S. 21 F ATA and Remission/ descrimination
3 member Bench

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# CERTIFICATE OF THE COURT IN REGARD TO REPORTING

CP 584/2009 & two others

Junaid Rehman Ansari & 2 others vs The State

## HIGH COURT OF SINDH

Composition of Bench: ~~S. B./D. B.~~ Larger Bench
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Mohammad Karim Khan Agha,
Mr Justice Shamsuddin Abbasi

Date(s) of Hearing: 10-12-18... 02-09-19

Decide on: 16-09 -2019

(a) Judgment approved for reporting: Yes

## CERTIFICATE

Certified that the judgment*/order is based upon or enunciates a principle of law */ decides a question of law which is of first impression / distinguishes / over-rules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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NOTE:
(i) This slip is only to be used when some action is to be taken.
(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
(iv) Those directions which are not to be used should be deleted.

**IN THE HONORABLE HIGH COURT OF SINDH AT KARACHI.**

**Jail Petition No._____-** **Dated: / /2009.**

Junaid Rehman Ansari & Others.....Petitioner

**Versus**

The State.....Respondents

**Subject: - REQUEST TO DECLARE S.21-F OF ANTI TERRORISM ACT, 1997 AND SUB-SECTION (1) OF SECTION 401 Cr.P.C. ULTRA VIRUS THE CONSTITUTION .**

The Constitution of Islamic of Pakistan ensures the fundamental rights to the citizens and all citizens are treated equal before law but, unfortunate amendments made in the Anti Terrorism Act, 1997 vide 21-F in the year 2001 and another amendment of sub-section (1) of Section 401 Cr.P.C. made in the year 2005 have restricted the convicts tried and sentenced under the provisions of Anti Terrorism Act, 1997 from all sorts of remissions. These amendments are inconsistent with Article 8, in violation of Article 2(b) and Article 25 of the Constitution of the Islamic Republic of Pakistan which are required to be declared ultra virus the Constitution and accordingly struck down on the following grounds:-

**GROUNDS**

1. That since the promulgation of Anti Terrorism Act, 1997 and subsequent amendment in this Act has changed the definition of heinous crime because there is no difference between the offence committed by any ordinary individual who under various circumstances gets involved in the crime of kidnapping for ransom by the Anti Violent Crime Cell and charged and tried by Anti Terrorism Courts under the provisions of Anti Terrorism Act, 1997, whereas the purpose of promulgation of Anti Terrorism Act was to curb the terrorism activities committed by various JEHADI groups involved in terrorism acts against the State and against other countries, who are also charged and tried by Anti Terrorist Courts.

That prior to the promulgation of Anti Terrorism Act 1997 most of such offences were being charged and tried in the other courts such as, ATA and Session courts. The purpose of promulgation of Anti Terrorism Act was in fact to curb different ***Jehadi Groups*** who are involved in the activities against the State and challenging the writ of the State and are engaged in black mailing the government by various means such as suicide attacks, kidnapping the government functionaries.

C. P. No. D-206 of 2010

Khursheed Ahmed & others ..... Petitioners

Versus

Province of Sindh & others ..... Respondents

To

(The Petitioners)

1. M. Khursheed Ahmed s/o Muhammad Sadiq, House No. 106, Sector A, Baldia Town, Karachi
2. Muhammad Yousuf s/o Muhammad Ibrahim
3. Nizam ul Islam s/o Abdul Qasim
4. Saeed Nazir Ahmed s/o Nazir Ahmed
5. Yousuf S/o Islamuddin.
6. Syed Aamir Hussain @ Fauji s/o Syed Shoukat Hussain
7. Muhammad Jameel Sharif s/o Muhammad Afzal Sharif
8. Abdul Ghaffar s/o Muhammad Hussain
9. Shafi Muhammad s/o Gulab.
10. Abdul Bari S/o Abdul Hadi.
11. Abdul Razzak S/o Abu Kalam.
12. Abu Kalam S/o Muhammad Manzoor Ali.
13. Khan Muhammad S/o Muhammad Ibrahim.
14. Zahoor S/o Aman.
15. Anzar Gul S/o Dosham Gul.
16. Iqbal Masih S/o Jeeta Masih
17. Muhammad Kashif @ Shiko S/o Muhammad Yousuf.
18. Dennis Masih s/o Nazeer Jalal Masih
19. Muhammad Kamal S/o Farch Muhammad
20. Muhammad Arshad S/o Abdul Hakim.
21. Waqar Ali Shamsi S/o Mushtaq Hussain.
22. Muhammad Rafiq S/o Abdullah
23. Gulab Ali @ Taddy S/o Ali Muhammad.
24. Ghayasuddin S/o Saeed-Ur-Rehman.
25. Muhammad Moosa S/o Sawan Khan.

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26. Abdul Ghafoor S/o Karim Dad.

27. Muhammad Naeem S/o Jamal Uddin.
28. Muhammad Zaman S/o Shakoor Muhammad.
29. Azhar Iqbal S/o Muhammad Akram.
30. Muhammad Ramzan S/o Muhammad Bux.
31. Muhammad Hanif S/o Abdul Hakeem.
32. Muhammad Siddiq S/o Muhammad Mubarak
33. Muhammad Abdul Rahim S/o Waseem Ahmed.

***** To be served through Superintendent Jail Central, Karachi**

**Take notice** that the above matter is fixed in Court on 17th day of July 2017 at 09:15 A. M. for hearing of Main Case, when you are required to be present, failing which the matter will be decided in your absence.

Given under my hand and the seal of the Court this 27th day of June 2017.

By order

Assistant Registrar (Writ)

# IN THE HIGH COURT OF SINDH AT KARACHI

*(EXTRA ORDINARY CONSTITUTIONAL JURISDICTION)*

CONST PETITION NO. OF 2012

Presented on 8-11-2012

Deputy Registrar (Writ)

ZAMEER SON OF HAMZO GORAR,
MUSLIM, ADULT, RESIDENT OF,
VILLAGE SOJHRO GORAR,
TEHSIL MEHAR, DISTRICT DADU,
P S MEHAR, SINDH ... PETITIONER

## VERSUS

1. PROVINCE OF SINDH
THROUGH ITS SECRETARY,
HOME DEPARTMENT,
SINDH SECRETARIAT,
KARACHI.

2. SUPERINTENDENT OF JAIL,
CENTRAL PRISON KARACHI

3. INSPECTOR GENERAL PRISON,
KARACHI ... RESPONDENTS

## PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973

The Petitioner above named most respectfully submits as under

1. That the brother of Petitioner was nominated in F.I.R/ Crime No. 41/1999. He was arrested on 28.07.1999 in aforesaid crime.

2. That Safdar son of Hamzo Gorar, the brother of the Petitioner along with two others namely Abdul Ghafoor son of Muhammad Umer, Alloo son of Haji Rahim Dino Jakhio were convicted and sentenced vide judgment of the learned special Court Anti-terrorism Hyderabad in special case No. 41/1999 whereby the above mentioned Accused were convicted on 09.03.2000 as under:

i Section 302/34 PPC, sentenced to death.

Section 394/34 PPC, sentenced to imprisonment for life fine of Rs 50,000/- in default SI 2 years.

E-5756/2012

## IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No. D- 2789 /2014

Presented on 23-5-14

Deputy Registrar (W...

1) Sajid Iqbal son of Ghulam Sarwar
Presently confined in Central Prison,
At Karachi

2) Zafar Iqbal son of Ghulam Sarwar,
Presently confined in
Central Prison, Karachi .....Petitioners

**Versus**

1. The Superintendent Central Prison, Karachi.
Having office at Central Jail Karachi.

2. Inspector General Prisons, Karachi.
Central Prison, Jail Road, Karachi.

3. The Province of Sindh Through
Secretary Home Department,
Government of Sindh,
Karachi.

4. The State through [illegible],
Province of Sindh, Karachi.....Respondents

## CONSTITUTION PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN 1973.

The petitioners submit as under:-

1. That the brief facts leading to the institution of present petition are that the petitioners / convicts namely (1) Sajid Iqbal son of Ghulam Sarwar Presently confined in Central Prison, Karachi & (2) Zafar Iqbal son of Ghulam Sarwar. Presently confined in Central Prison, Karachi, were convicted by Anti Terrorism Court No. III, Karachi on 10.03.2005, after conclusion of trial of FIR No. 856/2001, U/s 365-A/34 P.P.C, P.S. Gulshan-e-Iqbal, Karachi, and were awarded life imprisonment. As they were arrested on

# IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-584 of 2009, D-206 of 2010,
D-3950 of 2012 and 2784 of 2014

Present:

*Mr. Justice Muhammad Iqbal Kalhoro,*
*Mr. Justice Mohammad Karim Khan Agha,*
*Mr. Justice Shamsuddin Abbasi.*

| | |
|---|---|
| Petitioner: | 1. Junaid Rehman Ansari & others.<br>2. Khursheed Ahmed & others.<br>3. Zameer S/o. Hamzo Gorar,<br>4. Sajid Iqbal & others through Raj Ali Wahid Kunwar, Ravi Pinjani and Haq Nawaz Talpur Advocates. |
| Respondent/State: | The State through Mr. Ali Haider Additional PG Sindh |
| On court Notice: | Mr.Salman Talibuddin, Advocate General Sindh.<br>M/s. Kashif Paracha Deputy Attorney General and Mukesh Kumar Khatri, Assistant Attorney General. |
| Dates of hearing: | 10.12.2018, 17.12.2018, 08.04.2019, 06.05.2019, 20.05.2019, 24.08.2019, 26.08.2019 and 02-09-2019 |
| Date of announcement. | 16.09.2019 |

## JUDGMENT

**Mohammad Karim Khan Agha, J.-** All the petitioners have been convicted for various offenses under the Anti Terrorism Act 1997(ATA) and have been awarded various sentences on conviction. These petitions involve the same single question of law and as such we intend to dispose of the same through this one common judgment.

