STATUS OF
WOMEN
IN
ISLAM

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PREFACE

This book deals with the question of rights and liabilities of women as enjoined in Islam, a subject which has become controversial since the recent phase of Islamisation was set in motion by General Muhammad Zia-ul-Haq, President of Pakistan. Various questions concerning the status of women were raised before the Federal Shariat Court during my tenure in that Court. Some were decided while others remained pending. Heated controversy was generated by the proposed Law of Evidence and the draft of the Law of Qissas and Diyat concerning evidence of women and the quantum of Diyat for causing hurt to or death of a woman. Some provisions of the Dissolution of Muslim Marriages Act, 1939 and the Muslim Family Laws Ordinance, 1961 have throughout been the subject of criticism in our religious circles but heat was not turned on those debatable matters because of the indirect protection afforded to matters of personal law by the Constitution. The Constitution did not extend the jurisdiction of the Federal Shariat Court *inter alia* to matters of personal law. But now that it is proposed by the Ninth Amendment Bill to the Constitution to extend the jurisdiction of the Court to those matters also, a new current of apprehension has run through the feminine leadership that the bill, if passed, will deprive the women of the Constitutional safeguard in respect of the rights guaranteed to them by these laws, and the problem of their validity will become an open question.

The present book attempts to elucidate in one volume the rights and liabilities of woman as a daughter, wife or mother, as a member of an Islamic society and as a citizen of an Islamic State. She is as useful a member of the society as her counterpart, man, and is his equal except that as the Holy Qur'an says : men are in charge of women. But it is a charge that enhances his liabilities towards her, makes her immune from financial liabilities and thus magnifies her importance as a human being. Like a man she has an independent individuality and is economically, socially and politically identifiable as an entity different from her husband, father or son with right to own property, earn money, vote at elections, hold electoral or other public offices and protect her legal and constitutional rights or interests through Courts, and judicial, *quazi*-judicial, or Administrative authorities. She is not subject to the rule of segregation imposed on her by social customs, and whenever necessary may appear in public with face unveiled and hands open. The only restraint upon her is that of covering her adornments and embellishments. She has as much right to acquire education as a man. In fact the acquisition of knowledge is as much her duty as that of man.

If man has the right to divorce, the woman has the right to seek dissolution of marriage and Khula'. Both are the most condemnable among matters permitted. This is the purport of the traditions of the Prophet pbh on the subject. The book, however, deals in detail in the light of the Qur'an and the Sunnah with the point that it is the divine will that divorce should be the matter of last resort and for this reason the book of Allah has placed numerous obstacles in the way of the husband which if observed faithfully, would make it impossible for him to terminate the

conjugal relationship arbitrarily and at his sweet will. A woman seeking dissolution of marriage or Khula' likewise meets many barriers in the way of achievement of this objective.

The provisions of the Dissolution of Muslim Marriages Act, 1939 and the Muslim Family Laws Ordinance, 1961 have generally been found to be valid in Sharia. The only exceptions are of sections 4 and 7 of the Ordinance of 1961. It is suggested that section 4 be replaced with the provisions of compulsory will in favour of grandchildren of the deceased son or daughter of the propositus, and section 7 be amended to expunge from its scope the divorce of a woman who had no conjugal relationship with her husband.

The chapter on Family Planning reiterates the views of the old prominent jurists of Islam particularly those belonging to the Shafei and Hanafi Schools of thought and vehemently advocates it in the circumstances of the population explosion in the country. It entirely justifies the Government's policy on the subject on some new grounds.

The book is not an attempt at Ijtihad nor was Ijtihad at all necessary. It deals with the various points of view of prominent Imams and Ulema of the Islamic world in different ages, discusses their reasoning in detail and then reproduces the author's conclusions which have the support of some Imams or prominent Ulema, or the others and which, in his opinion, suit the modern age. These views are, however, entirely his own.

The characteristic feature of the book is its balanced, well reasoned liberal approach. It portrays the various rights of women in a light which was dimmed by a thousand years of Taqlid. The illiteracy and ignorance of women, which was no doubt the fault of their men, largely contributed to this.

Another important feature of the book is its discussion of the theory of legislation in Islam. It also deals with many Sharia maxims which are equally useful for interpretation as well as legislation in an Islamic State. It denies any role to the Ulema in legislation or in passing a verdict of invalidity of legislation in Sharia on any ground of public interest in any era.

I am grateful to my old friend Mian Bashir Ahmad, Advocate, who willingly undertook to prepare the corrigenda, the index etc. But for his assistanae my task would not have been successfully accomplished.

The book is undoubtedly a new addition to the law libraries of the world. It is hoped that it shall prove of immense value to the lawyers. It also caters to the interests of women, intellectuals, legislators and those who are interested in the study of Sharia literature. One of the objects with which it was written is that it may promote public interest in the study of Sharia which is not as difficult a subject as is generally believed. This purpose will be served if lawyers, legislators, women and intellectuals in Pakistan make the study of Sharia one of the focal points of their educational pursuits.

Lahore
6th April, 1987.

AFTAB HUSSAIN

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Back in 1934 when I was a student of the Intermediate (First Year) in the Bareilly College, my Professor of English once asked me : "Aftab! what is your opinion about girls' education?" Promptly I replied : "If you wish to make harlots of them, educate them in schools." The answer did not stun or surprise him. By that time he had become accustomed to receiving such darts from members of the middle and higher classes among the Muslim Junta. He was Professor Abdul Shakoor the Founder of the first Islamia Girls' School in Bareilly and a local Sir Syed. My impromptu answer only articulated the feelings and views of the gentry of the town who had nothing but censure and reproof for that valiant champion of women's uplift. These were days when even my aged grandmother could not think of going out of the residential house even in a veil which covered her from head to toe. She could go to the house of relatives properly veiled and seated in a well curtained palanquin or *doli* (a small sedan) and all men were removed when she appeared in the porch to take her seat in the litter or when she vacated it. Later when the litter was substituted by horse driven vehicles or tongas, they were also curtained from all sides when women sat in them fully veiled.

The objection against female education was threefold. The girl students were veiled alright and they also went to schools in curtained horse driven vehicles, but they descended at the school gate within sight of men. Then for several hours they remained away from the care of their mothers and other members of the households, and the immaculateness of their activities during their absence from home could not be vouchsafed. Lastly they became more independent and self-reliant in their behaviour.

The frequent use of college library and some study of the commentaries of the Quran and Iqbal's poetry and other similar literature set me thinking and changed my outlook and vision which was obscured by customary seclusion of women, and the inflexible rigidity of *taqlid* (imitation) in religious matters.

Another jolt which I received concerned the rule of finality of three divorces pronounced simultaneously by the husband. This was never the intention of the Quran. As a lawyer a query often troubled me. This form of divorce was an innovation and was also held punishable. How an offence which is a punishable act, can bind the offender and the victim of the offence equally in the severance of their relationship and thus let the offender have his way under the sanction of law which is a violation of law? What should be held as void is thus validated.

The other problems of birth control, and inequality of men and women in matters like evidence and *diyat* cropped up later. Research study of these problems, my discussions with the Ulema and their prevarications soon convinced me that the various concepts pertaining to the rights of women required to be re-evaluated in the light of the Quran and the Sunnah of the Prophet pbh and our fresh experience of intellectual evolution and development of the women *inter alia* in Pakistan. The modern woman—and I am proud to call her modern—despite the denunciation of modernism by the Ulema, equipped with instruction and education in various sciences and subjects of Art in Colleges and Universities, is entirely distinct in understanding, outlook, behaviour and probity from the woman placed in seclusion though the present ties of segregation of women are quite loose and veiled women are now found walking on the streets and in public places and talking to shopkeepers without shyness and sometimes familiarly. The woman, these days, has refuted many of the theories of our jurists and doctors of the early centuries.

