

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SALAHUDDIN MIRZA

SUO MOTO NO. 1/K OF 2006

PAKISTAN CITIZENSHIP ACT. 1951

In Re: GENDER EQUALITY

For Federal Government ...

Sardar Abdul Majeed,
Standing Counsel and
Mr. Naveed Akhtar, Section
Officer Ministry of Interior,
Islamabad

PUNJAB

...

Mr. Shafqat Munir Malik,
Additional Advocate-General

SINDH

...

Mr. Arshad H. Lodhi,
Assistant Advocate General

N.W.F.P.

...

Pir Liaqat Ali Shah,
Advocate-General

BALUCHISTAN

...

Mr. Mehmood Raza,
Additional Advocate General

For Human Rights Commission ...
of Pakistan and Lahore High
Court Bar Association

Syed Afzal Haider, Senior Advocate,
Supreme Court of Pakistan

For National Commission on
the Status of Women

Mr. Muhamamd Idrees Baig,
Secretary

Dates of Hearing

...

25.1.2007, 12.2.2007, 13.2.2007,
14.3.2007, 2.4.2007, 7.5.2007,
29.5.2007, 7.6.2007, 4.9.2007,
6.9.2007 and 18.9.2007

Date of Decision

12.12.2007

JUDGMENT

JUSTICE HAZIQUL KHAIRI C.J. On 27.6.2006, the Federal Shariat Court in exercise of its powers under Article 203-D of the Constitution of Islamic Republic of Pakistan took suo moto notice of a news item that under Citizenship Act 1951 a married Pakistani woman was denied the right to get Pakistan's Citizenship for her foreign husband while a married Pakistani man was entitled under section 10 of the said Act to obtain Pakistan citizenship for his foreign wife. The question, therefore, before the Court was whether or not the said provision of law in the Citizenship Act, 1951 is discriminatory and repugnant to the Injunctions of Islam and violative of the principles of democracy, equality and social justice, as enumerated and laid down in the Holy Quran and Sunnah. Section 10 of the Citizenship Act, 1951 reads as under:

“Married women. (1) Any woman who by reason of her marriage to a [British subject] before the first day of January, 1949, has acquired the status of a [British subject] shall, if her husband becomes a citizen of Pakistan, be a citizen of Pakistan.

(2) Subject to the provisions of sub-section (1) and sub-section (4) a woman who has been married to a citizen of Pakistan or to a person who but for his death would have been a citizen of Pakistan under section 3, 4 or 5 shall be entitled, on making application therefor to the Federal Government in the prescribed manner, and, if she is an alien, on obtaining a certificate of domicile and taking the oath of allegiance in the form set out in the Schedule to this Act, to be registered as a citizen of Pakistan whether or not she has completed twenty-one years of her age and is of full capacity.

(3) Subject as aforesaid, a woman who has been married to a person who, but for his death, could have been a citizen of Pakistan under the provisions of sub-section (1) of section 6 (whether he migrated as provided in that sub-section or is deemed under the proviso to section 7 to have so migrated) shall be entitled as provided in sub-section (2) subject further, if she is an alien, to her obtaining the certificate and taking the oath therein mentioned.

(4) A person who has ceased to be a citizen of Pakistan under section 14 or who has been deprived of citizenship of Pakistan under this Act shall not be entitled to be registered as a citizen thereof under this section but may be so registered with the previous consent of the Federal Government."

121

2. In the first instance, the Court issued notices to the Secretary, Ministry of Law, the Secretary, Ministry of Interior and the Attorney General for Pakistan as to why denial of right of a married Pakistani woman to obtain citizenship for her husband under the Citizenship Act, 1951 may not be declared repugnant to the Injunctions of Islam

with direction to them to file written comments within three weeks thereof.