2. The question of law is whether Section 21F of the ATA which in essence provides that no person convicted and sentenced under the ATA shall be entitled to remission is in violation of Articles 4 ,12, 13 and 25 of the constitution and as such it should be struck down as having no legal effect.

3. It has already been held by this court in CP D-572/2006 that Section 21 F of the ATA which was incorporated as an amendment in the ATA on 15-08-2001 shall not have retrospective effect.

4. Since the petitions in hand questioned the validity of a section of a piece of legislation in terms of its constitutionality the Advocate General of Sindh and Attorney General of Pakistan were put on notice to assist this court under Order XXVII-A CPC.

5. Learned counsel for the petitioners firstly submitted that some offenses under the ATA were also covered under the PPC especially in terms of those offenses listed in S.6(2) of the ATA.

6. The petitioner's argument was that there was a two limb test for the offense to fall under the ATA. Firstly, that before an act could be deemed to be an act of terrorism for the purposes of the ATA it had to be an act which fell within the purview of S.6 (2) (a) to (g) for instance at (a) involves the doing of anything that causes death which was equivalent to the offense of murder u/s 302 PPC **and** that in both cases of an offense under S.6 (2) (a) to (g) being committed both the actus reus and mens rea of the offense had to be proved. However for the act u/s S.6 (2) (a) of doing of anything that causes death to amount to an offense under the ATA there was an **additional** mens rea requirement. Namely either 6(1) (b) or (c) also had to be proven. He also pointed out that for similar offenses purely under the PPC such as murder under S.302 remission was allowed but if the offense also satisfied S.6(1) (b) or (c) and fell within the ATA then no remission was permissible. He submitted that in many cases convictions under S.6 (2) (a) to (g) of the ATA lead to higher sentences than the base sentence under the PPC, for example u/s 6(2) (b) ATA which was the offense of causing grievous bodily injury to a person u/s 7 (c) ATA the conviction was higher than the similar offense u/s S.337 L (a) PPC and that to some extent this enhanced sentence was justified as a double mens rea had to be proved under the ATA which lead to an enhanced sentence but could not justify the exclusion of remission under the ATA, bearing in mind that an enhanced sentence had already been given under the ATA as compared with some offenses under the PPC which would lead to a further enhancement of the sentence which was

unjustified and was a violation of Articles 4, 12, 13 and 25 of the Constitution.

7. In this respect the petitioners produced the following table of offenses under the ATA and PPC setting out the sentences in respect of each for similar offenses.

**SCHEDULE / COMPARISON BETWEEN SENTENCES PROVIDED UNDER ATA 1997 AND PPC 1860**

| Sr. # | ATC SECTION | PUNISHMENT | PPC SECTION | PUNISHMENT |
|---|---|---|---|---|
| 1. | **7(1) (a)** Death of any person is caused | Death or with imprisonment of life & with fine | **S.302** Qatl-e-Amd S.315 Act done with intent to prevent a child being alive, or to cause it to die after its birth | Death, imprisonment of life or imprisonment up to 25 years [but shall not less than 10 years] Imprisonment of neither description for 10 years, or fine, or |
| 2. | **(b)** Does anything likely to cause death or endangers life, but death or hurt is not caused | Conviction with imprisonment shall be not less than 10 years but extend to imprisonment of life & with fine. | **S.324** Attempt to Qatl-e-Amd | Imprisonment of either description for 10 years and fine |
| 3. | **(c)** Grievous bodily or injury is caused | Conviction with imprisonment shall not be less than 10 years but extend to imprisonment of life and liable to fine or | **S.337 L (a)** | Daman and Imprisonment either description for 7 years. |
| 4. | **(d)** Grievous damage to property is caused | Conviction with imprisonment not less than 10 years but extend to imprisonment of life and with fine or | **S.427** Mischief and thereby causing damage to the amount to 50 rupees or upwards | Imprisonment of either description for 2 years or fine or both. |
| 5. | **(d)** Kidnapping for ransom or hostage-taking has been committed | Conviction with death or imprisonment of life and shall also liable to forfeiture of property | **S.365-A** Kidnapping or abduction for extorting any property or valuable security, | Imprisonment of life and forfeiture of property. |
| 6. | **(f)** Hijacking | Conviction with death or imprisonment of life and fine | Not Applicable | Not Applicable |

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| 7. | **(ff)**<br>Terrorism falls u/s 6(2)(ee)<br><br>The Use of Explosives | Shall not be less than 14 years but extend to imprisonment of life. | **S.285**<br>Dealing with fine of any combustible matter so as to endanger human life, etc.<br>**S.286**<br>So dealing with any explosive substance | Imprisonment of either description for 3 years and fine<br><br>Ditto |
| 8. | **(g)**<br>Terrorism falls u/s 6(2)(f & g)<br><br>Inciting Hatred, Religious Contempt, etc/ Vigilantism | Conviction with imprisonment Not less than 2 years and not more than 5 years & with fine or. | **S.295**<br>Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of person<br><br>**S.295**<br>Malicious insulting the religion or the religious beliefs of any class. | Imprisonment of either description for 2 years, or fine, or both.<br><br>Imprisonment of either description for 2 years, or fine, or both. |
| 9. | **(h)**<br>Terrorism falls u/s (h) to (n) sub-section (2) of Section 6 | Conviction to imprisonment of not less than 5 years but may extend to imprisonment of life and with fine or | **(h)=S.296**<br>Causing a disturbance to an assembly engaged in religious worship.<br><br>**(i)=S.148**<br>Rioting, armed with a deadly weapon.<br><br>**(j)=S.437.**<br>Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden or a vessel of<br><br>**(k) = S. 384**<br>Extortion<br><br>**(i) = N/A**<br>**(m) = S. 353**<br>Assault or use of criminal force | Imprisonment of either description for 1 year, or fine, or both.<br><br>Imprisonment of either description for 3 years, or fine, or both.<br><br>Imprisonment of either description for 10 years and fine.<br><br>Imprisonment of either description for 3 years or fine or both.<br><br>Imprisonment of either description |

| | | | | |
|---|---|---|---|---|
| | | | to deter a public servant from discharge of duty.<br>**(n) = S. 152**<br>Assault or obstructing public servant when suppressing riot, etc. | for 2 years or fine both.<br><br>Imprisonment of either description for 3 years or fine, or both. |
| 10. | **(i)**<br>Act of terrorism not falling u/s (a) to (h) above. | Conviction to imprisonment of not less than 5 years and not more than 10 years with fine or both. | **Example**<br>**S.120-C**<br>Any other criminal conspiracy.<br><br>**S. 124-A Section**<br><br>**S.144**<br>Joining an unlawful assembly armed with any deadly weapon.<br><br>**S.189.**<br><br>**S.385.**<br>Putting or attempt to put in fear of injury, in order to commit extortion. | Imprisonment of either description for six months and fine or both.<br><br>Transportation for or for any term and fine imprisonment of either description for 3 years and fine, or fine.<br><br>Imprisonment of either description for 2 years or fine, or both.<br><br>Threatening a public servant with injury to him, or one of whom he is interested to induce him to do or forbear to do any official act.<br><br>Imprisonment of either description for 2 years, or both. |

| | | | | |
|---|---|---|---|---|
| 11. | 7(2) Convicted under this act | Shall be punishable with imprisonment of 10 years or more, including offences of kidnapping for ransom and hijacking shall also be liable to forfeiture of property | Not Applicable | Not applicable |

8. The petitioners next submitted that the purpose of someone being imprisoned was essentially reformation whereby after completing his prison term the convict would come out of jail as a reformed person who would no longer engage in criminal conduct and would be an asset to society and if a convict was denied remission this would just make the convict more bitter and resentful to the State and turn him into a hardened criminal who on release would commit more crimes and thus as a matter of policy all convicts should be entitled to remission.

9. The petitioners main argument however was that not allowing remission to persons convicted under the ATA was contrary to Article 25 of the constitution where all persons were entitled to equal treatment under the law. In that in all other laws in Pakistan (whether general or special) the convict was entitled to remission on his sentence.

10. In this regard, in particular the petitioners placed reliance on the fact that both this court and the Supreme Court had held that the denial of remissions to convicts under the National Accountability Ordinance 1999(NAO) by virtue of S.10 (d) NAO was unconstitutional being in violation of Article 25 of the Constitution and drew a comparison with S.21 F ATA which by the same reasoning was also in violation of Article 25 of the constitution.

11. In this respect the petitioners relied heavily on the fact that there was no reasonable classification in excluding ATA convicts from remission as there was no intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out.

12. The petitioners even submitted that S.6 (1) (b) and (c) ATA could not co-exist with S.21 F as in essence S.6 (1) (b) and (c) ATA were different mens rea requirements and as such under S.21 F remission should be allowed depending on whether the mens rea was proved in either S.6 (1) (b) or (c) ATA.

