

IN THE FEDERAL SHARIAT COURT
(ORIGINAL JURISDICTION)

Present :

Mr. Justice Aftab Hussain	Chief Justice
Mr. Justice Zahoorul Haq	Judge
Mr. Justice Malik Ghulam Ali	Judge

SHARIAT PETITION NO.K-4 OF 1982

Ansar Burney Petitioner

Vs

Federation of Pakistan Respondent
and others.

For the Petitioner Mr. Ansar Burney, Petitioner
(in person)
Mr. M.A. Khalil Siddiqi, Advocate.
Mr. G.M. Saleem, Advocate

For the Respondent Mr. Sharif ud Din Pirzada,
Attorney General of Pakistan.
Mr. Khalid M. Ishaq, Advocate
alongwith Mr. Ishrat Ali Khan,
Advocate for APWA.
Mr. Anwar Ahmad Oadri, Advocate
for Federal Government.
Mrs. Rashida Patel, Vice
Chairman, APWA and President
Women Lawyers Association,
Karachi.
Mrs. Salima Nasir ud Din,
Advocate.

Dates of hearing 31.7.1982, 1.8.1982, 5.8.1982,
8.8.1982, 9.8.1982 & 10.8.1982.

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JUDGMENT:

AFTAB HUSSAIN, CHIEF JUSTICE.

This petition has been filed to challenge the appointment of women as judges or magistrates for the following reasons:-

1. They discharge their functions of Qazi without observing pardah which is a clear violation of the Injunctions of Islam.
2. During the period of the Holy Prophet and his rightful companions the duties of Qaza were never entrusted to females since it appears to be a violation of the Injunctions of Islam.
3. According to Muslim Law the evidence of a woman is half of that of a man and her share in the inheritance is equal to half of that of her brother. The judgment of two ladies only can be equivalent to that of a male.
4. The ladies do not fulfil the qualification of Qazi according to the established principles of Muhammadan Jurisprudence.

2. This petition was fixed at Karachi for preliminary hearing but since the Attorney General as well as other lawyers wished to be heard, we considered it advisable to hear full arguments from the learned counsel of the petitioner as well as to give a hearing besides the Attorney General of Pakistan to all those who wished to be heard. The case was thus argued by Mr. G.M. Saleem for the petitioner, Mr. Attorney General, Mr. Anwar Hussain Qadri, Mr. Khalid M. Ishaq, Mrs. Saleema Nasiruddin and Mrs. Rashida Patel, Advocates. After hearing the case, the petition was dismissed by a short order for detailed reasons to be given later.

3. Some of the points need not detain us. It was conceded before us that there is no law or custom or usage having the force of law for or against the seclusion of women. In these circumstances, we are not called upon to go into the question whether

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Islam allows complete seclusion or partial seclusion or whether a woman shall appear in public veiled or unveiled. The argument of the learned counsel for the petitioner that since the evidence of two women is a substitute for the evidence of one man and her share in inheritance is equal to one half of that of her brother, there should be at least two female judges to decide a case, is impossible to accept. If such a concept is given effect to it will follow that no male Qazi sitting alone can decide a civil or criminal case. According to Fiqh, in cases other than that of adultery in which four eye witnesses are required to prove the offence, at least two male witnesses must prove disputes of property or criminal cases of Hudood and Qisas. If the argument of the learned counsel is taken to its logical conclusion, it should follow that the number of Qazis to decide a particular case should correspond to the number of witnesses required to prove it. A Qazi sitting alone can be allowed to act as a judge in rare cases. Similarly it is not a ground for excluding women from appointment as Qazis that the holy Prophet or his four successive Caliphs did not appoint any woman as such since the rule is that what is not prohibited by the holy Quran and Sunnah is permitted, and the burden of proof about anything being prohibited is on the person who claims it to be so. This is apparent from the maxim *الأصل في الأشياء الإباحة حتى يدل الدليل على حرمة الإباحة* (Alashbahu wal Nazair by Ibn Nujaim P.66). We have to see whether there is any express or even implied restriction on the appointment of a female Qazi. If no such restriction can be inferred,



the appointment will be legal in shariat.

4. It was not denied that there is no specific and direct Injunction in the Quran or the Sunnah of the holy Prophet concerning this matter. There are only the conflicting opinions of the Jurists. The view of Imam Abu Hanifa is that the authority of a Kazi is not valid, unless he possesses the qualifications necessary for a witness. Hedaya (Hamilton's) P.334. This opinion excludes from its ambit all cases of Hudood and Qisas which in his Fiqh do not admit of evidence of women. According to Imam ^{Han}Jareer Al-Tabri she can be appointed as Qazi in all matters. Hedaya by Hamilton P.334, Sharh Waqaya P.62, Durrul ^KMah^ftar, Vol.III, P.2⁵³, Jurisprudence by Abdul Rahim, P.389, Administration of Justice by Alhaj Mohammadullah S.Jung, P.9, Islam Ka Nizam-i-Adal by Mahmud bin Mohammad, P.169, Ehkam ul Sultania by Mawardi (Urdu) P.117, Philosophy of Jurisprudence by Subh Mahmasani, P.180. According to 'Kitabul Qaza' in Fateh-ul-Bari, Vol.13,P. 56, some of the Malakees also favour the opinion of Ibne Jareer. See also Mchalla by Ibn-e-Hazam, Vol.7, P.430. Ibne Hazam also supports this view as his opinion is that a female can be a head of the state and Hazrat Umar had appointed a lady as the Inspectress (حاسب السوق) of the market (Ibid). Ibn-e-Arabi does not accept the correctness of the Hadith about appointment of a woman by Hazrat Omar to supervise the market.

5. The learned counsel for the petitioner relied upon the view of Imam Sha'fai and Imam Ahmad bin Hanbal who held to the contrary on this proposition. He further submitted that according to a tradition correctness of which is undisputed the holy Prophet said: ^{لَنْ يَنْبَغَ قَوْمٌ وَلَوْ أَمْرَهُمْ امْرَأَةٌ} (There will be no blessings or prosperity for a nation which is ruled by a woman). He further relied upon the Quranic verse " ^{الرِّجَالُ قَوَّاتُونَ عَلَى النِّسَاءِ} " which, as will be seen, has been interpreted mainly in proof of the

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suzerainty of men over the women and by some in favour of a man being only a provider for woman. Some traditions were also quoted to which reference will be made at the proper stage. He further quoted the verses from which he inferred Injunctions about the seclusion of women and their appearance in public only with their faces veiled.

6. The learned Attorney General first made it clear that he was not presenting the Government's case as such but was appearing only for the assistance of the Court in this controversial matter. He referred to the views given by the Council of Islamic Ideology on a query by the Government about the legality of appointment of woman as Qazi. The Council said in its reply that a lady can be appointed a Qazi in all family matters subject to her being over 40 years of age and subject to the condition of observance of purdah. He cited a quotation from "Islami Nizam-i-Adalat" by Dr. Tanzilur Rehman, (now Chairman of the Islamic Ideology Council) page 41, which refers to the opinion of Imam Abu Hanifa in regard to the legality of appointment of a female Qazi in all matters in which her evidence is admissible with which the author agreed. He also referred to the opinion of Ibne Jarir who does not impose any restriction of admissibility of evidence and is of the view that a woman can be appointed a Qazi in all matters. As regards the opinion to the contrary held by Shafies, Hanblies and some Malikies he submitted that this view is based upon the above tradition in which the Holy Prophet condemned the appointment of a female ruler. But he argued that the tradition pertained to the then ruler of Iran and did not lay down the law that the women are disqualified from being elected or appointed rulers.