The old system of social stratification of women hardly left for them any avenue for talk except unworthy criticism of those they knew. They were seldom interested in world news or in the politics of their country or what was happening round them. The educated or the modern woman worked miracles in the Muslim League and Pakistan movement, arranged processions and public meetings of women, instructed them in what was required of them —vote, sacrifice and work—for the attainment of their goal of a free and independent Muslim State. In retrospect in the middle of forties and later the acts of valour to the credit of these women, including the hoisting of the Muslim League flag on the Punjab Secretariat are in every way comparable to the valiant deeds of men. They participated in the Jihad for homeland of the Muslims of the sub-continent of India with fanatic fervour and enthusiasm when the majority of the Ulema of the sub-continent were busy eulogising the blessings of Akhand Hindustan with an overwhelming Hindu majority and condemning and sabotaging the movement for a separate homeland for the Muslims to be carved out of the sub-continent. In the elections of 1945 and 1946—central as well as provincial—these ladies went from door to door requesting their sisters to cast their vote for the Muslim League candidates. This is more than sufficient to prove their love for Islam, practical demonstration of which they have been making time and again in the history of Pakistan. The women had become so politically conscious during the Muslim League movement that there were numerous examples of their voting for the Muslim League candidates when the male members of their family, under the influence of the Ulema voted for the Congress candidates. Such was the mettle of women who had a share in the making of Pakistan. The Ulema, for centuries have persisted in attacking the memory of woman but the girl students of Pakistan have demonstrated the fallacy and irrationality of their charge by competing successfully with boys in various University and Board of Education examinations.

As doctors, engineers, teachers, professors, lawyers, judges, politicians, administrators, ministers, prime ministers, pilots, sportswomen, the women in the modern world have proved themselves either equal to, or even superior to men. To such women probably, the sympathetic but orthodox Ulema may apply the analogy of man as done by Fariduddin Attar in the case of a saintly woman named Rabia Basri. He remarked :

> "If anyone should ask me why I note her amongst the ranks of men, I reply that the master of all prophets has said, God looks not to your outward appearance. Attainment of the divine lies not in appearance but in (sincerity of) purpose... If it is possible to have learnt two-thirds of the faith from Aisha the Righteous, then it is possible to learn some of the truth of religion from one of the handmaidens. Since a woman on the path of God becomes a man she cannot be called a woman."[1]

This is only an unwilling acknowledgement of the truth that many a women may be superior to men as many men may be superior to women. The deficiency in one and the perfection of the other or the inferiority of woman and the superiority of man is not the rule. Islam ordains equality of sexes except to the extent that husband is the head of the family which augments his liabilities to earn for the family.

The later jurists and the succeeding generations, however, tilted the balance in favour of man probably in view of the social conditions of their times when women were virtually illiterate, weak and confined within the harem. Otherwise there is ample anthropological and historical evidence to indicate that cultures vary widely with respect to the roles they assign to one sex or the other. Building their homes or shelters, making clothes, planting and cultivating the land, trading and many other occupa-

1. *The Social Structure of Islam* by Reuben Levy, p. 132 cf *Tadhkirat al Aulia* ed. Nicholson (Leyden, 1905-7) vol. 1, p. 59.

tions may be regarded as women's jobs in one society, men's in another.[1] In the following chapters examples have been given from the rural womenfolk in Pakistan who attend to all the household work unassisted by men and have to bring water and fodder from outside, in addition to performing various outdoor duties including grazing of cattle, harvesting of crops and helping the men in the performance of other agricultural duties. Sometimes they have to do planting and cultivation work single handedly. There are examples of their being yoked to the plough along with an animal.

Women's lesser strength and slighter build than men's have not prevented them from being the carriers of burdens or from doing heavy agricultural labour and other strenuous and physical labour.[2] In Pakistan women of the Ode tribe are seen climbing high buildings with loads of bricks on their heads while their men collect their earnings in the evening.

During the nineteenth century, European women were regarded as 'frail vessels' and indeed many suffered from 'the vapours' and were liable to faint at the sight of a mouse. Today that image of femininity from the higher classes of Europe is gone. Now women have become explorers, mountaineers, racing drivers, and pilots and have taken an active part in wars, resistance movements, and revolutions not only in nurturing roles, as protectors of fugitives, as nurses, but also as combatants.[3] The role of women in the Indian sub-continent in the Pakistan movement has already been briefly commented upon. The latest illustration of women's active participation in resistance movements are provided by the Palestinian and Lebanese women. Lately young girls sacrificed themselves by driving bomb cars direct into the enemy lines and blowing up there.

1. *Encyclopaedia Britannica*, under the heading "Women—Status of", p. 906.
2. *Ibid.*
3. *Ibid.*, p. 907.

They thus caused immense damage to the enemy. In Pakistan many a women are members of the Police force and also hold positions in the Army particularly in the Medical units.

The concepts of masculinity and femininity exist above all in the realm of abstract ideas. At different times, diverse and sharply contrasting qualities were attributed to men and women, thus keeping the idea of bipolarity intact. Rationality, for example, was thought characteristic of men, emotionality of women. Greater practical sense was believed to be typical at times of one, at other times of the other sex. Man's thinking was said to be logical, women were credited with intuition, thus giving different names to the same quality in both sexes.

These and similar convictions, though firmly held by rational men and women, can today be consigned to the folklore. In reality it has proved impossible to isolate among the wealth of behaviour patterns and personal traits exhibited by women even within one society, let alone in different cultures, those characteristics that could be considered typically feminine in a general sense.[1]

The results of test surveys of the Western society are quite revealing in respect of the psychological differences between the sexes :

> "The surveys have shown significant psychological sex differences in contemporary Western society. As far as measured abilities are concerned, men have been found superior in speed and coordination of gross bodily movements, as opposed to manual dexterity, in which women have a higher mean score. Men are better in spatial orientation, mechanical comprehension, and arithmetical reasoning. Women, on the other hand, excel in speed and accuracy of perception and in memory, numeri-

1. *Encyclopaedia Britannica* under the heading "Women—Status of," p. 907.

cal computation, verbal fluency, and linguistic abilities generally.

Girls on the whole, develop faster towards adulthood than do boys, both physically and mentally. This applies at all stages, from infancy, when they are earlier in learning to speak and to count, and to adolescence and beyond. The fact is in line with the observation that during their school years girls at first equal if they do not, in fact excel boys, even in mathematical reasoning, spatial skill; analytical thinking, and some other predominantly masculine abilities. That is to say, girls reach their peak at an age, boys forge ahead later. Developmental studies, testing in greater detail various intellectual abilities in preschool and school children of different grades, have on the whole supported these findings.

With respect to personality traits, men are characterized by greater aggressiveness, dominance, and achievement motivation, women by greater dependency, a stronger social orientation, and the tendency to be more easily discouraged by failure than men. As the miscellaneous nature of this summary indicates, there is a vast variety of personality traits that might be made the object of comparisons between the sexes. This has, in fact, been done, and the number of studies testing the differential distribution of various traits and types of behaviour between men and women is legion.

Experimental studies have led to the conclusion that masculinity and femininity are not mutually exclusive alternatives but are combination of traits, unevenly distributed among individuals of either sex. Physically as well as psychologically, each person is a unique balance of characteristics that, if one so wishes, may be placed on a continuum, extending from maleness at one end to femaleness at the other, with a wide area of overlap at the centre,

tion of the woman being a chattel is clearly noticeable in this punishment. It is noticeable similarly in patria potestas, and in the custom of slaying her at her husband's death[1] or forcing her to commit *sati* as among the Hindus. The query put by one of the companions of the Prophet pbh whether he could kill his wife and her paramour when taken *flagrante delicto* smacked of the same notion. The idea of private revenge arises out of the loss of private belonging. The reply of the Prophet pbh that no punishment could be awarded to either culprit in the absence of the testimony of four eye-witnesses gave a death blow to the notion that a woman is the property of the husband to be killed by him if found with a lover in *flagrante delicto*. The Prophet pbh in this manner held the offence of adultery to be an offence against the State which could be punished by a judicial officer on the evidence of four eye witnesses. The idea of her being a chattel was fully refuted by the Prophet pbh. In a civilised society no human being can be punished for an offence except by a judicial officer who can act only on evidence and not arbitrarily.