13. The petitioners stressed that in respect of the subject issue no intelligible differentia existed which distinguishes persons or things that are grouped together (ATA convicts) from those who have been left out so as provide a reasonable classification for treating people in the same class differently which was evident from the fact that when the ATA was amended in 2001 by amongst other things inserting S.21 F which denied remission to ATA convicts no reason was given in so doing and as such the amendment was without intelligible differentia criteria and was absolutely arbitrary and as such the addition of S.21 F in the ATA through the amendment Act in 2001 was also violative of Article 4 of the Constitution. The petitioners further contended that **Nazar Hussain's case** (Supra) was not applicable as it did not consider the issue of the constitutionality of S.21 F ATA on merits but merely referred to it in passing.

14. In the alternate the petitioners submitted that if this court were to find S.21 F ATA not to be in violation of Article 25 of the constitution then remissions may be allowed in convictions for those offenses under the ATA which imposed greater sentences than under the PPC. Another alternate submission was that if this court were to find S.21 F ATA not to be in violation of the constitution then at least the convicts under the ATA should be entitled to the earned remissions. In this regard they drew this courts attention to the fact that some remissions were regarded as general remissions whilst others were regarded as special remissions under the Prison Rules and some remissions were earnt by the convict for example, by giving blood, completing the fast during the holy month of Ramazan, passing examinations as laid down in the Pakistan Prison Rules 1978 as amended from time to time and at least convicts under the ATA should be given the benefit of earnt remissions and that in any event remissions were a right and not a privilege.

15. In support of their contentions the petitioners placed reliance on **Saleem Raza v. The State** (PLD 2007 Karachi 216), **Hammad Abbasi v. Superintendent, Central Adyala Jail, Rawalpindi** (PLD 2010 Lahore 428), **Superintendent, Central Adyala Jail, Rawalpindi V Hammad Abbasi** (PLD 2013 SC 223) **Muhammad alias Khuda Bakhsh v. ATC Makran at Turbat and 2 others** (2018 P. Cr.LJ 148) **Mazhar Iftikhar V Shahbaz Latif** (PLD 2015 SC 1), **Nazar Hussain and another v. The State** (PLD 2010 SC 1021), **Mujeebur Rehman V The State** (2014 P Cr. L J 1761), **Ex. Brigadier Ali Khan v. Secretary, Home Department, Government of Punjab** (PLD 2016 Lahore 509), **Muhammad Ali v. The State** (2018 YLR Note 191), **Muhammad Nawaz and another v. The State** (1987 SCMR 1399), **Habib-ul-Wahab Alkhairi and others v. Federation of Pakistan** (PLD 1991 Federal Shariat Court 236), **Muhammad Ismaeel v. Secretary Home Department, Government of Punjab** (PLD 2018 Lahore 114), **Abdul Aziz Memon and others v. The State** (PLD 2013 SC 594),**Ghulam Asghar Gadehi v. Sr. Superintendent of Police, Dadu and 4 others** (PLD 2018 Sindh 169) **I.A.Sherwani V Government of Pakistan** (SCMR 1991 1041) 1047), **National Commission on Status of Women through Chairperson and others v. Government of Pakistan through Secretary Law and Justice and others** (PLD 2019 SC 2018), **Baz Muhamamd Kakar and others v. Federation of Pakistan through Ministry of Law and Justice, Islamabad and others** (PLD 2012 SC 870), **Smith Kline & French of Pakistan Ltd. Karachi v. A. Rashid Pai and another** (PLD 1979 Karachi 212), **Government of Pakistan through Director-General, Ministry of Interior, Islamabad and others v. Farheen Rashid** (2011 SCMR 1), **Tariq Aziz-ud-din and others: in re Human Rights Cases Nos.8340, 9504-G, 13936-G, 13635-P & 14306-G to 143309-G of 2009,** (2010 SCMR 1301), **Abdul Jabbar v. The Chairman NAB through Director General National Accountability Bureau and 3 others** (PLD 2016 Peshawar 298), **Syed Wajih-ul-Hassan Zaidi v. Government of Punjab through D.C. Jhelum and 2 others** (1996 SCMR 558), **Javed Jabbar and 14 others v. Federation of Pakistan and others** (PLD 2003 SC 955), **Dr. Mobashir Hassan and others v. Federation of Pakistan and others** (PLD 2010 SC 265) and Ordinance XXXIX of 2001 **Anti-Terrorism (Amendment Ordinance) 2001.**

16. Learned Deputy and Assistant Attorney Generals submitted that the cases cited by the petitioner had no relevance to the instant petition in

that **Saleem Raza's case** (supra) concerned the striking down the exclusion of remission under S.10 (d) in the NAO as was upheld by the Supreme court in **Mazhar Iftikhar's case** (Supra) and **not** S.21 F ATA which also excluded remission for those convicts who were convicted under the ATA which was a distinct piece of legislation dealing with heinous crimes as opposed to corruption and that both statutes had distinct objectives; that although the Balochistan case of **Muhammad alias Khuda Bakhsh** (supra) had upheld the striking down of S.21 F ATA and had reached finality as it had not been appealed to the Supreme court that case was not binding on this court and was only of persuasive value and in addition it appeared that the Court may not have been properly assisted as the Supreme court case of **Nazar Hussain** (PLD 2010 SC 1021) which had dealt with the issue of the constitutionality of S.21 F ATA had not been brought to the courts attention. Likewise the case from Lahore being **Hammad Abbasi** (supra) which was decided by a single judge again did not have the benefit of **Nazar Hussain's case** (Supra) and in any event was remanded back by the Supreme court in the case of **Superintendent, Central Adyala Jail, Rawalpindi** V **Hammad Abbasi** (Supra) to be decided afresh by the Lahore High Court and the case still remained pending before the Lahore High Court. In conclusion he contended that the Federal Government had already issued guidelines of remission and in these there was an intelligible differentia which ensured that S.21 F ATA was not discriminatory in terms of Article 25 of the Constitution and since S.21 F ATA did not violate any provision of the Constitution it should be upheld and the petitions dismissed. In support of his contentions he placed reliance on **Nazar Hussain's case** (Supra) and the remission policy of the President of 2002 which remained unchanged to date and had been relied upon and reproduced in **Nazar Hussain's case** (Supra)

17. Learned Advocate General Sindh submitted that firstly the issue had been settled by the Supreme Court in **Nazar Hussain's case** (Supra) that there was an intelligible differentia and sufficient distinction had been made for different classes of person to not receive remission under the ATA. He secondly submitted that in any event remission was not a right but rather a privilege extended by Statute and thus it could not be claimed as such as of right. That S.21 F ATA did not violate any Article of the

constitution and that these appeals should be dismissed. In support of his contentions he placed reliance on the Indian authorities of **State of Haryana and others v. Mohinder Sindh** (2000) (3 Supreme Court Cases 394), **State of Haryana and another v. Jai Singh** (Supreme Court of India Appeal (Crl.) 661 of 2002) and **Jameel Ahmed v. State of Rajasthan and others** (2007 CriLJ 2009) and a summary approved by the Chief Minister of Sindh dated 09-08-2019 allowing special remission to prisoners on the occasion of Eid-Ul-Azha and Independence day 2019 **except** for, amongst others, those convicted under the ATA .

18. Learned Additional PG submitted that there had been no violation of Article 12 (b) of the Constitution as it was perfectly legal for different laws to impose different sentences; that there had been no violation of Article 13 of the Constitution as it was not a case of double jeopardy ; that there had been no violation of Article 25 as the exclusion of remission was not discriminatory as the ATA dealt with heinous offenses against society where as the NAO where S.10 (d) of the NAO had been struck down as being discriminatory only dealt with financial crimes which were not heinous crimes which were intended to frighten and intimidate society whereas offenses under the ATA were heinous crimes the intention of which was to frighten and intimidate society and ordinary citizens whether men , women or children and as such the ATA was not on the same footing as the NAO and was a distinct statute which had a different objective to the NAO and as such the two could not be compared for purposes of discrimination under Article 25 of the Constitution in terms of whether remission should be allowed or not and as such since there had been no violation of any of the Articles of the Constitution S. 21 F ATA should remain in the field and the petitions be dismissed. In support of his contentions he placed reliance on **Nazar Hussain's case** (PLD 2010 SC 1021).

19. We have heard the arguments of the learned counsel for the parties, gone through the record and have considered the relevant law including that cited at the bar with their able assistance.

**The trichotomy powers.**

20. Our constitution is based on the trichotomy of powers shared between the legislature, the executive and the judiciary each of whom has

its distinct and separate role to play in our system of governance and each of which is supposed to act as a check and balance on the other organs of state operating within its own defined sphere of power as provided in the law and the Constitution.

