

Sh.Petition No 8/I of2004

The petitioner has filed this petition under Article 203-D of the Constitution for declaring that the Office Memorandum No.F.2(3)/2003dated 31-7-2004, issued by the Ministry of Law& Parliamentary Affairs is repugnant to the Injunctions of Islam. In the said O.M procedure has been laid down for hiring the residential accommodation. Under sub para 14(xiv) of the said OM,it has been provided that:-

“When both husband and wife are employed at the same station, only one of them shall be entitled to allotment of hired accommodation and house rent allowance shall not be paid to both of them and 5% rent charges shall be deducted from the pay of the allottee. In case they are serving at two different stations, one of them shall be allotted accommodation and the other one shall be allowed house rent allowance.”

2. The petitioner considers this piece of law not in line with the Islamic injunctions as appeared in the holy Quran and Sunnah of the Holy Prophet. The contention of the petitioner is as under:-

1. That where both the spouses are government servants, the house rent deduction is made from the salary of the wife although the house is allotted in the name of her husband.

2. That the husband and wife are not treated equally in respect of the payment of the conveyance and house rent allowance which is against the principles of equality in Islam.

3. This amounts to exploitation of the weaker vessel and deprivation of the women civil servants.

When we examine the issue raised by the applicant, we find that there is no clear cut Quranic verses or traditions of the Holy Prophet in direct support or against the issue raised by the applicant. However, we find commandments in the holy Quran and Sunnah of the holy Prophet laying emphasis on maintaining justice and equity in the society. It is established fact

that the divine law (The Shariah) contains some outlines with clear injunctions regarding certain issues. At the same time, the lawgiver has conceded to us an open road (Minhaj) for temporal legislation which would cover contingencies, deliberately left un-touched by the Nusus of Quran and Sunnah. In this respect, Allah almighty says that: *لِكُلِّ جَعَلْنَا مِنْكُمْ شَرْعَةً وَمِنْهَا جَا*. "For every one of you we have ordained a divine law and an open road.(5:48) Under Islamic law, the man in power or head of the state is empowered to make legislation for all matters which are not covered by the injunctions of Quran and Sunnah of the holy Prophet. The only condition prescribed in this regard is that the legislation must be within the frame work and in line with the principles of Islam. In this respect, Allama Rashid Raza writes that: "In circumstances where regarding any issue, no Quranic verse or tradition is available, Imam or head of the State is empowered to examine that issue on the yard stick of *Muslihat*(expedience) and should enact law regarding that issue with consultation of the intellectuals, jurists and *Ahle hal wal aqd*. If they agreed on a point, the people should follow/accept their verdict, because Imam is the individual, responsible to protect the rights/interests of the general public "(Tafseer Al-manar by Allama Rashid Raza vol.3, page 147)

Secondly, the principle of Shariah is that "تصرف الامام على الرعيه منوط بالمصلحة". The appointment of Imam on the people is based on expedience (*Maslihat*). This principle defines the limit within which the man in authority can exercise his administrative and political authority and take measure for the protection of the rights of the people. The criterion of justice changes in changing circumstances. A law is just in a time and in a context, is unjust in another time and another context. In this respect, it is pertinent to quote another principle of Shariah that: "لا يترك تغير الاحكام بتغير الازمان" "It cannot be denied that with the change of time, the requirement of the law also change." A law which is beneficial and based on *Maslihat*, can be non beneficial in changing circumstances if the *Maslihat* does not remain in place. In this respect, Abdul Qadir Audah, a prominent Egyptian jurist writes that: "And it has been left to the discretion of the ruler to declare any act un-lawful which he deems prejudicial to peace and tranquility in the society. Moreover, a ruler has the power to frame rules and regulation for the maintenance of peace and tranquility and punish those who oppose them"(Tashriul Jinai vol-1 page 78) In this respect, another acclaimed jurist Abdul Aziz Amir writes

that: "If the ruler deems any public welfare in awarding punishment on acts which are permissible and not liable to punishment, he is authorized to do so in all such cases" (Al-Tazir fi Shariatil Islamia page 497)

