

JUDGMENT

SYED AFZAL HAIDER, JUDGE.

وَيُطْعَمُونَ الطَّعَامَ عَلَى حُبِّهِ مِسْكِينًا وَيَتِيمًا وَأَسِيرًا

And they make provision

Out of love (of Allah)

For the Indigent,

The Orphan and

The Captive.

Al-Quran: Ayat 08 Sura 76 AL-INSAN

INTRODUCTORY

This consolidated judgment will dispose of four Shariat Petitions and Five Shariat Miscellaneous Applications which have been clubbed together because each petition seeks to challenge one or the other legal provision relating to Prisons, Prisoners and Prison Discipline. The impugned provisions as well as the titles of four Shariat Petitions and five Shariat Miscellaneous Applications are detailed below in sections A and B respectively for reference sake.

SECTION A:

SHARIAT PETITIONS

SHARIAT PETITIONS

PROVISIONS CHALLENGED

- i. Shariat Petition No. 61/I of 1992
(filed on 19.10.1992)

Dr. M. Aslam Khaki
Vs
Federation of Pakistan etc.
- Rules 307, 314 of Chapter 13
entitled: **Women Prisoners and Children.**
- Rules 935, 939 of Chapter 39
entitled: **Superintendent.**
- Rule 1002 of Chapter 41
entitled: **Deputy Superintendent.**
- Rules 1180, 1181 of Chapter 46
entitled: **Lady Superintendents and Women Warders.**
- Rule 1004 of Chapter 41 entitled:
Deputy Superintendent.
- ii. Shariat Petition No. 62/I of 1992
(filed on 01.11.1992)

Dr. M. Aslam Khaki
Vs.
Federation of Pakistan etc.
- Rules 225, 242, 243, 244,245
248, 249 of Chapter 9 entitled: **The Classification and Separation of Prisoners.**
- Rules 250, 252, 253, 254, 255, 256,
257, 261, 262, 263, 264, 265, 266,
267 of Chapter 10 entitled:
Superior Class Prisoners.
- Rules 180, 181 Chapter 7 entitled:
Transfer of Prisoners.
- iii. Shariat Petition No. 12/I of 1999
(filed on 31.03.1999)

Master Ijaz Hussain
Vs.
Govt. of Pakistan.
- Rule 1078 of Chapter 44 entitled:
General Rules Relating to Prison Officers.
- iv. Shariat Petition No. 4/I of 2004
filed originally on 2004
and refilled on 23.12.2008
Dr. M. Aslam Khakhi
Vs.
Federation of Pakistan etc.
- Section 30(2) Prisons Act, 1894 and
Rules 624(f),633 of Chapter 25
entitled:
Prisoners in cells.

Reference to Rules in the above noted Petitions or in the body of this Judgment means Pakistan Prison Rules, 1978.

2. The first cause to be agitated on the subject of prison discipline was registered as Shariat Petition No.61/I of 1992. It was moved on 18.10.1992 and admitted to regular hearing on 12.11.1992. This petition challenged Rules 307, 314, 935, 939, 1004, 1180 and 1181 of Pakistan Prisons Rules on the ground that under Islamic provision no woman can be placed in custody of a Ghair-Mahram and the conditions of service which could lead to indecency would also be forbidden. Shariat Petition No. 62/I of 1992 was filed on 01.11.1992 and admitted to regular hearing on 17.10.1993. It sought to challenge Rules 180, 181, 225, 242, to 245, 248 to 250, 252, to 257, 261 to 267 as well as section 59 of the Prisons Act, 1894 on the ground that classification of prisoners into A, B and C category was violative of Injunction of Islam. No injunction was however mentioned. Shariat Petition No. 12/I of 1999 was filed on 22.03.1999 and admitted to regular hearing on 05.06.2000. This petition impugned Rule 1078 which prohibits employment of dismissed Government Servant and previous convicts. It was urged that earning of Rizq-e-Halal i.e, legitimate livelihood

is the right of every person. No injunction of Islam was shown to have been violated by this provision. Shariat Petition No. 4/I of 2004 was moved on 23.12.2008 and placed before the Court at Karachi on 14.01.2009 when, after admission, it was ordered to be heard alongwith Shariat Petition No. 61/I of 1992. The subject matter of Shariat Petition No.4/I of 2004 is section 30(2) Prisons Act, 1894 (Act IX of 1894) which relates to prisoners under sentence of death commonly known as Condemned Prisoners. During the course of arguments on other petitions we had already on our own motion, before the filing of Shariat Petition No.4/I of 2004 on 14.01.2009, taken notice of section 30 of the Prisons Act, 1894 as a whole alongwith the related provisions contained in Chapter 14 of the Prison Rules. This was the time when the issues pertaining to the controversy in hand were being re-structured. Issue No.VI in fact related to the Condemned Prisoners. We had also taken Suo Moto notice of some other provisions. The judgment in these petitions was to be announced before June, 2009 when it transpired that regular notices had not been formally issued to the parties in matters wherein the Court, on its own motion, had

decided to examine certain legal provisions. Notices, as directed, were therefore issued on 20.6.2009 for further hearing in August 2009. Further hearing in these connected matters was deemed necessary firstly for the reason that a few months had elapsed when we last heard arguments in these petitions and the judgment had not been announced and secondly on the ground that we also wanted to hear the view point of parties as regards the subjects in which this court had, during the course of arguments, taken notice on its own motion. Formal legal processes had been issued in this regard.

SECTION B: SHARIAT MISCELLANEOUS APPLICATIONS.

3. During the pendency of the above mentioned Shariat Petitions, following Shariat Miscellaneous Applications were also moved in the Federal Shariat Court to impugn certain provisions of law with different prayers. The description of these applications is tabled below:-

<u>SH. MISC.APPLICATION NO.</u>	<u>PROVISION CHALLENGED</u>
i. Sh.Misc. App. No. 21/I of 1995 (filed on 09.04.1995) Master Ijaz Hussain Vs. Govt. of Pakistan	Section 382-B of the Code of Criminal Procedure and other matters.

- ii. Sh. Misc. App. No. 16/I of 1997
(filed on 07.07.1997)
Master Ijaz Hussain Vs.
The State.
(filed on 07.07.1997)
Master Ijaz Hussain Vs.
The State
- Rule 546 of Chapter 22 entitled:
Letters and Interviews and Rules
690 of Chapter 28 entitled:
Discipline And Family Foutines.
- iii. Sh. Misc. App. No. 19/I of 1997
(filed on 23.08.1997)
Capt. Retd. Mukhtar
Ahmad Sheikh Vs.
Federal Govt. of Pakistan
- Rules relating to classification
prisoners into A, B & C category.
Chapters 2 and 10 of the Rules
entitled: **Classification of Prisons;**
Superior Class Prisoners
respectively.
- iv. Sh. Misc. App. No. 10/I of 1998
(filed on 22.07.1998)
- This application seeks amendment
in Sh. Petition No.61/I of 1992.
Rules 307(i) and 314 of Chapter
13 entitled: **Women Prisoners and**
Innocent Children.
- in
S.P.No.61/I of 1992
Dr. M. Aslam Khaki
Vs. Federation of Pakistan
and others
- v. Sh. Misc. App. No. 11/I of 1998
(filed on 23.07.1998)
- This is an amended petition and
impugns Rules 242(b), 245(d,e,f)
248 (i)(ii) of Chapter 9 entitled:
The Classification and
Separation of Prisoners.
- in
S.P.No.62/I of 1992
Dr. M. Aslam Khaki
Vs. Govt. of Pakistan &
Others

4. The legal instruments challenged through these Shariat
Miscellaneous Applications as well as the ground of attack are being
mentioned below very briefly:-

i/ Shariat Miscellaneous Application No.21/I of 1995 was
moved by prisoner Master Ijaz Hussain from Central Jail, Faisalabad, on

09.04.1995 in which he raised the following 11 contentions for consideration of the Federal Shariat Court:-

- a. The use of Bar Fetters is un-constitutional, un-Islamic and is violative of the Islamic principles of human dignity;
(Bar fetters are no more in use)
- b. Prisoners undergoing long terms sentences be released on parole for two months every year for the performance of conjugal rights and looking after family affairs;
(Provision already incorporated).
- c. For grant Benefit of section 382-B of the Code of Criminal Procedure should be given invariably to the prisoners;
(Notice taken)
- d. Judicious and equal grant of remissions to prisoners on auspicious days;
(Already applicable).
- e. All the Government employees who are convicted should get suspension allowance till such time that their appeals are finally decided by the Supreme Court;
(Does not concern Prison Rules).
- f. While awarding concurrent sentence there should be no discrimination between the poor and influential prisoners;
[Note: This question was not raised at the time of arguments. However the case of Bashir and 3 others vs. The State PLD 1991 Supreme Court 1145 may be seen].
- g. The execution of the sentence awarded to the prisoners by the Superintendent of Jail should not be executed till it is confirmed by the District & Sessions Judge concerned;
(Notice already taken).
- h. The District & Sessions Judge should visit Prisons in their jurisdiction every month to redress the genuine grievances of the prisoners;
(This is already being done).
- i. Proper arrangements should be made outside the prison house for those who come to visit the prisoners;
(Notice already taken).

- j. Free legal aid should be provided to the prisoners at the initial stage in the Supreme Court of Pakistan when petition for special leave to appeal is moved;
(*Notice already taken*).
- k. Maintenance allowance from Bait-ul-Mal be given to the dependents of needy prisoners.
(*Does not relate to Prison Rules*).

[NOTE: The fate of each contention mentioned above has been indicated in bold letters in brackets]

This application was admitted in Islamabad on 10.07.1997 by a Full Bench of the Federal Shariat Court. Written arguments were submitted by some convicts in support of these contentions in which it was contended that Islamic teachings enjoin equality and it was further stated that the Holy Prophet (PBUH) once let off a prisoner of war without demanding compensation. It was therefore contended that the Zakat fund maintained officially by State should be used for securing release of the prisoners. This aspect will be discussed in Segment Fifteen.

ii. Shariat Miscellaneous Application No. 16/I of 1997 was also moved by Master Ijaz Hussain on 07.07.1997 from District Jail, Faisalabad to challenge Rules No.546 and 690 of the Jail Manual. Rule No.546 makes it mandatory for the Superintendent Jail to censor letters sent by or

addressed to a prisoner. No.690 deals with list of articles which are prohibited in the prisons. However the petitioner has not mentioned verses of Holy Quran or Sunnah which have been violated by these two rules. This topic is the subject matter of discussion in Segment Three of this judgment.

iii. Shariat Miscellaneous Application No.19/I of 1997 was moved by Capt. (Retd) Mukhtar Ahmad Shaikh on 23.8.1997. It is in fact a letter requesting the Federal Shariat Court to examine the question of classification of prisoners into class A,B and C because the Pakistan Law Commission did not deal with this issue in its report on jail reforms. There is no reference to any verse of Holy Quran or Sunnah in support of the contention that the classification of prisoners in class A, B and C is ultra vires the Injunctions of Islam. This topic will be discussed in Segment Two.

iv. Shariat Miscellaneous Application No.10/I of 1998 in Shariat Petition No.61/I of 1992 was moved by Dr. Muhammad Aslam Khaki on 14.07.1998. This Miscellaneous Application does not challenge any

existing provision of the prison discipline but it seeks to propose amendments in Rules 307(i) and 314.

v. Shariat Miscellaneous Application No.11/I of 1998 was moved on 15.02.1997 by Dr. M. Aslam Khaki to amend the main Shariat Petition No.62/I of 1992 with the object of seeking a declaration that Rules 242(b), 245(d), (e) and (f) as well as Rule 248 (i) and (ii) are repugnant to the Injunctions of Islam. These legal provisions deal with *classification of prisoners* into class A, B and C as well as b) the classification of under-trial prisoners. The contentions raised therein will be discussed in detail in Segment Two.

ISSUES INVOLVED

5. The above mentioned Shariat Petitions and Miscellaneous Applications were heard on more than 20 occasions spread over a period of 16 years. During this period certain obstinate questions relating to prison discipline also became subject matter of public debate at socio-political plane. In order therefore to resolve the controversy agitated before us through these petitions, two steps were taken: *firstly*, to consider the prison

discipline as amended upto date instead of scrutinizing the prison discipline as it prevailed in 1992 when these petitions were moved and *secondly* to strike consensus issues afresh with the active assistance of the learned counsel for the parties, in order not only to understand the scope of the problem agitated before us but also to make effort to define the limits of the controversy in order to finally determine the various questions under review. The issues were therefore reframed. Supplementary issues during the course of arguments cropped up which are also being incorporated after mentioning the re-framed issues.

- i. Whether a prisoner be allowed to perform conjugal rights in the prison?
- ii. Whether the female prisoners be allowed to remain under control and conduct of the male staff of Jail?
- iii. Whether various classes i.e. A,B,C in the Jail be allowed to prisoners on the basis of their status, position, educational and financial background?
- iv. Whether remission of sentence be granted to prisoners on festival and special occasions?
- v. Whether financial assistance and remuneration for labour of prisoners be provided to the families of prisoners?
- vi. Whether a convicted person sentenced to death whose appeal has not been disposed of for long be allowed to suffer double punishment of imprisonment?
- vii. Whether all prisoners who have not been given benefit under section 382-B, of the Code of Criminal Procedure should by a general order be accorded benefit thereunder?

- viii. Whether the provision of section 35 of the Code of Criminal Procedure be made mandatory so that sentences awarded to prisoners in two or more sections under one FIR be made to run concurrently?
- ix. What facilities and conveniences be provided to the prisoners and their families?
- x. What measures be taken for rehabilitation, reformation and character building of prisoners?

6. At the close of lengthy arguments spread over years the following questions were however considered germane to the ten issues already under consideration.

SUPPLEMENTARY ISSUES

- a. Whether the punishment by way of rigorous imprisonment is not opposed to Islamic Injunctions?

This point is not the subject matter of any Shariat Petition.

- b. Whether uncompensated hard labour, as a consequence of imposition of the punishment of rigorous imprisonment by criminal courts, can be exacted from a convict without violating Ayat 29 Sura 4 of Holy Quran and the tradition “The wages of a labour should be paid immediately” quoted by Ibn Maja in the Book on Mortgage?

Issue answered in this Judgment. See Segment 19

- c. What are the rights of an accused before and after the verdict has been recorded?

Issue answered in this Judgment. See Segment 15

- d. Whether a system be not evolved on the basis of Islamic Insurance permissible by Islamic Injunctions, to compensate the victim in advance and then deduct the same from the wages in installments on monthly basis from the wages that will be earned by a prisoner within prison precincts?

Proposal given: See Segment 19

- e. Whether a convict can be declared as condemned prisoner the moment a trial court announces capital punishment upon him notwithstanding the fact that the sentence is subject to confirmation by the High Court? and he still has a statutory right of appeal against confirmation of his conviction and sentence by the High Court;

Issue answered in this judgment. See Segment 13

- f. Whether the isolation imposed upon an already incarcerated condemned convict while confined in a death cell at all justified in the light of Islamic Injunctions? And

Issue answered as above

- g. Whether the current amount of Rs. 33/- allocated by the Prison Department as dietary money per person per diem is adequate to sustain a normal healthy person? Reference Ayat 8 Sura 76 (Al-Dahr).

Issue answered in this judgment. See Segment 11

- h. Whether the sentences awarded to persons convicted under different counts in relation to the same crime report should not be made concurrent by operation to law.

Issue not raised in any petition.

- i. Whether Prison Department should not be under administrative control of Judiciary

Suggestion made in Segment 14

- j. What are the main causes of Jail Riots?

Mentioned in Part B of Segment Fifteen of this Judgment.

- k. Issue No.VI relating to Condemned Prisoners was recast to read as follows:-

“Whether the person, sentenced to death by the trial court, should continue being treated as a Condemned Prisoner immediately after the trial court has announced its verdict and before his appeals or mercy petitions are decided and thereby subject him to additional hardships and strict surveillance in squalid and overcrowded cells?”

- l. In view of notices sent in the related matters the following issues were also struck:-

- a. What are the causes of Jail riots?

- b. Are the Guiding Principles (the Permanent Values), enunciated in the Holy Quran, not covered by the scope of the term Injunctions of Islam? Can these principles be identified?
- c. What are the problems associated with prison discipline and what are the possible solutions?
- d. What are the rights of accused/prisoners in our legal system.

7. We decided to deal with the four Shariat Petitions and five Shariat Miscellaneous Applications through this consolidated Judgment as the substance of all these petitions is the same i.e, prison discipline. Though the provisions actually challenged before us by the applicants have been picked up from different chapters of Prison Rules, The Prisons Act, 1894 and the Code of Criminal Procedure, 1898, yet during the course of arguments copious reference was made to various chapters of the Rules and laws relating to criminal administration of justice. For all practical purposes we had to go through various legal instruments in force in Pakistan in addition to the Pakistan Prison Rules,1878 while deciding these eleven connected matters.

8. During the hearing of these petitions we had the opportunity to go through some of the International documents relevant to the controversy

before us. The reasons for considering the contents of these instrument and making a reference to these International Documents in this judgment are **firstly** that a larger Bench of the Federal Shariat Court through this Judgment will, for the first time in our judicial history go through the entire provisions of Prison Discipline in Pakistan; **secondly** to enable individuals, groups and authorities, working in different capacities towards achieving the goal of a better and human friendly prison discipline, to appreciate and profit from the views adopted and steps taken at global level by renowned jurists and friends of humanity on a long neglected chapter of the administration of criminal justice; **thirdly** a perusal of these documents will certainly enable the policy making Executive and the law making Legislature to comprehend not only the dimensions of the problem but will assist them in appreciating the mode and manner in which the leaders of public opinion in different jurisdictions the world over, succeeded in introducing human friendly measures in the once very oppressive and degrading discipline; and **fourthly**, the need to watch, examine and adopt new developments in contemporary societies is a religious obligation of

every Muslim in view of the following precepts of the Holy Prophet

PBUH, which must be kept in mind whenever amendments are about to be

incorporated in the existing legal code.

- a. *Wisdom (erudition) is the lost treasure of a believer. He should acquire it (whenever and) from wherever it is available. Hadees No.2687 in Kitab-ul-Ilm Jama Tirmazi and Ibn-e-Maja.*
- b. *Acquisition of knowledge is obligatory for every Muslim (male or female). Reference Ibn-e-Maja, volume 1 (urdu translation), page 143 Chapter ILM.*
- C *Muslims must acquire knowledge even if he has to travel to China because acquisition of knowledge is obligatory for every Muslim man and woman. So long as a person is busy in the pursuit of knowledge the angels keep their wings spread for the seeker of knowledge. Reference Hadith No.28697 Bab-ul-Ilm, volume 10 Kunz-ul-Ummal.*
- d. *Whenever Advice/Information is sought from you, it should be given (honestly). Ibn-e-Maja volume 3. Chapter on Advice.*

For the sake of reference we have detailed below the list of various legal

instruments relating to Prisons, Prisoners and Detenues applicable in

Pakistan in section A and the list of International documents relatable to these subject have been noted in section B. To avoid narration of the lengthy text, the titles of relevant legal instruments alone have been mentioned.

A. **PAKISTANI LAWS**

1. Regulation III of 1818 for the confinement of state prisoners.
2. The Prisons Act, 1894.
3. The Prisoners Rules, 1894
4. The Reformatory School Act, 1897
5. Chapter VIII of the Code of Criminal Procedure, 1898 (Chapter 13).
6. The Prisoners Act, 1900
7. Provisions of the Civil Procedure Code, 1908
8. Lunacy Act 1912
9. The Punjab Borstal Act, 1926
10. Restriction of Habitual Offender (Punjab) Act, 1918
11. Good Conduct Prisoners Probationers Release Act, 1926
12. Superintendence and Management Adaptation of Pakistan Laws Order, 1947
13. The Probation of Offenders Ordinance, 1960
14. The West Pakistan-Maintenance of Public Order Ordinance, 1960.
15. The Probation of Offenders Rules, 1961
16. West Pakistan Public Order Detention Rules, 1962
17. The Defence of Pakistan Rules, 1971

18. Article 10 of the Constitution of Pakistan, 1973
19. Pakistan Prisons Rules, 1978
20. Execution of the Punishment of Whipping Ordinance, 1970
21. The Punjab Execution of the Punishment of Whipping Rules, 1979
22. Sindh Execution of the Punishment of Whipping Rules, 1986
23. Abolition of Punishment of Whipping Act, 1996
24. Prisons (NWFP) (Amendment) Act, 1996
25. Juvenile Justice System Ordinance, 2000
26. Juvenile Justice System Rules, 2001
27. Baluchistan Ordinance No.VII of 2001
28. Punjab Ordinance XXXIX of 2001
29. Punjab Ordinance XL of 2001
30. Women Protection Ordinance, 2007
31. Offences under various Court Martial Regulation
32. Pakistan Law Commissions Report No.80 on Jail Reforms
33. Rules and Orders of the Lahore High Court Lahore, volume III, Chapter 27: Judicial and Police Lock-ups.
34. Report of Pakistan Law Commission on Jail Reforms.

B. RELATED INTERNATIONAL DOCUMENTS

1. Charter of the United Nation, 1945
2. The Criminal Justice Act, 1948 (U.K)
3. Universal Declaration of Human Rights, 1948
4. European convention for the Protection of Human Rights, 1950.
5. International Covenant on Civil and Political Rights, 1966
6. Declaration on Territorial Asylum, 1967
7. Declaration on the Protection of all Persons from Tortuous and other Cruel, Inhuman or Degrading Treatment or Punishment, 1976

8. Standard Minimum Rules for the Treatment of Prisoners, 1977
9. Code of Conduct for Law Enforcement Officials, 1979
10. African Charter on Human and Peoples Rights, 1981
11. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
12. European Convention for the prevention of tortuous and Inhuman or Degrading Treatment or Punishment, 1987
13. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985.
14. Declaration of basic Principles of Justice for Victims of Crime and abuse of power, 1985.
15. Basic Principles for the Treatment of Prisoners, 1990
16. Protocol to the American Convention on Human Rights to Abolish Death Penalty, 1990.
17. African Charter on the Rights and Welfare of the Child, 1990.
18. Cairo Declaration on Human Rights in Islam, 1990.
19. Protocol No.1 to the European Convention for the Prevention of Tortuous and Inhuman or Degrading Treatment or Punishment, 1994.
20. Arab Charter on Human Rights, 1994.
21. Crime and Criminal Procedure (Escape and Rescue), U.S.A. A resume of these instruments has been tabled in the appendix.

MEANING OF THE TERM REPUGNANT

9. The Federal Shariat Court has to examine and decide the question whether or not a provision of law, or a law which includes any custom or usage having the force of law, is *repugnant* to the Injunctions of Islam. It is called upon, therefore, to see **firstly** whether the stated

Injunction of Islam covers the impugned provisions of law or both are related inter-se and **secondly** whether the provision under challenge as well as the touch-stone i.e, the Injunction of Islam can be read and construed together, with a view to harmonizing them; and **thirdly** whether the impugned legal provision cannot be given effect to without violating the **letter or spirit of** the Injunction of Islam. If the NASS ie. the Injunction of Islam declares an act or omission to be a sin or something abominable, then the impugned legal provision, permitting such a thing, would certainly be covered by the mischief of repugnance. If it is not possible to retain the impugned legal provision along with the Injunction of Islam, then the Court would proceed to declare the legal provision under review to be offensive to the Injunctions of Islam. It is therefore imperative to know the meaning of the term **repugnant/repugnance** because this word plays a pivotal role in the exercise of jurisdiction.

10. The word Repugnant has however not been defined in the Constitution. Meaning of this word has also not been given in the General Clauses Act. In order to understand its meaning we have no option but to

consult the dictionaries and those precedents where the meanings of this word have been explained.

DICTIONARY MEANINGS.

- i. extremely unpleasant or offensive **MacMillan: English Dictionary.**
- ii. disagreeable or offensive; distasteful; objecting averse, opposed; inconsistent, contrary; **The World Book Dictionary.**
- iii. strong feeling of dislike or disgust about something. Incompatibility, of ideas, statements etc; the synonym suggested is repulsive.
Oxford Dictionary.
- iv. The urdu meaning of the word *repugnant* is **(Tanafur) (Karahat) : Dictionary of Terms/English-Urdu** volume 3 page 1472, 1985 Edition Printed by Urdu Science Board 299 Upper Mall, Lahore. The word **repugnance**, according to Kitabistan's New Millennium Practical Dictionary English - English-Urdu by B.A. Qureshi means: **Nafrat, Napasand**The word **repugnancy** according to law Dictionary English Urdu published recently by National Language Authority Pakistan (based upon the famous Black's Law Dictionary) means: **Tanaqaz, Zid, Adum Mutabqat**
- v. The State of being opposed, highly distasteful, offensive, objectionable, contrary. (The **Lexicon Webster Dictionary** - Volume II, p. 815).

- vi. That which is contrary to what is stated before (**Wharton's Law Lexicon**).
- vii. Repugnant: "Repugnant to" really means "inconsistent with" and when they cannot stand together at the same time, and one law is inconsistent with another law when the command or power or provision in the one law conflicted directly with the command or power or provision in the one law conflicted directly with the command or power or provision in the other. Vishnu Bhattathiripaid v. Poulo, 1953 Ker. L. T. 238: I.L.R. 1952 Trav-Co. 670: A.I.R. 1953 Trav-Co. 327 (D.B.)
- ix. Repugnancy is an inconsistency or conflict with something else. Presson vs. Presson, 147 p. 1081, 1082, 38 Nev. 203 (**Words and Phrases** - Volume 37-Page 90).
11. The question, therefore, that the impugned provision of law would be repugnant to the Injunction of Islam only if both of them relate to the same subject matter is not very relevant under Article 203-D or the latter part of Article 227 of the Constitution for the reason that the Injunctions of Islam exist prior in time to the legal provision under question. In other words, the man-made law has to conform to the pre-existing NASS/Injunctions of Islam. From the wordings of Article 203-D of the Constitution it is abundantly clear that in case of repugnancy, the

impugned law or provision of law shall give way to the Injunction of Islam to the extent of such repugnancy. In other words, the impugned law shall not prevail and declared void without legal effect. Moreover the interpretation of a NASS cannot be static at all because a NASS is a Divinely acknowledged source of guidance till eternity. The constitutional requirement of conformity, which for convenience sake and for the purpose of this judgment, may be termed as Theory of Conformity, under Article 227 of the Constitution is that the laws must conform to the Injunctions of Islam. This theory will pre-suppose that the impugned law and the NASS/Injunction of Islam must not necessarily relate to the same subject. The letter as well as the spirit of the NASS/Injunction of Islam would be a relevant factor. It should not be violated at all. The Injunction of Islam is a **permanent value** whereas the legislative instrument is variable. Furthermore the application and interpretation of an Injunction of Islam can neither be limited to a particular time or a clime or for that purpose to any particular provision of law. The Injunctions of Islam or NASOOS are

meant to guide in all ages and situations. The possible interpretations of NASOOS cannot be predicted.

12. However according to this theory there can be no repeal of impugned law by implication but a declaration based upon reason must be made under Article 203 D(2)(3) of the Constitution stating clearly that the provision of law under challenge, is repugnant to a given NASS/Injunction of Islam and till such time that the required declaration is not made under Chapter 3A of the Constitution, the presumption of validity of the impugned law or the provision of law will continue unaffected. In accordance with this Theory of Conformity it would be irrelevant whether the impugned law is general or special in nature or is Federal or Provincial. Even a custom having the force of law, existing before or after the commencing day of the Constitution of the Islamic Republic of Pakistan, would be valid and enforceable unless struck down in accordance with the procedure prescribed under Chapter 3A of the Constitution.

13. The net result of the discussion is that the meaning and scope of the term repugnant is not limited only to the actual state of being

contrary i.e. contrariety, conflict, antagonistic, opposite or being disparate to the letter of the NASS/Injunction of Islam alone but would also cover the case when an impugned provision of law, law itself or a custom is, disagreeable, repulsive, offensive, distasteful, inconsistent, incompatible, irreconcilable or even averse to the spirit of the NASS i.e. Injunction of Islam.

TABLE

SUBJECTWISE EXAMINATION

14. With this background we will now take up examination of the contentions and provisions of law impugned before us in the above mentioned petitions and applications. We propose dividing our discussion on the various issues relating to prison discipline, which have been grouped into distinct segments, wherein different provisions, under challenge, will be examined on the touchstone of the NASOOS/Injunctions of Islam as mandated by Article 203 D of the Constitution. In the end we intend enumerating ground realities relatable to the subject under review and would also consider certain amendments and thereafter we will give closing remarks and our conclusions:

SEGMENT	SUBJECT	LEGAL PROVISIONS	ISSUE NO.	PETITION OR APPLICATION
ONE	TRANSFER OF PRISONERS	Rules 180-181, Chapter 7 Pakistan Prison Rules, 1978	Ix	Sh.Petition No.62/I-1992
TWO	CLASSIFICATION OF PRISONERS	Rules 225 through 267, Chapters 9/10 Pakistan Prison Rules, 1978.	Iii	Sh. Petition No. 62/I-1992 Sh.Misc.A.No. 19/I-1997 Sh.Misc.A.No.11/I-1998
THREE	LETTERS AND INTERVIEWS	Rule 546, Chapter 22 Pakistan Prison Rules, 1978	Ix	Shariat Miscellaneous Application No.16/I-1997
FOUR	DISCIPLINE AND DAILY ROUTINE	Rule 690, Chapter 28, Pakistan Prison Rules, 1978 (Reference S.42/45 Prisons Act, 1894)	Ix	Shariat Miscellaneous Application No.16/I-1997
FIVE	WOMEN PRISONERS AND INNOCENT CHILDREN	Rules 307,314 Chapter 13, Pakistan Prison Rules, 1978	Ii	Sh. Petition No. 61/I-1992, Sh.Misc. A.No.10/I-1998
SIX	SUPERINTENDENT OF JAIL	RULES 935,939 Chapter 39, Pakistan Prison Rules, 1978	Ix	Sh.Petition No. 61/I of 1992
SEVEN	LADY ASSISTANT SUPERINTENDENT AND WOMEN WARDERS	Rules 1180,1181 Chapter 46, Pakistan Prison Rules, 1978	ii & ix	Sh.Petition No.61/I-1992
EIGHT	DEPUTY SUPERINTENDENT	Rules 1002,1004 Chapter 41, Pakistan Rules, 1978	Ix	Sh.Petition No.61/I-1992

NINE	EMPLOYMENT RESTRICTIONS	Rule 1078 Chapter 44, Pakistan Prison Rules,1978	Ix	Sh.Petition No.12/I-1999
TEN	STATUTORY RELIEF	Section 382-B Code of Criminal Procedure.	vii, viii	Sh. Miscellaneous Application No.21/I-1995
ELEVEN	DIETARY REQUIREMENTS	Chapter 20 Pakistan Prison Rules, 1978	ix	Suo Moto
TWELVE	FAMILY LIFE	Rule545-A, Chapter 22 Pakistan Prison Rules, 1978	i, ix	Sh.Misc.A.No.21/I- 1995 SUO MOTO
THIRTEEN	CONDEMNED PRISONERS	Chapter 14, Pakistan Prison Rules, 1978 and S.30(2) Prisons Act, 1894	vi	Sh.Petition No.4/I- 2008 originally registered as S.P.No. 4/I-2004
FOURTEEN	GROUND REALITIES	Chapter 36,38, 49	iv,ix, x	Suo Moto
FIFTEEN	PRISON DISCIPLINE	PRISON RULES	x	Sh.Misc.A.No.21/I- 1995 Sh.Mis.A.No.10/I- 1998 Suo Moto
SIXTEEN	JAIL RIOTS	ON PRISONS	x	Suo Moto
SEVENTEEN	GUIDING PRINCIPLES/ PERMANENT VALUES	ISSUES UNDER DISCUSSION	x	Suo Moto

EIGHTEEN	OFFENCES AND PUNISHMENT	PRISON DISCIPLINE	x	Suo Moto
NINETEEN	PRISONER'S PROPERTY	RULE 84		Suo Moto
TWENTY	CLOSING REMARKS			Suo Moto
TWENTY ONE	CONCLUSIONS			Final Order of the Court

SEGMENT ONE

TRANSFER OF PRISONERS **(ISSUE NO.IX)**

15. The subject matter of the first segment is Chapter 7 of Rules entitled **Transfer of Prisoners**. Rules 180-181 have been challenged through Shariat Petition No.62/I of 1992 and Shariat Miscellaneous Application No.11/I of 1998. The text of both the rules is reproduced below:-

Notice to Railway Authorities

Rule 180—(i) The Superintendent shall give at least three days, notice to the Station Master of the number of persons, both prisoners and guard, for whom reserved accommodation is required and the particular train by which it is desired to dispatch them.

(ii) Prisoners on transfer shall be dispatched by ordinary passenger trains except when it may be necessary for special reasons to dispatch them by mail train.

Superior class prisoners may travel in a higher class.

Rule 181--- Normally third class railway accommodation shall be provided for prisoners. Superior class prisoners may, however, travel in second class and if they pay the difference in railway fare both for themselves and for the police escort they may be allowed to travel in a higher class.

16. Rule 180 contemplates a notice to the Railways Authorities for prisoner's accommodation and rule 181 deals with the travelling of superior class prisoners. No specific arguments based upon Nasoos were advanced by petitioners to challenge the two rules but it appears that the general arguments advanced, on the question of discrimination, covered rule 181 under which the superior class prisoners are allowed to travel in better class compartments attached with trains. It will however be appreciated that the superior class prisoner is only *given the option to travel in second class compartment on the condition of payment of difference in the railway fare, both for himself and the escort.* The prisoner on transfer, while travelling by train in the general compartment, is legally exempt from paying the stipulated railway fare. He travels free. Even in the days of the Holy Prophet (PBUH) and in the times before and after him the way

farers would travel on foot or donkeys or horses or camels or even improvised carts according to the resources available with them. Reference be made to Ayat 27 Sura 22 (Al-Hajj) where Allah Almighty directs Syedna Ibrahim (A.S.) to:-

Proclaim the (performance of) Pilgrimage
Among people: they will come
To thee on foot and (mounted)
On every kind of camel,
Lean on account of journeys
Through deep and distant
Mountains, highways.

It was not shown to us during arguments that the two impugned rules are repugnant to the letter and spirit of any one or more Injunctions of Islam. Presumption of legality is certainly attached to all legal provisions as contemplated by Article 227 of the Constitution of Pakistan. Hence we do not agree that rules No.180 and 181 contravene any of the Injunctions of Islam. Consequently the part of Shariat Petition No.62/I of 1992 which impugns Rules 180, 181 is hereby dismissed.

17. Notwithstanding dismissal of a part of Shariat Petition No. 62/I of 1992 we proceed to take Suo Moto Notice of Chapter 7 of the

Prison Rules as well as Sections 29, and 42 of the Prisoners Act, 1900.

These provisions speak in terms of transferring certain categories of prisoners within and beyond the territorial limits of a Province and such transfers of prisoners from one Jail to another Jail within the Province, as seen in the following provisions, is the domain of the Inspector General of Prisons.

A. Rule 147 of Chapter 7 The transfer of prisoners from one prison to another within the Province shall be directed by the Inspector General.

B. THE PRISONERS ACT, 1900

(i) 29.--(1) The Provincial Government may, by general or special order, provide for the removal of any prisoner confined in a prison--

- (a) under sentence of death, or
- (b) under, or in lieu of, a sentence of imprisonment, or
- (c) in default of payment of a fine, or
- (d) in default of giving security for keeping the place or for maintaining good behavior,

to any other prison in the Province, or, with the consent of the Provincial Government concerned, to any prison in the other Province or, with the consent of the Federal Government to any prison maintained by it or under its authority in any part of Pakistan.

(2) Subject to the orders, and under the control, of the Provincial Government the Inspector-General of Prisons may, in like manner, provide for the removal of any prisoner confined as aforesaid in a prison in the Province to any other prison in the Province.

(3) The Federal Government may, by general or

special order, provide for the removal of any prisoner or class of prisoners confined in any prison to any other prison in Pakistan maintained by or under the authority of the Federal Government or of a Provincial Government with the consent of the Provincial Government concerned.”

- (ii) **Section 42. Power of Government to exempt certain prisoners from operation of this Part-** The Provincial Government may, by notification in the official Gazette, as the case may be, direct that any person or any class of persons shall not be removed from the prison in which he or they may be confined; and thereupon, and so long as such notification remains in force, the provisions of this Part, other than those contained in Section 44 to 46, shall not apply to such person or class of persons”.

18. Having gone through these provisions we find **firstly** that no provision has been incorporated for any notice being given to the prisoner before his removal within or beyond the local limits of a Province and **secondly** arbitrary powers have been given to the Provincial Government as well as the Inspector General of Prison for transfer of a prisoner to different prisons within the Province and the same unfettered power is enjoyed by the Federal Government when the transfer is to be made beyond the limits of a Province, and **thirdly** that the right of appeal before an independent tribunal has not been provided against such routine but harsh orders; and **fourthly** there is no limit to the number of transfers that can be inflicted upon a prisoner.