The rules that the consent of an adult girl is essential for her marriage, and that the *mahr* or *sadaq* (dower) payable by the husband is wife's property alone support the same theory. During Jahiliya 'the suitor paid a sum of money (known as the *mahr*) to the father or the nearest kinsman of the girl he wished to marry, and another sum (the *sadaq*) to the girl herself.[2] This was abolished by Islam and whatever amount is payable by the husband as *mahr* or *sadaq* is the wife's property.

It is noticeable that St. Paul also held that 'adultery is sinful because it is a kind of theft.[3] It is a resounding echo of what the Africans presumed, or in the Torres Straits or among the Arunta. In the Torres Straits there is no word for adultery

1. *Encyclopaedia of Religion and Ethics*, Vol. 1, p. 124.
2. *The Social Structure of Islam* by Reuben Levy, p. 95.
3. *The Encyclopaedia of Religion and Ethics*, Vol. 1, p. 132.

apart from theft (*puru*) and all irregular connection was called 'stealing a woman'[1] and among the Arunta a man who committed adultery with a woman of the class in which he could marry was called *atna mylkura* (vulva thief). Unfortunately without realising the implication of likening the woman to valuable thing required to be protected from thieves, our Ulema have virtually lowered the status of a woman to a chattel. This is to say that she had ceased to be a free human being. A reorientation of the status of women is therefore required in the light of the Quran and the Sunnah of the Prophet pbh.

The reduction of the status of the woman by the religious scholars is proof of a double standard for modesty and chastity, one for the man and another for the woman. The Quran fixed a uniform standard by directing the man *yahfazu furujahum*[2] (to guard their private parts) and as a preliminary to the attainment of this object *yaghuddu min absarihim*[3] (to lower their gaze) and by similarly directing the women *wa yahfazna furujahunna*[4] (to guard their private parts) and *yaghdudna min absare hinna*[5] (to lower their gaze). Both the sexes were required to be free agents in the achievement of the goal of maintaining his/her chastity. But the doctors in the classical age terminated the agency of the woman and for guarding her chastity as well as the chastity of man, segregated her entirely from male society. Unobtrusively the woman through the negative attitude of segregation thrust upon her by the Ulema was made the sentinel of male chastity. This is what the present day Ulema deduce from the seclusion and veiling of women.

An apt illustration of this psychology was furnished by certain letters received by me from students of religious schools

1. *The Encyclopaedia of Religion and Ethics*, Vol. 1, p. 123.
2. Q. 24 : 30.
3. Q. 24 : 31.
4. *Ibid.*
5. *Ibid.*

or madrassa students during my tenure as Chief Justice of the Federal Shariat Court. The significance of the letters was not different. But while some students communicated their point of view in civilised language others described in the most abusive language possible how their sexual feelings were aroused at the sight of unveiled and well dressed women in public places. They demand one way traffic free either of feminine presence or at least of unveiled women and conveniently forget their own duties to guard their chastity and to lower their gaze.[1] It is, however, remarkable that the leading religious scholars of Pakistan are now frequent visitors of Western countries where if they turn their glance from one feminine face it is more often than not, likely to fall at another face, and if they lower their gaze it falls on bare legs and sometimes bare thighs.

The view voiced and the doctrines expressed by the religious scholars in this age are not their own; they are of the old jurists they follow. The binding edict for them is *taqlid* which makes it incumbent upon them to follow any or a group of religious leaders of the second and third century Hijra without leaving any right to them to question their decisions or doctrines or to inquire about their correctness. It is a rule of Islamic Shariah that law may change with the change of age but in practice the decision given or rule, regulation, law or doctrine formulated or agreed upon by religious leader one follows, must remain unaltered and binding because change would require Ijtihad, but the doors of Ijithad[2] are closed forever.

There are four systems of jurisprudence besides Imamia system. They are Hanafi, Shafei, Hanbli and Maliki. According to the doctrine of *taq'id* the authority of Ijtihad extends only in cases which have not been decided by the authors of these four systems of jurisprudence.

1. Q. 24 : 30.
2. *Ijtihad* (exercise) is the logical deduction on a legal and theological question by a learned and enlightened doctor.

The trends have somewhat changed in this age of rationality. The educated Muslim has an inquiring mind and sometimes freely questions the decisions of old masters though he generally shows the utmost respect for their immense contribution to Islamic Shariah. He would like to restrict *taqlid* (imitation of the old Masters) to ritual and details of five times prayers, fasting, Haj and to some extent rules of Zakat and inheritance and not to any other form of legislation to which the jurisdiction of the legislative authority of a modern state generally accrues. He is tempted to re-evaluate Islamic laws framed or assented to by these leaders in the light of only the Quran and the Sunnah of the Prophet pbh *inter alia* keeping in view the principles of Istehsan and Masaleh Mursala which are equitable rules for adjudging practicability of analogy, expediency and requirements of public good and public welfare in the changed circumstances of the modern age.

The trend of the Ulema (religious scholars) has also slightly undergone a change. If they confront you with the decisions of leading doctors they follow they also try to advance arguments in support of those decisions which are generally reproduced in the commentaries of the Quran, Hadith and other law books written by medieval authors. When they find their logic fail, they either base the inevitability of their stand on Ijma'a which according to them is absolutely irresistible and obligatory, or they appeal to the reverence entertained by their questioner for the old Masters by posing the question : Were those old masters fools to decide like this? They do not realise that what the old masters decided might have been apt or even unquestionable in the circumstances of their age or might have been based on the concepts of that age which are no longer true or are easily refutable by further insight or broadening of outlook. Reverence, however great, for those pioneers and eminent people who undoubtedly excelled us, does not mean blindly following them. If such had been the natural rule of conduct the world would

still have been in the Aristotelean or Platonic age and Galileo would still be condemned.

In view of the inhibitions of *taqlid* of the religious scholars in Pakistan I have re-evaluated the various problems in the light of the Quran and the Sunnah of the Prophet pbh and in addition have dealt analytically with the reasoning to the contrary. It will be, however, noticed that the arguments advanced in support of the modern view are seldom new. They are based on the principles laid down by the same old masters who founded the four systems of jurisprudence and the later exegists and commentators. There may be no novelty except in the application of those rules. I do not claim the credit for that novelty because the number of Ulema (religious scholars) who arrived at the same result by similar reasoning is on the increase in the Islamic World. In Pakistan also the number of such Ulema though negligible a few years ago, is now growing.

The respective reasoning and arguments may not be properly appreciated unless the readers who know little of the Islamic Shariah are enlightened about the relevant details of the sources of law in Islam, which are four *i.e.* the Quran, the Sunnah, Ijma'a (concensus) and Qiyas (analogy). There was no concept of Ijma'a during the lifetime of the Prophet pbh. As will be noticed later the doctrine took several centuries to formulate and develop. The order of priority of the other three sources is laid down in the Hadith of Ma'az and is repeated in the letter of instructions for the administration of justice sent by Hazrat Omar to Abu Moosa Ash'ari. When Ma'az was appointed Governor of Yemen, the Prophet inquired from him how would he decide. He replied: 'According to the Quran.' On the Prophet's query that if he was not able to find the solution there, he referred to Hadith as the next anchor sheet. When the Prophet pbh asked him the alternative if he could not find the answer there, he referred to his opinion as the final option. The letter of Hazrat Omar referred to above put the foundation of Qiyas. The instructions are thus stated there:

> "If during your investigation and research for anything you don't find the answer in the Quran and the Sunnah you should find problems and matters which bear comparison to it and after a discovery of what is closest in analogy to and in the name of Allah more illustrative of truth concerning matter under consideration, rely upon it."[1]

The Hadith thus paved the way for further legislation.