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7. In this connection the learned Attorney General referred to "Mawahibur Rehmania" and the Fatawa of some Ulema including Maulana Maudoodi issued in favour of Miss Fatima Jinnah's candidature for election to the Presidentship of Pakistan. He submitted that the basis of these Fatawa are the opinions of distinguished scholars like Maulana Ashraf Ali Thanvi and Syed Sulaiman Nadvi.

8. The Attorney General submitted that he had not been able to find in books on Sharia any limitation as regards age, purdah or that female judges can be appointed only for deciding cases concerning family matters. He said that even as regards the last point the Hanafi view was much more liberal. He also cited a phrase written by Syed Suleman Nadvi in his book "سیرتِ النَّبِيِّ" page 292 that whenever the companions of the Holy Prophet differed on any matter, they referred the case to the court of Hazrat Aisha. He said that the use of the word "عدالت" is important since it would show their intention that they wanted a judgment from her.

9. He referred to the book on "purdah"(English) by Maulana Maudoodi in which he expressed his opinion that the rule of purdah could be relaxed in some cases. He read extensively from the "The Introduction to Islam" by Dr. Hamidullah who argued after referring to the obligation of a woman as stated in the Quran that when the jurists admit the possibility of their being appointed as judges of tribunals there is no reason why they should not collaborate with men to earn their livelihood and to develop their talents.

10. Mr. Anwar Hussain Qadri referred mostly to verses from the Holy Quran and particularly placed reliance on verse 58 of Chapter IV:

" وَإِذَا حَلَّمْتُمْ بَيْنَ النَّاسِ أَنْ يَتَكَلَّمُوا بِالْعَدْلِ "

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(and if ye judge between mankind, then ye judge justly). He submitted that this verse is general in scope and the injunction is directed to both men and women and proves the legality of appointment of members of that sex as Qazis. He also submitted that the mother of Muqtadar Billah presided over the High Court of Appeal.

11. Mr. Khalid M. Ishaq submitted that it was not correct that the evidence of a woman is half of the evidence of a male. Referring to verse 6 of Surah Noor about Lian, he submitted that it is clear that the oath of a woman is equal to the testimony of one witness. He referred to a judgment of Qazi Shuraih, in "Akhbarul Quzzat" by Wakeei, Vol.III, page 359 in which he decided a matter on the solitary evidence of a lady because the plaintiff and the defendant both males signified their assent to this procedure. He argued that the phrase "الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ" was used in the Holy Quran in order to lay stress upon the responsibility of a male to provide for the female. He quoted extensively from different books. Similar arguments were given by Mrs.Saleema Nasiruddin and Mrs.Rashida Patel.

12. It has already been observed that the question of purdah is not relevant since there is no law, custom or usage enforceable by law in regard to it. However, in passing, it may be stated that according to Imam Abu Hanifa, Imam Malik, Imam Shafai and Imam Ahmad bin Hanbal, the face and hands of a woman are exempted from concealment. This opinion is also attributed in Tirmzi to Ibne Abbas on a report from Saeed bin Jubair. According to a report from Atta, Hazrat Aisha in addition to face and hands also exempted feet from being covered. (Tafseer-Mazhari, Vol.8, P.326).

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13. There is a Hadees of the holy Prophet that a lady of the tribe named Akhsam came to the Prophet in the year of Hajjat ul Widaa and enquired whether she could perform Haj on behalf of her father who was too old to ride an animal. The Prophet answered in the affirmative. Ibn Abbas who reported this tradition said that Fazal who was riding behind the Prophet gazed at the lady who was looking towards him. The Prophet turned Fazal's face to another side.

14. Ibn Qatan^h inferred from this tradition that since the Prophet did not order that woman to veil or cover her face it follows that it is not prohibited to see if there be no apprehension of mischief by enchantment. Tafseer-i-Mazhari, Vol.8, P.325.

15. The only question which remains to be considered is the legitimacy of appointment of a woman Qazi according to the holy Quran and the Sunnah of the holy Prophet (PBH).

16. The first point is about the interpretation of verse 34 of Surah Nisa (Chapter IV), "الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ" (Men are incharge of women). This verse furnishes the main plank for the argument in favour of women being subordinate to men. In some of the commentaries the

word "قَوَّامٌ" (Qawwam) is used in the sense of a ruler or master or a person having an authority, for example "مُحَافِظُ الْقُرْآنِ" (Naarufyk Quran) by Mufti Mohammad Shafi. In "روح المعاني" (Rooh ul Maani) by Aloosi Vol.V page 21 the position of man is of "الْوَالِدَاتُ الرَّاعِيَاتُ" i.e. sovereign power over the subject. The word "وَالِدَاتُ" (soverign power) in respect of women is also used in

"تفسير المنار" (Tafseerul Manar) Maulana Fateh Muhammad of Julundhar translated the said verse in the same meaning (^{فدور تون پر مسلط})

(اور حاکم ہیں) i.e. they are rulers and have absolute sovereignty over them.

17. In other commentaries, however, the word "قَوَّامٌ" (Qawwam) is interpreted as a guardian or head of the family.

(See Tadabburul Quran by Maulana Amin Ahsan Islahi).

Maulana Abul Kalam Azad translated the word as "تفسیر برادہ اور کلوز فاما" (See Tafseer-e-Buradah aur Kuloz Fama)

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(a manager and a ruler) but it appears from his commentary that he has used the word " سربراہ " (ruler) in the sense of the head of the family or a person who manages the affairs of the family. The word " سربراہ " (Sarbarah) is also used to mean a provider. In the Urdu-English Dictionary by John Shakespear one of the meanings of sarbrahi (سربراہی) is the act of providing supplies. It is in this sense that Maulana Umar Ahmad Usmani interprets it in Fiqh-ul-Quran, Vol.III.

18. In support of the diluted meaning Maulana Abul Kalam Azad has referred to the pre Islamic concept about the members of the other sex being entitled to subservient status only and their duty is to serve the members of the male sex, to obey them and satisfy their desires. The Quran has improved this status. For proper appreciation of this view it is necessary to refer to the various concept in which the role of a woman ranges from subordination to subjugation.

19. In Will Durant's story of civilization Vol.III, Pages.596, 597 is summed up Paul's instructions to his communities which they were required to follow strictly.

"Women should keep quiet in Church. They must take a subordinate place. If they want to find out anything they should ask their husbands at home; for it is disgraceful for a woman to speak in church.....Man was not made from woman, but woman from man; and man was not created for woman, but woman for man. That is why she ought to wear upon her head something to symbolize her subjection."
(See 1Corinthians 11:3-16)

He (Paul) ordered them to take veil at the risk of their heads being shaved.