3. In response, on 7.2.2007, Government of Pakistan, Ministry of Interior filed reply duly approved by the Ministry of Law, Justice and Human Rights and the Provincial Governments as under:-

- a) "Foreign women marrying Pakistani Husband cannot be equated with foreign men married to Pakistani women in our society.
- b) It would add legal stay of a large number of illegal immigrants residing in Pakistan and also increase their influx.
- c) Unemployment ratio would add to the problem.
- d) The foreign husband after marrying a Pakistani lady and obtaining Pakistan nationality would be free to divorce Pakistani lady and move freely in Pakistan anywhere.
- e) It would be a blanket approval for all the foreign nationals to marry Pakistan women and obtain Pakistani nationality.
- f) Majority of persons would misuse the provision especially illegal immigrants like Afghan refugees, Bengali, Behari and other South Asian States/Countries who do not intend to return to their country.
- g) Apart from social/economic implications, the provision can also be used by any foreign country to plant their agents in Pakistan.

12/1

h) The citizenship rights like entitlement to vote, seek appointment to constitutional posts and equal opportunities in matters of public appointments may be weighed with their political or national interests.

i) The proposed amendment may be assessed on the touchstone of Indo-pak relations; it will provide legal ingress to Indian male citizens into Pakistan.

4. The Ministry of Interior while submitting its reply stated that the Law, Justice and Human Rights Division was consulted for their views/opinion from legal point of view which had also recommended opposing grant of citizenship to the foreign male who marries a Pakistani lady. Thus keeping in view the implications of the case and as a matter of State policy, the Ministry in unequivocal terms opposed gender equality in the best interest of the country.

5. On 13.2.2007 when the matter came up before the Court, the Standing Counsel for the Federal Government Sardar Abdul Majeed sought time to file further comments. Keeping in view the importance of the case, the Court deemed it expedient to grant time to him to file further comments and also issued notices to the Secretary, Ministry of Religious Affairs, National Commission on the Status of Women,

Aurat Foundation, Human Rights Commission of Pakistan, APWA.

Vice Chairman, Pakistan Bar Council, Vice Chairman, Provincial Bar

Councils, President, Supreme Court Bar Association and Presidents,

High Court Bar Association of Sindh, Punjab, N.W.F.P. and

Balochistan to file their comments within three weeks and plead their

views, if they so desire, before the Court on 14.3.2007 at Islamabad.

6. On 14.3.2007, comments were also filed by Aurat Foundation

which may advantageously be reproduced as under:

“Aurat Foundation believes that Section 10(2) of the Citizenship Act, is discriminatory to a female citizen of Pakistan who marries a non-Pakistan national, as it denies her the right to get Pakistani citizenship for foreign husband, whereas it expressly provides for the granting of citizenship to the foreign wife of a Pakistani citizen. This discriminatory clause negates Article 25 of the Constitution which ensures that all citizens are equal before the law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex alone. Further the discriminatory clause also negates Article 2, 15 and 16 of the Convention on the Elimination of All forms of Discrimination against Women, to which Pakistan as a State is a party has signed and ratified it”.

7. It was proposed by the Aurat Foundation that the following changes may be made in the said Act to remove discrimination against

women:-

- (i) Section 4: Every occurrence of the words 'his' and 'father' be replaced with 'his' or 'her' and 'either person' respectively.
- (ii) Section 5: Every occurrence of the word 'father' be replaced by 'parent'.
- (iii) Section 8: every occurrence of the words 'father' and 'father's' be replaced with 'parents' and 'parent's parent' respectively.
- (iv) Section 10: Every occurrence of the words 'woman' and 'women' be replaced with the words 'person' and 'persons' respectively."

8. The Province of Sindh filed its comments through its Advocate General exactly in line with the stand taken by the Government of Pakistan as above reiterating that a foreign woman marrying Pakistani husband cannot be equated with foreign men marrying Pakistani women in our society.