19. Arbitrary exercise of power by mundane authorities has not at all been conceded by Injunctions of Islam. The Federal Shariat Court in re The Civil Servants Act, reported as 1973 PLD 1984 FSC 34 and Dr. Muhammad Aslam Khaki and others Vs. Government of Punjab and others, PLD 2005 FSC 3, and the Apex Court in the case of Pakistan and others Vs. Public at large reported as PLD 1987 SC 304 (374) has held that *Notice and right of appeal has to be provided whenever an order adverse to the interest of an aggrieved person is passed by any authority.* In this view of the matter we find that by now the following principles should be read as part of every statute namely:

a). Notice must issue to a person against whom an order/action, adverse to his interests, is proposed to be made disclosing the reasons for the same with an adequate opportunity to show cause against it.

b). The authority, office or person issuing any order or direction which affects any person prejudicially, will state reasons for making the proposed order. Reasonable opportunity will also be given to the affected

person to show cause against the proposed action. Reference Section 24-A

General Clause Act, 1897.

c). Right of appeal before an independent tribunal/authority, higher than the one which issues the impugned order, vests in the person aggrieved by an adverse order. The District and Sessions Judge of the District should be the appellate authority.

20. The origin of these principles can be traced to Ayaat 14 and 71 of Sura 17; Ayat 12 Sura 36; Ayat 29 Sura 45: Ayaat 18,19 and 25 of Sura 69; Ayat 20 of Sura 83; Ayat 9 of Sura 84 and Ayaat 06 through 08 Sura 99 of the Holy Quran.

21. Direction by the Government or the Inspector General of Prison Department for removal of a prisoner from one prison to another prison within the Province or from one Province to another Province must be supported by a speaking order. Unless it is a question of **dire necessity or emergency**, a notice of transfer must be given to the prisoner. It is the right of a prisoner to know why he is being transferred away from his home

town. There must be legal justification to lodge a prisoner far away from the place of his residence. Such a transfer has, in many cases, worked to serious disadvantage, particularly of women folk and children, of prisoner.

We are guided by the tradition of the Holy Prophet (PBUH) wherein the Muslims have been directed to create facilities for the people and not to add to their hardships and apprehensions: “*YASSARA WA LA TOASSARA*.”

22. As a consequence thereof Rules 147 through 149 of the Pakistan Prison Rules, 1978 as well as section 29 of the Prisoner’s Act, 1900 is hereby declared repugnant to the above mentioned Injunctions of Islam. However the repugnancy is to the extent that the Government enjoys unfettered power to transfer a prisoner from one Province to another Province without giving notice to the prisoner or without obtaining his consent or without referring to any lawful reason by way of a speaking order conveyed to the detinue and without providing any remedy against exercise of such authority. Similarly the power of the Inspector General of Prisons to transfer a prisoner from one prison to another within the province without notice or consent of the prisoner and without providing a

right of appeal before an independent tribunal is declared as repugnant.

Chapter 7 of the Jail Manual and section 29 of Prisoners Act 1900 should

be recast in a manner in which a) arbitrary, unbridled and unfettered

powers are neither given to the Government nor the Inspector General of

Prisons; b) and unless the gravity of the situation really demands an

expeditious action, transfers within the Province or beyond the limits of

Province, without Notice or consent, should be eschewed. This however

does not cover the case of a convict whose release is due and he is being

transferred near his home town as provided in Rule 148 or who is required

to be produced in another court in a case being tried elsewhere or there are

other reasonable ground such as safety, security or health. However the

transfer policy should be based upon reasonable considerations subject of

course to notice and the right of appeal or representation before an

independent tribunal. Notice need not be given where a prisoner himself

seeks transfer on solid grounds.

23. There is not much case law available on the point. However

the case of *Ataullah Mangal Vs. The State* PLD 1965 Karachi 350 and the

case of Ali Muhammad Vs. State reported as 1974 P.Cr.L.J. 249 may also be considered by the amending authorities. This decision regarding repugnancy of the impugned provisions of law will take effect as from 01.12.2009 during which period the necessary amendments, additions or alterations may be effected by relevant authorities.

SEGMENT TWO

CLASSIFICATION OF PRISONERS **(ISSUE NO.III)**

24. Rules 224-249 find mention in Chapter 9 of the Pakistan Prison Rules, 1978. The title of this chapter is *Classification and Separation of Prisoners*. Rules 250-270 are contained in Chapter 10 entitled *Superior Class Prisoners*. These provisions have been challenged in Shariat Petition 62/I of 1992 as well as Shariat Miscellaneous Application No.19/I of 1997 and Shariat Miscellaneous Application No. 11/I of 1998. The emphasis of learned counsel appearing in support of these petitions was on all the provisions contained in the two chapters which deal with classification and separation of prisoners with particular reference to the privileges attached with category A and B. In order

therefore to appreciate the controversy it would be useful to examine the

text of the impugned provisions in Chapters 9 and 10 together:-

CHAPTER-9

THE CLASSIFICATION AND SEPARATION OF PRISONERS

Classes of Prisoner

Rule 224—A prisoner confined in prison may be-

- i) a criminal prisoner , which includes:
 - (a) a convicted prisoner; and
 - (b) an unconvicted or under trial prisoner:
 - (ii) a civil prisoner; or
 - (iii) a state prisoner detained under Regulation III of 1818, or a person ordered to be detained in prison without trial under any law relating to the detention of such person.

Note. Lunatics may also be temporarily detained in prisons under the orders of the Magistrate.

Classification of convicted prisoners

- Rule 225**—(i) Convicted prisoners shall be classified into
- (a) superior class;
 - (b) ordinary class; and
 - (c) political class
- (ii) Superior class includes A and B class prisoners. Ordinary class comprises of prisoners other than superior class.

Political class comprises of prisoners who commit crimes not for personal gain but for political motives. This class is not criminal and does not require reformative or correctional treatment.

Casuals and habitual

Rule 226—Convicted prisoners are classified into casuals and habitual.

- (i) Casuals are first offenders and who lapse into crime not because of a criminal mentality but on account of their surroundings, physical disability or mental deficiency.

(ii) Habituals are:-

- (a) Ordinary habituals prisoners; and
- (b) Professionals or repeaters.

Ordinary habitual prisoners are those frequently lapse into crime owing to their surroundings or some physical or mental defects.

Professionals or repeaters are men with an object, sound in mind and in body, competent, often highly skilled, who deliberately and with open eyes prefer a life of crime and know all the tricks and maneuvers necessary for that life. They may be first offenders.

Classification of convicted prisoners according to age

Rule 227—Convicted prisoners are further classified as under:-

- (a) Juveniles under the age of 18.
- (b) Adolescent over 18 and under 21 years of age.
- (c) Adults over the age of 21.

Nature of sentence

Rule 228—There shall be two classes of convicted prisoners according to the nature of their sentence, i.e.:-

- (a) those undergoing rigorous imprisonment; and
- (b) those undergoing simple imprisonment.

Classification of Under-Trial Prisoners

Rule 229.—Under trial prisoners shall be classified as under:-

- (a) Committed to Sessions.
- (b) Committed to other Courts.

For Sindh Province Only

In rule 229, for the word “committed” the word “sent” shall be substituted.

Classification of women prisoners

Rule 230.— Women prisoners will be classified in the same manner as is provided in the case of males.

Separation of prisoners

Rule 231.-- Prisoners shall be kept separate as under:-

- (i) In a prison containing men as well as women prisoners, the women shall be imprisoned in a separate prison, or separate

part of the same prison in such manner as to prevent their seeing, conversing or holding any communication with the male prisoners.

- (ii) Juveniles shall be kept separate from all other prisoners.
- (iii) Undertrial prisoners shall be kept separate from convicted prisoners.
- (iv) Civil prisoners shall be kept separate from criminal prisoners.
- (v) Political prisoners shall be kept separate from all other prisoners.

For Sindh Province Only

In rule 231, for sub-rule (ii) the following sub-rule shall be substituted, (ii), Juveniles shall be kept in a separate institution or jail, or if there be no separate institution or jail in any area, in a separate part of the same prison in such manner as to prevent their meeting or holding communication with adult prisoners.

Further provisions regarding separation

Rule 232.—Separation of the following prisoners shall, to the extent to which it can in each prison be observed, be carried into effect;

- (i) Under trial prisoners who have been committed to Sessions, shall be kept separate from under trial prisoners who have not been so committed and those who have been previously convicted shall be kept separate from those who have not been previously convicted.
- (ii) Casual convicted prisoners shall be kept separate from habitual convicted prisoners.
- (iii) Simple imprisonment prisoners shall be kept separate from the rigorous imprisonment prisoners.
- (iv) Convicted prisoners who are under 16 years of age shall be kept separate from convicted prisoners who are more than 16 years of age.
- (v) Every habitual criminal shall, as far as possible be confined in a special prison in which only habitual criminals are kept. The Inspector-General may, however sanction the transfer to such special prison of any prisoner not being a habitual prisoner, whom for reasons to be recorded, the Superintendent of the prison believes to be of so vicious and depraved a character: as to make his association with other casual prisoners undesirable. Prisoners so transferred shall not otherwise be subjected to the special rules affecting the habitual criminals.
- (vi) Political prisoners may be kept separate from each other, if deemed necessary.

Exception to the Rule regarding separation

Rule 233.—When in any prison only one prisoner exists in any class and separation would amount to solitary confinement, such prisoner, if he so desires, be permitted to associate with prisoners of another class in such a manner so as not to infringe the provisions of Section 27 of the Prisons Act, 1894.

Association and segregation of prisoners

Rule 234.—Subject to the provisions of Rule 231, convicted prisoners may be confined either in association or individually in cells or partly in one way and partly in the other.

Segregation of under trial prisoners

Rule 235.—Under trial prisoners may be confined separately in cells, when in the opinion of the Superintendent, it is necessary in the interest of the prison discipline to do so, or under the orders of the Inspector General, or of Government.

Occupation of vacant cells

Rule 236.—Cells not in a use for purposes of punishment or otherwise, shall be occupied by the convicted prisoners for the purpose of separation subject to the following conditions:-

- (a) Juvenile shall in preference to any other class of prisoners be confined in cells both by day and night.
- (b) Prisoners convicted under section 366 (A), 376 and 377 of the Pakistan Penal Code, shall in preference to prisoners other than juveniles be placed in cells both by day and night.
- (c) Habitual prisoners shall be placed in cells both by day and night in preference to casual prisoners.

Sections 366-A, 376 and 377 of Pakistan Penal Code are:

Section 366-A. Procreation of minor girl.

Section 376 Punishment for rape

Section 377 Unnatural offences

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.

Separation of habituals

Rule 237.—Habitual prisoners shall be subjected to the system of separation prescribed in the preceding rules in rotation.

Separation of casuals

Rule 238.—If at any time there are more cells in any prison than suffice for the separation of all habituals, prisoners of the casual class shall be confined in cells by night only in rotation.

Procedure when separation by day is not feasible

Rule 239.—A convicted prisoner who would ordinarily come under the operation of any of the preceding rules relating to the separation of prisoners, but cannot be confined in a cell by day, by reason that he is required for some prison service shall be confined in a cell by night.

Explanation- Separation under Rules 235 to 239, is restricted merely to the separation of individual prisoners for purpose of prison management; such separation is not to have any irksome conditions attached to it.

Separation of prisoners to prevent the commission of any offence

Rule 240.—If in the opinion of the Superintendent, the presence of any prisoner in association with others is detrimental to good order and discipline, and is likely to encourage or lead to the commission of any offence, such prisoner may be kept separate in a cell.

Separation to be as complete as possible

Rule 241.—Subject to the provisions of Rule 233, the separation of the various classes of prisoners shall be carried out to the fullest extent as far as possible. If there are not a sufficient number of latrines, bathing rooms and feeding arrangements to keep the classes completely apart, such arrangement for separation as are under the circumstances practicable shall be made.

Rules for the classification of prisoners into A,B and C Class

Rule 242.—(i) Convicted shall be divided into three class; A,B and C class. Class will contain all prisoners who are-

- (a) casual prisoners of good character;
- (b) by social status, education and habit of life have been accustomed to a superior mode of living and;
- (c) have not been convicted of offence involving elements of cruelty, moral degradation, personal greed, serious or premeditated violence, serious offence against property, offences relating to the possession of explosive, firearms and other dangerous weapons with object of

committing or enabling an offence to be committed and abetment or incitement of offences falling within these sub-clauses.

(ii) Class B will consist of prisoners who by social status, education or habit of life have been accustomed to a superior mode of living. Habitual prisoners can be included in this class by order of the Government.

(iii) Class “C” will consist of prisoners who are not classified as A and B.

Classifying authority

Rule.---243—For A and B Classes the classifying authority will be the Government. Courts may classify prisoners into A and B class pending final orders of the Government. Class ‘C’ will be classified by the trying Courts, but such prisoners will have a right to apply for revision to the Government. Petitions of revision will be forwarded by the Superintendent to the Inspector General for transmission to Government.

Superintendent may award B class to convicted prisoners.

Rule 244—In case convicting Court omit to classify convicted prisoners for better class treatment. Superintendents of prisons subject to the approval of Government may classify them as B class prisoners, provided that such prisoners appear to fulfil the conditions prescribed for better class treatment.

Qualifications for A and B class

Rule 245—The recommending authority shall invariably furnish to Government the following details when recommending a prisoner to A or B class.

- (a) Whether the prisoner is casual or habitual.
- (b) Previous convictions if any.
- (c) Offence and sentence.
- (d) Social and financial status of family.
- (e) Profession of the prisoner.
- (f) Income of the prisoner, if any.
- (g) Academic qualifications of the prisoner.

If the statement of the prisoner on these points requires verification, further enquiries should be made from the [District Coordination Officer] or any other source. The recommending authority may either defer making any recommendations until it

has received the information asked for or may make the recommendations on the materials available and state that the result of further enquiries will be submitted when received.

Disagreement between the convicting Court and the District Coordination Officer.

Rule 246.—In case in which there is disagreement between the convicting Court and the District Coordination Officer, as to the classification of any prisoner, the [District Coordination Officer] shall decide the class in which a convicted prisoner shall be kept pending final orders of the Government.

Condemned prisoners governed by these rules

Rule 247.—The above rules shall also apply to the prisoners under sentence of death.

Classification of under-prisoners

Rule 248.—(i) There shall be only two classes of under-trial prisoners-

- (a) better class; and
 - (b) ordinary class.
- (ii) better class will include those under-trial prisoners who by social status, education or habit of life have been accustomed to a superior mode of living and will correspond to A and B class of convicted prisoners. Ordinary class will include all others and will correspond to C class.
- (ii-a) Those under-trial prisoners who pass matriculation or higher examination in Ist Division during their stay in the jail shall be allowed better class jail facilities with effect from the date the result is announced.
- (iii) Before an under-trial prisoner is brought before a competent Court, it will be at the discretion of the Officer [not below the rank of Assistant Superintendent/Deputy Superintendent of police having jurisdiction in the area] to properly classify him. After he is brought before the Court, he will be classified by that Court, subject to the approval of the Provincial Government.

(b) **Rule 248**—Order passed under r. 248 with approval of District Coordination Officer cannot be revised by that authority.

For Sindh Province Only

In rule 248:-

After sub rule (ii), the following new sub-rules shall be added:

(ii-a) Members of the Senate, National Assembly, Provincial Assembly, Officers of grade 17 or above in the Federal or Provincial Government, Commissioned Officers in the defence forces or the Rangers, Mayors of Metropolitan Corporations, chairmen of Municipal Corporations and District Councils, officers in autonomous institutions or corporations established or controlled by the Federal or nay Provincial Government, holding posts equivalent to or higher than grade 17 in Government, and any person paying income tax or agricultural/wealth tax not less than Rs. 10,000/- per year shall be classified as better class facilities, both in the jails, and sub-jails and while in police custody;

(ii-b) those under trial prisoners who pass matriculation or higher examination in Ist division during their stay in the jail shall be allowed better class jail facilities with effect from the date of result is announced.

(b) for sub-rule (iii) the following sub-rule shall be substituted,

“(iii) The court competent to try a prisoner, if it is satisfied that the prisoner by reason of his exceptionally high educational or professional qualification or his status is accustomed to a superior mode of life, may by an order in writing, with reasons therefore, classify such prisoner as better class prisoner. Provided that if such order is passed by any court sub-ordinate to a Sessions Court,” the order shall be subject to approval of the Sessions Judge.

Classification of political prisoners

Rule 249.-- Classification of political prisoners will be determined by the authority ordering their retention in prison.

CHAPTER 10

SUPERIOR CLASS PRISONERS

Superior Class Prisoners

Rule 250.—superior class prisoners are-

- (i) convicted prisoners admitted to A or B class by order of the Government;
- (ii) convicted prisoners admitted to A or B class by order of the Courts pending the orders of Government; and
- (iii) under trial prisoners admitted to superior class by order of the Court subject to the provisional order of the Provincial Government.

Rule 251.—Except as provided in the chapter, all prison rules shall also apply to superior class prisoners.

Accommodation

Rule 252.-- (i) Superior class prisoners shall, where such accommodation is available, be kept apart from other prisoners and be accommodated in rooms or in association barracks set aside for them. The imprisonment shall in no case involve any thing in the nature of separate confinement, except when it is given as prison punishment.

(ii) In the case of B class prisoners, it shall not be necessary to keep them separate from ordinary prisoners in factories or at times when they are not required to be in their rooms or barracks.

Tasks

Rule 253.—The tasks shall be allotted with due regard to the capacity, character, previous mode of life and antecedents of the prisoners.

Sleeping outside in hot weather

Rule 254.-- (i) A and B class prisoners may be allowed to sleep outside their rooms or barracks during the hot weather (1st May to 1st October), if the arrangements in the particular prison permit this to be done with safety and without any additional expenditure.

(ii) This facility shall not be permitted to condemned prisoners admitted to superior class.

Furniture

Rule 255. (i) - - Rooms shall be supplied with following articles:-

[One cot, one chair, one teapoy, one lantern if there is no electric light, one shelf, and necessary washing and sanitary appliances].

(ii) Association barracks shall be provided with the following :-

One cot per prisoner, one large table with benches, shelves, sufficient lamps to enable reading at the table, necessary night sanitary appliances, latrines and bath rooms in the enclosure.

(iii) A class prisoners may supplement the furniture by other articles within reasonable limit at their own cost, at the discretion of the Superintendent.

(iv) Commodes shall also be supplied to those prisoners who are accustomed to their use and ask for them.

(v) They shall be allowed a lamp or light for reading upto 10 p.m.

Amendment for Punjab/Sindh

More Furniture.

Rule 255.(i)—Rooms shall be supplied with following articles:-

[One cot woven with niwar, one chair, one tea-poy, one table lamp, one shelf, one ash tray, one wooden rack and necessary washing and sanitary appliances].

[(ii) Association barracks shall be provided with the following:-

One cot woven with niwar per prisoner, one large table with banches, shelves, sufficient light to enable reading at the tables, necessary night sanitary appliances, latrines and bath rooms in the enclosure.

(iii) A class prisoners may supplement the furniture by other articles within reasonable limit [and also portable Radio and T.V. set] at their own cost, at the discretion of the Superintendent [and the B class prisoners shall be allowed to keep a portable Radio at their own cost.]

(iv) Where flush fittings are not available, commodes shall be supplied to those prisoners who are accustomed to their use and ask for them.

(v) They shall be allowed a table lamp for reading upto 10 P.M.

(vi) One waste paper basket will be supplied for each cell and more for association barracks at the discretion of the Superintendent.]

Exercise and games

Rule 256.—When there is only one superior class prisoner, he should be allowed walking or some other physical exercise for half [2 hours] an hour both morning and evening. Where the number of such prisoners exceeds one, outdoor games such as volleyball, deck tennis and badminton may be allowed at the discretion of the Superintendent, provided that the space in the enclosure permits it. The initial expenditure in every case shall be paid by the Government. Indoor games such as cards carom or chess may also be permitted at the cost of the prisoners.

Sanitary and bathing arrangements

Rule 257. (i)—They shall be allowed reasonable facilities for bathing, latrines, etc., with due regard to the provision of privacy. They use of toilet and washing soap shall also be allowed. Superior class prisoners shall be allowed to keep the articles as permissible under Rule 75.

(ii) Soap will be allowed to A and B class prisoners on the following scale:-

Toilet soap-One cake weighing about 117 grs. For a fortnight.
Washing material .. 117 grs. washing soap and 117 grs. washing soda weekly.

For Punjab and Sindh Province Only

In Rule 257, for sub-rules (ii) the following sub-rules shall be substituted and sub-rule (iii) shall be added:-

- (ii) A and B class prisoners, if they can not afford themselves, shall be allowed the following articles:
 - (a) Toilet soap one cake weighing about 140 grams for a fortnight.
 - (b) Washing material, 125 grams washing powder weekly.
 - (c) Mustard oil 60 grams per week for those who grow hair.
- (iii) Prisoners in association barracks shall be provided with one fixed mirror of size 57 x 41 cm, in wall, one hair comb medium quality, one soap case, one lota plastic one mug plastic and one towel per prisoner and one plastic tub (Medium size) for every ten prisoners. A fixed towel hunger shall be provided in each bathroom.

Cooking arrangement

Rule 258.—When several superior class prisoners are confined together, a separate cook house [two c class prisoners for every ten such superior prisoners] shall be provided for them. In the case of a superior class prisoners if confined individually he may be permitted a C class prisoner-cook to cook his food.

Utensils

Rule 259. (1). The following utensils shall be supplied to each prisoner:-

One enamel plate, two enamel cups, one metal glass, one spoon and one enamel mug.

- (ii) A class prisoners if they desire, shall be allowed to use their own utensils.

Amendment for Punjab Province only:

Better utensils

Rule 259.—The existing Rule 259 shall be substituted as:-

- (i) The following utensils shall be supplied to each prisoner:-
 - (a) One full plate, one quarter plate, one teaspoon, one table spoon and one tumbler of stainless steel and one tea cup.
 - (b) The following utensils shall be supplied to the prisoners for common use by six prisoners.

One tea set (tea pot, milk pot and sugar pot).

One tea kettle and one jug of stainless steel.

- (c) The following articles will be provided in common kitchen for preparation and service of food (for six better class prisoners):-

One steel Tawa, one medium size Parat, one cooking kettle, one cooking spoon, one dish for curry, one dish for sweet, one dish for rice, one fry pan, one meat safe (medium size) and one kitchen knife of stainless steel and condiment grinding equipment, one kerosene oil stove (where no Sui gas arrangement exists)

- (d) Any other articles of kitchen requirement, considered necessary, may be provided at the discretion of the Superintendent Jail.

- (ii) A class prisoners if they desire, shall be allowed to use their own utensils.]

For Sindh Province Only

For rule 259, the following rule shall be substituted:

- (i) The following utensils shall be supplied to each prisoner;

One full plate, one quarter plate, one teaspoon one table spoon and one tumbler of stainless steel and one tea-cup.

- (ii) The following utensils shall be supplied to the prisoners for common use by six prisoners:-

One tea set (tea pot, milk pot and sugar pot) one tea kettle and one jug of stainless steel.

- (iii) The following articles shall be provided in common kitchen for food preparation and services for every six better class prisoners:-

One steel tawa, one medium sized plate, one cooking kettle, one cooking spoon, one dish for curry, one dish for sweet, one rice, one frying pan. One meat safe (medium size) and one kitchen knife of stainless steel and condiment grinding equipment, one kerosene oil stove (where no sui gas arrangement exists),

Note: The plates and dishes shall be of stainless steel. Any other articles of kitchen requirement, considered necessary, may be provided at the discretion of the Superintendent Jail.

- (iv) A and B class prisoners, if they so desire, shall be allowed to use, their own utensils.

Diet

Rule 260. (i)-- Superior diet shall be provided

according to the following scale; provided that the Inspector General may, with the approval of the Government, modify or alter the scale of diet to suit the local conditions:-

Name of Article	Diet Scale for Meat Eaters	Diet Scale for Vegetarians eaters
	Kgr. Grs.	Kgr.Grs.
Wheat atta	0...583	0...583
Dal	0...117	0...117
Meat	0...17	...
Milk	0...233	0...583
Vegetable Ghee	0...29	0...29
Sugar	0...58	0...58
	0..29	0...29
Milk for tea	0...117	0...117
Vegetables	0...117	0.233
Potatoes	0...117	0...117
Condiments	0...15	0...15
Salt	0...15	0...15
Firewood	1...886	1...886

(ii) Meat eaters can exchange meat with eggs or fish when available, or liver, kidneys, brain, etc., provided cost does not exceed that of the authorized amount of meat 175 grs.

(iii) Loaf bread weighing upto 467 grs may be substituted for wheat atta, in the case of foreigners or Pakistanis accustomed to western diet 467 grs. rice may be substituted for 583 grs. wheat-atta in case of rice eaters.

(iv) Prisoners will not be permitted to accumulate raw rations from day to day. Unconsumed raw rations will be taken back in the prison stock.

(v) The diet in the case of A class prisoners may be supplemented at their own expenses with extra article of food of a simple character, provided money for its purchase is deposited with the Superintendent.

(vi) The occasional present of fruits to superior class prisoners by their relatives and friends is permitted at the discretion of the Superintendent. Alcohol, intoxicating drugs and articles of luxury shall not be permitted.

(vii) A copy of the scales prescribed shall be hung up in the rooms or barracks where such prisoners are confined.

Amendment For Punjab

Better Diet

Rule 260.-- Against the below noted items the quantity be substituted as follows:

<u>Name of Article</u>	<u>Kgr.Grs.</u>	<u>Kgr.Grs.</u>
Meat	0...175	-...-
Tea	0..7	0...7
Potatoes	0...117	0...117
Salt	0...15	0...15
Firewood	1...886	1...886

For Sindh Province Only

In Rule 260, in the table of articles and scales the existing quantity of the articles mentioned shall be substituted as given against them:-

Meat	175 grs	nil
Tea	7 grs.	7 grs
Firewood	1.886	350 grs

(Where gas is not provided)

Clothing and bedding

Rule 261. (1)—A class [superior class convicted] prisoners may, within reasonable limits, wear their own clothing and provide their own bedding, shoes, etc.

(ii) A class [superior class convicted] prisoners who prefer prison clothing, etc. and all 'B' class [deleted] prisoners shall be supplied with clothing and other equipment according to the scale given below; provided that the Inspector-General may with the approval of the Government, modify or alter the scale to suit the local conditions:-

Male Prisoners

Throughout the year. _____.

2 dasuti shirts or kurtas 2 dasuti shalwars or trousers.

2 cotton azarbands. 2 dasuti caps.

2 towels. 2 dasuti pillow covers.

1 pillow case filled with cotton. 2 dasuti bed sheets.

1 blanket woolen 1 cotton durrie.

During winter—

1 woollen jersey.

2 Blankets woolen.

1 dasuti mattressfoam Mattress 5 cm thick

Women Prisoners

Throughout the year-

2 cotton shalwars.	2 dasuti pillow covers.
2 cotton shirts.	6 napkins.
2 cotton dopattas of coarse Muslin.	
2 towels.	2 cotton azarbands.
2 dasuti pillow covers.	1 pillow case filed with cotton.
2 dasuti bed sheets.	1 blanket woolen
1 cotton durrie.	

During winter—

3.	blankets woolen.
1	Foam Matters 5 cm thick
1	woolen jersey.

Amendment for the Punjab Province only:

Better clothing and bedding

Rule 261.—The existing rule shall be substituted as under:-

(i) A class prisoners may, within reasonable limits, wear their own clothing and provide their own bedding, shoes, etc.

(ii) A class prisoners who prefer prison clothing, etc. and all 'B' class convicted prisoners shall be supplied with clothing and other equipment according to the scale given below; provided that the Inspector General may with the approval of the Government, modify or alter the scale to suit the local conditions:-

Male Prisoners;

Throughout the year--

Two dasuti shirts or kurtas.	Two dasuti Shalwars or trousers.
Two cotton azarbands.	Two towels.
Two dasuti caps.	Two dasuti pillow covers.
One foam pillow.	Two dasuti bed sheets.

Male Prisoners;

Throughout the year-

One	blanket
One	cotton durrie.

During winter:

One	woolen Jersey.
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Four blankets (medium quality),

One foam mattress 5 cm thick.

Women Prisoners throughout the year:

Two	cotton shalwars.
Two	dasuti pillow covers.
Two	cotton shirts.
Six	napkins.
Two	cotton dopattas of coarse muslim.
Two	cotton azarbands.
Two	towels.
One	foam pillow.
Two	dasuti bed sheets.
One	blanket.
One	cotton durree.

During Winter:

Four	blankets.
One	foam mattress 5 cm thick.
One	woolen jersey.

For Sindh Province Only

In Rule 261, for sub-rule (ii), the following sub-rule shall be substituted:

- (ii) A class prisoners who prefer prisoner clothing, and all 'B' class convicted prisoners shall be supplied with clothing and other equipment according to the scale given below; provided that the Inspector General may with the approval of the Government, modify or alter the scale to suit the local conditions:-

Male prisoners throughout the year

Two Dasuti Shirts or Kurtas

Two Dasuti Shalwars or trousers

Two cotton Azarbands

Two towels

Two Dasuti caps

Two Dasuti pillow covers

One foam pillow

Two Dasuti bed sheets

One blanket

One cotton Duree.

During Winter :-

One woolen jersey

Four blankets (Medium quality)

One foam matters 5 cm

Women Prisoners throughout the year

Two cotton Shalwars

Two Dosuti Pillow covers

Two cotton shirts

Six napkins.

Two cotton Dupattas of coarse Muslim

Two cotton Azarbands

Two towels

One foam pillow

Two Dasuti bed Sheets

One blanket

One cotton duree

During Winter:-

Four blankets

One foam mattress 5 cm thick

One woolen jersey.

Mosquito nets

Rule 262.—Superior class prisoners may be permitted to use mosquito nets at their own expense.

Facilities for reading

Rule 263.— In addition to books from the prisoner library a prisoner may have any [reading material legally available in the market subject to clearance of superintendent from private source] number of books or magazines upto a reasonable limit from private sources, provided that such books or magazines are not considered unsuitable by Superintendent, who if in doubt, shall consult the Inspector General. Daily newspapers shall be supplied from a list approved by Government. These papers shall be examined by the Superintendent before issue to the prisoners.

Electric Fans

Rule 264.—Prisoners may be allowed to use their own electric fans during the summer season, if such arrangement do not already exist in the ward reserved for them.

Letters and interviews

Rule 265.—Superior class prisoners shall be allowed to write one letter and have one interview weekly. Both the letter and interview are interchangeable. One urgent occasion such as death or serious illness in a prisoner's family, this rule may be relaxed at the discretion of the Superintendent. The number of persons who may visit a prisoner at any given times should be limited to six. The discussion of political matters shall not be

allowed at these interviews. The subject matter of all letters shall be strictly limited to private affairs and shall not contain any reference to prison administration and discipline, other prisoners or politics.

Publications of matters discussed at interview or of the substance of letters received from prisoners shall entail the withdrawal or curtailment of this privilege.

Menial duties

Rule 266.—They shall not be required to perform menial duties nor to pay for having such duties done for them. These duties will be discharged by the prison servants who shall not be used as personal servants by a superior class prisoner. One attendant and one cook prisoner may be allowed to superior class prisoners upto ten in number.

Punishments

Rule 267.-- There shall be subject to the general rules regarding punishments, except that whipping shall only be inflicted with the previous sanction of the government. All penalties inflicted on A [Superior] class prisoners by the Superintendent shall immediately be reported to the Inspector-General. In case of misbehavior, the Superintendent may withdraw individual privileges, subject to the sanction of the Inspector General, when the period exceeds one month, but the power to remove a prisoner from this class rests with the Government only.

Discipline

Rule 268.—They shall at all times behave in an orderly manner, and shall be required to show due respect to prison officials and visitors. In all respects the prisoners shall be subject to the rules which apply to ordinary prisoners.

Transfer

Rule 269.—(i) Normally second class railway accommodation shall be provided at the time of transfer from a prison. Prisoners may be allowed to travel by a higher class at their own expense if they wish to do so, in which case they will be required to pay the difference in fares both for prisoners themselves and their escorts.

(ii) They shall be conveyed by taxi or tonga to and from the prison to the railway station at the time of transfer. Prisoners shall not be transferred from a prison in one district to a prison in another district by motor car unless the previous sanction of Government has been obtained.

Superior class under-trial prisoners

Rule 270.(i)—Accommodation-As far as possible they will be provided with accommodation superior to that provided for “c” class convicted prisoners.

(ii) Diet-They shall be allowed the same diet as prescribed for B class prisoners. They may supplement it at their own expense provided that the food so obtained is of a simple character. Alcohol, intoxicating drugs and articles of luxury shall not be permitted.

(iii) Clothing-Prisoners inadequately clad and who are unable to obtain clothing from private source be provided with B class clothing at Government expense. They may be allowed their own beddings at the discretion of the Superintendent.

(iv) Other Concessions-Subject to the discretion of the Superintendent, superior class under trial prisoners may be provided with ordinary furniture as is allowed to B class prisoners. They will ordinarily be permitted to obtain books, magazines and newspapers, subject to censorship by the Superintendent, and allowed the use of a light upto 10 p.m. [in Winter and 11 p.m. in Summer]

(v) **Letters.**—Their letters will be subjected to censorship in exactly the same way as those of ordinary under trial prisoners [by the concerned agencies.]

(vi) **Other matters.**—All other rules pertaining to ordinary under trial prisoners shall also apply to superior class under trial prisoners.

GENERAL DISCUSSION ON CLASSIFICATION.

25. Shariat Petition No.62/I of 1992 as well as Shariat Miscellaneous Application No. 19/I of 1997 and Shariat Miscellaneous Application No. 11/I of 1998 deal with the question of *classification of convicted prisoners* and matters relevant thereto. It is significant to note that in this petition, which consists of foolscap seven typed pages, not a

single impugned rule or provision of law has been shown to be violative of any one or the other Injunction of Islam. After narrating various provisions it has been stated in paragraph 3 of the petition that “the above classification of the prisoners and discrimination in their facilities is clearly against the principles of justice, equality, equity and fair play as given in Islam”. The mover of the petition, in paragraph 1 of this petition, states that he, as a Muslim citizen of Islamic Republic of Pakistan, has gone through legal provisions relating to prisons and has come to the conclusion that these rules are against the basic concept of justice and equality and hence against the Injunctions of Islam. This is an unfortunate trend that regular petitions and miscellaneous applications are moved in Constitutional Courts and registered in violation of the procedure laid down in the Federal Shariat Court (Procedure) Rules, 1981. Rule 7 is a mandatory provision contained in Chapter II of the said Procedure Rules. It is entitled OF PETITIONS. Rules 7 through 16 A deal in detail with the forms and the contents of petitions moved for consideration of Federal Shariat Court. It is unfortunate that the rules are not being followed by parties to litigation and

officials of the Federal Court Registry. It is high time petitions are filed in accordance with the mandated provisions so that the precise issues are brought before the Court for determination without loss of time. The Registry has to be vigilant in this respect.

26. The element of classification of prisoners was seriously and repeatedly objected to by petitioners before us. It has been urged that classification of prisoners into A, B and C groups is contrary to Injunctions of Islam. This issue has been canvassed forcefully before us by repeating the solitary argument that Islam teaches equality and further that the entire prison population should have equal facilities and any attempt to differentiate between one or the other class of prisoners would amount to violation of the Injunction of Islam. This question of discrimination has been raised at different fora during the past few years. Whether it is a case of discrimination or reasonable classification has now to be determined.

27. Sardar Abdul Majeed, Standing Counsel for the Federal Government however opposed the contention of learned counsel for the petitioner. He contended that it is in very rare cases that the Government or

Prison Department grants A or B class to the prisoners. It is only when political detainees are interned under administrative orders that B class is given to such detenus who are neither criminals nor under-trial prisoners.

Sardar Abdul Majeed, while referring to certain precedents from Islamic history, developed the argument that an accused is not entitled to claim equality in matters of punishments by way of Taazir. The judge may consider even a reprimand to be sufficient in a given case. There can therefore be no claim to equality in every sphere of life.

28. Under the circumstances, it is therefore necessary to consider this question at length through this judgment because this issue had come up for consideration in the case of Abdul Rashid vs. The State 1980 SCMR 632 as well as the case of Waheed Akhtar vs. Superintendent, Camp Jail, Lahore and another reported as PLD 1980 Lahore 131 but arguments based upon Holy Quran and Sunnah were not advanced before the Hon'ble Judges for their consideration.