The Quran

The Book of Allah is the ground norm for Muslims. It is certain, immutable and unalterable. It is the book, no dot of which is changed since its revelation. It includes the ordinances of Allah which require obedience. It is also the primary source of law and all temporal legislation must conform to it. It is revealed 'so that ye may understand it.'[2] The object of the revelation *inter alia* is "that they may ponder its revelations and that men of understanding may reflect."[3] The question posed in a verse in the chapter entitled 'Mohammad', "Will they then not meditate in the Quran or are there locks on the hearts?"[4] makes it obligatory on the Muslims to ponder over it and meditate in it because in it are described the courses of action which guarantee successful living on the earth and remission of sins and forgiveness in the hereafter. The earlier exegists, commentators and jurists have superbly performed this duty and have left for the Muslims a heritage for their guidance in future. They classified and categorised various verses, analysed and interpreted every word, laid down various rules of interpretation and wrote versatile treatises on various subjects including *mutlaq* (absolute) and *muqayyad* (limited), *a'am* (common), *ma'hud* (determinate

1. *Fiqh-e-Omar* by Shah Wali Ullah (Urdu translation by Maulana Abu Yahya Imam Khan), p. 13.
2. Q. 43 : 3.
3. Q. 38 : 24.
4. Q. 47 ; 24.

or particular), *nasikh* (abrogator) and *mansukh* (abrogated), and *muhkam* (word meaning of which is unalterably fixed), *mut-ashabah* (unintelligible), *mujmal* (vague) etc.

Sunnah

It is not relevant for the present discussion to deal with the technical distinction between Sunnah and Hadith. As a source of law it means the specific opinions of the Prophet pbh embodied in the form of ratiocination and delivered from time to time on questions raised before him. It also includes what is impliedly approved by the Prophet pbh. There are two divergent views on the classification of revelations. One view is that the Quran is *zahir* (manifest) revelation while the traditions of the Prophet pbh are *batin* (internal) revelation. This view confers on Hadith the status of revelation from Allah. In support of this dictum reliance is placed upon verses Q. 53: 3 and 4 "Nor doth he speak of (his own) desire, it is not but a revelation that is revealed." The other view would not accord to such opinions of the Prophet pbh, the status of revelation.[1]

This question was considered by me as a member of the Federal Shariat Court in the case of Hazoor Bakhsh *v.* Federation of Pakistan.[2] I held, following the view of Shah Wali Ullah[3] that the word *wahi* (revelation) in verse Q. 53 : 4 refers to the Quran and not the Sunnah. It is the interpretation to the contrary that would justify the abrogation of the Quran by the Sunnah and would upset the priorities in the Hadith of Ma'az. There are clear traditions that in case of conflict between the Quran and the Sunnah accept what is in accordance with the Quran and not what conflicts with it. The following traditions may be cited:

1. *Muhammadan Jurisprudence* by A. Rahim, p. 68.
2. P L D 1981 F S C 145 (196).
3. *Shah Wali Ullah aur unka Falsafa* by Maulana Obeidullah Sindhi, p. 114.

"Abu Yousuf, while warning against the flood of Ahadith says that the Prophet once said, 'Hadith in my name will spread; so what comes to you in my name and agrees with the Quran, take it as coming from me while what comes to you in my name but is in conflict with the Quran cannot be from me."[1]

"Tabarani relates from Thauban that the Messenger of Allah pbh said: 'Test Hadith with the Book of Allah. If it is in accord with it take it to be from me and I stated it."[2]

Another version of the same Hadith is reported at another place in *Kanz al Ummal*.[3]

"It is reported by Ibn Asakir from 'Ali that the Messenger of Allah pbh observed: 'There will be relators in the near future who shall relate traditions from me. Accept from them what is in accordance with the Quran and leave the rest of them."[4]

Imam Kuleini relates this tradition in *Bab al Akhzal Sunnah wa Shawahid al Kitab* from Abu Abdullah that the Messenger of Allah pbh said, "There is truth in everything which is right and luminousness is the reward for every virtue. Accept what agrees with the Quran and reject what is repugnant to it."[5]

He cites another Hadith in *Bab al farq bain al rasul unnabi wal mohaddis* (Chapter relating to difference between the messenger prophet and traditionist) that 'it is stated by our great doctors from Ahmad bin Mohammad bin Khalid who related from his father on the authority of

1. *Al Radd ala Sayar al Auza'i*, p. 25 cited in *Islamic Studies*, June, p. 161.
2. *Kanz al Ummal*, Vol. 1, p. 46.
3. *Ibid.*, p. 50.
4. *Ibid.*
5. *Kafi Kuleini*, p. 34.

> Nazar bin Suwaid who related from Yahya bin Halbi to whom it was related from Ayub bin Hur that "I heard Abu Abdullah saying that everything should be tested on the Book of Allah and the Sunnah of the Messenger of Allah pbh. Whichever Hadith is not in accord with the Book of Allah is nonsense and meaningless."[1]

It will be noticed in the following chapters that the traditions on various subjects are conflicting. Some agree with the Quran while others are in conflict with it but appear to agree with the prevailing doctrines or concepts *inter alia* about divorce, *diyat* and other matters relating to the status of women. If the traditions which agree with the Quran had been accepted as was done by the Hanafis on the question of *diyat* of a protected non-Muslim the result would have been exactly the same for which the women in Pakistan are crying hoarse.

Often the traditions on a subject are weak but out of them those which support a prevailing concept or doctrine are accepted and those which agree with the Quran are ignored.

Qiyas (Analogy)

Qiyas is third according to the Hadith of Ma'az and stands fourth as a source of Shariah law in Fiqh. But since Ijma'a which is treated by the jurists as the third source, requires a detailed description, I have rather changed the juristic order.

The root meaning of the word Qiyas is 'measuring', 'accord', 'equality'. As a source of law it is defined by the Hanafis as an extension of law from the original text to which the process is applied to a particular case by a common *illat* or effective cause, which cannot be ascertained merely by interpretation of the language of the text;[2] by the Malikis as 'the accord of a deduction with the original text in respect of the *illat* or effective cause of

1. *Kafi Kuleini*, p. 82.
2. *Mukhtasar* (Bulaq Edition), Vol. 2, p. 204.

its law';[1] and by the Shafe'is as 'an accord of a known thing by reason of the equality of the one with the other in respect of the effective cause of its law.'[2] In plain language Qiyas is a process of deduction by which the law of a text is applied to cases which, though not covered by the language, are governed by the reason of the text. The reason of the text, which is technically called '*illat* or effective cause' is the *rukn* (constituent of analogy) and the extension of the law of the text to which the process is applied is its legal effect (*hukm*).

As an illustration may be cited verse Q. 24 : 4 which provides the sentence of eighty stripes for those 'who accuse honourable women but bring not four witnesses'. The verse mentions the Qazf (defamation or calumniation) of women only and not men but the same effective cause or *illat* of the provision being applicable to the slander, defamation or calumniation of honourable men, according to one view, that offence would likewise be punishable with eighty stripes.

Qiyas is much more restricted in its scope than 'opinion' which was approved by the Prophet pbh in the Hadith of Ma'az; it is likely to create many difficulties. It was not accepted as a valid source of law by the Zahiris, some Hanablis and Ibn Hazm, except in a few matters. Its defects were, therefore, sought to be remedied by the Hanafis by the equitable principles of *Istihsan* (juristic equity, public good) and *Istidlal* (reason), and by the Malikis by enunciating the principle of Masalch Mursala (public weal according to Sharia). These principles raise Qiyas to the level of "opinion not repugnant to the Quran and the Sunnah of the Prophet pbh which involves consideration of public welfare". The utilitarian principle is thus embodied in this source of law.