In Pakistan, under Section 5 of the Muslim Family law ordinance 1961, registration of marriage is necessary. Likewise, under section 6 of the said law, second marriage in the presence of first wife, without her consent is punishable while Islam has not placed any embargo on these issues; rather it is permissible to marry wives up to four. This law has been enacted on the basis of Maslhat by using the powers granted to a man in authority to regulate the laws. The Ulema of the country still against this law. Thirdly, the State or head of the Islamic State and Ahle hal Wal aqd are empowered to regulate the laws excluding Hudood and Qisas and those do not come within the purview of Faraiz (obligatory nature of commandment or Wajib.,

It is also an established principle of Islamic jurisprudence that if a permissible act becomes a source of trouble for general public, such act will be declared prohibited in the interest of the society. The Masalih and Mafasid pertaining to worldly affairs should be understood in accordance with what is predominant. If prevalent aspect is that of maslaha, then this constitutes what is conventionally known as Maslaha, and if the opposite prevails, then this is what is conveniently understood as Mafsadah. Accordingly, actions including both aspect of Maslahah and Mafsadah are usually judged according to the predominant aspect. When the first aspect prevails in the action, it will be considered as Maslaha, if, on the contrary, it is the second aspect that prevails, the action is avoided and is therefore considered as Mafsadah .

During the era of Hazrat Umar, when the Islamic state was financially sound and affluent, the government had fixed stipend for each new born child within the limit of Islamic State and used to increase it with the passage of time keeping in view the needs of the child but in subsequent period, it was discontinued by the successive Governments. Likewise, during the life time of the holy Prophet as well as during the Khilafat of Hazrat Umar, there are instances where the share of married couples in booty was double as compare to singles but in later period, it was discontinued due to instability within the boundry of Islamic State. Apart from this, there are many examples where decisions were

made on the basis of Maslihat;for example,Hazrat Umar suspended the Hadd punishment of a person who involved in a crime of theft during famine.Likewise,declared thrice divorce in a single pronouncement as thrice,forcibly send Nasir bin Hajjaq,the handsome young boy,on exile to avoid possibility of creating mischief amongst the women, suspended the share of Mu'alafatul Quloob in Zakat tax when Islamic State became stronger and left the land of Khyber at the hands of its owner against fixed tax.Prior that,Hazrat Abu bakr had fixed death punishment for those who refused to pay Zakat,while the fact is that refusing to pay Zakat is not a crime for which death punishment can be awarded.There are many more examples to substantiate the arguments that the head of the Islamic state is empowered to make decisions on the basis of Maslihat where no clear injunctions of Quran and Sunnah are available provided that it is not against the fundamental principles of Islam

Under the family laws of Islam, the husband is responsible to provide maintenance including residence to his wife.Though,traditionally she is bound to do household work including cooking, washing cloths and upbringing of children etc but legally, this responsibility also lies on the shoulder of the husband. The spouses normally live together and that is also necessary to achieve objectives of marriage, prescribed by Islam. Specifically in present circumstances, one can ill afford to live separately.

In the light of Quranic commandments, a suckling period of two years has been fixed for a new born baby. However the child can be weaned before the completion of two years by mutual consultaion.The right of custody of small children in first instance belongs to mother. The responsibility of maintenance shall be on father's shoulder. He will bear the maintenance of the divorced wife during the period of Iddat and after the completion of Iddat,if the child has not been weaned, the mother will continue the suckling, if she so destres, against the wages to be paid by the father of the child. She has the opton to refuse the suckling of the child.In such circumstances, another wet nurse shall be hired against the wages..The mother shall not demand so high wages for suckling child which is beyond the reach and means of the father.The purpose of mentioning these examples is to prove that:In Islam,the responsibalities lie on the shoulder of the husband being Qi'yam,as mentioned in the Holy Quran. The property recived by her through inheritance,gift,Wassiya or other sources are net saving, accumulated in her credit and there is no financial burden or responsibilities on her shoulder. In this respect Allah almighty says that.: (لِّلرِّجَالِ نَصِيبٌ مِّمَّا اكْتَسَبُواْ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا اكْتَسَبْنَ) (For men there

is a share of what they earned, and for women, a share of what they earned.(4:32)It is also appeared that: *للرجال نصيب مما ترك الوالدان والأقربون وللنساء نصيب مما ترك الوالدان والأقربون مما قل منه أو كثر نصيبا مفروضا*
 For men there is a share in what the parents and the nearest of kin have left And for women there is a share in what the parents and the nearest of kin have left, be it small or large a determined share.(4 7)