29. Before proceeding it would be useful to make a statement about the principle of Equality vis-a-vis the teachings of Islam. Holy

Quran and the precepts of Prophet Muhammad, PBUH, are vocal on the issue of equality status of human beings. The Injunctions of Islam bear ample testimony, as is evident from Ayat 13 Sura 49, that the noblest among the believers in the sight of Allah is the one who is most mindful of his duties towards Allah. Reference may also be made to the Khutba of the Holy Prophet, PBUH, at the time of conquest of Macca as well as the last Sermons. Both the Sermons constitute an illuminating charter of human rights and freedoms wherein Liberty and Equality are declared as basic principles of Divine Message. But equality should not be confused with classification. Islam negates discrimination but uphold reasonable classification.

30. The principle of Equality between human beings is innate in Islamic teachings. When the Holy Quran proclaims that every human being is worthy of respect and dignity as is evident from Ayat 70 Sura 17, Bani Israel, it presupposes *that all human beings, irrespective of sex, caste, colour, creed, community, country and other man made geo-political divisions, are equal.* The divine statement contained in Ayat 76 Sura 38,

to the effect that man was created from clay is a loud and clear proclamation that all human beings are in fact equal. Similarly the declaration contained in Ayaat 22 and 29, Sura 2 Al-Baqra, and repeated at number of places in the Holy Quran, namely that the bounties scattered in the cosmos are meant *for the consumption of human beings*, necessarily implies that human beings are not only equal but enjoy equal opportunities. The Quranic principle that those who do good shall inherit gardens clarifies the matter further by suggesting that the criteria of success is good conduct whether done by some one from the lower strata of society or done by a politically and financially strong person or a blue-blooded aristocrat. The right to choose, as enunciated in Ayat 104 Sura 6 and Ayat 29 Sura 18, has been granted to all and sundry. Why? Because Islamic jurisprudence presupposes that all the human beings are equal and enjoy the same set of liberties and limitations. The Holy Quran is that revealed Book which in fact introduced the concept of unity of human race. Reference may be made to Ayat 213, Sura 2, Ayat 32 of Sura 30 and Ayat 19 of Sura 10. Similarly the declaration that no one shall bear the burden of any other

soul, as given in Ayat 164 of Sura 67, and that every one is accountable for his deeds as enunciated in Ayat 202 Sura 2, is a clear pointer towards the principle of equality. At the socio-economic and political level, the Holy Quran makes it abundantly clear in Ayat 35 Sura 33, that men who submit and the women who submit, the faithful men and the faithful women etc. etc. shall receive rewards. Ayat 173 of Sura 7 refers to the joint covenant of the children of Adam which is a vivid illustration of equality of all human beings irrespective of time and place of birth. Equivalence is a distinctive feature of Islam. These human friendly principles introduced by Divine Message through the honoured Prophets A.S. paved the way for humanism and the International Charter of Human Rights.

31. Reverting to the main question of the legality or otherwise of the concept of classification it might as well be stated that Islamic history is replete with instances which vividly illustrate that the principle of classification has a sanction is based upon reasonable and material grounds. The above mentioned cases of Abdur Rashid and Waheed Akhtar were decided without reference to the Islamic Injunctions on the subject. Hence

a detailed discussion has been undertaken in this judgment in the light of Islamic principles in resolving the question relating to legal justification of classification of prisoners into various categories notwithstanding the general principle of equality of human beings.

32. It is not only the prisoners alone but the prisons in Pakistan have also been divided in different categories as in evident from Chapter 2 of the Prison Rules. This categorization did not at all seem unreasonable to the petitioners and they did not opt to challenge this classification. These are all administrative matters and hence beyond challenge. The fact of the matter is that the concept of reasonable classification is now a universally acknowledged phenomenon. The element of inhuman and vicious classification amounting to abject discrimination was an accepted reality in the erstwhile Arab Customary Code and contemporary societies elsewhere. With the advent of Islam a rational and a judicious basis was introduced whenever classification had to be resorted to. However the historically old, appalling and crude mode of classifying human beings on false grounds of colour, caste, creed or nationality was strictly prohibited by Holy Quran

and Sunnah of the Holy Prophet (PBUH) as is evident additionally from the

following illustrations:-

A. Ayat 11, Sura 4, (An-Nisa) of Holy Quran, accepts categorization of surviving relatives of deceased into different classes of heirs and allots specific shares for each class of heirs. This is an admitted proposition of law of inheritance. Care is taken not to discriminate among the heirs of the same class though shares allocated to each class vary. At the same time Holy Quran warns the believers in the said verse not to be swayed by personal sentiments or inclinations or apprehensions about the future conduct of the recipients of the legacy. The last full owner should therefore eschew discrimination. Each heir must get the prescribed share. Holy Quran while laying down the basis for this principle states: **You know not which of them is nearer to you in usefulness.** Ayat 11 Sura 4.

B. Ayat I of Sura 4, (An-Nisa) of Holy Quran contains the following declaration:-

“O people! be careful of (your duty to) your Lord, who created you from a single being and created its mate of the same kind and spread from these two many men and women”.

This Ayat on the one hand declares unity of human race and on the other hand classifies humanity into two main classes i.e. Men and Women. The reason for maintaining this classification is the perpetuation of human race. Each sex has been declared to be ZAUJ of the other i.e, both complement one another and each category 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 from the outset classified the entire creation into pairs. In other words the principle of classification is a congenital trait amongst the mortals. Ayat 49 of Sura 51, (Az-Zariat) declares:-

“And of everything We have created pairs that you may be mindful.”

To the same effect is Ayat 45 of Sura 53 as well as Ayat 39 of Sura 75.

C. The most conspicuous example of the principle of equality among human race despite disparate racial and linguistic social groups is to be found in Ayat 13 of Sura 49 of Holy Quran. Its translation reads as follows:

Ayat 13 of Sura 49, (Al-Hijrat, the Chambers) states:-

*“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 honourable is the one among you who is most careful (of his duties); Surely Allah is knowing and Aware”.*

This declaration embraces the entire humanity, past, present and the future generations. Mankind originated from a couple. The two complement each other. The two were created from a single soul. The tribes, races, and nations are convenient labels by which human being may know the characteristics of different people among themselves but as far as Lord Creator is concerned, the entire humanity is one group referred to time and again in the Holy Quran as An Naas. The classification into tribes and families is of course apparent. The purpose of this pluralism inspite of unity of human race is to ensure the preservation of different languages and cultures and a means of identifying the different ancestries, groups or stocks. We find black, white, tanned and yellow races with distinct languages, cultures and history but the rights of all categories of human beings inhabiting this earth are the same. There is no discrimination from

that aspect though the element of mutual classification, from a practical point of view, has been accepted by Holy Quran as a social necessity. The Holy Prophet (PBUH), in Khutba Hijat-ul-Wida declared that neither is a white superior to black nor is an Arab nonpareil. This declaration illustrates Unity in Diversity.

D. The Holy Quran envisions classification among created thing. It recounts various types of creatures into pairs and species of various categories. Reference may be made to the following Ayaat of Holy Quran under different heads:

- a) The animals in pairs: Ayat 143 Sura 6; Ayat 6 Sura 39 and Ayat 11 Sura 42.
- b) Adam and Eve: Ayat 35 Sura 2; Ayat 19 Sura 6; Ayat 117 Sura 20.
- c) Other Categories: Ayat 88 Sura 15, Ayaat 53 and 131 Sura 20; Ayat 05 Sura 22, Ayat 07 Sura 26; Ayat 10 Sura 31. See also Ayat 40 Sura 11, Ayat 27 Sura 23, Ayat 03 Sura 13, Ayat 36 Sura 36; Ayat 45 Sura 53; Ayat 39 Sura 75.
- d) Categorization in Paradise: Ayat 07 Sura 56, Ayat 52 Sura 55. See also Ayat 35 Sura 02, Ayat 19 Sura 07 and Ayat 117 Sura 20 to show that both categories of sexes will enter heaven.

E. The last sermon of the Holy Prophet PBUH declared that the **white race** has no preference over the **black people**. However the existence of different races was recognized.

F. Every Prophet of God was a class in himself and each one was endowed with a distinct gift. Each Prophet addressed a different nation in a different age though the source of revelation was the same. The Book given to each Prophet was different but the Communication did not vary. Syedna Ibrahim A.S. had the **SOHF**, Syedna Daood A.S. had the **ZABOOR**, Syedna Moosa As.S. had the **TORAH**, Syedna Isa had the **INJEEL** and Syedna Muhammad PBUH had the **QURAN**. Each Prophet is a distinct entity and each one of them is an illustrious link in the celebrated chain of Apostles. The Muslims are commanded not to differentiate between them but the fact of the matter is that even today the followers of the tradition of Abraham (A.S) i.e. Jews, Christians and Muslims are *three separate divisions of the same tradition*. Reference Ayaat 136, 253 and 285 of Sura 2, Al-Baqra (The Cow). It might as well be added that notwithstanding the equality of status of the Prophets, as the authorized spokespersons of Allah,

Syedna Ibrahim, in the roll call of honour, has the unique distinction of not only being a forebear of a distinguished progeny but the Holy Prophet Muhammad (PBUH), alone, among the revered descendents of Syedna Ibrahim A.S. had the unique distinction of becoming Khatam-ul-Ambiya i.e. the Seal of Prophets. In Ayat 124 Sura 2, the office of Imamah in addition to prophet-hood, was reserved exclusively for the righteous progeny of Syedna Ibrahim A.S. and he thereby became a distinct and venerable *class in himself in the chain of esteemed Prophets of yore.*

Syedna Ibrahim A.S, as an individual, has also the singular distinction of being referred to as an **Ummah**. Reference Ayaat 120-122, Sura 16 of Holy Quran. This is a distinct honour which no other Prophet shares with him.

Ayat 78 Sura 22 indicates that the word Muslim was first used with reference to Syedna Ibrahim A.S. Ayat 253 of Sura 2 of Holy Quran make the point amply clear wherein it is stated: *“We have made some of these apostles to excel the others; among them are they to whom Allah spoke, and some of them He exalted by (many) degrees of rank; and we gave clear arguments to Jesus son of Mary and strengthened him with holy*

revelation.” The Holy Prophet Muhammad (PBUH), though a Messenger like any other Prophet, has alone been described in Ayat 107 of Sura 21 to be Rahmatal-al-Alameen i.e, Mercy for all the nations of the world for all times signifying a class in himself.

G. The followers of the Holy Prophet Muhammad (PBUH) were classified into various categories during his life time and later on as well:-

- (I) Muslim: Ayaat 35-36 Sura 33 Surah Al-Ahzab of Holy Quran and
- (II) Momin: Ayat I of Sura 23 Sura Al-Mominoon of Holy Quran. Reference may also be made to Sura 7 of Sura 40 of Sura Ghafir of Holy Quran
- (III) Ibad-ur-Rehman: Ayat 63 Sura 25 Surah Furqan of Holy Quran.
- (IV) Munafiq: Ayat 1 Sura 63 (Munafiqoon).
- (V) Muhajir: Ayat 72 of Sura 8 (Anfaal).
- (VI) Mujahid: Ayat 19 Sura 9 and Ayat 95 Sura 4. The Ayat classifies the believers who sit at home i.e. refractory from others who strive in the path of Allah.
- (VII) Ansaar: Ayat 72 of Sura 8 (Anfaal).
- (VIII) The First Migrants to Habsha:
- (IX) Ashra Mubasharah: (The ten companions to receive tidings of Salvation)
- (X) Badri companions: Reference Ayat 72 Sura 8 of the Holy Quran.
- (XI) Ashab us Shajrah. (Those who submitted under the tree)
- (XII) Those who accepted Islam before the conquest of Makkah. Reference Ayat 10 Sura 57.

- (XIII) Those who accepted Islam after conquest of Makkah.
- (XIV) Ahle-e-Bait-e-Rasool. Ayat 33 Sura 33.
- (XV) Ummahat-ul-Momineen. Ayat 6 Sura 33.
- (XVI) People of the Book: i.e. Ahl-e-Kitab. Ayat 70 Sura 3
- (XVII) The four rightly guided Caliphs.
- XVIII) Division as regards the period: the pre-Islamic period bereft of Divine Guidance is known as Ayyam-ul-Jahilia. The Holy Prophet (PBUH) is the line of demarcation between the period of darkness and light.
- (XIX) The Muslims as a whole, followers of the last Prophet(PBUH), have been classified as Ummat-e-Wusta to distinguish them from the Ummah of the previous Prophets and contemporary nations. Reference Ayat 143 Sura 2 Sura Al-Baqra,
- (XX) Ayat 7-11 of Surah Waqia, Sura 56 of the Holy Quran divides human beings into three classes namely;
- i. Companions of the right hand (good luck) **Ashab ul Maimanah;**
 - ii Companions of the left hand (ill luck) **Ashab ul Mashamah.**
 - iii the Foremost in faith. **As-Sabeqoon.** Of-course this division is applicable to hereafter but the fact of the matter is that the concept of classification according to the Injunctions of Islam is applicable not only to the mundane life but also to the life after death.
- (XXI) Believers and Unbelievers. Ayat 254 Sura 2
- XXII) Reference may also be made to Ayat 177 of Sura 2 (Al-Baqra). In this verse the attributes of a believer are enumerated including the trait that he spends for the love for Allah upon the *various classes of persons*:-
- i. Near of kin,
 - ii. Orphans,
 - iii. Needy,
 - iv. The way-farer
 - v. Those who asked for help; and
 - vi. For emancipation of captives.

Existence of various classes of persons in the society at a given time is recognized in this verse.

- XXIII. Denizens of Heavens and Hell is another division visible in the Holy Book. Reference Ayaat 1-16 Sura 58 (Al-Ghashia The Overwhelming Event).
- XXIV. The Meccans had objected to the mission of the Holy Prophet (PBUH) on the ground that he was neither a chief of the tribe nor a wealthy person. This division, according to non-believers at social level was natural and customary because honour was considered to be the preserve of the privileged classes. But the Holy Prophet (PBUH) became a class unto himself.
- XXV. Some people, at the time of Revelation, raised an objection as to why revelation was not directed towards some significant person of Macca or Taif. Ayat 31 states that a the blessings of Allah i.e, revelation cannot be divided though material wealth has been divided among people in a way that some are exalted. Abundance of resources is only the provision of this life. The first part classifies human beings into those who are entrusted with Revelation while the other groups received the Message through the Messenger and the second part of these Ayaat deal with un-even distribution of wealth among the people. Reference Ayaat 31-35 Sura 43 Al-Zukhruf.
- XXVI. In the case of divorce, men may enter into another matrimonial contract soon after the divorce; but the women have to wait for a certain period. Reference Ayat 229 Sura 2. This classification is an admitted fact of life notwithstanding

the equality of social, political, cultural and economic rights between men and women. There is a rational basis for this restriction ie, the protection of lineage. This however does not become an instance of discrimination. Equality of rights between men and women is however evident inter-alia from Ayat 195 Sura 3, Ayaat 32, 124 Sura 4; Ayat 97 Sura 16 and Ayat 35 Sura 33.

XXVII. Men have been declared as protectors and maintainers of women. This is what Ayat 34 Sura 4, (Al-Nisa The Women) ordains. In spite of equality of rights the classification has been prescribed on rational basis. The husband, being the male partner, has also to bear the cost of a wet nurse as provided in Ayat 233 Sura 2 (Al-Baqra The Cow).

XXVIII. There is yet another Injunction of Islam contained in Ayat 08 Sura 76 (Al-Insan) which, while recounting the attributes of believers, signifies that a believer for the love of God alone provides sustenance to the three disadvantaged classes i.e. (i) indigent (ii) orphan and (iii) the captive. By following this commandment the believer is satisfied that he is doing it for the sake of God alone and no one else and he desires no reward or thanks from any one because he fears the Day of distressful wrath from the side of his Lord. Such believers stand distinct from other believers. The three categories of the needy recipients are also recognized, though the purpose of charity itself was to eradicate poverty.

XXIX. The Holy Book recounts different categories of people (at spiritual level and otherwise) under separate heads:-

- a. The Deaf: Ayat 18 Sura 2
- b. The Dumb: Ayat 18 Sura 2
- c. The Blind: Ayat 18 Sura 2
- d. People of the Ditch: Ayat 4 Sura 85
- e. People of the Town: Ayat 13 Sura 36
- f. Inmates of the fire: Ayat 17 Sura 68
- g. People of the Elephant: Ayat 1 Sura 105
- h. People of Rome: Ayat 1 Sura 30
- i. People of the cave and Inscription: Ayat 9 Sura 18.
- j. Ibad-ul-Mumineen; Ibad us Saleheen, Ibaden al Mukhlissen
Ayat 25 Sura 12; Ayat 81,111,122,133; Ayat 10 Sura 66.

XXX. Though each lunar month has a distinct name yet the four months are considered sacred. These sacred months constitute a separate class. Reference Ayat 194 Sura 2 and Ayat 36 of Sura 9.

XXXI. Only two mosques have been reverentially mentioned in Holy Quran: Ayat 1 Sura 17 and Ayat 125 Sura 2 as well as Ayat 96 Sura 3. See also Ayat 97 Sura 5 as well as Ayat 29 Sura 22.

XXXII The three Mosques namely the Holy Kaaba, the Mosque of Holy Prophet (PBUH) and the Mosque at Aqsa had acquired a distinctive status as compared to other mosques. Each one of these Mosques is a class unto itself though each mosque is the house of God.

XXXIII. According to Ayat 25 Sura 4, the punishment of a slave married woman, guilty of adultery, is half the punishment of a free guilty woman. On the other hand the wives of the Holy Prophet (PBUH) were warned that if any indecency was committed by them the chastisement shall be double the prescribed punishment ----Ayat 30 Sura 30 of the Holy Quran. Classification among the wrong doers for the purpose of awarding lesser punishment has also been made. Leniency to

members of under-privileged sections of society is manifest in this Divine rule. Less fortunate social groups will be awarded lesser penalty whereas persons belonging to privileged groups, who had better facilities to lead life according to legal rules will receive exemplary punishment in case of transgression.

XXXIV. Ayat 32 Sura 3 of the Holy Quran declares that surely Allah chose **Adam** and **Noah** and the descendents of Abraham and the descendents of Imran above the nations.

All these references are a pointer to the principle that notwithstanding general equality among human beings, the rule of classification is an established principle of Islamic Jurisprudence. It does not amount to discrimination if Allah selects one human being or one family to spread His Message.

H. The concept of ranking persons according to their deeds is familiar to Holy Quran. Ayat 19 of Sura 4, Sura al-Ahqaf states:-

“Of these all have ranks
According to their deeds
So that Allah may
Recompense them for
Their deeds. They shall not be wronged”.

33. Ayat 10 of Sura 57, (Al-Hadid) declares that those believers, who spent their wealth and took part in fighting before the Victory (conquest of Mecca), cannot be equated (with those who spent their wealth

and took part in fighting afterwards). They are higher in rank than those who spent and fought afterwards.

34. Ayaat 95,96 of Sura 4, allude to the higher ranks of believers according to their deeds. Ayat 132 of Sura 6, (Al-An'am) states in very clear terms that every human being is assigned a station according to his deed because Allah is not heedless of what people do. All human beings are equal but, at the same time, each individual is a class in himself. Now we know it as a scientific truth that finger prints of each individual are different. Ayat after Ayat can be quoted to establish that reasonable classification is an accepted principle of Islamic jurisprudence which is as old as the Revelation and the creation of Adam and Eve. But it should not be confused with the equality clause which is a principle of general application in Islamic Fiqh.

35. During the course of arguments on the question of classification of prisoners and the elements of reasonable classification, reference was made to the principle of equality as envisaged in Article 25 of the Constitution of Islamic Re-public of Pakistan particularly clause(2)

where the words “**discrimination**” and “**alone**” occur. The meaning and scope of the words “discrimination” and “alone” as they occur in clause 2 of Article 25 were discussed in the case of Shireen Munir and others versus Government of Punjab reported as PLD-1990 SC 295. Mr. Justice Shafi-ur-Rehman, author of the Judgment at page 309, was pleased to observe as follows:

“Discriminating against a group or an individual implies making an adverse distinction with regard to same benefit, advantage or facility. All pervasive nature of this constitutional provision is self evident. In interpreting Constitution and also in giving effect to the *various legislative measures, one distinction has to be consistently kept in view and it is that classification based on reasonable considerations is permissible and not violative of the principle. This aspect of the matter* was dealt with in a case in the Indian Jurisdiction in *Kathi Raning Rawat Vs. State of Saurashtra (AIR 1952 Supreme Court 123)* in the judgment of the Chief Justice in the following words:-

“Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in the Articles it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies”. (Emphasis Added).

36. This report was also considered in the case of I. A. Sherwani which is proposed to be discussed shortly.

37. The question of grant of class A or B to a prisoner had come before the Hon'ble Supreme Court of Pakistan in the case of Abdul Rashid versus The State reported as 1980 SCMR 632. It was held that no justiciable right vests in a prisoner to seek better class even though he is shown as eligible to better class of prisoners.

38. The case of Waheed Akhtar versus Superintendent Camp Jail, Lahore and another, reported as PLD 1980 Lahore 131, a judgment delivered by Justice Aftab Hussain, as his Lordship then was, pertained to rules 243, 246, 248 and 250 of the Prison Rules. It was held that the Prison Rules have made different provisions for convicted prisoners and undertrial prisoners.

39. Reference may also be made to the case of Pakistan Petroleum Workers Union Versus Ministry of Interior reported as 1991 CLC 13 wherein this history of concept of "Equality before law" as it occurs in Article 25 of the Constitution has been traced in the following terms:-

“This Article guarantees to all citizens of Pakistan equality before law and equal protection of law. These rights guaranteed by the Constitution are now universally applied and practiced in all the civilized world. It finds recognition in Universal Declaration of Human rights and the Covenant on Human Rights, 1950. An examination of Constitution of various countries will show that the written Constitutions have invariably used the expression “equality before law” but “equal protection of law” has not so commonly been used. According to the jurists term “equal protection of law” finds its origin in the 14th Amendment of the American Constitution. In my human view, the concept of both terms “equality before law” and “equal protection of law” is not of so recent origin in jurisprudence as described by various authors and jurists. From a comparative study of the legal history and jurisprudence we find that the concept of equality before law and principles of “equal protection of the law” was for the first time given and firmly practiced by the Holy Prophet (PBUH). Therefore, it can be traced as far back as 1400 years, i.e. much before the Magna Carta, 14th Amendment of American Constitution, declaration of Human Rights and the theory of Rule of law, enunciated by the Western Jurists. The last Sermon of the Holy Prophet (PBUH) is a landmark in the history of mankind which recognizes the inalienable Rights of a man conferred by Islam which are now known as Fundamental Rights. The following extracts from the farewell Sermon can be reproduced for reference. The blood revenges of the days of ignorance are remitted... all interest and usurious dues accruing from the times of ignorance sand wiped out.

“O people, verily your blood, your property and your honour are sacred and inviolable until you appear before your Lord, as the sacred inviolability of this day of yours, this month of yours and this very town (of yours). Verily you will soon meet your Lord and you will be held answerable for your action”.

40. This classification helps the jail officials in keeping different categories of prisoners in separate cells. This type of classification is based upon the status of the prisoner and has no nexus with the nature of offence complained of. This classification is categorized as A, B and C class as stipulated in rule 242 of the Pakistan Prison Rules. The prisons too have been classified. Chapter 2, rule 4 through rule 9 of the Pakistan Prison Rules, 1978 deals with classification of Prisons into four categories: The Central Prisons; Special Prisons, District Prisons and Sub-Jail. There is also the category of a Female Prison which which is located in Multan.

41. We expected that each and every provision of prison discipline, challenged before us, would be supported by reference to a distinct injunction of Islam. During the course of arguments learned counsel for parties relied upon a few very well known verses of Holy Quran and two or three traditions of the Holy Prophet (PBUH). In order to

fully appreciate the issues involved in the controversy we have detailed in this Judgment various rules relating to classification of prisoners because this issue is not as simple as it was given out at the time these petitions were filed in this Court. *The question of classification of prisoners as well as the prisons is very much linked with the question of security and safety of the prisons, prisoners and prison staff.* The prison rules cover the entire discipline including the management and supervision of prison houses apart from maintenance of peaceful atmosphere as well as law and order situation within the prison precincts in addition to health and cleanliness facilities, food requirements, technical and educational training of prisoner population, the regular outward and inward flow of prisoners for attendance in the trial courts and a host of other factors obtaining at the spot. This aspect also explains the reason for maintaining division and classification among the prison population. The courts are not required to hunt for the reasonableness of each individual provision of law. There is a general presumption of laws having been made validly. Suffice it to say

that the entire law on a given subject has to be seen as one integrated whole

to cater to social requirement in a particular chapter of human life.

42. In response to a Court question, learned counsel for the petitioner frankly conceded that there was no prison system in Mecca and Madina during the time of Holy Prophet (PBUH). The words Sijan i.e. prison, Aseer i.e. a prisoner, Hubs i.e. restraint and Mask i.e. to confine, are words of Arabic language. The Holy Quran used the then current words Sijan, Aseer, Mask and Habs as part of the erstwhile system of administration of justice. There are no verses of Holy Quran or traditions of Holy Prophet (PBUH) to provide extensive guidelines on different chapters of prison discipline which could become the basis on which the existing prison legislation could have rested. There are certain injunctions of Islam, of general import, which have relevance with administration of justice, human dignity and human welfare. However the specific Injunctions advanced by the petitioners on these issued will be considered.

43. In the case of Baluchistan Bar Association versus Government of Baluchistan cited as PLD-1991 Quetta 7, the Civil Law (Special

Procedure) Ordinance I of 1968) and Criminal Law Special Provisions of Ordinance II of 1968 were declared to be void as being inconsistent with articles 25, 2A and 175(3) of the Constitution. The Court came to the conclusion that the *said Ordinances gave unbridled, un-fettered and unlimited powers to apply or withdraw the provisions of the Ordinance in any area of the Province without any rational basis* and as such discriminated amongst the people or class of people living in the like circumstances. The application of Ordinance was neither universal nor uniform and it had been left entirely to the whims and caprice of the Government to decide, without any rational basis, to withdraw the Ordinance or re-apply the same in any area in a most subjective manner. It was held that this type of classification was neither intelligible nor reasonable nor it was discernible and thus offended articles 4 and 25 of the Constitution. This case went into appeal which was decided as Government of Baluchistan versus Aziz Ullah Memon and 6 others reported as PLD 1993 SC 341. The Apex Court was pleased to confirm the Judgment of the Quetta High Court reported as PLD 1991 Quetta page 7. The Apex Court

was pleased to re-affirm the principles enunciated in the case of I.A. Sherwani. The Supreme Court while referring to the case of F.B. Ali reported as PLD 1975 SC 506, observed that the principle laid down in Waris Meah's case was that if the Foreign Exchange Regulation Act had set up a Tribunal of exclusive jurisdiction, with a procedure different from the Code of Criminal Procedure, the challenge would not succeed as the offences under the Foreign Exchange Regulation could validly and reasonably be considered a different class from the offences under the ordinary law. It was further observed that Fauji Foundation case reported as PLD 1983 SC 457, ruled that legislation in regard to an individual can be made provided it is not discriminatory. The Hon'ble Judges were pleased to hold that although class legislation was forbidden, yet reasonable classification for the purpose of legislation was permissible. Classification is allowed in the legal domain provided the classification is founded on intelligible differentia. There should be a nexus between the classification and the objects of the Act. This principle symbolizes that persons or things similarly situated cannot be distinguished or

discriminated while making or applying the law. It has to be applied equally to persons situated similarly and in the same situation. Any law made or action taken in violation of these principles is liable to be struck down. If the law clothes any statutory authority or *functionary with unguided and arbitrary power enabling it to administer in a discriminatory manner, such law will violate the equality class*. Thus the substantive and the procedural law and action taken under it can be challenged as violative of Article 8 and 25". (Emphasis Added)

44. In the case of I. A. Sherwani and others versus Government of Pakistan reported as 1991 SCMR 1041, the provisions contained in article 25 of the Constitution came under review of the Apex Court. It was observed therein that clause (1) of article 25 enshrines the basis concept of religion of Islam, which is now known as the golden principle of Modern Jurisprudence. This principle enjoins that all citizens are equal before law and are entitled to equal protection of law. The apex court, after reviewing eleven judicial pronouncements from Pakistan and Indian jurisdiction, was

pleased to deduce, formulate and enumerate the following seven principles

with regard to equal protection of law and reasonableness of classification:

- i. that equal *protection of law does not envisage that every citizen is to be treated alike in all circumstances*, but it contemplates that persons similarly situated or similarly placed are to be treated alike;
- ii. That reasonable *classification is permissible* but it must be founded on reasonable distinction or reasonable basis;
- iii. That different *laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes*;
- iv. That *no standard of universal application to test reasonableness of a classification can be laid down* as what may be reasonable classification in a particular set of circumstances may be unreasonable in the other set of circumstances;
- v. That a law *applying to one person or one class of persons* may be *constitutionally valid* if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
- vi. That equal *protection of law means that all persons equally placed be treated alike* both in privileges conferred and liabilities imposed;
- vii. That in order *to make a classification reasonable, it should be based:*
 - a) *On an intelligible differentia* which distinguishes persons or things that are grouped together from those who have been left out;
 - b) *That the differentia must have rational nexus* to the object sought to be achieved by such

classification.

(Emphasis Added)

45. Syed Shabbar Raza Rizvi as his lordship then was, in his Book on the Constitution of Islamic Republic of Pakistan, while commenting on Article 25 made a reference to a passage from V.N. Shukla's Constitution of India, 7th Edition wherein the learned author had formulated certain principles as regards the question of classification, based upon various judgments of Indian Supreme Court, delivered under article 14 of Indian Constitution, which is counterpart of section 25 of the Constitution of Pakistan. The Principles enunciated therein are as follows:

- (a) A law may be constitutional even though it relates to a single individual if, on account of some special circumstances, or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.
- (b) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The person, therefore, who pleads that Article 25, has been violated, must make out that not only has he been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis and such differential treatment has

been unjustifiably made. However, it is extremely hazardous to decide the question of the constitutional validity of a provision on the basis of the supposed existence of facts by raising a presumption. Presumptions are resorted to when the matter does not admit of direct proof or when there is some practical difficulty to produce evidence to prove a particular fact;

- (c) It must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds;
- (d) The Legislature is free to recognize the degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest;
- (e) In order to sustain the presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;
- (f) While good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonable be regarded as based, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation;

- (g) A classification need not be scientifically perfect or logically complete;
- (h) The validity of a rule has to be judged by assessing its overall effect and not by picking up exceptional cases. What the Court has to see is whether the classification made is a just one taking all aspects into consideration.

46. Reference may also be made to the case of Ghulam Mustafa Insari and 48 others versus Government of Punjab and others reported as 2004 SCMR 1903 wherein the interpretation of Article 25 cropped up for consideration. The seven principles enunciated in the case of I.A. Sherwani were re-iterated and it was further held that:-

“ the right relating to the equality of citizens was not violated, if the discrimination proceeded on a rational classification, having relevance to the underlying object of the legislation. [p. 1920] D

“.....that the principle of equality did not mean that every law must have universal application to all persons who were not by nature, attainment or circumstances in the same position. The varying needs of different classes of persons required different treatment. Classification was the recognition of the relations, and, in making it, a legislature must be allowed a wide latitude of discretion and judgment. [p.1921] E

“the Courts did not expect from legislature a “scientific accuracy in classification adopted”. [p.1921] F

“.....that the State was empowered to distinguish and classify persons or things for the purpose of legislation and that a classification need not be scientifically perfect or logically complete. [p. 1921] G

“.....that the guiding principle of equality was that all persons and things similarly circumstanced would be treated alike both in respect of privileges conferred and liabilities imposed.” [p. 1921]H

47. As regards the vires of a statute, the Honourable Judges of the Apex Court in this very case also held (at page 1921) that the courts generally lean towards upholding the constitutionality of a statute rather than destroy it unless such a statute is ex-facie discriminatory or capable of discriminatory application and otherwise clearly violative of any provision of the constitution. At page 1923 the learned author judge was pleased to hold further that the court **cannot question the wisdom of the legislature merely on the ground that a provision of law may work some inconvenience or hardship in the case of some persons unless it is violative of a constitutional provision including fundamental rights** and further that the vires of a legislative measure including an Ordinance are not to be examined with reference to any idea or philosophy extraneous to the Constitution but the Constitutional provisions themselves as held in

Liaqat Hussains's case PLD 1999 SC 504. The cases of Malik Khizar Hayat PLD 1956 F.C 200 and Prafulla Kumar Das AIR 2003 SC 4506 (2003) 11 SCC 614. Reference in the case of Ghulam Mustafa Ansari was made to the case of Mehreen Zaibun Nisa versus Land Commissioner, Multan and others PLD 1975 SC 397; The Province of East Pakistan and others versus Sirajul Haq Patwari and others PLD 1966 SC 854, Inam-ur-Rehman versus Federation of Pakistan and others, 1992 SCMR 563 and Darbar Patiala through S. Ajmer Singh, Managing Director of Patiala State Bank, Patiala versus Firm Narain Das Gulab Singh of Jagadhri through Kr. Kishore Saren and others AIR 1944 Lahore 302.

48. In the case of Liaqat Hussain versus Federation of Pakistan PLD 1999 Supreme Court 504 at page 591, the author Judge observed that a validly enacted law cannot be struck down on the grounds of mala fide. On page 632 it was further observed that no mala fide can be attributed to the Parliament as it is a sovereign body to legislate on any subject, for which it has been empowered under the Constitution to legislate. The Court, it was further observed, cannot strike down a statute on the ground

of mala fide, but the same can be struck down on the ground that it is violative of a Constitutional provision. The Hon'ble Judge made a reference to the case of Mehr Zulfiqar Ali Babu and others verses Government of Punjab and others reported as PLD 1997 S.C. 11.

49. In the case of Muhammad Ramzan and three others versus Government of Pakistan, a case decided by a Division Bench of the Lahore High Court, Lahore reported as 2004 YLR 1856, the issue of reasonable classification came up for discussion. Honourable Judges after reviewing the case law, adverted again to the principle enunciated in the case of I.A. Sherwani and came to the conclusion that different laws could validly be enacted for different sexes, person and different groups and person having different status or financial standing etc. It was further held that the court is not required to run behind the wisdom of the legislature or to challenge or discard the same. The courts of law are under obligation to give effect to the laws as they stand. The controversy in this case arose out of the point whether the Punjab Local Government Ordinance, 2001 was ultra vires the constitutional provisions contained in articles 8 and 25 inasmuch as it

creates two classes of persons, one coming to their office through a direct vote of the electors of their respective constituency and the other reaching their office through an indirect vote. The court held that the law was not discriminatory because discrimination has to be within one group or classification.

50. Reference may also be made to the case of Pakistan Petroleum Workers Union Versus Ministry of Interior reported as 1991 CLC 13 wherein the history of concept of “Equality before Law” as it occurs in Article 25 of the Constitution has been traced in the following terms:-

“This Article guarantees to all citizens of Pakistan equality before law and equal protection of law. These rights guaranteed by the Constitution are now universally applied and guaranteed by the Constitution are now universally applied and practiced in the entire civilized world. It finds recognition in Universal Declaration of Human rights and the Covenant on Human Rights, 1950. An examination of Constitutions of various countries will show that the written Constitutions have invariably used the expression “equality before law” but “equal protection of law” has not so commonly been used. According to the jurists term “equal protection of law” finds its origin in the 14th Amendment of the American Constitution. In my humble view, the concept of both terms “equality before law” and “equal protection of law” is not of so recent origin in jurisprudence as described by various authors and jurists. From a comparative study of the legal history and jurisprudence we find that the concept of equality before law and principles of “equal protection of the law” were for the first time given and firmly practiced by the Holy Prophet (PBUH). Therefore, it can be traced as far back as 1400 years, i.e. much before

the Magna Carta, 14th Amendment of American Constitution, declaration of Human Rights and the theory of Rule of law, enunciated by the Western Jurists. The Last Sermon of the Holy Prophet (PBUH) is a landmark in the history of mankind which recognizes the inalienable Rights of a man conferred by Islam which are now known as Fundamental Rights. The following extracts from the farewell Sermon can be reproduced for reference. The blood revenges of the days of ignorance are remitted... all interest and usurious dues accruing from the times of ignorance sand wiped out.

“O people, verily your blood, your property and your honour are sacred and inviolable until you appear before your Lord, as the sacred inviolability of this day of yours, this month of yours and this very town (of yours). Verily you will soon meet your Lord and you will be held answerable for your action.”

51. The concept of reasonable restriction, as it emerged as a consequence of interpretation of constitutional provisions including Article 25 enshrined in Chapter I of Part II of the Constitution, is not alien to Islamic teachings. Right of life on the one hand, is respected to such an extent that the killing of one person, without legal sanction, is declared in Ayat 32 Sura 5 (Al-Maida: The Food) of Holy Quran, equal to the killing of entire humanity, but we find that the law of Qisas is also recognized by Holy Quran. Similarly as against the right that no one shall cause injury to human body the principle of retaliation permits causing similar injury

to the offender. Reference Ayaat 178, 179 & 194 of Sura 2, (Al-Baqra)

and Ayat 45 of Sura 5, (Al-Maida).

