevant design of the offence and vice-versa.

¹⁸¹ PLD 2016 SC 01. In *Ahmed Jan vs. Nasrullah*, 2012 SCMR 59 and *Bashir Ahmed vs. The State*, PLD 2009 SC 11, the court rejected the presence of design behind the crime hence the cases were dealt as regular crimes and not as the terrorist acts.

An ample discussion on this special factor took place in *Kashif Ali vs. The Judge, Anti-Terrorism, Court No. II, Lahore and others*.¹⁸² This case was also an incident of personal enmity where the Supreme Court had to interpret the definition of terrorism. Barrister Aitzaz Ahsan presented the argument that, sub-section 6(1)(b) of the ATA as amended in April, 1999 and in its current form, does not include the cases of personal vendetta in its ambit. And that “the very object of the amendment and the insertion of the word ‘design’ in Section 6 was to draw a line between the cases of terrorism and the cases of personal vendetta.” He further elaborated that “the legislature has deliberately used the term ‘design’ and not ‘intent’”. Therefore, effect must be given to the term ‘design’ to make the Act more efficient.” Thus the creation of a sense of fear or insecurity in the society must be judged through the ‘design’ behind the action to attract the ATA. On this argument the Court was of the view that, “a strictly narrow interpretation of the term ‘design’ in Section 6 of the Act is undoubtedly one where a premeditated plan to create terror is the object behind the said act.” Therefore the requirement to prove mens-rea to establish terrorism should be carried out in the light of the design prepared to commit the action.

In *Khuda-e-Noor vs. The State*,¹⁸³ the Court made a more elaborated and clear discussion. It was opined that Section 6 is divided into two main parts, i.e. the first part is contained in sub-section 6(1)(b) and (c) of the said Act dealing with the mens-rea mentioning the ‘design’ or the ‘purpose’ behind an action and the second part falling within sub-section 6(2) of the said Act specifying the actions which, if coupled with this mens-rea would constitute the offence of ‘terrorism’.¹⁸⁴ Thus the Court while excluding the act of ‘honor killing’ from within the ambit of the ATA feared that if the honor killing would be termed as terrorism, in that situation all cases of those persons taking law in their own hands were to be

¹⁸² PLD 2016 SC 951. See also, *Tahir Javed Khan vs. The State*, MLD 2016 Peshawar (Abbotabad Bench) 1840.

¹⁸³ PLD 2016 SC 195.

¹⁸⁴ Same observation was given by the Supreme Court of Pakistan in *Malik Muhammad Mumtaz Qadri vs. The State*, PLD 2016 SC 17.

declared or accepted as the cases of terrorism but that surely was not the intention of the legislature.¹⁸⁵

In the case of *Malik Muhammad Mumtaz Qadri vs. The State*,¹⁸⁶ Justice Asif Saeed Khosa repeated the same stance which he gave in the *case of Khuda-e-Noor*. He said that,

...provisions of section 6(1)(b) of the Anti-Terrorism Act, 1997 quite clearly contemplate creation of a sense of fear or insecurity in the society as a design behind the action and it is immaterial whether that design was actually fulfilled or not and any sense of fear or insecurity was in fact created in the society as a result of the action or not. It is the specified action accompanied by the requisite intention, design or purpose which constitutes the offence of terrorism under section 6 of the Anti-Terrorism Act, 1997 and the actual fallout of the action has nothing to do with determination of the nature of offence.

Accordingly the Court in fact connected the design with mens-rea and the creation of sense of fear and insecurity with actus-reas. Thus in the view of the Court, it is vital to prove the existence of mens-reas and actus-reas both to establish terrorism through the help of design and creation of fear and insecurity (respectively) within the minds of at-least one segment of the society.

Primarily, the rule laid down in the cases of *Basharat Ali, Bashir Ahmed, Khuda-e-Noor and Mumtaz Qadri* of requiring the ascertainment of design, intention and mens rea of an act for establishing the jurisdiction of an ATC rests on dicta given in *Mehram Ali's case*. However the cases of *Mehram Ali* and *Bashir Ahmed* do not consider the ways and means by which the design, intention or mens rea, for an act of terrorism, requiring in essence the proof of an assailant's state of mind, should be ascertained by a court of law. Whether the Court should mechanically consider the motive alleged by a complainant in the FIR to be decisive or should it also scrutinize other aspects of an occurrence to assess if the culprits had any design, intention or mens-rea to commit a terrorist act? This particular aspect was specially

¹⁸⁵ See also, *Muhammad Akram Khan vs. The State*, PLD 2001 SC 96; *The State through Prosecution General vs. Noor ud Din and two others*, YLR 2013 Quetta 618.

¹⁸⁶ PLD 2016 SC 17.

addressed in the cases of *Basharat Ali, Khuda-e-Noor, Mumtaz Qadri and Shahbaz Khan Alias Tippu and others vs. Special Judge Anti-Terrorism Court No.3, Lahore and others*.¹⁸⁷ It was elaborated that in most cases, the nature of the offences, the manner of their commission and the surrounding circumstances demonstrate the motive given in the FIR. However, that is not always the case. When offences are committed disregarding the consequence or impact of the overt action, the private motive or enmity disclosed in the FIR cannot be presumed to capture true intent and purpose of the offender. In such cases, it is plain that action taken and offences committed are not instigated 'solely' by the private motive alleged in the FIR. Intention, motive or mens-rea refer to the state of mind of an offender and a particular state of mind cannot be proven by positive evidence or by direct proof. Therefore the settled law is that the intention of an accused for committing an offence is to be gathered from his overt acts and expressions that he deemed to have intended and through the natural and inevitable consequences of this action.¹⁸⁸ However the question, what if the accused could not execute or convert his mens-rea into actus-reus, was left unattended by these judgments.

C- Factor of 'Actus-Reus'

At the midst of the continuity of discussion on mens-rea as decisive factor to determine the ambit of the ATA, the Supreme Court adopted another astounding approach where it declared that the actus-reus alone can also become the decisive factor to establish the scope of the ATA in *Mirza Shaukat Baig and others vs. Shahid Jamil and others*.¹⁸⁹ The contention was again repeated in the case of *Nazeer Ahmad vs. Nooruddin*¹⁹⁰ in 2012 which was decided by the division bench of the Supreme Court in 2012. The verdict completely rejected the possibility of relevance of mens-rea or intention to conclude a crime as an act of terrorism. Instead the Court declared the actus-reus as the only important ingredient to constitute the act

¹⁸⁷ PLD 2016 SC 01.

¹⁸⁸ *The State vs. Ataullah Khan Mangal*, PLD 1967 SC 78.

¹⁸⁹ PLD 2005 SC 530.

¹⁹⁰ 2012 SCMR 517. See also, *Qammaruddin vs. The State*, MLD 2016 Karachi 877.

of terrorism. The Court while applying the principle of strict liability affirmed that, “Neither the motive nor the intent for commission of the offense is relevant for the purpose of conferring jurisdiction on the ATC. It is the act which is designed to create sense of insecurity and to destabilize the public at large, which attracts the provisions of Section 6 of the AT Act”.

The judgment itself seems deficient to provide proper reasoning for the issuance of such strict verdict. However it was pronounced in 2012 when the terrorism was at its max out in Pakistan. It is though not clear from the decision whether it was the contemporary scenario which provoked the Court to decide in such firm way for all the criminal acts or any other thing became the reason of this proclivity. In any case this exceptional approach of the Apex Court allowed all those cases to fall under the ambit of this special law which were in any way touched by the ATA without indicating any particular standard despite that this was the high time to differentiate the terrorism from the criminal acts.

D-Factor of ‘Fear’ and ‘Intimidation’

‘Fear’ and ‘intimidation’ arising in the minds of general public are two consequent effects of that act which was done after having a previous mens-rea provable through the presence of a particular design to make that mens-rea functioning. This is that if the design and mens-rea are coupled with that actus-reus which left the affect of fear and intimidation on common people, there is a greater chance that the relevant court would impinge the ambit of the PPC. The Lahore High Court established the relationship of factor of fear and intimidation with other three factors in *Muhammad Abbas vs. Special Judge ATC and 6 others*.¹⁹¹ While giving the details of components of ‘terrorist act’, the High Court discussed the question whether the element of personal vendetta or satisfaction of personal vengeance gives rise to terrorism or a terrorist act? The Court answered this question from the definition of sub-section 6(2)(a-n) of the Act. It was of the opinion that the ‘purpose’,

¹⁹¹ YLR 2016 Lahore 2702.

‘motivation’, ‘actus-reus’ and ‘mens-rea’ collectively constitute the components of terrorism. If an action is designed to coerce or intimidate or to create a sense of fear or insecurity in society or to over-awe the government or the public or section of public or community or sect or an act done with the background of religious, sectarian or ethnic cause, that shall constitute an act of terrorism. In this scenario, the High Court said that a private crime which creates ‘unintended’ fright cannot be termed as an act of terrorism. The important rather decisive factor to differentiate between casual/common criminal act and an act of terrorism as highlighted by the Court was ‘fright’, intended (a terrorist act) or unintended (a regular crime), created in the minds of the public at large as the consequence of a particular act. Hence as per High Court, mere gravity and the shocking nature of any offence, committed in pursuance of personal enmity was not by itself sufficient to brand such act as ‘terrorist act’.

Bashir Ahmed vs. The State,¹⁹² *Basharat Ali vs. The Special Judge, Anti-Terrorism Court-II*,¹⁹³ *Muhammad Mushtaq vs. Muhammad Ashiq and others*¹⁹⁴ and *Bashir Ahmed vs. Naveed Iqbal and others*¹⁹⁵ were held not to be tri-able by the ATC because the motive for the occurrence was enmity inter-se the parties on account of some previous murders. And the revengeful acts done in those cases left no such sense of fear and intimidation in the minds of locals which might terrorize them. In *Muhammad Mushtaq vs. Muhammad Ashiq and others*,¹⁹⁶ the Supreme Court concluded that,

A physical harm to the victim is not the sole criterion to determine the question of terrorism. What is to be seen is the psychological effect produced by the violent action or with the potential of producing such an effect on the society as a whole or a section thereof. There may be a death or injury caused in the process. Thus where a criminal act is designed to create a sense of fear or insecurity in the minds of the general public disturbing even tempo of life and tranquility of the society, the same may be treated to be a terrorist act. There may be just a few killings, random or

¹⁹² PLD 2009 SC 11.

¹⁹³ PLD 2004 Lahore 199.

¹⁹⁴ PLD 2002 SC 841.

¹⁹⁵ PLD 2001 SC 521.

¹⁹⁶ PLD 2002 SC 841.

targeted, resorted to with single mindedness of purpose. But nevertheless the impact of the same may be to terrorize thousands of people by creating a panic or fear in their minds.

Therefore according to prevailing statutory and general judicial standards, to prove a particular criminal act as an act of terrorism, firstly, this is imperative to establish a designed pattern of crime which can ascertain, as a second requirement, a particular mens-rea behind the commission of an act of terrorism, thirdly, the institution of actus-reus according to that designed mens-rea and intent and fourthly there must be clear evidences available that the act left the element of fear and intimidation in the minds of general public as consequent effect of the whole previous activity. However this commonly defined chain can always be dented through different judicial interpretation. This variant interpretation which gathers its validity from widely applicable and interpretable law actually creates issues and captures the field of general penal law as well as affects the rights of the offenders. Despite of several attempts by the higher judiciary to uphold the separation between the regular crimes and the terrorism, many decisions take place at every level of the judicial hierarchy which clash with these attempts. It is primarily attributable to the legislative inadequacies and interpretational ambiguities, differences and discrepancies.

5.2 CONSEQUENCE OF EXISTING AMBIGUITIES AND VACUUM LYING IN

THE DEFINITION AND INTERPRETATION OF TERRORISM

On factual grounds, every terrorist act is a crime but all crimes are certainly not the terrorist acts. Therefore the ambit and scope of the general penal law and the special penal law must be such clear, unambiguous and comprehensible that the court can without any doubt determine the specific areas of applicability of both types of laws. Nevertheless the ATA gives such an obscure picture of its ambit that the common crimes can easily be converted into terrorism.

The negative effects of ambiguities lying in the statutory definition and judicial interpretations of terrorism can be seen at three levels. At first level, these ambiguities give a chance of exploitation to various classes of the society, such as, police and the parties to the case. This is usually aimed and attempted by the prosecution to include the ATA provisions in First Investigation Report (FIR hereinafter) to intricate the case for the defendant. On emotional grounds this trend sometimes appears to be justified because the crimes are usually committed in extremely barbarous manner however on legal standing this phenomenon is sabotaging and incapacitating the whole anti-terror regime.

At second level, the high courts get confused while deciding the question of the scope of this particular law. Quite often they go behind the satisfaction of those four factors which are described by Section 6 of the ATA to constitute terrorism instead of finding out the right cases falling within the ambit of those factors. Resultantly they decide regular crimes under the ATA which burdens them with piles of irrelevant cases and that certainly disturbs their original mandate.¹⁹⁷

At third level, the offender faces the ensuing results of all such ambiguities at pre-trial, trial and post-trial stages. The ATA being the special law does not offer those various

¹⁹⁷ For example, the Quetta High Court in, *The State through Prosecution General vs. Noor ud Din and 2 others*, YLR 2013 Quetta 618, while relying upon the judgment of the Supreme Court of 2001, *Muhammad Akram Khan vs. The State*, PLD 2001 SC 96 put the incident of siyahkari (honor killing) or murders incidental thereto under Section 6(ii)(g) of the ATA with a purpose to make them an example for those who commit such acts and for not leaving any chance of compromise on issue between the parties (as possibly can happen in murder cases decided under PPC by the Court of Sessions through the application and execution of the rules of *Diyat*). The Court took such decision despite that the Apex Court had decided in 2007 in *Mohabbat Ali and another vs. The State*,¹⁹⁷ against the inclusion of honour killing in the ambit of the ATA. In the same way *Gul Muhammad vs. The State*, 2007 SCMR 142, was decided in extraordinary manner by the Quetta High Court. The Court categorically admitted that the matter which arose in consequence of an incidence of honor killing though could also have been dealt under Section 311 of the PPC however it was decided through the application of the provisions of the ATA. Then the Peshawar High Court criticized the decision of the ATC to refer the case of abduction which happened in consequence of personal enmity and the incident of firing on Police force that reached to release that abductee, by the ATC to the Court of Sessions in appeal petition in *The State through Advocate General vs. Khaista Rehman*, MLD 2013 Peshawar 1872. In this case the ATC had the contention that it fell short of jurisdiction to try the case. The High Court decided this matter through applying the ATA provisions. In all these cases apparently the High Courts just satisfied the aforementioned criterion of establishment of ‘four factors’ to constitute the act of terrorism and pronounced the judgment under the ATA. The meaning of one High Court judgment in a common law state is that an array of judgments of the lower courts is in line to follow the same pattern under the rules of precedent. Hence what is imperative is to interpret these four factors with special reference to terrorism.

legal guarantees which are included as an integral part in the regular criminal justice system.¹⁹⁸ Therefore a whole lot of those offenders who though commit regular crimes but are dealt through the ATA due to the vacuums lying in the law get deprived of those guarantees which are available to the regular offenders.

These all consequent three levels are interconnected; the first two are grave because they in fact pave the way for the third one which is the most severe and long-lasting in nature. When a regular criminal is dealt under the ATA, its provisions directly attack on his legal rights and guarantees and put him under more serious penal affects. “Therefore, when a law visits a person with serious penal consequences, extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of law.”¹⁹⁹

5.2.1 The Negative Impact of the Ambiguities of the ATA on the Rights of Offenders/Prisoners

The error in making choice to apply the PPC or the ATA in a particular case can affect the rights of the offender at pre-trial, trial and post conviction stage. All regular offences dealt under the PPC are investigated, inquired into, tried, and otherwise taken in accordance to the provisions contained in the PPC whereas CrPC is used as its procedural law.²⁰⁰ Same principle

¹⁹⁸ The courts are practically bound by the available law; the judges can, as a maximum, pronounce decisions by employing all their faculties. They do not carry that every tool which can stop exploitation of a law which itself provides loopholes. These exploitation tactics are usually employed by the law enforcing agencies such as the police and sometimes by the parties to the case. Nevertheless as a next step, one must consider why they need to misuse the law? There are various understandable grounds behind this tendency of mixing up a regular crime with an act of terrorism by the police and the prosecution. For example, the ATA is an inflexible piece of law with strict provisions especially with reference to its procedures and penalties whereas the regular penal law offers several exceptions for the offender. For example, in most of the homicide cases decided by the regular courts, the culprits usually get succeeded to reach at a compromise under Section 309 or 310 of the PPC while no such compromise can take place under the ATA. Therefore the legal heirs of the victims try their utmost for the inclusion of anti terror provisions in the FIR thus the culprit can maximum suffer and should not escape from the penalty. The police also sometimes try to put the cases of serious offenders under the ATA to ensure their punishment and to avoid any kind of compromise by the guilty party.

¹⁹⁹ Dicta issued by the Supreme Court of India in, *Usman Bhai Dawood Bhai Memon vs. The State of Gujrat*, 1988 SCC 271.

²⁰⁰ Federal Shariat Court elaborated the issue of relevance of law with the procedural matters and proceedings of the case in *Mst. Azeeba Kausar vs. Zafar Iqbal and two others*, PCrLJ 2001 FSC 255, in this

is applicable with regard to the ATA. If a case has been initiated under the ATA and accepted by the ATC for asserting its jurisdiction, the ATC shall proceed with the case; the investigation, inquiry, trial, conviction and the post-conviction/ (rights during) imprisonment rights shall also be maintained under the ATA. As Section 3 (Z) of the ATA says,

Terrorist investigation means an investigation of; a. the commission, preparation or investigation of acts or terrorism under this Act; b. an act which appears to have been done for the purposes of terrorism; c. the resources of a prescribed organization; d. the commission, preparation or instigation of an offence under the Act; or e. any other act for which investigation may be necessary for the purposes of this Act.

At first instance, when the case is lodged under the ATA, it proceeds with its own special procedures particularly drafted to make it speedy; such as, the extremely difficult procedures of seeking bail (Section 21-D),²⁰¹ the conditional admissibility of extra-judicially made confessions by the accused before District Superintendent of Police (DSP) (Section 21-H), the applicability of special provisions of Remand (Section 21-E) and trying the juvenile suspects under the ATA (in the course of application of Section 2(d),²⁰² 21-C(5),²⁰³ 21-

way, "Having regard to the explicit provisions of sections 5 and 29, Code of Criminal Procedure (Cr.P.C.) as well as the provisions contained in Chapter 22-A of the Cr.P.C, which provide for trial of offences before High Courts and Court of Sessions, it may be pointed out here that under the law, not only trial of a case has to be conducted by the Court competent to try the offence but proceedings must be carried out in the "prescribed manner" which shall follow a judgment of acquittal or conviction as provided by section 265-H of the Criminal Procedure Code."

²⁰¹ The Anti-Terrorism Act, 1997 was amended through the Anti-Terrorism (Amendment) Ordinance 2009, which bars Courts from granting bail to suspected terrorists liable to death sentence, life imprisonment or 10 years' imprisonment.

²⁰² Section 2(d) of the ATA says, "Child" means a person who at the time of the commission of the offence has not attained the age of eighteen years."

See for detailed discussion on the issue, *Safeer Ahmad vs. The State*, PCrLJ 2015 Lahore 1380; *Mamarras vs. State and others*, PLD 2009 SC 385; *Meraj Hussain vs. Judge, Anti Terrorism, Northern Areas, Gilgit and another*, PCrLJ 2007 Northern Areas Chief Court 1011; *Mst. Naseem Akhtar and another vs. The State*, 1999 SCMR 1744.

²⁰³ Section 21-C(5) of the ATA says, "A child guilty of an offence under sub-section (4) shall be liable on conviction to imprisonment for a term not less than six months and not exceeding five years."

See for detailed discussion on the issue, *Asadullah Alias Shakirullah vs. The State*, PCrLJ 2011 Gilgit Baltistan Chief Court 1022; *Muhammad Din vs. Muhammad Jahangir*, PLD 2004 Lahore 779; *Mst. Azra Bibi vs. The State*, PCrLJ 2004 Lahore 1967; *Ahmad Bakhsh vs. Shaukat Ali Khan, Special Judge of Special Court under Anti-Terrorism Act, Multan and another*, MLD 2003 Lahore 422; *State vs. Anis Bawani*, PCrLJ 2000 Karachi 1418.

C(7)(e),²⁰⁴21-C(7)(f),²⁰⁵21-G,²⁰⁶21-F²⁰⁷) instead of JJSO, 2001. (However the deprivation of rights of accused during trial is not discussed in this research in detail as this area is not covered under the scope of this thesis.)²⁰⁸

A-Bar to avail the Right of Conjugal Visits for the Persons Imprisoned in connection to Terrorism

The prisoners convicted under anti terror charges are dealt differently than the other prisoners. For example, their ‘right of conjugal visits’ has been curtailed under Rule 545-A (1)(e) of the PPR.²⁰⁹ They may benefit from this right only after getting a special permission of relevant (Federal or Provincial) Government; however the author found no reported case where any of the ATA convicts submitted an application to avail the opportunity.

B-Bar to Get Benefitted from the Right of Reformation

²⁰⁴Section 21-C(7)(e) of the ATA says, “A child commits an offence if he provides, generally or specifically, any instruction or training in acts of terrorism, and on conviction, shall be liable to imprisonment for a term not less than six months and not more than five years.”

For detailed discussion on the issue see, *Muhammad Ibrahim vs. Superintendent, Central Jail, D.G.Khan and another*, YLR 2006 Lahore 91.

²⁰⁵ Section 21-C(7)(f) of the ATA says, “A child commits an offence if he receives, generally or specifically, instructions or training in acts of terrorism, and on conviction, shall be liable to imprisonment for a term not less than six months and not more than five years.”

See, *Muhammad Raheel alias Shafique vs. The State*, PLD 2015 SC 145; *Tauqeer Ahmed Khan vs. Zaheer Ahmad and others*, 2009 SCMR 420; *Masood Sarwar vs. Sadaqat Hussain and others*, 2007 SCMR 936; *Muhammad Akram vs. The State*, 2003 SCMR 855; *Muhammad Ajmal vs. The State through Advocate-General, Punjab*, PLD 2003 SC 01; *Ziaullah vs. Najeebullah and others*, PLD 2003 SC 656.

²⁰⁶ The Anti-Terror Courts take up the exclusive jurisdiction with regard to juveniles offenders accused of committing terrorist acts on the bases of 21-G which says, “All offences under this Act shall be tried exclusively by Anti-Terrorism Court established under this Act.”

²⁰⁷ Section 21-F of the ATA says, “Remissions:- Notwithstanding anything contained in any law or prison rules of the time being in force, no remission in any sentence shall be allowed to person, other than a child who is convicted and sentenced for any offence under this Act, unless granted by the Government.

(Though under Section 21-F, the relevant authority can grant the remissions to juvenile convicts nevertheless these permissions are usually denied because the courts do not (cannot) want to intervene in to the matters of relevant Government or the Prison authority and sometimes, and when they are challenged in the courts (in very few instances) the courts while overlooking the specific wording of the provision, do not allow the remissions to even juveniles convicted under the ATA. See, *Muhammad Ibrahim vs. Superintendent, Central Jail, D.G.Khan and another*, YLR 2006 Lahore 91.

²⁰⁸ The regular prisoners convicted with death sentence may request for compromise through the operation of rules of *Qisas* and *Diyat*, as given under Chapter XVI of the PPC; nevertheless such request cannot be made in case if the conviction had been pronounced under the ATA. However such appeals may be made by the regular convicts only as an attempt to change the method of punishment through the operation of law; it is otherwise not enlisted as the, ‘right of prisoner’ in the PPR. Therefore this particular aspect of the ATA has not been thrashed out here.

²⁰⁹ Section 545-A(1)(e) of PPR says, “.the convict who is confined on the charge of terrorism or anti-state activities shall not be allowed to avail this facility except with the prior permission of the Government.”

The 'right of remission' is curtailed for child prisoners and is completely denied to the adult prisoners under Section 21(f) of the ATA. This Section says,

Notwithstanding anything contained in any law or prison rules for the time being in force, no remission in any sentence shall be allowed to a person who is convicted and sentenced for any offence under this Act.

Provided that in case of a child convicted and sentenced for an offence under this Act, on satisfaction of government, may be granted remission, as deemed appropriate.

Remission is maintained as a powerful tool of rehabilitation and reformation of prisoner by the prison authorities but it seems that the prisoners convicted under anti-terror charges either do not need to reform and rehabilitate or perhaps it is considered that these convicts cannot have such capacity. The courts are very clear to disallow the applications filed against the refutation of remission to prisoners under the ATA. In a few cases where the courts allowed the remissions to those prisoners in whose conviction the provisions of the ATA played a substantial role were decided on the bases of exceptional principles which are discussed here.

In *Ex- Brigadier Ali Khan vs. Secretary, Home Department, Government of Punjab and another*,²¹⁰ the petitioner was awarded five years imprisonment by the Court of Martial law under three different charges. One of the charges was related to Section 11-F of the ATA (the other counts were made under some other laws). This particular Section lays down maximum 6 month imprisonment as punishment for the offender convicted under this provision. The Court held that the jail authorities could deny the grant of remission only for 6 months of imprisonment (as determined under 11-F) and not more than that. Thus the Court directed to grant due remissions for remaining five and a half years. This decision establishes the principle that remission must be granted while keeping all the counts in to consideration. If any of the count is falling under the ATA provisions, the remission might be granted after

²¹⁰ PLD 2016 Lahore 509.

the exclusion of its duration for rest of the other counts. Nevertheless the remission cannot be granted under the ATA convictions.

In 2016, in *Javed Iqbal and others vs. The State*,²¹¹ the Supreme Court reversed the decision of Division Bench of the Lahore High Court that did not allow the remission to 26 appellants who had already served almost ten years of their sentence but having been convicted under Section 7 and 9 of the ATA they had not been granted remission. The Apex Court cleaned them from the ATA charges first and then allowed their due remissions.

In *Muhammad Nawaz Alias Asif Alias Phallo vs. The Superintendent Central Jail Gujranwala and others*,²¹² the benefit of the remissions was extended only for that period when the case was pending in the Court when Section 21-F had not been inserted in the statute books and not afterwards. The cases of *M. Aslam Mouvia v. Home Secretary and others*,²¹³ and *Abdul Qadir Tawakkal v. The State*,²¹⁴ were also decided on the same principle.

The Lahore High Court declared Section 21-f of the ATA as ultra-vires to the Constitution and liable to be struck down in *Hammad Abbasi vs. Superintendent Central Jail, Adyala, Rawalpindi*,²¹⁵ for being in clash with Article 9²¹⁶ of the Constitution. The decision was challenged in Supreme Court in *Superintendent Central Jail, Adyala, Rawalpindi vs. Hammad Abbasi*.²¹⁷ The judgment of the Lahore High Court was set aside by the Apex Court on the contention that the High Court pronounced the said judgment without issuing the notice to the Advocate General as required under Order XXVII-A of the CPC. And a writ petition was remanded to the High Court for its fresh decision after issuance of required notices. The researcher could not find the subsequent judgment of the High Court however it

²¹¹ 2016 SCMR 787. The Apex Court also touched the issue of non-applicability of right of remission for the ATA convicts in *Shah Hussain vs. The State*, PLD 2009 SC 460; *Nazar Hussain vs. The State*, PLD 2010 SC 1021.

²¹² PCrLJ 2016 Lahore 986.

²¹³ PLD 2011 Lahore 323.

²¹⁴ PLD 2013 Sindh 481.

²¹⁵ PLD 2010 Lahore 428.

²¹⁶ Article 9 of the Constitution says, "Security of person. No person shall be deprived of life or liberty saves in accordance with law."

²¹⁷ PLD 2013 SC 223.

must be considered overruled by the Supreme Court through the decision of *Nazar Hussain Case* (as discussed following) delivered on August 11, 2010 (whereas the Lahore High Court passed its verdict on June 15, 2010).

Seven judges bench of the Supreme Court gave a very detailed decision in relevance to remissions in 2010 in *Nazar Hussain vs. The State*.²¹⁸ This case reviewed the consistency of policy framed by the Government of Pakistan, Ministry of Interior in August, 2009,²¹⁹ with the judgment passed in *Shah Hussain vs. The State*.²²⁰ The policy contained a few guidelines to be observed by the prison authorities while granting remissions to the prisoners. The special point of reference was that these guidelines clearly prohibited the prison administration to grant remissions to the prisoners convicted under the “crime of murder, espionage, subversion, anti-state activities, terrorist act (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No.XIII of 1999), *Zina* (Section 10, Offence of *Zina*, Enforcement of *Hudood* Ordinance, 1979) (also under Section 377, PPC), kidnapping/abduction (Section 364-A and 365-A), robbery (Section 394, PPC), dacoity (Section 395-396, PPC), and those undergoing sentences under the Foreigners Act, 1946.”

The Court categorically declared this ‘classification of prisoners’ devised through this policy as intra-vires and not arbitrary or discriminatory. The Court held that, “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.” Therefore the Court declared it justified to not to grant remission to the prisoners convicted through Section 21-F of the ATA.

In consistency to the discussion made in the first half of this chapter, a couple of issues arise; first and foremost, how about those convicts who usually face the consequences

²¹⁸ PLD 2010 SC 1021.

²¹⁹ See, Letter No. D. 2792/2009-DS (Admn.), Government of Pakistan, Ministry of Interior.

²²⁰ PLD 2009 SC 460.

of ambiguities lying within the law? This is that, should an offender who actually committed a regular crime but due to lacunas existing in law and the judicial system could not succeed to prove his case to negate charges of terrorism always suffer? What if he had a genuine urge to change himself? What if he had an actual capacity of reform? Would it be appropriate to exclude him from that whole lot who is enjoying the given legal guarantees? Secondly, even if he has been convicted on justified grounds under the anti-terror charges, why the law is curtailing his legal rights? If he has not been sentenced to death by the court of law then he will indisputably at last come out of the prison; the methods to prolong his incapacitation (through denying his right to remission) will actually make no clear difference except (apparently) to sharpen his criminal tendencies as a possible offshoot of incarceration. In such circumstances the only workable strategy is to reform and rehabilitate these prisoners by applying latest techniques upon such convicts.