9. The Province of Punjab through its Advocate-General Mr. M. Aftab Iqbal Chaudhree also filed its comments and in the backdrop of partition and emergence of Pakistan as a newly born State maintained that Section 10 of the Pakistan Citizenship Act 1951 was in accordance with the fundamental injunctions of Islam and does not appear to violate the canons of Islam and the Constitution of the

Islamic Republic of Pakistan 1973. The backdrop of and the reasons

envisaging this view was:-

“That a lot of problems to the issues of marriages, child custody and inheritance arose after the Partition/Independence of Pakistan particularly due to the fact that the sub-continent, before Partition, was governed by English law, therefore, in Pakistan, after its creation in order to solve the above issues and the specific issues of legal status of women, who themselves were domiciled in the Indian territory but were married to those men born within the territory of Pakistan had become citizens of Pakistan. Section 10 of the Citizenship Act, 1951 gave such women the right to get domicile and citizenship of Pakistan. Furthermore, Section 10 of the said Act also gave legal right to get domicile or citizenship to those women whose husbands had died before coming into force the said Act but such husband, by reason of their birth within the territory of Pakistan, would have become citizens of Pakistan.

This right given under the Pakistan Citizenship Act, 1951 to the women in the above scenario does conform with the right given to women under the Islamic law and is intended to solve issues relating to marriages, child custody and inheritance, there under”

10. The Government of Pakistan in its further comments through Sardar Abdul Majeed Khan, standing counsel contended that “Section 10 of the Citizenship Act 1951 is not against any specific verse of Quran and Sunnah” and that ‘the Citizenship in Pakistan is regulated

by the Nationalization Act 1926 and the Pakistan Citizenship Act 1951.

11. However, Government of Pakistan through National Commission on the Status of Women came out with an entirely different stand stating that Section 10 of the Act appears to discriminate on the basis of sex and suggested that wherever the words 'woman' and 'women' appear in the Act, should be replaced by the words 'Person and persons' respectively. Other objections raised by it were the same as submitted by Aurat Foundation above.

12. Syed Afzal Haider, Advocate who appeared before us on behalf of Human Rights Commission and Lahore High Court Bar Association, in his scholarly discourse elaborately dealt with a number of basic questions of Islamic Law and Jurisprudence viz-a-viz the Constitution of Islamic Republic of Pakistan, 1973, which gave rise to a number of intricate questions some of which are: (1) whether the principle of democracy, freedom, equality, tolerance and social justice as enunciated by Islam" forming part of Article 2-A of the

Constitution is in consonance with the injunction of Islam. (2)

Whether the Objective Resolution was to serve as beacon light for the

Constitution makers as it is neither a Nass of Quran nor an injunction

of Sunnah. (3) Whether repugnancy not directly covered in a

provision of Law be brought within the mischief of repugnancy and if

so under what circumstances? (4) What is the position and status of

Article 25 of the Constitution of Pakistan relating to equality of

citizens in the light of dictates of Quran and Sunnah. (5) What

precisely is the extent of jurisdiction of the Federal Shariat Court

under article: 203-D of the Constitution for testing the vires of a law.

13. However, for our limited purpose we are confronted as to whether gender discrimination in the said section 10 is repugnant to Quran and Sunnah within the meaning of Article 203-D of the Constitution paving way to exercise our suo moto powers under Article 203-D of the Constitution.

14. It was rightly pointed out by Syed Afzal Haider, Advocate, that the term "Injunctions of Islam" employed in the Constitution has not

been defined nor its scope determined, therefore, if there is any repugnancy of any law to Quran and Sunnah, it is left open to be identified and construed by the Federal Shariat Court in exercise of its powers under Article 203-D (2) of the Constitution of Islamic Republic of Pakistan, 1973. It will be advantageous to refer to Article 203-D of the Constitution as under:

“203-D. Powers, jurisdiction and functions of the Court.—

(1) The Court may [either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or Provincial Government, may examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam; as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the injunctions of Islam.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

[(1A) Where the court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the injunctions of Islam, the court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List or the concurrent Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in the either or those Lists, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court).

(2) If the Court decides that any law or provision of law is repugnant to the injunctions of Islam, it shall set out in its decision:-

- (a) the reasons for its holding that opinion; and
- (b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect (;

[provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.]

- (3) If any law or provision of law is held by the Court to be repugnant to the injunctions of Islam, ---

(a) the President in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the court takes effect.