52. In this connection it might as well be stated that the concept of human dignity received legal recognition for the first time when Ayat 70 of Sura 17, Sura Bani Israil was revealed. It declared:-

“An surely WE have conferred dignity on the children of Adam, and WE carry them in the land and in the sea, and WE have given them of the good things, and WE have made them to excel, by a high degree of excellence, most of those whom WE have created”.

But inspite of this honour, there are people who commit crimes and sins.

These are the persons who choose to tear asunder the robe of dignity and consequently merit a different treatment as a separate class of criminals/sinners and transgressors against accepted norms.

53. Every human being enjoys the right and freedom of expression but Islamic Injunctions put a limit on the exercise of this fundamental right because an individual is not authorized to violate similar rights of others on the pretext of realization of his own basic rights. The violators are however a different class altogether. Following Injunctions of Holy Quran are being

cited in support of the proposition that even fundamental rights are not

absolute in the eyes of law:

1. There is no compulsion in Deen (loosely translated as religion): Ayat 256 of Sura 2 (Al-Baqra). It clearly means that a person is free to choose or reject a faith and he has no right to abuse or ridicule the beliefs of others because the others have a similar right.
2. Every person has a right to marry and raise a family but societies and religion prohibits incest. Ayat 23 Sura 04 (An-Nisa).
3. The right of ownership over wealth is absolute but Allah and His Apostle, PBUH, impose obligatory taxes upon the believers Zakat, Khums, Ushar, Sadaqaat etc. Ayat 60 Sura 9; Ayat 41 Sura 8, and Ayat 43 Sura 2.

54. We are conscious of the fact that under Article 8(I) of the Constitution any law, custom or usage having the force of law, in so far as it is inconsistent with the rights guaranteed in Chapter 01 of the Constitution, shall to the extent of such inconsistency be void. Clause (2) of Article 08 stipulates that the State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to that extent be void. The petitioners in the Shariat

Petitions and Shariat Miscellaneous Applications did not opt to challenge the various provisions of prison laws in the High Court or Supreme Court of Pakistan on the authority of Article 08 which means very clearly that the petitioners did not consider the impugned provisions to be violative of the fundamental rights as enshrined in Chapter I of Part II of the Constitution. Needless to say that all the rights guaranteed by the Constitution are firmly based upon various Injunctions of Islam. The existing provisions of prison legislative instruments are therefore presumed to be valid, legal and not violative of the constitutional guarantees unless proved to the contrary. There is a presumption of constitutionality attached to every legislative instrument. The Supreme Court of Pakistan in the case of Ghulam Mustafa Insari and 48 others versus Government of the Punjab and others reported as 2004 SCMR 1903 at page 1921, after referring to the cases of:

- a) East Pakistan and others Versus Sirajul Haq Patwari and others reported as PLD 1966 SC 854;
- b) Inamur Rehman Versus Federation of Pakistan and others reported as 1992 SCMR 563; and
- c) Darbar Patiala through S. Ajmer Singh Versus Firm Narain Das reported as AIR 1944 Lahore 302;

observed that the courts generally lean towards upholding the constitutionality of a statute rather than destroy it unless such a statute is, ex-facie discriminatory or capable of discriminatory application and otherwise clearly violative of any provision of the Constitution.

55. It will be useful to mention a few more reports on the question of equality before law, reasonable classification and discrimination in order to make the proposition clear. In the case of Zohra and 5 others versus the Government of Sindh, Health Department reported as PLD 1996 Karachi-1, the Full Bench of the Court held that:

“The basic or fundamental rule is that all persons, under like circumstances and conditions, shall be treated alike both in privileges conferred and in liabilities imposed. Thus, discrimination between persons or classes or persons similarly situated or circumstances is prohibited or, in other words, class legislation is forbidden. It follows that the rule does not prohibit different laws or different treatment for those differently circumstances and the State has the power to distinguish or classify persons or things and to make laws or rules applicable only, to the persons or things falling within the particular class. However, a classification which is arbitrary or capricious and not founded on any

rational basis or which has no rational nexus with the object sought to be achieved by the law or the rules is no classification. It must, therefore, be reasonable and rest upon a difference which is real as distinguished from one which is seeming, specious or fanciful. Thus, classification would be reasonable and valid:

- (i) if it is based on intelligible differentia which distinguishes persons or things that are grouped together from those that have been left out; and
- (ii) if it has rational nexus with the object sought to be achieved by it.

It was further held that “Intelligible differentia” means “an attribute by which a species is distinguished from all other species of the same genus, or, a distinguishing mark”.

56. In the case of 7-UP Manufacturers versus Federation of Pakistan and others reported as 1994 CLC 1251, an Honourable Judge of the Lahore High Court observed that “equality clause in Art. 25 of Constitution of Pakistan, did not forbid reasonable classification, but classification must not be only reasonable and rational, but it should also be based upon intelligent differentia and must have nexus to the purpose for

which law was enacted--- All persons who were similarly placed in similar circumstances, must be treated equally”.

57. In the case of Abdul Farid versus N.E.D. University of Engineering and Technology, Karachi and another reported as 2001 CLC 347, while considering the scope of the concept of reasonable classification, it was held that all persons cannot be alike in all circumstances and the concept of reasonable classification is implicit in Article 25 of the Constitution. It was further held that where the classification is rational and based upon intelligible differentia bearing a direct nexus with the object of law, such classification passes the test of constitutionality.

58. In the case of Pakistan Burmah Shell Limited and another versus Federation of Pakistan reported as 1998 P.T.D. 1804 the Full Bench at pages 1860 and 1861 referred to the following observation made in the case of F.B. Ali as regards equal protection of law and reasonable classification:-

“Equal protection of the laws does not mean that every citizen, no matter what his condition, must be treated in the same manner. The phrase ‘equal protection’ of the laws means that no person or class of persons shall be denied the same protection of laws which is enjoyed by other persons or other class of persons in like circumstances in respect of their life, liberty, property or pursuits of happiness. This only means that persons, similarly situated or in similar circumstances, will be treated in the same manner. Besides this, all law implies classification, for, when it applies to a set of circumstances, it creates thereby a class and equal protection means that this classification should be reasonable. To justify the validity of a classification, it must be shown that it is based on reasonable distinctions or that it is on reasonable basis and rests on a real or substantial difference of distinction. Thus, different laws can validly be made for different sexes, for persons in different age groups, e.g. minors or very old people; different taxes may be levied from different classes of persons on the basis of their ability to pay. Similarly, compensation for properties acquired may be paid at different rates to different categories of owners. Such differentiation may also be made on the basis of occupations or privileges or the special needs of a particular locality or a particular community. Indeed, the bulk of the special laws made to meet special situations come within this category”.

59. In the case of Messers Shadman Cotton Mills Limited versus Federation of Pakistan reported as 2001 PTD 411, the principle of equality came under discussion and it was held that all persons placed in similar

circumstances must be treated alike and the reasonable classification must be based on reasonable grounds in a particular set of circumstances but it must not offend the spirit of Article 25 of the Constitution. The Honourable Judge further observed that persons equally placed must be treated alike in the matter of privileges and liabilities under the rule of equal protection of law.

60. Again in the case of Pattoki Sugar Mills Limited versus Province of Punjab and others reported as 2001 PTD 3415 a learned Single Bench of the Lahore High Court observed that reasonable classification was not prohibited by the Constitution and the same requires that all persons similarly placed should be treated alike.

61. In the case of Muhammad Safdar versus Government of Sindh and others reported as 2001 PLC 692 the Supreme Court of Pakistan considered the concept of “equal protection of law” and “reasonable classification” and proceed to enunciate 07 principles applicable to the equality clause of the Constitution. These 7 points have already been

considered above in the case of I.A. Sherwani reported as 1991 SCMR

1041.

62. On the question of equal protection of law, discrimination and

reasonable classification the following cases may also be seen in addition

to those mentioned above:

1. Bashir Ahmed versus Chaudhry Ghulam Sarwar Noor MIC, Lahore and 3 others
2002 CLC 139 Lahore High Court, Lahore
2. Federation of Pakistan and others versus Mrs. Samra Shakeel
2001 PTD 3919 Supreme Court
3. Safdar versus Government of Sindh and others
2001 SCMR 1231
4. Amanullah versus Secretary to Govt. of NWFP & 5 others
PLD 2003 Peshawar 14
5. Muhammad Akram & others versus Selection Committee for admission in First Year M.B.B.S. Bolan Medical College and others
2003 CLC Quetta 18
6. Shaikh Aljazur Rehman versus The State through Director General (NAB) and another
PLD 2006 Karachi 629
7. Shaikh Abdul Sattar Lasi versus Federation of Pakistan
2006 CLD 18 Quetta High Court
8. Saleem Raza and 31 others versus The State
PLD 2007 Karachi 139
9. Dr. Munir Ahmad & 37 others versus Government of Pakistan Finance Division and 4 others 2007 CLC 107
Ch. Nazir Ahmad and 2 others versus Province of Punjab
2007 PLC(C.S.) 285
10. Miss Shazia Batool versus Government of Baluchistan and others.
2007 SCMR 410

63. In a recent case of Ibrahim Flour and General Mills District

Sheikhupura versus Government of Punjab reported as PLD 2008 Lah. 184

a learned Single Bench of the Lahore High Court after reviewing three reported cases came to the conclusion that the act of omission on the part of authorities in ignoring the petitioner mill owner, for the grant of wheat quota, was un-lawful, discriminatory and of no legal effect. It was also observed that Government is not supposed to discriminate between citizens, who are placed in similar circumstances and functionaries of the Government cannot be allowed to exercise discretion on their whims, sweet will or in a manner it pleased them. It was further held the supply of wheat quota to one set of mill owners and its refused to petitioners was “sheer discrimination, conceived and tainted with defect of naked and unbridled discretion.

64. Dr. Muhammad Aslam Khaki, learned counsel appearing in various Shariat Petition before us, submitted a research note in Shariat Petition No.62/I of 1992 in which the following points were raised with reference to the Islamic teachings:

- a) Islam came basically to establish justice and all its injunctions are directed towards the achievement of this particular goal;

- b) Ayat 25 Sura 57, (Al-Hadeed) is to the effect that the Prophets were commissioned with Book and Balance so that people stand for justice;
- c) Ayat 58, Sura 4 (An-Nisa) commands that trusts be handed over to the deserving and justice should be done;
- d) Ayat 13, Sura 49 (Al-Hujrat) informs us that human beings, created from a single pair, were then divided in tribes and nations so that people may know each other;
- e) Ayat 90, Sura 16, (Al-Nahl) indicates that Allah commands the doing of Adl (Justice) and Ehsan (Equity).
- f) Ayat 115, Sura 6, (Al-Anaam) tells us that the Word of God finds fulfillment in Truth and Justice;
- g) Ayat 2, Sura 24, (An-Noor) shows that tenderness for culprit should not affect administration of criminal justice;
- h) The element of equality between human beings has been commanded by Holy Prophet (PBUH) as declared in Khutba Hujjat-al Wida. Legal provision which permit grouping of the prisoners in category A,B and C are hence discriminatory.
- i) The cause of fall of nations is relatable to the fact that rich/influential culprits were let off while the penal provisions were imposed only upon those who belonged to poor section of society. It was therefore waged that the element of discrimination is ultra vires the Injunctions of Islam. The other well known tradition of the Holy Prophet

(PBUH) that even if his daughter Fatima were to commit a crime she would not escape the requisite penalty. This tradition was relied upon to show that Islamic Injunctions do not countenance inequality and discrimination.

j) A quotation from the letter of Hazrat Umar (R.A) addressed to Abdu Musa Ashari, directing him to hold fast to the equality between the litigating parties even when he addresses them because the influential may not start expecting more and the weak should not get disappointed.

65. All these references, according to the learned counsel, are a pointer towards the principle that justice must prevail. It is contended that a believer is not supposed to show concession or facility in the punishment either on account of the social status or superior standard or the living style of the convict. Consequently it was argued that classification of prisoners into class A, B and C on the basis of social or economic status, profession, academic qualification was against the basic concept of justice and fair play and hence contrary to the Injunctions of Islam.

66. It is not possible to agree with the interpretation put forward by learned counsel. On his own showing, the opulent and educated persons on conviction get A or B class which means that as far as award of

punishments by the courts in Pakistan is concerned there is no difference between the wealthy and the poor or the well-read or uneducated. The only objection is relatable to the possible facilities available during the period of incarceration awarded as a result of the conclusion of trial. No Injunction of Islam was relied upon by learned counsel to show that the facilities admissible to the prison population belonging to different classes of society under the Prison Rules must be uniform in all circumstances. It is well nigh impossible to treat all the categories of prisoners alike. Children, women, suspects, political detenués, hardened criminals, repeaters, condemned prisoners, ailing persons, prisoners who are assigned the duty of teaching or cooking and serving in different capacities in the prison houses and persons belonging to terrorist groups or an enemy country or these prisoners who are foreign agents have to be treated and accommodated separately with different standards of surveillance. These are practical difficulties and cannot be ignored under any circumstances.

67. The question of the imprisonment of Syedna Yousaf, as narrated in Holy Quran, had also crept in during arguments. From the story

of Syedna Yousaf, as reported in Holy Quran, the element of imprisonment in a prison house under the then prevailing Code was an alternate mode of punishment. Ayat 25 of Sura 12 of Holy Quran states that the complaining lady demanded imprisonment or grievous chastisement as the mode of administering justice. It means that the erstwhile customary law permitted detention in prison as an alternative to the corporal punishment. The prison cell could also be as a place of sojourn for the prisoners awaiting judicial pronouncement of some other category of punishment. The story of Syedna Yousaf A.S. in relation to imprisonment is a clear pointer to the erstwhile customary code wherein the man in authority had the discretion to award lesser punishment by way of imprisonment for a fixed period instead of imposing a painful chastisement upon the accused. The narrative also establishes that communication between prisoners was not prohibited. Notwithstanding his imprisonment Syedna Yousaf A.S. enjoyed certain privileges. He would respond to the incisive questions of the inmates and preach Tawheed. He would also interpret their dreams. The Ayaat relating to the imprisonment of Syedna Yousaf A.S. do not suggest detailed

provision for a Jail Manual which can be instantly enforced. We can seek guidance after pondering over that part of the story which deals exclusively with prisons and prisoners.

68. The contention worth advancing at the bar, under the circumstances, should be for providing opportunities for better educational and medical facilities to the less fortunate prisoners, subject of course to the availability of resources. The proper forum however, for agitating all these demands would of course be the political front from where legislation through Assemblies can be initiated.

69. However, it is worth mentioning that the award of quantum of punishment under Taazir depends purely upon the discretion of judges and our judges do not exercise judicial discretion arbitrarily. This is an accepted position in the administration of justice. It was also not urged before us by learned counsel for petitioners that it amounted to discrimination that varying quantum of sentences were awarded to different accused or different categories the punishment i.e. simple or rigorous imprisonment or imprisonment of either description, or with or without fine, or a direction to

pay compensation to the aggrieved person from the fine realized from the accused or additional term of imprisonment in case of non payment of fine was imposed to different convicts. This division in the award of penalties to different accused persons facing trials under the same charge, appears to have been accepted and has not be challenged by the petitioners as an instance of Discrimination. It has not been considered discriminatory. Notwithstanding the discussion on the issue of classification it might as well be stated that every case depends upon the peculiar facts of that particular cause. However the basic principle of Islamic jurisprudence is that reasonable Classification is permissible but Discrimination has to be eschewed because discrimination violates the well known tradition of Holy Prophet (PBUH) proclaimed in the Khutba Hujjat-ul-Wida.

70. The primary concern of Islamic jurisprudence is the administration of even-handed justice. The prevailing prison system, regrettably, does not envision rectification, reform, reformation, or rehabilitation of the convict. This deficiency is a matter of fundamental importance for the managers of prison system because the prison

population till date has not received considerate attention. The prisons are of course necessary to save the society from the wrong doings of nasty persons. There are other considerations as well for maintaining prison system but that does not mean that human beings should not be saved. A prisoner should not be left alone to ruin himself nor should he be abandoned as a total wreck. He has to be rescued and supported at emotional level. The message of hope, as given in Ayat 53 Sura 39, has to be inculcated in him. The Ayat proclaims:-

“Say: O My servants!
Those of you who have
Acted extravagantly
Against their own souls
(against themselves), do not
Despair of the Mercy of Allah:
Surely Allah forgives the
Faults altogether: Surely
He is forgiving, The Merciful.

The mercy and love of Allah finds its true expression in this Divine Declaration. The world community had become conscious some time back of the deficiencies and the inherent and vital defects in their prison disciplines but they hard to adopt an objective attitude. The

system was brought under sympathetic scrutiny with the result that the conditions of prisons, the world over, are registering an improvement due to the efforts of human friendly associations. The dungeons of old times are now being replaced by *correctional and rehabilitation centres*.

71. The classification and categorization of prisoners on the basis of age, sex, nature of accusation, past conduct, social and educational status, preventive or political detention, casual and habitual offenders, convicted and under-trials prisoners, civil and criminal detenues, and further division into A,B and C category is not as simple as originally perceived by the petitioners. The number of A and B category of prisoners at present in our prisons would show that classification is hardly a problem in the prison system. Problem lies elsewhere. It is the other section of prison discipline which needs basic amendments. The Prison Manual had a rational basis then when the prison discipline was visualized by foreign masters on the strength of their own experience in British Jails. A change in the prison discipline as well as in our outlook, in view of changed situation

after 15 August 1947, is certainly the dire need of the time. It must be realized that unless a new system based upon egalitarian concept is introduced, not much can be achieved.

72. It has been reported that Jarir-bil-Abdullah was treated with special respect when he first appeared before the Holy Prophet (PBUH). On inquiry as to the reason why special courtesy was shown to him, the Holy Prophet (PBUH) remarked that when a respectable person from any tribe comes to you, pay him due respect and honour him.(Reported in Sunan Abi Daud and Sunan Ibn-e-Maja).

73. In another tradition reported in *Kitab-ul-Kuna-Aldaulabi* that Abdur Rehman alongwith one hundred persons went to see the Holy Prophet (PBUH) who, in order to honour the leader of the delegation laid down his wrap for him to sit upon. On being asked later about this singular good-will gesture he replied that the leader was a respectable representative of his tribe. Whenever any respectable persons of any tribe comes to you give him respect and honour, it was again stated by the Holy Prophet (PBUH).

74. Another tradition is reported from Hazrat Ayesha (R.A) that the Holy Prophet (PBUH) summoned Saad bin Maaz in connection with the decision of a case pertaining to the Jews of Madina. On his arrival the Holy Prophet (PBUH) asked the Ansaar to stand up as a mark of respect for Saad bin Maaz. He is reported to have remarked that due respect should be paid to the head of the tribe. This tradition is reported as Sunan Abi Daud as tradition No.5215-5216.

75. There is yet another tradition of Holy Prophet (PBUH) reported in Sunan Abi Daud as tradition No.4842 which says that the people should be treated in accordance with their social status.

76. These traditions do not militate against the principle of equality because everybody is worthy of respect. These traditions only go to show that extra respect has to be shown to certain categories of persons. For example every man and woman is worthy of respect *but the parents enjoy additional advantage over every other man and woman of the world*. Extra respect for the parents or for the elders of the family or for the teacher does not mean that the principle of equity has been sacrificed.

77. At the end it may be stated that the position of better class

prisoners in 32 prisons of the Punjab, as on 31.12.2008, was as follows:-

Total number of Prisoners:	59965
A class Male under-trial prisoners	<u>03</u>
B class Male under-trial prisoners	<u>62</u>
B class Female under-trial prisoners	<u>01</u>
B class Male convicts	<u>61</u>
B class condemned prisoners	<u>123</u>

It means that out of 59965 prisoners only 250 prisoners are better class prisoners at present.

78. At the risk of repetition it may be stated that Rule 151 and 152 Chapter 7 classify prisoners into at least 12 classes namely those under *sentence of death, long term prisoners, juvenile and women prisoners, prisoners detained under the Reformatory Schools Act, 1897 and the Borstal or Children Act, Court Martial prisoners, prisoners whose transfer is necessary to relive over crowding, prisoners with special qualifications whose services are required elsewhere, influential, violent or dangerous prisoners, prisoners whose transfer is necessary in the interest of their*

health and prisoners whose transfer is necessary or desirable for any other reason, eg. insecurity of the prison, character of the prisoner, or his having friends or relatives among the staff. This is the recognized classification from the view point of transfer. This is over and above the classification of prisoners contemplated in Chapter 9 of the Prison Rules. The petitioner has apparently accepted all categories of classification of prisoners whether stated in Chapter 7 or Chapter 9 of the Prison Rules or otherwise. He has not opted to challenge classification contained in these chapters. This is not understandable. It is not permissible to blow hot and cold in the same breath in the field of law.

79. In view of preceding discussion on the question of classification Shariat Petition No.62/I of 1992, Shariat Miscellaneous Application No.19/I of 1997 and Shariat Miscellaneous Application No.11/I of 1998 are hereby dismissed.

SEGMENT THREE

LETTERS AND INTERVIEWS **(ISSUE NO. IX)**

80. Shariat Miscellaneous Application 16/I of 1997 seeks to challenge Rule 546 of the Pakistan Prison Rules. It forms part of Chapter 22 entitled **Letters and Interviews**. It envisages facilities to be provided to new entrants in the prison including provisions for reading, writing and meeting friends and relatives. It also mentions the number of things that a prisoner can validly receive at the time of interviews.

81. Rule 546 of the Pakistan Prison Rules deals with censorship of letters delivered to or sent by prisoner. The rule is being reproduced as under:-

Censorship of letters

Rule 546—No letter shall be delivered to or sent by a prisoner until it has been examined by the Superintendent or an officer authorized by the Superintendent in this behalf, but no un-necessary delay shall be allowed to occur in its delivery or dispatch. If a letter is written in a language unknown to the examining officer, he shall take steps to get it translated before forwarding it. No letter written in cipher shall be allowed to be sent or received. The Superintendent may withhold any letter which seems to him to be in any way improper or objectionable. The subject matter of letters shall be restricted to private and domestic affairs only. Suspicious looking letters may be exposed to heat or treated in any other suitable manner as a safeguard against unauthorized message written in invisible ink being smuggled in or out of prison.

This rule has been objected to in Shariat Miscellaneous Application No.16/I of 1997 by convict Master Ijaz Hussain. The grounds of attack are as follows:-

A. That under Article 19 of the Constitution every citizen is free to write or express himself.

B. That the N.W.F.P. Government has already permitted the prisoners in their province to retain pen and paper with them in the cell.

C. That due to censorship restriction, the prisoners are precluded from informing the higher authorities about the excesses of prison administration. A constitutional petition registered as W.P.4719/1995 is stated to be pending disposal in the Lahore High Court on this very issue.

82. It will be appreciated that no reference to any Injunction of Islam has been made. The fact that NWFP Government has allowed prisoners to retain pen and paper in the cell is not relevant to Rule 546. Article 19 of the Constitution no doubt guarantees freedom of speech etc. but it is subject to “any reasonable restriction imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, (commission of) or incitement to an offence”. The existence of this Rule regarding compulsory censorship is a definite check against many problems relating to internal security, jail-breaks and other disciplinary matters. As regards

the opportunity of sending complaints against prison administration to higher authorities, without being intercepted or censored by prison officials, the prisoners can always put it across when a judicial officer visits the Jail in routine once in a month. It is worth while mentioning the incident of Hatib Ibn Abi Balta, who had entrusted a secret letter about the activities of Muslims in the nascent state of Madina, to an old woman for being conveyed safely to the enemies of Islam in Macca. This letter was placed in the tresses of the elderly women. The Holy Prophet (PBUH) sent Zubair and Miqdad (R.A) to catch that woman at Rauza Kakh. The needful was done and the letter was recovered. Investigation was initiated after recovery of the offensive letter. This incident shows that for the purpose of security the Administration can take steps like checking and censorship. Such a course of action is permissible in Islam.

83. The petitioner had also stated in his petition that a constitutional petition registered as W.P. 4719/95 was pending adjudication before Lahore High Court under its extra-ordinary constitutional jurisdiction. In view of these two reasons namely i) the constitutional

allowance to impose reasonable restriction on the right of expression and

ii) the pendency of a constitutional petition in the Lahore High Court,

Lahore and also due to the reason that no particular Injunction of Islam was

shown by the petitioner to have been violated by Rule 546 of the Prison

Rules the Shariat Miscellaneous Application No 16/I of 1997 is without

force and consequently merits dismissal.

SEGMENT FOUR

DISCIPLINE AND DAILY ROUTINE. **(ISSUE NO. IX)**

84. Rule 690 of Pakistan Prison Rules has also been challenged in

Shariat Miscellaneous Application No.16/I of 1997. This rule is part of

Chapter 28 entitled **Discipline and Daily Routine**. The rule is as follows:-

“List of Prohibited Articles.

Rule 690.-- The articles specified or included in any of the descriptions contained in the list annexed to this Rule, shall be deemed to be prohibited articles, within the meaning of Section 42 and clause (12) of Section 45 of the Prisons Act, 1894, unless any such articles shall be--

- (a) introduced into any prison.
- (b) removed from any prison.
- (c) supplied to any prisoner outside the limits of any prison or

- (d) received processed or transferred by any prisoner, with the permission of the Superintendent or other officer empowered by him in this behalf.

List of Prohibited Articles --

- (1) Spirituous liquors of every description.
- (2) All explosives, intoxicating or poisonous substances and chemicles, whether fluid or solid of whatever description.
- (3) All arms and weapons and articles which are capable of being used as weapons of whatever description.
- (4) All bullion, metal, coin, jewellery, ornaments, currency notes, securities and articles of value of every description.
- (5) *All books, papers, and printed or written matters and materials and appliances for printing or writing of whatever description.*
- (6) String, ropes, chains, bamboos and all materials which are capable of being converted into string or rope or chain, any article to facilitate escape, or implement of any kind; and
- (7) Wood, bricks, stones and earth of every description.

For Sindh Province Only

In Rule 690, in the entries against item 5, after the words “and materials” the words “specifically prohibited by the Provincial Government”, shall be inserted.

The rule under scrutiny enumerates various prohibited articles

“within the meaning of section 42 and clause (12) of section 45 of the Prisons Act, 1894”.

85. According to item No.5 in the List of Prohibited Articles, all books, papers and printed or written matters and materials and appliances

for printing or writing of whatever description are prohibited. The words “all books, papers and printed or written matters” occurring in the first part of item No.5 are obviously repugnant to the Injunctions of Islam. The following Injunctions, to quote just a few, can be cited in support of the contention that prohibition on reading and writing material is palpably ultra vires of the Islamic Injunction.

A. Ayat 269 Sura 2, (Al-Baqra of Holy Quran declares:-

He grants wisdom to those
Whom He wills; and whoever
Is granted wisdom has
Indeed been granted much
Good. Yet none take heed.

B. Ayat 1-5 Sura 96, Sura Alaq, of Holy proclaims:-

Read (recite) in the name of
Your Lord Who created,
Created human being from a clot,
Recite: and your Lord is Most Generous,
Who taught by the pen
Taught human being what he did not know.

C. Ayat 1, Sura 68, Sura Al-Qalm (The Pen) of Holy Quran declares:-

Nun: by the pen and
What the scribe writes.

D. Repeated references in the Holy Quran to the application of intellectual faculties is indicative of the importance of reading and writing (Pen and Book) in Islamic teaching. It is worth considering that the Holy Quran describes itself as a Book. The previous revelations were also described as Books. The believers are therefore under religious obligation to acquire the facility and methodology to read and write otherwise they will not be able to understand and appreciate the Message contained in these Books. At numerous places the Holy Book exhorts the believers to **think, ponder, question and assimilate knowledge**. Reference Ayat 73, 76 and 171 and 242 of Sura 2.

E. Ayat 43 Sura 16, Sura Al-Nahl may also be seen.
So ask those who possess.
Knowledge if you do not know.

A reference to the following traditions of the Holy Prophet (PBUH) would be useful.

F. “To acquire knowledge, go as far as China”. This tradition exhorts the believers to cover long distances in the pursuit of knowledge. And we know that the Muslim Jurists and traditionists had undertaken

arduous and extensive journeys in different lands with the object of collecting and compiling volumes on traditions and other disciplines of jurisprudence. Such an exercise is not possible without writing material.

G. Tirmazi, in the Book of knowledge (Tradition No.2687), records a saying to the effect: “Wisdom is the lost heritage of believers: He (i.e, the believer) is entitled to its acquisition wherever he find it.” The distinction of modern era is that knowledge of varied disciplines is not only being recorded but is being made readily available to students. Right to know is now a fundamental right.

H. The Angels, it is also reported in a tradition, spread their nimble wings beneath the footsteps of scholars who traverse unkind and hazardous distances in search of knowledge.

I. Tradition No.1919, appearing in Kitabul Amara, in the Sahih Muslim records: One, who acquired the knowledge/technique of using an arrow and then forgot it, is not one of us.

J. Seeking knowledge is obligatory for every Muslim male and female: These traditions have been referred to in earlier part of this judgment.

K. Another reason that has weighed with us is that according to Islamic teachings the Divine revelation is purpose-oriented. Muslim Jurists have recognized a few Objectives of Shariah, known as **Maqasid-e-Shariah**. These objectives are in fact guarantees for the betterment of humanity. The five basic principles or the five values/five **Maqasid-e-Shariah** are as follows:-

- i. Preservation of Deen (Religion)
- ii. Preservation of Intellect
- iii. Preservation of Life
- iv. Preservation of Property and
- v. Preservation of Progeny

The second value i.e, preservation of Intellect (Tahafaz-e-Aql) is not possible without education for which reading and writing is the minimum requirement. Consequently any prohibition on reading and writing material would be tantamount to the basic philosophy of Islam. It is a Deen wherein

the first word of the first revelation is **IQRA** i.e, **READ**. Denial of reading

and writing could be a denial of a fundamental injunction of Islam:

“Thus does Allah make His
commandments manifest
and clear for you that you
may reflect”

Ayat 220 Sura 2 (Al-Baqra)

86. During the course of writing this Judgment we got in touch with Inspector General of Prisons NWFP on the issue of disallowing books, pen and paper for the use of prisoners. He sent us a copy of the Official Gazette of the North-Western Frontier Province dated 4th September, 2004, No.4/44-SO (Prisons)HD/2004 whereby amendments in the Prison Rules were effected so as to include Pen/Pencil as item No.32; Books/Papers as item No.33, reasonable number/quantity; but item No.5 of rule 690 has so far not been repealed. Rule 75 in Chapter 4 however permits reading material and pen to the prisoners. In so far as Baluchistan and NWFP Provinces are concerned the needful has been done but amendment entitling the prisoners to a reasonable quantity of reading and writing material has not been incorporated in Rule 75. This omission is not only violative of Islamic Injunctions relating to acquisition of knowledge at

every stage, place, time and age of human life but it is also contrary to the principle of uniformity of laws applicable to same categories of citizens all over the country. It may however be added that Article 37 of the Constitution obliges the Government to “promote, with special care, the educational and economic interest of backward class or areas.” It also provides that illiteracy should be removed and “free and compulsory secondary education within minimum possible time” be provided. It is hoped that the other provinces will follow suit. However in so far as Rule 690 is concerned we declare the first part of item (5) i.e. the words “ All books, papers and printed or written matters and materials and” as violative of Injunctions of Islam. These words shall cease to have effect from 1st day of December, 2009. Shariat Miscellaneous Application No.16/I of 1997 has borne fruit.

SEGMENT FIVE

WOMEN PRISONERS AND INNOCENT CHILDREN **(ISSUE NO.II)**

87. Shariat Petition No.61/I of 1992 and Shariat Miscellaneous Application No.10/I of 1998 seek to challenge Rules 307 and 314 of the

Pakistan Prison Rules, 1978. These rules find mention in Chapter 13

entitled **Women Prisoners and Innocent Children**. The text of both the

rules is as follows:-

Rule—307. (i) Women prisoners with sentences of less than two months shall be confined in the prisons to which they are committed.

(ii) When the number of women prisoners confined in any prison is in excess of the available accommodation, the excess number shall ordinarily, irrespective of the length of sentences, be transferred to the Women's Prison.

Conditions under which male officers may enter women's enclosure

Rule—314. A male officer of the prison may enter the women's ward by day only if he has a legitimate duty to attend to, and is accompanied by the woman warder all the time he remains inside such ward or enclosure. Should it be necessary to enter the women's ward at night, the head warder on duty shall call the Deputy Superintendent, and the women warder and these three officers shall enter together. Warders acting as escorts to visitors or officials shall remain outside the enclosure.

88. Learned counsel during the course of arguments relied upon

Ayat 151 Sura 6, Sura Al-Anaam of the Holy Quran. Translation of the

Ayat reads as under:-

“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.”
(Emphasis Added)

89. This verse certainly contains five commandments including a moral edict which prohibits all categories of lewdness and all unseemly acts whether open or secret. There is nothing at all either in rules 307 or 314 which violates injunction contained in Ayat 151 quoted above. On the contrary Rule 314 specifically mandates that a male officer can enter ***only if he has a legitimate duty to attend to, and is accompanied by the Woman Warder all the time he remains inside such ward or enclosure.*** Such a situation is not conceivably covered by the mischief of the term ***FAWAHISH*** i.e. Lewdness.

90. Care has been taken under the Rules to separate different categories of women prisoners as provided in Rules 308 and 309 which in itself is a healthy provision. Rule 310 provides that where there is only one woman prisoner in the prison, arrangement shall be made for a women

warder to remain with her both by day and night. Similarly Rule 311 totally forbids a woman prisoner leaving or being removed from the women enclosure except on a/ transfer, or b/ her attendance in Court or c/ release from prison or d/ under special order of the Superintendent for any lawful reason.

91. In this connection, it may be pointed out that precautionary measure have already been adopted by introducing sub-sections 5,6, and 7 in section 167 of the Code of Criminal Procedure vide Act XX of 1994 (See PLD 1995 Central Statute part page 231). These provisions which took effect from 15 November, 1994 are being reproduced as under:-

“(5) Notwithstanding anything contained in sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under subsection (2) is a female, the Magistrate shall not, except in the cases involving Qatl or dacoity supported by reasons to be recorded in writing, authorize the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer.

(6) The officer incharge of the prison shall make appropriate arrangements for the admission of the investigating police officer into the prison for the purpose of interrogating the accused.

(7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer incharge of the police station or the police officer making investigation not below the rank of Sub-Inspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of the prison in the company of a female police officer appointed by the Magistrate:

Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise.”

At the most the Government may consider defining the scope of the word “necessary” occurring in rule 314 of the Prison Rules. The Government may restrict the nocturnal visits only to situation when a prisoner needs emergent medical care, or there are riotous conditions in the barrack, a calamity like fire or an earthquake has damaged the enclosure. Every such visit of senior officers may by law be required to be recorded and its intimation sent to the Inspector General Prisons next morning telephonically as well as in writing.

92. No other argument was advanced before us to show that these two provisions violate any Injunction of Islam. Consequently Shariat

Petition No.61/I of 1992 and Shariat Miscellaneous Application No.10/I of

1998 to the extent of these two rules, are hereby dismissed.

SEGMENT SIX

THE SUPERINTENDENT OF JAIL **(ISSUE NO. IX)**

93. Shariat Petition No.61/I of 1992 seeks to challenge rules 935, 939 of the Pakistan Prison rules, 1978 as well. These rules form part of Chapter 39. The text of both the rules is reproduced as under:-

APPOINTMENT OF SUPERINTENDENT

Rule 935—Superintendent of Prisons shall be appointed by Government and shall hold their office either alone or in conjunction with any other duties at the discretion of Government.

Duties of the Superintendent in general

Rule 939.---(i) The over all responsibility for the security and management of the jail shall squarely revolve on the Superintendent.

(ii) Subject to the orders of the Inspector General, the Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control.

(iii) Subject to such general or special directions as may be given by the Government, the Superintendent of a prison other than a Central Prison shall comply with all orders not inconsistent with the Prisons Act, 1894 or any rule thereunder which may be given respecting the prison by the [District Coordination Officer], and shall report to the Inspector General all such orders and the action taken thereon.

(iv) Under Section 12 of the Prison Act, 1894, the Superintendent is required to keep or cause to be kept, certain specified records and such other records as may be prescribed under Section 59 of the said Act.

For Sindh Province Only

In Rule 939, existing sub-rules (i), and (ii) shall be renumbered as sub-rule (ii), (iii) and (iv) of the said rule and before the said sub-rules the following new sub-rule shall be inserted as sub-rule (i), namely:-

“(i) The over-all responsibility for the security and management of the jail shall squarely devolve on the Superintendent.”