"If a woman does not wear a veil, let her hair be cut; but if it is disgraceful for a woman to have her hair cut off or her head shaved, then let her wear a veil."
(1 Corinthians 11:6)

This was the Judaic and Greek view of woman (story of civilization by Will Durant, Vol.III, P.597). In ancient Israel the husband had a proprietary right over his wife (Encyclopaedia of Religion and Ethics, Vol.5, P.724).

The father could sell his daughter into bond-service (with concubinage) though not to foreigners. He might cause a prodigal son to be stoned to death or a prodigal daughter to be burnt alive (Ibid P.728).

20. The property right of women were as limited in Talmud as in Eighteenth century England; their earnings and the income from their properties belonged to their husbands. (The Age of faith by Will Durant P.363). In law according to one Rabbi 'a hundred women are equal to only one witness'.

21. Even in the nineteenth century in America (New England) a married woman had no legal existence apart from her husband's. She could not sue, contract, or even execute a will of her own; her person, estate and wages became her husband's when she took his name (Bonds of Women by Nancy F.Cott, P.5) The property reforms in most States started after 1839. In England the first Act 'The Married Women's Property Rights Act', was promulgated in 1882. As late as the 18th century Sir William Blackstone published his influential commentaries on the laws of England in which he reaffirmed the legal inferiority of women. He held that women had no legal existence once married; husband and wife were one person, in law, and that person was their husband. (New Standard Encyclopaedia on 'Women's Rights'), section 37 of the Law of property. Act, 1925 declared that a husband and wife shall for all purposes of acquisition of any interest in property under a disposition made or coming into operation after the commencement of this Act, be treated as two persons. Law Reforms (Married Woman and Tortfeasor's Act, 1935) declared her to be capable of suing or being sued either in tort or in contract or otherwise, of acquiring holding and disposing of property and of rendering herself and being rendered liable in respect of any tort, Contract or debt or obligation (S.1). It also declared that what was her separate property or may

belong to her or devolve upon her after this Act shall belong to her and may be disposed of by her as if she were a feme sole.

22. Among the Greeks the women were left in complete seclusion. She was expected to stay at home, and not allow herself to be seen at a window. Most of her life was spent in the women's quarters at the rear of the house; no male visitor was ever admitted there nor did she appear when men visited her husband. She could visit her relatives if properly veiled and attended. "The name of a decent woman, like her person, should be shut up in the house" said Plutarch. (Story of civilization by Will Durant, Vol.II, P.305. See also Encyclopaedia of Religion and Ethics Vol.5, P.735).

23. In Roman Law a woman was considered legal minor under perpetual tutelage of father and husband. (Patria Potestas)

24. The condition of women among the Hindus is well known to persons residing in the sub-continent. Her position was no better than that of a slave and she had to be Sati (die by burning) on the cremation of her husband.

25. In Japan after the coming of Confucian and Buddhist teachings woman's duty became that of obedience to her father, her husband & her son; when married her property became the possession of her new family. (Encyclopaedia of Ethics & Religion Vol.5, P.740).

26. Thus generally the women were not considered economic individual. On the other hand if they had property or earned wages or were made to earn wages, their income was spent only to provide economic relief to their husband. Their position was of subjugated individuals.

27. Islam on the other hand placed woman and man both on the same footing in economic independence, property rights and legal process. She might follow any legitimate profession, keep her earnings, inherit

property & dispose of her belongings at will (Q.4:32)
(See The Age of faith by Will Durant P.180).

28. The commentaries in which the concept of dominion or sovereignty is advanced appear to be based upon the old conceptual trends.

29. The root word of "qawam" in Arabic is "قَوَّامٌ" or "قَوْمٌ".^(Qawwama) The words "قَوْمٌ عَلَى" (Qawama ala) means to provide someone's needs, to support someone or furnish someone with the means of subsistence. قَوَّامٌ عَلَى (Qawwama ala) will, therefore, mean a provider, a supporter or furnisher for another with the means of subsistence. It also means a manager, care-taker, custodian or guardian. It is for this reason that Abdullah Yousaf Ali has translated the word "قَوَّامٌ" as meaning protector. Pickthal has translated it as incharge, which is the something as caretaker or guardian. Arberry interprets it as one who manages the affairs of women.

30. This sense is more in accord with the subsequent language of this verse. The reason is that men spend their property for the support of women. Abdul Aziz Jaweesh says Al Islam Deen ul Fitrata Wal Hurriya, P.98 that the superiority if any is not for any natural proficiency in one and deficiency in another but it is only on account of the liability to maintain. It must follow that one who does not maintain his wife should not be Qawwam. And this is exactly what is said in Al-Bahr ul Moheet by Abu Hayyan Undusi with reference to Qurtabi (P.239).

31. The sense of a provider and a protector is very much included in the verse. By calling male a sovereign, the concept of his having full dominion over her life and property both will have to be imported which can not be in accordance with the Quranic injunctions in which the life and property of all including that of women is sacrosanct. On the other hand Shariah provides that even if the woman is wealthy enough or wealthier than her

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husband, the latter is under an obligation to provide for her maintenance keeping in view his own means as well as the status of woman in the society. The excellence of one over the other is in relation to the physical strength and the will and determination to fight and to protect *فَضَّلَ اللَّهُ الْبُحْصَانَ عَلَى الْبَعِضِ* "Because Allah has given the one more (strength) than the other" connotes this excellence in strength. The word strength includes physical strength. They are for such reasons in a better position to safeguard the interest of women.

32. I think the best commentary of this verse is in the tradition of the holy Prophet (PBH):

إِذَا كَلَّمْتُمْ رَاعٍ وَكَلَّمْتُمْ مَسْئُولًا عَنْ رِعْيَتِهِ قَالَ إِمَامٌ الَّذِي عَلَى النَّاسِ رَاعٍ فَهُوَ مَسْئُولٌ عَنْ رِعْيَتِهِ وَالرَّجُلُ رَاعٍ عَلَى أَهْلِ بَيْتِهِ وَهُوَ مَسْئُولٌ عَنْ رِعْيَتِهِ وَالْمَرْأَةُ رَاعِيَةٌ عَلَى أَهْلِ بَيْتِ زَوْجِهَا وَوَلَدِهِ وَهِيَ مَسْئُولَةٌ عَنْهُمْ وَعَبْدُ الرَّجُلِ رَاعٍ عَلَى مَالِ سَيِّدِهِ وَهُوَ مَسْئُولٌ عَنْهُ إِذَا كَلَّمْتُمْ رَاعٍ وَكَلَّمْتُمْ مَسْئُولًا عَنْ رِعْيَتِهِ

(Every one of you is a guardian and is responsible for his charges. The Imam (ruler) of the people is a guardian and is responsible for his charge; a man is the guardian of his family (household) and is responsible for his charge; a woman is the guardian of her husband's home and of his children and is responsible for them; and the slave of a man is a guardian of his master's property and is responsible for it. Every one of you is a guardian and responsible for his charges (Bukhari). "راعى" means protector, custodian or a person who is responsible for the development of his protected thing and thus he is required to be just and to look after its interests. (Fathul Bari, Vol.13 Page 112).