The consistent chain of happenings, i.e. the insertion of incomplete and flawed definition of 'terrorism' in the ATA; the vague interpretations by the higher judiciary corresponding to this definition; the resultant growing scope of the ATA and shrinking scope of the PPC has badly affected the rights of the offenders/prisoners. Thus it is certainly required to find out the apt scope of the relevant law so that its unpredictability might be avoided. And minimum people should bear its consequences. The minimum guarantees of justice must not be taken away from the convicts of the ATA.

5.3 CONCLUSION

Though the highest international forums are still trying to develop a consensus among the world community at a suitable and harmonized definition of 'terrorism' but they have not succeeded as yet. Nevertheless national and international law making and law enforcing scenarios differ in nature; international considerations, such as border issues, the issues in relevance to comity with other nations and so on. However these issues might not be

shown up at national levels. Pakistan is facing a special kind of circumstance with relation to its law and order situation and the most difficult issue is attached to the spreading terrorism and the various strategies to deal with it. This is ill-fated that a country which is already facing international and non-international terrorist activities carried out by proscribed and non-proscribed organizations, without being under any state of war, is unable to clearly differentiate these terrorist activities from the criminal acts committed by common criminals. The legislature perhaps has not realized the specifications of dispersal terrorism in Pakistan; hence left an unclear law to extend the chances of deliberate and un-deliberate human errors.

The courts are practically bound by the available law; the judges can, as a maximum, pronounce decisions by employing all their faculties. They do not carry that every tool which can stop exploitation of a law which itself provides loopholes. The deficiencies existing in law affect the overall criminal justice system making many innocents to face its consequences and several culpable to get escaped from its rope.

Therefore after over-viewing the judicial decisions, it is suggested that the anti-terror regime must not be separated from the rest of the other criminal matters; the provisions relating to anti-terror issues must be incorporated within PPC through the inclusion of a separate chapter instead of having a full fledged statute to deal with such cases. This step will minimize the time of the proceedings; the regular Sessions courts should deal with the cases of terrorism too instead of wasting the time in solving the question of jurisdiction.

It might also be added that another distinctive feature of terrorism should lie in the presence of an organization actually carrying out acts of serious violence. In fact if compared with the action of an isolated agent the spread of terror is more evident in the cases where people perceive the presence of a group behind acts of violence and the probability of the

repetition of similar acts. This requirement or alike other requirements would restrict the scope of the ATA up to certain specialized cases. This will exclude a majority of regular crimes from the jurisdiction of the ATA and will hence safeguard the accused and the prisoners from its speedy but disadvantageous procedures.

In critically serious cases, as an alternative to the ATA provisions, Section 311 of PPC might be applied where the relevant court can pronounce the highest penalty on its own discretion under the rule of Fasad-fil-Ard even after a compromise would have already taken place between the parties. To serve this purpose, the Section might be amended with the insertion of an additional expression, 'terrorism' as coming within its scope. Through taking this measure the case might proceed without disturbing the right of offender of a fair trial which is affected by the speedy trial under the ATA. However if these steps are taken up as the temporary arrangements to improve judicial decisions then the need for an amendment in existing laws would become more intensified.

The wrong application of the law heavily affects the rights of the accused at pre-trial, trial and post-conviction (i.e., during imprisonment) stages. The higher judiciary also endorses the legal practice of denial of rights to the prisoner/offender charged for the involvement in terrorist activities. The situation of prisoners convicted under the ATA who get deprived of several of those rights which are generally available to the offenders charged under other laws must also be reconsidered by the legislature. Most importantly the prisoners of anti-terror charges lose the 'right of remission' through the application of Section 21-f of the ATA. This is perhaps a big mistake on part of the legislature to exclude these prisoners from the eligible loop for remissions. This is indirectly their exclusion from the sphere of the rehabilitation and reformation through improvement of character. This is a greater hazard for the society at large as every convict who has not been awarded death sentence ultimately comes out of the prison and if he would not have been rehabilitated during imprisonment then

the chances of his repetition of crime would enhance. The one who is condemned under the ATA charges needs more attention and the state should invest more on him for his rehabilitation. Refusal to remissions cannot confine him behind the bars for the rest of his life. Therefore it is suggested that the legislature must reconsider Section 21-F for the betterment of the society at large. Rather some additional (special) and extensive measures to rehabilitate the offenders convicted under the ATA should be included in the PPR.

While figuring out the acts of terror, the legislature and the judiciary must not disregard the two inter-connected crucial concepts, i.e. the 'presumption of innocence' and the 'human rights' of the offender. These are two shields available to the offender against injustice and inequality. Therefore the statute which would exclude these two shields would in fact exclude the justice and equality from its scope.

CHAPTER VI

THE RIGHT OF REFORMATION THROUGH REHABILITATION

INTRODUCTION

Nitai Roy Chowdhury says,

Society has not yet made the choices that will be necessary to resolve the problems.

Do we want prisons only to punish? Or do we want prisons to educate and train offenders to aid their adjustment in society?²²¹

The traditional aim of imprisonment was to put all those who commit offences against the society behind the bars as a punishment.²²² Through this way the offenders would pay back the debt of the society which they owed for committing crime. In old times, the prisons were considered a place in which individuals were physically confined, and were kept deprived of a range of personal freedoms.²²³ However the jurisprudence of incarceration got evolved with the passage of time and specialized approaches on incarceration started touching prison statutes worldwide. Currently the legal regimes philosophy their prison laws in four essential dimensions i.e., retribution,²²⁴ deterrence,²²⁵ incapacitation²²⁶ and reformation.²²⁷

²²¹ Nitai Roy Chowdhury, *Indian Prison Laws and Correction of Prisoners* (New Delhi, India: Deep and Deep Publication Private Limited, 2002), 01.

²²² For detailed study see, H. D. Barlow, *Introduction to criminology*, 2nd ed (Boston: Little Brown & Company, 1981); Garland, R. Adams, *The Abuses of Punishment* (Lincoln: Social Research Publications, Policy Studies Research Centre, University of Lincolnshire & Humberside, 1999); S.I. Benn, "*Punishment*" in *The Encyclopedia of Philosophy* (London: Macmillan Publishing Co, 1967); A. Von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill & Wang 1976).

²²³ New World Encyclopedia, s.v. "Prison".

²²⁴ The retributory laws are essentially drafted to hit the goals of vindication by awarding a proportionate retribution for the satisfaction of the victim. In this way the offender pays back the price of the wrong done to the victim and his heirs. This is the method where the government consoles the victim by taking revenge from the offender on his behalf and reduces the chances of violent retaliation by the victim himself. See for detailed study, Steven Briggs, *Criminology for Dummies* (Indiana: Willey Publishing Inc, Indianapolis, 2011), 302-304; Also see <http://www.encyclopedia.com/topic/Rehabilitation.aspx> (last accessed: July, 2018).

²²⁵ The Deterrent or Preventive theory is applied while keeping two subjects under contemplation; first is the 'offender' and second is the 'society at large'. In first case the 'specific deterrence' is endeavored where the offender is tried to realize that the offence 'does not pay' and that the offender is a rationale person who should choose to 'go straight' in future due to the fear of more painful punishment. The other part of the theory is expressed as 'general deterrence' for the society at large to be fearful of the punishment if they happen to commit the crimes. Hence this is a utilitarian approach which is purposeful for both the offender and the society. (Ibid)

The evidences collected after the decades of struggle and researches establish that the ‘reformation through rehabilitation’ is a better strategy to fight with crime. Thus reformation through rehabilitation has been recognized in contemporary age as a ‘right of offender’. This right is recognized actually to assure that during the continuance of his punishment the lawbreaker shall receive mentoring and rehabilitation support to get his life back on track to avoid future recurrence of crime.

Legislatures and judicial offices of developed countries are employing novel methods and strategies of reformation and rehabilitation of offenders with the assistance of society, non-governmental organizations and volunteers. However in Pakistan, where the recidivism rates are ever increasing, the legislative and judicial behavior is not by any means proportionate to the necessity of curbing crime through transformation of offenders.

This chapter will explore and analyze the available strategies to rehabilitate and reform prisoners in Pakistani prisons and the chances of success of these strategies. The study provides comprehensive suggestions to legislature and administration.

6.1 RIGHT OF REFORMATION THROUGH REHABILITATION UNDER INTERNATIONAL LAW

The idea of reforming an offender through treatment is highly appreciated under international

²²⁶ The Incapacitation theory aims for the protection of the society and the individual victims by confining the criminal intent of the offender through depriving him of his freedom holding him behind the bars. (Ibid)

²²⁷ In comparison to the other theories, the theory of rehabilitation is to assist both the offender and the society by creating a “positive deterrent impact”. In a strict sense this is not a theory of punishment rather it is anti-punishment and aims at restoration and repatriation of the offender back in to the society. This is formed on a direct and inter-dependent relationship of the offender and the society in which the particular individual shows his wish to change himself, the society identifies such individual and develops effective programs to help him in doing that. This is not fundamentally to pamper the criminals rather the insightful theme is for the future protection of the whole society from crime and the criminal. (Ibid) The hypothesis of rehabilitation is actually the positive form of deterrence under which the subject prevents himself from the crime by putting his energies in a positive direction and with having a positive deterrence against repeating the crime.

As an accumulative effect, all these theories are applied alongside. Under the pragmatic grounds this is unattainable and unfeasible for a legal regime to use a single conjecture in complete isolation of others. All prisons are a mixture of isolation, punishment, negative deterrence and rehabilitation. The social attitudes of its human groups, inmate, staff and external society, will reflect this mixture despite an identifiable emphasis on one motive or another. Hans W. Mattick, “Some Latent Functions of Imprisonment,” *Journal of Criminal Law & Criminology* 237 (1959): 50. Available online at <http://scholarlycommons.law.northwestern.edu/jclc/vol50/iss3/4> (last accessed: October, 2018).

law. It is stressed that the treatment should be extended preferably through non-custodial means of punishment such as, community sentencing; in case of imprisonment the person should be indulged into diverse, healthy and result-oriented activities. For example, Article 10(2) of the United Nations International Covenant on Civil and Political Rights, 1966 (ICCPR hereinafter)²²⁸ accentuates upon the need of rehabilitation of prisoners as a fundamental requirement of Imprisonment. Rule 26 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, (UNRAJJ) and Principle 6 of the United Nations Basic Principles for the Treatment of Prisoners, 1990 (UNBP) provide the mechanism to satisfy these requirements through the provision of basic essentials of human personality building such as, cultural activities, protection, purposeful education, vocational skills, religious care, employment counseling, physical development and strengthening of moral character in accordance with the individual needs of each prisoner taking in to account his social and criminal history, physical and mental capacities and aptitudes, personal temperament, the length of sentence and the prospects after release with a view to assist him for assuming socially constructive and productive role in the society.²²⁹

Rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1977 (UNSMR hereinafter) comprehends that, “The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.” It is also stressed that the vitality of the purposes of the treatment of prisoners is to encourage their self-respect and development of sense of responsibility along with the enhancement of their law-abiding and self-supporting

²²⁸ Pakistan ratified this international law document on June 23, 2010.

²²⁹ See, Rule 26 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, (UNRAJJ) and Principle 6 of the United Nations Basic Principles for the Treatment of Prisoners, 1990 (UNBP).

faculties.²³⁰

At regional level the European states brought into result-oriented major prison management reforms which fundamentally transformed their idea of imprisoning the felons from deterrence towards rehabilitation. Hence the current tendency is exceedingly tending towards rehabilitation and reformation of character of the prisoner. The European Prison Rules (EPR hereinafter) list down the compulsorily available objectives of incarceration for the member states, it provides, “in addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.”²³¹

For substantiating additional significance to the issue and to certify the smooth and sustainable applicability of laws on prisoners’ rehabilitation throughout the Europe, the ‘European Court of Human Rights’ is in a process to develop a well built line of precedent based law. In a number of cases, the Court has clearly shown that the current European policy does have a propensity towards rehabilitation instead of other objectives of incarceration. For example, in the land mark case of *Vinter and Others vs. The United Kingdom*,²³² the court decided that life imprisonment pronounced as the replacement of capital punishment must not be for an infinite time rather it must also be with some prospect of release so that the prisoner might have a chance to atone for his crime and move towards rehabilitation. A same kind of decision was taken by the Court in the case of *Wells and Lee vs. The United Kingdom*,²³³ where the Court examined different features of the laws concerning ‘indeterminate sentence of imprisonment for public protection’ for violent convicts or those who once had been convicted for sexual crimes. In this case, the court criticized the statutes and declared the

²³⁰ UNSMR, Rule 65.

²³¹ EPR, Rule 102.1.

²³² [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013.

²³³ Nos. 25119/09, 57715/09 and 57877/09, 2012.

arrangement of rehabilitative programs for such offenders as the duty of the Secretary of State, failing which he would have breached his duty.²³⁴

Thus the international standards collectively emphasize upon the adoption of multi-dimensional approach to reform the prisoners under which;

- 1- the authorities should have a proper understanding of the background environment of the convict and the connection of that background with the crime committed;
- 2- those treatment programs should be offered which can strike the previous background and the crime committed;
- 3- the first two steps should support the post-release prospects of the offender.

Though Pakistan is member only to ICCPR out of aforementioned international documents however the principles provided at the other places might be adopted as guiding rules to amend and improve the local legislative and administrative system.

6.2 THE ‘RIGHT OF REFORMATION THROUGH REHABILITATION’ IN PAKISTAN

(A) Preferential Sequence of ‘Objectives of Punishment’ in the Eyes of Pakistani Judiciary

As a matter of fact it generally seems difficult to clearly conclude the statutory perspective on objectives and purposes of incarceration in Pakistan. Apparently the legal system places the retribution and deterrence at the top of the hierarchy whereas incapacitation and reformation come later. Such categorization is construed through the analysis of various verdicts given by the courts of law in Pakistan.

The Islamic Republic of Pakistan fundamentally has an Islamic Constitutional/legal formation.²³⁵ Thus the major features of the legal system of Pakistan are established through

²³⁴ Also see, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 75, ECHR 2007-V; *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, ECHR 2012. A detailed review of the decisions is available at https://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Conference_19_files/COURT%20Clare%20Ovey%20Helsinki.pdf

an amalgamation of Islamic law and the common law. Nonetheless Islamic law always has priority in the matter of all kinds of statutory clashes. The penalties are also very much included in this ambit of Islamisation of laws. According to the punitive structure of Islam, the two key methods to punish the offenders are found in the rules of *Qisas* and *Hudood*. The principle of *Qisas*²³⁶ and its relevant requirements are codified under Section 302(a) of the PPC. The particular Section was inserted on the recommendation given by the Supreme Court of Pakistan in the case of *Federation of Pakistan vs. Gul Hassan*.²³⁷ Since then various Pakistani courts have time and again discussed the meaning and purpose of the *Qisas*. The dominating judicial school of thought concludes that the expression '*Qisas*' denotes the 'retaliation or retribution' which stands for a punishment inflicted in return of a wrong and that the rule of *Qisas* is available and applicable in those cases where the retribution and retaliation is straightforwardly possible by doing same act with same proportionality against the offender for the satisfaction of the victim.²³⁸ Whereas the other school disagrees with such interpretation of the word '*Qisas*'; their explanation is reliant on the main *Quranic* source of Rule of *Qisas*, i.e. Ayat 178 and 179 of *Surah-e-Baqarah*, where though "strict claim of justice and equality is prescribed but with a strong recommendation for mercy and forgiveness."²³⁹ Nevertheless the usual juristic opinion is inclined towards the first meaning.

²³⁵ The Constitution, Article 2-A, 31, 203-A to 203-J and 227.

²³⁶ In Pakistani law, under the principal of *Qisas* the matter ensues straightly between parties to the case after the exhaustion of all the rights of appeal by the convict. Once the final conviction is pronounced by the court, the right of legal heirs of the deceased to let off the accused or to take revenge from him becomes operative and they can solely decide about his fate; the state or the court can exercise no authority over this right (For a detailed discussion see *Anwar ul Haq vs. The State*, PCrLJ 2010 Lahore 1380).

²³⁷ PLD 1989 SC 633.

²³⁸ See for example, the second Para of the opinion formed by Justice Ejaz Afzal Khan while interpreting the word '*Qisas*' in the case of *Zahid Rehman vs. The State*, PLD 2015 SC 77.

²³⁹ See for example the dissenting opinion of Justice Qazi Faez Isa on the interpretation of the word, '*Qisas*'. He opined, "My distinguished colleague states that the word *qisas* means "return of evil for evil" and also "retaliation" or "retribution". However, Abdullah Yusuf Ali in his commentary on the 178th and 179th verses of *Surah Al-Baqarah*, wherein the word *Qisas* is mentioned writes:--

"Note first that this verse and the next make it clear that Islam has much mitigated the horrors of the pre-Islamic custom of retaliation. In order to meet the strict claims of justice, equality is prescribed, with a strong recommendation for mercy and forgiveness. To translate *Qisas*, therefore, by retaliation, is I think incorrect. The Latin legal term *Lex Talionis* may come near it, but even that is modified here. In any case it is best to avoid technical terms for things that are very different. "Retaliation" in English has a wider meaning

This is because a clear authority of showing equal response has been sanctioned in any way in the hands of the victim or his legal heirs and this is their discretion either to forgive the offender or not. Therefore retaliation and retribution are taken as principle purposes of *Qisas* by the Pakistani judiciary.

While in the cases relating to *Huddod* crimes, the retribution in same mode and possibly with same intensity as prescribed in the case of *Qisas* is unattainable (for example the sex crimes may not be reattributed back to the offender) hence in these cases usually the objective of deterrence is kept behind the penalty; for the cases of *Zina*,²⁴⁰*Qazaf*²⁴¹ and for Drinking of Wine also, hard punishments are prescribed to maintain the purpose of deterrence. Whereas for the cases of *Hadd* of Theft²⁴² and Infidelity,²⁴³ the punishment is intended as a combination of the objectives of deterrence and incapacitation of the offender. While keeping the objectives and purposes of these defined penalties in mind and the fact that *Sharī‘ah* is the primary source of law making for Pakistani system in contemplation, the judicial forums generally establish an inference in favor of a system of strict punishments in Pakistan. The infrequently shown leniency is also usually fused with stringency.

For instance, in some cases the court forms the blend of retribution and reformation to hold its opinion. For example, the Supreme Court of Pakistan discussed the theories of incarceration in the case of *Auditor General of Pakistan vs. Muhammad Ali and others*,²⁴⁴ in quite an interesting manner. The Court opined that the philosophy of punishment is based on the concept of retribution; this retribution may be achieved either through employing the

equivalent almost to returning evil for evil, and would more fitly apply to the blood-feuds of the Days of Ignorance. Moreover, when we examine the said two verses (2:178 and 179) they do not mandate stern and stringent punishments, but seek to inculcate forgiveness and charity in hardened hearts. "This is a concession and Mercy from your Lord" (2:178) and "In the law of *Qisas* there is (saving of) life to you, O ye men of understanding; that ye may restrain yourself (2:179)."

²⁴⁰ The word is Arabic translation of 'adultery'.

²⁴¹ *Qazaf* is the name of prescribed *Hadd* for putting false charge of adultery against the chaste women.

²⁴² *Hadd of Sariqa*.

²⁴³ *Hadd of Irtidad*.

²⁴⁴ 2006 SCMR 60 SC.

method of deterrence or through reformation. The Court said that the deterrent punishment maintains balance with the gravity of wrong done. Such punishment also establishes an example for others and ultimately proves a preventive measure for the reformation of the whole society; whereas the minor punishment is awarded as an attempt to reform the offender individually. *Secretary, Ministry of Finance and another vs. Kazim Raza*,²⁴⁵ *Wazir and 4 others vs. The State*,²⁴⁶ *Muhammad Aslam vs. The State*,²⁴⁷ were also decided on the principle of mixture of retribution and reformation.

The same philosophy was followed by the Sindh High Court in *Saud Nasir Qureshi vs. Federation of Pakistan through secretary and another*.²⁴⁸ The Court said that,

The philosophy of punishment is based on the concept of retribution, which may be either through the method of deterrence or reformation. The purpose of deterrent punishment is not only to maintain balance with the gravity of wrong done by a person but also to make an example for others as a preventive measure' for reformation of the society, whereas the concept of minor punishment in the law is to make an attempt to reform the individual wrong doer.

The principle was adopted in *Mrs. Munasingh Arachchige vs. The State*,²⁴⁹ where a three-fold categorization of the objectives of punishment was made by the Court; retribution, protection of society and reformation of offender. The Court stated that, the sentence should not be so lenient as to make crimes lucrative. Same principle of retribution plus reformation was used by Justice Tassaduq Hussain Jilani in the case of *Agha Ijaz Ali Pathan vs. The State*.²⁵⁰ The crux of the principle is that the punishment should start from the retribution or the deterrence and might conclude on the reformation of the convict.

Since Pakistani legal system is generally retribution and deterrence based thus there are a very little number of cases in which the courts exclusively decide with an aim to reform the

²⁴⁵ PLD 2008 SC 397 (also available at 2008 PLC (C.S) 877 SC).

²⁴⁶ PLD 2007 Karachi 113.

²⁴⁷ PLD 2006 SC 465.

²⁴⁸ PLC (C.S) 2012 Karachi 192.

²⁴⁹ PCrLJ 1990 Karachi 62.

²⁵⁰ PCrLJ 2004 Lahore 1586.

convict. Nevertheless those few decisions usually stem out of specific reformation centric statutes. For example, the Probation of Offenders Ordinance, 1960 gives power in the hands of the judicial officers substantially to reform the convicts through the application of Section 4 and Section 5. (The statute is discussed in detail in Chapter III of this work.)

Apart from the application of the Probation of Offenders Ordinance, 1960, there are certain other statutes which require the courts to pronounce rehabilitation friendly verdicts. For example, after the promulgation of the Juvenile Justice System Ordinance, 2000 (the JJSO hereinafter), the rights of juvenile convicts got more sheltered through statutory protection. The law requires the courts to pronounce compassionate and reformation oriented decisions for the juveniles. Therefore the juvenile convicts are especially dealt sympathetically by the courts for their tender age and are awarded short term imprisonments to safeguard their future from the curses of incarceration. In *Afsar Zameen vs. The State*,²⁵¹ the Court expressed its opinion about the JJSO in the following words,

The Ordinance is aimed at extending protection to the children involved in criminal litigation and their rehabilitation in society. In a way, it safeguards the human rights of a section of society who deserve reasonable concession because of their tender age; therefore, the Ordinance is to be construed liberally in order to achieve the said object.

The same principle was extended in various other cases, such as, *Asghar Ali vs. The State*,²⁵² *Abaidullah vs. Sessions Judge, Jhang and others*,²⁵³ *Raheem Dad and 2 others vs. The State*.²⁵⁴ In *Shamaal Khan Shah vs. The State*,²⁵⁵ the High Court emphatically stated that,

...the Ordinance of 2000 is aimed at extending protection to children and indeed under Article 25(2) of the Constitution of the Islamic Republic of Pakistan, the State

²⁵¹ PLD 2002 Karachi 18. Even prior to the promulgation of the JJSO, the courts were generally lenient towards juvenile convicts. *Siraj Din vs. Safhir-ud-din alias Goga and another*, 1970 SCMR 30; *Muhammad Jamil vs. The State*, PCrLJ 1970 Lahore 252; *Altaf Hussain vs. Abdul Muttal and another*, 1975 SCMR 139; *Yousaf vs. The State*, PCrLJ 1975 Karachi 936; *Mohammad Anwar vs. The State*, 1983 SCMR 1001; *Mst. Zafrana vs. The State*, PCrLJ 1997 Peshawar 163; *Usman Ali vs. The State*, PCrLJ 1996 Lahore 166 are the examples of such decisions. However the JJSO streamlined the system.

²⁵² MLD 2002 Karachi 1566.

²⁵³ PCrLJ 2004 Lahore 1881.

²⁵⁴ YLR 2012 Karachi 590.

²⁵⁵ PCrLJ 2012 Karachi 897.

has the power to frame laws for the protection of Women and Children, Juvenile Justice System Ordinance, 2000 is an example of such legislation. It is aimed at safeguarding rights of a segment of society which due to tenderness of age, needs providing firstly protection, secondly speedy justice and thirdly separation from mature and hardened criminals. Therefore, the Ordinance is a piece of welfare legislation, aimed at ameliorating the lot of this weaker segment of the society.

Besides these statutory protections, sometimes the courts categorize particular classes of the offenders, inclined towards mending their character, for compassionate decisions; such as, young people. For example, in the cases of *Jahangir vs. The State*,²⁵⁶ *Abdul Ghaffar and another vs. The State*,²⁵⁷ *Fatah Khan vs. The State*,²⁵⁸ *Fahim Khan vs. The State*,²⁵⁹ *Murid Abbas vs. The State*,²⁶⁰ *Muhammad Nawaz vs. The State*,²⁶¹ *Muhammad Amin vs. The State*,²⁶² *Imtiaz Ahmed vs. The State*,²⁶³ *Mst. Anwari vs. The State*,²⁶⁴ the courts extended the benefit of young age to the convicts. Then the young or middle aged people with several responsibilities are usually considered leniently by the courts. For example, in the cases of *Reham Din vs. The State*²⁶⁵ and *Khalid Latif Alias Goga vs. The State*,²⁶⁶ the courts made reformation friendly decisions while keeping the errands of the offenders in mind. Sometimes the prestigious place at government institution is also regarded. For example, in *Zulfiqar Abbas vs. The State*,²⁶⁷ *I.G Police Punjab vs. Mahmood Ikram*,²⁶⁸ *The State vs. Muhammad Ashraf Zahid*,²⁶⁹ *Fakhre Alam vs. The State*,²⁷⁰ *Attorney-General of Pakistan vs. Yusuf All Khan*,²⁷¹ *Ashfaque Ahmed Sheikh vs. The State*,²⁷² *Arif Nizami and 02 others*,²⁷³ the courts gave

²⁵⁶ YLR 2011 Lahore 2330.

²⁵⁷ PCrLJ 2005 FSC 887.

²⁵⁸ MLD 1999 Karachi 556.

²⁵⁹ MLD 1998 FSC 1810.

²⁶⁰ 1992 SCMR 338.

²⁶¹ PCrLJ 1995 Lahore 35.

²⁶² PLD 1984 SC 343.

²⁶³ PLD 1977 SC 545.

²⁶⁴ PCrLJ 1968 Lahore 457.

²⁶⁵ PLD 1985 Quetta 272.

²⁶⁶ PCrLJ 1971 Lahore 1313.

²⁶⁷ PCrLJ 2007 Karachi 306.

²⁶⁸ 1998 PLC (C.S.) 521.

²⁶⁹ PLD 1975 Lahore 635.

²⁷⁰ PLD 1973 SC 525.

²⁷¹ PLD 1973 SC 115.

the benefit of professional placement to the offenders. The general circumstances of the particular offender also play a special role in paving the path of mercy for the offender by the relevant court. For example in *Jahangir vs. The State*,²⁷⁴ accused was an unmarried young man of 24 years with no previous criminal history. The court gave him the benefit of earlier clear character, repenting behavior and of his very young age. The court was optimistic for his reformation hence modified and reduced his sentence into lesser imprisonment.

Collectively, in some of the cases, the court thinks it fit to leave a deterrent effect on the particular criminal as well as to make him an example for the society at large. In such cases the courts do not show leniency while awarding the punishment and even go to the extent of pronouncement of capital sentence. The other cases where the preventive measures may become workable, the court adopts the prolonged imprisonment strategies instead of awarding corporal punishment. And the cases where the offender seems inclined towards the reformation, the court tries to reduce his imprisonment. The discretionary reformatory courses assumed by the courts in few cases can be shaped through the espousal of additional absolutely reformation and rehabilitation centric statutes as similar to the Probation of Offenders Ordinance, 1960 and the JJSO, 2000.

B- The Statutory Aspect of Reformation with reference to Prison Rules

Nearly all the future rights of a prisoner including life, dignity, respect, equal status in society and professional placement depend upon better reformatory and rehabilitative measures taken during the continuance of his sentence and sometimes even before the pronouncement of the sentence. Thus the assurance of availability of apt reformatory and rehabilitative measures is essential for the better provision of the other rights too.

²⁷² PLD 1972 SC 39.

²⁷³ PLD 1971 SC 72.

²⁷⁴ YLR 2011 Lahore 2330.

Two important statutory modes to reform a prisoner are provided in the Pakistan Prison Rules (PPR). They include, ‘reformation through remission’ and ‘reformation through sanction of the exercise of conjugal rights (during imprisonment)’.

I-Reformation through Remission

The expression ‘remission’ is destined for ‘reduction in punishment’. Chapter 8 of the PPR (consisting of Rules 199 to 223) categorizes the remissions into ‘special’ and ‘ordinary’ classes (divide-able into sub-categories). Rule 199 which is substantially relevant to the ordinary class of remissions describes,

Remission system is an arrangement by which a prisoner sentenced to imprisonment, whether by one sentence or by consecutive sentences, for a period of four months or more may by good conduct and industry become eligible for release when a portion of his sentence ordinarily not exceeding one-third of the whole sentence has yet to run.

The ordinary remissions are earned by the prisoner himself through presenting proof-sheet of his good conduct.²⁷⁵ The proofs of ‘good conduct’ include, the compliance to all prison rules,²⁷⁶ involvement in labor based activities and prison service,²⁷⁷ blood donations,²⁷⁸ for presenting himself for surgical sterilization²⁷⁹ and for taking result oriented education (which also includes memorization of the *Quran*).²⁸⁰

The ‘special remissions’ are granted in two ways. First, under Rule 214 a special remission may be granted to any prisoner whether entitled to ordinary remissions (under Rule 199) or not for rendering special services such as, teaching and training to the other prisoners, providing assistance to maintain peace and security within the prison and for showing good morals. In the second category, under Rule 216, the prison authorities i.e. the Superintendent of Prison, the Inspector General of Prisons and the respective Governments such as, the

²⁷⁵ PPR, Rule 211.