94. Learned counsel for the applicant neither advanced any precise objection as to the text or terminology of these two rules nor was any Injunction of Islam shown to have been violated by the inclusion of these two provisions in the Rules. In this view of the matter Shariat Petition No.61/I of 1992, in so far as its challenge relates to rules 935 and 939, is hereby dismissed.

SEGMENT SEVEN

**LADY ASSISTANT SUPERINTENDENT AND
WOMEN WARDERS.
(ISSUE NO.II & IX)**

95. Shariat Petition No.61/I of 1992 seeks to challenge legality of rules 1180, 1181 of the Pakistan Prison Rules 1978. These rules are contained in Chapter 46 entitled **Lady Assistant Superintendent and Women Warders.** The following two grounds were mentioned in support of the contention that both these rules are violative of the Islamic Injunctions:-

- a. that no woman can be placed in custody of a male not within prohibited degree (NON MAHRAM)
- b. that any situation, arrangement, event or system which may possibly lead to immorality or adultery is prohibited by Islam.

The text of both the rules is reproduced below:-

Rule 1180.—(i) In the women’s prison there shall be a Lady Assistant Superintendent who shall subject to the control of the Superintendent of the local men’s prison, have complete charge of all women prisoners at any time committed to, or detained, in the prison.

(ii) All rules, regulations, etc., applicable to Assistant Superintendents as regards appointment, conditions of service and duties, shall *mutatis mutandis* be applicable to Lady Assistant Superintendent.

(iii) The Lady Assistant Superintendent shall be assisted by a staff of women Warders who shall perform duties as laid down in the succeeding rules, subject to the control of the Lady Assistant Superintendent.

Women Warders duties

Rule 1181.—(i) In every other prison where women prisoners are confined, a woman Warder shall be incharge of the women enclosure. She shall work under the supervision and orders of the Deputy Superintendent and the Superintendent.

(ii) The duties of the woman Warders, shall, as regards women prisoner, be similar to those performed, as regards male prisoners, by Warders and Head Warders. All rules, regulation, orders and directions for the time being applicable to such Warders and Head Warders, shall be applicable to women Warders.

96. During the course of arguments there was only a general reference to these rules without of course mentioning any particular injunction of Islam which was claimed to have been violated by these two rules.

97. On the contrary we find that a lady Assistant Superintendent has been made physical incharge of a women's prison. The rule also affirms that Woman Warder shall be incharge of the women enclosure in any prison. The women enclosures are already separate from the male enclosure and therefore there does not exist any "situation, arrangement, event or system which is directed towards or may possibly lead to immorality or adultery".

98. The other objection raised was that the Lady Assistant Superintendent should not be under the control of the Superintendent of local men's prison. It was also asserted that the female Warders should not be under the control of Superintendent or Deputy Superintendent of Prisons.

99. The objection could have been valid if all the female prisoners would have been under the control of male Superintendent/Deputy Superintendent. Rule 1180 visualizes a Lady Assistant Superintendent incharge of the female prisoners and Rule 1181 contemplates a woman warder as incharge of the women enclosure.

100. In so far as the chain of command in the prison department or for that matter any other wing of Government administration is concerned, the presence of a female at any give step does not create any trouble. There is a well defined hierarchy from bottom to top which is known as chain of command. This chain includes both men and women.

101. The only objection expressed at the Bar was that this provision can be misused and may lead to immorality. This objection is not valid for the simple reason that the provision itself is not being challenged but apprehensions are being expressed that the impugned provision might as well be misused. This line of argument would exclude innumerable things from human activity which are otherwise valid. For fear of printing seditious matter you cannot stop the functioning of printing press or the apprehension that phony medicines may be manufactured by unscrupulous elements no Government will ban medicine preparations. However, in the case of *Pakistan and others v Public At Large and others* reported as PLD 1987 Supreme court 304 at page 355 it was held that “Only because a provision can be used in an oppressive or capricious manner or is capable

of being misused does not mean that the provision itself becomes invalid.

The sole criteria are the test of repugnancy to Holy Quran or Sunnah of the Holy Prophet (PBUH).

102. No Ayat of Holy Quran or Sunnah has been shown to be violated if a female officer is placed at a particular step in the chain of command. Consequently the Shariat Petition No.61/I of 1992 being without force is dismissed.

SEGMENT EIGHT

DEPUTY SUPERINTENDENT **(ISSUE NO.IX)**

103. Shariat Petition No.61/I of 1992 seeks to impugn rules 1002 and 1004 of the Pakistan Prison Rules, 1978. These rules are part of Chapter 41 entitled **Deputy Superintendents**. Rules 1002 and 1004 are being reproduced below:-

Persons included in the word “Deputy Superintendent”

Rule 1002.—For the purposes of duty, the expression “Deputy Superintendent” shall be deemed to include Assistant Superintendent and every person for the time being performing all or any of the functions or duties of a Deputy Superintendent.

General Duties

Rule 1004.—(i) The Deputy Superintendent shall be the chief executive officer of the prison and shall discharge his duties under the immediate directions and orders of the

Superintendent. It shall be his duty to see that all orders issued by the Superintendent are duly carried out.

(ii) It shall be the duty of the Deputy Superintendent to maintain discipline both amongst subordinate officers and the prisoners and the strict enforcement of all rules, regulations and orders relating to the management of the prison, prisoners, and the staff.

104. The learned counsel for the petitioner has challenged the above provisions on the grounds mentioned in paragraph 3,4 and 5, of the Shariat Petition. These grounds are in fact apprehensions eg: that the control of male staff over female prisoner can lead to moral excesses. The fact of the matter is that no male officer is in physical control of female prisoners. *The latter are under the supervision of female warders and Lady Assistant Superintendent of Jail.* The other ground is that according to Islamic Injunction “no women can be placed in custody of non-Mahram male” As prescribed in rules no female prisoner is placed in custody of non-Mehram male staff. The third objection, that any thing leading towards immorality is prohibited in Islam, is a misplaced feeling.

105. The two rules i.e.1002, 1004 impugned in this Shariat Petition, are therefore valid as no reason was advanced to show that the said provisions were repugnant to any one or more Injunction of Islam. These

provisions relate to the performance of normal duties. It will certainly not advance the cause of justice if an effort is made to read a mischievous meaning in any provision of law unless of course it is shown by reasonable interpretation that the provision under review is either expressly hit by an Injunction of Islam or by implication is repugnant to the letter or spirit of Injunctions of Islam. The Injunction of Islam, to be relied upon, must be identified so that a bare reading of the Injunction would indicate the obvious mischief complained of. As a consequence thereof the portion of Shariat Petition 61/I of 1992, in so far as challenge to Rules 1002, 1004 is concerned is hereby dismissed.

SEGMENT NINE

EMPLOYMENT RESTRICTION **(ISSUE NO. IX)**

106. Shariat Petition No.12/I of 1999 seeks to challenge Rule 1078 of the Jail Manual. This rule occurs in Chapter 44 entitled “**General Rules Relating to Prison Officers**”. This rule prohibits employment of persons dismissed from Government Service without the special sanction of the Government. This rule, according to the petitioner, is un-Islamic as it prohibits a person from earning legitimate livelihood (Rizq-e-Halal). The

petitioner however proposes that convicted persons be allowed employment in the Government service on merit. The petitioner relied upon Verse 70 of Chapter 25 of the Holy Quran in support of the point raised by him. Rule 1078 reads as under:-

Prohibition against employment of persons dismissed or punished criminally.

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.

107. An objection was raised by Master Ijaz Hussain in his application that rule 1078 was violative of the Injunctions of Islam in as much as it prohibits a person from earning honest living. It was further asserted that a convicted person should have an equal right of employment. Reliance in this connection was placed on Ayat 70 Sura 25, (Al-Furqan). The Ayat states that Allah will change the evil deeds into good deeds of those who repent because Allah is Forgiving and Most Compassionate.

108. However during course of argument no one canvassed this proposition before us. It is worth mentioning that it is not the fundamental right of every person to obtain a Government job. Prisons, as a segment of the administrative machinery of the State, cannot be equated with any other department or institution under the control of Government. Every department has specialized functions to perform. The appointing authority has an inherent right to acquire or requisition services of skilled persons according to the need or the standard determined by that department. The matter of eligibility of an employee can best be settled by the department concerned. Recruits cannot be thrust upon the prison departments. Moreover there is no law to prohibit a previous convict from pursuing lawful economic enterprise in his private capacity. No Injunctions of Islam has been referred to by petitioner to establish that the impugned rule is in any manner opposed to Islamic Injunctions. However we observe that this rule does give arbitrary authority to Government as well as the Inspector General of Prisons to employ dismissed government officers and previous convicts. This is a discriminatory provision and is not covered by the

principle of classification on reasonable grounds. In this view of the matter the elements of special sanction of Government and special sanction of Inspector General of Prison are hereby declared violative of Injunctions of Islam on account of arbitrariness and other reasons as discussed in detail in Segment Two of this judgment. The impugned provision *to the extent of special sanction* shall cease to have effect as from 01.12.2009. Consequently rule 1078(i) is declared repugnant to Injunctions of Islam to the extent indicated above. Resultantly Shariat Petition No.12/I of 1999 is partly accepted.

SEGMENT TEN

STATURORY RELIEF
(ISSUE NO. VII, VIII)

109. This segment is the subject matter of Shariat Miscellaneous Application No.21/I of 1995 which seeks amendment in section 382-B of the Code of Criminal Procedure. The Code of Criminal Procedure (Second Amendment) Ordinance, 71 of 1979 had substituted the word “**may**” with **shall** in section 382-B of the Code. The section as amended, at present, reads as follows:-

“Where a court decides to pass a sentence of imprisonment of an accused for an offence it shall take into consideration the period, if any, during which such accused was detained in custody for such offence.”

The objection of the petitioner is that the period of detention in custody for the offence should be deducted from the quantum of sentence of imprisonment awarded at the end of the trial for the same offence. Let us examine it in the light of relevant verses of Holy Quran. The following principles can be inferred from the Injunctions of Islam relating to the realm of administration of justice.

a. All human beings are equal before law and even handed justice has to be administered to the affected parties and no one should be punished beyond the period stipulated in law.

- i. Ayat 48, 123, 286 Sura 2:
- ii. Ayat 135, Sura 4
- iii. Ayat 8, Sura 5
- iv. Ayat 15, Sura 10

b. Temper Justice with Equity (Soften Adl with Ehsan). Ayat 90 of Sura 16 of Holy Quran

c. The recompense of an injury is an equal injury but forgiveness

in Divine. Allah loves the compassionate. Ayat 41 of Sura 42.

110. In this view of the matter it appears to be just and reasonable that the period spent by a prisoner in detention/custody for an offence before and during the trial ought to be deducted from the sentence awarded by the trial court for the reason that the prisoner has already suffered incarceration on account of the crime report which becomes the basis of his conviction and the consequent sentence of imprisonment. The omission to deduct such a period of detention in the same cause would fall in the category of Zulm which the Holy Quran does not countenance under any situation: Refer Ayat 85 Sura 3. The existing provision i.e. section 382-B of the Code of Criminal Procedure in so far as it speaks of *taking into consideration the period spent in detention for the same offence*, before pronouncement of judgment is declared derogatory to the Injunction of Islam. Necessary correction may be made by 01.12.2009 whereafter the order of this court will take effect and the provision of section 382-B of the Code of Criminal Procedure would read as follows:-

“Where a court decides to pass a sentence of imprisonment of an accused for an offence, the period, if any, during which such accused was detained in custody for such offence, whether before or after submission of report under section 173 of the Code of Criminal Procedure or initiation of a trial in a case instituted upon a complaint, shall be deducted from the quantum of sentence of imprisonment awarded by the trial court or it may be adjusted against imposition of fine if the court so directs.

111. Consequently Shariat Miscellaneous Application No.21/I of 1995 succeeds partly. We took notice of this provision also because this point invariably crops up whenever the question of benefit of section 382 B of the Code of Criminal Procedure comes under consideration at the time of award of sentence to the accused both at the conclusion of the trial and at the time of hearing the appeal. It is hoped that this declaration will put an end to the controversy.

SEGMENT ELEVEN

DIETARY REQUIREMENTS
(SUO MOTO-ISSUE NO. IX)

Feed the Hungry,
Visit the Sick,
And free the prisoner
If he be unjustly bound

(HADEES)

112. Chapter 20 of the Pakistan Prison Rules deals with the Dietary requirements of the prison population. We have taken Suo Moto notice of an extremely hard situation which relates with the basic human necessity i.e. daily diet prescribed in the rules. This problem is being faced by almost every prisoner since the time prison discipline was applied upon the prison population. Our main concern is that according to the Islamic teachings, the **Captor** is under an obligation to make adequate provision for persons who are under his charge. Ayat 8 of Sura 76 of Holy Quran, with which this judgment opened, is a pointer to this very thing.

113. Chapter 20 of the Rules, covering Rules 468 through 507, empowers prison authorities, inter alia, to fix scales of prison diet, number of meals per day, receiving food gifts from private societies and other related matters as mentioned in this chapter. The basic point which attracted our attention was the amount of money spent on each prisoner

per day to meet his food requirements because according to Islamic dispensation of justice, a dependent or a ward including a captive is the responsibility of the guardian/custodian/captor/keeper/shepherd. Violation of such an important principle is certainly cognizable.

114. Allocation of funds to cater to the actual daily dietary requirements of the prisoners was a matter that demanded thorough probe though it was not challenged before us. We have however taken judicial notice of this fact because improper nutrition of persons, under the control of a keeper/captor, is not only a negation of Islamic tenets but also a source of constant irritation among the inhabitants of penal institutions.

Ayat 56 of Sura 24 of Holy Quran draws the attention of its readers to the Divine promise that when He establishes the rule of believers on this earth, the element of fears and apprehensions of all categories vanishes and in exchange peace and security prevails. The **KHAUF** gets converted into **AMAN**. This is supposed to be a guarantee available in the Constitution of every Muslim country and the State should takes steps to fulfill the Divine

promise, whenever it is brought to its notice that a certain deficiency is a source of trouble for any disadvantaged group in the society.

115. Chapter 20 of the Pakistan Prisons Rules deals with the dietary requirements of the prisoners. This chapter consists of 40 rules starting from rule 468 and ends up with rule 507. Rule No.468 authorizes the Inspector General of Prisons to fix scales of prison diet. The scale for labouring and non-labouring prisoners as well as ailing prisoners is also prescribed. Rules 472 and 477 prescribe scales for the morning, mid day and evening meals etc. for each prisoner. Special diet on Eids and Aftari during the month of Holy Ramzan is also prescribed. The good thing in these rules is that diet money has not been prescribed and instead the scale of meals has been prescribed in grams. However these scales also need revision because the other persisting complaint is that even quantity wise the food is exiguous.

116. The amount of money allocated by the Provincial Government to meet the dietary requirements of the prisoners is deplorable, to say the least. A sum of @ Rs. 19.57 per person was allocated by the Punjab

Government to the prison department to defray the expenses of three meals a day in the prisons. This amount was later increased to Rs. 33/- per person per day in 2006-2007. We are told that the Government is now considering increasing this amount to Rs. 50/- per person per day which means that three meals would be covered by fifty rupees per person per day. Even this amount is insufficient keeping in view the prices of food stuff.

117. The amount of money allocated by the NWFP Government for an undertrial prisoner per diem is Rs.35.57 and for a convicted (labouring) prisoner per day is Rs.39.04. This amount is the current dietary charge as stated by the office of Inspector General of Prisons NWFP Peshawar. The amount of money allocated for three times diet in the province of Baluchistan is approximately Rupees 37.00 per prisoner per day. This state of affairs in all the provinces does not reflect a satisfactory picture. Malnutrition coupled with uncompensated labour would certainly earn for the prisons the name of a *Kharkari camp* or more of a *concentration camp* under enemy occupation rather than a prison house in one's homeland. The Injunctions of Islam are very clear on this point. The Muslims are

ordained to make adequate provisions for their dependents. These provisions include food, clothes, medicines and lodging of the persons under their control. Reference in this connection may be made to Ayat 8 of Sura 76 (Al-Dahar) of the Holy Quran.

118. A captive is the responsibility of his captor and the latter is, for all practical purpose, answerable about the well being of the detnue. Bukhari, in Book LXXXIX, The Book of Ahkaam, Chapter 1 relates a tradition on the authority of Musa bin Ismail to the following effect:-

“Surely! Everyone of you is a guardian and is responsible for his charges; The Imam (ruler) of the people is a guardian and is responsible for his subjects; a man is the guardian of his family (household) and is responsible for his subjects; a woman is the guardian of her husband’s home and of his children and is responsible for them; and the slave of a man is a guardian of his master’s property and is responsible for it. Surely, every one of you is a guardian and responsible for his charges”.

119. This tradition is a notable commentary of Ayat 34 of Sura 4 of the Holy Quran. This tradition was dilated upon by a Full Bench of the Federal Shariat Court in the case of Ansar Burney Versus Federation of Pakistan and others reported as PLD 1983 Federal Shariat Court 73 at page

81 Wherein it was held that the word **Raa** means a herdsman, shepherd, guardian, keeper, protector. “The functions of a shepherd are firstly to graze or tend herd which makes him undertake the responsibility of a provider, secondly to protect it from the attacks of wild animals which gives it a sense of protector and thirdly to see that a member of the flock does not stray from the path. In that case he can also exercise his authority of retribution. Primarily the shepherd uses all means of love for keeping the members of the flock from straying”. Another tradition might as well as be considered. It has been mentioned on pages 277 -278 of the book *Al Mausooatal Qazaya*, a book containing the cases decided by Holy Prophet Muhammad (PBUH), printed by Falah Foundation Pakistan, on the authority of Behqi in *Sunan-e-Kubra*, that a prisoner (who was held as a hostage because two Muslims had been captured by his tribe) entreated the Holy Prophet (PBUH) for food and water who is reported to have said approvingly: This is your need. Thereafter he was released in exchange for the two Muslim captives.

120. In this view of the matter we feel that even a sum of Rupees fifty per day to defray expenditure on three meals per person is inadequate. Learned State counsel does not disagree with the aspect. Since the amount is not mentioned in the rules so we cannot declare it ultra vires the Injunctions of Islam but we want to make it clear that adequate provision has to be made by all the Provincial Governments to rationalize the quantum of dietary sanction for the prison population because the Islamic Injunctions are very clear on this point. Rule 176(iii) is declared violative of the aforesaid Islamic Injunctions because it provides that a prisoner on transfer will get diet money of Rupees Three per meal. This diet money will not buy even one thin loaf of bread. Unless otherwise deleted or suitably amended this provision will cease to be part of the Code after 01.12.2009. The minimum diet amount per meal should be Rupees 50/- which amount will be revisable every three years.

SEGMENT TWELVE

FAMILY LIFE
(ISSUE NO.I, IX)

121. During the course of arguments on various points relating to different petitions, the scourge of increasing drug addiction and immoral activities in the prison houses also came under discussion. It was noticed that the lack of facilities for conjugal sex for married prisoners was an additional factor for continuance of the practice of anal sex as an offshoot. In this process the comparatively young and new entrants in the prison become potential targets of the sex hungry senior denizens of the barracks. One of the sinister consequences of sexual deprivation erupts in the form of drug addiction other than venereal diseases. Due to the efforts of certain committed human rights activists, a vigorous campaign through print media for improving the living conditions of prisons was initiated in the decade of 1980. A positive result of this drive was an amendment in Rule 544 by NWFP Government on 04.01.2005 followed by addition of Rule 545-A in the Pakistan Prison Rules, 1978 by the Government of the Punjab on 3rd May, 2007. Both the Notifications merit honourable mention by way of reproduction in this judgment.

1. **NOTIFICATION**

No.4/44-SO(PRISONS)HD/2004. -- In exercise of the powers conferred by Section 59 of the Prison Act, 1894 (IX of 1894) the Government of the North West Frontier Province is pleased to direct that in the North West Frontier Province Prisons Rules, 1985, the following further amendments shall be made, namely:-

AMENDMENT

The existing rule 544 shall be renumbered as sub rule (i) of this rule and after sub-rule (i), as so renumbered, the following new sub-rule (ii) & (iii) shall be added, namely:

(ii) Those convicts whose term of imprisonment exceeds five years shall be allowed to keep their spouses with them inside the jail premises in place specially meant for the purpose for three consecutive days thrice in a year subject to the following conditions:-

(a) only that person will be allowed who is legally married to a convict and whose identity has been certified by the District Coordination Officer concerned;

- (b) such male convict who has more than one wife will be allowed two days for each wife at a time;
 - (c) only children below the age of six years will be allowed to accompany during such arrangement;
 - (d) those convicts who can not bear the maintenance charges shall be provided meal etc. from the jail cook house free of cost as per provision of rules, while those convicts who can afford to run their own kitchen shall be allowed to do so;
 - (e) the convicts who are convicted on the charge of terrorism or anti-state activities shall not be allowed to avail the facilities permissible under this sub-rule, except with the prior consent of Government;
 - (f) The Superintendent jail will detail one or more Assistant Superintendents Jail who will be responsible for maintaining all the relevant record i.e. date of visit and other particulars of the spouses of the convict concerned under the supervision of Deputy Superintendent Jail; and
 - (g) monthly statement of convicts who have availed such privileges be sent to Inspector General of Prisons.
- (iii) For availing facilities under sub rule (ii), a convict or his spouse shall apply through the Superintendent Jail concerned to the District Coordination Officer of the District to which they belong.

2. **NOTIFICATION**

No.SO(R&P) 8-3/2005. In exercise of the powers conferred upon him under section 59 of the Prisons Act, 1894 (IX of 1894), the Governor of the Punjab is pleased to direct that in the Pakistan Prisons Rules, 1978 to the extent of their application in the Province of the Punjab, the following further amendments shall be made:-

AMENDMENTS

In the said rules-

(1) after rule 545, the following rule 545-A shall be inserted:

“545-A Special meetings:- (1) 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 three consecutive days;

(b) 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;

- (c) only the spouse whose identity has been certified by the District Coordination Officer shall be allowed to avail this facility;
 - (d) the spouse and the child shall be provided meal etc. from the jail cookhouse, 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
 - (e) 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.
- (2) 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.
- (3) A monthly statement showing such meeting shall be sent to the Inspector General of Prisons.”

(KHUSRO PERVAIZ KHAN)
Secretary to Govt. of the Punjab
Home Department

122. It is indeed a welcome start. It is hoped that the Interior Ministry will, through coordinated efforts of the Provincial Home Secretaries and Provincial Inspector General of Prisons, widen the scope of this amendment not only in the larger interest of prison population but also for the reason that maintenance and protection of family life is that chapter of Islamic law on which extra ordinary emphasis has been placed in the

Holy Quran. Prolonged absence of the bread winner and lack of contact with members of his family can give rise to varied forms of social evils.

Article 25(3) of the Constitution in fact speaks in terms of making special provision for the protection of women and children. Article 35 of the Constitution of Pakistan, for that matter, stipulates that the State shall protect the marriage, the family, the mother and the child. In this connection provision contained in clause (d) of Article 38 of the Constitution of Pakistan may be recapitulated with profit:-

The State shall-

- (d) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, *as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;*” (Emphasis added)

123. We are aware of the fact that even the limited physical movements of a prisoner or a detinue, during day and night, are under

strict watch and control. He is neither enabled not encouraged to observe basic human values despite the fact that the pre-amble of our Constitution enunciates the resolve in very clear terms:-

“Wherein the Muslims **shall be enabled to order** their lives in the individual and collective sphere in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah.”

(Emphasis added)

The Constitution expects that adequate State- sponsored measures shall be adopted in order to **enable** backward and deprived classes and sections of society to order their lives in accordance with Islamic tenants and it is only then that they should be expected to become responsible citizens.

124. The Home Department can formulate a policy wherein the married prisoners, except lifers and condemned prisoners, are enabled and encouraged, subject to all necessary and reasonable conditions, to avail a week’s parole every four month in the larger interest of maintenance of Family Life. The spouse and children of the accused have a legitimate claim upon the latter. The family union of the condemned prisoners and

lifers can be arranged in the family quarters within the prison walls. It will not only have a salutary effect upon the prison population but the above mentioned steps will be positive measures towards reduction of some problems arising on account of over population in the prisons. It is hoped that all the Provincial Governments will consider what has been stated, particularly in this segment relating to family life of prisoners, and make amends by extending on the one hand the scope of amended Rule 544, but also take positive steps to introduce conjugal-oriented parole scheme in appropriate cases and also initiate family reunion on auspicious occasions within the prison precincts in the larger interest of preservation of Family Life. It is further hoped that necessary action will be taken by the end of 2010 and a report to that effect will be sent by the Secretaries Home of all the Provincial Governments. Secretary Interior, Government of Pakistan will also send his own report containing an objective assessment as regards the efforts made and steps taken in this regard. These reports must reach the Registrar of this Court by 31.01.2011 whereafter this aspect of the case will be examined in February 2011.

SEGMENT THIRTEEN

CONDEMNED PRISONERS
(ISSUE NO.VI)

125. This topic is the subject matter of 6th reframed issue. Rules relating to Condemned Prisoners are contained in Chapter 14 of the Pakistan Prison Rules, 1978 whereas the main provision on the subject is section 30 of Act IX of 1894. This item was taken up Suo Moto because of a general demand on behalf of the prisoners made known through press clippings and direct appeals to the Federal Shariat Court. A member of this Board (The Author Judge) had visited jails on three occasions during the last six years to see the actual living conditions of the prisoners in general and those in particular who were awaiting final adjudication of their appeals/confirmation of death/decision on their mercy petitions. The condemned prisoner have to undergo a protracted period of uncertainty in the persistent inclement weather and hostile surroundings.

126. Provisions relating to the living conditions of prisoners under sentence of death are contained in a) Section 30 of the Prisons Act, 1894

(Act No. IX of 1894) and b) chapter 14 Pakistan Prison Rules, 1978 and in particular Rule 330. Both the provisions are detailed below:-

“S.30. Prisoners under sentence of death.-- (1) Every prisoner under the sentence of death shall, *immediately on his arrival in the prison after sentence*, be searched by, or by order of the Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner *shall be confined in a cell apart from all other prisoners*, and shall be placed by day and by night under the charge of a guard.

“Rull 330.-- Every prisoner under sentence of death shall be searched immediately on arrival in the prison by, or under the orders of, the Deputy Superintendent, and every article of clothing and other articles of whatever description shall be taken away from him. After having furnished him with prison clothing, bedding, aluminum utensils and light chappals, the Deputy Superintendent *shall remove him to a cell and forthwith make arrangements for his watch and ward.*”
(Emphasis added)

127. Rules 330 through 364 regulate the living conditions of a prisoner between the period when he is sentenced to death and the actual date of execution or acquittal on account of acceptance of appeal etc. During this period, the cell, where he is to be confined, is examined and

carefully watched from the point of view of security. Special guards are placed “both by day and night.” The guards are equipped with sticks and whistles. The keys of these death cells are in the custody of head warder. Prisoner has to be handcuffed before his is permitted half an hour stroll in the courtyard out of the cell. Not more than one convict is allowed to be in the enclosed courtyard at one time during which period the door of his cell and the yard door must be secured by locks. The condemned prisoner is searched twice. Electrical light during night constantly illuminates his cell to ensure that the convict has not disappeared. The food supplied to him is examined before it is served. Rule 346 permits the use of bar fetter on account of punishment or when he is out of prison on transfer. At the time of his execution all prisoners in the prison remain locked-up. In this view of the matter it was decided to take Suo Moto Notice of Chapter 14 of the Pakistan Prison Rules which deal with prisoners under sentence of death. We heard arguments on this aspect of the case on two occasions: before June 2009 and then during last week of August 2009.

128. Under Rule 329, as soon as a prisoner is sentenced to death by the trial court the police officer who attends the trial is under legal obligation to inform the Superintendent of the prison of the fact of such conviction on his return to jail and from that point onward starts the rigorous regime of search and confinement as well as special guards over the convict who is henceforth termed a Condemned Prisoner. He is kept in a cell apart from all other prisoners by day and night. From sunset to sunrise the cell of the condemned prisoner is kept bright by electric light so that he is under strict observation all the time. The condemned prisoner is searched twice daily under Rule 342 by the Assistant Superintendent of Jail and the food intended for the consumption of a condemned prisoner is examined by the jail authorities who have the discretion to withhold any article which in their opinion is suspicious. From the time the trial court awards the sentence of death, at the end of an agonizing and protracted trial, upto the time of the acceptance or rejection of his mercy petition by the President of Pakistan after dismissal of his appeal in the Apex Court, he has to pass through a distressing period of time awaiting confirmation of

death sentence and disposal of his appeal by the Provincial High Court followed by an appeal before the Apex Court and subsequent mercy petition as well. The mercy petition is the last hope of a condemned prisoner. The conditions in which a condemned prisoner spends a trying period extending over a few years are simply deplorable, inhuman and unpardonable.

129. It may be legally justified for the State to detain prisoners pending execution of sentence but there is no moral or lawful reason whatsoever to subject such a convict to humiliation and disgrace. As a matter of grace even embarrassment for such a prisoner should not be countenanced. A prisoner who is serving a long term of sentence while awaiting disposal of his appeal against capital punishment is already passing through a distressing period. He has to be saved from further agony. After all the system of administration of justice revolves around human beings who have feelings like other free human beings. Disgrace and agony is alien to the concept of justice.

130. Ayat 60 of Sura 22, (Al-Haj) of Holy Quran has permitted retribution alone for the wrong done by an accused but this verse at the same time refers to the two attributes of Allah: that Allah is Pardoning and Forgiving. These verses do not sanction severe treatment or added agony for the condemned prisoners. Ayat 126 of Sura 16, (Al-Nahl) reminds the believers that punishment **shall not exceed the injury actually inflicted.**

“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.”

The lesson therefore is that death penalty may be awarded to a killer but there is no authority to treat him inhumanly for a decade or so before he is hanged by neck till death. A prisoner cannot be kept under a constant and unending fear of death in hostile surroundings for an uncertain period.

131. The fact of the matter is that even though the Sessions Judge is competent to pass the sentence of Death at the end of the trial yet his order is subject to confirmation by the High Court. The process of confirmation or otherwise of the death sentence awarded by the Sessions Judge

invariably takes a few years. Even if death sentence is confirmed the condemned prisoner has a right to move the Supreme Court against the decision of the High Court. The possibility of acquittal of the convicted prisoner at the High Court level or in appeal before the Supreme Court cannot be ruled out. Even after the appeal of the convict has been dismissed in the Apex Court the prisoner still retains the right of seeking pardon, reprieve, respite, remission, suspension or commutation of the sentence passed by any court, tribunal or other authority. It is only after the President has rejected the mercy petition of the convict that the sentence of capital punishment passed by the Sessions Judge becomes final and capable of execution. It has however been observed that in 1988 and now in the year 2008 the Federal Government did think in terms of converting death penalties into life imprisonments. But this is besides the issue.

132. It therefore means that a condemned prisoner, who has a chance of acquittal in appeal or of the conversion of the capital punishment into life imprisonment, has in fact to wait for a period of about 10 years after the date of the pronouncement of the original judgment of the trial

court. The trial itself takes a few years. A question therefore arises as to when should such a convict be treated as a condemned prisoner. This question is important because the agony through which he passes as a condemned prisoner must be reduced to minimum possible period. A period which is essential for all practical purposes.

133. After considering this issue from various angles in the light of Injunctions of Islam, we are of the considered view that a convict should not be declared a condemned prisoner from the date of pronouncement of the verdict of guilt by the trial court for the reason that unless the sentence of death is confirmed by the High Court *the sentence awarded to the accused by the trial court is not capable of execution*. The execution can legally follow only after confirmation by the High Court has taken place though the accused retains the right of appeal before the Supreme Court and the right to move a Mercy Petition before the President of Pakistan. That means almost a decade before his fate is finally decided. The delay is not the fault of the prisoner. He should therefore be declared a condemned prisoner at the stage when the death sentence is legally executable. He

would still be within his right to move the Apex Court or initiate a mercy petition under article 45 of the Constitution. We may however add that mercy petitions should not be allowed to linger on for years and should be decided in a reasonable period, preferably within a month.

134. Let us also consider the living conditions of condemned prisoners. The cells in which a condemned prisoner is confined under strict supervision usually measures 9 x 12 feet. The prevailing position in the prisons is that about 5 to 7 condemned prisoners are detained in a cell measuring 108 Sq. Ft. leaving just 15 square feet for each convict. For all practical purposes this is inhuman. If however it is conceded that only one person is retained in a death cell even then it amounts to a case of an uncertain and long period of solitary confinement which is contrary to the provisions contained in sections 73 and 74 of the Pakistan Penal Code.

135. If we keep Article 13 of the Constitution in view we find that there is a positive guarantee of protection against double punishment. On the one hand the condemned prisoner is being already detained in the highly protected prison and on the other hand he alongwith a few other

condemned prisoners is under additional punishment by way of strict surveillance and isolation in a cell where he has no facility even to answer the call of nature in complete privacy. In this view of the matter the provisions of the Pakistan Prison Rules are tantamount to an additional chastisement which is violative of the protection guaranteed by the Constitution against double punishment. It is worth noting that the cell allocated to the condemned prisoner is also his wash room (if the sophisticated term wash-room could be used for that smelling niche in the cell) which means that he is forced to live in adverse conditions as well. He is permitted only half an hour walk in the morning and half an hour stroll in the evening with bar fetters.

136. Ayat 70 of Sura 17 of the Holy Quran confers human dignity upon every person. This very principle finds mention as a fundamental right in Article 14 of the Constitution. We are made to believe that the dignity of man and, subject to law, the privacy of human being is also inviolable. The compulsion of condemned prisoners to use the same small congested living space as a W.C. within the sight of other dwellers in

stinky atmosphere is certainly violative of human dignity. The Right of Privacy is a very well recognized Injunction of Islam. Ayaat 58/59 of Chapter 24, Sura An-Nur of Holy Quran, relate to the **rule of personal and family privacy**. It is observed by commentators of Holy Quran that non-observance of the principle of privacy may even lead to evil deeds.

137. The basic purpose of detention of a prisoner is to restrict his movement and ensure that he does not escape till the time his case is finally decided. The principle enunciated by the Islamic teachings is that the things are judged by the intention and the motive behind it. 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 the hiatus.

138. The Holy Quran enunciates the principle of ADL and EHSAN in Ayat 90 Sura 16. The verse says:-

God commands justice,
The doing of good, and
Liberality to kith and kin,
And He forbids,
All shameful deeds
And Injustice
And rebellion.
He exhorts you

That ye may be mindful.

Protracted harsh treatment with a detenue, already confined in a prison house, only because he is awaiting result of his appeal, is indeed violative of the Quranic principles of Ehsan. Such an unfriendly treatment is covered by the mischief of Zulm as enunciated by Holy Quran.

139. Detention of a prisoner in death cell for a long period and keeping him under strict surveillance, when his appeal is pending disposal, or his mercy petition is being processed, amounts to hammering a message every moment that the detenue *is a condemned prisoner*. He loses hope as a result of circumstances thrust upon him. This violates the Injunctions of Islam contained in Ayat 53 of Sura 39 of Holy Quran which says that even those who have transgressed should despair not of the mercy of God. The prison department should therefore create conditions that infuse hope in the convict particularly because the existing living conditions in our prisons are already demeaning and dehumanizing, to say the least. The Government owes a debt to the prison population because all the majestic buildings under the use of Provincial Government, including the Government

Houses, the Civil Secretariat and the Prison houses were constructed with the uncompensated labour of the whilom prison population during the British regime. The digging of the canal network over long stretches and growing jungles like Changa Manga was also the output of millions of tiring and unpaid working hours of the incarcerated population over a period of decades. If we were to add up the amount of money payable as wages to the prisoners for the unaccountable hours of hard labour extracted from the voiceless and oppressed denizens of bounded barracks, the resultant figure should put to shame any reasonable citizen of this sub-continent.

140. There is another tradition reported in Bab-e-Mazalam, Volume 9 of Sahih Bukhari, which consists of following four parts:-

“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 call of the oppressed. Between him and Allah no screen exists”.

Yet there is another tradition in Chapter 80 in Sahih Bukhari to the following effect:-

Make things easy for the people

Don't create difficulties

Give good tidings

Don't create circumstances which generate hatred.

141. This tradition appears to be the elaboration of the Quranic principle of *Yusar* as mentioned in Ayat 185 of Sura 2 which says:-

“Allah intends every facility for you. He does not Want to put you in difficulties”.

This principle is further elaborated in Ayat 4 of Sura 65:

“And for those who fear Allah,
He will make their path easy”

and Ayaat 5,6, of Sura 94 of Holy Quran.

5. So, verily,
With every difficulty
There is relief:

6. Verily, with every difficulty
There is relief.
94/5-6 (Al-INSHRAN)

142. The other significant principle enunciated by Holy Quran is that **no one shall bear a burden greater than he can bear**. This principle has been mentioned six times in the Holy Book. Reference:

Ayaat 233, 286 of Sura 2,

Ayat 84 of Sura 4,

Ayat 42 of Sura 7,

Ayat 62 of Sura 23 and

Ayat 7 of Sura 65 of Holy Quran.