15. In order to test whether the provisions of section 10 of the Citizenship Act are repugnant to Quran and Sunnah, it is incumbent to refer to them. The number of Quranic verses dealing with legal issues are limited, while the legal cases or issues faced by the Muslims are

unlimited. There are approximately six hundred verses in the Quran that indicate the Ahkam of Islamic law. Over four hundred of these pertain to the Ibadat and the remaining to Muamilat, a few of these verses are definitive in terms of meaning and explanation; while others require interpretation and elaboration. Likewise, the texts of the Sunnah dealing with legal issues do not go beyond two thousands traditions. In dealing with the dictates of the Quran and Sunnah to legal issues arising from time to time are the concept of Ijtihad, Qiyas, Istihsan and Masalih Mursalah were introduced by our Jurists to whom a reference may be made and their view point may be considered by the Federal Shariat Court while examining any law or provision of law or any set up in which in its implication and effect is violative thereof.¹ In NLR 1984 SD 474 (Muhammad Ramzan Qureshi Vs. Federal Government etc.), it was held:-

“Argument that the Court has jurisdiction only to find out the repugnancy from specific injunctions in the Holy Quran and the Sunnah and that if no such injunction is found, the law will be treated to be good, that is to say the least a very narrow view of the constitutional jurisdiction of Federal Shariat Court. Specific laws in the Holy Quran and the

1. International Institute of Islamic Thought and Islamic Research Institute.

Sunnah are not many but the principles laid down therein embrace everything interalia in the field of legislation. In view of the absence of specific provision pertaining to a particular matter it becomes our duty to discover and find out whether a particular legislation is not repugnant to the principles laid down in or emanating from the Holy Quran and the Sunnah. Repugnancy is to be discovered interalia not only against a specific provision (Ibarat ul Nas) but also what is described by the jurists and commentators of Holy Quran as (Dalalat un Nas, Isharatun Nas, Iqtada un Nas).”

16. A bare reading of section 10 of the Citizenship Act 1951 brings into fore that the law makers purposely omitted a situation whereby right of citizenship sought for an alien husband who had contracted marriage with a Pakistani woman dead or alive has been denied. In the case of Pakistan Vs. Public at large, PLJ 1986, S.C. 220, it was held “While discovering ‘Injunctions of Islam’ for particular subject or situation, court not only to have power but also duty to state them and that no statement of Injunction, however, to be complete without reference to Holy Quran and Sunnah”. This brings home our duty to invoke our suo moto jurisdiction under Article 203-D of the Constitution and to declare if any law is repugnant on the touchstone of Quran and Sunnah. However, in order to proceed

further, it is incumbent to examine Articles 2-A and 25 of the Constitution and see if they are in consonance with the provisions of Article 203-D. The principles and provisions set out in Objectives Resolution were made substantive part of the Constitution by the Constitution (First Amendment) Act, 1974, by introducing Article 2-A which interalia speaks of the principles of democracy, freedom, equality, tolerance and social justice while Article 25 expressly guarantees equality of citizens as under:-

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

17. It was held by the Supreme Court of Pakistan in the case of Pakistan Vs Public at large (PLJ 1986 SC 220) that "Federal Shariat Court having been conferred power to exercise jurisdiction also suo moto examination of other provisions or whole law and connected laws in addition to specified provisions in Shariat Petition in such like matters to be not only permissible but also salutary." As regard the

object, scope and effect of Article 2-A the Supreme Court of Pakistan in Mst. Kaneez Fatima Vs. Wali Muhammad and another (PLD 1993 SC 901) had held: "In this context it may be observed that while interpreting Constitution, enactments, rules and regulations having the force of law and examining Orders, Acts and actions of Government functionaries/authorities the Court is competent to apply well recognized principles of Islamic common law and such interpretation which is in conformity with the Injunctions of Islam. In the fields not occupied by statutory dispensation, principles of Islamic common law and principles in conformity with Injunctions of Islam can be pressed into service'.