1. *Tauzih* (Calcutta Edition), p. 302.
2. *Mukhtasar, ibid.*

Ijma'a (Concensus)

The juristic principle of Ijma'a or consensus of the learned is a principle on which there is no consensus. In theory it has to its credit universal acceptability in a particular age and the idea of infallibility, but in practical application the gulf of differences has always been unbridgeable. Imam Shafe'i who gave Ijma'a a juristic form as a source of Islamic law held Ijma'a impossible of attainment except in a few matters which concern Faraiz (obligatory ordinances). In his book *Jama al Ilm* he poses a question to his debator, "Who are those doctors, whose unanimity, if they are unanimous on any problem, becomes its proof" ? The debator replies: "(They are) those whom the residents of the city acknowledge to be jurists and act on their declarations and obey their orders." Imam Shafe'i opposes this view, discusses its possibilities and says:

> "I know that the learned of each city have difference of opinions. I also know that the learned of one city are opposed to the learned of another place. It is also within my knowledge that there are people in Makkah who do not oppose what 'Ata says and there are others who adopt the view of others in preference to his views. Consider about the verdict of Zanji Ibn Khalid. There are those who prefer him in Fiqh. And among them are also people who are inclined towards what Saeed bin Salim says. The followers of one treat the other as weak. I also know that the people of Madina prefer Saeed bin ul Musyyib over others but some time do not accept some of his views. During our time such people became prominent as Imam Malik. Many a people favour him but there are others who criticise him and prove his views fallible. Similarly there are Mughira bin Hazim and Darawradi. A body of people follow their opinions. The other body censures them. Similarly there is a group in Kufa which prefers what Ibn Abi Laila says and

criticises the views of Abu Yousaf, but there are other people who prefer him, and censure the teachings of Ibn Abi Laila. Some people favour Sauri, others follow the instructioas of Hasan bin Saleh. If the people of the cities differ to such degree how is it possible to concede that they can agree on any general juristic proposition."

The debator is confused over such objections raised by Imam Shafe'i and inquires from him: 'Is then Ijma'a of any substance?' Imam Shafe'i says in reply :

> "Yes, the greater part of Faraiz (obligatory prayers) is such that no one can deny its knowledge. This is such a consensus that you can say that people have reached an Ijma'a on these problems and no person can say that it is not Ijma'a. So this is the way to test the truth of Ijma'a."[1]

In his book *Ikhtilaf ul Hadith*, Imam Shafe'i clarified that the points on which the companions and tabei'in (those who came after the companions) had reached concensus, were concerned with the essentials of what is obligatory and incumbent. He said:

> "The Companions of the Prophet pbh and those who came after them and those who came after them did not arrive at a concensus on anything except what is obligatory which it is incumbent upon every one to perform. They never had an Ijma'a on any other point. And there is no scholar on the surface of the earth, within my knowledge who may have deviated from this course."[2]

About Ahmad bin Hanbal Ibn Qayyim said:

"Imam Ahmad calls the claimant of Ijma'a a liar. He

1. *Jama al Ilm* printed Ma'arif, Egypt, pp. 61-64 *cf. Imam Ahmad bin Hanbal* by Abu Zahra (Urdu trans.), pp. 367-368.

2. Al Ikhtilaf al Hadith on margin of *Kitab al Umm*, p. 147 *cf. Imam Ahmad bin Hanbal, ibid.*, p. 360.

did not consider it lawful that it should overrule a correct Hadith. Like Imam Shafe'i he also held that declaration of Ijma'a cannot be made if there be no knowledge of any difference of opinion. Abdullah bin Ahmad bin Hanbal said that he had heard his father say that whoever claims that there is Ijma'a on any point makes a false statement. It is possible that there may be people who differ with his knowledge or what he knows, and he is ignorant of it. Instead of claiming that there is Ijma'a on any point he should only say that he did not know about any difference of view on this point."[1]

Abu Zahra explained that Imam Ahmad did not deny Ijma'a. He only contradicted the scholars of his age who would lay claim to Ijma'a indiscriminately to support their point of view on any problem.[2] It is however clear that he did not like the claim of Ijma'a on any point which amounts to elimination of Ijma'a in practice, though he agreed with the theory of Ijma'a. This is clearly stated in *Al Madkhal* the famous book of Hanabli Fiqh :

"None should think that Imam Ahmad denied Ijma'a (as a source of Islamic law). He denied knowledge of Ijma'a on such problem which might have come within the knowledge of every Mujtahid in all the territories of Islam, and then all of them might have agreed with one solution, and after the crossing of all these hurdles the claimant of Ijma'a might also have obtained categorical knowledge of it. Every just person knows that this is practically difficult. The knowledge of such Ijma'a is possible only about the period of the Companions because in those days besides the number of Mujtahids being small, their statements have been compiled by the traditionists."[3]

1. *Imam Ahmad bin Hanbal* by Abu Zahra (Urdu trans.), p. 370.
2. *Ibid.*
3. *Ibid.*, p. 375 from Ahmad Khalil, *Mazhab il Imam Ahmad bin Hanbal*, p. 129.

Imam Ibn Qayyim did not include Ijma'a as a source of law. Imam Shafe'i thus denied Ijma'a in practice on any point except the essentials of obligatory prayers. Imam Ahmad bin Hanbal called the claimant of Ijma'a a liar. Imam Shaukani refers to the view of Abu Muslim Isfahani who said that the learned agree that the Ijma'a of the Companions is entitled to esteem and regard, but they, differ regarding any other Ijma'a. According to Abu Muslim also the Ijma'a of others is impossible of attainment. He said:

> "The truth of the matter is that the categorical knowledge of Ijma'a of people other than the Companions is not possible to obtain, because during the period of the companions the number of scholars whose consensus mattered was small. It could be tested easily. But now that Islam has reached upto distant corners and the number of the scholars has increased considerably, it is no more possible to obtain knowledge about it. This as also the view of Imam Ahmad bin Hanbal whose period was nearer the period of the Companions and who was a very distinguished figure on account of power of retention and knowledge obtained from reports.[1]

Now the need for such notes of dissent arose because of the prevailing custom of the scholars to lay claim to Ijma'a in support of their point of view, indiscriminately. It appears from the opinion of Abu Muslim Isfahani that the practice prevailed during his time too.

One instance is of the claim of Auzae'i which was refuted by Imam Abu Yousuf in his book *Al Rad ala Sayar ul Auza'i*. He said:

> "Imam Abu Hanifa said that a person having two horses (in the field of battle in Jihad) is entitled to the share of one horse only (in booty). Imam Auzae'i says that he

1. *Imam Ahmad bin Hanbal* by Abu Zahra (Urdu trans.), p. 375 *cf. Irshad ul Fahool* by Shaukani, p. 69.

> will be given the share of two horses and no more and *this had been the practice of the learned and the Imams.* Abu Yousuf says we have no such report from which it may be proved that the Prophet pbh or his Companions ever distributed to any one the share of two horses. What is known in this matter is a Hadith which according to us being isolated is treated as rare. We do not act upon it. The claim of Auzae'i that this is the practice of the learned and the Imams cannot be accepted. It should be known (specifically) who among the Imams acted upon it and who among the scholars made it a rule of practice so that we may test whether he can at all be relied upon, and on what basis he awards the share of two horses and deprives the (owner of three horses of the share of) three horses."[1]

Thus persons of the status of Imam Auzae'i known as Imam of the Syrians referred to the consensus of scholars and Imams without using the word Ijma'a and Imam Abu Yousuf had to refute the same and contradict him on this score.

Similar criticism of Auzae'i in the same book is in relation to the share of mule. Imam Abu Yousuf wrote:

> "I thought it is common knowledge that there is no difference between the share of a horse and a mule, nor is there any difference on the point that in Arabic language mule is included in the word horse... As far as our knowledge goes we claim that in matter of strength, excellence and obedience to the rider mules are more suitable in war than horses. Now Auzae'i says that this (the contrary) was the view of the Imams (unanimous view). This claim is not correct, because this is the opinion of the scholars of Hijaz and some scholars of Syria only, who had the least knowledge of the rules of ablution and

1. *Imam Ahmad bin Hanbal, ibid.*, p. 366 *cf. Al Rad ala Sayar ul Auzae'i.*

tashahhud (sitting during prayer) and were ignorant of the principles of jurisprudence."[1]

Abu Hanifa considered illegal the selling and buying of slaves captured in the enemy territory before they were brought to the land of the Muslims. On this al-Auzae'i comments, "the Muslims have always been buying and selling war-captives in the Dar-al Harb. No two (Muslims) have ever disagreed upon this point until the murder of (Caliph) al Walid." Abu Yousuf comments, "Judgment regarding what is lawful and what is unlawful cannot be based upon such statements 'people have always been practising such and such'. For, much of what people have always been practising is unlawful and should not be practised... The basis (of judgment) should be the Sunnah of the Prophet pbh or of the early generations (*salaf*) *i.e.* Companions of the Prophet pbh and men who have an understanding of the law."[2] Again criticising the Sunnah concept of the Hijazi lawyers, Abu Yousuf writes, "The lawyers of Hijaz give a decision and when they are asked about the authority, they reply, 'This is the established Sunnah.' In all probability, this Sunnah is (the result of) some decision given by a market tax-collector ('Amil us Suq) or a tax collector in an outlying district."[3]

The criticism of Imam Abu Yousuf brings in bold relief the frequency of references to general opinion or general practice of the people irresponsibly and indiscriminately made by the scholars in those early days of Islam. Imam Ibn Taimiya also held that the known Ijma'a is of the Companions only and the later consensus, if any is deficient on account of difference of opinions. He said:

"The known Ijma'a is that of the period of the Compa-

1. *Imam Abu Hanifa* by Abu Zahra (Urdu trans.), p. 512 *cf. Al Rad ala Sayar ul Auzae'i*, p. 21 pinted Egypt.