²⁷⁶ Ibid, Rule 204 (i) (a).

²⁷⁷ Ibid, Rule 204 (i)(b) and 204 (ii).

²⁷⁸ Ibid, Rule 212.

²⁷⁹ Ibid, Rule 213.

²⁸⁰ Ibid, Rule 215.

Provincial Government (through Chief Minister) and Federal Government (through President or Prime-Minister) are authorized to reduce the period of imprisonment at particular occasions of public rejoice, such as, Eid-ul-Fitar, Eid Milad-un-Nabi, 23rd March and 14th August. This category is governed by Section 401 of the CrPC.

Though the remissions come under the exclusive domain of prison management and the courts are also well convinced that no command may be inflicted by any other authority to impose unjustified restrictions upon prison management either to pre-empt such jurisdiction or to overawe their statutory right of granting or refusing remissions;²⁸¹ however there are a few categories of prisoners which have statutory bar to avail remissions. For example, Section 21-F of the ATA which has an overriding effect over all other laws puts a mandatory ban to allow remissions to the offenders convicted under the ATA provisions (the judicial jurisprudence developed upon Section 21-F of the ATA has been discussed in detail in the previous Chapter).

Then the persons convicted under Section 10(d)²⁸² of the NAB Ordinance, 1999 were also not permitted to avail any kind of remission nevertheless this particular provision finally got struck down by the higher judiciary after having a considerable discussion. In *Saleem Raza and 31 others vs. The State*,²⁸³ the Sindh High Court excluded Section 10(d) of the NAB Ordinance from the list of statutory provisions prohibiting the grant of remissions to the prisoners falling under their purview. The plea was taken in this case that the right of remission is available under Section 5 of the Prevention of Corruption Act, 1947 despite the fact that the Prevention of Corruption Act, 1947 and the NAB Ordinance both are applicable

²⁸¹ For detailed discussion see, *Ex. Brigadier Ali Khan vs. Secretary, Home Department, Government of Punjab*, PLD 2016 Lahore 509. See also, *Nazar Hussain and another vs. The State*, PLD 2010 SC 1021; *Shah Hussain vs. The State*, PLD 2009 SC 460; *Abdul Malik vs. The State*, 2006 PLD 365 SC; *Bhattacharya vs. The State*, PLD 1963 Dacca 422.

²⁸² The NAB Ordinance, 1999, Section 10 (d), "Notwithstanding anything to the contrary contained in any other law for the time being in force an accused convicted by the courts of an offence under this Ordinance, shall not be entitled to any remission in his sentence."

²⁸³ PLD 2007 Karachi 139. See also, *Nazar Hussain vs. The State*, PLD 2010 SC 1021; *Tallat Hussain vs. The State and 2 others*, PCrLJ 2013 Lahore 386.

in identical situations i.e., the involvement in corrupt practices. But Section 10(d) of the NAB Ordinance puts a ban on the right of remission while Section 5 of the Prevention of Corruption Act does not bar to enjoy the right. The Court while accepting this argument declared Section 10(d) as ultra-vires to Article 25 of the Constitution. The Court hence defined the principle that,

..there is no intelligible differentia, distinguishing one group of persons from other group of persons and thus, there is no reasonable classification permissible for such purpose. Merely on the basis of change of forum the classification cannot be held to be permissible as reasonable because such classification shall not be based on any real and substantial distinction.

The Court further elaborated that, "...test for permissible classification is that the differentia must have rational nexus to the object sought to be achieved by such classification." Such rational nexus between corruption and remission was not found by the Court. The Court however without elaborating the rational nexus to the object sought to be achieved for placing Section 21-F in this list discarded any similarity of position between 21-F of the ATA and Section 10 (d) of the NAB Ordinance. And thus did not exclude Section 21-F from this list.

In 2009, in *Shah Hussain vs. The State*,²⁸⁴ the Supreme Court again enlisted Section 10(d) with the other statutory provisions which were not open for remission nevertheless the Apex Court in 2010 in *Nazar Hussain and another vs. The State*,²⁸⁵ upheld the judgment given in *Saleem Raza's Case* considering the observation in *Shah Hussain's judgment* made as per in-curium in relation to Section 10(d). However the Supreme Court in a *Suo Motu* action taken in 2012 yet again declared the persons convicted under Section 10(d) as disentitled for remissions.²⁸⁶ But in 2015, in *Mazhar Iftikhar and others vs. Shahbaz*

²⁸⁴ PLD 2009 SC 460.

²⁸⁵ PLD 2010 SC 1021.

²⁸⁶ *Suo Moto* Case No.24 of 2007, the order was passed on March 29, 2012.

Latif,²⁸⁷ it was stated that the Court was not properly assisted in 2012 regarding the judgment given in *Nazar Hussain's Case*. The Court thus declared that *Nazar Hussain's Case* held the field.

Another aspect of award and refusal of remission is discussed in the light of Section 382-B of CrPC by the higher judiciary.²⁸⁸ The Section mandates, “The length of any sentence of imprisonment imposed upon an accused person in respect of any offence shall be treated as reduced by any period during which he was detained in custody for such offence.”

The question whether the beneficiary of Section 382-B can claim the benefit of ‘special remissions’ pronounced during the continuance of his trial period or not has been answered by the Apex Court through diversified interpretations given at different times. Before 2005, the Supreme Court was in support of the literal and beneficial interpretation of the said provision; hence the Court awarded the benefit of Section 382-B and of all those remissions for which the convict became eligible during his trial period.²⁸⁹ However in 2005, in *Haji Abdul Ali vs. Haji Bismillah and 3 others*,²⁹⁰ the Supreme Court while relying at some very old cases excluded the under-trial prisoners from the eligible loop for securing the benefit of remissions though they could get full advantage of Section 382-B. The reason was recorded by the Court that no law including Section 382-B indicates that a person who gets the benefit of Section 382-B is to be treated as convict from the very inception while the benefit of remission is extendable towards convicted prisoners. Therefore he cannot claim

²⁸⁷ PLD 2015 SC 01. See also, *The State through National Accountability Bureau vs. Shaikh Abdul Sattar Lasi*, Criminal Petition No-59. Q of 2005; *Dr. Azhar Malik vs. Chairman NAB*, 2005 PLJ 354; *Rauf Bakh Qaadri vs. The State*, SBLR 2003 Sindh 163.

²⁸⁸ Section 382-B of the CrPC says, “The length of any sentence of imprisonment imposed upon an accused person in respect of any offence shall be treated as reduced by any period during which he was detained in custody for such offence.”

²⁸⁹ See for example, *Muhammad Bashir vs. The State*, PLD 1982 SC 139; *Ramzan vs. The State*, PLD 1992 SC 11; *Muhammad Rafiq vs. The State*, 1995 SCMR 1525; *Muhammad Saleem vs. The State*, 1996 PCrLJ 1598; *Mukhtiar-ud-Din vs. The State*, 1997 SCMR 55; *Ghulam Murtaza vs. The State*, PLD 1998 SC 152; *Javed Iqbal vs. The State*, 1998 SCMR 1539; *Aamir Ali vs. The State*, 2002 YLR 1902.

²⁹⁰ PLD 2005 SC 163. See also, *Human Rights Case No.4115 of 2007*, PLD 2008 SC 71.

remission for the period during which he had not been convicted of any offence nor was he undergoing any sentence.

This was a unique position taken on the matter by the Court; the extension of the benefit of Section 382-B and the grant of remission for the under-trial period of a prisoner are intertwined and interlinked and cannot be dealt with in isolation from each other under the principles of interpretation. Keeping this in view, in 2009, the Supreme Court revisited the judgments given in *Haji Abdul Ali's Case* and *Human Rights Case No.4115 of 2007*. In *Shah Hussain vs. The State*,²⁹¹ the Court particularly pointed out that the Law Reforms Ordinance, 1972 had substituted the word 'may' from 'shall' in Section 382-B of the CrPC (Second Amendment Ordinance No. LXXI of 1979); therefore it is mandatory for all the subordinate courts and the prison authorities to give the benefit of Section 382-B to all the offenders falling under the defined ambit along with all the remissions pronounced during this period by any authority. Because such denial to remission to a category of convicts/prisoners (for pre-sentence period) is arbitrary and devoid of reasonable classification. The Court also declared it violative of Article 25 of the Constitution.²⁹² The question, whether the right of remission can be joined with the mandatory benefit of Section 382-B was answered by the Court in *Shah Hussain Case*,

..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

²⁹¹ PLD 2009 SC 460. The judgment upholds the field and has been used in later cases, such as in, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1; *Shahid Mahmood vs. The State and others*, PLD 2011 Lahore 502; *Muhammad Shakeel Shah vs. The State*, PCrLJ 2011 Lahore 1997; *Muhammad Zahir Alias Tiko vs. The State*, 2011 SCMR 38; *Falak Sher Alias Bholli vs. The State*, PCrLJ 2011 Lahore 1366; *Abdul Karim and others vs. The State and others*, YLR 2011 Lahore 1572; *M. Amir Rashid vs. The State*, MLD 2011 Lahore 916; *Ghulam Gillani vs. The State and 2 others*, PCrLJ 2012 Lahore 1148; *Mudassar Ahmad Khan vs. The State*, YLR 2015 Karachi 360; *Sajjad Ikram and others vs. The State*, 2016 SCMR 467; *Ashfaq Ahmad vs. The State*, 2017 SCMR 307.

²⁹² Article 25 of the Constitution says, "Equality of citizens.- (1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex [***].

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

account of denial thereof, they would be required to remain in prison for a longer time than warranted and deprived of their liberty.

The stance taken in *Shah Hussain's Case* on Section 382-B and the remissions incidental thereto was upheld by the seven judges bench of the Supreme Court in 2010 in *Nazar Hussain vs. The Satate*.²⁹³ However in this case, the Apex Court declared another type of statutory classification of prisoners (i.e. for murder, espionage, anti-state activities, sectarianism, Zina, robbery, dacoity, kidnapping/abduction, and terrorist acts) as lawful, intra-vires and not arbitrary or discriminatory attributable to the reason that 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. Currently the judgments passed in *Shah Hussain's Case* and *Nazar Hussain's case* uphold the field.

The above discussion raises a few issues; first, since remission or the system of reduction in punishment is utilized as a correctional measure primarily to persuade the offenders for reformation of their character then why this measure has not been offered to especially those classes of prisoners who are convicted for being involved in heinous offences? As a matter of fact, they are in a dominant need to get rehabilitated and reformed. This behavior of law seems discriminatory and violative of the equal protection clauses of Article 9 and Article 25 of the Constitution. Though a victim's perspective makes this classification permissible by signifying that differentia which can create a rational nexus to the object sought to be achieved by such classification, i.e. the imposition and completion of justified punishment for the crime committed; however the wretched conditions prevalent in jails, the suffering and the miseries of jail inmates when are juxtaposed with the 'fundamental right of dignity of man' call for a rational treatment of remissions being granted during the incarceration to a prisoner.

²⁹³ PLD 2010 Supreme Court 1021.

Second, the underline rationale behind the reduction of punishment is to engage offenders in certain authorized structured activity through which they might be peacefully rehabilitated. But whether the activities offered by Pakistani legal regime to get a remission can achieve its required principal purpose of reforming a prisoner? In a broader perspective, the answer is no. This largely temptation centric method sometimes abates the chances of perpetual or long-lasting tendency of modification of behavior and personality of the offender. Only the voluntary and objective based rehabilitation and reformation of offender may prove ceaseless and continual. The PPR needs to incorporate measures and defined strategy to calculate the follow-on correction through remissions. It seems highly improbable that remission, as an exclusive strategy would become very helpful to reform a prisoner; as the skeptics claim that, in many cases, prison education produces nothing more than, 'better educated criminals'. Though, many studies have shown significant decreases in recidivism through adopting education based strategies;²⁹⁴ yet for reformation of prisoner some fresh methods are necessarily required. The remission strategies should principally focus the objective instead to persuade the subject towards good behavior only for securing his early release. In such case, for prisoner, the spotlight is 'before time liberty' and not the 'mended behavior'. The regimes progressive with regard to their prison systems have put much effort to ensure the desistence of maximum criminals. Through espousing various research based strategies, they characterized the remission as one 'possible' method of reformation and correction of the prisoner but not the 'sole' mean to do that. Mostly the remission is considered one essential of the system of 'early release from prison' whereas the other fundamental of this system is parole which is extended through controlled release, community control, supervised release, and community custody etc.²⁹⁵ Thus as a first step, the prisoner gets a temporary release through parole in which a day-to-day or weekend

²⁹⁴ <http://listverse.com/2008/08/14/top-10-modern-prison-programs/> (last accessed: July, 2013).

²⁹⁵ *Doris Layton Mackenzie*, Supra note 85.

release is possible which generates vast possibility to facilitate work training along-with advancement of family ties. Provided these mechanisms are utilized carefully in order to gradually prepare the prisoners to rejoin the community in a safe, structured and supported manner.²⁹⁶ During this time, the parolee is being monitored; a number of factors are examined; such as, the offence committed, the individual's circumstances, attitude to rehabilitation, his general behavior towards common people instead of exclusively with his co-inmates, the level of inclination towards recidivism and his employment and training skills to help his smooth repatriation in society.²⁹⁷ If he shows satisfactory results then he is considered for early release through the operation of remission. Thus such system demands a step-wise reduction of punishment that might be more beneficial and result-oriented in relation to both, the prisoner and the society in general. This whole process can, to a great extent, reduce the risk of recidivism posed to the prisoner and the danger which society endures by a non-rehabilitated offender. However in Pakistan, the prison authorities neither peruse the beneficiary offenders to assess the maintenance of that good conduct which they adopt during their imprisonment to secure their early release nor do these prisoners usually spend some period on temporary release.

Third, the absolute power of decision making for grant of remission whether ordinary or special has been delegated to a few authorities of executive branch. The fact, that the prisoners have not been offered any complaint mechanisms to address their grievances enhances the probability of arbitrary use of this absolute power by the authorities. Even the courts are usually not authorized to intervene in exercise of these administrative powers except to resolve the issues concerning law on the subject. A strong superior monitoring body consisting of a hybrid of administrative and judicial authorities to receive and satisfy the complaints of prisoners can control the arbitrariness of decisions of grant of remissions. Such

²⁹⁶ Irish Penal Reform Trust, "Temporary Release and Parole", Position Paper 9, Reform of Remission, (Ireland, IPRT, October 2012), 7.

²⁹⁷ Ibid.

authority should also ensure the grant of equality of chances of remissions proportionate to performance of convict within the prison.

Fourth, the remission system is currently used for relatively different purposes than was originally envisioned. The authorities utilize the early remissions to defeat the overloading of prisons. This particular concern was also pointed out in guidelines issued by the Ministry of Interior, as a policy matter in August 2009 to the Prison authorities. Guideline No 'D' emphasized, "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."²⁹⁸ Remission, therefore, has become increasingly more significant administrative measure to assuage overcrowding than being a tool to facilitate the correction and reformation of prisoners. Such practices endanger the originality of purpose of remission which ultimately causes damage to the rights of public to enjoy a safe and protected life.

II Reformation through Sanction to Exercise Conjugal Rights within the Prison

Research into the collateral consequences of imprisonment for prisoners and their families has documented the stigma and social exclusion of prisoners' family members, especially prisoners' partners.²⁹⁹ As the research literature acknowledges that it is tempting but too simplistic to argue that since they are not convicted prisoners themselves, prisoners' partners and family members retain all the same rights as other citizens. It is not easy to explain why the partner of a prisoner can lose her own right to found a family as a consequence of being married to a prisoner since prisoners' partners have not been convicted and imprisoned. It is, however, well-established in the criminological research literature that prisoners' family

²⁹⁸ See, Letter No. D. 2792/2009-DS (Admn.), Ministry of Interior, Government of Pakistan.

²⁹⁹ Helen Codd, "Policing Procreation: Prisoners, Artificial Insemination and the Law," *Genomics, Society and Policy, Lancaster University, UK 2*, No.1 (2006): 110–117.

members are frequently treated as ‘guilty by association,’ stigmatized and taking on a share of the ‘spoiled identity’ of the imprisoned family member.³⁰⁰

Pakistan is one of those few states of the world which, as a correctional measure, permit the exercise of conjugal relations within the bounds of the prison.³⁰¹ The prisoners, under rule 545-A of PPR, are able to avail the facility as a matter of right (excluding a few exceptions). The said provision was inserted on the directions issued by the Federal Shariat Court (the FSC hereinafter) in 2010 in, *Dr. Muhammad Aslam Khaki and others vs. The State and others*.³⁰² For the first time, through this judgment, the right was appreciated at federal level; though it had already been inserted through an amendment titled, ‘special meetings’ in provincial PPRs of KPK (N.W.F.P formerly), under rule 544 in 2005 and Punjab, under rule 545-A in 2007. The government of each province has a prerogative to amend its respective prison rules under Section 59 of the Prisons Act, 1894.³⁰³ Balochistan and Sindh granted the right to inmates in 2010 just after the pronouncement of judgment on *Aslam Khaki’s Case*.

The FSC ordered to ensure the availability of this right in all prisons of Pakistan essentially to facilitate the rehabilitation of prisoners. The Court observed that the propensity to sexual abuse of fellow inmates and drug addiction in married prisoners might be best controlled by letting them conjugal visits. Because as a matter of fact, only the offender should be held responsible for his offence, his family must not suffer. The Court thus proposed the family get-together in prison compound on auspicious occasions along-with providing parole facility for private family meetings; these meetings might prolong for a

³⁰⁰ *Ibid*; Helen Codd, “Prisoners’ Families: the ‘Forgotten Victims,’” *Probation Journal* 45, No.3 (1998): 148-154; Helen Codd, “Age, Role Changes and Gender Power in Family Relationships: The Experiences of Older Female Partners of Male Prisoners,” *Women & Criminal Justice* 12, No 2/3 (2000): 63-93; Helen Codd, “The ties that bind’: Feminist Perspectives on Self-Help Groups for Prisoners’ Partners,” *Howard Journal of Criminal Justice* 41, No.4 (2002): 334-347.

³⁰¹ The other states which offer such right are, Saudi Arabia, Iran, Qatar, Turkey, Canada, Spain, Belgium, Russia, France, Zimbabwe, Brazil Costa Rica, Israel and Mexico. However UK and USA do not allow the prisoners to exercise the right of maintenance of conjugal visits. For details see, BBC News aired at, June 29, 2000. Available online at, http://news.bbc.co.uk/2/hi/uk_news/812165.stm (last accessed: January 14, 2014).

³⁰² PLD 2010 FSC 01.

³⁰³ Prisons Act, 1894 (XI of 1894).

week every four months for every married prisoner except lifers and condemned prisoners at the arrangement of satisfactory sureties for his return back to prison.

Currently in KPK, the inmates of Peshawar and Haripur Central Prisons and Banu Jail can avail the meeting facility in family quarters.³⁰⁴ While in District Jail Dera Ismael Khan, one separate room was constructed for private family meetings where afterward all the female convicts got shifted; currently the prisoners have no other option except to meet their families in presence of other female convicts.³⁰⁵ In Punjab, family quarters are under construction in various prisons, such as, the Central Prison Multan and the Adyala Jail Rawalpindi however no proper meeting has been arranged in this regard as yet.³⁰⁶ Several heavily crowded prisons of Sindh and Bulochistan such as, Mach Jail, Quetta District Jail, Sukkhar Jail, Karachi Central Jail and many others do not offer the facility due to deficient space.

The statutory insertion of right is not sufficient if the pertinent circumstances are missing. The federal and provincial governments have not made preliminary arrangements for smooth happening of these meetings. The absence of allocation of funds for staff assembling, space arrangement, adequate provision of all accessories for private meetings of the prisoners with their spouses, assembling of meals for families of the prisoners and so forth make this court order futile. The absence of a proper set-up to establish the identity of spouses through their nikah-namas (marriage deed) has turned out to be a complicated and burdensome matter for the jail authorities.³⁰⁷

³⁰⁴ Abdul Majeed Aulakh, *Pakistan Uniform Jail Manual, compilation and commentary* (Lahore, Pakistan: Omer Law Book House, 2013), 208-209. (Abdul Majeed Aulakh, *Pakistan Uniform Jail Manual, compilation and commentary* hereinafter.)

³⁰⁵ Federal Ombudsman, "Prison visit (District Jail Dera Ismael Khan) Report Part II", National Committee on Prison Reforms (Islamabad, 19th October, 2015), 188. Available online at, http://www.mohtasib.gov.pk/wafaqimoh/userfiles1/file/Prison%20Report_Part%20II.pdf (last accessed: October 2, 2016).

³⁰⁶ According to a serving Superintendent Police (Prisons) interviewed by author on July 14, 2016.

³⁰⁷ Report by Aroosa Masroor, "Prisoners granted conjugal rights", published on May 8, 2010 in The Express Tribune(Sindh, Pakistan). Online available at, <https://tribune.com.pk/story/11618/prisoners-granted-conjugal-rights/>.

The FSC, while proceeding with *Aslam Khaki's Case*, proposed two sets of options; one, to provide conducive atmosphere for private family meetings in separate rooms constructed within the bounds of prisons; second to send eligible prisoners on conjugal parole for some days after every four months. Federal and provincial governments opted for the first one which is far much arduous for government exchequer, practically less feasible and is considered socially hazardous.

The procedure of short release on parole is already operational throughout the country through Rule 223 of the PPR. This is comparatively much more practical and uncomplicated to add a special category of 'conjugal parole' in the system to make the right realistically useful. Such kind of parole would not be used only as a chance of reunion of spouses but also of the other family members, such as the parents of the offender.

C- Administrative Method to Reform the Prisoners

Administrative methods are employed as a direct strategy to reform prisoners. Under this method, the prison administration is required to arrange future centric skillful programs for prisoners that can equally help transforming their felonious character. Chapter 33, Rule 810 of PPR makes it obligatory for the respective prison superintendent to provide locally available labour (industrial/non-industrial) to every class of prisoners sentenced to rigorous imprisonment for enabling them to earn respectable livelihood after their release. These programs may continue within the bounds of prison under the authority of prison administration as a general rule.³⁰⁸ However special permissions to work outside the prison can be granted in extraordinary circumstances.³⁰⁹

In Pakistan, this particular rehabilitative strategy is carried out in an outmoded manner with a very few options offered with regard to programs and trainers. According to

³⁰⁸ The PPR, Rule 829 (i).

³⁰⁹ This permission is granted to those prisoners who have good character with no apparent inclination to escape and who are not residents of foreign territory. When there are more prisoners eligible than are actually required, those with the shortest unexpired sentence are chosen (PPR, Rule 829).

the information imparted by Punjab Prison Department's official website, the reformation mechanisms tendered for inmates include the formal education facility, religious education, vocational training which include tractor mechanic, motor winding, electric home appliances repair, welding, motorcycle mechanic, masonry, auto mechanic, carpentry, hand embroidery, beautician, computer skills, sports (indoor/ outdoor), TV facility in barracks, cold drinking water in hot weather and proper medical care.³¹⁰ (This is altogether un-understandable that how the supply of cold water and medical care can help to reform a prisoner.)

Sindh Prison Department offers training programs for carpet manufacturing, dari manufacturing, textile, carpentry, smithy, tailoring laundry, power looms and facilitation in learning sewing.³¹¹ However the department states that it is running short of funds to purchase raw material and maintenance machinery for such trainings; additionally they assert that the work carried out at smaller scale on self help basis becomes the reason for not achieving the desirable results.³¹² Ironically such limited prison industry is available in only 3 prisons of Sindh i.e. Karachi, Hyderabad and Sukkhar out of 25 in total.³¹³ Whereas the law requires the provision of such programs for every class of prisoners sentenced to rigorous imprisonment.

The official website of KPK Prison Department affirms 'correction' as one of its prime functions. For this purpose, four categories of psychological- ethical- moral and vocational motivational programs are open for prisoners.³¹⁴ However the prison website of province of Bulochistan is silent in this regard.

The quick examination of the means available at administrative level for reformation and rehabilitation of convicts downrightly divulge the paucity of novel ideas on the particular subject. The execution of necessity of mending the character of hardened criminals is in no

³¹⁰ See for details, http://www.prisons.punjab.gov.pk/vocational_training_of_prisoners (last accessed: April 22, 2016).

³¹¹ See for details, http://sindh.gov.pk/dpt/sindh_prisons/All%20PDF/Prison%20Industries.pdf (last accessed: August 19, 2016).

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ http://www.hdkp.gov.pk/index.php/Cms/Cms_Pages/Mw (last accessed: April 24, 2016).

way likely through only educating or sharpening the hand skills (which is available at only limited incarceration points) of prisoners. This is comprehensible that various basic features which should have been taken in to account for the training of a prisoner while he is being incarcerated are ignored or missed out; such as, that this is vital to de-criminalize the offender, that he should desist, that he should be provided an atmosphere where he can voluntarily reform himself, that he must have mended his ways at the time of his release from the prison, that the society should be ready to receive him open-heartedly and that he should be smoothly repatriated.

For achieving these purposes there must be the utilization of substantive method of involvement of right inmate at right time in right program. This is that if he needs education let him have it; if he needs work skills give him training. For resolving the behavioral psychological and drug related issues provide necessary treatments and if he is mentally ill, do not put him in prison in the first instance rather shift him to the hospital. These measures are needed to bring a better public safety and cost efficient outcome by ensuring that more people come out of prison able, willing and motivated to behave as good citizens.³¹⁵

In this reference, the prison authorities should carefully examine the particular needs of prisoner along with his general history and criminal inclinations. Canadian researchers Andrews and Bonta have presented the theory of five principles for selection of prisoners for various rehabilitation and reformation programs. These principles include risk, need, responsivity, professional discretion and program integrity.³¹⁶ They suggest that the offenders with higher risk benefit more than low risk offenders from rehabilitation programs; under the needs principle, programs should meet individual offender's criminogenic needs; the third

³¹⁵ Erwin James, "Prisoners are our Future Neighbors So is Rehabilitation Such a Dangerous Idea?," *The Guardian*, November 01, 2013. Available online at, <http://www.theguardian.com/commentisfree/2013/nov/01/prisoners-are-our-future-neighbours-so-is-rehabilitation-such-a-dangerous-idea> (last accessed: March 03, 2014).

³¹⁶ For detailed study see, Andrews, D. A. Zinger, I. Hoge, R. D. Bonta, J. Gendreau, P. & Cullen, "Does correctional treatment work? A clinically relevant and psychologically informed meta-analysis," *Criminology* 28 (1990): 369-404.

principle suggests that particular programs must be responsive to the characteristics of individual offenders. The other two principles are however connected with the sound training of the trainer and the integrity of the particular program itself.³¹⁷Hence the proper selection of prisoner for different programs according to their personal needs is vital whereas the programs must also be well developed and the trainer must be suitably trained.

I- Contemporary International Trends with reference to Reformation Programs for Prisoners

The contemporary international trends of rehabilitation of prisoners through a structured activity at administrative level are entirely different from those existing in Pakistan. In particular, when the other states develop their rehabilitation programs for prisoners, first of all they premeditate to target psychological aspects that are amenable to alter through treatment and have a functional relationship with offence committed (criminological inclination). Programs prepared by focusing on psychological theory and research are developed to control particular inclinations such as, use of drugs, anger management, to curb the violent behavior, curtail sexual offending and restrain general offending.³¹⁸

As a next step, choices are given to the offenders to opt suitable rehabilitative and reformatory training. For example, the possible mechanisms which may be taken up for the purpose of reforming and rehabilitating the criminals under international schemes are community-based treatment, psychological/counseling programs, vocational trainings, programs emphasizing the need to treat others with respect or the need for self-discipline and education, work/occupational programs, mental health, substance abuse programs (programs to control use of drug) and behavioral programs.³¹⁹These main heads can be sub-categorized. For example, in USA, the Education for prisoners is imparted through adult basic education,

³¹⁷ Kevin Howells & Andrew Day, "The Rehabilitation of Offenders: International Perspective applied to Australian Correctional System," *Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice* Canberra 112 (1999): 4. Available online at, http://aic.gov.au/media_library/publications/tandi_pdf/tandi112.pdf (last accessed: July 04, 2017).

³¹⁸ *Ibid.*, 2.

³¹⁹ New World Encyclopedia, s.v. "prison".

career technical education, general education development, high school diploma program, institutional television services, library services and voluntary education programs.³²⁰

The Californian Department of Correction and Rehabilitation offers six different careers under the head of “Technical Education”. That includes the sectors of building, trade and construction, energy and utilities, finance and business, public service, manufacturing and product development and the transportation sector. They further train in solar, geothermal and smart energy management practices, construction technology, carpentry, dry wall, masonry, plumbing, industrial painting, electrical construction, heating/ventilation/air-conditioning/refrigeration, sheet metal, welding, electronics/network cabling, roofing, auto mechanics, engine service and repair, automotive body repair and refinishing and small engine repair, office services and related technologies, computer literacy, cosmetology, and machine shop. Each of the programs is also aligned to industry recognized certification.³²¹

The ‘Recreation Program’ offers various activities for the inmate population. Activities include intramural leagues and tournaments in two teams, individual sports, board games, courses on personal fitness and the arrangement to show a selection of institutional movies.³²²

Then there are honor programs based on the principle of motivating positive behavior and holding individuals accountable for their actions. Prison contemplative programs include meditation, yoga, contemplative prayers and similar activities. These programs become helpful for stress relief of the inmate. Such programs are being tested even in the neighboring country, India and the authorities found them highly productive.³²³ The noteworthy thing is that such long list of options is available for all the inmates without any discrimination.

³²⁰ <http://www.cdcr.ca.gov/rehabilitation/oce.html> (last accessed: March 22, 2015).