In order to lay emphasis on the significance of this principle in various aspects of human life, a special prayer has also been ordained for Muslims.

Translation of the supplication contained in Ayat 286 of Sura 2 is worth considering:-

“On no soul doth God place a burden greater that it can bear. It gets every good that it earns, And it suffers every ill that it earns. (Pray) Our Lord! Condemn us not if we forget or fall into error, our Lord! Lay not on us a burden like that which Thou didst lay on those before us; Our Lord! Lay not on us a burden greater than we have strength to bear. Blot out our sins, and grant us forgiveness. Have mercy on us. Thou art our Protector; help us against those who stand against Faith”. (Emphasis added)

143. Let us also examine this question from another angle namely, the actual position of the pending appeals of condemned prisoners in various courts. In this way we will be able to understand the gravity of the situation faced by tight-lipped condemned prisoners. The total number of condemned prisoners languishing in 26 Jail of the Punjab alone as on 05.03.2009 was 6674. The fate of their appeals, pending disposal, is reflected from the following statement:-

Number of appeals pending in
Lahore High Court, Lahore since:

Number of appeals (of Punjab
Province) pending in the
Supreme Court of Pakistan
since:

a. Last 1 year = 2382	Last 1 year : 270
b. 1 to 2 years = 1347	1 to 2 years : 160
c. 2 to 3 years = 923	2 to 3 years : 108
d. 3 to 4 years = 685	3 to 4 years : 53
e. 4 to 5 years = 351	4 to 5 years : 33
f. Above 5 years: 286	Above 5 years : 34

Mercy petitions pending in GHQ were 12 in number whereas Mercy petitions pending before President of Pakistan were 47 as on 31.12.2008. It may be noticed that these 6674 prisoners, confined in 26 prisons all over the Province, are awaiting result of their appeals in a tense, uncertain and over-wrought frame of mind.

Under the circumstances we consider that a prisoner should be treated as **Condemned Prisoner only after his appeal in the High Court or the Federal Shariat Court has been dismissed and/or the sentence of death has been confirmed by the High Court or the Federal Shariat Court under section 376 of the Code of Criminal Procedure.** Rules 329 through 364 in Chapter 14 of the Pakistan Prison Rules as well as section 30 of the Prisons Act, 1894 provide that as soon as a prisoner is sentenced to death he will be deposited in the death cell and subjected to special care as provided in Chapter 14. We have held that a prisoner under sentence of death shall be deemed to be a condemned prisoner only when the death sentence awarded by the trial court has been confirmed and it becomes executable i.e. when the death sentence has been confirmed under section

376 of the Code of Criminal Procedure and consequently portion of the legal provisions which authorize the prison authorities to treat a prisoner under sentence of death as a condemned prisoner before confirmation of his sentence i.e. it becomes executable, is declared to be violative of the principles of Islam.

SEGMENT FOURTEEN.

GROUND REALITIES **(ISSUES NO. IV, IX, X)**

We will discuss the question of ground realities under four distinct heads namely:

- A. INTRODUCTORY
 - B. CHALLENGING PROBLEMS
 - C. PROPOSED SOLUTIONS
 - D. ROLE OF PRISONS.
- A. INTRODUCTORY

144. The central problem in the prisons is the prolonged deprivation of prisoners. As he enters the prison his attire is changed. He is not free to move about. He has no access to his family members. He loses contact with outside world. Hostile and unfriendly atmosphere prevails all around. The sight of strong and lofty walls, fortified with concrete watch towers, and the steel barracks all around are a constant source of depression. His entire possession in the barrack consists of a cup, a plate, a

spoon, a blanket, a cotton durrie and of course his history ticket. *This piece of paper, known as history ticket, is his total identity.* Conjugal sex is denied henceforth. Homosexuality instead of heterosexual contact prevails. An oppressive and unfamiliar regime controls his conduct. He has the uncanny feeling of being watched by thousand eyes throughout his stay. He is a permanent suspect and presumed to be a potential malingerer. Disowned by society and unclaimed by friends the prisoner sojourns in a forsaken barrack for a stipulated period. From within he is broken as he is enmeshed in a maze of bureaucracy. His personality gets split. An outcast, exposed to desperate criminals, he loses sense of proportion and security. He can neither witness the rise nor the setting of sun. He can neither watch the flight of birds back to their nest nor can he observe the movement of moon in the starry nights. The only hope on which he lives and the only thing that sustains him is the sight of a fruitless day creeping into a somber dusk because this very twilight carries a veiled message that another day of misery has in fact passed away. He entered the strongly guarded penitentiary with no voice in the affairs of his own life or the life of his

family members. He is no more master of even his own destiny. He lives in a persistent vegetative state. “The best prison community is no more than an extreme totalitarian society and the most it can produce is a good convict, who is quite different from a good citizen.”

145. Prison as a means of coercive confinement is a source of hardships and many ills. Prison administration, under the peculiar prison conditions, is itself beset with a host of serious problems at the same time. The current prison problems include over-population, poor living conditions within the prison premises as well as inadequate medical facilities and minimal vocational/educational facilities. It is indeed a continuing wrong. Then there are problems faced by those who visit their relatives and friends in the prison houses. Another related issue is the regular supply of narcotics and illicit arms and mobile phones through “approved” agents who come under the garb of visitors and have already penetrated the prison administration. Another category of the problem is the service conditions of prison administrations. These officers are obliged,

as a part of their duty to continually handle a community of angry and deprived persons.

146. The element of over-population in the prison houses is a source of many ills. It is the bane of Jail administration. We have scanned the Population Statement of Prisoners confined in Jails of the Punjab as on 31.12.2008 as well as the crime wise and section wise Monthly Population Statement for the month of December 2008 as well as the statement showing the number of juvenile convicts/under trial and condemned prisoners in the Punjab Jails as on 31.12.2008. The figures were obtained from the office of the Inspector General Prisons, Punjab. The population chart shows that out of 32 jails in the Province, 30 prisons are over crowded. As against the authorized strength of 229 prisoners the District Jail Multan is maintaining a choking level of 807 prisoners, the Central Jail Gujranwala has a population of 4481 as against the permissible strength 913 prisoners. It means that the maximum over-crowding in Multan by the end of the year 2008 was 394 %. This is a staggering disclosure. The gravity of the problem needs immediate attention as it is in fact a human

problem. The cause of the oppressed is being shelved because they are not permitted the right of protest before any mundane tribunal.

147. The number of prisoners languishing in jails of the Punjab as on 31.12.2008 was 59965 out which 999 were juvenile convict/under trial prisoners whereas the total strength of female prisoners was 856. It is however heartening to note that the number of female prisoner is less than a thousand but it is unfortunate that the number of juvenile prisoners is approximately one thousand. This figure serves a note of caution to the entire nation. The ratio of adults to juvenile is 60 to 1. These figures were obtained from the office of the Inspector General of Prisons, Punjab, Lahore in April 2009. These figures reflect the situation only in one province. The situation in other province would not be much different.

148. These figures also show that out of 60 thousand prisoners the number of under trial prisoners is 40 thousand. These figures suggest that with better management of trial and bail petitions and providing Judicial lock-up, the number of prison problems could be reduced considerably.

149. We have taken judicial notice of the service conditions of prison staff. We have also attempted to identify and enumerate the various problems facing this sector of administration of Criminal Justice. We have in this exercise made an effort to proffer solutions as well for consideration of the Executive and the Legislature. We are of the considered view that things can improve provided sincere efforts are devoted towards solution of these problems.

150. We will not hesitate in reiterating the fact that the living condition in prison houses is not up to the mark. A reference may be made to the case of Majeeda Bibi Vs. Superintendent Jail reported as PLJ 1995 Karachi 1. It was a Division Bench case. The Central Prison Karachi was visited by the erstwhile Chief Justice Sindh High Court alongwith 18 Hon'ble Judges on 30.12.1993 who, for the first time in judicial history under-took such massive inspection of the Prisons. The Hon'ble judges held as follows:

“During the inspection, it was noticed that the condition of most of the prisoners who were kept in the Security/Bund Wards was pathetic and pitiable. The manner in which they were kept in a cell, having an area of few feet, in solitary

confinement with bar-fetters on. If a comparison of the conditions of these prisoners is possible, then it can only be made with the animals who are kept in zoo. It can be said without any hesitation that even the animals in the zoo are better placed as they have no bar-feeters inside the cage and they are provided with better facilities. Most of the prisoners complained that they were kept inside the cell for several days with bar-fetters on and were taken out only once in a week for a bath, otherwise they had to eat, drik, sleep and to relieve themselves in the cell in the presence of other prisoners and had to perform all other daily routine inside the small cell some of which even do not have facility of direct sun-light In some of the cells, prisoners were kept in solitary confinement, while in some of the cells there were 2, 3 and even 5 prisoners. Neither there were any arrangements for proper supply of drinking water nor there were any sanitary arrangements. Several cells were full with filthy and dirty water and on account of the bad smell it was difficult even to stand outside the cell.

During the inspection, it was further noticed that:

- (i) entries made on the history tickets were not upto date;
- (ii) some of the prisoners were kept in these cells as punishment, but the period for which they were punished to stay in the cell was not specified on the history ticket;
- (iii) some of the prisoners complained that they have been confined in these cells because the Superintendent or Jail/Staff was not happy with them;
- (iv) some of the prisoners also complained of beating and maltreatment by the staff of the prison;
- (v) generally all the prisoners complained that they were not allowed to meet the visitors;
- (vi) several prisoners complained that they were not allowed to meet the visitors;

- (vii) the manner in which the prisoners were kept in the cell was in gross violation of the Prison Rules.”

It was further held as follows:

“In the circumstances we direct that the copies of the Constitution of Pakistan, Pakistan Prisons Act, the Prisoners Act and the Rules framed there under, Jail Manual, Pakistan Penal Code, Criminal Procedure Code and Evidence Act etc. should be made available in all the prisons throughout the Province of Sindh for use and for reference by the prisoners. We further direct that copies of the Constitution and Jail Manual should also be made available in Urdu and Sindhi. We further direct that arrangements be made for providing more useful and educative books in the libraries of all the jails in the Province of Sindh.”

B. CHALLENGING PROBLEMS

151. As stated above the Prison Administration is itself plagued with a number of serious problems. Under the circumstances we would also advert to the issue of the service conditions of the prison bureaucracy and the stark atmosphere in which the prison officers themselves spend a life term and in turn suffer the reaction of prisoners which, in fact, is occasioned by of their own rigid attitude. Risks and persisting tension in the atmosphere are added incidents of the peculiar type of job they have to perform when they manage a prison house. Prison staff itself, under the

circumstances, can be considered part of Prison Population. Detailed below

are some of the major problems which are being faced by the Prison

Administration and thereafter we will consider some proposals for solving

these problems:-

- i. The basic problem is **overcrowding** in jails. In the Punjab Province alone the prisoner population as on 31.12.2008 was 60,000 (to be precise 59,474) as against the sanctioned strength of 21527. Out of 59,965 prisoners the number of under-trial prisoners is 41,505 i.e. almost two third strength. This figure is a pointer towards a) the urgent need of making adequate provision for Judicial Lock Ups in all those places where criminal cases are heard, b) proper management of trials and c) liberalization of Bails in certain categories of offences. Overcrowding in itself gives rise to multifarious problems which need not be recounted here. Suffice it to say that overcrowding is the nursery of varied types of evils and moral aberrations.
- ii. Shortage of Warder Guards and other staff to combat recurring problems within the prison premises due to overcrowding and related matters.
- iii. Lack of modern equipments, which includes arms and ammunition as well as gadgetry, to enable the staff to achieve

fool proof safety and security of the prison barracks, boundaries and prison population.

- iv. Absence of adequate funds to provide emergent and routine medical facilities for the inmates within prison premises. There is dire need to revamp medical administration in the jails.
- v. Lack of appropriate vocational/educational facilities for the prisoners.
- vi. Absence of a properly planned programme for recreational activities. Availability of such like facilities would go a long way to ensure reduction of prison problems.
- vii. Retarded career progression of the prison staff.
- viii. Lack of incentives to boost up morale of prison staff.
- ix. Long and uninterrupted association with criminals affects the psyche, conduct and responses of the prison officialdom.
- x. Shortage of residential accommodation for the jail staff.
- xi. Non existence of correctional centres within prison premises.
- xii. Inadequate training facilities for jail staff at local and international level.

C. PROPOSED SOLUTION

- a. Construction of **Judicial Lock Ups** at each Tehsil Headquarter for the safe custody of under-trial prisoners. It will go a long way not only to reduce crowding but will save the accused and police from the hazards of negotiating cumbersome distances between Prison compound and Court premises. This step will also ensure timely presence of under trial prisoners in the Courts and thereby reduce the number of un-necessary adjournments of trials. The number of visitors to the Prison Houses will also diminish, thus reducing pressure on the streets choked by vehicles.

- b. Establishment of the proposed **open jail** in Bahawalnagar at an area of 200 squares should be undertaken immediately. 500 good conduct long term prisoners can be employed alongwith their families in open jail for their rehabilitation. This sort of agriculture therapy is considered useful both for the convicts and the Home Department. Every province can provide land for open jails. The open prison system, which had been developed especially in the United States, the United Kingdom and the British Commonwealth, and the Scandavian countries, was recognized in due course of time as an important contribution to effective rehabilitation of prisoners. The Swedish Prison Code of 1944 and English Criminal Justice Act 1948 gave legislative expression to progressive thoughts on the treatment of offenders.

- c. Construction of jails in the Districts where previously no jail exists like District Nankana Sahib, District Chiniot, District Khushab should not be delayed any more. Similarly another District Jail in Lahore along River Ravi to feed District Courts near Data Darbar, can be added to solve the problem of overcrowding and related issues in this city of increasing populace with rising rate of crime.
- d. Incentive based performance/pay **package/career** progression for prison staff, at par with the Police employees, is long awaited. The present disparity in service conditions of prison and police staff certainly affects the efficiency of prison staff, adversely.
- e. Establishment of Drug **Rehabilitation Centres**.
- f. Establishment of **Correctional Centres** so that services of Sociologist/Social Workers, Psychiatrists and Law Officers is readily available for redressing problems of staff as well as the prisoners.
- g. **Watch & Ward Force** of Prisons Department be increased proportionate to the increasing population of prisoners in the jails according to the yard stick determined by the Government.
- h. **Liberalization of Parole & Probation System** so that maximum number of prisoners are released on parole and probation system to reduce overcrowding. There is one good

provision in Jail Manual namely Rule 146 which allows release of a prisoner on ground of old age, infirmity or illness subject of course to verification of the ailment by a Medical Board. The scope of the term **illness** has not been defined. Prisoners suffering from various diseases like cancer, tuberculosis, coronary thrombosis, kidney problems etc. who need constant care could be released on certain conditions.

- i. **Expeditious disposal** of cases to reduce strength of under-trial prisoners in jails. Moreover, bails can be liberalized both in certain categories of offences and unavoidable delays in the completion of trials.
- j. Establishment of **Training Institutes**.
- k. Prisons Management and Information System.
- l. Provision of modern **security equipment**, gadgetry, arms and ammunition.
- m. Introduction of market oriented **Trade Training Vocational skills** and **Prisons** industries.
- n. Increase in the number of Death Cells **in order** to reduce pressure on the existing cells.
- o. Introduction of a secure and properly guarded but a respectable system of **receiving visitors** who come to meet prisoners.

- p. Reasonable number of **family quarters** for married prisoners.
- q. **Cultural shows** at regular intervals.
- r. **Religious instructions** with special emphasis on character building and moral values.
- s. **Extra remissions** on account of educational achievements like those provided by Rule 248(ii-a) whereby under trial prisoners who pass matriculation or higher examination in first division during their stay in the jail are duly rewarded . Better class jail facilities can be allowed to successful candidates with effect from the date the result is announced.
- t. **Canteen** in every prison house can be established not only to avoid contact of lower prison staff with prisoner on money matters but also provide much needed facility to incarcerated population.
- u. **Family reunion** in prison compound on auspicious occasions for well behaved prisoners.
- v. Introduction of **insurance based compensation** for the labour put in by a prisoner. Enabling rules be incorporated to provide compensation/wages to the prisoners for the hard work put in by them during detention period.
- w. **Compulsory** attendance/detention centres can be established as alternative to imprisonment of young or first offenders wherein education facilities/guidelines can also be provided.

- x. **After release follow-up** can be of considerable assistance. NGO's or even a new branch of social service within prison discipline can be created wherein voluntary services of social workers, teachers, psychiatrists and selected members of civil society can be obtained for the rehabilitation of released prisoners so as to properly absorb them in social set-up.
- y. **Free Legal aid facilities** for poor prisoners both before and after conviction through the good offices of Pakistan Bar Council at Supreme Court level and Provincial Bar Councils at the High Court and District Courts level.
- z In view of the mandate contained in Article 38 of Constitution there should be a **Community Centre** in each central prison wherein apart from arranging collective meals twice a day, arrangements be made for congregational prayers five times a day, workshops, seminars, plays and other recreational, educational, cultural, religious activities not only to keep the prison population mentally and physically occupied but help them exploit their hidden potential during the forced detention period under the guidance and supervision of psychiatrists and social workers. So far the prison discipline, over a period of more than a century failed to introduce steps for the **Reformation or Reclamation or Rehabilitation** of prison population. Serious efforts for assimilation of released prisoners in the social environment is urgently required. Three Rs must find mention in revised Jail Manual.

To expect, under the prevailing circumstances, that the prison beaurucracy will take initiative in the above mentioned proposals and go beyond the terms of reference is in fact asking for the moon. However tangible results can be achieved if the prison officialdom could be persuaded to work according to the letter and spirit of the authority already stipulated in the prison discipline. But to achieve salubrious and beneficent conditions a sincere paradigm shift would be required. It may also be added here that at least the prison houses located in the Provincial Headquarters namely Karachi, Quetta, Lahore and Peshawar must have properly manned and separate but effective **de-toxification centres** for the drug addicts is absolutely essential to combat the increasing drug menace. In view of the increasing number of drug addicts the Federal Government can provide funds to the Provincial Governments to construct Annex in the prison compound to accommodate and treat the addicts in a separate section away from the non-adict prisoners.

D. ROLE OF PRISONS

One who misbehaves
With his slave (prisoner)
Shall not enter Paradise

(HADEES)

152. There are three functions of prisons: **CUSTODY, CARE and CORECTIVE**. The purpose of prisons is certainly custodial but the purpose of custody has to take care of prisoner and apply corrective

measures. The Corrective/Rehabilitation aspect is not visible in the Prison Discipline applicable in Pakistan. The Jail Manual was drafted with the sole object of holding the under trial prisoners or confining the convicted persons. Effort should be made to clear the prisons and not to fill them. The Corrective or Rehabilitation aspect must be introduced with a missionary zeal and efforts should be geared towards after-release welfare of prison population. **Relief, Reclamation and Rehabilitation** should be the logo of new prison discipline. Those leaving the prisons at the end of their terms must return home with the realization that human life is a Divine gift which has to be honoured because it has a meaning and a purpose:-

“Verily Thy Lord is full of
Forgiveness for mankind
For their wrong doing”

Ayat 6 Sura 13 Sura Raad Al-Quran

“Did you think
That We created you
Without any purpose, and
You will not be
Brought back to Us”

Ayat 115 Sura 23 (Al-Muminun)

153. There is however a salutary provision in the otherwise demanding and depressing prison rules, contained in Rule 304, Chapter 12 of Pakistan Prison Rules, 1978. It states that:

“Rule 304.-- when a juvenile prisoner is due for release and required assistance to settle in life, the Superintendent shall send intimation to the Secretary of the District Committee of the Prisoners’ Welfare Society of the district of his residence at least one month before the date of release.”

154. The rights of children have been specifically enumerated in Holy Quran which should be a part of our legal code. Noted below are the provisions where Holy Quran mentions the rights of children in the domain of their sustenance and upbringing, including protection from evil influences, facilities for education, right to life, proper guidance, sympathetic attitude and a host of other things.

“Ayat 233 Sura 2	Ayat 9 Sura 4
Ayat 141 Sura 6	Ayat 40 Sura 14
Ayat 31 Sura 17	Ayat 3 Sura 22
Ayat 74 Sura 25	Ayaat 7-12 Sura 28
Ayaat 13-19 Sura 28	Ayaat 6-7 Sura 65.”

Learned Standing Counsel agrees that when a juvenile prisoner is released there should be some body to guide him and enable him to enter life as a productive unit of society. The Government can consider

amending the rule whereby Probation Officers, particularly in cases of orphan juvenile offenders, are deputed to provide necessary assistance.

155. The fundamental guiding principle of Islamic polity, as enunciated by Holy Quran and Sunnah of the Holy Prophet PBUH, in so far as human affairs are concerned, *is the establishment of Justice and negation of Injustice and Inequity*. The rule appears to be: *Eschew ZULM and foster ADL-O-EHSAN*. This approach is amply corroborated by the fact that the first significant thing in the life of Holy Prophet Muhammad PBUH, while still he was 20 years old, was the convening of Hilf-ul-Fuzul. It was a voluntary organization by a few committed sons of Macca. The commitment made by a member of this voluntary association was that each member would be always ready and come forward for the rescue of victims of high-handedness or tyranny and those who needed succor, support or security.

156. 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 the Holy Quran is a indication that **justice** is almost an article of faith for the Muslims. Quran is not content with the use of the term ADL (Justice) alone but the Holy Scripture, 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.

157. It is in this background that we have examined the various provisions of prison discipline in the matters agitated before us. It is not our obligation alone but the Legislature as well as the Executive is equally bound to erase every such provision which smacks of Zulm. Allah Almighty has at numerous places in the Holy Quran disparaged the element of Zulm. Ayat 279 Sura 2 lays down the principle La Tazleimoon wa la Tazlamoon i.e. **NEITHER DO A WRONG (ZULM) NOR BE WRONGED.** Ayat 57 Sura 3 proclaims that **Allah does not like the transgressors (Zalemeen)** and Ayat 22 Sura 14 conveys a note of caution to the Believers: *A grievous chastisement awaits the wrong doers (Zalemeen).* This Court hopes that necessary steps will be taken by all the Provincial Governments with the active collaboration of the Secretary

Interior. The Secretary Interior and the Provincial Home Secretaries will send a detailed report on the various issues identified discussed in this segment should also reach the Registrar of this Court by 31.01.2010 whereafter the Court will examine the steps taken by the Federal and Provincial Governments in this matter. The case will be taken up again in February 2011 for reconsideration and necessary action.

SEGMENT FIFTEEN

PRISON DISCIPLINE
(ISSUE NO. X)

PART A RIGHTS OF ACCUSED PERSONS/PRISONERS

158. Since this judgment deals with laws relating to prison population so it is meet that the various categories of rights of an accused or a detinue or a prisoner, as recognized by Constitution, Law, Precedents and Deen (Religion), are enumerated at one place and in particular this Judgment in order to appreciate the reason why an elaborate exercise of reviewing the prison discipline has been undertaken by this Court in the Shariat Petitions. The prison population deserves special attention because

every incarcerated individual, due to the prevalent routine, has to suffer invariably on account of delays initially in the completion of police investigation and then disposal of cases before the trial and appellate court.

There have been instances when the appeal was put up at a time when the prisoner had already served the sentence awarded to him by the trial judge whose judgment he had impugned. The appeal then becomes infructuous.

Such a situation is embarrassing for a judge hearing the appeal. It must be appreciated and realized that prison discipline is an integral part of the administration of justice. The current prison practice is already torture oriented. The minimum requirement is that every one must be judged in accordance with law *without delay*.

159. In this view of the matter the rights of accused guaranteed by

a) Constitution and b) other sources are being enumerated below:-.

A. **GUARANTEED BY CONSTITUTION.**

i. Article 4: To enjoy the protection of law and to be treated in accordance with law;

ii. Article 4(2) (a): No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in

accordance with law. The life of a prisoner is as sacred as the life of any person outside the prison compound;

iii. Article 4(2) (b): No person shall be prevented from or be hindered in doing that which is not prohibited in law;

iv. Article 4(2) (c): No person shall be compelled to do that which the law does not require him to do;

v. Article 9 stipulates that no person shall be deprived of life or liberty save in accordance with law. The accused/prisoner also has a right of personal safety before, during and after completion of police investigation and also during the period of imprisonment. Life means a secure life.

vi. Article 10 mandates safeguards as to arrest and detention in its 09 detailed clauses;

vii. Article 11 prohibits all forms of forced labour except compulsory service on account of a punishment for an offence against any law or on account of public purpose. This however does not mean that

constitution has disapproved payment of wages for the labour put in by a prisoner;

viii. Article 12 affords protection against retrospective punishment,

ix. Article 13 affords protection against double punishment and self-incrimination;

x. Inviolability of dignity of man is an inalienable right recognized by Article 14 of the Constitution. The Constitution does not create any exception. The accused or a prisoner has a valuable right to claim freedom from torture under clause(2) of Article 14 of the Constitution. Torture includes mentally or physically uncomfortable feelings;

xi. Article 20 guarantees freedom to profess religion;

xii. Equality before law and equal protection of law is another fundamental right guaranteed by Article 25 of the Constitution;

xiii. Article 25 of the Constitution further guarantees that there shall be no discrimination on the basis of sex alone. Women and children are entitled to better treatment;

xiv. Article 45 of the Constitution confers a right upon a prisoner to apply for grant of pardon, reprieve and respite, remission, suspension or commutation of sentence passed by any court, tribunal or other authority. See also section 401 through 402 C of the Code of Criminal Procedure in this regard;

xv. Article 184 of the Constitution provides a remedy whereby any person (including a prisoner) can invoke the constitutional jurisdiction of the Supreme Court of Pakistan, when a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved and the Apex Court shall have power to make an order of the nature mentioned in the said Article;

xvi. Yet another remedy at provincial level is available to an aggrieved person (including a prisoner) under Article 199 (1) (a) and 199 (1) (b), to invoke the constitutional jurisdiction of a High Court to seek a declaration or a direction against violation of fundamental right;

xvii. Any citizen of Pakistan (including a prisoner) may, under Article 203-D of the Constitution invoke the extra-ordinary jurisdiction of the Federal Shariat Court to impugn any law or provision of law as being repugnant to an Injunctions of Islam and thereby get a declaration that the law or legal provision under challenge is a bad law and hence not enforceable.

B. **REMEDIES AND RIGHTS PROTECTED UNDER LAW.**

xviii. Right of the accused to the initial presumption of innocence unless proved guilty.

xix. Right of participation in investigation conducted by police.

xx. To lead evidence and plead innocence before Investigating Officer.

xxi. Right to plead alibi and adduce evidence to that effect.

xxii. To move senior police officers under section 551 of the Code of Criminal Procedure to present his view point in case the accused is dissatisfied with investigation at the lower level.

xxiii. Freedom from being subjected to threats, promises or influence inducing him to disclose or withhold any matter within his knowledge as contemplated in section 163 of the Code of Criminal Procedure.

xxiv. The right of accused of being informed of the cause of his arrest. Reference section 56(1) of the Code of Criminal Procedure.

xix. The Magistrate has, under section 63 of the Code of Criminal Procedure, the authority to discharge a person after he has been taken into custody. This remedy can be availed of in appropriate cases;

xxvi. The right of an accused, arrested by a police officer, to be produced before the Magistrate without unnecessary delay (not beyond twenty four hours excluding the time necessary for the journey from the place of arrest to the Court of Magistrate). Reference Section 61 of the Code of Criminal Procedure.

xxvii. An accused may be released by officer in charge of the police station under section 169 of the Code of Criminal Procedure when the evidence against him is not sufficient.

xxviii. Cancellation of case against an accused person as contemplated by Rule 247 of the Police Rules, 1934.

xxix. The accused has a right to plead innocence at the time the court takes cognizance under section 190 of the Code of Criminal Procedure.

xxx. The accused has a right to seek acquittal from a Magistrate under section 249 A of the Code of Criminal Procedure at any stage of the case.

xxxi. The accused has a right to seek acquittal from a court under section 265 K of the Code of Criminal Procedure at any stage of the case.

Reference Farrukh Salim vs. The State PLD 1997 Lahore 385

xxxii. The right of participation in the trial. Section 353 of the Code of Criminal Procedure.

xxxiii. The right to retract a confession. Unless corroborated on material particulars it is not prudent to base a conviction in a criminal case on the strength of a retracted confession alone. Reference The State through A.G. NWFP Peshawar Vs. Waqar Ahmad 1992 SCMR 950.

xxxiv. It is the right of an accused that before he is arrested under section 54 of the Code of Criminal Procedure, the police officer must have reasonable information about his possible involvement. Arrest without application of mind is illegal. The police officer must be satisfied that, a) the complaint against him is reasonable, b) that the information about his involvement is credible; and c) there is reasonable apprehension about his involvement. **It is however hoped that the legislature will incorporate an amendment where-under the person arrested would be immediately informed of the grounds of his arrest as well as the right of bail as is conceded in section 50 of the Indian Code of Criminal Procedure 1973.**

Reference is **made to Allah Rakhi Vs. The SHO etc. NLR 2000 Cr. 92.**

xxxvi. The right to plead benefit of Exceptions as enumerated in sections 76 through 106 of the Pakistan Penal Code.

xxxvii. The right to claim identification parade. Article 22 of the Qanun-e-Shahadat Order, 1984.

xxxviii Confession of an accused before a police officer cannot be proved. Reference Articles 37, 38 and 39 of Qanun-e-Shahadat, 1984.

C. **MISCELLANOUS.**

xxxix. Right of being defended by a counsel of his choice as far as is possible. Reference section 340 of the Code of Criminal Procedure as well as section 22(3) of the Legal Practitioners and Bar Councils Act, 1973 read with rules 145 through 158, Chapter XII of the Pakistan Legal Practitioners and Bar Counsel Rules, 1976 and section 40 of the Prisons Act, 1894. **(This is the oldest provision on the subject followed by Code of Criminal Procedure, 1898).**

xxxx. Right of a prisoner to be defended at State expense vide High Court Rules and Orders Volume 3 and Rules 24 of the Federal Shariat Court (Procedure) Rules, 1981 read with Pakistan Bar Counsel Free Legal Aid Rules 1999 particularly when he is a pauper. See also 2002 YLR 3832.

xl. Right of an accused that allegations against him are investigated by an independent agency established under law. It is also expected that the investigating police officer will not be biased.

xli. That the investigation will be conducted in a transparent manner and the version of accused and his evidence or evidence in his support will be duly recorded.

xlii. Investigation will not be shelved and a report by the incharge police station would be submitted before the trial court **without delay** as stipulated in section 173 of the Code of Criminal Procedure.

xliii. The accused also has a right to move the court to seek pre-arrest or post arrest bail under sections 496-498 of the Code of Criminal Procedure.

xliv. The accused may, if the court permits, exercise the option of appearance through counsel as visualized in section 205 of the Code of Criminal Procedure.

xlvi. Freedom that the case of accused shall not be prejudiced at the trial.

xlvii. Right to claim benefit from irregularities which vitiate the trial. Section 530 of the Code of Criminal Procedure.

xlviii. Right to be tried by an independent tribunal.

xlvi. Right to cross-examine witnesses and test their credibility.

Articles 133-134 Qanun-e-Shahadat Order, 1984.

xlix. Right to make a statement without oath and to explain the material points appearing against him in prosecution evidence which tend to incriminate him. Section 342 of the Code of Criminal Procedure. Pieces of incriminating evidence not put to the accused cannot be used against him. PLD 2003 Lahore 217.

l. Right to make a statement under oath. Section 340(2) of the Code of Criminal Procedure.

li. Right to lead evidence/recall witnesses. Sections 231, 540 of the Code of Criminal Procedure.

lii. Freedom from inducement to disclose or withhold any matter within his knowledge. Section 343 of the Code of Criminal Procedure.

liii. Right of being heard at the conclusion of the trial.

liv. Right of compounding specified offences. Section 345 of the Code of Criminal Procedure.

lv. Right to be tried under Juvenile Justice System Ordinance, 2000, if

he is less than 18 years at the time of commission of crime.

lvi. Right to seek pardon. Section 338 of the Code of Criminal Procedure.

lvii. Right to be heard before the pronouncement of judgment both before the trial court as well as appellate court.

lviii. Right to demand that conviction against him cannot be recorded/sustained unless the ingredients of the offence with which he has been charged have been proved beyond reasonable doubt.

lix. Right to seek transfer of investigation in case of partial attitude of the Investigating Officer.

lx. Right of being charged with specific offence and not vague allegations and that the charge should be read and explained to him. Section 227 of the Code of Criminal Procedure.

lxi. That evidence of his bad character will not be led against him unless he leads evidence of good conduct. Article 68 Qanune Shahadat.

lxii. Right to confront a witness with his previous statement.

Section 162 of the Code of Criminal Procedure read with Article 140 of the Qanun-e-Shahadat Rules, 1983.

lxiii. Right of speedy justice/trial as contemplated by High Court Rules and Order Vol. III. The State Vs. Sh. Mumtaz Ahmad and two others 1982 PCrLJ 1284.

lxiv. Right to seek transfer of cases. Sections 526, 528 of the Code of Criminal Procedure.

lxv. Right of appeal/revision. Sections 410, 439 of the Code of Criminal Procedure.

lxvi. Right of appeal before Supreme Court of Pakistan under Article 185 (2)(a)(b)(c)(f) of the Constitution.

lxvii. Benefit of doubt even on one significant point is a judicially accepted right of an accused.

lxviii. Evidence shall be recorded in his presence except as otherwise provided by section 353 Code of Criminal Procedure.

lxix. The right to demand production of evidence that has become available because of modern devices or techniques. Article 164 of the Qanun-e-Shahadat Order 1984.

lxx. Confession of co-accused is no evidence against the accused.

lxxi. And above all **Fair Trial** is the basic right of an accused, Corpus Juris Secundum Vol 88 CJS Edn. 1955 page 88.

A “fair trial” to which an accused is entitled must be one where accused’s legal rights are safeguarded and respected, and there must not only be a fair and impartial jury and a learned and upright judge, but there ought to be an atmosphere of calm, in which the witnesses can deliver their testimony without fear and intimidation and in which attorneys can asserts accused’s rights freely and fully, and in which the truth may be received and given credence without fear of violence. Garret Vs. State 193 So, 452, 458, 187 Miss. 441 Reference page 155, Column one volume 16 WORDS AND PHRASES, 1959 EDITION.

REASONS FOR RECORDING RIGHTS

160. Interests of justice demanded that the rights and freedoms of prisoners be enumerated at one place particularly when the human friendly groups all over the world are highly critical of the manner in which the American and British armed forces are treating prisoners (invariably Muslim by faith) from Iraq and Afghanistan. It is also in our mind that the contemporary standard of judging and assessing a society/State is the respect and commitment it shows towards human rights. Civilized societies are those which respect and honour human freedoms/rights. This is precisely the reason why prison discipline in the West has undergone healthy amendments and legal instruments at the International level have been ratified to safeguard the rights of incarcerated lot. Quaid-e-Azam Muhammad Ali Jinnah, father of the nation, was committed to the cause of human freedoms. He advocated forcefully the issue of human rights, as is evident from the second part of the historic Lahore Resolution of 23 March 1940. The citizenry and the Government of Pakistan is therefore committed to the cause of human rights. Islam enjoins its votaries not only to be conscious of the rights of others but also to adopt an attitude of

compassion for others even though some of them have transgressed. Allah commanded the Holy Prophet (PBUH) to forgive and forbear (even) those who wanted to turn him into a disbeliever (Ayat 109 Sura 2). At another place (Ayat 134 Sura 3) it is ordained that excellent reward awaits those who overlook the faults of others (knowing that Allah loves these who forgive and are benevolent) and those who, when they commit indecency call Allah to mind and implore forgiveness for their sins and who do not persist knowingly in that of which they have been guilty. The Holy Quran proceeds further to prescribe a supplication for the believers (Ayat 119 Sura 23): Pray: Lord, forgive and have mercy (on us), for You alone are the best of those who show mercy. We may recall the incident of Sawama Ibn Asal of Yamama when he was brought before the Holy Prophet (PBUH) as a prisoner and was released without any pecuniary penalty on the third day where after he accepted Islam. (Reported by Bukhari, Muslim and Mishkat).

161. However the report about the living conditions of prison population as indicated in the case of Majeeda Bibi, PLD 1995 Karachi 1,

referred to above, illustrates the point that considerable efforts are required to improve the existing system and prevailing conditions. In fact a duty is cast to review the existing prison discipline for the reason *that Holy Quran exhorts the believers to enjoin what is right and forbid what is wrong*. This social obligation has to assume the form of legislation at human level when the law making institutions make laws in the field of human affairs by forbidding what is harmful for society. Ayat 110 Sura 3 enjoins:-

“You are the best of nations
Raised up for (the benefit of)
Humanity: You enjoin what is
Right and forbid what is
Wrong and believe in Allah.”