2. 1962 *Islamic Studies* (June Part), p. 3, *cf. Al Rad ala Sayar al Auzae'i* (printed Hyderabad Ind.), p. 76.

3. *Islamic Studies, ibid.*, Abu Yousuf, *ibid.*, p. 11.

nions only. It is, however, difficult to attain knowledge of each consensus of that age. It is for this reason that there is controversy or opposition about the illustrations of consensus in the post Companion era and many problems have become controversial; for example there is difference of opinion on the consensus of Tabee'in (those who come after the Companions) on any matter concerning two statements of a Companion. Same position obtains in matter of Ijma'a by silence etc."[1]

These are the Imams of various schools of thought, including Shafe'i, Hanabli and Hanafi who did not approve of the claim of Ijma'a. Most of them did so on the ground that it was difficult rather impossible to pinpoint Ijma'a on any point after the end of the Companion's era. Imam Abu Yousuf insists that a claim of consensus should be proved by giving the names of the scholars who had agreed with the view on which the consensus was claimed. Broadly speaking there were two reasons for this impracticability of Ijma'a. Firstly the number of scholars had increased considerably during the centuries and secondly, with the spread of the territories of Islam, the scholars were also so spread out that it was physically impossible to know the opinions of all on a particular point even if it is assumed that they had knowledge of the problem in issue. In this criticism of post-Companion era on Ijma'a is also clearly defined the main ingredients of Ijma'a. Those scholars who treat Ijma'a as a source of Islamic law define it as 'an agreement of the Mujtahids of the Islamic Ummah on any rule of Islamic law in an era.' This is the definition approved and given by Imam Shafe'i who was the first jurist to write on the subject of authority of Ijma'a and its authoritative character in Islamic jurisprudence.[2] This is the definition reproduced in *Mukhtasar al Tahrir*[3] with the

1. *Imam Ibn Talmiya* by Abu Zahra (Urdu trans. by Naib Husain Naqvi), p. 656.

2. *Imam Abu Hanifa* by Abu Zahra (Urdu trans.), p. 509.

3. *Mukhtasar ul Tahrir fi Usul l Fiqh al Saada al Hanabila* by Ibn al Najjar, p. 33.

addition that the disagreement of one Mujtahid only is sufficient for its negation.

It may be stated that Imam Malik does not believe in the doctrine of Ijma'a as such. He relies on the Ijma'a of the residents of Madina. Similarly the Shias have faith in the findings of the family of the Prophet pbh through his daughter, Fatima. It was said that Imam Abu Hanifa talked of Ijma'a of the residents of Kufa and treated it as binding,[1] though Imam Ibn Taimiya does not agree with it.[2] It appears from the writings of Imam Ibn Taimiya that there were scholars who considered the agreement of the residents of Makkah, Syria or Iraq as binding.[3] It is therefore, explained in *Mukhtasar al Tahrir* by Ibn Najjar[4] that the Ijma'a of various groups of residents of Madina, or the opinions of the four Caliphs, or of the family of the Prophet pbh, *i.e.* Hazrat Ali, Hazrat Fatima and their descendants, are not Ijma'a, nor is it Ijma'a when even one Mujtahid is opposed or holds to the contrary.

There is no specific reference to the doctrine of Ijma'a in the Quran or the Sunnah of the Prophet pbh. A number of verses and traditions are now cited in support of the doctrine, but the process of discovery of these verses or traditions is also evolutionary. In the well-known tradition of Ma'az reference is to the three sources of law, the Quran, the Sunnah of the Prophet pbh and Raay or Ijtihad which later developed as Qiyas on the basis of which remarkable feats were performed by the great Imams in the field of *inter alia* research and legislation. It appears that the word Ijma'a first came to be used for the agreed decisions of the Companions of the Prophet pbh, to emphasise their binding nature inasmuch as the Companions, association with the Prophet pbh ensured the correctness of their decisions and

1. *Imam Abu Hanifa, Ibid.*, p. 510.
2. *Fatawa Ib Taimiya*, Vol. 20, p. 300.
3. *Ibid.*
4. *Ibid.*, p. 33.

their agreement even though they sometimes exhibited extreme dynamism (like the farsightedness exhibited in the rules laid down by Hazrat Omar), guaranteed their freedom from error. In later times when the Companions spread in the then ever expanding territories of Islam the focus of attention for guidance became the practice of the people of Madina, because as explained by Imam Ibn Taimiya that during the three preferable eras (of Sahaba, Tabeein, and Tabe Tabeein meaning the Companions, those who came after them and those who came after the second category) no *bida'at* (new and heterodox doctrine) appeared in Madina, nor appeared there any new doctrine of the principles of religion, though new doctrines appeared in all other towns. In these big cities resided the Companions of the Prophet pbh and from them exuded knowledge of the five pillars of belief—from the two cities of Haram (Makkah and Madina), and the two cities of Iraq and Syria. Also emerged from there the (knowledge of) the Quran, Hadith, and Fiqh, and prayer and worship which widened and broadened in all matters pertaining to the religion of Islam. Everywhere *bida'at* (innovation) also developed, but not in Madina.[1] The practice of the residents of Madina thus came to have binding force for some jurists.

Later, on the analogy of the same, the means of communications being meagre and religious discussions being confined to the precincts of a town itself, the agreement of the scholars of a city or specified region came to be recognised as a binding rule and the concept of the Ijma'a of a city or region developed. This is evident from the following passage of Imam Ibn Taimiya:

> "And during the generations which were praised by the Prophet pbh (three generations of the Companions and those who came after them and those who came after this second generation) the religion of the people of Madina was the most correct religion, among the people of different cities. They were praised in all other regions

1. *Fatawa Ibn Taimiya*, Vol. 20, pp. 300-301.

by the residents of those regions for following the tracks of the Prophet pbh. They (Madinites) were in advance of them in the knowledge of the Sunnah of the Prophet pbh and in following it so that they did not need any sort of diplomacy of the rulers. Undoubtedly the requirements of the scholars and the objectives of the people outnumbered the needs of the people of Madina, who were richer than others in the knowledge which they possessed of the traditions of the Prophet pbh a knowledge which was essential for each man to enable him to comply with the dictates thereof.

For this reason none of the scholars adopted the rule that the consensus of the people of Madina out of all the cities was (in any way) conclusive and binding on those not belonging to Madina neither during these generations nor after them. Nor the consensus of the people of Makkah or Syria or Iraq or of any other regions peopled by Muslims was binding. The story that for Abu Hanifa or any of his Companions the consensus of the people of Kufa was in any way, binding and required compliance of all Muslims was a lie attributed to Abu Hanifa and his companions. People only talked about the consensus of the people of Madina. The rule came into prominence from Malik and his followers that their consensus was conclusive. But the other Imams have been disputing this claim."[1]

Imam Ibn Taimiya denied that anyone claimed that the consensus of the scholars of Kufa or for the matter of that of any city was binding on all Muslims. This was the claim of Imam Malik and his followers about the consensus of the people of Madina only. But this is not a denial of what is actually attributed to Imam Abu Hanifa in Al Manaqib.[2] It is related there

1. *Fatawa Ibn Taimiya*, Vol. 20, pp. 299-300.
2. *Ibid.*, Vol. 1, p. 89.

that Imam Abu Hanifa strictly complied with those rules on which there was consensus in Kufa. The people of other regions including Syria and Makkah thus must have been acting according to the consensus of the people or, to be more specific, the scholars of their respective regions, as is clear from the discourse of Imam Shafe'i about the impossibility of Ijma'a (except the Ijma'a of the Companions of the Prophet pbh). He talked about different cities and regions and rather deplored that the people of each region preferred their own scholars and censured others. It therefore appears that the doctrine of Ijma'a was still undergoing an evolutionary process upto the end of the second century after Hijrah.