33. It may be clarified that the word "رعى" which is the root word of "راع" and "رعيته" means to graze, to tend, to take care of, to guard, to protect. "راع" means shepherd, herdsman, guardian, keeper, protector. "رعيته" in that sense carries the meaning of 'herd' or 'flock'. The functions of a shepherd are

firstly to graze or tend the herd which makes him undertake the responsibility of a provider, secondly to protect it from the attacks of wild animals which gives it a sense of protector and thirdly to see that a member of the flock does not stray from the path. In that case he can also exercise his authority of retribution. Primarily the shepherd uses all means of love for keeping the members of the flock from straying. It is only as a last resort that he may give them a slight beating.

34. The meaning of the verse which may now be reproduced fully from Abdullah Yousaf Ali's commentary on the Quran will bear out this sense of a shepherd and it appear that a part of this Hadith is really a commentary of this verse:

"Men are the protectors
And maintainers of women,
Because Allah has given
The one more (strength)
Than the other, and because
They support them
from their means.
Therefore the righteous women
Are devoutly obedient, and guard
In (the husband's) absence
What Allah would have them guard." (Verse 4:34)

It also appear from Hadith that the mantle of shepherdhood is not for the male only; a female also may be a shepherdess. She enjoys that role over her children. In a case where she is un-married or a widow or her husband deserts her or there is separation between the spouses, she becomes the Qawwam or guardian or mentor of those she has to look after. The verse deals with family in which the man and the wife are the two principal characters but in such a normal family also her position is that of second in command and in her children she has a flock to be shepherded by her. In these circumstances it will be doing violence to the language of the verse to interpret it in the sense that a man always holds some dominating position over the other sex. This is clarified by the Hadis.

35. The same result can be obtained from a reference

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to Q.2:223, "Your women are a tilth for you (to cultivate)". This verse has been generally interpreted to be against the commission of an un-natural sexual act with one's wife. There is, however, no justification for confining it to that matter. It also indicates how a person is to act towards or to treat his wife. The treatment should be of a farmer handling and managing his land as lovingly as possible and looking after it with such care and caution which may enable him to get the best produce out of it. Maulana Amin Ahsan Islahi has partly referred to this point while commenting upon this verse in Tadabbarul Quran. He says:

"It is a common desire on the part of a tiller of the soil that he should obtain the best crop from his land and for this purpose to plough at the right time, to water it and to give manure to it according to need, and see that it remains protected from seasonal calamity and the depredation of beasts of prey, grazing animals, birds, enemies and thieves. When he looks towards it, he will be gratified and pleased by its verdure, and freshness and when the time comes, he may reap excessive crop."

36. The simile is very apt and is suggestive of the loving treatment to which a wife is entitled.

37. The position of a "Qawwam", guardian, manager, maintainer, provider, in whatever sense it is interpreted, does not give any particular triumph to the husband over the wife. Islam is a religion which stresses upon extreme discipline. It is to advance this object that the holy Prophet advised that even during a journey the co-travellers should choose from amongst themselves a chief i.e. a person who may look after their collective interest for so long as they travel together. In this view of the matter, it is not strange that need has been felt for appointment of someone as the head of the family. This duty could naturally be assigned to one who undertakes the additional duty to maintain his wife and children, to look after the latter's training and education and also to guard them against evil doers.

These are functions which can be more satisfactorily ~~be~~ discharged by a male. Alternative arrangement has been made for the mother to act as second-in-command during the presence of the husband and an alternative head during his absence or even non-existence, as is clear from the above Hadith. In fact everyone is enjoined to look after persons who are in his care.

38. In classical Roman Law, a patriapotestas or the elder of the family was given the right even to kill the children. In the Old Testament in case of disobedience of the father by the son, the latter was liable to be sentenced to death. But Islam does not allow the head of the family to kill anyone. The role of "Qawwam" therefore being that of a protector, a manager, or maintainer, the position does not give him a particular edge over the members of his family.

39. On the other hand there is mutuality in the relationship of the spouses. The Quran says:

"They (women) are raiment for you and you are raiment for them." (Q.2:187)

Q.9:71"

"And the believers, men and women, are protecting friends one of another; they enjoin the right and forbid the wrong, and they establish worship and they pay the poor-due, and they obey Allah and His messenger. As for these Allah will have mercy on them. Lo! Allah is Mighty, Wise."

There is thus mutuality in friendship and also in enjoining the right and forbidding the wrong. Even in the story of Adam and Eve Quran does not paint one as temptress and the other acting under the enchanting influence of the other (Gen.3:1-6).

According to the story in Genesis the woman first yields to temptation. But the Quranic story keeps them on level of equality even when satan leads them astray.

"Then satan whispered to them.....And he swore unto them: Lo! I am a sincere advisor unto you. Thus

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did he lead them on with guile. And when they tasted of the tree, their shame was manifest to them..... And their Lord called them.....They sued:Our Lord! we have wronged ourselves" (Q.7:20-23).

40. The injunctions to men and women are similar and their reward and punishment are equal. In some injunctions the man and woman both are addressed. Such injunctions may be regarding the duties or they may be regarding reward or punishment.

Q.33:35 "Lo! men who surrender unto Allah, and women who surrender, and men who believe, and women who believe, and men who obey and women who obey, and men who speak the truth and women who speak the truth, and men who persevere (in righteousness) and women who perservere, and men who are humble, and women who are humble, and men who give alms and women who give alms, and men who fast and women who fast, and men who guard their modesty and women who guard (their modesty), and men who remember Allah much and women who remember - Allah hath prepared for them forgiveness and a vast reward."

Q.33:73 "So Allah punisheth hypocritical men and hypocritical women, and idolatrous men and idolatrous women. But Allah pardoneth believing men and believing women, and Allah is Forgiving, Merciful."

41. There are a large number of injunctions in which only masculine gender is used but it is an established rule of interpretation of the Quran that unless there be something repugnant in the subject or context, the masculine will also include the feminine.

Q.10:27. "And those who earn ill deeds, (for them) requital of each ill deed by the like thereof; and ignominy overtaketh them - They have no protector from Allah - as if their faces had been covered with a cloak of darkest night. Such are rightful owners of the Fire; they will abide therein!"

Q.18:88. "But as for him who believeth and doth right, good will be his reward, and we shall speak unto him a mild command!"

Q.56:24.

"Reward for what they
used to do."

such

There are a large number of injunctions but only a few
of them have been cited for the sake of illustration.

42. These verses prove the measures of equality
between men and women. In Q.3:195 and Q.4:25 it is
stated " بفضل من بغض " meaning "Ye proceed one
from another". Pickthal interprets it as laying down
that men and women are of equal status. Some of the
women, in fact, have preference over males eg. the
wife of Pharaoh who brought up Moses, Mary mother of
Jesus, Hazrat Khadija, Hazrat Aisha and Hazrat Fatima
and all other wives of the holy Prophet. The first person
who believed in the mission of the holy Prophet was a
woman i.e. Hazrat Khadija. She believed and acknowledged
the truth of Islam. According to Ibne Hasham, whenever
the holy Prophet heard something that grieved him
touching his rejection by people, she reassured and
supported him (Women in Muslim History by Charis Waddy,
P.9). The high opinion of the holy Prophet about Hazrat
Khadija is clear from the Hadith reported by Hazrat
Aisha. He said:

"She believed in me when I was rejected,
when they called me a liar she proclaimed me
of truthful, when I was poor she shared with
me her wealth and Allah granted me her
children though with-holding of others
(Ibid, Pages 18-19)."