³²¹ USA, Californian Department of Correction and Rehabilitation, *Career Technical Education Programs* (USA). Available online at, <http://www.cdcr.ca.gov/rehabilitation/career-technical-education.html> (last accessed: June 22, 2017).

³²² *Ibid.*

³²³ Harpeet Kaur, *Prisoner's Reform in India* uploaded (n.p., n.d.). Available online at, http://www.academia.edu/2221298/Prisoners_Reforms_in_India (last accessed: August 27, 2016).

Therefore not only the choices of programs but their smooth accessibility for prisoners is also essential.

II- Suggestive Measures in line with Contemporary International Trends

Some of the aforementioned multiple beneficial programs to rehabilitate the prisoners should at least be incorporated in labor based rehabilitative measures offered to Pakistani prisoners. The novelty of methods to provide vocational education to the prisoners is essential to open up various professional avenues in post-imprisonment scenario for them. This will also control their recidivism phenomenon. This is also imperative to provide equal rehabilitative opportunities to all the prisoners falling in the loop. In addition to it, reformation based educational, psychological, recreational and motivational programs should also be available in the prisons.

Solutions for several relevant issues which hinder the execution of such programs are presented here.

- 1- One vital problem is the availability of suitable and experienced trainers for conducting different programs; this difficulty may be defeat by hiring professionals indulging NGOs working in specific areas of prisoners' rehabilitation, volunteers and students (interns). For gaining the maximum results; some full time professionals might also be hired by the relevant prison departments.
- 2- The budgetary issues can be handled through international/national funding including the help made by the philanthropists. The largest funding source must be the relevant government itself; it should specify a special fraction of money for deterring the recidivism rates out of the capital fixed for maintaining law and order in the state.
- 3- Another aspect is the security hazards attached to hiring so many trainers or program conductors. The security and scrutiny arrangements of/for the potential trainers is indeed a serious issue but its gravity is not more than that of the provision of security

for the whole society from future recidivists. Hence it is imperative to keep the priority of investment for the betterment of personalities of convicts on top. The administrative rehabilitative measures for prisoners should be revisited and modified in pursuance of practical measures.

6.2 SUGGESTIVE MEASURES

Several aspects of Pakistan's present rehabilitation structure are inconsistent with the emerging norms of International human rights law. It is believed that the existing statutory, administrative and judicial systems should be reformed to attain exactitude in the law and to maintain a correct balance between the protection of public and the rights of sentenced persons to a fair and balanced reformation and rehabilitation centric system. In this regard a few suggestions are comprehended;

- 1- Some follow up measures to check the progress of prisoners benefitted from remission should be taken up to make the institution of remission result-oriented.
- 2- There must be some supervisory/complaint body devised to reduce the chances of arbitrary exercise of power to take the decision regarding remissions by the prison authorities. And the underline purpose of remission, that is to make a rehabilitated and reformed person liberated from the prison must not be over-shadowed under any administrative measures of using the remission as a mean of reducing the population of overcrowded prisons.
- 3- To achieve the goal of reformation or to reduce the over-crowdedness of prisons or for introducing the alternative mechanisms to imprisonment through administrative methods, the authorities should ponder for supplementary novel means to deal with particular requirement of the convict instead of using identical strategy against all the offenders.

- 4- Reformation of convict is basically the transformation of a felon into a productive citizen of the society. The process of this transformation is however not easy in any way as it is endeavored to alter the whole personality and especially the psychological mind-frame of a human being. Such an activity requires a cumbersome process where the past background of the convict ought to be explored which may contain the difficult family conditions including experience of childhood abuse, unemployment, financial problems, homelessness and mental health problems, impulsive or low self control, attitudes supportive to crime (anti-social behaviours), crime friendly social networks and accommodation related problems.³²⁴ These factors may vary from person to person or group to group such as relating to gender or age.³²⁵ Hence the reformatory programs held by the prison management for the safety of post-imprisonment scenario must be scheduled according to the special needs of the beneficiary, i.e. the prisoner. For this purpose, some added programs must be available without any discrimination for all the prisoners with a fully prepared staff and reasonable budgets.
- 5- While discovering the judicial approach on rehabilitation of convict it seems like an off-track service because of lack of defined principles to be followed by the judge. Courts use some archaic concepts to base their verdicts with no substantive improvement. To solve this issue, either the Parliament must legislate specifically

³²⁴ For detailed study see, Martin Wood and Jack Cattell, "Offender Management Community Cohort Study (OMCCS): Baseline Technical Report," *Ministry of Justice, Analytical Series* (2013):01-44. Available online at, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296181/omccs-baseline-technical-report.pdf ; Singleton and others, "Psychiatric morbidity among young offenders in England and Wales," *Office for National Statistics* (1998):01-30. Available online at, <https://www.google.com.pk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwid2bLCwpvVAhXDj5QKHwzAfMQFggiMAA&url=https%3A%2F%2Fwww.ons.gov.uk%2Fons%2Frel%2Fpsychiatric-morbidity%2Fpsychiatric-morbidity-among-prisoners%2Fpsychiatric-morbidity-among-prisoners--summary-report.pdf&usq=AFQjCNGLXZ7T6RmqfLf2epvIQGZ2SFgfBQ> (last accessed: October 14, 2014).

³²⁵ United Kingdom, Ministry of Justice, *Transforming Rehabilitation: a Summary of Evidence on Reducing Reoffending* (Analytical Series, 2013):01-54. Available online at, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305319/transforming-rehabilitation-evidence-summary-2nd-edition.pdf (last accessed: July 14, 2014).

to attain the goal of reformation of a felon or the higher judiciary should itself sketch perusing points to find reformation responsive verdicts. The thought, to be 'tough' for some and to be 'soft' for other crimes has been proved as highly effective consideration for developed states which must be adopted by Pakistani legal and judicial system as well.

6.3 CONCLUSION

It is time to hear the alarming bells. The rehabilitation and reformation of prisoner is not only important for a prisoner; this is rather more significant in relation to the whole society. This is imperative to realize that the essential aspect of punishing an offender is to make him conscious about his wrong done in a way that he abstains to repeat it. If such grueling does not conclude with the desistence of criminal and he replicates his mistakes then what benefit the society can get out of such lengthy procedure of punishing a criminal? Hence the statutes, administration and the judiciary, in maximum cases, should move in the direction of treatment of prisoner instead of solely penalizing him for his act.

PART III

RIGHT OF SMOOTH REPATRIATION

CHAPTER VII

RIGHT OF REPATRIATION FOR EX-PRISONERS IN PAKISTAN

INTRODUCTION

We sentence, we coerce, we incarcerate, we counsel, we grant probation and parole, and we treat—not infrequently with success—but we never forgive.³²⁶

During the past few decades, right of smooth repatriation of ex-prisoners has got much importance. UK, France, USA and many other states have comprehensive laws to rehabilitate and smoothly repatriate their ex-prisoners. In Pakistan, however the idea of repatriation of ex-prisoners is completely unfamiliar; the common people are generally inconsiderate and unkind towards the ex-prisoners and usually look upon every offender with the same insensitivity. The legislature and the judiciary however surprisingly have variant attitudes, with no principled stance, towards different classes of ex-prisoners. Though several statutory provisions talk on diverse aspects of post-conviction scenario however no evidences show that their original purpose is to involve the ex-prisoners back in to normal life. For example, the Constitution of Pakistan, 1973 (Constitution hereinafter) presents a raw procedure through Article 63, sub-clause 1 (g) and (h) to specifically exonerate only those ex-prisoners who had been previously convicted from the court of law under a few particular crimes that are enlisted by the Article itself and who could turn out to be qualified only to contest general elections after the lapse of a prescribed time which is also fixed by the same Article. Section 15 of National Accountability Bureau Ordinance, 1999 (NAB Ordinance hereinafter) offers a similar kind of clemency which can be availed by those who had been convicted under the charges of corruption. Whereas second proviso of Article 3 of Quanoon-e-Shahadat Order, 1984 (Quanoon-e-Shahadat hereinafter) (the applicable law of Evidence in Pakistan) gives

³²⁶ Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders* (Washington: U. L.Q Publishers, 1966), 147-148.

powers to the court to pronounce the exoneration specifically for previously convicted perjurers however defines no specific procedure to pass on this coverage. Moreover such exoneration opportunities or methods to secure ordinary positions in the society are not generally open for the other classes of ex-prisoners. This phenomenon gives an impression that the legislature had prejudiced spectacles to view the issue with no clear objectives to repatriate ex-prisoners. The issue however has never been highlighted by researchers, judges or even by ex-prisoners in Pakistan.

This chapter with the help of statutory examples elaborates mechanisms to handle ex-prisoners in Pakistan. These examples cover both sides of laws; the side which offers clemency and the side which altogether rejects such chances. The study proposes that the subjectivity of law should be converted into generality to make it judicious through adopting a separate statute on the pattern of the Rehabilitation of Offenders Act, 1974, UK (ROA hereinafter). Such piece of law might equally provide an opportunity of exculpation to the desisted previous-offenders at a justified level.

7.1- THE STATUTORY LAW REGARDING PREVIOUS OFFENDERS IN PAKISTAN

A- Article 62 and 63 of the Constitution of Pakistan, 1973

Article 63 of the Constitution provides the ‘grounds of disqualification for membership of the Parliament’. Sub-clauses 1 (g) and (h) of the said Article discuss the procedure of exoneration of some classes of ex-prisoners who have been previously convicted under different types of offences to gain or regain qualification to hold membership of the Parliament. It says,

- (1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if,
 - (g)- he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into

ridicule the judiciary or the Armed Forces of Pakistan, unless a period of five years has elapsed since his release; or

(h)- he has been, on conviction for any offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release.³²⁷

Whereas Article 62 of the Constitution enlists the ‘qualifications required for becoming member of the Parliament’, its sub-clause 1(f) says,

(1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless-

(f) he is sagacious, righteous, non-profligate, honest and ameen,³²⁸ there being no declaration to the contrary by a court of law;

Article 63, sub-clause 1 (g) and (h) and Article 62, sub-clause 1(f), according to the interpretation of the courts, principally are in contrast to each other for having different legal consequence for the convicted offenders. The courts elaborate that the disqualifications pronounced under Article 63 are erasable after the passage of specified duration but since Article 62 does not state any time limit to clear the guilt therefore it leaves a perpetual mark on the life of the person. The Supreme Court, in the case of *Malik Umar Aslam vs. Mrs. Sumaira Malik*,³²⁹ explained that the loss of ‘qualification’ under Article 63(1) (g) and (h) is of temporary nature and a person disqualified under Article 63 can become qualified after the lapse of a certain period as mentioned therein, whereas, the one who lacks the qualifications given under Article 62 is debarred to become member of the Parliament perpetually. In *Jehangir Khan Tareen vs. Muhammad Siddique Khan Baloch*,³³⁰ Justice Umar Atta Bandial wrote, “.the qualifications of a candidate set out in Article 62 of the Constitution are a *sine-qua-non* for eligibility to be elected as member of the Parliament. No time limit for ineligibility on this score is given in the Constitution.” The Court further continued on the

³²⁷Eighteenth Amendment amended this particular sub-clause, previously it was given as, “he has been convicted by a court of competent jurisdiction on a charge of corrupt practice, moral turpitude or misuse of power or authority under any law for the time being in force.”

³²⁸ The one who is faithful and trustworthy.

³²⁹ 2014 SCMR 45.

³³⁰ 2014 SCMR 308.

effect of Article 62, “The Constitutional norm must be respected and therefore implemented. The above noted precedents have applied a lifetime bar on a delinquent elected member of Parliament.”³³¹

The crimes discussed under Article 63 (1) (g) and (h) are noticeably sensitive in nature nevertheless their effect might be obliterated under the Constitution for securing the eligibility to hold the position/office of law making for the entire country. This is only because the required time to become entitled for exoneration has been intrinsically provided in the provision as the single requirement to be satisfied by the person. In comparison to it, for Article 62, sub-clause 1(f), the framers of the Constitution have chosen not to prescribe any period of time through the flux whereof the disqualified person can get qualification. This happens despite of the fact that the said clause disqualifies the person at some exceptionally broad and comparatively vague grounds.

Another identical rule of absolution for those ex-prisoners who had been convicted for the crime of corruption is discussed under Section 15 of the NAB Ordinance. Here the provision provides relatively more details than are given in Article 63. The law puts a categorical ban to hold every public office, or for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or statutory or local authority or allocated in service of Pakistan or of any Province for a period of ten years. Under Section 15, sub-clause (b), the person convicted for corruption and/or corrupt practices as described at serial No. 1 of the Schedule of the said law is further debarred to apply for or

³³¹ The same principle was elaborated in *Abdul Ghaffoor Lehri v. Returning Officer PB-29, Naseerabad-II*, 2013 SCMR 1271; *Allah Dino Khan Bhayo v. Election Commission of Pakistan*, 2013 SCMR 1655; *Iqbal Ahmad Langrial v. Jamshed Alam*, PLD 2013 SC 179; *Najeeb-ud-Din Owaisi v. Amir Yar Waran*, PLD 2013 SC 482 and *Muhammad Ijaz Ahmad Chaudhry vs. Mumtaz Ahmad Tarar and others*, 2016 SCMR 01. The courts used the principle mentioned in Article 62 and 63 with regard to exoneration of ex-convicts in many other cases. For example, see, *Sadiq Ali Memon vs. Returning Officer, Na-237, Thatta-I and others*, 2013 SCMR 1246; *Syed Yusaf Raza Gilani, Prime Minister of Pakistan vs. Assistant Registrar, Supreme Court of Pakistan*, 2012 SCMR 466; *Contempt Proceedings against Syed Yusaf Raza Gilani, Prime Minister of Pakistan*, 2012 SCMR 909; *Muhammad Azhar Siddique vs. Federation of Pakistan*, PLD 2012 SC 774; *Ch. Muneer Ahmad and others vs. Malik Nawab Sher and others*, PLD 2010 Lahore 625; *Ch. Muneer Ahmad vs. Malik Nawab Sher*, PLD 2010 Lahore 625; *Imtiaz Ahmad Lali vs. Ghulam Muhammad Lali*, PLD 2007 SC 369; *Malik Umar Aslam vs. Sumaira Malik*, PLD 2007 SC 362.

be granted any financial facilities in the form of any loan or advances or other financial accommodation by any bank or financial institution owned or controlled by the Government for a period of 10 years; this period is to be reckoned from the date he is released after serving the sentence.

B- Article 3 of Quanoon-e- Shahadat Order, 1984

Article 3 of Quanoon-e-Shahadat is essentially about the competency of witnesses; its provisos however particularly present the legal position regarding the competency of the previously convicted perjurer to present his evidence in some future proceedings.

The first proviso says, “Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence.” The second proviso however tells the method to erase the effect of the first proviso, it explains, “Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways.” The last part of the third proviso gives another effect to the legal sight of the Article. It says, “Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the injunctions of Islam as laid down in the Holy Quran and Sunnah³³² for a witness, and, where such witness is not forthcoming, the Court may take the evidence of a witness who may be available.” The legislature added proviso number 1 and 2 in this Article fundamentally to codify the *Quranic* injunctions provided in verse 4 and 5 of *Surah-al-Noor*.³³³

³³² The two primary law making sources in Islam; Quran is the holy book for Muslims whereas Sunnah stands for the practices of Prophet Muhammad (PBUH) (explanation given by the author).

³³³ Verse 4 of *Surah-Al-Noor* says, “And those who launch a charge against chaste women, and produce not four witnesses, (to support their allegation), ---Flog them with eighty stripes, and reject their evidence ever after: for such men are wicked transgressors.” verse 5 of *Surah-Al-Noor* says, “Unless they repent thereafter and mend (their conduct): for Allah is oft-forgiving, most merciful.”

Justice Tanzil-Ur-Rehman writes in his judgment given in *Haidar Hussain and others vs. Government of Pakistan and others*, PLD 1991 FSC 139, that verse 4 and 5 of *Surrah Al-Noor* became the source of drafting of first two provisos.

The second proviso principally overturns the effect of the first proviso for that class of witnesses who fulfill the requirements given in the second proviso. Whereas under proviso number 3, the relevant court can exercise two different powers; first, it is authorized to determine the level of repentance (as required under verse 5 of *Surah-al-Noor*) of the witness and secondly, if the witness fails to satisfy the court, it can take up his evidence as the ‘witness of availability’; in such case, the court would use its own wisdom to find the truth out of his statement. While measuring the realistic side of the Article, one should keep this fact alive in mind that there is a difference between ‘perjurer’ and ‘convicted perjurer’. Several times the court knows the fact that the person appearing in witness-box is perjurer and is or has been fabricating the evidence, despite that, the court neither can convict him due to lack of evidence of his perjury nor can reject his testimony because the other party fails to produce the rebuttal. In such situation, the hands of the court are tied with the legal and judicial requirements. And it has no other option except to accept his testimony. Therefore this ‘availability’ becomes justified on the bases of the ‘rule of necessity’.³³⁴ Justice Fakharud-Din Shaikh throws light on the modus operandi of the third proviso of Article 3 in some more precise words in *Zahir Shah vs. The State*.³³⁵ He observes,

...the proviso does not say that if witness bearing qualifications prescribed by the injunctions of Islam are not available, then the accused is to go scot-free. In spite of omission to hold enquiry, the law provides that the Magistrate may proceed to record evidence of such witness who is available, and may decide the case on the basis thereof. Hence the proviso is not mandatory, because it does not provide penalty for non-compliance with the first part of the proviso. In the absence of provision regarding consequence of non-compliance with the first part of the proviso, it shall be presumed that the proviso is directory and not mandatory and as such its non-compliance would not vitiate the trial. Again official acts are presumed to have been performed in the normal course.

³³⁴ For a detailed discussion see, *Haidar Hussain and others vs. Government of Pakistan and others*, PLD 1991 FSC 139.

³³⁵ PCrLJ 1986 FSC 1503.

However despite of having second and third provisos, when the court actually receives a previously ‘convicted perjurer’ in the court, as witness, it usually behaves differently. It is evident from the judicial practices that the courts as quite a common occurrence disqualify the ‘previously convicted perjurers’ from appearing to give fresh evidence, relying on the principle of ‘un-trustworthiness of the witness’. For example, in *Muhammad Ilyas vs. The State*,³³⁶ the Apex Court did not rely on testimony of the single witness of the case of murder because he was previously convicted for perjury though the Court had found the corroborative evidences to support his testimony. The Court stated that, “We have become cautious in the peculiar circumstances of this case and cannot rely upon Muhammad Yousaf as he would not tell the truth even on oath. The recovery of weapon at his instance shall also not be acceptable because of his shady character.” In another case, the court made use of the provisos of Article 3. In *Didar Ali vs. The State*,³³⁷ the Karachi High Court, being the appellate court pointed out the odd method of trial court to carry out the application of proviso 1 and proviso 2 of Article 3. The trial judge convicted the witness for committing perjury in evidence in one suit whereas on the same day accepted his evidence in another suit despite of the fact that he, according to the first proviso, was not a competent witness. The trial judge also did not produce any special reasons for accepting the evidence of the same witness in second case, who got convicted for committing perjury in first case and by the same judge. Therefore the High (appellate) Court reversed the conviction pronounced on the bases of sole evidence of a perjurer who could not have satisfied the Court as required under the second proviso. Practically this decision of the appellate court was justified according to the demands of proviso 1 and proviso 2 because prudence requires the afflux of reasonable time with reasonable proofs to establish the claim of repentance and mended ways. Nevertheless the court though rejected the testimony of the convicted perjurer but it did

³³⁶ 1997 SCMR 25. See also, *Mian Saif-Ur-Rehman Joya vs. Returning Officer PP-226, Sahiwal-VII, Sahiwal*, CLC 2013 ETP 1017.

³³⁷ PLD 1994 Karachi 309.

not define any such rule in the judgment which could clearly highlight the process of repentance for such perjurer.

The primary reason behind non-acceptance of evidence of previously convicted perjurer is that the drafting of second proviso is of such a nature that it appears impossible for an ordinary human being to judge its requirements and decide the ‘genuineness of repentance’ merely by using his intuition. The provision needs defined rules and principles which can clearly describe the criterion. In this regard, the statute itself does not elaborate the expressions, ‘repentance’ and ‘mended ways’ however the Supreme Court remarked during the proceedings of the Civil Appeal No. 233/2015 regarding disqualification duration under Article 62(1) (F) of the Constitution. The Court opined that the concept of repentance requires a ‘publically pronounced apology’ which merely can be accepted by the relevant court. The remarks were given about deposed Prime Minister of Pakistan, Mr. Nawaz Sharif, who was previously declared ‘untruthful’ by the Supreme Court on July 28, 2017 in “C. M. A. No. 4978 and 2939 of 2017 in Constitution Petition No. 29 of 2016 ETC”. However public pronouncement for showing regrets can neither be made in every case nor can it always be trusted. Therefore it is not an appropriate method of assessment of every single case.³³⁸

C-Article 68 and 69 of Quanoon-e- Shahadat Order, 1984

Article 68 of Quanoon-e-Shahadat affirms that the ‘bad character’ of an accused is irrelevant for the criminal proceedings however the exception to this general principle says, “in criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence

³³⁸ Before the insertion of Eighteenth Amendment (Act 10 of 2010), Article 62 had sub-clause (1) (g) saying, “A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless: - he has not been convicted for a crime involving moral turpitude or for giving false evidence”. However the Eighteenth Amendment successfully removed the particular sub-clause from the freshly provided version of Article 62 and now that su-clause is no more inclusive for fulfilling the requirements for becoming the member of Parliament. Nevertheless as a food for thought while discussing Article 3 (proviso 2) of Quanoon-e-Shahadat and Article (1) (g) of the Constitution on hand to hand a new situation arises, that is Article (1) (g) disqualifies the perjurer and Article 3 (proviso 2) of Quanoon-e-Shahadat gives the discretion to the court to accept the repentance of the previously convicted falsifier. This is difficult to balance two situations for the court as the Constitution as supreme law of the state is carrying a different requirement whereas Quanoon-e-Shahadat is thrashing out the principles based on *Quran* and *Sunnah* [Article 3 (proviso 2)]which might also not be refuted being part of the basic Islamic legal structure of the state.

has been given that he has a good character, in which case it becomes relevant.”³³⁹ Its Explanation number 2 provides that, “A previous conviction is relevant as evidence of bad character.” Hence as a principle, the bad character of an accused has otherwise no relevance with the proceedings however it may become a relevant fact in exceptional situation; that is where the evidence is produced to prove his good character. The aggrieved party may establish the case contrary to it and for such purpose it can use the previous conviction as a specialized relevant fact.

The relevancy of previous conviction to prove bad character of the accused has been more strengthened through Article 69 of Quanoon-e-Shahadat. The ‘Explanation’ of this Article defines the word ‘Character’ in this way, “In Articles 66, 67, 68 and 69 the word —character includes both reputation and disposition: but, except as provided in Article 68, evidence may be given only of general reputation and general disposition, and not of particular acts by which ‘reputation of disposition were shown’.” Therefore as a general principle, the ‘character’ includes the ‘general reputation and general disposition’, however Article 68 carries an exception to this generality where the ‘particular act’ in the shape of ‘previous conviction’ can become a relevant fact to establish the bad character of the accused in a fresh case.³⁴⁰

The later part of the principle enunciated in Article 68 of Quanoon-e-Shahadat has been discussed by the Supreme Court of Pakistan in *Pir Mazhar ul Haq and others vs. The*

³³⁹ Article 68 of Quanoon-e-Shahadat says, “Previous bad character not relevant, except in reply: In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it become relevant.

Explanation 1: This Article does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2: A previous conviction is relevant as evidence of bad character.”

³⁴⁰ The procedural part of these explanations has been discussed under Section 340 of the Criminal Procedure Code, 1898 (CrPC hereinafter). (Section 348 and 511 of CrPC are also relevant to the provision.) While going into the details of rules relating to previous convictions which make them relevant for the court of law in specific cases as necessity are those when the recurrence of crime may enhance the punishment of accused. Such possibilities are discussed under Section 245-A, 265-I and 348 of the CrPC. Here in such cases it appears as standard procedure to inquire for previous convictions by the court as necessity to conclude the extent of particular sentence nevertheless this legal cause of enhancement of punishment for recurrence of crime might not become relevant evenly in all cases such as the cases discussed above with relation to Quanoon-e-Shahadat.

*State through Chief Ehtisab Commissioner, Islamabad.*³⁴¹The Court stated while referring the commentary of M. Monir on law of Evidence that,

It is no disproof of good character that a man has been suspected or accused of a previous crime. The only safe course therefore is to find the verdict exclusively on evidence duly received and no inference logically to be drawn from such evidence. And no evidence is to be received which is second hand rendering of testimony not produced, though producible, by which higher degree of certainty could be secured.

Therefore in the eyes of the Apex Court, only the suspicion or accusation is not a valid rebuttal of good character however if it is supported with conclusive verdict held up with all evidences then it can become a reason to refute the claim of good character of the person.

Now under Article 68, the practical general effect of previous convictions is of a perpetual nature and no special circumstance or effort on the part of ex-convict can erase the stigma as well as the consequences of his previous criminal record.

While establishing a connection between Article 68 of Quanoon-e Shahadat and the Constitutional provisions, the situation seems confusing. Article 62, sub-clause (1) (d) of the Constitution says, “(1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless: d- he is of good character and is not commonly known as one who violates Islamic injunctions.” This sub-clause basically requires two sets of conditions; the first set declares it obligatory for the candidate to have good character and the second set entails that he should not violate Islamic injunctions nevertheless both requirements are separate from one another. For this discussion, the first portion is of significance. While comparing the two provisions, i.e. Article 62 (1)(d) of the Constitution and Explanation 2 of Article 68 of Quanoon-e-Shahadat, the Constitution requires good character of the candidate as a pre-qualification to become the member of the Parliament

³⁴¹ PLD 2005 SC 63.

whereas Quanoon-e-Shahadat accepts previous conviction as sufficient proof of a bad character. Constitutionally the contestant is bound to prove his 'good character' which can be rebutted (under Quanoon-e-Shahadat) through the production of evidence of his previous conviction. The moment the rebuttal has been accepted by the court of law, the person shall become perpetually disqualified from being 'member of the Parliament' because previous conviction is a sufficient proof to rebut the claim of having 'good character' and the one who does not bear 'good character' is perpetually disqualified to become member of the Parliament under Article 62, sub-clause (1) (d).³⁴² As a consequence, a serious clash appears with another aspect between Article 62, sub-clause (1) (d) and Article 63, sub-clause (1) (g) and (h) of the Constitution. Article 63, sub-clause (1) (g) and (h) exonerate the previously convicted persons to become qualified for securing the membership of the Parliament after the lapse of a specified time whereas under Explanation 2 of Article 68 of Quanoon-e-Shahadat, previous conviction is a sufficient proof to rebut the claims of good character while having a good character is pre sine qua requirement to become the member of the Parliament. Hence if someone would have already lacked requirement of having 'good character' due to his previous conviction disqualifying him perpetually, how would he get exoneration after the lapse of certain time under Article 63(1) (g) and (h)?

7.2 PROPOSED SOLUTION TO THE ISSUE

The prime reason behind this disharmony amongst various provisions is that no specific corresponding law regarding repatriation of ex-convicts is readily available. To legally facilitate the former convicts in their readjustment in the social system, though two choices of relief are at practice in Pakistan; first, the statute based relief, second, the statutory cum judicial remedy.

³⁴² The principle of 'intrinsic non-availability of time limitation' as used by the Supreme Court to interpret Article 62(1)(f) has been extended here.

The statute based remedy is given under the provisions, such as, Article 63, sub clause (1) (g) and (h) of the Constitution and Section 15 of the NAB Ordinance. The second method of statutory cum judicial remedy is operational under, such as, Proviso II of Article 3 of Quanoon-e-Shahadat. The first method has its own deficiencies, most prominently, the relevant provisions operational under this method put the only requirement of efflux of certain time for placing the claim of exoneration. These provisions do not fix any other apt conditions essentially to give protection to the rights of society and to avoid the higher risk of exoneration in false cases. Whereas prima facie, the second method has also been failed in Pakistan due to its own particular paucities; the courts could not use their judicial law making power given under the statutes pertinently. For example, the higher judiciary should have devised certain mandatory rules and conditions to identify and recognize the phenomenon of desistance in individual/s and then should have listed down the compact procedural rules for giving clean chit to the beneficiaries falling within the purview of Article 3 of Quanoon e Shahadat. However it has not happened as yet.

Giving relief through exoneration for previous convictions is in fact not a usual remedy. It carries a number of sensitive issues. If the deserving desisted offender is denied a chance of repatriation, he again can involve himself in to his criminal activities; on the other side, a clemency for a non-deserving ex-offender encourages him for the commission of future crimes that endangers the society at large. Therefore such remedies should be offered to those who have made changes in their lives and who can prove that they are no more a threat to public safety. To ensure this measure, an organized uniform system of rules in the shape of a separate statute should be promulgated at national level. These rules should be followed by the authorities to give clean chit to a previous offender. Such statute might be structured at the pattern of Rehabilitation of Offenders Act, 1974, UK (ROA hereinafter).

Under ROA, all those desisted offenders who revolutionize themselves positively and can demonstrate their non-criminal disposition by not recurring any offence for a certain prescribed period of time,³⁴³ their criminal history may be automatically spent or wiped clean off from database of police records for defined various usual purposes.³⁴⁴ Therefore along with the specification of efflux of time the fulfillment of requirement of non-recurrence of every kind of criminal activities is also to be ensured. After the realization of this pre-requisite, the person gets clean chit for multiple purposes, such as, no evidence can be presented in any proceedings before a judicial authority to prove his previous guilt which has been turned into spent conviction,³⁴⁵³⁴⁶ the person does not remain liable to give answer to any question relating to his past spent conviction;³⁴⁷ he is not obliged under any law to disclose a spent conviction or any circumstances ancillary to a spent conviction³⁴⁸ and any failure to disclose a spent conviction or any such circumstances, is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.³⁴⁹ ROA also provides the process to penalize any unauthorized disclosure of these spent convictions³⁵⁰ through allowing the initiation of defamation proceedings³⁵¹ against those who try to locate these records and for any other purposes to show prejudice against the person whose criminal record has been successfully got expunged. ROA categorically lays down a certain few places where the previous offenders cannot use the plea of expungement of previous criminal records; these places are the exceptions to ROA.³⁵²

³⁴³ The ROA, Section 1.