21. Within the trichotomy of powers it is the role of the legislature to make laws and the role of the judiciary to interpret those laws if such interpretation is necessary. It is well settled law that if a statute has expressly provided for something without any ambiguity then there is no question of the courts interpreting the same as the legislative intent is clear and the Act/Ordinance must be given effect to **unless** it is deemed to be contrary to the constitution. The judiciary's role of interpretation of the statute only arises when the statute is to a certain extent either unclear or ambiguous or is prima facie in violation of the constitution and in such cases it is for the judiciary to interpret that piece of legislation by trying to ascertain the intent of Parliament in passing that legislation. **The Courts have absolutely no authority or power to substitute their views for those intended by the legislature simply because they may disapprove of a particular law and the way in which that law is being applied.**

22. In this respect reliance is placed on the case of **Justice Khurshid Anwar Bhinder V Federation of Pakistan** (PLD SC 2010 483.P.493) whereby a larger Bench of the Supreme Court held as follows:

> *"A fundamental principle of Constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. The pole star in the construction of a Constitution is the intention of its makers and adopters.* ***When the language of the statute is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language beside declares, without more, the intention of the law givers and is decisive on it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore if the meaning of the language used in a statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions, however admirable the same may be because, in that event they would be traveling beyond their province and legislating for themselves.*** *But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given.* ***The first and primary rule of***

*construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the court to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act."* (bold added)

23. S.21 F of the ATA is set out as under:

" **21F. Remissions.-** (1) **Notwithstanding anything contained in any law or prison rules** for the time being in force, no remission in any sentence shall be allowed to a person, who is convicted and sentenced for any offence under This Act,

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

24. In our view the wording used in S.21 F of the ATA on a plain reading is absolutely clear and requires no interpretation by the courts. Namely, that that the legislature intended that no remission would be applicable to persons convicted for offenses under the ATA. The legislature would have known the effect of such a section and would have provided it in the ATA after much thought and consideration especially as it was added by way of an amendment to the ATA four years after the ATA was promulgated by Ordinance No.XXXIX of 2001 dated 15.08.2001. The fact that the amendment was made four years after the promulgation of the ATA in our view suggests that the legislature after debating the issue must have had good reasons for inserting S.21 F into the ATA since as a general rule the legislature does not pass legislation or amend existing legislation for the sake of it. In most such cases new legislation and proposed amendments to existing legislation before being passed into law by the legislature are very often sent for discussion and debate before the concerned standing parliamentary committee in this case , law, for debate and considering the reasons, pros and cons for passing new legislation or amending existing legislation. Perhaps in this case a rise in terrorist acts in Pakistan from 1997 up to 15.08.2001 when S.21 F was incorporated in the ATA prompted the legislature to make this amendment for deterrent purposes. Whether or not the denial of remission is harsh for convicts under the ATA is not for us to pass judgment on as this issue lies within

the domain of the legislature which as we discussed above would have had in its wisdom its own reasons, aims and objectives in inserting S.21F in the ATA in 2001.It is also significant to note that despite the insertion of S.21 F in the ATA over 18 years ago none of the three successive democratically elected legislatures have deemed it fit to remove S.21 F from the ATA which is an indication that successive legislatures are satisfied that S.21 F is justified in ATA case.

25. We would, at this stage, like to make it clear that in our view policy and the purpose behind sentences which the legislature deems appropriate for certain offenses under the law whether reformative/deterrent/punitive or otherwise and the time convicts spend in jail on their conviction as provided under the law for a certain offense is outside our domain to consider/determine as judges. This is for the legislature to consider and decide upon in its wisdom being the chosen representatives of the people as a matter of policy. Whether we agree or disagree with this policy as judges whose role is to interpret law or test its constitutionality is outside our domain. If the legislature is of the view that the people whom it represents no longer agree with its policy to deny remissions to persons convicted under the ATA then it has the ability to repeal S.21 F ATA. **We, as judges since the language of S.21 F is clear and unambiguous are only concerned with the issue whether S.21 F ATA is in violation of the Constitution or not.**

26. As such most of the authorities cited by the petitioners which concern the rationale of allowing remissions are of little, if any, assistance to them. Likewise the authorities cited by the petitioners concerning the release of a convict on parole/license or probation prior to the expiration of his sentence since such release on parole/license or probation is specifically permitted under the relevant legislation dealing with the same unlike remission under the ATA which is specifically excluded under the ATA.

27. The ATA is a special law and it is well settled by now that it will take preference over a general law and even other special laws such as the Prison Act since the ATA has been passed later in time with the legislature

being well aware of the system of remissions provided in the Prison Rules and yet deliberately chose to exclude them by specific intent by inserting S.21 F into the ATA. S.21 F as noted above also contains a non obstante clause which specifically states that," **Notwithstanding anything contained in any law or prison rules for the time being in force** ....."and as such will also override the sections in The Pakistan Prison Rules (Jail Manual) u/s 59 of the Prisons Act 1894 in so far as they relate to remission.

28. In our view, therefore, the only question that needs to be answered in this case is whether S.21F ATA as contended by the petitioners is in contravention/violation of the Constitution and in particular Articles 4, 12, 13 and 25 as would justify the aforesaid section being struck down by this court.

29. We have already set out S.21 F and since the petitioners have contended that the aforesaid provision is in violation of Articles 4, 12,13 and 25 of the Constitution we by way of assistance set out Articles 4, 12, 13 and 25 of the Constitution below and shall consider the petitioner's arguments in respect of the same.

**The Article 4 of the Constitution Argument.**

30. Article 4 of the Constitution reads as under;

> **"4. Right of individuals to be dealt with in accordance with law, etc.**
>
> (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.
>
> (2) In particular—
>
> (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;
>
> (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and
>
> (c) no person shall be compelled to do that which the law does not require him to do."

31. We do not consider Article 4 to be of particular relevance to these petitions on a stand alone basis as in our view S.21 F ATA is in accordance with law, no person is prevented from or being hindered in doing that which is not prohibited by law and nor does it compel any person to do something which the law does not require. In short every one convicted under the ATA will be dealt in the **same way in accordance with the law as provided in the ATA including S.21 F** and as such S.21 F is not in violation of Article 4 of the constitution.

**The Article 12 of the Constitution Argument.**

32. Article 12 of the Constitution reads as under;

> "**12. Protection against retrospective punishment.-** (1) No law shall authorize the punishment of a person –
>
> (a) For an act or omission that was not punishable by law at the time of the act or omission; or
>
> (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.
>
> (2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence".

33. In our view Article 12 (b) is the only part of Article 12 which may be of some relevance. We are of the view however, that Article 12 (b) is meant to apply to situations where someone had committed a crime and at the time of committing the crime the sentence was 5 years but **after** he committed the crime the law is amended to enhance the sentence for that same crime to 7 years and as such under Article 12(b) it is ensured that the accused 's maximum sentence on conviction is only 5 years which was the only sentence which was available when he committed the crime and not 7 years which was the sentence which was imposed for the same offense **after** he committed the crime which would prevent a blatant unfairness befalling the accused and would shield him from such eventuality. In our view A.12 (b) has no relevance in cases where a person is given a sentence prescribed under the law at the time when he commits the offense and

whether remission is available or not under the statute for the offense which he committed. As such we do not find S.21 F ATA to be in violation of Article 12 of the Constitution

**The Article 13 of the Constitution argument.**

34. Article 13 of the Constitution reads as under;

> **Article 13. Protection against double punishment and self-incrimination. – No person –**
>
> (a) shall be prosecuted or punished for the same offence more than once; or
>
> (b) shall, when accused of an offence, be compelled to be a witness against himself.

35. In our view we find this argument to be without substance. A plain reading of Article 13 of the Constitution clearly shows that it only (a) excludes prosecution and punishment for the same offense more than once and (b) excludes self incrimination. Article 13 has in our view nothing to do with remissions. This is because under the ATA the accused on conviction for an offense under the ATA is only sentenced/ punished as provided for under the law. The act of refusing him remission in our view does not amount to him being punished for the same offense more than once. He is only punished for one offense and the question of availability of remissions is governed by the law and is a matter of concession not as of right. Similarly the issue of self incrimination is not relevant to the issue in hand.

36. The fact that a convict can be given a higher sentence if convicted under the ATA for a similar offense committed under the PPC is in our view fully justified by the heinousness of the offense namely terrorism and **the additional mens rea/other aspects of the offense** which need to be proved. For example, in a simple murder case under S.302 PPC the actus reus and mens rea will need to be proved. In some cases the murder is on account of enmity or disputes over property or other grievances between two parties. This cannot be equated with an offense the motivation, design and intention of which is to cause terror to the public and destabilize state institutions and governments which elevates the offense to a different level. It is perhaps this distinction being the sheer

**heinousness** of the crime which is motivated to terrorize the general public that has led to the legislature deliberately and consciously excluding remission as a deterrent.

**The Article 25 of the Constitution Argument.**

37. Article 25 of the Constitution reads as under:

> 25 **Equality of citizens.** - (1) All citizens are equal before law and are entitled to equal protection of law.
>
> (2) There shall be no discrimination on the basis of sex [**]
>
> (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

38. We note that learned counsel for the petitioners in respect of their arguments in respect of Article 25 have relied on the cases of **Hammad Abbasi** (Supra) and **Muhammad alias Khuda Bakhsh** (Supra) decided by the Lahore High Court and Balochistan High Court respectively which both struck down S.21 F ATA on account of it being in violation of Article 25 of the Constitution. The case of **Hammad Abbasi** (Supra) however was set aside and remanded back to the Lahore High Court for a fresh decision by the supreme court in the case of **Superintendent Central Jail Adyala V Hammad Abbasi** (PLD 2013 SC 223) since the law officers had not been put on notice to assist the court under Order XXVII-A R.1 CPC which was a mandatory requirement of the law when the constitutionality of any provision of a Statute is under challenge and thus it is no longer in the field and so far as we are aware has yet to be decided a fresh. The case of **Muhammad alias Khuda Bakhsh** (Supra) decided by the Balochistan High court in 2018 relied on the case of **Hammad Abbasi** (Supra) which was no longer in the field and the case of **Saleem Raza** (Supra) which concerned a 3 member Bench of the Sindh High Court holding as unconstitutional S.10 (d) of the NAO which also did not permit remissions to persons convicted under the NAO on account S.10(d) NAO being in violation of Article 25 of the Constitution which decision reached finality and was in effect upheld by the Supreme Court in the case of **Mazhar Iftikhar** (Supra) on the same reasoning namely that the exclusion of remissions for persons convicted under S.10 (d) NAO was in violation of Article 25 of the constitution and was as such struck down.