Allah almighty has ordained to treat the women folk pleasantly and nicely On the occasion of last pilgrimage, the Holy Prophet repeatedly emphasized to treat the women folk in a better way Allah almighty says that *وعاشروهن بالمعروف، فإن كرهتموهن فعسى أن تغرهنها شيئا ويحفظ الله فيه خيرا كثيرا*
 “Live with them in the recognized manner If you dislike them, then it is quite likely that you dislike something and Allah has placed a lot of good in it.(4-19)

The holy Quran termed wife and her husband as apparel, clothes or garment which protect the body of a person from being exposed It is appeared in the Holy Quran that: *هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ*
 They are apparel for you, and you are apparel (2:187)In another place, it has been revealed that: *وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً*
 And it is among His signs that He has created for you wives from among yourselves, so that you may find tranquility in them, and He has created love and kindness between you(30:2)In the light of this Quranic verse, the creation of man and woman or husband and wife is source of solace and love which ultimately make the life pleasant for them.

It is established fact that Islam is torch-bearer of women's right. In this respect, Allah almighty says that:“And the women have rights similar to those(of men)over them in kindness and men are a degree above them”2:28.She has been given extensive rights in matters of Nikah and Talaq.She has the right of inheritance. She is entitled shares in inheritance being a mother,sister and wife.She can be appointed as a judge or against any other high profile post.She can dissolve her marriage through the Courts without consent of the husband. She can appear before the court as a witness even in matters of Hudood and Qisas.when we go though the Islamic history,we find great women jurists,traditionists,Narrators and Saints.Hazrat Khadija not only the pioneer in accepting Muhammad (pbuh)him as a messenger of God but supported him in a extremely un-favorable circumstances.Hazrat Aisha not only narrated many traditions from the Holy Prophet but on many occasions corrected Hazrat Abu Hurira.Hazrat Rabia Basri was a great saint of her era. The mother of Mustansar billah was a judge of Superior Court who delivered many administrative and legal


judgments on this capacity. The daughter of Al-Tamash, Razia Sultana's administrative capabilities adorn on the pages of the history.

In the light of above discussion, it is thus concluded that: In temporal matters, the State or head of the State is empowered to legislate laws and rules keeping in view the interests of the people provided that the law may not be against the established principles of Islam.

Regarding this particular issue, there are no hard and fast rules in Islam but the state can extend the facility of Government accommodation to all its employees and there is no legal bar on it but it is subject to availability of resources in the country. At present, the situation is that thousands of Government employees are without shelter. In such circumstances, the principle of necessity and Maslihat can be invoked. Some jurists of Islam have quoted a tradition wherein it has been laid down that. The Islamic State is responsible to provide a residence, a horse and should also bear the marriage expenditures of its citizens. In present circumstances, one can only imagine about such types of facilities. No Islamic State in the world is in a position to materialize this commandment.

Providing accommodation to any spouse is a possible way out of a residential problem confronted by the government employees and it is based on Maslihat, hence cannot be declared repugnant to the injunctions of Islam. However, the deduction made by the Government from the spouses like house rent, conveyance allowance are concerned, it requires serious consideration because the original law, i.e. the Accommodation & Allocation Rules 2002 is silent about such kinds of deductions. At present, the deduction is made on the basis of the Office Memorandum No.F.2(3)/2003 dated 31-7-2004, issued by the Ministry of Law & Parliamentary Affairs. The question arises whether the O.M. can supersede the original law, which is silent about such deduction. It is not out of place to refer two judgments of i.e. (Pl C, CS 1999-485

and PLC-CS 2010-1178, where the FST has examined this issue and has held that it is against the norms of natural justice.


Fazal Elahi Qazi 14/6/2012

SRA