³⁴⁴ Ibid, Section 1 subject to subsections (2), (5) and (6).

³⁴⁵ Ibid, Section 4 (1)(a).

³⁴⁶ Ibid, Section 4 (2).

³⁴⁷ Ibid, Section 4 (1) (b).

³⁴⁸ Ibid, Section 4 (3) (a).

³⁴⁹ Ibid, Section 4 (3) (b).

³⁵⁰ Ibid, Section 9, 9-A, 9-B.

³⁵¹ Ibid, Section 8.

³⁵² These are the occupations which are excluded from the cover provided through the ROA and come under the ambit of "Exceptions Order of ROA, 1975". As an effect of these exemptions, the potential employers

7.3 CONCLUSIONS

This is certainly not possible for state to be lenient towards every type of crime however there are a number of offences which are either of a petty nature or do not leave their significant marks on the life of the victim and the society or are such inconsequential that they may be regarded as trivial. Or there are offenders who get convicted in crimes of lower gravity and want to desist or those who become guilty by chance or because of error of law or miscarriage of justice and are in a position to prove their mended/good ways must be provided a second chance. In such cases the strategy of ‘being soft’ by the state towards desisted offenders may be helpful to move their life further in a smooth manner.

In Pakistan, a particular statute, based on principles of harmony, completeness and exhaustiveness must be promulgated for specifically dealing with the process of repatriation of ex-convicts. The protection provided under this statute should be offered to those who prove their mended ways instead for all kinds of ex-offenders convicted under every level of crime or for those who have been habitually remained part of criminal episodes. And the

are legally entitled by the Act to inquire thoroughly about the previous criminal records (including the ‘spent’ or ‘unspent’ convictions) of their prospective employees (however the criminal records can be checked only once the employing agency has decided to hire a particular person and not before that) under the public protection agenda. The exclusions cover, inter alia, judicial appointments (however the right of non-disclosure of spent convictions [Section 4 (2), (3)(a)(b) of ROA] does not apply in certain circumstances to justices of the peace), procurators fiscal, medical practitioners [A person who is a member of profession regulated by body mentioned in the National Health Service Reform and Health Care Professions Act 2002, Section 25 (3).], dental hygienists, nurses, solicitors, chartered accountant, certified accountant, firearms dealers, trustees of a unit trust and directors and managers of insurance companies or the professionals who can have a direct access to children or the other vulnerable classes of society as young or disabled people, the old, etc, or to enter the armed services, chartered legal executive of other authorized person and the receiver appointed by the court of law. The conviction against sale or purchase of a public office or a neglect of duty of public office may become the cause of permanent disqualification from holding that particular office. There is no scope for extension of these professions by analogy [For a detailed discussion on issue see, *Property Guards Ltd v Taylor and Kershaw*, [1982] IRLR 175, EAT.].

Except these exempted cases, the law penalizes the unauthorized disclosure of spent convictions in any other case by any one [The ROA, Section 9]. The other employers are prevented from repudiating a contract or to justify a dismissal [For a detailed discussion on issue see, *Hendry v Scottish Liberal Club* [1977] IRLR 5, Industrial Tribunal.] on the basis of non-disclosure of a spent conviction even if they had requested full disclosure [The ROA, Section 04(02)(b), 04(03)(a). For a detailed discussion on issue see, *Walker v Greenock and District Hospital Board*, 1951 SC 464, 1951 SLT 329.]. The Act also allows a person with spent conviction to recover damages for defamation where the conviction has been published; in spite of the fact it was true, provided they can show that the publication was malicious [*Herbage vs. Pressdram Ltd*, [1984] 2 All ER 796, [1984] 2 All ER 769, [1984] 1 WLR 1160, CA.].

exoneration should be available generally to all those who come within the loop of this particular statute.

Alternatively the judiciary must develop some guiding and a few binding principles to provide a clean chit to eligible ex-prisoners just like French judicial rehabilitation system. These rules should be uniform and available in an identical manner. Moreover they must cover the exceptional areas where such rehabilitation and repatriation mechanisms cannot work; these are those professions which might be of a highly sensitive nature and despite of all precautionary measures, this is difficult to trust an ex-offender to indulge in those professions such as, a sex offender might not be trusted to engage with vulnerable classes, etc.

PART IV

THE RIGHTS OF PRISONERS UNDER SHARĪ'AH

CHAPTER VIII

A COMPARATIVE STUDY THE OF RIGHTS OF PRISONERS UNDER THE SHARI'AH AND THE CONTEMPORARY LAW OF PAKISTAN

INTRODUCTION

This Chapter will visit the rights of prisoners generally protected under Islam; further it will focus the rights specifically discussed in previous chapters of this work with relation to Pakistan and other modern legal regimes. It will also give a brief comparison of approach towards rights of prisoners under Shari'ah and contemporary regimes.

8.1 CONCEPT OF PRISON UNDER ISLAMIC HISTORY

The *Holy Quran* uses the word *Al-Sijn* to describe the expression 'Prison'.³⁵³ The other words traditionally used in Arabic for defining imprisonment are, *Al-Habs*, *Al-Hasr*,³⁵⁴ *Al-I'tqāl*, *Al-Imsāk*,³⁵⁵ *Al-ithbāt*.³⁵⁶³⁵⁷ The technical meaning of the expression '*Al-Sijn*' is discussed by various Islamic scholars. For example, *Ibn-al-Taimiya* defines it as, "a place of confinement to restrain and restrict the offender's free movement". For this purpose he may be held in a house, mosque or may be given in the custody of his opponent or the agent of the opponent.³⁵⁸ *Al-Sijn* is also described as a punishment laid down by Allah Almighty for a wrong done by an offender with the particular purposes of betterment of society together with reforming and disciplining an individual.³⁵⁹

³⁵³ See, the *Quran*, 12:33.

³⁵⁴ See, *Ibid*, 17:08.

³⁵⁵ See, *Ibid*, 4:15.

³⁵⁶ See, *Ibid*, 8:30.

³⁵⁷ For a detailed discussion on these terminologies see, Ahmad Bin Yusuf al-Draiweesh, *Huqooq-ul-Sijna Fi-Shari'ah-al-Islamiyah wa Tatbiqataha Fin Nazmat-ul-Mulkat-ul-Arabiat-al-Saudia* (2014), 10-11. (Draiweesh, *Huqooq-ul-Sijna*, hereinafter) The book has been translated in English by Munir Ahmad Mughal, *Rights of Prisoners in Islamic Law and their Modern Applications in the Legal System of the Kingdom of Saudi Arabia* (Forthcoming).

³⁵⁸ *Ibid* 12.

³⁵⁹ *Ibid*.

The *Quranic* revelations give details of the existence of penitentiaries in the periods of earlier Prophets (AS).³⁶⁰ However the concept of ‘Prison’ as a ‘proper institution’ is unfounded in early period of Islam. Nevertheless the legitimacy of imprisonment is proven through several verses of the *Holy Quran*,³⁶¹ the narrated *Ahadith* of Prophet (PBUH)³⁶² and practices of rightly guided four Caliphs.³⁶³ *Al-Shaukani* says that, the Holy Prophet (PBUH), his companions and their successors and those who came after them adopted the punishment of imprisonment in all ages and in all countries. And that they found many visible advantages in this method.³⁶⁴

During the time of Prophet (PBUH) though no regular prison complexes were found yet the prisoners were kept in mosques,³⁶⁵ houses³⁶⁶ and tents.³⁶⁷ The same practice continued throughout the reign of Hazrat Abu Bakar (may Allah be pleased with him) and in early period of Caliph Hazrat Umar (may Allah be pleased with him). However Hazrat Umar (may Allah be pleased with him) confined prisoners in deserted wells also; for example, *al-Hatiah* was imprisoned in a well by Umar. During Umar’s later period in office he purchased a house and declared it a prison. It was the first assertion of proper institutionalization of prison in Islam. Usman (may Allah be pleased with him) carried on with similar practice whereas Ali (may Allah be pleased with him) was the first who ordered to especially construct a house for imprisoning the offenders; this ‘prison house’ was named as *Nafi* (beneficial).³⁶⁸ Since then the Muslim Governments have been using the prisons as an effective tool of punishment for transgressors.

³⁶⁰ See, the *Quran*, 12:25, 35; 26:29; 38:37, 38.

³⁶¹ See, *Ibid*, 5:33; 5:106.

³⁶² For a detailed discussion on the topic see, *Draiweesh, Huqooq-ul-Sijna*, 15-16, *Supra* note 357.

³⁶³ *Ibid*, 17.

³⁶⁴ *Ibid*.

³⁶⁵ *Ibid*.

³⁶⁶ *Ibid*, 23.

³⁶⁷ *Ibid*.

³⁶⁸ *Ibid*.

8.2 GENERAL RIGHTS WITH REFERENCE TO ADMINISTRATION OF JUSTICE GIVEN THROUGH ISLAMIC INJUNCTIONS

According to Islamic teachings, Allah created all the human beings with egalitarianism. The fact mentioned in the *Quran* that, “man is created from clay”,³⁶⁹ is the clear declaration of equality of all mankind without any distinction. The *Quran* also proclaims that every human being is worthy of respect and dignity.³⁷⁰ It further decrees that all human beings, irrespective of sex, caste, colour, creed, community, country and other man made divisions are equal.³⁷¹ Then Allah declares the right over his bounties without distinction of man and woman.³⁷² These all arrangements are made because Islamic jurisprudence pre-supposes that all the human beings are equal and enjoy the same set of liberties and limitations. The revelation of the *Holy Quran* in fact introduced the concept of unity of human race.³⁷³

Similarly the right to choose has been given to all men and women.³⁷⁴ This is why it is said by the *Quran* that, “no one shall bear the burden of any other soul”,³⁷⁵ and that “everyone is accountable for his own deeds”³⁷⁶. Further the *Quran* highlights that the only thing which scratches the principle of ‘equality by birth’, is the good or bad deeds of a human being.³⁷⁷ Therefore the principle derived from all these revelations collectively is that, all human beings are equal but at the same time each individual is a class in himself. The concept of reasonable restriction is also enshrined under Islamic teachings. For example, ‘right of life’ on one hand is respected to such an extent that the killing of one person without legal sanction is declared equal to the killing of entire humanity³⁷⁸ nevertheless on the other hand the rule of *Qisas* is also well recognized by the *Holy Quran*. Alike as against the right

³⁶⁹ See, the *Quran*, 38:76.

³⁷⁰ See, *Ibid*, 17:70.

³⁷¹ See, *Ibid*, 3:195; 4:32, 124; 49:13; 16:97; 33:35.

³⁷² See, *Ibid*, 2:22, 29.

³⁷³ See, *Ibid*, 2:213; 10:19; 30:32; 33:35; 7:173.

³⁷⁴ See, *Ibid*, 6:104; 18:29.

³⁷⁵ See, *Ibid*, 67:164.

³⁷⁶ See, *Ibid*, 2:202.

³⁷⁷ See, *Ibid*, 4:19; 57:10; 4:94, 96; 6:132.

³⁷⁸ See, *Ibid*, 5:32.

that no one shall cause injury to human body,³⁷⁹the principle of retaliation permits causing similar injury to the offender.³⁸⁰The *Quran* also says, “And do not kill any one whom Allah has forbidden except for a just cause...”³⁸¹Therefore the *Holy Quran* along with giving the concept of human dignity³⁸²also allows to retaliate against any injustice and to punish the wrongdoer. The *Holy Quran* says,

Say: “come, I will rehearse what God hath (really) prohibited you from”: join not anything as equal with Him; be good to your parents; kill not your children on a plea of want; - We Provide sustenance for you and for them; - come not nigh to shameful deeds, whether open or secret; take not life, which God hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom.³⁸³

Islam came to strengthen the justice; and Islamic injunctions direct towards the achievement of this goal. *Surah Al-Hadeed* is to the effect that the Prophets were commissioned with book and balance so that people stand for justice.³⁸⁴*Surah-An-Nisa* commands that trusts be handed over to the deserving and justice should be done.³⁸⁵*Surah-Al-Nahl* indicates that Allah commands the doing of *Adl* (Justice) and *Ehsan* (Equity).³⁸⁶*Surah-Al-Anaam* tells that the word of God finds fulfillment in truth and justice.³⁸⁷*Surah-An-Noor* shows that tenderness for culprit should not affect administration of criminal justice.³⁸⁸The element of equality between human beings has been commanded by the Holy Prophet (PBUH) also in *Khutaba Hujjat-al Wida*. He (PBUH) told in his sayings that the cause of fall of nations is relatable to the fact that rich and dominant culprits were let off while the penal provisions were imposed only upon those who belonged to poor section of society. The wife of Prophet (PBUH), Aisha (may Allah be pleased with her) narrates that the people of

³⁷⁹ See, Ibid, 2: 178,179, 194.

³⁸⁰ See, Ibid, 5:45.

³⁸¹ See, Ibid, 17:31.

³⁸² See, Ibid, 17:70.

³⁸³ See, Ibid, 6:151.

³⁸⁴ See, Ibid, 57:25.

³⁸⁵ See, Ibid, 4:58.

³⁸⁶ See, Ibid, 16:90.

³⁸⁷ See, Ibid, 6:115.

³⁸⁸ See, Ibid, 24:02.

Quraish(tribe) were worried for the girl of *Bani Makhzum* who was caught under the charge of theft. They asked Usama bin Zaid to mediate for her with Prophet (PBUH). When Usama spoke about that to Allah’s Apostle (PBUH), He said, “do you try to intercede for somebody who is connected to a case of Allah’s prescribed punishments?”Then he stood up for delivering a sermon. Prophet (PBUH) said, “what destroyed the previous nations was that they used to inflict the punishments on the poor and forgive the rich. By Him in Whose Hand my soul is! If Fatima, the daughter of Muhammad stole, I would cut off her hand.”³⁸⁹ Hence it is established that the element of discrimination is ultra-vires to the Injunctions of Islam.

Though a very few verses of the *Holy Quran* or traditions of Holy Prophet (PBUH) may be found to provide wide-ranging principles on the topic of prison discipline upon which the existing prison legislation can rest. Nonetheless certain Islamic injunctions of general import relevant with administration of justice, human dignity and human welfare are extended in case of prisoners too. These are basically founded on the principle of relationship between ‘*Hukm* and *Hikmat*’. One set of these rules is termed as, ‘*Maqasid ul Sharī‘ah*’ or the ‘fundamental objectives of *Sharī‘ah*’ (or the ‘higher objectives of *Sharī‘ah*’) according to which the purpose of revealing the Injunction was in fact preservation of certain values, freedoms or rights which are essential for maintenance of balance among society. These *Maqasid* are preservation of faith, life,³⁹⁰ property,³⁹¹ intellect,³⁹² progeny³⁹³ and according to some, it also includes the preservation of reputation.³⁹⁴ Therefore this is the responsibility of a Muslim to safeguard these rights of him; and the one who damages any of them is liable for punishment. The other rights protected through injunctions of Islam are freedom from human

³⁸⁹ See, *Sahih Bukhari*, 4: 681.

³⁹⁰ This right is however subject to the right of retribution in the field of administration of justice. See, the *Quran*, 2: 178; 6: 151; 32:05.

³⁹¹ See, *Ibid*, 2:188; 4:11, 29.

³⁹² See, *Ibid*, 2:31-33; 96:3-5.

³⁹³ See, *Ibid*, 2:205, 233; 6:151.

³⁹⁴ See, *Ibid*, 4:148; 49:11, 12.

bondage,³⁹⁵ equality without gender discrimination,³⁹⁶ right to protest representation/appeal,³⁹⁷ sanctity of covenants at domestic and international level,³⁹⁸ justice must prevail³⁹⁹ and must be tempered only with mercy,⁴⁰⁰ preservation of human dignity,⁴⁰¹ right to chastity,⁴⁰² no one shall be held responsible for the evil of another,⁴⁰³ right to remuneration,⁴⁰⁴ human liberty,⁴⁰⁵ unity of human race,⁴⁰⁶ freedom from oppression (compulsion),⁴⁰⁷ freedom of choice,⁴⁰⁸ preservation of places of worship of different religions,⁴⁰⁹ Knowledge as a permanent value⁴¹⁰-the prevalence of merit⁴¹¹-freedom of conscience (religion)⁴¹²-right to raise family⁴¹³-presumption of innocence⁴¹⁴-freedom from exploitation⁴¹⁵-equality before law⁴¹⁶-everyone is accountable for his own deeds⁴¹⁷-human affairs are decided by mutual consultation,⁴¹⁸ maintenance of rule of law,⁴¹⁹ labour must be compensated,⁴²⁰ supremacy of rule of law,⁴²¹ right to notice and explanation before pronouncement of verdict.⁴²² It is also maintained that Allah does not lay a responsibility on

³⁹⁵ See, Ibid, 3:79.

³⁹⁶ See, Ibid, 3:195; 4:1; 33:35; 49:13.

³⁹⁷ See, Ibid, 4:148; 58:1.

³⁹⁸ See, Ibid, 2:177; 17:34.

³⁹⁹ See, Ibid, 4:135; 5:8.

⁴⁰⁰ See, Ibid, 16:90; 6:153; 7:29; 4:135.

⁴⁰¹ See, Ibid, 17:7.

⁴⁰² See, Ibid, 24:2; 12:23; 66:12.

⁴⁰³ See, Ibid, 12:79.

⁴⁰⁴ See, Ibid, 39:70; 53:39.

⁴⁰⁵ See, Ibid, 7:157.

⁴⁰⁶ See, Ibid, 2:123; 30:32; 10:19.

⁴⁰⁷ See, Ibid, 2:256; 10:99.

⁴⁰⁸ See, Ibid, 18:29.

⁴⁰⁹ See, Ibid, 2:115; 22:40.

⁴¹⁰ See, Ibid, 2:31-33; 96:3-5.

⁴¹¹ See, Ibid, 4:58; 46:19; 49:13.

⁴¹² See, Ibid, 2:256; 9:6; 10:99; 16:125; 18:29.

⁴¹³ See, Ibid, 4: 3-17.

⁴¹⁴ See, Ibid, 24: 12-16.

⁴¹⁵ See, Ibid, 39:70; 53:39.

⁴¹⁶ See, Ibid, 2:48, 123, 286; 10:15.

⁴¹⁷ See, Ibid, 2:202.

⁴¹⁸ See, Ibid, 42: 38; 3:159.

⁴¹⁹ See, Ibid, 57:25.

⁴²⁰ See, Ibid, 39:70; 53:39.

⁴²¹ See, Ibid, 5:44, 45, and 47.

⁴²² See, Ibid, 7:12; 15:32-38; 17:61.

any one beyond his/her capacity. Then no one shall bear the burden except his own. In other words no one is held responsible for another person.⁴²³

These all Islamic injunctions clearly indicate that there must be a comprehensive judicial system maintained in every society which can protect the legal rights of citizens of that society and can award justified punishment on infringement of those rights.

8.3 AN ANALYTICAL STUDY OF THE RIGHTS OF PRISONERS UNDER ISLAMIC INJUNCTIONS

8.3.1 General Rights of Prisoners in Islam

The Quran says,

It is not righteousness that ye turn your faces towards east or west; but it is righteousness-- to believe in God and the last day, and the angels, and the book, and the messengers; to spend of your substance, out of love for him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for ransoming the captives (prisoners) to be steadfast in prayer, and practice regular charity; to fulfil the contracts which ye have made and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing.⁴²⁴

The early Islamic history does not recognize 'prison' as a proper institution thus does not provide rich substance on the 'rights of prisoners' however a few examples especially of later periods can be quoted. These examples are the general picture of currently available rights under prison manuals. For instance, a prisoner (who was held hostage because two Muslims had been captured by his tribe) entreated the Holy Prophet (PBUH) for food and water. The Prophet (PBUH) said approvingly that, "this is your need."⁴²⁵ It proves that this is the duty of the authorities to provide all basic necessities to the captives. Hazrat Abu Yusuf (the renowned disciple of Hazrat Imam Abu Hanifa) dispatched a letter to the Abbasid Caliph Haroon al-Rashid and gave advice on prominent rights of prisoners. He wrote,

⁴²³ See, Ibid, 2:286; 7:42; 23:62; 3:24.

⁴²⁴ See, Ibid, 2:215.

⁴²⁵ As quoted in Muhammad Aslam Khaki and others vs. The State and others, PLD 2010 FSC 01 (Para 119).

“Provide them (the prisoners) proper food and drink. And give them a monthly allowance because if you order to provide them the bread, the guardians of prison will take it away. And appoint upon them a warden who possesses good character. He should record the names of all inmates to pay them a monthly charity. He should make them seated and call them with their names. And order the related authority to provide the prisoners, a shirt and a robe in winter and a shirt and pants in summer. And forbid the prison-keepers from abusing and smacking the prisoner. Provide enough space, proper bedding and all accessories necessary for taking bath to the prisoners. And provide them pen and paper. Do not proscribe them from having a meeting with their visitors once a week. Appoint a postman to deliver their letters to their family. If they owe a debt allow them to go out and defend their case.”⁴²⁶

According to *Maliki* point of view,⁴²⁷ to safeguard the family ties, it is encouraged that the prisoners who are relative should not be separated in the same jail from each other.⁴²⁸ *Maliki* jurists also recommend that the prisoner must be allowed for visits made by his relatives and friends in the jail.⁴²⁹

These directions made for authorities present a good piece of evidence of recognition of generally available human rights to the prisoners. A few other instances mentioned by *the Quran* are important to be noted here with relevance to the prisoners’ rights. The narrative of Hazrat Yusuf (AS) as given in 12th *Surat* of *the Quran* establishes a few rights available to prisoners during incarceration. For example, the fact that two other inmates narrated their dreams to Yusuf to get them interpreted from him shows that communication between prisoners was not prohibited even in old times.⁴³⁰ Yusuf was also not debarred from preaching within the prison.⁴³¹ These *ayaat* and above quoted examples are indicators for Muslim jurists to define the generally available rights to a prisoner during incarceration. However the specific rights discussed in this research in modern scenario (in the other chapters of this work) are also protected by Islam. An analysis is given here.

⁴²⁶ See, Draiveesh, *Huqooq-ul-Sijna*, 51-52, Supra note 357.

⁴²⁷ The Maliki school was founded by Imam Malik b. Anas (d. 179/795).

⁴²⁸ See, Draiveesh, *Huqooq-ul-Sijna*, 59, Supra note 357.

⁴²⁹ Ibid, 60.

⁴³⁰ See, *the Quran*, 12:36.

⁴³¹ See, Ibid, 12:39, 40.

8.3.2 *Specific Rights of Prisoners in Islam*

Islamic injunctions based on the *Quran* and the *Sunnah* provide ample material with regard to several of those specific rights of prisoners which have been discussed in other chapters of this work and which are available under the modern legal regimes of the world.

(A) *Alternative Sentencing Measures*

There are numerous instances of espousal of alternative measures of punishment in Islamic and Pre-Islamic history (and which are discussed by the *Quran* in a positive or recommended compartment). These instances show that the authorities had been accustomed to alter a severe punishment with a soft penalty in suitable cases, such as, insertion of imprisonment at the place of corporal punishment⁴³² or award of release on probation or parole instead of sentencing through incarceration to the subject. Considerably, there is no jurist found who did argue on enhancement of captivity period beyond one year instead the jurists usually went in favor of immediately imposable corporal punishments such as whipping or supported the imposition of damages and compensation. The basic theme behind alteration of punishment under Islamic law is to achieve the real purpose of the penalty. This is to restrain the offender from a fresh crime and to rehabilitate him in a constructive manner through imposition of either direct or indirect penalty. For example, the *Quran* lays down the system of payment of blood-money (*Diyat*) as an alternative punishment of retaliation (*Qisas*).⁴³³ Then a *Taaziri* punishment may also be placed instead of *Qisas* or *Diyat*.⁴³⁴ The other alternatives to incarceration include, *arsh*, *Al-Islah* (reformatory treatment),⁴³⁵ *Tazkiyah* (purification),⁴³⁶ *Afw*

⁴³² For instance, while quoting the narrative of Hazrat Yusuf's tale, the *Holy Quran* states that the lady who made a frivolous complaint against Yusuf demanded for his imprisonment or the infliction of grievous chastisement as the mode of administering justice. Upon which the Emperor chose to detain Yusuf in a prison. This shows that the customary law of that old time permitted imprisonment as an alternative to corporal punishment (as a lesser penalty). (See, the *Quran*, 12:25, 32.)

⁴³³ See, the *Holy Quran*, 2:178.

⁴³⁴ See, *Ibid*, 4:92.

⁴³⁵ See, *Ibid*, 4:16, 114; 5:39; 6:48, 54; 7:35, 56; 8:01; 16:119; 24:5.

⁴³⁶ See, *Ibid*, 111:9.

(pardon allowed by the Court or the victim),⁴³⁷*Sulh* (mutual settlement),⁴³⁸*Tauba* (repentance),⁴³⁹*Kuffara* (Atonement or expiation)⁴⁴⁰ and *fidya*⁴⁴¹.

However the difference of comprehensiveness is visible between past Islamic practices and contemporary Pakistani practice. The Islamic practices give a complete structure of non-custodial measures inclusive of procedure. For example, there are several places where the *Quran* refers to the system of parole. Such as, while interpreting the dreams of his two inmate colleagues, Yusuf prophesized to one of them that he was to be inducted as chief butler at the palace of the emperor of Egypt.⁴⁴²The *Quran* also indicates that this convict was released on parole and was given employment as post-conviction rehabilitative measure. Hazrat Yusuf also became the ultimate parolee.⁴⁴³Later he was appointed as advisor of food and agriculture of that emperor.⁴⁴⁴This shows that parole is an old-dated sentencing methodology which is acknowledged by the *Quran* along with its mode and mechanism of employment. Non-custodial system of punishment for instant treatment of offender is discussed in *Surah-e-Anfall* also. It reveals the instance of first use of parole by the Holy Prophet (PBUH) for the prisoners of battle of Badar.⁴⁴⁵The modern prevailing concept of imposition of community sentences was employed hundreds of years back against these prisoners when they were later asked to carry out community work for their release. Under the prescribed stipulations of this community work requirement each prisoner could win his freedom by making ten Muslims able to read and write. Therefore the system of probation and parole of Prophetic time was in fact a community based sentencing method.⁴⁴⁶ However

⁴³⁷ See, Ibid, 3:178; 4:43; 7:199.

⁴³⁸ See, Ibid, 4:128.

⁴³⁹ See, Ibid, 4:9; 5:4, 11; 6:54; 11:2, 52, 90; 16:119; 24:5; 25:69.

⁴⁴⁰ See, Ibid, 4:92.

⁴⁴¹ Ibid.

⁴⁴² See, Ibid, 12:36-41.

⁴⁴³ See, Ibid, 12:50, 54.

⁴⁴⁴ See, Ibid, 12:55.

⁴⁴⁵ The battle was fought on 13th March 624 AD or 17th Rama'dan 2 AH.

⁴⁴⁶ Later under Islamic schools of thought, some *Maliki* jurists also recognized the release of prisoners on parole for certain purposes, such as, to visit his sick relatives and to attend their funeral prayer. However they

the legal contemporary features of probation in Pakistan do not include the community work as their part of strategy rather the courts simply on usual bases allow the probation bonds without inclusion of community work. Despite that on factual grounds this is the community sentencing which rehabilitates the offender and fulfills the original purpose of non-custodial sentencing.

(B) Reformation, Repatriation and Expungement of Criminal Records of Prisoners

Once Caliph Umar (may Allah be pleased with him) imprisoned a person and said: “I shall keep him imprisoned till I find repentance in him.”⁴⁴⁷

‘Rule of Repentance’ given in Islamic Criminal Law, is repeatedly explained in the *Holy Quran*. At one place it is said, “And those two of you who commit it, torture them both. But if they repent and amend, turn away from them. Surely, Allah is Most-Relenting, Very-Merciful.”⁴⁴⁸ In another verse it orders in this way, “But those who repented before you have control over them then know that Allah is Forgiving, Merciful.”⁴⁴⁹ At another place it emphasizes, “Then who so repents after his injustice and amends then Allah will turn to him with His Mercy, Undoubtedly, Allah is Forgiving, Merciful.”⁴⁵⁰ (There are several other orders present in the *Quran* and the *Sunnah* relating to the same topic).⁴⁵¹ These verses order to accept the repentance in case of one of the most heinous crimes which is adultery and fornication. Abdul Qadir Auda’a elaborates some conditions while describing this principle of repentance of Islamic Criminal Justice System. He deliberates that,

- 1- All Islamic schools of thought are unanimously agreed to accept the repentance of that person who committed a crime against a single individual. Hence this principle of

stress that during such visits he must be escorted by a guardian who is now in modern times replaced by security personnel. (See, Draiveesh, *Huqooq-ul-Sijna*, 60, Supra note 357.)

⁴⁴⁷ See, Draiveesh, *Huqooq-ul-Sijna*, 19, Supra note 357.

⁴⁴⁸ See, the *Holy Quran*, 4:16

⁴⁴⁹ See, Ibid, 5:34.