39. It would appear that a brief analysis of these cases tends to show that the case of **Hammad Abbasi** (Supra) although remanded by the Supreme court for re-hearing tended to rely upon **Saleem Raza's case** (Supra) whereby S.10(d) NAO which excluded remissions to persons convicted under the NAO was found in violation of Article 25 of the Constitution without a particularly in depth analysis of how the Court reached this decision in **Saleem Raza's case** (Supra) as upheld by the supreme court in **Nazar Hussain's case** (Supra).Likewise the decision of the Balochistan High Court in the case of **Muhammad alias Khuda Bakhsh** (Supra) which also relied upon the case of **Hammad Abbasi** (Supra)

40. Thus, for all intents and purposes we need to carefully consider both the cases of **Saleem Raza** (Supra) and **Nazar Hussain** (Supra) to see if we can find any judicial guidance in terms of whether S.21 F ATA is in violation of Article 25 of the Constitution as was found to be the case in respect of S.10 (d) NAO which also excluded remissions for those persons convicted under the NAO.

41. The law regarding discrimination under Article 25 of the Constitution is settled and was well set out in the classic case of **I.A.Sherwani** (Supra) which held as under:

> *---Art. 25(1)---All citizens are equal before law and entitled to equal protection of law---**State, however, is not prohibited to treat its citizens on the basis of a reasonable classification**---Reasonable classification---Basis or criterion for classification as to avert violation of Art. 25(1).*
>
> *Clause (1) of Article 25 of the Constitution of Pakistan (1973) enshrines the basic concept of religion of Islam. However, **this is now known as the golden principle of modern Jurisprudence,** which enjoins that all citizens are equal before law and are entitled to equal protection of law (p. 1081)*
>
> ***Following are the 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 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*** *(p. 1086)*

***Principles as to classification are as under:-***

*(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 constitutionally 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 reasonably 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 just one taking all aspects into consideration (p. 1086)* (bold added)

42. **Sherwani's case** (Supra) has remained good law ever since and was followed in the cases of **Government of Balochistan V Azzizullah Memon** (PLD 1993 SC 341) and more recently by a full bench of the Hon'ble Supreme Court in the case of **Dr. Mubashir Hasan V Federation of Pakistan** (PLD 2010 SC 265).

43. Indeed it was the interpretation of **I.A.Sherwani's case** (Supra) vis a vis Article 25 of the Constitution which laid the foundation for S.10(d) of the NAO being found to be in violation of Article 25 of the Constitution and led to that provision being struck down in **Saleem Raza's case** (Supra).

44. In our view one of the key elements in determining discrimination so as to lead to a violation of Article 25 of the Constitution as set out in

**Sherwani's case** (Supra) are the following principles which have already been reproduced above but for ready reference are again set out below;

> ***Following are the principles with regard to equal protection of law and reasonableness of classification.***
>
> *(viii) 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*** *(p. 1086)* (bold added)
>
> ***Principles as to classification are as under:-***
>
> (c) ***There is always a presumption in favour of the constitutionally 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 unjustifiable 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;* (bold added)

45. According to these principles S.21 F ATA has a presumption of constitutionality and the burden lies on the petitioners to prove otherwise. Now if we apply these principles to S.10 (d) NAO which excluded remissions to those persons who were convicted under the NAO as was discussed in the case of **Saleem Raza** (Supra) it becomes apparent why S.10 (d) NAO fell foul of these principles. In short, this was because in Pakistan there are a number of laws dealing with corruption like the NAO. For example, the Prevention of Corruption Act (II) 1947, certain sections of the PPC, Offenses in Respect of Banks (Special Courts) Ordinance 1984, Provincial ACE etc. Now it is quite possible that similar offenses of corruption as contained in the NAO can be tried under these

other Acts/Ordinances dealing with corruption instead of under the NAO. The up shot of this is that a person convicted under say, the Prevention of Corruption Act (II) 1947 for a similar offense which exists under the NAO and is subject to a similar sentence would be entitled to remission whereas a person convicted under the NAO for the similar offense having the similar sentence will not be entitled to remission. Thus, it was apparent that persons who had been convicted of similar offenses of corruption but under different law's dealing with corruption would be treated differently in terms of whether or not they were entitled to remission. Thus, by the insertion of S.10(d) in the NAO whereby person's tried under that law were excluded from benefiting from remission and whilst those tried under other laws dealing with corruption in respect of similar offenses for which they received similar sentences under the NAO and were entitled to remission made an unreasonable classification since in respect of offenses under various corruption laws there was no ***intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out.*** Hence S.10 (d) NAO was rightly held to be discriminatory and in violation of Article 25 of the Constitution based on the principles laid down in **Sherwani's case** (Supra) because in all cases the persons were tried under different corruption laws but in some cases remission was allowable and not in other cases. **The common feature is that all the accused were tried under different corruption laws for similar offenses but which each had a different legal consequence in respect of entitlement to remission.**

46. In the case of **Saleem Raza** (Supra) which was largely based on **Sherwani's case** (Supra) regarding discrimination in terms of Article 25 of the Constitution the court at P.152 Para 15 summarized the position as under:

> *"This brings us to the principles governing the provisions pertaining to fundamental rights guaranteed under Article 25 of the Constitution relating to the equal protection of law. This Article enjoins that all citizens are equal before law and are entitled to equal protection of law, i.e., all persons subjected to law should be treated alike under all circumstances and conditions both in privileges conferred and in the liabilities imposed. It must be amongst equals.* ***The equality has to be between persons who are placed in the same set of circumstances. The guarantee of equal protection of the law requires that all persons shall be treated alike, under like circumstances and conditions. The Phrase "equal protection of law" envisaged by***

*Article 25 of the Constitution means that no person or class of persons would be denied the same protection of law which is enjoyed by persons or other class of persons in like circumstances in respect of their life, liberty, property or pursuit of happiness. Persons similarly situated or in similar circumstances are to be treated in the same manner. In the application of these principles, however, it has always been recognized that classification of persons or things is in no way repugnant to the equality doctrine, provided, the classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of legislation. It means that two sets of similar circumstances shall not have different legal effects, unless there is a difference of circumstances and the difference between the two sets is material enough to support the discrimination."* (bold added)

47. Likewise in summarizing the relevant case law the Supreme court in the case of **Government of Balochistan V Azzizullah Memon** (PLD 1993 SC 341) whilst summarizing both the Pakistani and Indian law on this point agreed with/approved the above summarization referred to in **Sherwani's case** (Supra) and **Saleem Raza's case** (Supra)in the following terms at P.359

*"As the judgments from Indian jurisdiction have been considered in the aforestated judgments of this Court, we would not refer to them here. In all these authorities there seems to be unanimity of view that although class legislation has been forbidden, it permits reasonable classification for the purpose of legislation.* Permissible classification is allowed provided the classification is founded on intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and such classification and differentia must bear a relationship to the objects sought to be achieved by the Act. ***There should be a nexus between the classification and the objects of the Act. This principle symbolizes that persons or things similarly situated cannot be distinguished or discriminated while making or applying the law. It has to be applied equally to persons situated similarly and in the same situation.*** *Any law made or action taken in violation of these principles is liable to be struck down. If the law clothes any statutory authority or functionary with unguided and arbitrary power enabling it to administer in a discriminatory manner, such law will violate equality clause. Thus, the substantive and procedural law and action taken under it can be challenged as violative of Articles 8 and 25."*

48. This conclusion was in essence reached by the court in **Saleem Raza's case** (Supra) at P.169 Para 27 and 37 in the following terms:

*"27. As in respect of public servants found involved in corruption or criminal misconduct, the offences punishable under sections 218 and 219 PPC, which are ordinarily triable by the Courts specified in the Second Schedule to the Criminal Procedure Code are also triable by NAB Court. The punishment and the nature of offence are still same. Similarly the*

*offences punishable under Sections 468, 471, 472, 477-A PPC are triable ordinarily by the Court specified in Second Schedule to Criminal Procedure Code, in appropriate cases by Special Courts under the offences in Respect of Banks (Special Courts) Ordinance, 1984 and Special Judges appointed under Pakistan Criminal Law Amendment Act 1958, as well as by the NAB Court by virtue of schedule 10(b) of the NAB Ordinance. The nature of offences are same and the punishments provided are also the same. The special rules of evidence contained in NAB Ordinance, Prevention of Corruption Act 1947, Criminal Law Amendment Act 1958 and Offences in Respect of Banks (Special Courts) Ordinance, 1984, also similar.* ***However, merely on account of change of forum one set of convicts under the same class not convicted by Accountability Court shall be entitled to remission and thus shall serve out their sentence, much earlier than the other set of convicts in the same category or class convicted by the Accountability Court. Result is too obvious that there is no intelligible differentia, distinguishing one group of persons from other group of persons and thus, there is no reasonable classification permissible for such purpose. Merely on the basis of change of forum the classification cannot be held to be permissible as reasonable because such classification shall not be based on any real and substantial distinction."*** (bold added)

*"37. The entire discussion above, leads to the conclusion that section 10(d) of the NAB Ordinance denying remission to the NAB convicts has the effect of enhancing the punishment awarded to the NAB convicts* ***and further is discriminatory as it is not based on any reasonable and rational classification. It is arbitrary in nature and as argued by the learned D.A.G. is merely based on the basis of the forum of trial is a reasonable and rational classification based on intelligible differentia. The denial of remission to NAB convicts under section 10(d) of the NAB Ordinance has no nexus with the object of the legislation*** *and consequently, we hold that it is violative of and repugnant to the provisions contained in Article 12 and 25 of the Constitution. We are of the considered opinion that such provision of law is not permissible and cannot be saved being patently violative of the fundamental right guaranteed in the Constitution."*(bold added)