This Hadith reflects the feeling of love, respect
and friendship which was mutual between the ideal
husband and the ideal wife.

43. That the holy Prophet also helped his wife (in
domestic work) is proved by another Hadith. Hazrat Aisha
was asked what was the first thing the Messenger of
Allah used to do when he came home, she answered, he
cleaned his teeth. She was asked what did he do at home,
she answered he helped his wife (Ibid P.21)

44. From these traditions it appears that the husband
and wife are like the two wheels of the same chariot and
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domestic work is not the duty of a woman only; the husband is also required to help her.

45. The concept of equality was summed up by the holy Prophet in his address on Hajjatul Wida as will be clear from the following passage:-

"All people are equal as equal as the teeth of a comb. There is no claim of merit of an Arab over a non-Arab or of white over a black person only God fearing people merit a preference with God."

Thus men & women are equal. But this may be superior because God fixes only one criterion for real superiority and it is "The noblest of you in the sight of Allah is the best in conduct."(Q.49:13)

46. In addition to the above precepts there are injunctions to show kindness and politeness to the parents and to lower unto them the wing of submission through mercy (Q.17:23,24) and to show courtesy and kindness to the women even at the time of divorce (Q.65:6;Q.2:229). The result to be obtained from these specific orders is that while a woman is entitled to be treated with honour, she should be released in kindness.

47. The holy Prophet Said: 'The best of you is one who treats his wife best' and 'God dislikes a man who is stern to his family and self conceited' Ihya ul Uloom Book II, P.38 (translation by Maulana Fazal Karim). It is not possible to infer any prohibition from verse Q.4:34 about Qawwam.

48. The next point is whether the Hadith " **لَنْ يَفْلَحَ** قومٌ ولو أمرهم امرأة " (That nation will not prosper which is ruled by a woman) disqualifies women from appointment as Qazis. It is on account of this Hadis that in the 22 points of the Ulema (learned jurists) of Pakistan which were presented to the Government as necessary preliminaries to the framing of a Constitution, Point No.12 specifically said that the Head of the State will be a Muslim male. This point was re-examined during the course of campagne for the Presidential Elections of 1964 in which Miss Fatima Jinnah was nominated by the opposition parties to fight the election to the office of the President of Pakistan against

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Field Martial Muhammad Ayub Khan. After a research the view as about a woman being qualified for the office of the Head of the State was changed on the basis of opinions of two of the most renowned Ulema of the 20th Century in Indo Pakistan, namely Maulana Ashraf Ali Thanvi and Allama Syed Sulaiman Nadvi. The Jamait-e-Islamia Pakistan endorsed this view after retracting its earlier stand on the matter which was reflected in the above mentioned point No.12. Maulana Maudoodi was severely criticised for this by Kalim Bahadur in his book "Jamait-i-Islami of Pakistan". But this criticism was not justified since it is the duty of a Muslim to accept the truth and to change and retract his earlier view. In technical parlance this is known as the doctrine of 'رجو' (Raju or retreat).

49. Maulana Ashraf Ali Thanvi expressed this opinion in answer to a query whether the women rulers of (Indian) States were included in ^{or} hit by this tradition. He said in reply that the governments are of three types. One category is in which there is absoluteness as well as generality; absoluteness in the sense that it may be a despotic rule and general in the sense that the governed should not consist of a small body. The second kind is where there is absoluteness but not generality. In the third category there is generality but not absoluteness. The example of the first is of a woman whose rule is despotic. The example of the second is of a woman who is absolute sovereign of a small body of persons. The third may be illustrated with reference to a popular Republican Government in which the defacto and dejure ruler is not in appearance a ruler but is only one of the consultative body and the government is composed of a body of advisers or consultants. It appears from the Hadith that it was meant for the first kind (despotic rule). These words were uttered by the holy Prophet in relation to the elevation of Chosroe's

daughter to full sovereignty in Iran. In the third kind though the selection is by the whole nation but there is no absolutism in authority and all acts are performed by advice and consultation.

50. In this connection reference was made to Bilqees of Saba in the Quran in which there is a verse " *ما كنت قاطعة بئراً حتى تشهدون* " (I decide no case till you are present with me) (Q.27:32) from which it appears that either constitutionally or by usage it was a sort of democratic government. There can be no objection to the appointment of a woman as such a Head of State and States with such Governments ^{are} free from the taint of deficiency pointed out in the Hadees (Imdad ul Fatawa, Vol V. Pp.91-93)

51. A similar opinion was given by Syed Sulaiman Nadvi in his book " *سيرت عائشه* " page 137. Maulana Zafar Ahmad Usmani is of the view, as stated in his book " *اعمال السنن* " Vol.15, P,28 that, the Hadith does not amount to prohibition against the appointment of a woman as Head of the State. It is by way of "Istehsan" that this view is given which means that generally it may not be advisable to appoint a woman.

52. Maulana Umar Ahmad Usmani in his book "Fiqhul Quran", Vol.III, Pp.286-287 has expressed some doubts about the authenticity of this "Ahad" (isolated) tradition (reporters of which do not exceed two in each age) on the ground that it was reported by Hazrat Abi Bakra at the time of War of Camels (*جذب الجمل*) which was being fought under the leadership and command of Hazrat Aisha. This Hadith was described by Hazrat Abu Bakra in an interne-cine war in which both the warring sides consisted of a large number of companions some of whom were illustrious and Hazrat Abu Bakra himself was in the rank and file of Hazrat Aisha. No companion of the Prophet of Allah disclaimed allegiance to Hazrat Aisha on this ground. Maulana Zafar Ahmad Usmani says that a number of companions of the holy Prophet participated in this battle

but none of them applied this Hadith to the leadership of Hazrat Aisah (Ela ul Sunnan, Vol.XV, P.28)

53. This difference of opinions on the question of appointment of woman as the Head of a State or as Qazi is not new. While some schools of thought opposed such appointment, Ibne Jarir Tabari who was in favour of legitimacy of appointment of women as Qazi also favoured her appointment as a Head of the State. According to Fathul Bari, Vol.VIII, Page 128 (printed by Darul Fikr, Beirut) (Chapter regarding "Letter of the holy Prophet to Qisra") not only Tabari has permitted this but there is a similar reported view of Imam Malik also. On the basis of opinion of Imam Malik, the Malki jurists have also given verdicts in favour of this view. (Fathul Bari, Vol.XIII, Page 56) (Printed by Darul Fikr, Beirut).

54. In the opinion given by Maulana Ashraf Ali Thanvi in "Fatawa-e-Imdadia" Vol.V, Pp.91-93, distinction has been made between Imamate Kubra (Headship of the State) and Qaza (judgeship). He says that though the jurists have made the maleness of sex as a condition precedent for legitimacy in headship of the state, it is not a condition precedent for judgeship. This is, however conditioned with " **صون عن الذم** " (to escape from sin) but there is no exemption on the basis of sex in the managership of a waqf, executorship of wills and evidence. It is also a fact that Hazrat Umar had appointed Shifa Binte Abdullah as an Inspectress of Markets. This fact as well as her biography is given in " **الاصابة في تميز الصحابة** " (Alisaba fi Tamiz al-Sahaba) /by Ibne Hajr Asqalani, Vol.IV, P.333, Mohalla by Ibn Hazam, Vol.VI, P.429 " **اعلان سنن** " /Vol.XV, P.27 by Maulana Zafar Ahmad Usmani, and " **سيرت عائشة** " (Seerat-e-Aisha) /by Syed Sulaiman Nadvi, P.126. It may be stated that Ibne Arabi does not consider this Hadith to be correct but it is not possible to agree with this in view of reliance placed on this appointment by other distinguished jurists and Ulema.