This principle is repeated in Ayat 113 of this very Sura as well as Ayat 157 Sura 7, Ayat 67, 71 and 112 Sura 9 of Holy Quran. The Prison Discipline is certainly a subject within cognizance of the parliament and consequently within the ambit of Federal Shariat Court which is bound to uphold the principle of beneficial legislation as ordained by various Ayat of Holy Quran.

A Hadees of Holy Prophet (PBUH) may also be noted:

That is the best of men who disliketh 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 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.

SEGMENT SIXTEEN

PART C JAIL ROITS (Supplementary Issue No. J)

162. Wild outbursts and untoward incidents are not uncommon in prison life. Sometimes planned crimes like hostage taking incidents are also committed by a section of prison population. There is a long history of prison disturbances in South Asia in particular and the world over in general. It is not possible to identify one particular reason why unpleasant situations develop in prison houses as there are a number of factors that influence the inmates of penal complexes. Every mutinous incident in the penitentiary is followed by an official enquiry which usually locates not only the causes of lawlessness but also identifies areas that need curative touch in view of the facts and circumstances of each particular event. One

such incident took place on 25th July, 2003 in District Jail Sialkot when five hardened criminals took nine Civil Judges/Judicial Magistrates as hostages along with four of their subordinate staff besides one Medical Officer and three Assistant Superintendent Jails in the female ward of the prison house. During the rescue operation three Civil Judges lost their life and the five desperados were also killed during the encounter. Two Civil Judges, four jail officers and one female prisoner received injuries and one of the seriously injured Civil Judge expired on 31.07.2003 in the hospital a week after the bloody incident.

163. Ch. Abdul Sattar Aajiz, D.I.G. (Inspection), Inspectorate of Prisons was the Inquiry officer to conduct departmental enquiry. The terms of reference were as follows:-

- a. to probe into the circumstances under which weapons were got smuggled into the jail and could not be detected during searches;
- b. to pin point security lapses because of which judges were taken hostage; and
- c. to recommend measures to avoid reoccurrence of such incidents in future;

164. As a result of the enquiry certain recommendation including strict implementation of existing rules, increasing strength of warders, construction of new jails to avoid consequences of over population in prison houses, supply of electronic security devices and improvement in training facilities of prison staff were made by the Enquiry Officer. Three recommendations deserve attention for our purpose: **firstly** the construction of additional prison houses, **secondly** installation of electronic security devices and **thirdly** implementation of rules without discrimination. Recurrence of Jail riots is an indicator of abject mismanagement. The causes for the jail riots can be attributed to the following factors:-

- a. Most of the Jails of the Province are over-crowded.
- b. Due to over crowding the prisoners experience additional hardship in the already prevailing stark conditions.
- c. The un-hygienic atmosphere causes epidemic diseases which situation irritates the entire population.
- d. Meager allocation of funds slows down development programme with the result that the maintenance of wash rooms suffers invariably. Dirty wash rooms are sources of constant annoyance for the prisoners.
- e. Adjournment of cases by the trial Courts cause frustration among the prisoners. The anger is expressed against the available prisons staff.

f. Delay in disposal of cases as well as resentment due to rejection of bail application by trial Court/appellate Court is reflected by recalcitrant reaction.

g. Shortage of staff as compared to the inflated number of prisoners at the time of emergency makes the Jail administration helpless or weak to control the unruly prisoners.

h. According to Jail authorities the abolition of the punishment chapter No.27 of Pakistan Prison Rules with no adequate alternate keeps on inducing the mischief mongers to ignite temper.

i. According to Jail authorities the NGO's, Media and the civil rights activist encourage the prison population to adopt extreme measures against Jail administration.

j. Non availability of modern security equipments and insufficient arms and ammunition including Rubber Bullet Guns, Tear Gas Guns, Color and Pressure water throwing equipments, Scanners, Metal detectors, close circuit TV's alongwith cameras, walk through gates, wireless base station alongwith wireless sets and walki talki sets.

k. Meager Dietary allowance for prisoners.

l. Inadequate arrangements for the production of prisoners before trial courts due to lack of police escort.

m. Frustration caused by long delays in deciding cases at the trial and appellate stage.

n. Harsh and exploitative attitude of prison staff.

- o. Paucity of medical facilities and necessary medicines and emergency treatment.
- p. Brake-down of electricity and gas supply.
- q. Easy availability of cell phones inside the Jail.
- r. The gradual decline in various chapters of our national life with consequential drug and Kalashnikov culture as well as abductions for ransom has made human existence insecure. The factual position prevailing in our prisons is that there is no emotional relief provided to prison population. The prisoners can have cathartic experience through Plays and other Cultural activities. Better results can be expected if tension is reduced by providing various avenues of mental occupation other than uncompensated hard labour. We must aim at creating paradigms of excellence in the domain of service to humanity in general and assistance to the disadvantaged sections of society in particular.
- s. The prisoner is virtually a pawn in the hands of his captor.

165. However, the latest medical report about the prison population is revealing. According to this report, published in daily Dawn, Sunday Issue of June 28, 2009 at page 13, Column No.2 and 3, a team of medical men from the Mayo and Jinnah Hospitals of Lahore, undertook a screening of prisoners the Central Jail Kot Lakhput and the Camp Jail under the

orders of Chief Justice of Pakistan. Clinical analysis of the blood samples

of 1,756 prisoners revealed the following results:-

“HIV Positive	36
Hepatitis C	236
Hepatitis B	112

The HIV virus, according to the report, was transmitted to the local prisoners from foreign inmates. Another test conducted on a group of 3590 prisoners from the Central Jail Kot Lakhput showed the following results:-

“HIV Positive	18
Hepatitis C	40
Hepatitis B	16

The report described these results as alarming”.

SEGMENT SEVENTEEN

JURISDICTIONAL ASPECTS **(ISSUE NO. X)**

We propose dilating upon three topics in this segment namely:

- A. The Guiding Principles.
- B. The Interpretative Feature
- C. Legal Literature.

PART A

THE GUIDING PRINCIPLES

166. The **Guiding Principles**. The sacred texts contain certain **Permanent Values** which for convenience sake, are being termed as **Guiding Principles**. These principles/values are covered by the scope of the term Injunctions of Islam for the simple reason that values are essential and fundamental for the maintenance and preservation of a progressive egalitarian society according to the Divine Scheme given in the Holy Quran. The Federal Shariat Court, under Article 203D of the Constitution of Pakistan, is required to examine laws on the touch stone of Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet (PBUH). An effort has been made to collate guiding principles from the text of Holy Quran at the first stage. This is however not an exhaustive list as the principles laid down in the Sunnah have not been included for the present.

167. Amendment in certain provision of prison discipline have been suggested by petitioners in different petitions namely Shariat Miscellaneous Application No.21/I of 1995 and others. It is indeed a healthy exercise to examine and analyze provisions of existing laws and to

propose amendments with the clear objective of removing hurdles and thereby making things easy for the people. This is the acknowledged method of development of law. Laws are made for the betterment of human beings. Hardships and difficulties faced by people have occasioned changes in law. Though this process of change is the domain of legislature alone yet the power to examine existing laws on the touchstone of Injunctions of Islam has been exclusively conferred upon Federal Shariat Court under Article 203 D of the Constitution. A reference to clauses 2 and 3 of Article 203 D would be useful:-

- (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.
- (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.

This shows that any custom, law or provision of law, existing on the statute book of Pakistan, can be reviewed by the Federal Shariat Court. This mode of effecting changes in laws has been recognized by the Constitution of Pakistan.

168. However, we are not unmindful of the fact that the laws are framed according to a procedure ordained in the Constitution which power cannot be usurped by this Court. The question of amendments suggested in the various petitions or to put it differently, as to what the law ought to be according to public perspective, is basically a question which is outside the jurisdiction of this Court.

169. The Constitution has very clearly identified the role of separate institutions in relation to the making, the evolution and interpretation of laws. The Parliament/Provincial Assemblies (which includes the President of Pakistan and Provincial Governors) frame legal

instruments, the Council of Islamic Ideology, on being asked, gives advice or makes recommendation for legislative bodies and the Federal Shariat Court examines validity or otherwise of the existing laws and customs on the touchstone of Injunctions of Islam, as laid down in the Holy Quran and the Sunnah and the Superior Judiciary interprets the legal instruments.

170. In this respect it would be useful to mention at this stage that the Guiding Principles and the Permanent Values enshrined in the Holy Book and the Sunnah of the Holy Prophet (PBUH), in particular the Sermons of the Holy Prophet (PBUH) including the sermon of Hujjat-ul-Wida, delivered on 9 Zil Haj 10th Year of Hijrah corresponding to March 632 AD, in Arafaat wherein the entire humanity was addressed, are very much covered by the meaning and scope of the term Injunctions of Islam. These principles may be described as basic human rights/freedoms. The Courts must therefore always keep these principles in view while examining any law or any provision of law challenged before it. These tenets are part of the sacred text and are amply covered by the meaning and scope of the term Injunctions of Islam. These principles, (the Permanent

Values or Guiding Principles) might as well be kept in view by the legislators at the time legislation in matters dealing with MUAMLAAT i.e., human transactions, is on their agenda. These injunctions have been identified in this judgment because, according to article 227 of the Constitution, no law shall be enacted which is repugnant to the Injunctions of Islam. Since fresh legislation in the field of prison discipline has to be undertaken so it was deemed necessary to advert to the scope of the term Injunctions of Islam as well.

171. We have identified certain problems affecting the prison discipline and made proposals for consideration of the Government and legislative bodies. We have done it as part of our duty because Sura 103 Al-Asr proclaims:-

“Consider the time!
The human being,
Most surely is in loss,
Except those
Who believe and do good
And enjoin on each other
What is correct

And enjoin upon each other

Patience (perseverance).

The suggestions and solutions mentioned in this judgment should be taken in the spirit contemplated by Ayaat 1-3 of Sura 103.

172. In order to fully appreciate the meaning and scope of the term Injunctions of Islam, it would be advisable at this stage to refer to some of the **Guiding Principles/Permanent Values** stated in the Holy Quran because the existing laws, or laws to be made in future, have to conform with Injunctions of Islam as per mandate of Article 227 of the Constitution of Pakistan. These guiding principles are also suggestive of a relationship between the HUKM and HIKMAT. However some of these principles can also be termed as the Objectives of Shariah i.e, MAQASID-E-SHARIAH. The purpose of revealing the Injunction was in fact preservation of certain values, freedoms or right which are essential for maintenance of balance i.e. Justice. Justice secures peace and peace become basis of development and smooth evolution and development augurs on egalitarian society. Detailed below are some of the guiding principles/permanent values. The

Ayat and Sura of the Holy Quran have been indicated at the end of every principle.

- i) Preservation of human life: This right is however subject to the right of retribution in the field of administration of justice: Ayat 178 Sura 2, Ayat 5 Sura 32 and Ayat 151 Sura 6.
- ii) Preservation of property: Ayat 188 Sura 2; Ayat 11 and 29 Sura 4;
- iii) Conservation of progeny; Ayat 151 Sura 6; Ayat 205, 233 Sura 2; Ayat 205 Sura 2.
- iv) Freedom from human bondage: Ayat 79 Sura 3.
- v) Equality without Gender Discrimination: Ayat 1 Sura 4; Ayat 35 Sura 33; Ayat 195 Sura 3, and Ayat 13 Sura 49;
- vi) Right of Protest, Representation/Appeal is an accepted remedy which is available in Islamic Jurisprudence: Ayat 148 Sura 4; Ayat 1 Sura 58.
- vii) The right of reputation: Ayat 148 Sura 4 as well as Ayat 11-12 of Sura 49;
- viii) Sanctity of Covenants at Domestic and International level: Ayat 177 Sura 2; Ayat 34 of Sura 17;
- ix) Maintenance of Balance in the social set-up: Ayat 35 Sura 17 and Ayat 152 Sura 6;
- x) Right to Sustenance: Ayat 152 Sura 6; Ayat 6 Sura 11 as well as Ayat 31 of Sura 17. Every individual is under obligation to support himself and his dependents but if he has no means, sustenance is guaranteed for him and his progeny by state or society.
- xi) Justice must be tempered with Mercy: Ayat 90 Sura 16;
- xii) Justice to prevail even though the opposite party is an enemy. Holy Quran mandates that believers must uphold Justice even though it is against their own interest. Ayat 135 Sura 4 and Ayat 8 of Sura 5:

- xiii) Justice is an absolute value. It cannot be circumscribed by conditionalities: Ayat 153 Sura 6; Ayat 29 of Sura 7 and Ayat 135 of Sura 4.
- xiv) Preservation of Human Dignity. Human Dignity is guaranteed as an inborn value as is evident from Ayat 70 Sura 17.
- xv) Right to chastity: Ayaat 2 and 4 of Sura 24; Ayat 23 Sura 12; Ayat 12 Sura 66;
- xvi) No one shall be held responsible for the evil doing of another: Ayat 79 Sura 12;
- xvii) Right to remuneration: Ayat 70 Sura 39 and Ayat 39 Sura 53;
- xviii) Human liberty: Ayat 157 Sura 7 of Holy Quran;
- xix) Unity of human race: Ayat 213 Sura 2, Ayat 32 of Sura 30 and Ayat 19 of Sura 10;
- xx) Freedom from oppression (compulsion): Ayat 256 of Sura 2 and Ayat 99 of Sura 10.
- xxi) Freedom of choice: Ayat 29 Sura 18
- xxii) Preservation of places of worship of different religions: Ayat 115 Sura 2; Ayat 40 Sura 22;
- xxiii) Knowledge is a permanent value: Ayaat 31-33 of Sura 2 and Ayaat 3-5 of Sura 96; read with various traditions referred to in this judgment as well wherein the seeker of knowledge is assured respect and assistance.
- xxiv) Merit must prevail: Ayat 58 of Sura 4, Ayat 19 Sura 46 and Ayat 13 of Sura 49.
- xxv) The bounties of Allah are a free gift for the entire creation: Reference Ayat 20 of Sura 17;
- xxvi) Freedom of conscience (Religion): Ayat 256 Sura 2, Ayat 6 Sura 9, Ayat 99 Sura 10, Ayat 125 of Sura 16 and Ayat 29 of Sura 18;
- xxvii) Right to raise family: Ayaat 3-17 of Sura 4.
- xxviii) Presumption of innocence: Ayaat 12-16 of Sura 24.

- xxix) Freedom from exploitation: Ayat 70 Sura 39 and Ayat 39 Sura 53;
- xxx) Human friendly system stays on the earth and has the capacity to turn fears and apprehensions into harmony, peace, amity and goodwill. Ayat 17 Sura 13;
- xxxix) Equality before law: Ayaat 48,123, 286 of Sura 2 as well as Ayat 15 Sura 10;
- xxxii) Every one is accountable for his deed: Ayat 202 Sura 2.
- xxxiii) Human affairs are decided by mutual consultation: Ayat 38 Sura 42 and Ayat 159 of Sura 3;
- xxxiv) Maintenance of Rule of Law is the primary obligation of Islamic polity: Ayat 25 of Sura 57. Quran refers to three things: Book, Balance and Iron in this verse. The object of the three gifts is: People may stand forth in Justice. These three things symbolize a) the Revelation wherein are contained injunctions which command good and forbid evil, b) Balance i.e, Justice by which individuals get their due and c) Iron stands for the strong arm of law implemented through judicial organ of the State.
- xxxv) Conquest of Universe is human destiny: Ayat 20 Sura 31, Ayat 65 of Sura 22, Ayaat 12-13 of Sura 45, Ayaat 79-80 of Sura 40, Ayaat 32-34 of Sura 14.
- xxxvi) There is no fault in God's creation. Ayat 3 Sura 67; Human being have been created in the best of moulds. It is therefore essential to preserve the creation so that Divine purposes of creation could be achieved. Ayaat 4-6 of Sura 95;
- xxxvii) Ease follows hardship: Ayaat 5 and 6 of Sura 94;
- xxxviii) Allah does not lay a responsibility on any one beyond his/her capacity. Secondly. No one shall bear the burden of another person. Every one is bound to bear the consequences of what he/she has earned. In other words no one shall be held responsible for another person: Ayat 286 Sura 2; Ayat 42 of Sura 7; Ayat 62 of Sura 23 and Ayat 24 Sura 3;
- xxxix) Labour shall not go waste. It must be compensated. Ayat 70 Sura 39. Every one has to be paid in full for what he has done. See also Ayat 39 Sura 53.

- xl) Supremacy of Rule of law: Ayaat 44, 45 and 47 of Sura 5; This is however not an exhaustive list.
- xli. Right to Notice and Explanation before pronouncement of verdict: Ayat 12 Sura 7; Ayaat 32 through 38 Sura 15 and Ayat 61 Sura 17; and
- xlii. Lastly, though in fact the primary principle of Islamic Jurisprudence is the belief that Sovereignty over the entire Universe vests in Allah Almighty alone: Ayat 54 Sura 7, Ayat 40 Sura 12, Ayat 83 Sura 36 and
- xliii. While concluding, for the present, discussion on the guiding principles it will be instructive to refer to Ayat 177 of Chapter 2 which is like a Manifesto for the believers. The translation of the text is as follows:-

“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 the 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.”

The importance of these values lies in the fact that they occur in the Holy Text. These principles were established by Allah in His own Wisdom. These are absolute and inviolable truths made available to

human beings as a Divine gift with the object of evolving balanced societies on this earth. These verities were not known to the denizens of this earth. It is therefore our bounden duty to up-hold these principles and thereby strengthen relationship with the ever Beneficent and Merciful creator on the one hand and build health relationship among the human beings.

We should not loose sigh of the basic principle of our faith that Divine Guidance, in the form of Revealed Text and the Sunnah of the Holy Prophet (PBUH), is the greatest of the varied and continuing blessings given unto human beings on this earth by the creator. These guiding principles/permanent values constitute a veritable mine of knowledge, understanding, wisdom and insight in mundane affairs.

The Holy Prophet (PBUH) had been deputed to enjoin what is good and to forbid the doing of evil. This is now the sacred legacy of the Holy Prophet (PBUH). It is now a Farz-e-Kifayah. The Holy Quran proclaims:-

“And from among you there should be a party who invite (people or men in authority) to do good and enjoin what is right and forbid the wrong, and these it is that shall be successful.

Ayat 103 Sura 3
Ayat 157 Sura 7.

The Federal Shariat Court like the Council of Islamic Ideology is charged with the duty of upholding the Injunctions of Islam so that the process of Amar bil MaarooF on Nahee anil Munkar is initiated. Improvement in the administration of justice is a matter fully covered by this principle of Holy Quran.

A reference to the historic Khutba of the Holy Prophet (PBUH) merits honourable mention of the conclusion of our discussion on the guiding principles:-

THE LAST SERMON

“O People, lend me an attentive ear, for I don’t know whether, after this year, I shall ever be amongst you again. Therefore, listen to what I am saying to you carefully and take these words to those who could not be present here today.

“O People, just as you regard this month, this day, this city as sacred, so regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners. Hurt no one so that no one may hurt you. Remember that you will indeed meet your Lord, and that He will indeed reckon your deeds. The Riba transaction of yore are hereby forbidden.

Beware of Statan for safety of your religion. He has lost all hope that he will ever be able to lead you astray in big things, so beware of following Satan in small things.

O People, it is true that you have certain rights with regard to your women, but they also have right over you. If they abide by your right then to them belongs the right to be fed and clothed in kindness. Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they neither make friends with any one of whom you do not approve, nor commit adultery.

O People, listen to me in earnest, worship Allah, offer prayers five times a day and observe fast during the month of Ramadhan, and give your wealth in Zakat. Perform Hajj if you can afford to.

You know that every Muslim is the brother of another Muslim. You are all equal. Nobody has superiority over other except by piety and good action.

Remember, one day you will appear before Allah and answer for your deeds. So, beware! do not astray from the path of righteousness after I am gone.

O People, no Prophet or Apostle will come after me and no new faith will be born. Reason well, therefore, O People, and understand my words which I convey to you. I leave behind me two things, the Qur'an and my example the Sunnah; and if you stick to both you will never go astray.

All those who listen to me shall pass on my words to others and those to others again; and may the last ones understand my words better than those who listen to me directly. Be my witness, Oh Allah, that I have conveyed your Message to Your people.”

It may be observed here that the analysis of Asbab-e-Nazool (causes of revelation) of a given Injunction may at times be helpful in order to ascertain a) the relationship between HUKM (the Injunction) and HIKMAT (reason behind the Injunction) and b) the scope of the Injunction sought to be interpreted or applied to a given contemporary situation. However if the Asbab-e-Nazool cannot be determined the object before a Judge, a legislative body or an Administrator should be the Maqasad-e-

Shariah because most of the permanent values are in fact the objectives of law.

PART B

THE INTERPRETATIVE FEATURE

173. After scanning through a number of Shariat Petitions moved in this Court, it has been observed that petitioners come out with proposals either to make fresh law in some uncovered field or they propose changes in existing legislative instruments to bring it in tune with the spirit of Islamic teachings as they understand it. It should be by now clear that the power, jurisdiction and function of the Federal Shariat Court under Article 203-D of the Constitution of Islamic Republic of Pakistan is to **“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, hereinafter referred to as Injunctions of Islam.”** The duty “to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect;” or “to compile in suitable forms, for the guidance of Majlis-e-Shoora (Parliament)

and Provincial Assemblies, such Injunctions of Islam *as can be given legislative effect*” vests exclusively in the Council of Islamic Ideology as contemplated by Article 230 of the Constitution of Pakistan. The other institution, which has the exclusive jurisdiction to enact laws in the uncovered field and to introduce amendments in existing laws in accordance with the spirit of Islamic teachings or injunctions, is of course the Parliament/Provincial Assemblies as mandated by the Constitution of Pakistan.

174. The Constitution, however, does not empower the Federal Shariat Court to *initiate legislation in conformity with the spirit of Islam*. The Court cannot travel beyond its prescribed jurisdiction in view of the age-old maxim *Actus Judicarius coram non judice irritus habetur de ministeriali autem a quocnnque provenit retur esto*= A judicial act without authority is void; not so a ministerial act. *Legislation is the function of the Parliament.*

175. Article 227(1) of the Constitution lays down that no law shall be enacted which is repugnant to the Injunctions of Islam and the authority

to bring the existing laws in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah has been assigned to the legislative bodies and making of recommendations and tendering advice to legislative bodies on requisition is the exclusive preserve of the Council of Islamic Ideology. However we cannot loose sight of the fact that whenever a jurisdiction is conferred upon a court or authority to do a certain thing, it is presumed that the power to do all those thing without which the main jurisdiction cannot be exercised is also given. This is what the old Latin legal Maxim means: **Cul Jurisdiction data est, ea quoque concessa esse videnture, sine quibus jurisdictio explcari non potest.**

176. The Court is well within its rights to interpret or redefine the undefined words and terms contained in a provision of law and to suggest ways and means of giving effect to its declaration of repugnancy. It may not be possible for the Federal Shariat Court to initiate or undertake legislation but guidelines for better administration of justice and beneficial legislation can be given at this forum. Reliance may be placed on the case of R.S.N. Co: Ltd Vs. Commissioner, Chitagong Port reported as PLD

1961 Dacca 412 wherein the Division Bench of the Dacca High Court

found support from the well-known legal maxim.

***Boni Judicis est Ampliare Jurisdictionem:** It is the duty of a judge to extend his jurisdiction).*

Broom's Legal Maxims: 10th Edition, Chapter III Page 44

177. In this view of the matter our basic obligation in these Shariat Petitions and Miscellaneous Applications was to examine whether the impugned law or provision of the law was repugnant to any of the Injunctions of Islam which term also includes the Permanent Values and Guiding Principles enshrined in the Holy text. However, the Federal Shariat Court, without declaring any law to be repugnant to Injunctions of Islam, might as well express its opinion on any legal provision or may even approve certain suggestions in the larger interest of justice, fair play and preservation of human rights in the light of Islamic teachings as is clear from Ayaat 1-3 of Sura 103 referred to above. Such an opinion will, however be deemed to be **obiter dictum**. It will be received by the legislature or Executive as judicial opinion of the Federal Shariat Court in the light of Islamic teachings and in that capacity the obiter will have

persuasive value for the relevant authorities which are engrossed in the task of re-drafting the Prison Discipline on the basis of experience gained by the Prison Department and also in the light of various recommendations made by different Committees, Commission and Review Boards over the years at domestic level and the legal documents framed at International level.

178. In so far as the powers, jurisdiction and functions of the Federal Shariat Court as envisaged by Article 203 D of the Constitution of the Islamic Republic of Pakistan are concerned, the Federal Shariat Court has been charged with the duty of examining and deciding “question whether or not any law or provision of law is repugnant to the injunctions of Islam”. These injunctions, according to Article 203D are only those injunctions which are contained in the “Holy Quran and Sunnah of the Holy Prophet (PBUH)”. The scope of the term Injunctions of Islam as used in article 203D is **therefore restrictive in the sense that the scope of the word Sunnah has been limited to the Sunnah of the Holy Prophet (PBUH) alone whereas the scope of the term “Injunctions of Islam” as**

used in Article 227 is comparatively wide because the term used there is Sunnah simplicitor.

179. In this view of the matter we restricted the examination of the impugned laws to the prescribed touchstone and the resultant declaration of legality or otherwise of the various provisions of law was given strictly on the touchstone of (a) a Nass of Holy Quran or (b) a Nass from the Sunnah of the Holy Prophet (P.B.U.H): The Sunnah of the Holy Prophet (PBUH) can be either Qauli, Failee or Taqriri. However if a law or a provision of law takes away or abridges a basic right of a human being, *without reasonable cause*, and thereby causes injury to an individual it can be struck down on the principle established in Ayat 31 Sura 17 of Holy Quran: “And do not kill any one whom Allah has forbidden *except for a just cause*”. 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 unbridled powers to a mundane authority to exercise it against the interests of people. The ultimate authority vests in Allah Almighty alone which authority cannot be challenged.

180. Shariat Miscellaneous Application No.21/I of 1995 also seeks a general survey of laws relating to imprisonment. Roving enquiry into the rightfulness of legal instruments is not the function of this Court. The point of reference is the Injunction of Islam and not what a person feels. Reference in this matter may also be made to the case of House Building Finance Corporation Versus Rana Muhammad Sharif and 4 others reported as PLD 2000 SC 760 at page 765 wherein the Court was pleased to observe:-

“It is painful to note that flagrant violation of law was allowed to be committed and perpetuated for all these years which manifests attitude of the people at the helm of affairs of Islamic values and their commitment to enforce Shariah. Such an attitude will have to be curbed if enforcement of Shariah is to be made a living reality. The concerned quarters will have to exhibit necessary vigilance to check and eliminate such flagrant violation of laws. The Shariat Appellate Bench of the Supreme Court of Pakistan can only examine the relevant law in the light of the Holy Quran and Sunnah”

181. Consequently Shariat Miscellaneous Application No.21/I of 1995 is hereby dismissed on accounts of vagueness and ambiguity of the contents of the said application. However this application made a reference

order, therefore, to ascertain and find out the correct version of prison legislation we sought assistance of the Inspector General of Prisons, Punjab, to secure an amended upto date and duly corrected version of Pakistan Prison Rules. In this process we procured a comparatively authentic book on Prisons Code (Jail Manual) authored jointly by Dr. Abdul Majeed Aulakh, Retired Principal and Muhammad Masood Khan, Principal CJSTI, 2008 Edition published by Kausar Brothers, Lahore. This Manual was then sent to the Inspector General of Prisons with a desire that amendments, if any, made in the Rules after the publication of this book may also be incorporated and returned to us alongwith a short history of amended Rules. We received a reply from the Inspector General of Prisons, Punjab vide memo No. Legal/FSC/2008/20963 dated 28th May, 2008 on the subject Pakistan Prison Code. The said letter is being reproduced as under:-

“Kindly refer to your letter No.F.1 (Addl)/2008-FSC-Lhr dated 24.05.2008 on the subject noted above.

1. It is submitted that subject Pakistan Prisons Code (Jail Manual) has been perused at length. It has been observed that the name/title of the said book i.e. Pakistan Prisons

Code (Jail Manual) is not classified/approved by the Federal/Provincial Government.

2. Brief history of the prisons rules is that a Jail Reforms Conference was held in Islamabad in August 1972, under the Chairmanship of Mr. Mahmud Ali the then Minister of State for National Affairs, Overseas Pakistanis and Prisons, Government of Pakistan. It was resolved in that conference that in order to achieve uniformity of discipline and administration in Pakistan Jails a common Jail Manual be evolved for implementation in all the Provinces. As a result thereof, Mr. Nazir Ahmad Akhtar, the then Inspector General of Prison Punjab, was entrusted with the task of compilation of common Jail Manual in accordance with the recommendations of the Reforms Conference, vide Joint Secretary to Government of Pakistan, National Affairs, Overseas Pakistanis and Prisons Division, Islamabad vide letter No.PW/4/72, dated 19.08.1972.

3. That Mr. Nazir Ahmad Akhtar, the then I.G. Prisons Punjab after a strenuous and laborious work of more than a year evolved a common Jail Manual for the Provinces. This common Jail Manual was duly discussed in the frequent meetings of Inspectors General of Prisons/Directors of Prisons of all the Provinces and after discussions and arguments certain modifications were included. The final draft was approved for publication by the Federal

Government. As Prisons was the Provincial subject the Federal Government in a meeting of the Inspectors General of Prisons/Directors of Prisons of all the Provinces held on 12.04.1976 advised that the Provincial Governments should adopt the draft Manual as far as possible keeping in view their own special conditions and also keeping in mind the fact that there should be uniform treatment of prisoners in all the jails of the Provinces. A difference of treatment of prisoners in one Province affected law and order in the jails in other Provinces and such difference, if any, should be reduced to a minimum.

4. That the common Jail Manual is actually the Pakistan Prison Rules for the superintendence and management of the Prison. These Prison Rules have been approved by the Provincial Government, vide Home Department Memo No. Prs. 1(M) 15/72; dated 06.01.1977 and the Jail Manual, 1955 was superseded by the Pakistan Prisons Rules, 1978 vide Home Department letter No.Prs-1(M)15/72 dated 01.10.1978.
5. It is further submitted that under section 59 of the Prisons Act, 1894 (XI of 1894) the Provincial Government of the each province has a prerogative to make amendments in the Pakistan Prisons Rules, 1978 from time to time. Moreover, the book in hand by Dr. Abdul Majeed Aulakh, (Rtd.) Principal Central Jail, Staff Training Institute Lahore is

almost upto date except rule 545-A, which has recently been inserted in the Pakistan Prisons Rules, 1978 to the extent of the Province of Punjab for the performance of Conjugal Rights to those convicted prisoners who's terms of sentence exceeding 05 years".

It is on the basis of this duly corrected Jail Manual and constant touch with library of Federal Law Ministry that we have been able to examine the current Prison Discipline. Some mechanism should be evolved to ensure supply of correct version of laws to the Courts, the legal community and the litigants as all of them are handicapped without books containing upto-date correct substance of the law.

SEGMENT EIGHTEEN

OFFENCES AND PUNISHMENTS **(SUO MOTO)**

184. We took up on our motion the issue of Prison Offences and the Penalties provided for the Prison Offence. Chapter 23 of the Prison Rules deals with Offences and Penalties. A bare perusal of some of these rules show that they are not only harsh in nature but are also humiliating

and hence violative of the principle of human dignity espoused by Islamic tenets. We are given to understand that proposals for necessary amendments have been initiated but there is no progress in this respect so far. We are not sure by when the proposed amendments will be incorporated in the Jail Manual after necessary approval. We were not asked by representatives of Federal or Provincial Government to await the result of any amendments that might as well be under consideration of the Government. In this view of the matter we are proceeding with examination of objectionable provisions contained in Chapter 24. The said disagreeable provisions are being reproduced as under:-

Rule 583: The following punishment provided in section 46 of the Act shall be considered minor:-

Minor Punishments

(6) Cellular confinement for not more than seven days.

Explanation 1. Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with but not from sight of other prisoners.

(7) Separate confinement for not more than fourteen days.

Explanation Separate confinement means such confinement with or without labour as secludes a prisoner form communication with, but not

from sight of, other prisoners, and allows him not less than one hour's exercise daily and to have his meals in association with one or more other prisoners.

(8) Imposition of handcuffs.

Explanation 1. -- Handcuffs which may be imposed by way of punishment for prison offences shall be iron handcuffs (swivel with spring-catch handcuffs) weighing not more than one Lb. each.

Explanation 2. -- Handcuffs may be imposed on the wrists in front by day or by night for a period of not more than twelve hours at a time, with intervals of not less than twelve hours between each period and for not more than four consecutive days or nights.

Explanation 3. -- A women or civil prisoner is not liable to the imposition any forms of handcuffs; and

(9) Imposition of link fetters will be for more than thirty days.

Explanation 1.-- Link fetters shall be composed of a chain and ankle rings. The total weight of such fetters including the ankle rings shall not exceed (1Kgr. 365 Gr) and the chain shall not be less than 61 Cm. in length.

Explanation 2.-- A period of at least ten days must elapse after removal of any kind of fetters imposed as punishment for a prison offences before these can be re-imposed as a punishment for another prison offence, whether of the same kind or not.

Explanation 3.-- A women or civil prisoner is not liable to the imposition of any form of fetters.

Major Punishments

Rule 584.-- The following punishments provided in Section 46 of the Prisons Act, 1894, shall be considered major punishments:-

(3) Cellular confinement for a period exceeding seven days.

Explanation.-- The maximum period for this punishment is fourteen days and an interval of not less than during the period of confinement must elapse before prisoner is again sentenced to cellular confinement.

(4) Separate confinement for a period exceeding fourteen days, but not exceeding three months.

Explanation.-- The previous confirmation of the Inspector-General is required when the period exceeds one month.

(5) Link fetters if imposed for more than 30 days but not exceeding three months.

(6) Bar fetters.

Explanation 1. -- Bar fetters shall be composed of two iron bars joined together by a welded link and attached to ankle rings. The total weight of such fetters including the ankle rings shall not exceed five lbs. and each bar shall not be less than 50 Cm-8 Mm in length.

Explanation 2.-- The maximum period for which bar fetters may be continuously imposed is three months.

Note.-- Punishment fetters should be removed when a prisoner wearing the same is to be produced in Court.

(7) Whipping.

Restriction to whipping

Rule 588.-- (i) The punishment of whipping shall be reserved for serious offences Islamic Hudood and, if inflicted, shall be severe enough to

act as a real deterrent. The total number of stripes shall never be less than fifteen. In case the Medical Officer certifies that a prisoner is unable to bear this number, some other punishment shall be awarded.

(ii) The punishment of whipping shall be inflicted only for mutiny or for conduct seriously affecting the discipline of the prison or for incitement thereto, for serious assaults on public servants or visitor or when other punishments have failed to deter him from commission of offences of specially grave nature.

(iii) A record shall be maintained in the Punishment Register as required by Section 51 of the Prisons Act, 1894, of every case punished with whipping. The Superintendent shall promptly submit a special report about the facts of the case and the award of this punishment, to the Inspector-General.

(iv) The punishment of whipping shall not be inflicted on special class prisoners except with the permission of Government.

Medical Officer to certify fitness for whipping

Rule 589. -- (i) The punishment of whipping shall not be inflicted unless the Medical Officer certifies that the prisoner is in a fit state of health to undergo such punishment.

(ii) If during the execution of a sentence of whipping, the Medical Officer certifies that the prisoner is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped (Section 394 of the Code of Criminal Procedure Code, 1898).

Mode of inflicting punishment of whipping

Rule 590.-- (i) No punishment of whipping shall be inflicted in instalments, or except in the presence of the Superintendent and Medical Officer or Junior Medical Officer.

(ii) Whipping shall be inflicted on the buttocks with a light rattan not less than half an inch in diameter, and in the case of prisoners under sixteen years of age, it shall be inflicted, in the way of school discipline , with a lighter rattan, (Section 53, Prisons Act, IX, 1894).

Explanation 1.-- To prevent undue laceration of the skin, a piece of thin cloth soaked in some antiseptic solution shall be spread over the prisoner's buttocks during the operation. Such cloth shall be thoroughly washed and afterwards soaked in an antiseptic solution before being again brought into use, so as to obviate the possibility of disease of any kind being conveyed from one prisoner to another.

Explanation 2.-- The drawing stroke which is calculated to lacerate the skin is prohibited.

Limits of stripes

Rule 591. -- In case of prisoners of over sixteen years of age, such punishment shall not exceed thirty stripes, and in case of prisoners under sixteen years of age, it shall not exceed fifteen stripes.

Act VII of 1996 was introduced on 15 April 1996 to abolish and restrict the punishment of whipping. Sections 2 and 3 of the said Act read as follows:-

“2. **Definition.** -- In this Act, unless there is anything repugnant in the subject or context, the expression “had” means the punishment of crimes laid down in the Holy Quran and Sunnah.