**49.** **Interestingly** in **Saleem Raza's case** (Supra) at P.171 Para 32 the Court stated as under in respect of no remissions being permissible under S.21 F ATA when dealing with the exclusion of remissions under the NAO

*"We would not like to make any observation in respect of this provision for the reason that the possibility of assailing the above provision before any Superior Court, cannot be ruled out and any observation made by us in this judgment may adversely affect any subsequent proceedings. However, we would like to observe that merely because a similar provision is contained in the Anti-Terrorism Act, 1997, it will not provide any justification for upholding the provision under challenge.* ***We will make a tentative observation to the effect that the object of enacting Anti-Terrorism Act, 1997 is entirely different from the object sought to be achieved through the enactment on its own merits with reference to the particular law under consideration."*** *(bold added)*

50. So having considered the rationale as to why S.10 (d) NAO excluding remissions was declared unconstitutional under Article 25 of the Constitution keeping in view **Sherwani's case** (Supra), **Azizullah Memon's case** (Supra), **Saleem Raza's case** (Supra) and **Mazhar Iftikhar's case** (Supra). **Let us now turn specifically to the ATA which deals as its name implies with acts of terrorism.**

51. S.6 of the ATA defines "terrorism" in the following terms:

> "**6. Terrorism-** (1) In this Act, "terrorism" means the use or threat of action where:
>
> (a) the action falls within the meaning of sub-section (2);
>
> **and**
>
> (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or
>
> (c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies:
>
> Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.
>
> **(2) An "action" shall fall within the meaning of sub-section (1), if it:**
>
> (a) involves the doing of anything that causes death;
>
> (b) involves grievous violence against a person or grievous bodily injury or harm to a person;
>
> (c) involves grievous damage to property including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any other means;
>
> (d) involves the doing of anything that is likely to cause death or endangers a person's life;
>
> (e) involves kidnapping for ransom, hostage-taking or hijacking;

(ee) involves use of explosives by any device including bomb blast or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive;

(f) involves hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;

(g) involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land;

(h) involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;

(i) creates a serious risk to safety of the public or a section of the pubic, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;

(j) involves the burning of vehicles or any other serious form of arson;

(k) involves extortion of money ("bhatta") or property;

(l) is designed to seriously interfere with or seriously disrupt a communication system or public utility service;

(m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties.

(n) involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant.

(o) involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or

(p) involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.

(3) The use or threat of use of any action falling within sub-section (2), which involves the use of firearms, explosives or any other weapon, is terrorism, whether or not sub-section 1(C) is satisfied.

(3A) Notwithstanding anything contained in sub-section (1), an action in violation of a convention specified in the Fifth Schedule shall be an act of terrorism under this Act.

(4) In this section "action" includes an act or a series of acts.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organization.

(6) **A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.**

(7) **In this Act, a "terrorist" means:**

(a) An individual who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation facilitation, funding or instigation of acts of terrorism;

(b) An individual who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above."

52. In our view there is **only one law** which deals with offenses of terrorism in Pakistan and that is the ATA. As such unlike offenses of corruption where there are numerous laws dealing with offenses of corruption it cannot be said that persons are treated differently in terms of remission if they are convicted for offenses of terrorism since there is only one Act namely the ATA for which you can be proceeded with if your offense meets the definition of terrorism. **As such all persons who are convicted of acts of terrorism in Pakistan are of the same class and are treated the same in terms of remission.** Namely, no remission is allowed to them and as such there is no question of any person who is convicted for an act of terrorism under the ATA being treated any differently. As such the denial of remission under the ATA is **distinguishable** from the facts and circumstances which lead to S.10 (d) NAO being struck down where an accused could be tried under different corruption laws for the same offense and receive the same sentence but be entitled to remission in all such cases **unless** he was convicted under the NAO where no remission was applicable especially keeping in view that it was the sole discretion of the Chairman NAB whether a case of corruption was to be proceeded with under the NAO and if not left to be dealt with under other corruption related laws. **In the case of offenses under the ATA** no single person has any discretion whether an offense is tried under the ATA or

the ordinary law. The only issue is whether as a matter of law based on the facts and circumstances of the particular cases the offense in question falls within the purview/meets the ingredients of being an offense under the ATA. If it does then the offense will proceed under the ATA whereas if it does not it will proceed under any other applicable law

53. It is apparent from the definition of terrorism in S.6 ATA as reproduced above that the offenses mentioned in S.6 (2) also in some cases fall under other laws. However it is only when such offenses have the **additional** requirement of design and intent as mentioned in S.6 (1) (b) and (c) that they will fall within the purview of the ATA and will be decided by the ATC courts and as such, although this point is not in issue in this case, this additional requirement in our view justifies the higher sentence which may be awarded in such cases and also the denial of remission as an additional mens rea is required which elevates the crime to one of the most heinous known to any civilized society whereby innocent civilians being men, women and even young children are deliberately and intentionally targeted with the intent to cause and spread terror within the state. The fact that there are two possible mens rea required in terms of either 6 (1) (b) or (c) we consider to be inconsequential

54. The next issue, in our view, is whether to deny remission in terrorism cases falling under the ATA is in violation of Article 25 of the Constitution having distinguished the case of S.10 (d) NAO when for many other criminal offenses remission is allowed. Namely, ***that in order to make a classification reasonable, it should be based on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out; and (b) that the differentia must have rational nexus to the object sought to be achieved by such classification*** **(as per Sherwani's case (Supra)** ***and that such discrimination is not arbitrary***

55. In this respect it is of assistance to consider apart from the Prison Rules (which are excluded from the ATA in terms of remission) the policy on remissions.

56. This is found in the policy framed by the Government of Pakistan, Ministry of Interior in August 2009 in consonance with the judgment in the case of **Shah Hussain V State** (PLD 2009 SC 460) whereby a larger bench of the Hon'ble Supreme court held that it was unconstitutional not to allow remissions **to under trial prisoners for the period they had spent in jail once they were convicted**. For ease of reference these guidelines are set out as under;

*""MOST IMMEDIATE*

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

*Islamabad, the August, 2009*

*From:*

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

*To:*

*The Registrar,*
*Supreme Court of Pakistan,*
*Islamabad.*

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

*Dear Sir,*

*Kindly refer to Additional Prosecutor General Punjab letter dated 28-7-2009 on the subject noted above.*

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

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

*Guideline*

a. *The present restrictive policy may continue.* ***Those who indulge in heinous crimes should not benefit from these remissions.*** *(bold added)*

b. *Solemn occasions on which this remission may be granted should be specified and there should be no deviation from that. Such remissions may be awarded on four occasions during a year i.e. Eid-ul-Fitr, Eid Milad-un-Nabi, 23rd March and 14th August.*

c. *Mercy petitions against death sentence may be dealt with on individual basis and there should be no general clemency.*

d. *Overcrowding in jails should not be considered a valid ground for special remissions. The indiscriminate practice in the past has at times encouraged crimes, crowding the jails further subsequently.*

e. *Federal and Provincial Governments may continue to exercise their power under the Pakistan Penal Code/The Code of Criminal Procedure/Pakistan Prison Rules 1978 in exercise of their best judgment that genuinely repentant and occasional criminals, who are victim of circumstances, benefit more from these remissions.*

*Remission*

i. *Special remission of 90 days to the prisoners convicted for life imprisonment* ***except those convicted for murder, espionage, anti-State activities, sectarianism, Zina (Sec.10 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under Sec. 377, P.P.C.), robbery (Sec. 394, P.P.C.), dacoity (Sec. 395-396 PPC), kidnapping/abduction (Sec. 364-A and 365-A), and terrorist acts (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No. XIII of 1999).*** *(bold added).*

ii. *Special remission for 45 days to all other convicts* ***except the condemned prisoners and also except those convicted of murder, espionage, subversion, anti-State activities, terrorist act (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No.XIII of 1999), Zina (Sec. 10 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under Sec. 377 PPC), kidnapping/abduction (Sec. 364-A and 365-A); robbery (Sec. 394, P.P.C.), dacoity (Sec. 395-396, P.P.C.), and those undergoing sentences under the Foreigners Act, 1946.(bold added)***

iii. *Special remission at sub-paras. i & ii above will be admissible provided that the convicts have undergone 2/3rd of their substantive sentence of imprisonment.*

iv. *Total remission to male prisoners who are 65 years of age or above and have undergone at least 1/3rd of their substantive sentence of imprisonment, except those involved in culpable homicide.*

v. *Total remission to female prisoners who are 60 years of age or above and have undergone at least 1/3rd of their sentence of imprisonment except those involved in culpable homicide.*

vi. *Special remission of one year to female prisoners who have accompanying children and are serving sentence of imprisonment for crimes other than culpable homicide.*

vii. *Total remission to juvenile convicts (under 18 years of age) who have served 1/3rd of their substantive sentence* ***except those involved in culpable homicide, terrorist act, as defined in the Anti Terrorism (Second Amendment) Ordinance, 1999 (No. XIII of 1999), Zina (Sec. 10 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (also under section 377, P.P.C.) robbery (Sec. 394, P.P.C.), dacoity (Sect. 395-396, P.P.C.), - kidnapping/abduction (Sec. 364-A and 365-A) and anti-State activities.***(bold added)

viii. *Those convicted in cases processed by NAB will not be entitled to any remission.* ***(NB as already noted in this judgment this (sub clause (viii) is no longer applicable having been struck down by the Hon'ble Supreme Court)***

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

*Yours faithfully,*
*(Mehir Malik Khattak)*
*Deputy Secretary*
*Tele:9203851"*

57. Whether this policy is in violation of Article 25 of the Constitution in terms of **Sherwani's case** (Supra) has in our view been answered by the Hon'ble Supreme Court in the case of **Nazar Hussain** (Supra) at P.1037 Para's 25 and 26 which are set out below for ease of reference.