The evolutionary process through which the idea of Ijma'a of the community passed is established from the fact that originally Imam Shafe'i relied upon the following Hadith in support of it. The Hadith is related in *Al Risala* on the authority of Suleiman bin Yasaar that once Omar bin Khattab gave a sermon in Jabia and said that "the Prophet pbh stood on this very site before us and said: Always respect my Companions, those who come after them and those who come after them (the third generation). After the era of these respectable generations falsehood shall prevail everywhere, so that a person shall lie on oath though oath shall not be administered to him. He will *suo motu* give evidence though he shall not be called upon to be a witness. Those who like paradise should remain with the body of the Muslims in that period because the devil lives with those who remain away from the body (ummah or millat) and he keeps a distance even from two men. No male should remain in seclusion with a woman because the third entity with them is that of devil. Whoever likes virtues and treats vices as vicious, is a believer."[1]

But as time passed similar traditions multiplied and were reli ed uponby others. It is related in *Tafseer i Kabir* by Imam

1. *Asar I Imam Shafe'i* by Abu Zahra (Urdu trans.), pp. 424, 425 *cf. Al Risala.*

Fakhruddin Razi[1] that when Imam Shafe'i was asked about the argument in support of the conclusiveness of Ijma'a he recited the entire Quran for three hundred times till he found out the Verse 4 : 115 which reads:

و من يشاقق الرسول من بعد ما تبين له الهدىٰ و يتبع غير سبيل المومنين نوله ما تولىٰ و نصله جهنم و ساءت مصيرا .

> And whoso opposeth the Messenger after the guidance (of Allah) hath been manifested unto him, and followeth other than the believer's way, we appoint for him that unto which he himself hath turned, and expose him unto Hell—a hapless journey's end.

Dr. Ahmad Hassan in his book *The Doctrine of Ijma'a in Islam*[2] writes that "Al-Shaybani (d. 189 A.H.) seems to be the first jurist who justified Ijma'a on the basis of a tradition. Discussing the question of *tarawih* prayer (additional supererogatory prayer offered in congregation in Ramazan) he remarks that this prayer is lawful because the Muslims have agreed on it and considered it good... he substantiates the authority of the agreement of Muslims by quoting a tradition from the Prophet pbh: 'Whatever the believers consider good is good in the eyes of God, and whatever they consider evil is evil in His eyes.' This tradition was later on reported as a statement of Abdullah b. Masood and not as a statement of the Prophet pbh." Dr. Ahmad Hassan then quotes the statement of Ibn Masood and proceeds: "This tradition has been recorded by Sarakhsi in a different context as a saying of the Prophet pbh. He justified Ijma'a, *inter alia*, on its basis. The tradition is: 'The Prophet pbh was asked about the leaven (*khamirah*) which people give and take from each other. He replied: 'Whatever the Muslims consider good is good in the eyes of Allah, and whatever they consider evil is evil in the eyes of Allah.'[3] One can hardly make

1. *Asar i Imam Shafe'i* by Abu Zahra (Urdu trans.), pp. 424, 425 *cf. Al Risala* p. 426, note by the translator, Syed Rais Ahmad Jaffari *cf. Tafseer i Kabir* on Q. 4 : 115.
2. *Ibid.*, pp. 37-38.
3. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hassan, p. 38.

out the meaning of this tradition grafted in the statement of Ibn Masood. It has no relevance to the former portion of the statement. The other version mentioned by Al Sarakhsi is, of course important for it shows the context in which the tradition was pronounced." Thereafter Dr. Ahmad Hassan gives his personal opinion on the tradition that it cannot be generalised because then on its basis customs contrary to the Quran and Sunnah shall also have to be held legal.[1]

According to Dr. Ahmad Hassan Imam Shafe'i did not rely upon any verse of the Quran in favour of infallibility of the doctrine of Ijma'a which was still in a formative stage. He says that the first jurist who found such justification for Ijma'a was Abu Bakr Jassas (d. 370 A.H.) in the fourth century. He cited Q. 2: 143; Q. 4 : 115; Q. 9 : 16; Q. 3 : 109 and Q. 31 : 15. Ghazali in the fifth century added some other verses namely Q. 7 : 181; Q. 3 : 102; Q. 42 : 10 and Q. 4 : 59.[2]

To demonstrate the development of the tradition about Ijma'a since Imam Shafe'i the earliest available work is *Kitab Usul al Fiqh* by Abu Bakr Jassas (d. 370 A.H.).[3] He relies upon a number of traditions but puts emphasis on the tradition from Ibn Maja that "My community will not agree on an error." He comes out with the principle that the previous Ijma'a cannot be changed by a subsequent Ijma'a. Al-Ghazali later elaborated the theme of Ijma'a with all the emphasis at his command mainly on the basis of traditions.[4] Imam Ibn Taimiya relied upon some verses of Quran including Q. 4 : 115 which is said to have been found out by Imam Shafe'i after reciting the entire Quran hundreds of times and referred to the thesis of Imam Shafe'i on this point but as already stated Imam Shafe'i, Imam Ahmad bin Hanbal, Imam Ibn Taimiya ultimately had to pronounce in favour of the practicability of Ijma'a of the Com-

1. *Ibid.*
2. *Ibid.*
3. *Ibid.*, p. 50 *cf. Kitab Usul al Fiqh* by Jassas, p. 215.
4. *Ibid.*, pp. 51-58.

panions as the only Ijma'a. Imam Shafe'i in addition referred to the Ijma'a on the essentials of obligatory prayers on which there was the Ijma'a of the community.

None of the verses of the Quran deal with the power of legislation of the community. About the traditions Shaukani said in *Irshad ul Fahul*[1] that the traditions only mean that a section of the Muslim Community will continue to follow the truth.[2] Firozabadi (d. 826 A.H.) remarks that Ijma'a is certainly a religious authority, but no tradition of the Prophet pbh is found on the subject, Dr. Ahmad Hasan summed up: "It seems that since there was no concept of Ijma'a as such in the time of the Prophet pbh by such traditions he might have predicted the eternity of Islam. The classical jurists, however, utilised these statements of the Prophet pbh to defend Ijma'a on traditional grounds.[3]

As already stated the Prophet pbh did not refer at all to Ijma'a as an aid to decision of matters or to legislation. There is specific reference only to the Quran, the Sunnah and Ijtihad. Hazrat Omar emphasised these three in his instructions to the Qazis and is also said to have used the word Qiyas instead of Rai or Ijtihad. The historical perspective of the development of Ijma'a as a doctrine and source of Islamic law shows that the word was originally used by the jurists for the consensus of the Companions and was later used for regional or citywise consensus. The idea of consensus of the community developed later after which attempts started to find its justification in the Quran and the Sunnah. Ijma'a, therefore, appears to be a purely juristic principle.