18. While the Federal Shariat Court is guided by the Injunctions of Islam and its common law as contemplated under Article 2-A it is invested with the power to declare a law or provision of law repugnant to Injunctions of Islam and the date on which its decision shall take effect. In Hafiz Abdul Waheed Vs Mrs. Asma Jehangir and another PLD 2004 SC 219, it was observed:-

“It is well settled that the Court will lean in favour of harmonious interpretation of statutes/various provisions and would certainly avoid an interpretation which has the potential of conflicting judgments or pitching one Constitutional Court against another Constitutional Court.”

19. The Federal Shariat Court in its land mark judgment, Hazoor Bakhsh Vs Federation of Pakistan reported in PLD 1983 FSC 255 at 330 had held as under:-

“The expression “Injunctions of Islam” is a comprehensive one which will include all injunctions of Islam of every school of thought and sect etc; but Article 203-D of the Constitution has restricted its meaning and application and confined it to only two sources for which no Muslim can have any valid objection. These sources, as mentioned above are (A) The Holy Quran and (B) The Sunnah of the Holy Prophet. The Holy Quran is the direct words of God revealed to Holy Prophet, whereas the word “Sunnah” has been used in the Holy Quran in different senses. The literary dictionary meaning of the word “Sunnah” is way; course, rule mode or manner of acting of conduct of life. Thus the Sunnah can be of Allah or His Holy Prophet (Peace be upon him) or the Caliph of the Holy Prophet and his companions. In Article 203-D, we are concerned only with the Sunnah of the Holy Prophet. In ordinary general sense, the expression “Sunnah of the Holy Prophet” consists of sayings and deeds of the Holy Prophet.”

20. In the backdrop of foregoing discussion, let us see what Quran and Sunnah say directly to gender equality or having nexus with it.

Quran says:-

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ -

1. O mankind behold we have created you all out of male and female and have made you into nation and tribes, so that you may know each other. Surely the noblest of you in the sight of Allah is the one who is most pious” (49:13) (No discrimination).

2. هُوَ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَجَعَلَ مِنْهَا زَوْجَهَا -

He it is who created you from a single being and therefrom did make his mate. (7:189).

3. هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ لَهُنَّ

They are raiment for you and ye are raiment for them. (2:187)

4. كُنْتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ وَتُؤْمِنُونَ بِاللَّهِ

You are the best of the nation raised up for the benefit of humanity; you enjoin what is right and forbid the wrong and believe in Allah. (3:110)

5. وَمَنْ يَعْمَلْ مِنَ الصَّالِحَاتِ مِنْ ذَكَرٍ أَوْ أُنْثَىٰ وَهُوَ مُؤْمِنٌ فَأُولَٰئِكَ يَدْخُلُونَ الْجَنَّةَ وَلَا يُظْلَمُونَ نَقِيرًا-

And whoso doeth good works, whether of male or female, and he (or she) is a believer, such will enter paradise, and they will not be wronged and dint in a datestone. (4:124)

6. وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ

And help one another (Men & Women) in goodness and piety, and do not help one another in sin and aggression. (5:2)

7. وَالْمُؤْمِنُونَ وَالْمُؤْمِنَاتُ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ يَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ

عَنِ الْمُنْكَرِ وَيُقِيمُونَ الصَّلَاةَ وَيُؤْتُونَ الزَّكَاةَ

The believing men and believing women they are guardians of each other; They (both) enjoin good and forbid evil and keep up prayers and pay the poor rate. (9:71)

8. وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا

And one of this sign is that he created mates for you from yourself. (30:21)

9. وَمِنْ كُلِّ شَيْءٍ خَلَقْنَا زَوْجَيْنِ لَعَلَّكُمْ تَذَكَّرُونَ

And all things we have created by pairs, that haply ye may reflect. (51:49)