55. There are also a number of historical instances

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about the exercise of jurisdiction of Qazi or Head of the State by women without any objection by the Ulema of that age. The oldest example is of the mother of Muqtadar Billah who presided at the High Court of Appeal (History of Saracens by Amir Ali, P.455, "Tarikhul Khulafa" by Sayooti, P.381). From this later book it appears that she decided criminal cases. Razia Sultana as a Head of the State also decided cases. (Administration of Justice in Medieval India by M.B.Ahmad, P.94) The name of Shajarut-ul-Durr is frequently mentioned in this connection by the jurists.

56. It is unnecessary to quote many examples, it may be sufficient to cite the summing up in the "Introduction to Islam" by Dr.Hamidullah, P.137 in regard to the working of women in different capacities:

"In every epoch of Islamic history, including the time of the Prophet, one sees Muslim women engaged in every profession that suited them. They worked as nurses, teachers, and even as combatants by the side of men when necessary, in addition to being singers, hair-dressers, cooks, etc. Caliph Umar employed a lady, Shifa bint Abdullah as inspector in the market at the capital (Madinah) as Ibne Hajar (Isabah) records. The same lady had taught Hafsa, wife of the Prophet, how to write and read. The jurists admit the possibility of women being appointed as judges of tribunals, and there are several examples of the kind. In brief, far from becoming a parasite, a woman could collaborate with men in Muslim society to earn her livelihood and to develop her."

57. There is a Hadith from Buraida that two categories of the Qazis will be in hell and only one will be in paradise. Those who will be in paradise are those who decide disputes on the basis of assessment of truth. But if anyone realises the truth but passes an order contrary to it, he will be in hell. Similarly that Qazi will be in hell who does not strive at finding out the truth

(*تفنى على الناس على جميل*) (Ela ul Sunnan, Vol.15,P.25)

58. Imam Ibne Taimia argued in " *المنتقى* " (Almuntaqa) that the appointment of a woman as Qazi is not correct since the

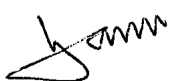
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word "رجال" (men) has been used in relation to the Qazi at all the three places. This argument does not appreciate that it was not intended to lay stress upon the sex of the Qazi; the intention is only to categorise Qazis in a manner so as to demonstrate as to how they should act and how they are likely to act. The only manner in which he should act is to strive at reaching the truth and then to decide and to refrain from shirking the truth. Even otherwise the masculine is more often used by way of Taghlib (being customary among the majority) and by habit to describe something which applies to members of the masculine as well as the feminine gender. Unless there be some repugnance in the context, the male will include the female also (علاء السنن (Elaul Sunan) Vol. XV, P.26).

59. Abu Bakr bin Tayyab Shafai opposed the view of Imam Abu Hanifa and Imam Ibne Jarir on the ground that it is not suitable for a woman to appear in public, to have contacts with men and to talk to them on equal terms because if she is young, it is not permissible to look to her and to listen to what she says and it will also not be right for her to appear amongst men without pardah or to look towards them.

60. In order to furnish a reply to this objection Maulana Zafar Ahmad Usmani tries to distinguish between what is merely allowed and what ought to be done (See Ela ul Sunnan, Vol. XV, P.28). According to him Imam Abu Hanifa has only given an opinion that judgeship of a woman is not incorrect but he no where said that she should be so appointed. He gives an example that if on account of "غلبه شوکت" (her awe inspiring magnificence) she decides some dispute, her judgeship will be unobjectionable.

61. This distinction appears to be without any distinction. In the absence of any prohibition the appointment, if made, will be treated to be legal, irrespective of any other consideration. The verdict



of legality would furnish sufficient ground for appointment of a woman as Qazi. It is quite possible that Imam Abu Hanifa and Imam Ibne Jarir while giving their respective opinions had in view the awe-inspiring dignity of the office of a judge in which the judge has to maintain the authority and dignity of court and it is not permissible either on his part or on the part of litigants to venture to be disrespectful to the Court or, to say in the Court anything which is irrelevant to the case. The litigants and members of the public present have to be respectful in their dealings towards the Court. The Court has to keep its decorum and for this purpose it is armed with powers to deal with a strong hand with cases of contempt of Court (See the Provisions of the Contempt of Court Act and S.228, Pakistan Penal Code). What is stated by Maulana Zafar Ahmad Usmani as an exception is really a rule in Courts. Armed with powers to deal with insult to the Court or even interruption in its proceedings a woman Kazi is also immune from the disrespectful conduct of others.

62. It is very strange as stated by Abu Bakr Ibne Tayyab Shafie that even hearing the voice of a woman is not permissible. This is contrary to the Injunctions of the holy Quran in which the wives of the holy Prophet are directed not to speak softly and politely to strangers (other than those who are 'mahram') but to show some sternness. Hazrat Saudah was allowed by the Prophet to go out of her house whenever necessary. As far as the objection about looking to one another is concerned, it has probably been taken from the order to men and women to lower their gaze on seeing one another and to the customary notion of veiling their faces. But there are circumstances in which in due course of business men and women have to see one another. This may be the case when a woman appears in Court as a witness. Even those who believe in the

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covering of the face of the woman by veil or in any other manner consider this to be justified. Maulana Maudoodi discusses this point in his book "Pardah" at page 181. He says:

"But sometimes one has to have a look at the other woman, e.g. a female patient who maybe under the treatment of a doctor, or a woman who has to appear before a judge as a witness or as a party. Then one may have to help a woman who is left in a burning place, or a woman who is drowning in water, or a woman whose life or honour is in danger. In such cases, even the shameful parts can be seen if required, and the body can also be touched. So much so that it is not only lawful but obligatory to rescue a drowning or a burning woman even by carrying her in one's lap. The Law-giver commands that as far possible one should keep one's intention pure at such an occasion. But if in spite of that one's emotions are a little excited naturally, it is not sinful. For one's looking at the other woman and having contact with her body was not intentional, but was necessitated by circumstances, and it is not possible for a man to suppress his natural urges completely.

Likewise, it is not only lawful to have a look at a woman before marriage but this has been enjoined by the Shariah. The Holy Prophet himself had a look at a woman for this purpose."

"If one considers these exceptions carefully, one will find that the Law-giver does not mean to prohibit at all having a look at the other women, but his real object is to prevent the incidence of evil results. That is why he has prohibited only that casting of the eyes which is not necessary, which does not serve any social purpose, but is charged with sexual motives."

63. The intention of prohibiting the wives of the holy Prophet from being soft in their speech towards men was that they may not entertain any false hope. In a Court of law while discharging one's duty in the manner as enjoined by the holy Prophet interalia in the Hadith of Buraida referred to above, that possibility cannot even be imagined. The utmost that can be done in this connection is to prescribe some other garment which may conceal the dress and womanly adornments.