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

*have been excluded who are accused of "heinous offences" in the paragraph of "remissions" in the policy letter reproduced in paragraph 24 above. The expression "heinous offences" has further been elaborated in the succeeding para i.e. that such remission would be available to those prisoners convicted for life imprisonment except those convicted for murder, espionage, anti-State activities, sectarianism, Zina (sec. 10 Offence of Zina (Enforcement of Hudood) Ordinance,1979 (also under Sec. 377, P.P.C.), robbery (Sec. 394, P.P.C.), dacoity (Sec. 395-396, P.P.C.), kidnapping/ abduction (Sec.364-A and 365-A), and terrorist acts (as defined in the Anti-Terrorism (Second Amendment) Ordinance, 1999 (No. XIII of 1999)). An analysis of the afore referred exclusions and the classification would show that the same are based on reasonable differentia and it is neither individual specific nor arbitrary. The classification made and denial of remissions to a class of convicts/prisoners is either backed by law or rule or there is an objective criterion. A breakup of the classification, the law or rules which may back this classification or the nature of heinousness of offence is given as follows* ;(bold added)

| *Sr. No.* | *Class of prisoners /convicts excluded* | *Reason* |
|---|---|---|
| *1.* | *Murder* | *It is a heinous offence* |
| *2.*<br>*3.* | *Espionage, )*<br>*Anti-State )*<br>*Activities )* | *Rule 214-A of the Prisons Rules mandates as follows: 214.A.--No person who is convicted for espionage or anti-State activities shall be entitled to ordinary or special remission unless otherwise directed by the Provincial Government.* |
| *4.* | *Secretarianism* | ***21F. Remission. - Notwithstanding anything contained in any law or prison rule for the time being in force, no remission in any sentence shall be allowed to person who is convicted and sentenced for any offence under this Act*** (bold added). |
| *5.* | *Zina/Rape* | *Section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Though this provision has since been repealed (by Act VI of 2006), but a similar provision has been inserted through sections 375 and 376 in P.P.C.* ***It is a heinous offence.*** |
| *6.* | *Dacoity (See 395-396, PPC Kidnapping/ abduction* | ***These are heinous offences.*** |
| *7.* | *Anti-Terrorism Act.* | ***21F. Remission. - Notwithstanding anything contained in any law or Prison Rule for the time being in force, no remission in any sentence shall be allowed to person who is convicted and sentenced for any offence under this Act.***(bold added) |

26. ***The afore-referred chart indicates that the policy of remissions under consideration is neither arbitrary nor discriminatory and is rather based on an intelligible differentia which is permissible and is therefore, not violative of Article 25 of the Constitution and the law laid down by this Court".***(bold added)"

58. The above policy remains in force as of today without any alterations or additions.

59. We are in full agreement with the above findings of the Hon'ble Supreme court in the case of **Nazar Hussain** (Supra) in finding that S.21 F ATA does not violate Article 25 of the Constitution.

60. It may be recalled that even in **Sherwani's case** (Supra) it laid down the ***following principles with regard to equal protection of law and reasonableness of classification at (iii):***

> ***(i)*** *.....;*
>
> ***(ii)***
>
> *(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;***

61. It is clear that in denying remissions to a **certain category of offenses these are regarded as heinous or as acts against the state**. There can be no doubt, in our view, **that acts of terrorism are heinous offenses** as indicated by the preamble to the ATA which reads as under:

> "**ACT NO.XXVII OF 1997**
> **An Act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences;**
> Whereas it is expedient to provide for the prevention of terrorism sectarian violence and for speedy trial of **heinous offences** and for matters connected therewith and incidental thereto; "

62. In **Saleem Raza's case** (Supra) it was also noted that another test for permissible classification is that the differentia must have rational nexus to the object sought to be achieved by such classification at P.170 Para 30 in the following terms;

> *"30.* ***Another test for permissible classification is that the differentia must have rational nexus to the object sought to be achieved by such classification. For this purpose the object of the law creating differentia is to be examined.*** *As rightly stated by the learned D.P.G.A. the object and purpose of enacting NAB Ordinance is*

*not to keep the accused persons in custody for longer periods but the main purpose is to recover the outstanding amounts and State money misappropriated by the persons prosecuted. The entire scheme of plea bargain, power to freeze the property, holding the transfer of property void, voluntary return, constitution of Conciliation Committees for payment of loans, reference of the cases to the Governor State Bank of Pakistan and prior approval of State Bank, are directed in this behalf. The Hon'ble Supreme Court while examining various provisions of the NAB Ordinance in the case of* ***Khan Asfandyar Wali v. Federation of Pakistan*** *PLD 2001 S.C. 607, held that one of the purpose and object of the law was to recover the ill-gotten money.* ***This object of the law has no nexus with the classification pleaded by the learned D.A.G. under section 10(d) of the NAB Ordinance.***"

63. Thus, there is no doubt in our minds that the denial of remission in cases under ATA **is in conformity with the object and purposes of the ATA** which Preamble was set out earlier and which is to give no concession to those persons **who commit heinous offenses** which strike at the very foundations of the State. A reading of the ATA in its totality shows that in effect its primary objective is punitive and to act as a deterrent to those who commit heinous crimes as opposed to the NAO which although penal in nature its primary object is the recovery of looted money of the State which is illustrated by the novel provisions of voluntary return and plea bargain which are found in the NAO where the accused can be released if in effect he returns the looted money which provisions still apply **after** conviction for an offense under the NAO which facilitates accused/convicts early release on that basis. Perhaps to a certain extent this legislation is reformative since usually a voluntary return and a plea bargain is only allowed in addition to the return of the plundered money **if the accused/convict admits his guilt and under takes not to engage in criminal activities in the future.**

64. The fact that offenses of terrorism **are heinous** is also shown by the fact that they require a **specific/special intent** in addition to the usual elements of a criminal offense being the actus reus and mens rea. Before an act can fall within the purview of the ATA not only do you have to have committed the actus reus **and** have the mens rea for the offense under S.6 (2) but you also need to have **the additional intent** under S.6 (1) (b) and (c) as under;

> (a) "**the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or**

**population or an international organization or create a sense of fear or insecurity in society; or**

**(b)the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies"** (bold added)

65. In essence offenses of terrorism through barbarous/heinous acts have the design and intent in effect of destabilizing the State which offenses are of the most heinous nature at the national level of any nation state.

66. As discussed earlier it is this requirement of special/specific intent **in addition** to the usual actus reus and mens rea of murder which leads to the crime of crimes known as genocide. Murdering a large number of people will not amount to the offense of genocide (although it may amount to extermination or mass murder) **unless** any of the following acts are committed with **intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:** (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.(**Article II Convention on the Prevention and Punishment of the Crime of Genocide** Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 Entry into force: 12 January 1951, in accordance with article XIII))

67. Such criminal offenses which **in addition** to the usual requirement of actus reus and mens rea **also require specific/special intent** (as with offenses under the ATA) are usually confined to the most heinous of crimes such as terrorism and genocide since there is a need to provide **an additional specific/special intent** which is usually of a very heinous nature and such acts are often carried out with the specific/special intent of destabilizing a State or trying to eliminate a certain class of people and as such legislatures in their wisdom may want to impose the highest

penalties **and restrictions** on the perpetrators of such acts as a deterrent to others.

68. Even in **Saleem Raza's case** (Supra) which was approved by the Supreme court in **Mazhar Iftikhar's case** (Supra) it accepted that certain offenses for which remission had been excluded were based on a reasonable classification based on intelligible differentia was available based on the nature of the offense such as Karo Kari, Siah Kari or similar other customs and practices, Espionage and other Anti State Activities even if in some of these cases remission can be granted with the permission of the Federal or Provincial Government.

69. We are further fortified in our view that the **heinousness** of the offense under the ATA is based on an intelligible differentia which is permissible by considering some Indian case law on this point.