⁴⁵⁰ See, Ibid, 5:39

⁴⁵¹ See, Ibid, 3:135; 25:70; 4:146; 39:53; 2:37; 4:48; 39:53; 25:69-71; 2:222; 66:08; 24:31; *Sahih-al-Bukhari*, 8:75:319; *Sahih-al-Bukhari*, 8:75:321.

remorse is not acceptable for those crimes which are committed against group or society at large;

- 2- He clearly asks for pardon;
- 3- He tries at maximum level to compensate his crime;
- 4- And most importantly, this remorse is conditional with his reformation of character.⁴⁵²

In such case, if the injured party himself or his legal heirs acknowledge that request of pardon, his repentance should be accepted by the society and people should not point fingers upon him. This is exactly that procedure of expungement which is adopted by modern legal regimes of this era.⁴⁵³ In Pakistan, the first point of this principle is virtually applicable in the cases of *Qisas* in comparison to the cases falling under the anti-terror regime. The principles of remorse and pardon are fundamentally devised keeping in contemplation the reformation, rehabilitation, repatriation and expungement of prisoner for his smooth readjustment in the society. However since at that time of revelation of the *Quran*, the Prophet (PBUH) was himself there to accept the repentance made by people which he could gather through divine disclosure, therefore the procedure of acceptance of remorse was very much in its complete form.⁴⁵⁴ But now the legislature and the judiciary need to devise certain rules to establish the truthfulness of remorse made by the offender. Therefore this is a requisite to define a proper procedure for expungement of past criminal record of an offender.

(C) Conjugal Rights of Prisoner

The *Holy Quran* contains the declaration that, “O people! be careful of (your duty towards) your Lord who created you from a single being and created its mate of the same kind and

⁴⁵² Abdul Qadir Auda'a, trans. Sajid ur Reman Siddiqui, *Islam Ka Fojdari Quanoon (Part I)* (Lahore, Pakistan: Islamic Publications Private Limited, 2006), 440-442.

⁴⁵³ For details see, chapter VII of this work.

⁴⁵⁴ The *Quranic* revelations about Hazrat Yusuf (AS) point toward an idea of expungement of prisoners and their reintegration back in to the society through commencing a professional life as happened with Yusuf or his co-inmate who was later chosen as royal butler.

spread from these too many men and women.”⁴⁵⁵In this verse the unity of human race is classified into two main sets of men and women which are basically meant for continuation of human race. Both genders are declared ‘*Zauj*’ of each other. This is that they both complement one another but each of them enjoys a distinct legal capacity with a separate but specific biological role though the twain in the social, economic, political and religious domain, have the same rights and obligations. As a matter of general principle, the *Holy Quran* has formed the entire creation into pairs. In other words the principle of classification is an innate attribute amongst the mortals.⁴⁵⁶ *Surrat-Al-Zariat* declares, “And of everything We have created pairs that you may be mindful.”⁴⁵⁷Then Allah says in *Surrat-Al- Hujurat* that, “O you people, We have created you of a male and a female, and made you tribes and families that you may know each other, surely the most honorable is the one among you who is most careful (of his duties); surely Allah is knowing and aware.”⁴⁵⁸There are many other verses to the same effect.⁴⁵⁹

As the second phase of this argument that man and woman are *Zauj* for each other, *Surrat-Al-Nisa* declares men as the protectors and maintainers of women.⁴⁶⁰In spite of equality of rights the classification has been prescribed on rational basis. In such situation a husband cannot refrain from his responsibilities towards his wife and kids. Similarly the wife also has duties towards the husband and children. Correspondingly all have undeniable rights towards one another. Therefore the fact that any one of the *Zauj* has been imprisoned cannot kill many of the natural rights. Hence the benefit of system of parole which has been accepted by the Shari’ah for the offenders should be extended to include temporary parole under which a prisoner might be allowed to perform his family responsibilities.

⁴⁵⁵ See, *Holy Quran*,04:01

⁴⁵⁶ Main concept behind this interpretation is elaborated and used by Federal Shariat Court in *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1.

⁴⁵⁷ See, *The Quran*, 51:49.

⁴⁵⁸ See, *Ibid*, 49:13.

⁴⁵⁹ See, *Ibid*, 53:45; 75:39; 6:143; 39:6; 42:11.

⁴⁶⁰ See, *Ibid*, 4:34; 2:233.

(D) Gravity of Crime and Punishment should correspond

The *Holy Quran* permits retribution alone for the wrong done by an accused but at the same time it refers to the two attributes of Allah that Allah is pardoning and forgiving.⁴⁶¹ The *Holy Quran* does not sanction severe treatment or added agony for condemned accused. It also reminds the believers that punishment should not exceed the injury actually inflicted. It says, “And if you take your turn, then retaliate with the like of that with which you were afflicted; but if you are patient, it will certainly be best for those who are patient.”⁴⁶² The other significant principle again and again enunciated by *the Quran* is that no one shall bear a burden greater than he can bear.⁴⁶³ The lesson therefore is that a severe punishment may be awarded to a criminal but authorities have no right to treat him inhumanly for a decade or so before he finishes his lawful penalty. A prisoner cannot be kept under a constant fear of death in hostile surroundings for an uncertain period. The basic rationale of detention of an accused (during trial) or a prisoner (imprisoned during the pendency of his appeal) is to limit his movement and ensure that he does not escape till the time his case is finally decided.⁴⁶⁴ So if the purpose of confinement is to secure the attendance of a condemned prisoner to face execution (if so decided ultimately) it does not give a license to jail authorities to treat the convict in a cruel manner during this gap. Protracted harsh treatment with a detainee already confined in a prison only because he is awaiting decision of his appeal is indeed a violation of the *Quranic* principles of *Ehsan*. Similarly unfriendly treatment is covered by the mischief of *Zulm* as pronounced by the *Holy Quran*.⁴⁶⁵ Prophet (PBUH) gave a golden principle which is equally applicable in case of prisoners that, “Be gentle to them and oppress them not, attract them by good countenance and repulse them not by an ill demeanor. Be careful of the distress

⁴⁶¹ See, Ibid, 22:60.

⁴⁶² See, Ibid, 16:126.

⁴⁶³ See, Ibid, 2:233, 286; 4:84; 7:42; 23:62; 65:7

⁴⁶⁴ See, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1 (Para 137).

⁴⁶⁵ Ibid.

call of the oppressed. , Between him and Allah no screen exists.”⁴⁶⁶ Another *Hadith* says, “Make things easy for the people, do not create difficulties, give good tidings, do not create circumstances which generate hatred.”⁴⁶⁷ The *Quran* says, Allah also intends facility for human beings.⁴⁶⁸

The theme of securing basic human rights and the establishment of justice runs through the entire fabric of Divine Message. The number of times the commandment to do justice has been mentioned in *Holy Quran* is an indication that justice is almost an article of faith for the Muslims. *Holy Quran* not only use of the term *ADL* (Justice) but it, at the same time, introduces terms like *Qist*, *Ehsan* and *Meezan* to give widest possible meanings and connotations to the concept of justice in Islamic jurisprudence.⁴⁶⁹

Therefore the Muslim administrations should devise the rules and policies which are constructive and benevolent for prisoners who are entirely dependent upon their administration. The accused must be given a fair and clear chance to defend himself and the court should keep the rules of justice in mind while making any decision. During imprisonment he should be dealt reasonably and compassionately by the controlling authorities and when he gets released from prison after finishing his lawful punishment, he should be given a chance of peaceful reintegration back in to the society. The society should avoid repeating the stories of his previous guilt because Allah terms the Muslims as the best of nations raised up for (the benefit of) humanity who enjoin what is right and forbid what is wrong and believe in Allah.⁴⁷⁰

8.4 SUGGESTIVE MEASURES

That is the best of men who dislike the power. Beware! Ye are all guardians; and ye will be asked about your subjects; then the leader is the guardian of the subject, and he will be asked respecting the subject; and a man is a shepherd to his own family, and will be asked how they behaved, and his conduct to them; and a wife is guardian

⁴⁶⁶ *Sahih Bukhari*, 9.

⁴⁶⁷ *Sahih-al-Bukhari*, 78:152.

⁴⁶⁸ See, *the Quran*, 2:185.

⁴⁶⁹ See, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 1 (Para 156).

⁴⁷⁰ See, *the Quran*, 3:110; 3:113; 7:157; 9:67, 71,112.

to her husband's house and children, and will be interrogated about them; and a slave is a shepherd to his master's property, and will be asked about it, whether he took good care of it or not.⁴⁷¹

Islam emphasizes on human rights. It covers all classes of society including the prisoners. All those rights which are now given by the modern legal systems, they had been offered by Islam hundreds of years back to its followers. Therefore this is the duty of Muslim states to safeguard these rights. The prison laws must be legislated while keeping the guiding principles of Islam in to consideration; the judiciary must interpret them accordingly and the administration should also behave humanely as directed by Islam. The man made law shall be deemed to be violative of Divine decree if without assigning any reasonable cause it curtails the recognized rights of human beings or it gives unrestrained powers to any authority to exercise it against the interests of a particular class of people. The criminal justice system of Islam requires relief, reclamation and rehabilitation for convicts. These three requirements must be fulfilled through applying all the means. If the court expects that these purposes can be more conveniently obtained through using non-custodial measures then it must go for penalties other than imprisonment. However if the detention is inevitable then the prisons in Muslim countries like Pakistan should carry out the three fundamental purposes of imprisonment, i.e. custody, care and correction. The prisons undoubtedly perform the custodial purposes but custody demands care and correction of the prisoners.

A comparative study of rights of prisoners discussed under the Shari'ah and Pakistani law confirm that the basic structure of Pakistani statutes on prisons is similar to that of the Shari'ah. A thorough analysis of the *Quran*, the *Sunnah*, practices of four Caliphs and the principles given by different Islamic Schools show that the modern laws currently implemented within the prisons had already been in practice in the Islamic history however the difference lies in the procedure. The Pakistani modern statutes are procedurally weak; this

⁴⁷¹ *Sahih-al-Bukhari*, 09:252.

is not the situation with different rules available under the Shari'ah. For example, one can easily gather the sound concept of substance and procedure of non-custodial mechanisms in the *Quran* and the *Sunnah*. These mechanisms are not left open-ended instead the community sentences were declared as part of these measures for making them meaningful. In Pakistan, the alternative methods to imprisonment are adopted without slotting the community sentence into them. This deficiency makes the non-custodial measures less effective. Islam introduced the alternative sentencing methods primarily for the reformation of offenders; however this aspect is deficient in Pakistani statutes on prisons. Their formation must be revised. Even during incarceration Islam offers the chance of reformation and rehabilitation to the hardest criminals whereas Pakistani statutes, in several cases, specifically exclude certain convicts from the loop of treatment and therapy which is in fact wrong because ultimately nearly all the prisoners come out of the prison and again reintegrate into society. At this moment the rehabilitated offenders join the peaceful part of the social gatherings and non-rehabilitated prisoners again unite to make a bond with their criminal society. The post-imprisonment repatriation aspect for prisoners has also been discussed under the Islam. This is that if an offender repents for his offence, his repentance should be accepted provided he completes certain requirements. The law in Pakistan also discusses the repentance and remorse made by a guilty person nevertheless it does not thrash out its procedural portion. That procedure must also be devised by the legislature through promulgation of a separate statute or by the judiciary through giving certain governing principles to extend pardon to a previous criminal. In short, Pakistan is a Muslim country where the FSC time and again checks the validity of laws in consonance of Islamic law. The decisions given by the FSC conclude the Pakistani law on prisons compatible with Sharia'h practices.⁴⁷² This is however recommended that the

⁴⁷² See for example, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 01; *Muhammad Aslam Khaki and others vs. Government of Punjab and others*, PLD 2005 FSC 03.

FSC must also point up those deficiencies which exist in smooth implementation of those laws.

CHAPTER IX

CONCLUSION

The increasing crime rate in Pakistan substantiates the fact that there are lacunas existing in the strategy of dealing with crime. Despite that Pakistani criminal justice system mostly relies upon the strategy of being ‘tough towards crime and punishment’ yet somehow it remains a challenge for the system to curb the crime. The situation indicates that the policy should either be altered or altogether changed. The criminal justice system needs to be a blend of ‘toughness’ and ‘softness’. This thesis emphasizes that the incarceration as a punishment should be adopted not only with an aim of retribution, prevention, incapacitation but it should mostly focus upon reformation of character of the prisoner. This reformation of character is a right of prisoner which becomes fundamental for him by the reason of his conviction. Because his future rights in fact depend upon the transformation of his character. Thus this thesis is actually not a discussion regarding the provision of basic amenities to the prisoners as their right but it touches some thematic approaches of rights of prisoners starting from the rights of ‘detainee prisoners’ towards ending upon the rights of ‘ex-prisoners’.

A summary of conclusions and suggestions of this work is submitted below:

In Pakistan, the occasional usage of alternatives strategies to imprisonment strengthens a number of other connected issues, e.g. the prisons get overburdened, the less serious or non-habitual offenders acquire a greater exposure of trained criminals who polish the negative skills of these offenders and ultimately the recidivist phenomenon amplifies. A generally applied major cause of less usage of these measures is that the supervision and surveillance mechanisms place-able against these non-custodial measures are extremely feeble in nature and less in number as guarantees to invoke the relevant procedures. For example, in the case of bail, the bail-seeker and the bail issuing authority can only operate ‘security’ and ‘surety’ as guarantee to seek and grant the bail. These two mechanisms, at

several times, prove insufficient from security point of view; thus ultimately diminishes the chance to avail right of securing bail for the detainee prisoner. This paucity of availability of strong and multiple surveillance mechanisms against non-custodial means is created through statutory and judicial stipulations which badly jeopardizes the rights of the other party of the case too. The un-amended law on surveillance and supervision against the bail, since the time of partition of Indo-Pak, needs serious alterations. India, the neighboring country which inherited the same law of bail with Pakistan and the UK, which devised this law for Indo-Pak, both have incorporated a bulk of novelties in their bail procedures with several surveillance and security options against the bail-bonds including 'conditional bail', 'supplementary conditions' and Electronic Monitoring System (EMS) etc. In Pakistani law, Section 499 of the CrPC might be amended; the mandate given by the law to place apt conditions against the surety must be extended to the bail-seeker also. This step will broaden the scope of the cases of grant of bail. Besides this, some more elaborated options, such as, curfew, EMS etc in supplement to system of surety and security bonds must be added in existing law to strengthen the institution of bail as a non custodial measure. And majorly the whole structure of law of bail needs to be revised. It can possibly be done by promulgating a blend of Indian and British laws.

Probation as the trial and sentencing alternative measure to imprisonment is in poor condition in Pakistan. The Probation of Offenders Ordinance, 1960 (the Ordinance) allows three kinds of powers i.e., 'Unconditional Release', 'Conditional Discharge' and 'Probation' to the court for extending non-custodial orders. In case of release through Probation, the court may place three different surveillance measures against the probationers; first, the supervision by the Probation Officers as principle surveillance mechanism; second, demand to present surety against probation bond; third, the placement of superadded conditions with surety bond. A standard format is usually adopted by the courts to put conditions in the probation

bond; whereas the surety is demanded with same requirements in case of bail and probation. While the Probation Officers who play the role of principle surveillance officers against the probationers are working in appalling conditions with no substantive means of ‘training and capacity building’; their relevant R&P Departments are facing a serious shortage of ‘human and technical resources’ as well. The Judicial aspect of this specialized non-custodial sentencing area has its own bottle necks. Such as, the judges are reluctant to issue probation based decision; first, because they are not well trained to issue such reformation centric judgments; second, the supervision mechanisms place-able against probationers are not that equipped to assist the courts for taking such decisions and to further carry out the rehabilitative requirements of such decision. Thus many offenders consequently cannot succeed to get benefitted from non-custodial means and are thus put in to incarceration.

To improve this particular sentencing system a major legislative amendment is required in the outdated laws of 1960 and 1961. The judicial and administrative behavior also needs a bulk of change. (The detailed suggestions have been incorporated in Chapter III.)

Parole as a post-sentencing non-custodial measure directly comes under the statutory ambit of prison administration and relevant Home Departments. Courts mostly do not and cannot challenge this administrative authority. Therefore the discretion is usually exercised arbitrarily in favor of political and favored prisoners. The Provincial R& PDs have authority to issue Parole licenses for chosen eligible prisoners nevertheless these departments do not have man-power to make such decisions. Resultantly the eligible prisoners suffer and remain deprived of their legal right. Therefore the institution of Parole should be equipped with trained staff which can expeditiously make such recommendations. There is a special need of a separate complaint department where the aggrieved prisoners can file their complaints against the discretion exercised by the authorities.

To be reformed through rehabilitative treatments during the continuance of

punishment (whether custodial or non-custodial) has emerged internationally as a right during the past few decades. In this regard this is significant to elaborate the position of right of reformation of terrorist prisoners under the Pakistani law during the imprisonment.

Though the highest international forums are still trying to develop a consensus among the world community at a suitable and harmonized definition of ‘terrorism’ but they have not succeeded as yet. Same is the situation with Pakistani law on terror. The legislature could not provide a comprehensive unambiguous definition of terrorism. The consequent wrong application of law heavily affects the rights of the accused at pre-trial, trial and post-conviction (i.e., during imprisonment) stages. The situation of prisoners convicted under the ATA who get deprived of several of those rights which are generally available to the offenders charged under other laws must be reconsidered by the legislature. Most importantly the prisoners of anti-terror charges lose the ‘right of remission’ through the application of Section 21-f of the ATA. This is perhaps a big mistake on the part of the legislature to exclude these prisoners from the eligible loop for remissions. This is indirectly their exclusion from the sphere of the rehabilitation and reformation through improvement of character. This is a greater hazard for the society at large as every convict who has not been awarded death sentence ultimately comes out of the prison and if he would not have been rehabilitated during imprisonment then the chances of his repetition of crime would enhance. The one who is condemned under the ATA charges needs more attention and the state should invest more for his rehabilitation. Refusal to remissions cannot confine him behind the bars for the rest of his life. Therefore it is suggested that the legislature must reconsider Section 21-F for the betterment of the society at large. Rather some additional (special) and extensive measures to rehabilitate the offenders convicted under the ATA should be included in the PPR.

The next Chapter deals with the methodologies of reformation and rehabilitation

applied upon prisoners in general terms. Several aspects of Pakistan's present rehabilitation structure are inconsistent with the emerging norms of International human rights law. It is believed that the reform of the existing statutory, administrative and judicial systems is essential to attain exactitude in the law and to maintain a correct balance between the protection of public and the rights of prisoners to a fair and balanced reformation and rehabilitation centric system. In this regard follow up measures to check the progress of convicts benefitted from remission (which is considered as a strong rehabilitative measure in Pakistan) should be taken up. There must be some supervisory/complaint body devised to reduce the chances of arbitrary exercise of power to take the decision regarding remissions by the prison authorities. The reformatory programs must be available without any discrimination to all the prisoners with a fully prepared trained staff and reasonable budgets keeping the special needs of the beneficiaries in mind. While discovering the judicial approach on rehabilitation of prisoners it seems like an off-track service because of lack of defined principles to be followed by the judge. Courts use some archaic concepts to base their verdicts with no substantive improvement. To solve this issue, either the Parliament add some more specialized legislation, as similar to the Probation of Offenders Ordinance, 1960 and the JJSO to attain the goal of reformation of a felon, or the higher judiciary should itself sketch perusing points to find reformation responsive verdicts.

Chapter VII discusses the post-imprisonment 'right of smooth repatriation' of an ex-prisoner which is important like any of his other rights. Several states have devised their special laws to reintegrate the ex-prisoners back in to the society. These laws essentially provide the mechanism to erase the previous criminal records of the desisted offenders. In Pakistan, this is needed to promulgate a law with all the procedural details to assist generally all those ex-prisoners who have desisted from crime and can come under the ambit of such a rehabilitative statute. Such law can provide a legal cover to erase the stains of criminal past of

the desisted offenders to make their present peaceful. It will also protect the rights of the society by saving them from wrongly expunged criminal records.

A comparative study of rights of prisoners discussed under the Shari'ah and Pakistani law confirm that the basic structure of Pakistani statutes on prisons is similar to that of the Shari'ah. A thorough study of the *Quran*, the *Sunnah*, practices of four Caliphs and principles given by different Islamic Schools show that those modern laws which are now applied within the prisons had already been in practice as part of the Islamic history. Pakistan is a Muslim country where the FSC time and again checks the validity of laws in consonance of Islamic law. The decisions given by the FSC conclude the Pakistani law on prisons compatible with Sharia'h practices.⁴⁷³ This is however recommended that the FSC must also point up those deficiencies which exist in smooth implementation of those laws.

⁴⁷³ See for example, *Muhammad Aslam Khaki vs. The State*, PLD 2010 FSC 01; *Muhammad Aslam Khaki and others vs. Government of Punjab and others*, PLD 2005 FSC 03.

APPENDIX

THE PARTICULAR PROVISIONS USED IN THIS THESIS

1- Anti Terrorism Act, 1997, Pakistan

Section 2:

In this Act, unless there is anything repugnant in the subject or context;

- a) "armed forces" means the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces;
- b) "civil armed forces" means Frontier Constabulary, Frontier Corps, Pakistan Coast Guards, Pakistan Rangers or any other civil armed force notified by the Federal Government as such;
- c) "Code" means the Code of Criminal Procedure, 1898 (Act V of 1898);
- d) "Child" means a person who at the time of the commission of the offence has not attained the age of eighteen years;
- e) "court" means an Anti-terrorism Court established under section 13;
- f) "explosives" means any bomb, grenade, dynamite, or explosive, substance capable of causing any injury to any person or damage to any property an includes any explosive substance as defined in the Explosives Act, 1884(IV of 1884);
- g) "fire-arms" means any or all types and gauges of handguns, rifles and shotguns, whether automatic, semi-automatic or bolt action, and shall include all other fire-arms as defined in Arms Ordinance 1965 (W.P. Ordinance XX of 1965);
- h) "fine" means a pecuniary amount to be determined by the Court having regard to the facts and circumstances of the cases;
- i) "Government" means the Federal Government or, as the case may be, the Provincial Government;
- j) "grievous", in relation to bodily injury means emasculation, mutilation, incapacitation disfigurement or serve harm or hurt: and in relation to property, means severe loss, damage or destruction;
- k) "High Court" means the High Court having territorial jurisdiction has been established;
- l) "hijacking" means any unlawful seizure or exercise of control, or any attempt at unlawful seizure or exercise of control, of an aircraft, by force, violence, threat or any form of abstraction, directly or through any other person, from within or outside the aircraft;
- m) "hostage-taking" means the holding of a person captive with threats made to kill or harm that person if demands are not met.
- n) "kidnapping for ransom" mean the action of conveying any person from any place, without his consent, or by force compelling or by any deceitful means inducing him, to go from any place, and unlawfully detaining him any demanding or attempting to demand, money, pecuniary or other benefit from him or from another person, as a condition of his release;
- o) "meeting" means a meeting of two or more persons, whether in public or private;
- p) "organization" means any group, combination or body of persons acting under a distinctive name;
- q) "prescribed organization" means any organization using a name which is listed in the First Schedule under Section 11B;
- r) "public servant" shall have the same meaning as in Section 21of the Pakistan Penal Code 1860. or law for the time being in force;
- s) "Schedule" means a Schedule to this Act;

- t) "Schedule offence" means an offence as set out in the Third Schedule;
- u) "sectarian" means pertaining to devoted to, peculiar to, or one which promotes interest of a religious sect or sects, in a bigoted or prejudicial manner;
- v) "sectarian hatred" means hatred against a group of persons defined by reference to religion, religious sec, religious persuasion, or religious belief;
- w) "serious" means dangerous to life or property;
- x) "terrorism" or "act of terrorism " act has the meaning as assigned to it in Section 6;
- y) "terrorist" has the meaning as assigned to it in Section 6(5).
- z) "Terrorist investigation" means an investigation of
 - a. the commission, preparation or investigation of acts or terrorism under this Act;
 - b. an act which appears to have been done for the purposes of terrorism;
 - c. the resources of a prescribed organization;
 - d. the commission, preparation or instigation of an offence under the Act; or
 - e. any other act for which investigation may be necessary for the purposes of this Act.
- aa) "terrorist property" means"
 - i. (a) Money or other property which is used or is likely to be used for the purposes of terrorism (including any resources of a prescribed organization).
 - (b) Proceeds the commission of acts of terrorism.
 - (c) Proceeds of acts carried out for the purposes of terrorism; and
 - ii. In subsection (i) above
 - (a) a reference to proceeds of an act, includes reference to any property which wholly or partly, and directly or indirectly, represents the proceeds of the act (including payments of other rewards in connection with the commission);
 - (b) The reference to an organization's resources includes a reference to any money or other property which is applied or made available, or is to be applied or mad available, for use by the organization and includes assets of any kind, whether tangible or intangible, movable or immovable, and legal documents or instruments in any form, whether written, electronic or digital and shares, securities, bonds, drafts and letters of credit; and
 - (c) a reference to money includes a reference to any cash which means any coins, notes in any currency, postal orders, money orders, and such other kinds of monetary instruments as the Federal Government may by order specify;
 - bb. "weapon" means any item which can be used to injure or cause bodily harm, and includes any type of fire-arm, explosive, sword, dagger, knuckle-duster, stengun, bomb, grenade, rocket launcher, mortar or any chemical, biological thing which can be used for causing injury, hurt, harm or destruction of person or property, and includes "illicit arms" as defined in the Surrender Illicit Arms Act. 1991 (XXI of 1991); and
 - cc. all other terms and expressions used bit not defined in this Act, shall have the meanings as are assigned to them in the Pakistan Penal Code, 1860, or the Code of Criminal Procedure, 1898.

Section 6:

- 1) In this Act. "terrorism" means the use or threat of action where:
 - (a) The action falls with the meaning of sub-section (2). And
 - (b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or
 - (c) The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause.

- 2) An “action” shall fall within the meaning of sub-section(1), if it:
- (a) Involves the doing of anything that causes death;
 - (b) Involves grievous violence against a person or grievous body injury or harm to person;
 - (c) Involves grievous damage to property;
 - (d) Involves the doing of anything that is likely to cause death or endangers a person’s life;
 - (e) Involves kidnapping for ransom, hostage-taking or hijacking;
 - (f) Incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;
 - (g) Involve stoning, brick-battling or any other form of mischief to spread panic;
 - (h) Involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;
 - (i) Creates a serious risk to safety of public Or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil (civic) life;
 - (j) Involves the burning of vehicles or another serious form of arson;
 - (k) Involves extortion of money (bhatta) or property;
 - (l) Is designed to seriously interfere with or seriously disrupt a communications system or public utility service;
 - (m) Involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; or
 - (n) Involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant.
- 3) The use or threat or use of any action falling within sub-section (2) which involves the use of fire-arms, explosives or any other weapon, is terrorism, whether or not subsection 1 (c) is satisfied.
- 4) In this section “action” includes an act or a series of acts.
- 5) In this Act, terrorism includes any act done for the benefit of a prescribed organization.
- 6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.
- 7) In this Act, a “terrorist” means:
- (a) A person who has committed an offence or terrorism under this Act, and is or has been concerned in the commission, preparation or instigation of acts of terrorism;
 - (b) A person who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation or instigation of acts of terrorism, shall also be included in the meaning given in Clause (a) above.

Section 21- C:

- 1) **Weapon Training:** A person commits an offence if he provides, without valid authorization from the competent authority, any
- (a) Fire-arms;
 - (b) Explosives; or
 - (c) Chemical, biological and other weapons.
- 2) A person commits an offence if he provides without valid authorization from the competent authority, authority, any instruction or training to any child under sub-section (1) and, conviction, shall be liable to a term of imprisonment of not less than ten years and fine.

3) A person commits an offence if he receives instruction or training from anyone, without valid authorization from the competent authority, to give such instruction or training or invites another, specifically or generally, to receive such unauthorized instruction or training in the making or use of.

(a) Fire-arms;

(b) Explosives; or

(c) Chemical, biological, and other weapons.

4) A child commits an offence if he provides, without valid authorization from the competent authority, any instruction or training, or if he receives such unauthorized instruction, or training or invites another specifically or generally, to receive such unauthorized instruction or training in the making or use of –

a. Fire-arm;

b. Explosives; or

c. Chemical, biological, and other weapons.

5) A child guilty of an offence under sub-section (4) shall be liable on conviction to imprisonment for a term not less than six months and not exceeding five years.

6) A person guilty of an offence under sub-sections (1) to (3) shall be liable on conviction to imprisonment for a term not exceeding ten years, or fine or with both.

7) Training Terrorism.

(a) A person commits an offence if he provides, generally or specifically, any instruction or training in acts of terrorism.

(b) A person commits an offence if he receives any instruction or training in acts of terrorism or invites another, specifically or generally, to receive such instruction or training.

(c) A person guilty of an offence under sub-section (a) and (b) shall, on conviction, be liable to imprisonment of either description for a term of not less than one year and not more than ten years and fine.

(d) A person is guilty of an offence if he provides, any instruction or training in acts of terrorism to a child, and on conviction shall be liable on conviction to imprisonment of either description for a term not less than ten years and fine.

(e) A child commits an offence if he provides, generally or specifically, any instruction or training in acts of terrorism, and on conviction, shall be liable to imprisonment for a term not less than six months and not more than five years.

(f) A child commits an offence if he receives, generally or specifically, instructions or training in acts of terrorism, and on conviction, shall be liable to imprisonment for a term not less than six months and not more than five years.

8) A Court by which a person is convicted of an offence under this section, may order the forfeiture of anything or property which it considers to have been in the person's possession for purposes connected with the offence, after giving any person, other than the convicted person who claims to be the owner or is otherwise interested, an opportunity of being heard.

Section 21-D:

1) Notwithstanding the provisions of Sections 439, 491, 496, 497, 498-A, and 561-A of the Code, no Court, other than an Anti-terrorism Court, a High Court or the Supreme Court of Pakistan, shall have the power or jurisdiction to grant bail to or otherwise release and accused. Person in a case triable by Anti-terrorism Court.

2) All offences under this Act punishable with death or imprisonment [***] exceeding three years shall be non-bailable.

Provided that if there appear reasonable grounds for believing that any person accused of non-bailable offence has been guilty of an offence punishable with death or imprisonment

for life or imprisonment for not less than ten years, such person shall not be released on bail.

3) Subject to sub-section (2), the Court may admit a person to bail unless satisfied that there are substantial grounds for believing that the person, if released on bail (whether subject to conditions or not), would-

(a) Fail to surrender to custody;

(b) Commit an offence while on bail;

(c) Interfere with a witness; otherwise obstruct or attempt to obstruct the course of justice, whether in relation to himself or another person; or

(d) Fail to comply with the conditions of release (if any).