21. At a late stage of hearing of this case Syed Afzal Haider,

Advocate in his written arguments pleaded before us that it was a case

of reasonable classification and referred to Quranic Verses pertaining to half punishment for slave girls as against Ummatul Momineen, right to pronounce talaq to husband only, half share of wife as compared to husband, of sister to brother, of daughter to son in matters of inheritance. According to him "equality before law" in clause (1) of Article 25 of the Constitution does not prohibit treatment of citizen by State on the basis of reasonable classification. In support of his contention he strongly placed reliance duly supported by Sardar Abdul Majeed, Standing Counsel for Federal Government, on the case of I.A. Sharwani Vs. Government of Pakistan 1991 SCMR 1041 in which the petitioner and others filed petitions under clause (3) of Article 184 of the Constitution of Islamic Republic of Pakistan for enforcement of fundamental rights. Their grievance was that being retired civil servants and retired Judges they were discriminated in payment of enhanced pensions in violation of Article 25 of the Constitution in as much as certain increases in the pension have been denied to some of them on the ground that they had retired prior to a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

specified date. The question revolved around the pay scales, benefit to the serving civil servants and the pensioners. In a subsequent case namely Pakistan Muslim League (Q) Vs. Chief Executive of Islamic Republic of Pakistan (PLJ 2002 SC 976) the Supreme Court of Pakistan while examining Articles 17, 25, 62 and 63 of the Constitution had held in an election matter that under Article 25 "all citizens are equal before law and are entitled to equal protection of law but State is not prohibited to treat its citizens on the basis of a reasonable classification". It was, however, further stated that "Article 25 of the Constitution enshrines basic concept of religion of Islam and is now known as golden principles of modern jurisprudence which enjoins that all citizens are equal before law and are entitled to equal protection of law"

22. Applying the principles enunciated by the Supreme Court of Pakistan it is to be observed firstly that the Court examined in both the above named cases the vires of clause (1) of Article 25 and not its clause (2) which specifically state that there shall not be any

discrimination on the basis of sex alone. Secondly in neither of the cases either Article 2-A or Article 25 was tested on the touchstone of Article 203-D of the Constitution. Thirdly the basis for classification in I.A. Sharwani's case related to pensioners whereas the case of Pakistan Muslim League (Q) related to election rules, both of which are man-made laws as against the dictates of Quran and Sunnah which in unequivocal term treat man and woman alike and repeatedly mention gender equality before Allah and his laws.

Such being the case, it is an established position that Articles 2-A and 25 of the Constitution have nexus with Article 203-D of the Constitution and for better understanding and guidance the concepts and principles contained therein may be pressed into service to test the repugnancy or otherwise of any law or provision of law to Quran and Sunnah.

23. Another aspect of the matter is that Pakistan is committed to International Community to equal and indiscriminate treatment to its women and to enforce equal rights for them. Pakistan is a signatory to the Universal Declaration of Human Rights which inter alia proclaimed that "everyone has a right to nationality and that "no one

shall be arbitrarily deprived of his nationality nor denied the right to change his nationality” Pakistan is also a signatory to the “Protocol to the convention on the elimination of all forms of discrimination against women”, as well as “the Convention on nationality of married women”. In the words of Professor Oppenheim “Law of Nations or International Law is the name for the body of customary and treaty rules which are considered legally binding by civilized States in their intercourse with each other.” Pakistan has also ratified these treaties in terms of Article 2 of Vienna Convention according to which ratification means “the International act whereby a State establishes on the international plane its consent to be bound by a treaty”.

24. Holy Prophet (Peace be upon Him) himself had made many treaties with States/tribes and fully adhered to its terms and conditions. However, treaties with the entire mankind such as above were not in the field in the days of Holy Prophet(Peace be upon him) of Islam which certainly stand at a higher pedestal than a treaty with a State, tribe or individual to which the Holy Prophet attached great sanctity and importance. The Holy Quran attaches utmost importance

to treaties, covenants, pledges and promises and enjoins its followers to fully adhere to its terms and conditions. According to

Encyclopaedia of Seerah Vol. 1.

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

“The Quran commands: “O you who believe! Fulfil all your obligations (and trusts).” (5:1).