64. Another Hadith on which generally reliance was placed for this objection is "النساء ناقصات العقل والدين" e.g. women are deficient in intelligence & religion (Muslim) It is said that the holy Prophet explained that the

defect of intelligence is clear from the fact that the evidence of two women requires support from the evidence of men and the defect in Din^(religion)/is that soemtimes they do not have to offer prayer or to keep fasts.

65. In Islami Qanoon-e-Shahadat, at P.339, Abdul Malik Arfani translated it. The holy Prophet said: "Is not the evidence of a woman equal to half?, we said "yes". He then said "this is the proof of defect in Aql (intelligence)". See also Fathul Bari Vol.V, P.299, Kitabush Shahadat. Ibne Hazam in his book " *المفاضلة بين الصحابة* " Pp.222-224, said that ^{because of} the defect in intelligence her evidence is equal to half of the evidence of man.

66. From the opinion of Ibne Hazam it appears that except for the defect in evidence there is no other defect of intelligence in a woman. This is a refutation of the argument in favour of the objection against her judgeship. Abdul Hamid Matwali in his book " *مبادئ نظام الحكم في الاسلام* " (mubadi e nizamul hukam fil Islam) P.867 has tried to prove that this isolated Hadith (Hadith A'had) is not acceptable as correct.

67. There are a number of precedents in which women were consulted or their opinions prevailed. It is widely known that the holy Prophet consulted Hazrat Umme Salma. On the occasion of Treaty of Hudaibia the companions were not willing to sacrifice animals at that place and to open their "Ehram" (unsewn cloth tied around the waist for Haj) which they were wearing for the purpose of Umra. Hazrat Umme Salma advised the holy Prophet to take precedence in sacrifice and opening of Ehram. It is established that all the companions then followed the holy Prophet. Similarly there are cases in which Hazrat Aisha corrected Hazrat Abu Huraira in respect of traditions on the basis of their repugnancy with Quran. Her objections involved consideration of juristic reasoning. A lady interrupted Hazrat Umar successfully in regard to his proposal about fixation of dower at a

low level. After assassination of Hazrat Umar the Board appointed by him for selection of a Caliph consulted women also. In this view of the matter we agree with the opinion of Maulana Umar Ahmad Usmani in Fiqhul Quran, Vol.III, Pp.280-281 that if there had been a defect in their intelligence they would not have been consulted nor Imam Tabari and Imam Abu Haneefa would have given opinion in favour of their appointment as judges.

68. It may be stated that the person who first accepted Islam was a woman i.e. Hazrat Khadija. There are a number of ladies who either reported Ahadith from the holy Prophet or committed them to memory but the main difference between them and the male reporters is that though a large number of male reporters were charged with faking Ahadith, no such charge or blame lies against any female. It is historical fact that people used to come from far and near to consult these ladies who were learned in hadith. In any case there appears to be weight in the opinion of Ibne Hazam that the words " *نافعات العقل* " (deficient in intelligence) was said atmost in relations to evidence and not to any other functions or attributes.

69. The view that woman cannot appear as a witness in matters of Hudood and Qisas is only a juristic view and is not based on either Quran or Hadith. It is not based on any precedent of the holy Prophet in which he might have refused to accept the evidence of a woman in such matters (Al Mohalla/by Ibn Hazam, Vol.6 P.430). Some support is sought for this juristic view from the words " *وَأَشْهِدُوا ذِي عِلْمٍ مِّنْكُمْ* " (and call to witness two just men from amongst you) (Q.65:2) in Chapter 'The Divorce' and the words " *نَادُوا شَهِدًا مِنَّا مَعَهُمْ* " (call to witness against them four from amongst you) (Q.4:15) in Chapter entitled 'The Women'. But the word " *مِّنْكُمْ* " cannot necessarily be said to be confined in its scope to men. On the principle of masculine being used on

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account of habit or taghlib so as to include the feminine, the word " ^{مكتة} " is susceptible of being interpreted as inclusive of men as well as women. In this connection the analysis made by Maulana Umar Ahmad Usmani in Fiqhul Quran, Vol.III, P.87-onwards, is quite revealing and weighty.

70. There are cases in which the holy Prophet acted on the evidence of a woman. The first case is of a Jew who robbed a girl of her ornaments and then caused her grievous injuries (which ultimately resulted in her death) by hitting her head with two stones from either side. She was taken to the holy Prophet. The names of different persons were taken to inquire from her whether any of them was the offender. Ultimately when the name of that Jew was uttered she nodded on which he was arrested and brought to the holy Prophet. In this connection there are two versions, in one of which it is said that immediately thereafter he was executed in the same manner as he had killed that girl (2 versions in Muslim, Jamaul Fawa'id Hadith No.5231, 5233 & 5234) but the other version is that the execution was ordered on the confession of the Jew (only one version in Muslim). The other case which is more to the point is of a lady who was raped by an un-known person while coming to the mosque for offering her morning prayers. She raised alarm on which a number of persons collected there and caught a person who was identified by her. He was caught and taken to the holy Prophet and though he protested his innocence, the holy Prophet on the evidence of that lady ordered him to be stoned to death. At that time another companion rose and confessed that he had committed the offence. The holy Prophet acquitted the first man. In regard to the second there are again two versions. According to Abu Daud (Hadith 974) he was also discharged since he had saved the life of an innocent person by confessing the truth but according to the report in Trimizi he

was stoned to death. Imam Ibne Qayam placed reliance upon the version in Abu Daud.

71. Maulana Umar Ahmad Usmani has given the instance of Hazrat Naila wife of Hazrat Usman who was the only witness who saw the assassination of her husband. It was only on the basis of her evidence that there was a demand for Qisas by a number of companions and none took any objection that in the absence of a male witness the demand for Qisas was not tenable. (Akhbar ul Quzzat)

72. Mr. Kahlid M. Ishaq relied upon " اخبار القضاة " by Wakee, P. 359 in which it is stated that Qazi Shuraih decided a dispute on the basis of evidence of a solitary woman since both the parties agreed to rely upon it. This precedent is, however, not on all ~~four~~ ^{four}, it is analogous to Section 20 of the Evidence Act which says that "Statements made by persons to whom a party to the suit has expressly referred for information to in reference to a matter in dispute are admissions". Atmost we can call it a case of " تكيم " (Tahkeem) which is a form of arbitration.

73. There appears to be a concensus on the point that if a woman Qazi gives a judgment and order in a matter of Hadd and the case goes to another Qazi the latter is bound to execute the order. (Al Bahrul Raique Fi Kannz ul Daqaique, Vol.7, Pp.5 & 6, Fath ul Taqdeer, Vol.6, P.391, Durrul Mokhtar, Vol.3, P.253, Hashiat ul Tahtawi, Vol.3, P.213). In Bidaitul Mujtahid, Vol.2, P.344 it is stated that the fact is that whoever is capable of deciding disputes between two persons his decision is executable except in respect of what is particularised by concensus in respect of headship of the State. There are several opinions in Musannaf Abdul Razzaq, Vol.8, P.331 about the admissibility of a woman's evidence in matters of Hudood and Qisas. Taous was of the view that the evidence of women alongwith men is admissible in all cases except that of

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Zina (adultery) because it does not behove them to look at that act. The same view is ascribed to Hasham bin Hujaira (See Atturuq-ul-Hukmia by Ibne Qayyam, P.135). Also See Atturuq ul Hukmia by Imam Ibne Qayyam, Pp.134-136 in which similar opinions are collected. He interalia says that Hamad bin Abi Sulaiman has also considered the evidence of a man and two women admissible in matters of Hudood and Qisas.