4) In exercising its powers in relation to a person seeking bail under this Act, the Court shall have regard to such of the following considerations (as well as to any others which it consider relevant)

(a) The nature and seriousness of the offence with which the person is charged;

(b) The character, antecedents, associations and community ties of the person;

(c) The time which the person has already spent in custody and the time which he is likely to spend in custody if he is not admitted to bail; and

(d) The strength of the evidence of his having committed the offence.

5) Without prejudice to any other power to impose conditions on admission to bail, the Court admitting a person to bail under this section may impose such conditions as it consider,

(a) Likely to result in the person's appearance at the time and place required, or

(b) Necessary in the interests of justice or for the prevention of crime.

6) It shall be lawful for the person to be held in military or police protective custody in accordance with the conditions of his bail.

7) The Government or the Court may, under this Section, at any time, in respect of a person charged off and offence under this Act, if it considers it necessary, by special or general order, direct special arrangements to be made as to the place at which the person is to be held in order.

(a) To prevent his escape; or

(b) To ensure his safety or the safety of others.

Section 21-E:

1) Where a person is detained for investigation, the Investigating Officer, within twenty-four hours of the arrest, excluding the time necessary for the journey from the place of arrest to the Court, shall produce the accused before the Court, and may apply for remand of the accused to police custody [or custody of any investigating Agency joined in the investigation] for which the maximum period allowed may be fifteen days;

Provided that, where an accused cannot within twenty-four hours be produced before the Court, a temporary order for police custody, [or custody of any other Investigating Agency joined in the investigation] not exceeding twenty-four hours may be obtained from the nearest Magistrate for the purposes of producing the accused before the Court within that period.

2) No extension of the time of the remand of the accused in police custody [or custody of any other Investigating Agency joined in the investigation] shall be allowed, unless it can be shown by the Investigating Officer, to the satisfaction of the Court that further evidence may be available and the Court is satisfied that no bodily harm has been or will be caused to the accused; Provided that the total period of such remand shall not exceed thirty days.

3) The court shall be deemed to be a Magistrate for purposes of sub-section (1).

Section 21-F:

Notwithstanding anything contained in any law or prison rules of the time being in force, no remission in any sentence shall be allowed to person, other than a child who is convicted and sentenced for any offence under this Act, unless granted by the Government.

Section 21-H:

Notwithstanding anything contained in the Quanoon-e-Shahadat, 1984 (President's Order No.10 of 1984) or any other law for the time being in force, where in any Court proceeding held under this Act the evidence (which includes circumstantial proceedings held under this Act the evidence) produced raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused during investigation without being compelled, before a police officer not below the rank of a District Superintendent of Police, may be admissible in evidence against him if the Court so deems fit;

Provided that the District Superintendent of Police before recoding any such confession, had explained to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and that no District Superintendent of Police has recorded such confession unless, upon questioning the person making it the District Superintendent of Police had reason to believe that it was made voluntarily; and that when he recorded the confession, he made a memorandum at the foot of such record to the following effect.

'I have explained to (...name...) that he is not bound to make a confession and that if he does so any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed)
Superintendent of Police.

2- Anti Terrorism Act, 2000, UK

Section 1:

(1) In this Act “terrorism” means the use or threat of action where–

(a) The action falls within subsection (2),

(b) The use or threat is designed to influence the government [or an international governmental organization] or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious [racial] 2 or ideological cause.

(2) Action falls within this subsection if it–

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or

explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section–

(a) “action” includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) “the government” means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

3- Bail Act, 1976, UK

Section 3:

(1) A person granted bail in criminal proceedings shall be under a duty to surrender to custody, and that duty is enforceable in accordance with section 6 of this Act.

(2) No recognizance for his surrender to custody shall be taken from him.

(3) Except as provided by this section—

(a) no security for his surrender to custody shall be taken from him,

(b) he shall not be required to provide a surety or sureties for his surrender to custody, and

(c) no other requirement shall be imposed on him as a condition of bail.

(4) He may be required, before release on bail, to provide a surety or sureties to secure his surrender to custody.

(5) . . . he may be required, before release on bail, to give security for his surrender to custody.

The security may be given by him or on his behalf.

(6) He may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that—

(a) he surrenders to custody,

(b) he does not commit an offence while on bail,

(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.

(e) before the time appointed for him to surrender to custody, he attends an interview with an authorized advocate or authorized litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990;

(6ZAA) Subject to section 3AA below, if he is a child or young person he may be required to comply with requirements imposed for the purpose of securing the electronic monitoring of his compliance with any other requirement imposed on him as a condition of bail.

(6ZA) Where he is required under subsection (6) above to reside in a bail hostel or probation hostel, he may also be required to comply with the rules of the hostel.

(6A) In the case of a person accused of murder the court granting bail shall, unless it considers that satisfactory reports on his mental condition have already been obtained, impose as conditions of bail—

(a) a requirement that the accused shall undergo examination by two medical practitioners for the purpose of enabling such reports to be prepared; and

(b) a requirement that he shall for that purpose attend such an institution or place as the court directs and comply with any other directions which may be given to him for that purpose by either of those practitioners.

(6B) Of the medical practitioners referred to in subsection (6A) above at least one shall be a practitioner approved for the purposes of section 12 of the Mental Health Act 1983

(7) If a parent or guardian of a child or young person consents to be surety for the child or young person for the purposes of this subsection, the parent or guardian may be required to secure that the child or young person complies with any requirement imposed on him by virtue of subsection (6) (6ZAA) or (6A) above, but—

(a) no requirement shall be imposed on the parent or the guardian of a young person by virtue of this subsection where it appears that the young person will attain the age of seventeen before the time to be appointed for him to surrender to custody; and

(b)the parent or guardian shall not be required to secure compliance with any requirement to which his consent does not extend and shall not, in respect of those requirements to which his consent does extend, be bound in a sum greater than £50.

(8)Where a court has granted bail in criminal proceedings that court or, where that court has committed a person on bail to the Crown Court for trial or to be sentenced or otherwise dealt with, that court or the Crown Court may on application—

(a)by or on behalf of the person to whom bail was granted, or

(b)by the prosecutor or a constable,

vary the conditions of bail or impose conditions in respect of bail which has been granted unconditionally.

(8A)Where a notice of transfer is given under a relevant transfer provision, subsection (8) above shall have effect in relation to a person in relation to whose case the notice is given as if he had been committed on bail to the Crown Court for trial.

(8B)Subsection (8) above applies where a court has sent a person on bail to the Crown Court for trial under section 51 of the Crime and Disorder Act 1998 as it applies where a court has committed a person on bail to the Crown Court for trial.

(9)This section is subject to subsection (3) of section 11 of the Powers of Criminal Courts (Sentencing) Act 2000(conditions of bail on remand for medical examination).

(10)This section is subject, in its application to bail granted by a constable, to section 3A of this Act.

(10)In subsection (8A) above “relevant transfer provision” means—

(a)section 4 of the Criminal Justice Act 1987, or

(b)section 53 of the Criminal Justice Act 1991.

Section 3AAA:

(1)A court shall not impose on a child or young person a requirement under section 3(6ZAA) above (an “electronic monitoring requirement”) unless each of the following conditions is satisfied.

(2)The first condition is that the child or young person has attained the age of twelve years.

(3)The second condition is that—

(a)the child or young person is charged with or has been convicted of a violent or sexual offence, or an offence punishable in the case of an adult with imprisonment for a term of fourteen years or more; or

(b)he is charged with or has been convicted of one or more imprison-able offences which, together with any other imprison-able offences of which he has been convicted in any proceedings—

(i)amount, or

(ii)would, if he were convicted of the offences with which he is charged, amount,

to a recent history of repeatedly committing imprison-able offences while remanded on bail or to local authority accommodation.

(4)The third condition is that the court—

(a)has been notified by the Secretary of State that electronic monitoring arrangements are available in each petty sessions area which is a relevant area; and

(b)is satisfied that the necessary provision can be made under those arrangements.

(5)The fourth condition is that a youth offending team has informed the court that in its opinion the imposition of such a requirement will be suitable in the case of the child or young person.

(6)Where a court imposes an electronic monitoring requirement, the requirement shall include provision for making a person responsible for the monitoring; and a person who is

made so responsible shall be of a description specified in an order made by the Secretary of State.

(7)The Secretary of State may make rules for regulating—

(a)the electronic monitoring of compliance with requirements imposed on a child or young person as a condition of bail; and

(b)without prejudice to the generality of paragraph (a) above, the functions of persons made responsible for securing the electronic monitoring of compliance with such requirements.

(8)Rules under this section may make different provision for different cases.

(9)Any power of the Secretary of State to make an order or rules under this section shall be exercisable by statutory instrument.

(10)A statutory instrument containing rules made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(11)In this section “local authority accommodation” has the same meaning as in the Children and Young Persons Act 1969 (c. 54).

(12)For the purposes of this section a petty sessions area is a relevant area in relation to a proposed electronic monitoring requirement if the court considers that it will not be practicable to secure the electronic monitoring in question unless electronic monitoring arrangements are available in that area.

Section 4:

(1)A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.

(2)This section applies to a person who is accused of an offence when—

(a)he appears or is brought before a magistrates’ court or the Crown Court in the course of or in connection with proceedings for the offence, or

(b)he applies to a court for bail or for a variation of the conditions of bail in connection with the proceedings.

This subsection does not apply as respects proceedings on or after a person’s conviction of the offence or proceedings against a fugitive offender for the offence.

(3)This section also applies to a person who, having been convicted of an offence, appears or is brought before a magistrates’ court to be dealt with under Part II of Schedule 3 to the Powers of Criminal Courts (Sentencing) Act 2000 (breach of certain community orders).

(4)This section also applies to a person who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.

(5)Schedule 1 to this Act also has effect as respects conditions of bail for a person to whom this section applies.

(6)In Schedule 1 to this Act “the defendant” means a person to whom this section applies and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom this section applies by virtue of subsection (4) above.

(7)This section is subject to section 41 of the Magistrates’ Courts Act 1980 (restriction of bail by magistrates’ court in cases of treason).

(8)This section is subject to section 25 of the Criminal Justice and Public Order Act 1994 (exclusion of bail in cases of homicide and rape).

(9)In taking any decisions required by Part I or II of Schedule 1 to this Act, the considerations to which the court is to have regard include, so far as relevant, any misuse of controlled drugs by the defendant (“controlled drugs” and “misuse” having the same meanings as in the Misuse of Drugs Act 1971).

Section 6:

(1) If a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody he shall be guilty of an offence.

(2) If a person who—

(a) has been released on bail in criminal proceedings, and

(b) having reasonable cause there for, has failed to surrender to custody, fails to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable he shall be guilty of an offence.

(3) It shall be for the accused to prove that he had reasonable cause for his failure to surrender to custody.

(4) A failure to give to a person granted bail in criminal proceedings a copy of the record of the decision shall not constitute a reasonable cause for that person's failure to surrender to custody.

(5) An offence under subsection (1) or (2) above shall be punishable either on summary conviction or as if it were a criminal contempt of court.

(6) Where a magistrates' court convicts a person of an offence under subsection (1) or (2) above the court may, if it thinks—

(a) that the circumstances of the offence are such that greater punishment should be inflicted for that offence than the court has power to inflict, or

(b) in a case where it commits that person for trial to the Crown Court for another offence, that it would be appropriate for him to be dealt with for the offence under subsection (1) or (2) above by the court before which he is tried for the other offence, commit him in custody or on bail to the Crown Court for sentence.

(7) A person who is convicted summarily of an offence under subsection (1) or (2) above and is not committed to the Crown Court for sentence shall be liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding level 5 on the standard scale or to both and a person who is so committed for sentence or is dealt with as for such a contempt shall be liable to imprisonment for a term not exceeding 12 months or to a fine or to both.

(8) In any proceedings for an offence under subsection (1) or (2) above a document purporting to be a copy of the part of the prescribed record which relates to the time and place appointed for the person specified in the record to surrender to custody and to be duly certified to be a true copy of that part of the record shall be evidence of the time and place appointed for that person to surrender to custody.

(9) For the purposes of subsection (8) above—

(a) "the prescribed record" means the record of the decision of the court, officer or constable made in pursuance of section 5(1) of this Act;

(b) the copy of the prescribed record is duly certified if it is certified by the appropriate officer of the court or, as the case may be, by the constable who took the decision or a constable designated for the purpose by the officer in charge of the police station from which the person to whom the record relates was released;

(c) "the appropriate officer" of the court is—

(i) in the case of a magistrates' court, the justices' chief executive;

(ii) in the case of the Crown Court, such officer as may be designated for the purpose in accordance with arrangements made by the Lord Chancellor;

(iii) in the case of the High Court, such officer as may be designated for the purpose in accordance with arrangements made by the Lord Chancellor;

(iv) in the case of the Court of Appeal, the registrar of criminal appeals or such other officer as may be authorized by him to act for the purpose;

(v) in the case of the Courts-Martial Appeal Court, the registrar or such other officer as may be authorized by him to act for the purpose.

Section 7:

(1) If a person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court fails to surrender to custody at the time appointed for him to do so the court may issue a warrant for his arrest.

(2) If a person who has been released on bail in criminal proceedings absents himself from the court at any time after he has surrendered into the custody of the court and before the court is ready to begin or to resume the hearing of the proceedings, the court may issue a warrant for his arrest; but no warrant shall be issued under this subsection where that person is absent in accordance with leave given to him by or on behalf of the court.

(3) A person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court may be arrested without warrant by a constable—

(a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;

(b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or

(c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.

(4) a person arrested in pursuance of subsection (3) above—

(a) shall, except where he was arrested within 24 hours of the time appointed for him to surrender to custody, be brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the petty sessions area in which he was arrested; and

(b) in the said excepted case shall be brought before the court at which he was to have surrendered to custody.

In reckoning for the purposes of this subsection any period of 24 hours, no account shall be taken of Christmas Day, Good Friday or any Sunday.

(5) A justice of the peace before whom a person is brought under subsection (4) above may, subject to subsection (6) below, if of the opinion that that person—

(a) is not likely to surrender to custody, or

(b) has broken or is likely to break any condition of his bail,

remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions, but if not of that opinion shall grant him bail subject to the same conditions (if any) as were originally imposed.

(6) Where the person so brought before the justice is a child or young person and the justice does not grant him bail, subsection (5) above shall have effect subject to the provisions of section 23 of the Children and Young Persons Act 1969 (remands to the care of local authorities).

Section 8:

(1) This section applies where a person is granted bail in criminal proceedings on condition that he provides one or more surety or sureties for the purpose of securing that he surrenders to custody.

(2) In considering the suitability for that purpose of a proposed surety, regard may be had (amongst other things) to—

- (a) the surety's financial resources;
 - (b) his character and any previous convictions of his; and
 - (c) his proximity (whether in point of kinship, place of residence or otherwise) to the person for whom he is to be surety.
- (3) Where a court grants a person bail in criminal proceedings on such a condition but is unable to release him because no surety or no suitable surety is available, the court shall fix the amount in which the surety is to be bound and subsections (4) and (5) below, or in a case where the proposed surety resides in Scotland subsection (6) below, shall apply for the purpose of enabling the recognizance of the surety to be entered into subsequently.
- (4) Where this subsection applies the recognizance of the surety may be entered into before such of the following persons or descriptions of persons as the court may by order specify or, if it makes no such order, before any of the following persons, that is to say—
- (a) where the decision is taken by a magistrates' court, before a justice of the peace, a justices' clerk or a police officer who either is of the rank of inspector or above or is in charge of a police station or, if magistrates' courts rules so provide, by a person of such other description as is specified in the rules;
 - (b) where the decision is taken by the Crown Court, before any of the persons specified in paragraph (a) above or, if Crown Court rules so provide, by a person of such other description as is specified in the rules;
 - (c) where the decision is taken by the High Court or the Court of Appeal, before any of the persons specified in paragraph (a) above or, if Supreme Court rules so provide, by a person of such other description as is specified in the rules;
 - (d) where the decision is taken by the Courts-Martial Appeal Court, before any of the persons specified in paragraph (a) above or, if Courts-Martial Appeal rules so provide, by a person of such other description as is specified in the rules;
- and Supreme Court rules, Crown Court rules, Courts-Martial Appeal rules or magistrates' courts rules may also prescribe the manner in which a recognizance which is to be entered into before such a person is to be entered into and the persons by whom and the manner in which the recognizance may be enforced.
- (5) Where a surety seeks to enter into his recognizance before any person in accordance with subsection (4) above but that person declines to take his recognizance because he is not satisfied of the surety's suitability, the surety may apply to—
- (a) the court which fixed the amount of the recognizance in which the surety was to be bound, or
 - (b) a magistrates' court for the petty sessions area in which he resides,
- for that court to take his recognizance and that court shall, if satisfied of his suitability, take his recognizance.
- (6) Where this subsection applies, the court, if satisfied of the suitability of the proposed surety, may direct that arrangements be made for the recognizance of the surety to be entered into in Scotland before any constable, within the meaning of the Police (Scotland) Act 1967, having charge at any police office or station in like manner as the recognizance would be entered into in England or Wales.
- (7) Where, in pursuance of subsection (4) or (6) above, a recognizance is entered into otherwise than before the court that fixed the amount of the recognizance, the same consequences shall follow as if it had been entered into before that court.

Section 9:

- (1) If a person agrees with another to indemnify that other against any liability which that other may incur as a surety to secure the surrender to custody of a person accused or

convicted of or under arrest for an offence, he and that other person shall be guilty of an offence.

(2) An offence under subsection (1) above is committed whether the agreement is made before or after the person to be indemnified becomes a surety and whether or not he becomes a surety and whether the agreement contemplates compensation in money or in money's worth.

(3) Where a magistrates' court convicts a person of an offence under subsection (1) above the court may, if it thinks—

(a) that the circumstances of the offence are such that greater punishment should be inflicted for that offence than the court has power to inflict, or

(b) in a case where it [sends] that person for trial to the Crown Court for another offence, that it would be appropriate for him to be dealt with for the offence under subsection (1) above by the court before which he is tried for the other offence, commit him in custody or on bail to the Crown Court for sentence.

(4) A person guilty of an offence under subsection (1) above shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 3 months or to a fine not exceeding [the prescribed sum] or to both; or

(b) on conviction on indictment or if sentenced by the Crown Court on committal for sentence under subsection (3) above, to imprisonment for a term not exceeding 12 months or to a fine or to both.

(5) No proceedings for an offence under subsection (1) above shall be instituted except by or with the consent of the Director of Public Prosecutions.

4- Constitution of Pakistan, 1973

Article 2-A:

The principles and provisions set out in the objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly.

Article 9:

No person shall be deprived of life or liberty saves in accordance with law.

Article 12:

(1) No law shall authorize the punishment of a person-

(a) for an act or omission that was not punishable by law at the time of the act or omission; or
(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence.

Article 25:

(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex [***].

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

Article 27:

No citizen otherwise qualified for appointment in the service of Pakistan shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth.

Provided that, for a period not exceeding forty years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan.

Provided further that, in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which can not be adequately performed by members of the other sex.

Provided also that under representation of any class or area in the services of Pakistan may be redressed in such manner as may be determined by an Act of Majlis-e-Shura (Parliament).]

2- Nothing in clause (1) shall prevent any Provincial Government, or any local or other authority in a Province, from prescribing, in relation to any post or class of service under that Government or authority, conditions as to residence in the Province for a period not exceeding three years, prior to appointment under that government or authority.

Article 31:

(1) Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam

and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

(2) The state shall endeavour, as respects the Muslims of Pakistan,-

(a) to make the teaching of the Holy Quran and Islamiat compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Quran;

(b) to promote unity and the observance of the Islamic moral standards; and

(c) to secure the proper organisation of zakat, ushr, auqaf and mosques.

Article 62:

(1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless—

(a) he is a citizen of Pakistan;

(b) he is, in the case of the National Assembly, not less than twenty- five years of age and is enrolled as a voter in any electoral roll in-

(i) any part of Pakistan, for election to a general seat or a seat reserved for non-Muslims; and

(ii) any area in a Province from which she seeks membership for election to a seat reserved for women.

(c) he is, in the case of the Senate, not less than thirty years of age and is enrolled as a voter in any area in a Province or, as the case may be, the Federal Capital or the Federally Administered Tribal Areas, from where he seeks membership;

(d) he is of good character and is not commonly known as one who violates Islamic Injunctions;

(e) he has adequate knowledge of Islamic teachings and practices obligatory duties prescribed by Islam as well as abstains from major sins;

(f) he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law; and

(g) he has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan:

(2) The disqualifications specified in paragraphs (d) and (e) shall not apply to a person who is a non-Muslim, but such a person shall have good moral reputation;]

Article 63:

(1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if

(a) he is of unsound mind and has been so declared by a competent court; or

(b) he is an undischarged insolvent; or

(c) he ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State; or

(d) he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder; or

(e) he is in the service of any statutory body or anybody which is owned or controlled by the Government or in which the Government has a controlling share or interest; or

(f) being a citizen of Pakistan by virtue of section 14B of the Pakistan Citizenship Act, 1951 (II of 1951), he is for the time being disqualified under any law in force in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir; or

(g) he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to the ideology of Pakistan, or the sovereignty, integrity or

security of Pakistan, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan, unless a period of five years has elapsed since his release; or

(h) he has been, on conviction for any offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release; or

(i) he has been dismissed from the service of Pakistan or service of a corporation or office set up or controlled by the Federal Government, Provincial Government or a Local Government on the ground of misconduct, unless a period of five years has elapsed since his dismissal; or

(j) he has been removed or compulsorily retired from the service of Pakistan or service of a corporation or office set up or controlled by the Federal Government, Provincial Government or a Local Government on the ground of misconduct, unless a period of three years has elapsed since his removal or compulsory retirement; or

(k) he has been in the service of Pakistan or of any statutory body or anybody which is owned or controlled by the Government or in which the Government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service; or

(l) he, whether by himself or by any person or body of persons in trust for him or for his benefit or on his account or as a member of a Hindu undivided family, has any share or interest in a contract, not being a contract between a cooperative society and Government, for the supply of goods to, or for the execution of any contract or for the performance of any service undertaken by, Government:

Provided that the disqualification under this paragraph shall not apply to a person—

(i) where the share or interest in the contract devolves on him by inheritance or succession or as a legatee, executor or administrator, until the expiration of six months after it has so devolved on him;

(ii) where the contract has been entered into by or on behalf of a public company as defined in the Companies Ordinance, 1984 (XLVII of 1984), of which he is a shareholder but is not a director holding an office of profit under the company; or

(iii) where he is a member of a Hindu undivided family and the contract has been entered into by any other member of that family in the course of carrying on a separate business in which he has no share or interest;

Explanation.— In this Article “goods” does not include agricultural produce or commodity grown or produced by him or such goods as he is, under any directive of Government or any law for the time being in force, under a duty or obligation to supply; or

(m) he holds any office of profit in the service of Pakistan other than the following offices, namely:-

(i) an office which is not whole time office remunerated either by salary or by fee;

(ii) the office of Lumbardar, whether called by this or any other title;

(iii) the Qaumi Razakars;

(iv) any office the holder whereof, by virtue of such office, is liable to be called up for military training or military service under any law providing for the constitution or raising of a Force; or

(n) he has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative society or cooperative body in his own name or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off; or

(o) he or his spouse or any of his dependents has defaulted in payment of government dues and utility expenses, including telephone, electricity, gas and water charges in excess of ten thousand rupees, for over six months, at the time of filing his nomination papers; or

(p) he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.

Explanation.- For the purposes of this paragraph "law" shall not include an Ordinance promulgated under Article 89.

Article 203A:

The provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution.

Article 203B:

In this Chapter, unless there is anything repugnant in the subject or context,-

(a) "Chief Justice" means, Chief Justice of the Court;

(b) "Court" means the Federal Shariat Court constituted in pursuance of Article 203C;

(bb) "judge" means judge of the Court;

(c) "law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any Court or tribunal or, until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure.

Article 203C:

(1) There shall be constituted for the purposes of this Chapter a court to be called the Federal Shariat Court.

(2) The Court shall consist of not more than eight Muslim Judges, including the Chief Justice, to be appointed by the President [in accordance with Article 175A.

(3) The Chief Justice shall be a person who is, or has been, or is qualified, to be, a Judge of the Supreme Court or who is or has been a permanent Judge of a High Court.

(3A) Of the Judges, not more than four shall be persons each one of whom is, or has been, or is qualified to be, a Judge of a High Court and not more than three shall be ulema ¹³³[having at least fifteen years experience in Islamic law, research or instruction.]

(4) The Chief Justice and a Judge shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine:

Provided that a Judge of a High Court shall not be appointed to be a Judge [**] except with his consent and except where the Judge is, himself the Chief Justice, after consultation by the President with the Chief Justice of the High Court.

(4A) The Chief Justice, if he is not a Judge of the Supreme Court, and a Judge who is not a Judge of a High Court, may, by writing under his hand addressed to the President, resign his office.

[(4B) The Chief Justice and a Judge shall not be removed from office except in the like manner and on the like grounds as a Judge of the Supreme Court.]

(4C) [***]

(5) [****]

(6) The Principal seat of the Court shall be at Islamabad, but Court may from time to time sit in such other places in Pakistan as the Chief Justice may, with the approval of the President, appoint.

(7) Before entering upon office, the Chief Justice and a Judge shall make before the President or a person nominated by him oath in the form set out in the Third Schedule.

(8) At any time when the Chief Justice or a Judge is absent or is unable to perform the functions of his office, the President shall appoint another person qualified for the purpose to act as Chief Justice or, as the case may be, Judge.

[(9) A Chief Justice who is not a Judge of the Supreme Court shall be entitled to the same remuneration, allowances and privileges as are admissible to a Judge of the Supreme Court and a Judge who is not a Judge of a High Court shall be entitled to the same remuneration, allowances and privileges as are admissible to a Judge of a High Court:

Provided that where a Judge is already drawing a pension for any other post in the service of Pakistan, the amount of such pension shall be deducted from the pension admissible under this clause.]

Article 203D:

(1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet (PBUH), hereinafter referred to as the Injunctions of Islam.

(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List [***], or to the Provincial Government in the case of a law with respect to a matter not enumerated [in the Federal Legislative List], a notice specifying the

particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:-

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect:

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal there from may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

(3) If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,-

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

Article 203DD:

(1) The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:

Provided that nothing in this Article shall be deemed to authorize the Court to convert a finding of acquittal into one of conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defence.

(3) The Court shall have such other jurisdiction as may be conferred on it by or under any law.

Article 203E:

(1) For the purposes of the performance of its functions, the Court shall have the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits; and

(d) issuing commissions for the examination of witnesses or documents.

(2) The Court shall have power to conduct its proceedings and regulate its procedure in all respects as it deems fit.

(3) The Court shall have the power of a High Court to punish its own contempt.

(4) A party to any proceedings before the Court under clause (1) of Article 203D may be represented by a legal practitioner who is a Muslim and has been enrolled as an advocate of a High Court for a period of not less than five years or as an advocate of the Supreme Court or by a juris-consult selected by the party from out of a panel of juris-consults maintained by the Court for the purpose.

(5) For being eligible to have his name borne on the panel of juris-consults referred to in clause (4), a person shall be an Aalim who, in the opinion of the Court, is well-versed in Shariat.

(6) A legal practitioner or juris-consult representing a party before the Court shall not plead for the party but shall state, expound and interpret the Injunctions of Islam relevant to the proceedings so far as may be known to him and submit to the Court a written statement of his interpretation of such Injunctions of Islam.

(7) The Court may invite any person in Pakistan or abroad whom the Court considers to be well-versed in Islamic law to appear before it and render such assistance as may be required of him.

(8) No court fee shall be payable in respect of any petition or application made to the Court under Article 203D.

(9) The Court shall have power to review any decision given or order made by it.

Article 203F:

(1) Any party to any proceedings before the Court under Article 203D aggrieved by the final decision of the Court in such proceedings may, within sixty days of such decision, prefer an appeal to the Supreme Court:

Provided that an appeal on behalf of the Federation or of a Province may be preferred within six months of such decision.

(2) The provisions of clauses (2) and (3) of Article 203D and clauses (4) to (8) of Article 203E shall apply to and in relation to the Supreme Court as if reference in those provisions to Court were a reference to the Supreme Court.

(2A) An appeal shall lie to the Supreme Court from any judgment, final order or sentence of the Federal Shariat Court-

(a) if the Federal Shariat Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or imprisonment for life or imprisonment for a term exceeding fourteen years; or, on revision, has enhanced a sentence as aforesaid; or

(b) if the Federal Shariat Court has imposed any punishment on any person for contempt of the Court.

(2B) An appeal to the Supreme Court from a judgment, decision, order or sentence of the Federal Shariat Court in a case to which the preceding clauses do not apply shall lie only if the Supreme Court grants leave to appeal.

(3) For the purpose of the exercise of the jurisdiction conferred by this Article, there shall be constituted in the Supreme Court a Bench to be called the Shariat Appellate Bench and consisting of,

(a) three Muslim Judges of the Supreme Court; and

(b) not more than two Ulema to be appointed by the President to attend sittings of the Bench as ad-hoc members thereof from amongst the Judges of the Federal Shariat Court or from out of a panel of Ulema to be drawn up by the President in consultation with the Chief Justice.

(4) A person appointed under paragraph (b) of clause (3) shall hold office for such period as the President may determine.

(5) Reference in clauses (1) and (2) to Supreme Court shall be construed as a reference to the Shariat Appellate Bench.

(6) While attending sittings of the Shariat Appellate Bench, a person appointed under paragraph (b) of clause (3) shall have the same power and jurisdiction, and be entitled to the same privileges, as a Judge of the Supreme Court and be paid such allowances as the President may determine.

Article 203G:

Save as provided in Article 203F, no court or tribunal, including the Supreme Court and a High Court, shall entertain any proceeding or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court.

Article 203GG:

Subject to Article 203D and 203F, any decision of the Court in the exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all courts subordinate to a High Court.