70. In the case of **State of Haryana and Another v. Jai Singh dated 17-02-2003 (SC India):(Indian Kanoon - http://indiakanoon.org/doc/1841133/** where the Indian supreme court also considered whether denying remission for those convicted for heinous crimes was discriminatory and violated Article 14 and 21 of the Indian Constitution (similar to Article 4 and 25 of our constitution) it was held as under;

> *"We will first take up for consideration the argument accepted by the High Court in the impugned judgment that the impugned classification is arbitrary, unreasonable and violate of Article 14 of the Constitution. While considering the challenge based on Article14 as to the arbitrariness in the impugned classification, the court has to examine whether the impugned classification satisfied certain constitutional mandates or not. They are (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; (ii) that the differentia must have a rational relationship with the objects sought to be achieved by the Act. (See Kathi Raning Rawat v. The State of Saurashtra [1952 SCR 435]).*
>
> *In the instant case, the State Government under the impugned notification granted the benefit of remission to all convicts except those excluded in the said notification. Though the notification in question does not give any specific reason for exclusion of such convicts, from the pleadings of the State Government,* ***it is clear that this exclusion was done based on the nature of offence committed by the said convicts and taking into consideration the effect of such offence on the society as also the integrity of the State. The question then is whether such classification of convicts based on the nature of***

*offence committed by them, would be an arbitrary classification having no nexus with the object of the Code.*

*The answer to the said question, in our opinion, should be in the negative. This Court in a catena of decisions has recognized that the gravity of an offence and the quantum of sentence prescribed in the Code could be a reasonable basis for a classification. This Court in State of Haryana & Ors. V. Mohinder Singh etc. (2000 (3) SCC 394) held "Prisoners have no absolute right for remission of special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case." (emphasis supplied) In Maru etc. etc. v. Union of India & Anr.(1981 (1) SCR 1196), THIS Court while repelling an argument of discrimination in regard to the sentence to be imposed in murder cases, held:*

*"The logic is lucid although its wisdom, in the light of penological thought, is open to doubt. We have earlier stated the parameters of judicial restraint and, as at present advised, we are not satisfied that the classification is based on an irrational differentia unrelated to the punitive end of social defence. Suffice it to say here, the classification, if due respect to Parliament's choice is given cannot be castigated as a capricious enough to attract the lethal consequence of Art. 13 read with Art. 14."*

*In Sunil Batra v. Delhi Administration & Ors. (AIR 1978 SC 1675), this Court upheld the validity of a classification based on the gravity of the offence.*

*From the above observations of this Court, it is clear that the gravity of the offence can form the basis of a valid classification if the object of such classification is to grant or not to grant remission.*

*Having come to the conclusion that the gravity of the offence can be the basis for a valid classification, we will not consider whether the offences excluded from the impugned notification can be said to be such offences which have been wrongly excluded from the benefit of remission. We notice that the convicts who have been excluded from the benefit of said notification, are those convicts who have been sentenced for offences of rape, dowry death, abduction and murder of a child below 14 years, offences coming under Sections 121 to130 IPC, dacoity, robbery, etc. These are the offences for which the Code has prescribed the sentence of rigorous imprisonment extending upto life, therefore, from the very nature of the sentence which the offence entails, the said offences can be categorized as grave offences, therefore, they can be aptly classified as grave offences, which classification will be a valid classification for the purpose of deciding whether the persons who have committed such offences should be granted remission or not. On this basis, we are of the opinion that the State Government having decided not to grant remission to these offenders/offences which carry life imprisonment, should not be granted remission, is justified in doing so.*

*Similarly, the offences under the NDPS and the TADA Acts, apart from carrying heavy penal sentences are offences which could be termed as offences having serious adverse effect on the society,*

*cognizance of which is required to be taken by the State while granting remission, therefore, they can also be classified as offences which should be kept out of the purview of remission". (bold added)*

71. TADA is the Terrorist and Disruptive Activities (Prevention) Act which remained in force in India from 1985 to 1995 to deal with a particular internal insurgency and rising terrorism and even some of its provisions were regarded as draconian and contrary to human rights and the NDPS is the Narcotic Drugs and Substances Act 1985 under Indian law which Statutes were respectively enacted to prevent terrorism and dealings in narcotic substances in India like the ATA and the Control of Narcotic Substances Act 1997 in Pakistan

72. In the Indian case of **Jameel Ahmed v. State of Rajasthan and Others dated 01-01-2007 ):(Indian Kanoon - http://indiakanoon.org/doc/1264082/** before the Rajasthan High court it was held as under when dealing with the withholding of remission to certain categories of convicts;

*"Remission and parole are not vested rights of the prisoners. In fact, they are privileges granted by the State to the convicted prisoners. Therefore, a convicted prisoner cannot claim these two privileges as their vested rights. Jurisprudentially, there is a difference between right and privilege. Rights are classified under two categories of either being a fundamental right under the Constitution, or a statutory right granted by a Statute. On the other hand, a privilege is granted by the State under certain conditions and privilege by their very nature can equally be taken away by the State. Whereas rights are universal in nature, privileges can be given to certain specific groups and need not necessarily be universal in its application. Remission and parole are part of the reformative theory of punishment. Since they are privileges granted by the State, it is not necessary that all the convicted prisoners must have the privilege extended to them. Certain categories of prisoners can be refused these privileges. In case the refusal is based on intelligent differentia and has a nexus to the object of the Rules, the refusal is not violative or Article 14 of the Constitution of India. Since a privilege can be denied under the law, it is procedure established by law, therefore, such a denial would not be violative of Article 21 of the Constitution of India. Undoubtedly, the freedom of movement is cribbed, cabined and confined by the very act of imprisoning a prisoner. Therefore, the personal liberty is curtailed by judicial order under a procedure established by law. It is a policy decision of the State to decide the category of prisoners who are entitled to the privilege of remission and parole and those who are disentitled for such a privilege. Considering the fact that TADA was a law enacted for the purpose of controlling the terrorist activities in India, considering the fact that terrorist activities shake the very foundation of the*

> ***nation, considering the fact that such activities are an attack on the integrity and unity of the nation, considering the fact that such activities entail the killing of innocent women and children, considering the fact that such activities post a serious threat to the survival of the nation as a whole, the State has rightly deprived prisoners convicted under TADA of the privilege of remission and parole and Open Camp. Those who conspire and threaten the nation do not deserve any mercy from the law or form the State".*** (bold added)

73. It also notably observed that the Government of Punjab had excluded remission in Narcotics related cases in the following terms at P.172 Para 36 in **Saleem Raza's case** (Supra) as under;

> *"Again in this provision there is a reasonable and rational classification specifying a class of persons and still leaving the discretion with Federal or the Provincial Government and competent authority. A similar provision has been inserted by the Punjab Government through Rule 214-A of the Prison Rules. The Punjab Government has deprived all the convicted persons for special remission or on premature release on parole if they are sentenced for drug/narcotics offences vide Home Department letter No.14/1/93/MP, dated 27.1.1993.* ***In this case also a classification has been made which is based on intelligible differentia. The remission has not been denied on account of mere forum of trial but on account of commission of offences pertaining to drugs and narcotics."*** (bold added)

74. Even in **Sherwani's case** (Supra) when dealing with principles regarding equal protection and reasonableness of classification it was noted at **(iii) that different laws can validly be enacted for person's accused of heinous crimes.**

75. We would also like to observe that the legislature in considering the kind of law which it needs to pass in order to deter such offenses like terrorism also needs to consider the current environment prevailing in the country which was again emphasized in **Sherwani's case** (Supra) when enunciating **Principles as to classification at © (d) and (e) as set out below for ease of reference:.**

> *(a).....*
>
> *(b).....;*
>
> ***(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;***

76. Pakistan unlike many other countries in recent times has been grappling with the problem of internal terrorism which deliberate design and intent is to adversely effect the stability of the State through acts which undermine the government and its institutions and create fear and insecurity in the minds of the general public and as such it is the duty of Parliament to respond to such situations by passing the appropriate legislation in order to protect the State and its citizens which it has done by passing the ATA. In recent times in order to attempt to combat this menace of terrorism the legislature by a two thirds majority even amended the constitution for a limited period to allow certain so called black terrorism cases to be tried by military courts. As mentioned earlier in this judgment Parliament being elected by the people and therefore reflecting the will of the people can promulgate any legislation, with any sentences and restrictions, which it deems necessary/appropriate and the courts will only interfere with the same by way of interpretation if the legislative intent is unclear or if such legislation or parts thereof are in violation of the Constitution which approach is in conformity with the sovereignty of Parliament and the doctrine of the trichotomy of powers on which our constitution is based in a Parliamentary democracy.

77. We have also deliberately avoided considering too many rules regarding remission in most other countries since in our view each country through its duly elected legislative body passes such laws as are relevant to its own particular environment and circumstances pertaining in that country. As such we have confined ourselves to the Indian sub continent which has also grappled with the menace of terrorism and is a similar environment to ours to some extent in terms of social and economic development. For example, in some countries which face a lesser threat from terrorism and a lesser threat to their internal stability on account of terrorism at this point in time not only might their Anti

Terrorism laws be much less stringent than the provisions in the ATA but they may also provide lesser penalties, remission etc. It is for each country to respond to its own particular challenges and pass effective laws in respect of such challenges through its own legislatures. Our role in this case as alluded to earlier in this judgment was only to consider whether under the Pakistani ATA 1997 the exclusion of remission was in violation of Articles 4, 12, 13 and 25 of the Constitution

78. In answering this question for the reasons and discussion mentioned above we find that Section 21F ATA 1997 does **not** violate Articles 4, 12, 13 or 25 or any other Article of the Constitution and as such we uphold S.21 F ATA with the result that the petitions stand dismissed.

79. Before parting with this judgment however we would like to **emphasize** that since remissions are not applicable in cases under the ATA which concern heinous offenses having a special object and intent aimed at destabilizing the State and its institutions and cowering it citizens through instilling in them a sense of fear and insecurity **the Anti Terrorism Courts must exercise great care and caution in determining whether the cases before them fall under the ATA based on the requirements of S.6 and in the absence of the ingredients of S.6 (1) (b) and (c) being made out amount to cases to be tried under the ordinary criminal law.** Without belaboring the point we set out once again below S.6 (1) (b) and (c) ATA which are a **pre condition** which needs to be satisfied before S. 6 ATA might be attracted by virtue of the offenses set out in S.6(2) ATA:

> **6. Terrorism-** (1) In this Act, "terrorism" means the use or threat of action where:
>
> (a) the action falls within the meaning of sub-section (2);
>
> **and**
>
> **(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or**
>
> **(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians including**

> **damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies.** (bold added)
>
> Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law".

80. We would also like to place on record our appreciation of all the learned counsel who have appeared before us in these petitions and provided us with their most valuable assistance.

81. These petitions stand disposed of in the above terms.