74. The opinion of Atta is that the evidence ^{of women} is admissible alongwith the evidence of men in all matters in cases of Zina. The conviction can be based on the opinion of two women with three men.

75. Ibn-e-Shahab said that Allah has directed the matter to be decided on the evidence of two men and in the absence of two men on the evidence of one man and two women and did not prohibit the evidence of women alongwith men. He also stated that the evidence of women alongwith a man is sufficient to prove a case of murder. Allama Ainee has mentioned that according to Shuraih the evidence of women alongwith men is admissible in Hudood and Qisas both.

76. There is also substance in the arguments of the learned Attorney General and Mr.Khalid Ishaq that firstly admission is equal to evidence (Ainul Hedaya, Vol.3, P.283) and secondly that even women's oath in lian has the effect of evidence. In Sura-e-Noor (Q.24:6) the oath has been given the status of evidence. By virtue of verses 8 & 9 effect of the oaths taken by the husband is refuted by the oaths of the women. Admission and oath in lian being substitutes for evidence and admission of woman being fully admissible in matters of Hudood and Qisas and oaths being admissible in matters of lian, there is no reason why the other kinds of evidence i.e. oral testimony may not be admissible.

77. It was urged that two women are proved to be equal to one man by the principle of inheritance. The

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inheritance in the male line has generally been the rule (Encyclopaedia of Religion & Ethics, Vol.VII on 'Inheritance')The Quranic Legislation giving the daughter half as much of the estate as went to a son was an innovation (Ibid P.306). The sons also did not always get equal share. In some countries and cultures the rule of primo geniture prevailed. There are instances when different type of properties were given to different sons e.g. among the Naga tribes the house was inherited by the youngest son (Ibid P.293). Amongst Bani Israel the first born was given a double of what was given to each other son. In view of this giving to the daughter half of what each of her brother gets is not a sign of inequality. The reason is that a woman has exclusive right of disposal over her property whether she inherits it or earns it. She has no financial liability of maintaining even her children. The husband is bound to maintain her and her children however considerable her own wealth may be. The share given to a male is in proportion to his responsibilities and not due to any superiority over the female.

78. There appears to be no reason to make the admissibility of evidence a criterion for appointment as Qazi and in this connection the opinion of Ibne Jarir and supported by Ibne Hazam is preferable. The functions of a Qazi and of a witness are quite different. Anyone who has the necessary knowledge of law and training in that field can act. It is worth mentioning that on the one hand it is said that a woman cannot be a Qazi in matters of Hudood and Qisas and on the other hand there is a rule that if a judgment is given by a woman Qazi in matters of Hudood, it must be executed and there is Ijma on this point (Fathul Qadeer, Vol.6, P.391). On the margin it is observed that defect in intelligence does not affect her aptitudes in other matters or as to deprive her absolutely of rights to be appointed as a Judge. It is further observed that

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the deficiency in intelligence is related to the sex of a woman. There may be woman having more intelligence than man.

79. There are certain Injunctions in the holy Quran which like the other Injunctions about good conduct, discharge of duties, reward and punishment, are common to men and women. These Injunctions are regarding the duty of all Muslims to be just and to do justice. Thus in Q.4:58 it is said interalia that:

"Lo! Allah commandeth you that ye restore deposits to their owners, and, if ye judge between mankind, that ye judge justly."

The other verse is Q.5:42:

"If thou judgest, judge between them with equity"

In Q.57:25.

"We verily sent Our messengers with clear proofs,..... that mankind may remain steadfast on justice."

or as Arberry says 'may uphold justice'. Pickthall translates the words "لِيَتَّقُوا النَّاسَ بِالْقِسْطِ" in this verse as "so that mankind may observe the right measure" but the translation does not correctly indicate the sense in which the above words are used. Arberry has correctly translated it as "So that men (people) might uphold justice".

80. The words ^{ادل} (Adl) or "قسط" (Qist), no doubt, ^{are} used in a much wider sense and each Muslim whether male or female is bound to be just and equitable in his dealings with his spouse, parents, children, neighbours, relatives, friends, fellow Muslims and all others. The concept of justice in deciding disputes between the parties or in deciding criminal cases is only a part of Adl or Qist. The first two verses Q.4:58 and Q.5:42 clearly envisage the determination of disputes or litigation. There is no distinction in this connection between man

and woman. In view of this; particularly in the absence of any prohibition in Quran or Hadith about the judgeship of a woman/^{or any}restriction limiting the function of deciding disputes to men only, the generality of these verses cannot be cut down. From whatever angle it may be looked there appears to be no merit in the objection raised by the petitioner against the appointment of women to judicial offices.

81. The Quran allows a woman to earn money. In the Chapter relating to women (Q.4:32) it is declared "Unto man a fortune from that which they have earned, and unto women a fortune from that which they have earned." There are instances in which the woman took to some profession for earning. Hazrat Zainab tanned skins and thread beads to sell to earn money for the poor. (Women in Muslim History by Charis Waddy, P.19)

82. Mrs. Salima Nasiruddin and Mrs. Rashida Patel argued that women are also entitled to as much education as men. There is no dispute on the question of the right of the women to acquire education. There is also no dispute that in respect of Ilm Islam does not distinguish between man and woman but on account of the incidence of Pardah there is opposition from certain quarters to their obtaining higher education in colleges and universities. It is, however, unnecessary to persue this matter further since the number of women being almost half in the population of any country, it is necessary that there should be sufficient number of lady doctors to attend them and teachers to teach them. Sometimes it is not possible for a female patient to consult a Doctor without exposing parts of her body which must be kept concealed. It would be better if there be lady doctors to attend to such patients. The job of a Gaenacologist should be better left to a woman. The importance of education in the present age cannot, therefore, be denied or even minimised.

J. S. M.

83. A Booklet known as Universal Islamic Declaration of human rights has been published by Mr. Salem Azzam, Secretary General, Islamic Foundation, London. It gives a list of the human rights as recognized by Islam. The third right which deals with the equality before Law, entitlement to equal opportunities and protection of the Law also provides firstly that all persons shall be entitled to equal wage for equal work and secondly that no person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language. This rule supports the view taken by us.

84. Before finishing this it may be clarified that we have not been able to find any justification for the imposition of conditions on an appointment of a woman Qazi. In fact the opinion of Dr. Tanzilur Rehman in his Book Islam Ka Nizam-e-Adalat, P.41 is also without any condition since he agrees with the view of Imam Abu Hanifa.

85. There is no merit in this petition which is dismissed.

Affah Khan

CHIEF JUSTICE

Sahoorul Haq

JUDGE - II

U. Q. Khan

JUDGE - IV

Karachi, the 10th August, 1982
AZN

FIT FOR REPORTING

Affah Khan

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