Article 203H:

(1) Subject to clause (2) nothing in this Chapter shall be deemed to require any proceedings pending in any court or tribunal immediately before the commencement of this Chapter or initiated after such commencement, to be adjourned or stayed by reason only of a petition having been made to the Court for a decision as to whether or not a law or provision of law relevant to the decision of the point in issue in such proceedings is repugnant to the Injunctions of Islam; and all such proceedings shall continue, and the point in issue therein shall be decided, in accordance with the law for the time being in force.

(2) All proceedings under clause (1) of Article 203B of the Constitution that may be pending before any High Court immediately before the commencement of this Chapter shall stand transferred to the Court and shall be dealt with by the Court from the stage from which they are so transferred.

(3) Neither the Court nor the Supreme Court shall in the exercise of its jurisdiction under this Chapter have power to grant an injunction or make any interim order in relation to any proceedings pending in any other court or tribunal.

Article 203J:

(1) The Court may, by notification in the official Gazette, make rules for carrying out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may make provision in respect of all or any of the following matters, namely: -

(a) the scale of payment of honorarium to be made to jurisconsults, experts and witnesses summoned by the Court to defray the expenses, if any, incurred by them in attending for the purposes of the proceedings before the Court;

(b) the form of oath to be made by a jurisconsult, expert or witness appearing before the Court;

(c) the powers and functions of the Court being exercised or performed by Benches consisting of one or more members constituted by the Chairman;

(d) the decision of the Court being expressed in terms of the opinion of the majority of its members or, as the case may be, of the members constituting a Bench; and

(e) the decision of cases in which the members constituting a Bench are equally divided in their opinion.

(3) Until rules are made under clause (1), the Shariat Benches of Superior Courts Rules, 1979, shall, with the necessary modifications and so far as they are not inconsistent with the provisions of this Chapter, continue in force.

5- Code of Criminal Procedure, 1898

Section 169:

If, upon an investigation under this Chapter, it appears to the officer incharge of the police-station, or to the police-officer making the investigation that there is no sufficient evidence or reasonable ground or suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or [send] him for trial.

Section 340:

(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

(2) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court shall, if he does not plead guilty, give evidence on oath in disproof of the charges or allegations made against him or any person charged or tried together with him at the same trial -

Provided that he shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged or for which he is being tried, or is of bad character, unless.

(i) the proof that he has committed or been convicted of such offence is admissible in evidence to show that he is guilty of the offence with which he is charged or for which he is being tried; or

(ii) He has personally or by his pleader asked questions of any witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character; or

(iii) He has given evidence against any other person charged with or tried for the same offence.

Section 348:

(1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Pakistan Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapter with imprisonment for a term of three years or upwards, shall, if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds [for the trial of the accused by the Court of Session or High Court, as the case may be send the accused for trial to such Court] unless the Magistrate is competent to try the case and is of opinion, that he can himself pass an adequate sentence if the accused is convicted:

Proviso [x x x x]

[(2) When any person is sent for trial to the Court of Session or High Court under sub-section

1), any other person accused jointly with him in the trial shall be similarly sent for trial.]

Section 382-B:

The length of any sentence of imprisonment imposed upon an accused person in respect of any offence shall be treated as reduced by any period during which he was detained in custody for such offence.

Section 401

(1) When any person has been sentenced to punishment for an offence, the Provincial Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the Provincial Government for the suspension or remission of a sentence the Provincial Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reason for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Provincial Government, not fulfilled the Provincial Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4-A) The provisions, of the above sub-section shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of the President or of the Central Government when such right is delegated to it to grant pardons, reprieves, respites or remissions of punishment.

(5-A) Where a conditional pardon is granted by the President or, in virtue of any powers delegated to it, by the Central Government, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The Provincial Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petition should be presented and dealt with.

Section 402:

(1) The Provincial Government may, without the consent of the persons sentenced, commute any one of the following sentences for any other mentioned after it: Death, [imprisonment for life], rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Pakistan Penal Code.

Section 497:

(1) When any person accused of non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or [imprisonment for life or imprisonment for ten years].

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail:

Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released.

[Provided further that the Court shall, except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, direct that any person shall be released on bail--

(a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded; or (b) who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded.

Provided further that the provisions of the third proviso to this subsection shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or involved in terrorism.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing.

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

Section 499:

(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

Section 501:

If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Section 511:

In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force.

(a) By an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order; or

(b) in case of conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered: together with, in each of such cases evidence as to the identity of the accused person with the person so convicted or acquitted.

6- Juvenile Justice System Ordinance, 2000

Section 11:

Where on conclusion of an inquiry or trial, the Juvenile Court finds that a child has committed an offence, then notwithstanding anything to the contrary contained in any law for the time being in force, the Juvenile Court may, if it thinks fit..

(a) Direct the child offender to be released on probation for good conduct and place such child under the care of guardian or any suitable person executing a bond with or without surety as the court may require, for the good behavior and wellbeing of the child for any period not exceeding the period of imprisonment awarded to such child: Provided that the child released on probation be produced before the Juvenile Court periodically on such dates and time as it may direct.

(b) Make an order directing the child offender to be sent to a borstal institution until he attains the age of eighteen years or for the period of imprisonment whichever is earlier.

(c) Reduce the period of imprisonment or probation in the case where the Court is satisfied that further imprisonment or probation shall be unnecessary.

7- National Accountability Bureau Ordinance, 1999

Section 10:

(a) A person who commits the offence of corruption and corrupt practices shall be punishable with imprisonment for a term which may extend to 14 years, or with fine, or with both, and such of the assets and property of such person which is found to be disproportionate to the known sources of his income or which is acquired 'by money obtained through corruption and corrupt practices whether in his name or in the name of any of his dependents, or benamidars shall be liable to be forfeited to the appropriate Government.

(b) Any person giving illegal gratification, or abetting, assisting or aiding a holder of a public office, or receiving or holding any property obtained or acquired by a holder of public office, through corruption or corrupt practices, or being a beneficiary of any asset, property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment that may be awarded to a holder of a public office as may be deemed fit by the Court.

Section 15:

a)Where an accused person is convicted for the offence of corruption or corrupt practices as specified in the Schedule to this Ordinance, he shall stand disqualified for 21 years for seeking, or from being elected chosen appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan:

Provided that any accused person who has availed the benefit of sections 26 and 27 of this Ordinance shall also be deemed to have been convicted for an offence under this Ordinance, and shall stand disqualified for 21 years as above.

(b) Any person convicted of an offence of corruption and/or corrupt practices as described at serial No. I of the Schedule shall not be allowed to apply for or be granted or allowed any financial facilities in the form of any loan or advances from any bank or financial institution in the public sector, for a period of 10 years from the date of conviction.

8-Pakistan Penal Code, 1860

Section 311:

Notwithstanding anything contained in Section 309 or Section 310, where all the wali do not waive or compound the right of qisas, or [if] the principle of fasad-fil-arz the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with [death or imprisonment for life or] imprisonment of either description for a term of which may extend to fourteen years as ta'zir. Provided that if the offence has been committed in the name or on the pretext of honour, the imprisonment shall not be less than ten years. Explanation: For the purpose of this section, the expression fasad-fil-arz shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community or if the offence has been committed in the name or on the pretext of honour]

9- Pakistan Prison Rules, 1978

Rule 202:

If a prisoner is convicted for an offence committed after admission into prison or for an assault committed after admission to prison, on a warder or other Officer, the remission of whatever kind earned by him excluding remission awarded by Government under section 401 of Criminal Procedure Code, awarded for blood donation, surgical sterilization and for passing examinations, upto the date of the said conviction may in part or whole be cancelled with the sanction of the Inspector-General.

Rule 204:

i) Ordinary remission to be awarded to a prisoner, other than a prisoner employed on prison service, shall be according to the following scale :- (a) two days per month for thorough good conduct and scrupulous attention to all prison regulations; (b) three days per month for industry and the due performance of the prescribed daily task.

ii) Ordinary remission to be awarded to a prisoner employed on prison service, as specified in the table below, shall be according to the scale specified against each category of such service.:-

Serial Prisoners Classification Extent of award of No. as per labor ordinary remission allotment per-month:

1. Numberdar.... 6 days.

2. Mu,qaddam , 7 days.

3. Shinposh 8 days.

4. Cook - ' 7 days.

5. Educational 8 days.

Teacher 6.

Sweeper 8 days plus Rs.10 per mensem to be paid under the head Contract

Contingencies" 7. Mason, Barber, 6 days.

Hospital Attendant, Cleaner and prisoners who work on Sundays and holidays.

Scale of award of remission when a prisoner is unable to labour through causes beyond his control.

Rule 211:

i) Any prisoner eligible for ordinary remission under these rules who for a period of one year commencing from the first day of the month following the date of his sentence or recommittal to prison or the date on which he was last punished for a prison offence, has not committed any prison offence whatever, shall be awarded fifteen days ordinary remission in addition to any other remission earned under these rules.

Example. A prisoner sentenced to two years rigorous imprisonment on 5th July, 1972 shall be eligible for annual good conduct remission of fifteen days on 1st August 1973, provided he is not punished for any prison offence during this period.

(ii) A prisoner who completes three years of his sentence without having committed during the whole of this period any prison offence whatsoever shall, in addition to the annual remission of fifteen days under sub-rule (i), be granted, at the of the third year of his sentence, a further remission of thirty days for good conduct; provided that the total remission earned shall not in any case exceed the. maximum remission permissible under these rules.

(iii) Prison offences punished only with a warning shall not be taken into account for the award of remission under this rule.

Rule 212:

[(i) A convicted prisoner subject to his medical fitness shall be allowed to donate blood and for such donation he shall be awarded thirty days extra remission.]

(ii) The number of times a prisoner shall be allowed to donate blood and earn remission therefore shall be in accordance with the Table II.

(iii) Remission granted under this rule:-

(a) is not liable to forfeiture, like ordinary remission, and

(b) shall be exclusive of the limit of one third remission prescribed under rule 217.

Rule 213:

A prisoner who voluntarily undergoes surgical sterilisation (vasectomies tuberculization) shall be awarded thirty days special remission. He shall also be allowed to receive a monetary award (if any) from the Family Welfare Department.

Rule 215:

i) A convicted prisoner who has already passed any examination specified in the Table III below may appear in any one of the said examination in an academic year, and shall on passing such examination be entitled to earn remission once as per scale given in sub-rule

ii): Provided that, in case of passing examinations at serial No.2 he shall be entitled to earn one remission for each such examination, but shall not be entitled to earn more than two remissions; and Provided also that he is certified by the Superintendent to have been of good character.

Rule 216:

(i) Special remission may be awarded by the following authorities upto the extent mentioned against each:-

1. Superintendent not exceeding thirty days in one year.

2. Inspector-General Not exceeding sixty days in one year.

3. Government not exceeding sixty days in one year.

4. Federal Government Not exceeding sixty days in one year.

Explanation: For the purpose of this rule, year shall be reckoned from the date of sentence.

(ii) An award of special remission shall be entered in the history ticket and remission sheet of the prisoner concerned as soon, as possible after it is made, and the reasons for every "award of special remission by the Superintendent shall be briefly recorded thereon.

Rule 545-A:

(01) In addition to the privileges conferred by these rules, a prisoner convicted for a term exceeding five years shall be allowed to keep with him, his spouse and child below the age of six years, inside the jail premises in a place specially meant or reserved for this purpose subject to the following conditions:-

a) This right may be exercised three times in a year for three consecutive days.

Provided that where a male convict has more than one wives, each of them shall be allowed to remain with the convict for the consecutive days;

- (a) The District Coordination Officer of the District where the convict is confined may grant permission for such a meeting on the application of the convict or the spouse of the convict forwarded through the Superintendent Jail;
- (b) Only the spouse whose identity has been certified by the District Coordination Officer shall be allowed to avail this facility;
- (c) The spouse and the child shall be provided meal etc. from the jail cook-house, free of cost, as per provision of these rules. A convict who can afford to run his own kitchen may be allowed to do so; and
- (d) The convict who is confined on the charge of terrorism or anti-state activities shall not be allowed to avail this facility except with the prior permission of the Government.

(02) The Superintendent Jail shall depute one or more Assistant Superintendents Jail to maintain all the relevant record that is, date of visit and other particulars of the spouse and the child of the convict under the supervision of a Deputy Superintendent of Jail.

(03) A monthly statement showing such meeting shall be sent to the Inspector General of Prisons.

Rule 829:

(i) No prisoner shall at any time be employed on any labour without the walls of the prison.

(a) without the sanction of the Inspector-General, until he has undergone not less than one sixth of the substantive term of imprisonment to which he has been sanctioned ;

(b) without the sanction of the Inspector-General, if the un-expired term of substantive imprisonment together with imprisonment (if any) in lieu of fine, to which he has been sentenced, exceeds two years;

(c) if a sentence of whipping remains to be executed; or

(d) if any other charge or charges are pending against him: Provided that clauses (a) and (b) shall not be deemed to apply to any camp prison established for the purposes of carrying out 290 any public work.

(ii) Prisoners who are of good character and who are not residents of foreign territory shall be employed, outside the prison. When there are more prisoners eligible than are actually required, those with the shortest unexpired sentenced shall be chosen. Care shall be exercised not to pass out any prisoner who had escaped or had attempted to escape or possesses any inclination to escape.

Rule 1078:

(i) Persons who have any time been dismissed from Government Service shall not be employed in the Prison Department without the special sanction of Government. The Government shall be given a full statement of the facts relating to such dismissal.

(ii) Persons who have any time been convicted of any offence against the Criminal Law and punished with imprisonment or with whipping shall not be employed in the Prison Department without the special sanction of the Inspector General.

(iii) Only persons of good conduct and respectable character shall be employed as prison officers.

10-Probation of Offenders Ordinance, 1960

Section 2:

In this Ordinance, unless there is anything repugnant in the subject or context:—

- (a) “Code” means the Code of Criminal Procedure, 18983 ;
- (b) “Court” means a court empowered to exercise powers under this Ordinance;
- (c) “Officer-in-charge” means the head of the Probation Department;
- (d) “probation officer” means a person appointed as such under section 12;
- (e) “probation order” means an order made under section 5;
- (f) “Probation Department” means the department responsible for the administration of this Ordinance;
- (g) all other words and expressions used but not defined in this Ordinance and defined in the Code shall have the same meaning as assigned to them in the Code.

Section 4:

(1) Where a court by which a person, not proved to have been previously convicted, is convicted of an offence punishable with imprisonment for not more than two years is of opinion, having regard to:—

- (a) the age, character, antecedents or physical or mental condition of the offender, and
- (b) the nature of the offence or any extenuating circumstances attending the commission of the offence, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may, after recording its reasons in writing, make an order discharging him after due admonition, or, if the court thinks fit, it may likewise make an order discharging him subject to the condition that he enters into a bond, with or without sureties, for committing no offence and being of good behavior during such period not exceeding one year from the date of the order as may be specified therein.

(2) An order discharging a person subject to such condition as aforesaid is hereafter in this Ordinance referred to as “an order for conditional discharge”, and the period specified in any such order as “the period of conditional discharge”.

(3) Before making an order for conditional discharge, the court shall explain to the offender in ordinary language that if he commits any offence or does not remain of good behavior during the period of conditional discharge he will be liable to be sentenced for the original offence.

(4) Where a person conditionally discharged under this section is sentenced for the offence in respect of which the order for conditional discharge was made, that order shall cease to have effect.

Section 5:

(1) Where a court by which—

(a) any male person is convicted of an offence not being an offence under Chapter VI or Chapter VII of the Pakistan Penal Code (Act XLV of 1860), or under section 216A, 328, 382, 386, 387, 388, 389, 392, 393, 397, 398, 399, 401, 402, 455, or 458 of that Code, or an offence punishable with death or 7 [imprisonment] for life, or

(b) any female person is convicted of any offence other than an offence punishable with death, is of opinion that, having regard to the circumstances including the nature of the offence and the character of the offender, it is expedient to do so, the court may, for reasons to be recorded in writing, instead of sentencing the person at once, make a probation order,

that is to say, an order requiring him or her to be under the supervision of a probation officer for such period, not being less than one year or more than three years, as may be specified in the order : Provided that the court shall not pass a probation order unless the offender enters into a bond, with or without sureties, to commit no offence and to keep the peace and be of good behaviour during the period of the bond and to appear and receive sentence if called upon to do so during that period: Provided further that the court shall not pass a probation order under this section unless it is satisfied that the offender or one of his sureties, if any, has a fixed place of abode or a regular occupation within the local limits of its jurisdiction and is likely to continue in such place of abode or such occupation, during the period of the bond.

(2) While making a probation order, the court may also direct that the bond shall contain such conditions as in the opinion of the court may be necessary for securing supervision of the offender by the probation officer and also such additional conditions with respect to residence, environment, abstention, from intoxicants and any other matter which the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or a commission of other offences by the offender and for rehabilitating him as an honest, industrious and law-abiding citizen.

(3) When an offender is sentenced for the offence in respect of which a probation order was made, that probation order shall cease to have effect.

Section 7:

(1) If the court by which an offender is bound by a bond under section 5 has reason to believe that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his arrest or may, if it thinks fit, issue summons to the offender and his sureties, if any, requiring them to appear before it at such time as may be specified in the summons.

(2) The court before which an offender is brought or appears under sub-section (1) may either remand him to judicial custody until the case is heard or admit him to bail, with or without sureties, to appear on the date of hearing.

(3) If the court, after hearing the case, is satisfied that the offender has failed to observe any of the conditions of his bond, including any condition which may have been imposed under sub-section (2) of section 5, it may forthwith— (a) sentence him for the original offence, or (b) without prejudice to the continuance in force of the bond, impose upon him a fine not exceeding one thousand rupees: Provided that the court imposing the fine shall take into account the amount of compensation, damages or costs ordered to be paid under section 6.

(4) If a fine imposed under clause (b) of sub-section (3) is not paid within such period as the court may fix, the court may sentence the offender for the original offence.

Section 10:

(1) The court by which a probation order is made under section 5 may at any time, on the application of the person under probation or of the probation officer or of its own motion, if it thinks it expedient to vary the bond taken under that section, summon the person under probation to appear before it, and, after giving him a reasonable opportunity of showing cause why the bond should not be varied, vary the bond by extending or reducing the duration thereof or by altering any other of its terms and conditions or by inserting additional conditions therein: Provided that in no case shall the duration of the bond be less than one year or more than three years from the date of the original order: Provided further that where the bond is with surety or sureties, no variation shall be made in the bond without the consent of the surety or sureties; and if the surety or sureties do not consent to the variation, the court shall require the person under probation to execute a fresh bond, with or without sureties.

(2) Any such court as aforesaid may, on the application of any person under probation or of the probation officer or of its own motion, if satisfied that the conduct of the person under probation has been satisfactory as to render it unnecessary to keep him under supervision, discharge the probation order and the bond.

Section 13:

A probation officer shall, subject to the rules made under this Ordinance,—

- (a) visit or receive visits from the offender at such reasonable intervals as may be specified in the probation order or, subject thereto, as the Officer-in-charge may think fit;
- (b) see that the offender observes the conditions of the bond executed under section 5;
- (c) report to the Officer-in-charge as to the behavior of the offender;
- (d) advise, assist and befriend the offender, and when necessary endeavor to find him suitable employment ; and
- (e) perform any other duty which may be prescribed by the rules made under this Ordinance.

11-Quanon-e-Shahadat Ordinance, 1984

Article 3:

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender year, extreme old age, disease, whether of body or mind, or any other cause of the same kind;

Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:

Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:

Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the Injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming, the Court may take the evidence of a witness who may be available.

Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Art 17:

(1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.

(2) Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law,—

(a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept or act on, the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

Article 68:

In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it become relevant.

Explanation 1: This Article does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2: A previous conviction is relevant as evidence of bad character.

Article 69:

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation: In Articles 66, 67, 68 and 69 the word —character| includes both reputation and disposition: but, except as provided in Article 68, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation of disposition were shown.

12-Rehabilitation of Offenders Act, 1974 (UK)

Section 1:

(1) Subject to [subsections (2), (5) and (6)] below, where an individual has been convicted, whether before or after the commencement of this Act, of any offence or offences, and the following conditions are satisfied, that is to say—

(a) he did not have imposed on him in respect of that conviction a sentence which is excluded from rehabilitation under this Act; and

(b) he has not had imposed on him in respect of a subsequent conviction during the rehabilitation period applicable to the first-mentioned conviction in accordance with section 6 below a sentence which is excluded from rehabilitation under this Act;

then, after the end of the rehabilitation period so applicable (including, where appropriate, any extension under section 6(4) below of the period originally applicable to the first-mentioned conviction) or, where that rehabilitation period ended before the commencement of this Act, after the commencement of this Act, that individual shall for the purposes of this Act be treated as a rehabilitated person in respect of the first-mentioned conviction and that conviction shall for those purposes be treated as spent.

Section 3:

Where a ground for the referral of a child's case to a children's hearing under the Social Work (Scotland) Act 1968 is that mentioned in section 32(2)(g) [Children (Scotland) Act 1995 is that mentioned in section 52(2)(i)] of that Act (commission by the child of an offence) and that ground has either been accepted by the child and, where necessary, by his parent or been established to the satisfaction of the sheriff under section 42 of that Act, the acceptance or establishment [(or deemed established) to the satisfaction of the sheriff under section 68 or 85 of that Act, the acceptance, establishment (or deemed establishment)] of that ground shall be treated for the purposes of this Act (but not otherwise) as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence; and references in this Act to a person's being charged with or prosecuted for an offence shall be construed accordingly.

Section 4:

(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in [England, Wales or Scotland] to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or

circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—

(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Subject to the provisions of any order made under subsection (4) below,—

(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and

(b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.

(4) The Secretary of State may by order—

(a) make such provisions as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a) and (b) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order;

(b) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order.

(5) For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say—

(a) the offence or offences which were the subject of that conviction;

(b) the conduct constituting that offence or those offences; and

(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.

(6) For the purposes of this section and section 7 below “proceedings before a judicial authority” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

(a) by virtue of any enactment, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.

12-The Good Conduct Prisoners' Probational Release Act, 1926

Section 2:

Notwithstanding anything contained in section 401 of the Code of Criminal Procedure, 1898, where a person is confined in prison under a sentence of imprisonment, and it appears to the [Provincial Government] from his antecedents or his conduct in the prison that he is likely to abstain from crime and lead useful and industrious life, if he is released from prison, the [Provincial Government] may by license permit him to be released on condition that he be placed under the supervision or authority of a [servant of the state] or a secular institution or of a person or society professing the same religion as the prisoner, named in the license and willing to take charge of him.

Explanation.--The expression "sentence of imprisonment" in this section shall include imprisonment in default of payment of fine and imprisonment for failure to furnish security under Chapter VIII of the Code of Criminal Procedure, 1898, V of 1989.

13-The Good Conduct Prisoners' Probational Release Rules, 1927

Rule 4:

The Assistant Director, Reclamation and Probation, may, at any time, after consultation with the Superintendent release of well or otherwise prepare a list of the prisoners, who are well behaved person. Their antecedents or conduct in prison appears to be likely, if released from prison, to abstain from crime and to lead a useful and industrious life, and may forward a list of such prisoners to the Government through the Director, Reclamation and Probation, with his recommendation for their release under the Act.

The Government may thereupon permit all or any of such prisoners to be released by license under section 2 of the Act.

(b) A license under section-2 of the Act shall in Form "A" (Form 2.1) herewith annexed, and shall contain the conditions stated therein.

(c) No prisoner shall be released from a prison unless the conditions of the license are personally explained to him by The Superintendent and are accepted by him. The fact that the condition were so explained to the prisoner and were accepted by him shall be certified on the license by the Superintendent.

Rule 5:

(a) The Assistant Director shall be generally responsibly for the supervision, direction and control of all prisoners released under the Act.

(b) Subject to any general or special orders issued by the Director Reclamation and Probation, in this behalf the Assistant Director may place any prisoner released under the Act under the authority of a Parole Officer and may delegate to him any of the duties in respect of such prisoners.

Rule 6:

(a) Parole Officer shall work under the control of the Assistant Director and shall perform such duties and exercise such powers as may be assigned to them by that officer.

(b) With the permission of the Assistant Director a Parole Officer may allow any prisoner placed under his authority to be employed by any person on rates of wages approved by the Assistant Director and shall take from the employers an agreement (Form 3.14) in writing embodying the conditions of employment. The Parole Officer shall be responsible in such cases for seeing that suitable agreements are made for the lodging of the prisoners in sanitary conditions and for enforcing payment of the moderation and other conditions of the agreements.

(c) A Parole Officer shall be generally responsible for the conduct and discipline of every prisoner placed under his authority and for his due observance of the conditions of his license. He shall report any breach of conditions of a license by a prisoner to the Assistant Director.

Rule 7:

(a) If on the report of a Parole Officer or otherwise, the Assistant Director finds that any prisoner has been guilty of a breach of conditions of his license or considers that he is unfit to be allowed to remain at large under the license, he shall report the matter through the Director, Reclamation and Probation and the Government may thereupon revoke his license.

(b) When the Assistant Director or Parole Officer decides to recommend the revocation of the license of a prisoner, he may order his arrest and detention in such place and subject to such restrictions as may be prescribed by the Government in this behalf, pending the receipt of the orders of Government, and if the license is revoked, may send him from the charge of a Parole Officer to the Superintendent of the jail mentioned in the revocation order, on or before the date specified therein.

(c) An order of revocation under section 6 of the Act, shall be in "Form B" (Form 2.2), herewith annexed and shall be served upon the prisoner by the Assistant Director, a Parole Officer or a Superintendent of jail. The Assistant Director, the Parole Officer, or the Superintendent of the Jail, as the case may be shall explain the order to the prisoner and shall certify the fact that the orders have been so explained, before the revocation order. A note as regards the revocation shall also be made on the original license.

14-United Nations Basic Principles for the Treatment of Prisoners, 1990

Principle 6:

All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.

Principle 8:

Conditions shall be created enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration into the country's labor market and permit them to contribute to their own financial support and to that of their families.

Principle 10

With the participation and help of the community and social institutions, and with due regard to the interests of victims, favorable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions.

15-United Nations International Covenant on Civil and Political Rights, 1966

Article 10:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

16-United Nations Standard Minimum Rules for Non-Custodial Measures, 1990 (The Tokyo Rules)

Rule 1:

1.1 The present Standard Minimum Rules provide a set of basic principles to promote the use of noncustodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

1.2 The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

1.3 The Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.

1.4 When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.

1.5 Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

Rule 5:

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

Rule 6:

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

Rule 7:

7.1 If the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency. The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified.

Rule 8:

8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

8.2 Sentencing authorities may dispose of cases in the following ways:

- (a) Verbal sanctions, such as admonition, reprimand and warning;
- (b) Conditional discharge;
- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment;
- (m) Some combination of the measures listed above.

Rule 9:

9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society. 9.2 Post-sentencing dispositions may include: (a) Furlough and halfway houses; (b) Work or education release; (c) Various forms of parole; (d) Remission; (e) Pardon. 9.3 The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender. 9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

Rule 10:

10.1 The purpose of supervision is to reduce reoffending and to assist the offender's integration into society in a way which minimizes the likelihood of a return to crime.

10.2 If a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law.

10.3 Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary. 10.4 Offenders should, when needed, be provided with psychological, social and material assistance and with opportunities to strengthen links with the community and facilitate their reintegration into society.

Rule 13:

13.1 Within the framework of a given non-custodial measure, in appropriate cases, various schemes, such as case-work, group therapy, residential programmes and the specialized

treatment of various categories of offenders, should be developed to meet the needs of offenders more effectively. Part one, chapter III. Alternatives to imprisonment and restorative justice 123 13.2 Treatment should be conducted by professionals who have suitable training and practical experience.

13.3 When it is decided that treatment is necessary, efforts should be made to understand the offender's background, personality, aptitude, intelligence, values and, especially, the circumstances leading to the commission of the offence.

13.4 The competent authority may involve the community and social support systems in the application of non-custodial measures.

13.5 Caseload assignments shall be maintained as far as practicable at a manageable level to ensure the effective implementation of treatment programmes.

13.6 For each offender, a case record shall be established and maintained by the competent authority.

Rule 16:

16.1 The objective of training shall be to make clear to staff their responsibilities with regard to rehabilitating the offender, ensuring the offender's rights and protecting society. Training should also give staff an understanding of the need to cooperate in and coordinate activities with the agencies concerned. 16.2 Before entering duty, staff shall be given training that includes instruction on the nature of noncustodial measures, the purposes of supervision and the various modalities of the application of noncustodial measures. 16.3 After entering duty, staff shall maintain and improve their knowledge and professional capacity by attending in-service training and refresher courses. Adequate facilities shall be made available for that purpose.

17-United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955

Rule 58:

The purpose and justification of a sentence of imprisonment or a similar measure of deprivation of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

Rule 61:

The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.

Rule 64:

The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient after-care directed towards the lessening of prejudice against him and towards his social rehabilitation.

18-West Pakistan Probation of Offenders Rules, 1961

Rule 7:

No person shall be appointed as a Probation Officer unless-

- (a) he is, at the time of his first appointment as a Probation Officer, more than twenty three years and less than thirty-five years of age;
- (b) he is at least a holder of 1Master's Degree in the subject of Sociology, Social Work, Rural Sociology of a recognized University,
- (c) he possesses good character and is in the opinion of the Officer-in-Charge competent by his personality, education and training to influence for the good probationers placed under his supervision; and
- (d) he has a working knowledge or practical experience of social work.

Rule 18:

(1) it shall require a Probation Officer, within such period as the Court may fix, to make preliminary enquiries as regards the character, antecedents, home surroundings and other matters of like nature of the offender; and the Court may postpone the passing of the final orders in the case until the Probation Officer has submitted his report.

(2) A Court requiring a Probation Officer to make enquires under sub-rule (1) may of its own motion or on the request of the Probation Officer, extend the time fixed by it for submission of the report by the Probation Officer

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