3. **Abolition of punishment of whipping.**-- Except in cases where the punishment of whipping is provided for as had, the sentence of whipping provided under any law, rule or regulation for the time being in force shall stand abolished:

“Provided that where, on the commencement of this Act, the sentence of whipping awarded by any Court or Tribunal has not been executed, such sentence of whipping shall stand remitted.”

185. It is therefore evident that rules permit the Superintendent to impose penalty by way of a) cellular confinement, b) imposition of link bars c) imposition of handcuffs and d) imposition of link fetters are part of existing Prison Discipline. If a prisoner is handcuffed or is in fetters *within a cell* as a consequence of the award of punishment by the Superintendent, for violating a prison offence, then he is precluded from a) performing ablution, offering compulsory prayers five times a day, b) recitation of Holy Quran, c) reading and writing, d) and is also handicapped in answering the call of nature apart from e) facing undue difficulty in performing Tahaarat. This practice is violative of a large number of

injunctions of Holy Quran and Sunnah which need not be cited as they are numerous and well known.

186. Imam Muslim quotes a tradition on the authority of Abu Huraira RA wherein it is stated that the Holy Prophet (PBUH) strictly prohibited the believers from transgressing or treating another person with contempt or dishonouring him. Even to consider another person to be insignificant is a sin according to this tradition. We have already referred to a tradition in this judgment wherein it is stated that every human being is answerable to Allah for the manner in which he treats those who are under his control and supervision. Ayat 11 of Sura 49 (Al-Hujurat) stipulate that addressing another human being, man or woman in a debasing manner should be scrupulously avoided. The translation of the Ayat is as follows:-

“(10) Surely the believers are none but brothers unto one another, so set things right between your brothers, and have fear of Allah that you may be shown mercy.

(11) Believers, let not a group (of men) scoff at another group, it may well be that the latter (at

whom they scoff) are better than they; nor let a group of women scoff at another group, it may well be that the latter are better than they. And do not taunt one another, nor revile one another by nicknames. It is an evil thing to gain notoriety for ungodliness after belief.

In this background it is clear that the provisions in the Jail Manual, being contrary to the letter and spirit of the aforesaid Injunctions of Islam, have a debasing, demeaning and a negative effect on the prisoners. It violates human dignity. No right of appeal is granted against such an inhuman penalty. Consequently we declare sub rules 6,7,8,9 of Rule 583; sub rules 3,4,5,6 and 7 of Rule 584, Rules 588; 589, 590 and Rule 591 in entirety contained in chapter 23 of Prison Rules to be violative of Ayat 43, 110 of Sura 2; Ayat 43 of Sura 4 and Ayat 6 of Sura 5 as well as Ayat 1 Sura 58 (Al-Mujadalah) of the Holy Quran. This declaration will take effect from 01.12.2009. It is hoped that necessary provisions will be incorporated and a right of appeal before an independent tribunal will also be provided to the accused prisoner against major offences. The Inspector General of Prisons

of each Province shall intimate in writing, through the Registrar of this Court, by 31.12.2009, about the grant of right of appeal. In case right of appeal is not granted the case will be reviewed in February 2010 to examine the desirability of declaring the entire Chapter 23 of the Pakistan Prison Rules, 1978 as violative of Injunctions of Islam and the judicial precedents.

187. We cannot help observing that the right of appeal against the penalty imposed upon a prisoner by Jail authorities for alleged violation of prison offence was intentionally not conceded to the prisoner even though the Federal Shariat Court in re The Civil Servants Act (LXXI of 1973) reported as PLD 1984 Federal Shariat Court 34 as well as in the case of Dr. Muhammad Aslam Khakhi and others versus Government of Punjab and others PLD 2005 FSC 03 had, over a period of two decades, held that right of appeal is inherent in Islamic system of administration of Justice. Another precedent of the Apex Court, Pakistan Versus Public At Large reported as PLD 1987 Supreme Court 304 may also be perused on this point. This

jaundiced and inane attitude of administration towards detenues is an instance of clear negation of Article 37 of the Constitution as well.

188. The Provincial Governments should therefore make provision for incorporating a right of appeal in Chapter 23 of the Pakistan Prison Rules as well in cases involving major penalties or where more than one penalty is sought to be imposed. The forum of appeal should be the Sessions Judge of the District in whose territorial jurisdiction the penalty is imposed. The rule should also provide that the punishment will not be executed till the disposal of appeal. By providing a legal remedy by way of appeal, the authority awarding the penalty will be under an obligation to frame a charge, record evidence and write a well reasoned order after recording statement of the answering respondent.

SEGMENT NINETEEN

PRISONER'S PROPERTY

189. In this part we would take up, on our motion, examination of Rule 84 occurring in Chapter 4 entitled "Prisoners Property" in the Pakistan Prison Rules. The rule reads as follows:-

“Rule 84.-- Cheques may be issued by the prisoners while confined in prison on the following conditions:-

- (a) A cheque for not more than 5000 rupees will be allowed at one time once a week for maintenance of the dependents of the prisoner.
- (b) The signature of the prisoner will be duly attested by the Superintendent.
- (c) If a cheque for more than 5000 rupees is required at any time, the relatives of the prisoners should get a written permission from the [District Coordination Officer]
- (d) On no account a prisoner should be allowed to run a business by issuing cheques during his term of imprisonment.
- (e) The cheque book shall remain in the custody of the Deputy Superintendent.

We consider these provision to be violative of the various Injunctions of Islam as enumerated in Ayat 60, 168, 172 and 187 of Chapter 2; Ayaat 4 and 88 of Sura 5; Ayaat 141-142 of Sura 6; Ayat 160 Sura7; Ayat 14 Sura 16; Ayat 81 Sura 20; Ayat 28 Sura 20 and Ayat 15 Sura 34 of Holy Quran which makes it abundantly clear that every person is entitled to use his income in any lawful pursuit /occupation/trade that he likes. It is also the legal responsibility of every believer to defray the expenses of his wife and children. No law or a provision of law can abridge or adversely affect the legal responsibility of a prisoner to maintain his family. The cheque book of a prisoner may be retained in safe custody and in order to ensure the

genuineness of the cheque issued by a prisoner, the Superintendent or Deputy Superintendent of prison can be authorized to counter sign the cheque issued by the prisoner but the condition of seeking permission from District Co-ordination Officer for an amount exceeding Rs.5000/-, as visualized by clause (c) of Rule 84, is an unwarranted clog on the exercise of a right which, according to the Holy Quran is an innate ingredient of the legal capacity of an adult. However it should be borne in mind that cheques can be issued as and when the prisoner wants provided the amount of money lying in the Bank is not subject-matter of any offence like cheating, theft, burglary or some other illicit means. An accused or a convict involved in other offences would be entitled to the concession of issuing cheques or giving advice to the financial Institution/Insurance Companies.

190. In this view of the matter we declare rule 84 to be violative of the Injunctions of Islam because this Rule, instead of providing facilities creates difficulties for the internees which hurdle in itself is violative also of the already quoted tradition of the Holy Prophet (PBUH) in which the Muslims have been directed to create conditions which make things easy

for the people rather than difficult. It is violative of the Principle of Usar and Yusar as enunciated in Ayat 185 Sura 2 and Ayaat 5 and 6 of Sura 94 of the Holy Quran. This provision is an un-necessary obstacle in earning Rizk-e-Halal which is the fundament right of every human being. The Holy Quran exhorts believers to earn livelihood through legitimate means. This provision shall cease to have effect from 1.12.2009 during which period necessary amendments or deletion may be made in Chapter 4 of the Prison Rules.

SEGMENT TWENTY

PART-A CLOSING REMARKS

191. In this segment we will consider the following issues.

- A. Deficiencies of Prison Manual
- B. Uncompensated Labour
- C. The Agreed Upon Matters.

A. DEFICIENCIES OF PRISON MANUAL

192. Before we part with this case we cannot help observing, though painfully, that the prevailing prison discipline lacks some basic

requirements. Drastic amendments are needed to make the existing Jail

Manual a real human friendly document. We have noticed inter-alia the

following aberrations in the prevalent prison discipline:-

1. Absence of Reformatory, Correctional and Rehabilitative schedule;
2. Malnutrition of prisoners.
3. Continuous exposure of the prisoner to hot and cold weather throughout the period of detention.
4. The detinue has no option but to live in unhygienic atmosphere without adequate medical aid during the entire detention period.
5. Indifference of Prison Staff towards the religious obligations of prisoners;
6. Uncompensated labour and that too beyond eight hours as contemplated by Rule 812 (barring the Province of Sindh and NWFP).
7. Ardous parole system;
8. Tardy remission system;
9. Complete denial of conjugal visits;
10. Absence of judicial supervision over prisons;
11. Humiliating procedure of interviews;
12. Delayed disposal of trials as well as appeals and mercy petitions.
13. Highly controlled and restricted communication with outer world even during emergencies;
14. Inability to seek judicial remedy against punishments awarded by prison authorities;
15. Denial of facility to regulate private business through cheques.
16. Exploitation of prisoners at every step;

17. Humiliation of the prisoner from the time a prisoner enters the prison house;

18. Insulting Parade system;

19. Corrupt practices.

193. Efforts should therefore be made by policy makers to rationalize the penal system with particular reference to prisons, prisoners, and prison discipline. Prisons are being used only for the purpose of awarding physical pain and punishment in addition to mental torture. The theory that prison regime should be punitive and humiliating must surrender now in favour of a human friendly system where prison should be developed into institutions for shaping prisoners into responsible and responsive citizens. Mechanical infliction of imprisonment as a mode of standardized punishment irrespective of the socio-economic conditions of an offender has for sure, been a completely unsuccessful experience in South Asia during the last 115 years of the prison history starting from the first prison legislative instrument, namely: The Prisons Act, 1894. It is also a disturbing experience that a vast majority of prisoners belongs to the poor

section of our society. This hard reality of our social life poses a challenge to the administration of justice in Pakistan.

B. UNCOMPENSATED LABOUR

194. The element of uncompensated labour is an extremely regrettable feature of Prison history in the sub-continent. Over a period of decades the prison population has been continually exploited by the white rulers who had virtually converted the local prisons into concentration camps. All huge projects like digging of a complicated canal system spread over hundreds of kilometers, the raising of jungles, constructing secretariats and other structures for official use was the un-compensated contribution of generations of prisoners. If the working hours put in by succeeding generation of detainees are converted into wages payable in cash extending over these long decades, it will reveal a staggering figure.

The same unfair trend and high handedness is persisting unabated notwithstanding the fact that this practice violates the Injunction of Islam.

The Prison officialdom must realize that compensation for labour is as vital as is the monthly salary of any government servant. Steps should therefore

be taken to initiate a judicious system in this neglected field. Concern must substitute apathy.

195. Section 53 of Pakistan Penal Code 1860 contemplates ten types of punishments to which offenders are liable. The Eighth category is imprisonment which is of two descriptions, namely:-

- (i) Rigorous i.e. with hard labour;
- (ii) Simple;

According to Appendix-A of the Pakistan Prisons Rules 1978 rigorous imprisonment is further classified as under:-

- (i) Hard labour;
- (ii) Medium labour;
- (iii) Light labour

Each classification contains a list of various kinds of labour to be undertaken by a prisoner in that category. Under rule 812 of Pakistan Prisons Rules 1978 read with section 35 of the Prisons Act, 1894 no prisoner shall be asked to undergo **labour for more than nine hours on any day except in emergencies** with the written sanction of the Central

Jail Superintendent. It is worth noticing that the *concept of monetary compensation for hard, medium or soft labour undertaken by prisoners during imprisonment is alien to prison discipline.* However under Rule 199 a prisoner, sentenced 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.

196. Ordinarily remission to be awarded to prisoners is on the following scales.

- (a) Two days per month for thorough good conduct and scrupulous attention to all prison regulation.
- (b) Three days per month for industry and due performance of the prescribed daily task.

Ordinary remission may also be awarded to a prisoner, other than a prisoner employed on prison service, as specified in the table.

Compensation in cash is never paid to any convicted prisoner in lieu of the hard labour put in by him. Prisoners are at best entitled to paltry remissions alone. However, in cases where Prison industry is leased out to private

sector/contractor, the compensation in cash can be given to a prisoner for the hard labour which however does not exceed Rs.15/- per day. However in the case of carpet weaving fields, a sum of Rs.40/- per prisoner per day may be sanctioned for Central Jail Faisalabad. Payment of this meager amount is clear exploitation. This sort of treatment is violative of:

- | | |
|-------------------------|--------------------------|
| i. Ayat 188 Sura 2, | ii. Ayaat 29, 161 Sura 4 |
| iii. Ayat 34, Sura 9 | iv. Ayat 70, Sura 39 |
| v. Ayat 39, Sura 53 and | vi. Ayat 90, Sura 16. |

Reference to Sunnah would also be useful. In section No.826 Chapter 533 Book of Ijara, Sahih Bukhari, it is reported on the strength of Abu Huraira R.A. that the Holy Prophet (PBUH) will oppose three categories of persons firstly those who, while making a promise, used his name as a surety, secondly those who sell a free man as a slave and *thirdly those who exacted work from a worker but did not pay him his wages.*

197. It will not be enough to abolish the system of uncompensated labour but steps will have to be taken to devise a methodology whereby uninterrupted work is provided to the prisoners and payments for the work done is also made regularly.

198. Such an exercise would not be without a policy decision at Government level and its incorporation in the Prison Rules. It could be a three pronged strategy. The first step would be to make a table of various types of jobs that could be undertaken by prisoners within the prison precincts. The purpose of this table would be to allocate work to each according to his proclivity. The wages of each category of work to be fixed according to prevailing market rates. The second step would consist of dividing the wages into three parts. One portion, not more than ten percent of monthly income, could be deposited in his name with the Prison Canteen, to enable him to defray expenses of personal nature. Forty percent of the monthly income could be paid to the wife or children of the accused and in case he has no dependent then the ninety percent of the monthly income could be invested in the Islamic Insurance so that the prisoner gets a handsome amount at the time of his release to help him enter the mundane life-cycle with confidence. The third step could be a scheme wherein the Government compensates the complainant or aggrieved person, at the time of the verdict of the last Court and then recover the

same amount from the amount of money accumulated with the Insurance company.

C **THE AGREED UPON ISSUES**

199. A general discussion during the course of arguments took place on 21.05.2008 on the ten consensus issues framed by this Court on 8.2.2008. These issues have already been noted in the earlier part of this Judgment. The general agreement of the learned counsel of all the parties on these issues is reflected in the following terms:-

- i. Facilities be provided to married prisoners to perform conjugal rights within and without the prison precincts depending upon the nature and type of convict/prisoner and/or his capacity to provide satisfactory sureties for his return. The representative of Prison Department brought to our notice an amendment effected in the Pakistan Prison Rule by Government of the Punjab with effect from 03May 2007. Rule 545-A Special Meetings was added. Similarly the Government of NWFP vide Notification printed in Gazette on 5.5.2005.
- ii. The general superintendence of the prison precincts should, from the administrative point of view, be under the control of male staff while female staff should perform general duties in the prison cells where female prisoners are lodged. This is in fact the prevalent practice. However extra care should be taken in so far as female and juvenile prisoners are concerned.
- iii. The question of classification of prisoners into A, B and C class will be determined in this judgment after a detailed

discussion in the light of Islamic Injunctions and judicial decisions.

- iv. Grant of remissions of sentence on special occasions is a prerogative of the Government which discretion cannot be controlled by judicial decisions. The Courts can only make observations and identify certain guiding principles for the administration to consider issues which affect human beings in the larger interests of justice, equity and fair play. There are certain categories of convicts who are denied the concession of remissions on special occasions but ordinary remissions under Chapter 08 of the Rules on account of good conduct and scrupulous adherence to all prison regulations, blood donation, surgical sterilization, passing an examination etc. are granted to all categories of the convicts. However Islamic teachings favour concession and relief to the prisoner and the authorities might consider grant of remission to all categories of prisoners/convicts on festivals, auspicious and special occasions. A few days relief to a prisoner means a valuable gift of release and liberty a few days before the appointed date.
- v. Whether financial assistance should be provided to the family of poor prisoners is again an administrative measure and thus beyond the jurisdiction of the Federal Shariat Court. No doubt a prisoner is unable to make a living for his family and during the period of his incarceration his dependents do suffer hardships of different types. It has been argued that millions of citizens need financial help and why should special allowance be made for dependents of a prisoner. The answer is simple. The prisoner has been deprived, by operation of law, of the right to earn livelihood. He is not eschewing work by choice. The hard labour done by him in the prison is almost uncompensated. Protection of family as contemplated by article 35 of the Constitution read with articles 37 and 38 lends

support to the contention that the State should provide basic necessities of life to those who are **permanently or temporarily unable earn their livelihood**. Zakat funds can be utilized to feed the unemployed dependents of prisoners.

- vi. The question of condemned prisoners is indeed a problem that needs immediate attention of the Government. A convict, who has been sentenced to death by the trial court immediately, upon the pronouncement of judgment, becomes a condemned prisoner and consequently loses all those paltry privileges which are admissible under the rules to ordinary convicts/prisoners. The fact of the matter is that the verdict of guilt returned by the Sessions Judge has to be confirmed by the High Court before it is executed, and sometimes it takes a few years before the confirmation or otherwise of capital punishment takes place at the High Court level or his appeal or mercy petition is decided by the apex court or President of Pakistan. There are cases when the death sentence awarded by the trial court is not confirmed by the High Court and the convict is either acquitted or lesser penalty is imposed. Even after confirmation of death sentence by the High Court the convict has a right to move the apex court and seek acquittal or conversion of death sentence into life or lesser penalty. Even after rejection of the appeal from the Supreme Court of Pakistan the convict has a right to move the President of Pakistan for remission under Article 45 of the Constitution in case of Taazir. In the case of Qisas, however, the Wali of the deceased has a right to forgive or demand compensation. This right continues till such time that the execution of the death sentence does not take place. The survey of the data relating to the time spent in appeals etc. shows that sometimes a decade or more intervenes the initial judgment of the trial court and the final decision under Article 45 of the Constitution. During this entire period the convict has to undergo a strenuous

- schedule of surveillance which makes the life of a condemned prisoner miserable.
- vii. Section 382(b) of the Code of Criminal Procedure provides that where a court decides to pass a sentence of imprisonment on an accused for an offence it shall take into consideration the period, if any, during which such accused was detained in custody for such offence. No doubt the sentence follows the judgment but the fact of the matter is that the period of detention of the accused during police investigation and trial is also related to the same offence for which he is awarded sentence after conviction by court. Amendment should be made in the law in the interest of justice.
- viii. This issue was dropped.
- ix & x These two issues pertain to the realm of social justice and should be left to the State functionaries to take necessary steps for providing facilities and giving effect to the programme of rehabilitation of convicts during internment and after release.
- xi. It was considered expedient that the Prison Department in Pakistan should be brought under administrative control of Justice Department to check political interference at all levels in the affairs of the prisons. Once the prison department comes under Justice Department the main source of irritation i.e. the appointment of Inspector General of Prisons would be regulated in accordance with the provisions contained in Chapter 36 of the Pakistan Prison Rules. In such an event the question of ignoring provisions of Chapter 44 and rule 1106 in particular of the Prison Rules would not arise.
- xii. As regards other demands of prisoners, the learned counsel submitted that facilities within permissible limits be granted to the prisoners. Radio and Television facilities, can be made available in common rooms so that prisoners not interested in watching a T.V. or listening to a Radio placed in a crowded barracks are not put to inconvenience. Cooking privately may

not be allowed in the larger interest of safety of prison population and the prison house itself. Facility to get home cooked food is usually not denied in the jails. The other matters have already be taken note of by the court.

200. Dr. M. Aslam Khaki, animated by noble sentiments of service to the neglected section of the society had initiated proceedings in propria persona as petitioner in the two Shariat Petitions. He alongwith other learned counsel argued the case on the reframed issues as well as matters on which notices were issued by this Court on its motion. Learned counsel for the Federation and Provinces as well as representatives of the Prison Department were available throughout to assist the Court on the various matters arising out of the controversy. We are also appreciative of the assistance provided by Sardar Abdul Majeed, Standing Counsel for Federal Government who was readily available to place the point of view of the Federal Government and Provincial Governments before us. He had been appearing regularly in this court since 29.04.2004. After hearing main arguments it was however decided on 21.05.2008 to adjourn the hearing of these petitions with a direction to the office to send a request to four nominated Juris-consults either to come in person to assist this Court

on the issues under deliberation or send their written comments and arguments for consideration of the Court. Dr. Allama Muhammad Hussain Akbar from Lahore and Dr. Yousaf Farooqi from Islamabad attended the proceedings as Jurisconsults in person and made submissions on the issue of betterment of prevailing prison discipline. The issues involved in these proceedings were not simple. It took us some time to examine the various questions from different angles. Fresh notices had to be issued in June, 2009. This is the reason for some delay in disposal of the case particularly after June, 2009.

201. We also record our appreciation for the work done by Human Rights Organizations in Pakistan which, inter alia is committed to the goal of betterment of Prison population and Prison Discipline. Mr. Mehboob Ahmed Advocate, representing the Human Rights Commission of Pakistan appeared in person to apprise this court of the commendable work done in the field of human rights. Similarly we appreciate the contribution of the two jurisconsults Dr. Allama Muhammad Hussain Akbar and Dr. Yousaf

Farooqi who attended proceedings in person at Court's call and dilated upon issues under consideration of this Court.

202. A word about the presumption *regarding knowledge of law*.

Every one is presumed to know the law. Ignorance of law is no excuse as the maxim goes. However in a country like Pakistan, where the literacy rate is low inspite of constitutional provisions contained in Articles 31, 37 and 38, it is the bounden duty of the Executive to take effective steps to apprise the citizens of their rights and obligations in the language which the people understand. This could be done conveniently now because of the availability of print and electronic media in all the national languages of Pakistan.

203. Law does not consist of the text or the terminology of the commandment but it also includes the wisdom believed the rule, the philosophy of the principle and the reason for the regulation. The Holy Quran, in Ayat 12 Sura 2 refers to the supplication of Syedna Ibrahim A.S, at the time the foundation of Holy Kaaba was being raised by the illustrious father and his celebrate son Syedna Ismail A.S, in the following words:-

“Our Lord! And raise in them
an Apostle from among them
who shall recite to them
Thy communications and teach
them the Book and the wisdom,
and purify them; Surely Thou
are the Mighty, the wise.

The same point is eloquently repeated in Ayat 2 Sura 62 in the following words:-

“He it is who raised among
the Meccans an Apostle from
among themselves, who recites
to them His communications
and purifies them and
teaches them the Book and
the Wisdom, although they were
before certainly in clear error.”

It therefore clearly means that law and reason are inter-related.

204. The Holy Quran vide Ayat 15 Sura 17 (Bani Israel) lays down
a principle:-

“And when We wish to
destroy a town, We
send Our commandment
to the people of it

This principle is a clear pointer to the fact **that before a penalty is imposed the transgressor should have been forewarned about the**

consequence of his lapses of commission or omission. The point that emerges is that it is the right of a human being to know before he is obliged to do something and to secure a balanced system the citizen should be enabled to know the law or rules. It certainly involves the duty to educate the masses as is clear from the two Ayaat of Holy Quran referred to above. The Prison Rules as well as necessary information about the rights and responsibilities of prisoners should be readily available in the prisons. In fact an information chart of a comprehensive nature could be affixed in every ward or barrack. Such a measure will certainly cause apprehensions in the mind of prison official but it will, without fail, go a long way to lessen the degree of fear among the prison population. This should not deter the authorities from relaxing the stern prison atmosphere. The process of informing people about their legal obligation can be initiated in right earnest from the prison population. Clause (2) of Article 5 of our constitution demands obedience to Constitution and law. Attempts be made to enable people to know their laws. Ayat 43 Sura 16 prompts the believers to find out truth if they donot know. It might as well be stated here that “to

know” is a basic right of human being. The Holy Quran, in Ayat 186 Sura

2 (Al-Baqra) concedes to the human beings the right to raise question about

Allah. In the same verse the Holy Quran responds by saying:-

“I am very near; I answer
The prayer of the supplicant
When he calls on Me, so
They should answer My
Call and believe in Me.
That they may find
The right way.

SEGMENT TWENTY ONE

C O N C L U S I O N S **(ORDER OF COURT)**

When God created the creation He wrote a book, which is near him on the Sovran Throne; and what is written in it is this: **Verily My compassion overcometh My wrath.**

(HADEES-E-QUDSI)

1. We took Suo Moto notice of the unfortunate and inhuman living conditions of the Condemned Prisoners and discussed the matter in detail in Segment Thirteen of this judgment. For reasons mentioned therein we declare the portions of Rules 329 through 330 forming part of Chapter

14 of the Pakistan Prison Rules, 1978, entitled *Prisoners Under Sentence of Death* and Section 30 of the Prisons Act, 1894 which authorize the Prison Authorities to treat a convict as condemned prisoner before the sentence of death become executable to be repugnant to the Injunctions of Islam. First of December, 2009 is the date on which this declaration will take effect. It is hoped that during this period Chapter 14 of the Pakistan Prison Rules, 1978 and Section 30 of the Prisons Act, 1894 will be recast in the light of what has been stated in Segment Thirteen of this judgment. A prisoner should be deemed to be a Condemned Prisoner only after the death sentence awarded to him by trial court has been confirmed. Learned Standing Counsel agreed with the declaration on this issue.

2. Shariat Miscellaneous Application No.21/I of 1995 bears fruit to the extent that it had challenged section 382-B of the Code of Criminal Procedure. The period spent by a prisoner in custody during and before the initiation of the trial shall be automatically deducted from the term of sentence awarded to him as a result of his conviction. This concession will be independent of any remission that a prisoner might as well earn during

the period of his incarceration. The aforesaid benefit *shall be available to all such* persons who will be serving their sentence on *01.12.2009 if they were not* awarded the benefit already by the trial or appellate Court. Reasons for the grant of this relief have been given in Segment Ten. Shariat Miscellaneous Application No.21/I of 1995 is hereby dismissed for its vagueness and lack of proof of repugnancy to any Injunction of Islam in so far as it had raised other pleas.

3. We also took Suo Moto Notice of the provisions relating to Prison Offences and the prescribed penalties contained in Chapter 23 entitled Offences and Punishment. For reasons recorded in the latter part of Segment Eighteen, we hereby declare sub rules 6,7,8,9 of Rule 583; sub Rules 3,4,5,6 and 7 of Rule 584, Rules 588, 589, 590 and Rule 591 in entirety, as violative of the Injunctions of Islam. This part of declaration will take effect from 01.12.2009 unless necessary amendments, as indicated, are made in Chapter 23 of the Pakistan Prison Rules, 1978 by respective Governments before the target date. I.G. Prisons have been directed to submit report in this Court by 31.12.2009. In case the right of

appeal, in major offences, is not provided the matter will be reviewed in

February 2010 to examine the feasibility of declaring the entire Chapter 23

of the Pakistan Prison Rules, 1978 as repugnant to Injunctions of Islam and

judicial precedents. This declaration also takes note that the learned

counsel for the parties agreed on this issue.

4. Shariat Petition No.62/I of 1992, Shariat Miscellaneous Application 19/I of 1997 and Shariat Miscellaneous Application No.11/I of 1998 are hereby dismissed in so far as they related to the question of classification of prisoners. Detailed arguments have been given in Segment Two of this judgment. Both the petitions inter-alia raised the question that classification of prisoners in category A, B and C violates Injunctions of Islam.

5. Shariat Petition No.61/I of 1992 challenged Rules 307 and 314. Rule 307 states that when the women prisoner confined in a prison are in excess of the available accommodation the excess number will be transferred to other prisons and Rule 314 regulates the conditions under which male officers are permitted to enter female enclosure in the company

of women warders. It was not shown that the impugned provisions violated injunctions of Islam. The provisions are prima facie reasonable. Discussion is given in Segment Five of this judgment. Hence Shariat Petition No.61/I of 1992 is dismissed.

6. We also examined the contents of Rule 304 and expect that the relevant Governments will implement in letter and spirit the requirements of Rule 304 which deals with providing assistance to juvenile prisoners after release. This topic has been discussed in Segment Fourteen entitled Ground Realities. Learned counsel for parties expressed agreement on this issue.

7. After examining the rules in Chapter 20 of the Pakistan Prison Rules, 1970 we are of the considered view that adequate funds should be allocated by Provincial Governments to the Prison Department to meet the daily dietary requirements of the prisoners. The system should be rationalized by 01.12.2009 as the current budgetary provision is utterly inadequate. There should be a built-in system in the Rules to revise the rates at least every three years to combat inflationary trends. This aspect of

prison life has been discussed in Segment Eleven of this Judgment.

Learned counsel for the parties agreed on this issue as well.

8. Shariat Petition No.12/I of 1999 sought to challenge Rule 1078 which prohibits employment of dismissed government servants from seeking employment in Prison Department. The petition is partly accepted for reasons recorded in Segment Nine of this judgment to the extent that the provision which authorizes the Government and the Inspector General Prisons to grant special sanction for the employment of a dismissed Government Servant or a previous convict has been declared violative to the Injunctions of Islam as it is not only discriminatory but it confers arbitrary powers on the Government. Shariat Petition No.12/I of 1999 bears fruit to that extent alone.

9. Shariat Petition No.62/I of 1992, to the extent that it challenged Rules 180-181 of Prison Rules, is dismissed for reasons recorded in Segment One dealing with prisoners travelling by trains. No Injunction of Islam was shown to have been violated if a prisoner on

transfer instead of travelling free in the lower class opts to travel in a better class by paying the difference in the fare from his own pocket.

10. Suo Moto notice was taken to examine Rules relating to transfer of prisoners in Chapter 7 of the Prison Rules read with Section 29 of the Prisoners Act, 1900. These provisions confer unfettered powers on the Government and the Inspector General of Police to transfer any prisoner from one prison to another within the Provincial borders without either assigning any reason or giving a notice to the prisoner or providing a right of appeal before an independent tribunal. Consequently Rules 147 of Pakistan Prison Rules, 1978 and Sections 29 of the Prisoners Act, 1900 have been declared violative of the Injunctions of Islam to the extent mentioned in latter part of Segment One of this judgment. Learned counsel for the parties expressed agreement on this issue also.

11. Shariat Miscellaneous Application No.16/I of 1997 impugned Rule 546 of the Prison Rules which relates with censorship of letters. The complaint was found baseless. Hence Shariat Miscellaneous Application

No.16/I of 1997 is dismissed. Arguments are given in Segment Four of this

Judgment.

12. Shariat Petition No.61/I of 1992 had also called into question Rules 935, 939 of the Pakistan Prison Rules, 1978. These rule deal with appointment and duties of Superintendents of Jail. No arguments were advanced to establish the invalidity of the impugned rules on the touchstone of Islamic Injunctions. Consequently Shariat Petition No.61/I of 1992, to the extent of its challenge against Rules 935, 939, is hereby dismissed for reasons recorded in Segment Six of this judgment.

13. Shariat Petition No.61/I of 1992 also challenges Rules 1180 and 1181 which relate to Lady Assistant Superintendent and Women Warders. The precise objection was that no woman can be placed in the custody of a male not within her prohibited degree. An appraisal of the factual position revealed that the objection was misconceived. Hence Shariat Petition No.61/I of 1992 to the extent of its challenge to Rules 1180, 1181 of Pakistan Prison Rules is hereby dismissed. Reasons are recorded in Segment Seven of this Judgment.

14. Shariat Petition No.61/I of 1992 also challenged Rules 1002, 1004. Both these rules deal with persons included in the definition of Deputy Superintendent and their duties. The main objection was that subordination of lady Deputy Superintendent to a male senior officer could lead to an objectionable situation. The ground realities show that the apprehensions are not genuine. Hence Shariat Petition No.61/I of 1992 to the extent of its challenge to Rules 1002, 1004 of Pakistan Prison Rules, 1978 is hereby dismissed. Reasons are recorded in Segment Eight of this Judgment.

15. The Court appreciated the step taken by the Government of North West Frontier Province and the Punjab for making provision through amendment of Rule 544 to permit the wives of convicts to live with them in the prison houses for certain period. In view of various Injunctions of Islam, with particular reference to the right to raise a family, which right has also been recognized in Article 25(3) and 35 of the Constitution, and also due to the agreement of learned counsel for the parties, this Court has expressed the hope that the scope of the amendment will be widened so as

to make provision for family get-together in prison compound on auspicious occasions as well as conjugal oriented parole facilities will be duly provided by the end of 2010 A.D.

16. The Court also took notice, on its own motion, of the various problems affecting the Prison Discipline in Pakistan and discussed these issues in some detail in Segment Fourteen of this Judgment. The questions that came under consideration of the Court were the ground realities such as over-population in prisons, poor living conditions in the barracks, service conditions of prison officers, security problems, ordeal of the visitors and the possible solutions of these problems. The role of prisons was also discussed candidly with learned counsel for the parties who agreed generally on this matter.

17. The Court, on its own motion, took up the issue of Prison Discipline and examined Rule 84 of Pakistan Prison Rules, 1978. This rule causes hindrances in the issuance of cheques and disallows a prisoner to run a business by issuing cheques. Clauses (a), (c) and (d) have been declared violative of the Injunctions of Islam. Reasons have been recorded

in Segment Nineteen of this judgment. Learned Standing Counsel agreed that in cases where money is not part of offence the issuance of cheques should not be controlled.

18. Shariat Miscellaneous Application No.21/I of 1995 has been dismissed because it sought a general survey of Prison discipline. No provision of law was challenged on the touchstone of Injunctions of Islam.

19. Shariat Miscellaneous Application No.16/I of 1997 challenged item 5 of Rule 690 which prohibits books, paper and printed or written matters in jail. Discussion on this issue may be seen in Segment Four of this Judgment. This prohibition has been declared violative of the Injunctions of Islam. Consequently Shariat Miscellaneous Application No.16/I of 1997 has borne fruit.

20. In conclusion the following provisions of law have been declared to be repugnant to the Injunctions of Islam:-

- i. Rules 329 through 364 Chapter 14 Pakistan Prison Rules, 1978 and Section 30 of the Prisons Act, 1894 to the extent indicated in Segment 13 of the Judgment;

- ii. Section 382-B of the Code of Criminal Procedure. The period spent by an accused in custody before and during the trial shall be deducted from the quantum of sentence awarded by the trial court;
- iii. Sub Rule 6,7,8 and 9 of Rule 583, Sub Rule 3,4,5,6 and 7 of Rule No.584 and rules 588 through 591 as they do not provide the right of appeal to the accused;
- iv. Rule 1078 of Pakistan Prison Rules 1978 to the extent that it authorizes employment of dismissed Government servants by way of special sanction of the Government and employment of previous convicts with the special sanction of the Inspector General Prisons and for reasons recorded in Segment 9 of this Judgment;
- v. Rules 147 through 149 of Pakistan Prison Rules, 1978 and Section 29 of the Prisoners Act, 1900 to the extent mentioned in Segment 1 of this Judgment;
- vi. Clauses (a), (c) and (d) of Rule 84 of Pakistan Rules to the extent and for the reasons recorded in Segment 19 of this Judgment; and
- vii. Item No.5 and Rule 690 of Pakistan Prison Rules, 1978 for reasons recorded in Segment 4 of this Judgment.

The reasons for repugnancy of the above mentioned provisions of law with the Injunctions of Islam have been detailed in the respective segments of this Judgment wherein the impugned provisions were duly discussed. The decision of this Court affecting all the above mentioned legal provisions, which have been declared repugnant, shall take effect from 01.12.2009 during which period the President of Pakistan in relations to the provisions contained in the Prisoners Act, 1900 and the Code of Criminal Procedure 1898 and the Governors of the four Provinces in relation to the above mentioned impugned legal provisions of the Pakistan Prison Rules, 1978 shall take the necessary steps to bring such provisions in conformity with the Injunctions of Islam as indicated in the text of this Judgment.

21. The Bench Registry of the Federal Shariat Court at Islamabad and all the four Provincial Headquarters shall strictly observe the directions contained in Rule 7, Chapter 2 as well as Chapter 3 of the Federal Shariat Court (Procedure) Rules, 1981 at the time Shariat Petitions/Shariat Miscellaneous Applications/Appeals and Revisions are filed.

22. The office is directed to send copies of this judgment to the Federal Government, Chief Secretaries and Secretaries of Home Department of the four Provincial Governments for report and necessary compliance on issues identified in this judgment.

JUSTICE SYED AFZAL HAIDER

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE SALAHUDDIN MIRZA

JUSTICE MUHAMMAD ZAFAR YASIN

**Announced in Open Court
on 28-08-2009 at Islamabad**

*MUJEEB-UR-REHMAN
UMAR DRAZ SIAL*

Fit for reporting

JUSTICE SYED AFZAL HAIDER