إِلَّا الَّذِينَ عَاهَدْتُمْ مِنَ الْمُشْرِكِينَ ثُمَّ لَمْ يَنْقُصُوكُمْ شَيْئًا وَلَمْ يُظَاهِرُوا عَلَيْكُمْ أَحَدًا فَأَتِمُوا إِلَيْهِمْ عَهْدَهُمْ إِلَىٰ مُدَّتِهِمْ إِنَّ اللَّهَ يُحِبُّ الْمُتَّقِينَ

“Excepting those unbelievers with whom you made treaties and who afterwards did not violate these in the least, nor did they give help to anyone against you; so you also should observe treaties with such people in accordance with their terms, for Allah loves pious people.”(9:4).

وَأَمَّا تَخَافَنَّ مِنْ قَوْمٍ خِيَانَةً فَانْبِذْ إِلَيْهِمْ عَلَىٰ سَوَاءٍ إِنَّ اللَّهَ لَا يُحِبُّ الْخَائِنِينَ

“If you fear treachery from any group, throw back (their covenant) to them, so as to be on equal terms, for Allah loves not the treacherous.” (8:58).

25. A perusal of Section 10 of the Citizenship Act of 1951 will reveal that its sub section (1) provides procedure for grant of citizenship of Pakistan to a woman who contracts marriage with a British subject and has acquired the status of a British subject before the 1st of January, 1949, shall, if her husband is a citizen of Pakistan becomes a citizen of Pakistan. Similarly sub section (2) thereof provides that subject to sub section (1) and 4 (relating to

citizenship by birth) thereof an alien woman married to a citizen of Pakistan even if dead shall be entitled to become a citizen of Pakistan after obtaining a certificate of domicile and taking the oath of allegiance whether or not she had attained twenty one year of age and is of full capacity. The Convention on the Nationality of married woman states:-

“Each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy. Each Contracting State agrees that the present Convention shall not be construed as affecting any legislation or judicial practice by which the alien wife of one of its nationals may, at her request, acquire, her husband’s nationality as a matter of right.

26. It is pertinent to note here that there is nothing in the said

“Convention on nationality of married woman” or in the Citizenship

Act 1951 or elsewhere in any International Convention which gives

right to a woman to acquire nationality for her husband on the basis of

her nationality and her right to live with him for good in her country.

Similarly no such right is given to the husband either to live with his

spouse in her country and acquire her nationality.

27. In our view of the matter, the position in Islam is somewhat different. Islam is a universal religion. The last sermon of Holy Prophet is the first Charter of Human Rights wherein all human beings are equal. Mankind is one. Allah says in Holy Quran that "He created man and woman from a single being (7:189)" and for HIM "whoso doeth good work, whether male or female and he (or she) is a believer, such will enter paradise. (4:124)."

28. In view of the above, we are of the view that section 10 of the Citizenship Act is discriminatory, negates gender equality and is in violation of Articles 2-A and 25 of the Constitution of Islamic Republic of Pakistan and also against International commitments of Pakistan and most importantly is repugnant to Holy Quran and Sunnah.

29. In the end, it may be clarified that while section 10 of the Citizenship Act 1951 expressly contemplates denial of citizenship to a foreign husband of a Pakistani woman as neither she nor he is entitled to apply under it, nevertheless under law whether municipal or international, grant of nationality would remain within the domain of discretion of the Government of the country which may refuse it for

reasons of national security or public interest etc to which she or he cannot claim it as a matter of right. We, therefore, in exercise of our powers under clause (3)(a) of Article 203-D of the Constitution of Islamic Republic of Pakistan require the President of Pakistan to take suitable steps for amendment of section 10(2) and other provisions of the Citizenship Act, 1951 within a period of six months hereof ensuring appropriate procedure for grant of Pakistani Nationality to a foreign husband married to a Pakistani woman.

s.d./-
JUSTICE HAZIQUL KHAIRI
Chief Justice

s.d./-
JUSTICE DR.FIDA MUHAMMAD KHAN

s.d./-
JUSTICE SALAHUDDIN MIRZA

Announced

Lahore: 12-12-2007

M.Khalil

12/12/07

Approved on behalf of

s.d./-

12/12/07