And then the reference in the traditions is to the community,[4] but the word Ummah has been interpreted differently by different persons. Another word is Jama'a. If the applicability of Ijma'a is limited to Faraiz as a practical solution, as was done

1. P. 60.
2. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hasan.
3. *Ibid.*, p. 60.
4. *Ummah.*

by Imam Shafe'i, there will be no difficulty in interpreting the word Ummah as meaning the entire community of the believers because every one agrees on the number of raka'at of obligatory prayers. But if it is extended to technical matters and day to day problems the consensus of the community can never be obtained. To obviate this difficulty the word Ummah has been differently interpreted by the jurists. One view which is formed on the basis of such reports as 'My community will not agree on an error', is that it means the overwhelming majority.[1] Another interpretation is that the report shall mean that 'The scholars of my community will not agree on an error', thus restricting its generality to scholars only who have always been few when compared to the number of members of the community. This interpretation is attributed to Abdullah bin al Muharak, Ishaq bin Rahwayhe.[2] A third interpretation is that the word Ummah means the body of the Companions since they are the people who cannot agree on an error. This is the view of Shatibi.[3] According to the interpretation attributed to Al-Tabari the word Jama'a means 'the community of Muslims who are agreed on a political leader', thus excluding such people as Khawarij.[4]

The requirement that Ijma'a means consensus of the community is sure to cause complications. Some must take it in its literal sense and then to confine its practical applicability to four raka'at of obligatory noon prayer or to the prohibition of liquor. But this would not serve the objective of the doctrine. Consequently other alternatives had to be switched on but the ultimate answer lay only in cutting down the scope of Ummah or Jama'a to the minimum, to the body of the Ulema, or scholars having the capacity of Ijtihad. This is what was held by Imam Shafe'i that the infallible Ijma'a is the consensus of all the

1. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hassan, p. 58.
2. *Ibid. Al I'tisam* by Shatibi, Vol. III, p. 136.
3. *Ibid.*, by Dr. Ahmad Hassan, p. 59; *Ibid.*, Shatibi, p. 137.
4. *Ibid.*, Dr. Ahmad Hassan; *Ibid.*, Shatibi, pp. 141-142.

scholars in the territories of Islam.[1] Imam Ibn Taimiya also held it to be consensus of the scholars provided it is established that all the scholars of the world of Islam agree.[2] According to the Hanafis the consensus must be of those who are qualified as Mujtahid and have the capacity of Ijtihad, except in matters which are generally known to members of the public like five times obligatory prayers or the way in which Quran has reached us.[3] Thus finally the scholars appropriated the right which was assumed to be that of the community to themselves, although as will be seen later, the right of legislation which is vested in man as the vicegerent of Allah can be exercised by the Imam or the head of the State in his Shoora. The scholars thus sought to appropriate the power which vested in the Imam and his Shoora. In the last analysis it is an attempt at separating the religion from the secular.

Out of the four sources of Islamic law the Quran, the first and the primary source, was being constantly interpreted from the time of revelation, in each successive verse. Sunnah, the, second source had been compiled in the form of books upto the third century. The principles of Qiyas, Istehsan and Masaleh Mursala had been laid down by the end of the second century and during this period various rules on the analogy of the Quran and the Sunnah had been devised by the eminent scholars in each age. The evolution of the third source meaning Ijma'a was not completed till centuries later probably because it took shape in the second century and remained in a formative stage. For the first time Imam Shafe'i defined it as the consensus of all Mujtahids in the world of Islam on any problem touching Islamic orders (legislation). The opposition of one was held sufficient to negative Ijma'a on any subject. In the fourth century Hijrah Abu Bakr Jassas, an eminent Hanafi scholar, held the same opinion.[4]

1. *Asaar Imam Shafe'i* by Abu Zahra (Urdu trans.), p. 427.
2. *Imam Ibn Taimiya* (Urdu trans.) by Abu Zahra, p. 654.
3. *Imam Abu Hanifa* by Abu Zahra (Urdu trans.), p. 519.
4. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hassan, p. 72.

Ghazali in the end of the fifth century after Hijrah, stipulated that the agreement of the Muslim community should continue beginning from the rise of Islam till the Day of Judgement. This was severely criticised as an impracticable condition.

The Hanafi scholars have persistently made efforts to dilute Ijma'a. Some opted, contrary to the orthodox view in favour of absolute and complete unanimity, for the majority view as a component part of Ijma'a. Others included Ijma'a by silence in the definition of Ijma'a. The non-Hanafis who consider Ijma'a as a source of Islamic law do not agree with these devices of dilution of the original concept.

Opinions differ among the Hanafis too on these deviations. The difference of opinion has been summarised as follows by Dr. Ahmad Hassan on the first point:

1. The disagreement of even a single competent scholar invalidates Ijma'a. This is the orthodox point of view.

2. If Ijma'a is reached on a tradition narrated from the early generations, then majority opinion will be recognised. But if it is reached on a question of Ijtihad the disagreement of a single scholar will be taken into consideration. Truth may be on the side of a single person.

3. Al-Khayyat (d. 300 A.H.) and Al-Tabari (d. 310 A.H.) are reported to have validated Ijma'a by majority opinion. Al-Tabari stipulates *tawatur* (continuity) for Ijma'a.

4. Abu Muhammad Al-Juwayni (d. 438 A.H.) thinks that Ijma'a is valid by the agreement of the majority and the prominent persons. Unanimity cannot be an essential condition for Ijma'a because there might be a certain competent scholar in a remote corner of the world who is not known to others. A person might be well

versed in law, but not known to his neighbour. Abu Bakr was elected by the majority of reliable and responsible persons and not by all and sundry. Even all the people of Madina did not take the oath of allegiance to him.

5. Al-Safi Al-Hindi (d. 715 A.H.) maintains that the Ijma'a by majority opinion is speculative and not positive.

6. A group of jurists holds the view that in principle it is preferable to follow majority opinion though one is allowed to dissent from it.

7. Ijma'a on a certain point is not valid by the opposition of two scholars. It is valid if opposed by one.

8. The opposition of three scholars invalidates Ijma'a and not of two.

9. If the community allows the exercise of Ijtihad on some questions, such as the awl case opposed by Ibn Abbas then the disagreement will be considered an Ijma'a. But in case the community does not allow Ijtihad on questions like essentials, the disagreement will not be taken into consideration.

10. Majority opinion constitutes authority (*hujjah*) and not Ijma'a.[1]

He then adds:

"The anchoring point in the argument in favour of unanimity is that truth certainly lies in the whole. If the whole is divided one cannot certainly know where the truth lies. But is total Ijma'a possible in practical life? It appears that Ijma'a was taken as the agreement based on majority opinion in pre-Shafe'i period. But the concept of unanimous ijma'a prevailed since

1. *The Doctrine of Ijma'a in Islam*, p. 80; *cf.* Al Shaukani, *Irshad ul Fahul*, pp. 78, 79; *Sharh Jama al Jawami* by Al Jala al Mahalli, Vol. II, pp. 157, 158.

his time onward as Al-Shafe'i vehemently attacks in his polemics the argument in favour of Ijma'a based on majority opinion.[1] The orthodox theory of total Ijma'a seems to have been influenced by him.[2]

It will be fruitful to reproduce the comment of Ghazali against Ijma'a by majority opinion. He asserts that infallibility lies in the unanimous agreement of the whole community. If by Ijma'a, he contends, is meant the consensus of the majority, it is, in fact, no Ijma'a at all. It is really a disagreement on a certain question. In such disputed cases one should refer to the Quran and the Sunnah. One might ask whether by the word Ummah is meant majority opinion as a number of Arabic idioms indicate. To this he replies that those who believe in the generality of meaning take it to mean the whole and not a part of it. Differentiation is not allowed without evidence and necessity. But those who do not believe in the generality of meaning may construe it as majority opinion. As such one cannot distinguish between those to whom the word applies and those to whom it does not apply. This shows that the word Ummah is taken in the comprehensive sense. Further it should be noted that the majority is not necessarily in the right. A number of the Quranic verses and traditions indicate that the followers of truth would always remain in minority. Hence there is no alternative but to recognise unanimity for the legitimacy of Ijma'a.[3]

Imam Shafe'i did not approve Ijma'a by silence. Ijma'a by silence occurs when a scholar by exercise of Ijtihad discovers a rule and it acquires such renown that no opinion in opposition thereof is prevalent or known. Imam Shafe'i did not include such consensus in the definition of Ijma'a because one of his conditions for Ijma'a was that each scholar should express his

1. *The Doctrine of Ijma'a in Islam*, p. 81; *Jama al Ilm* by Shafe'i, pp. 56-67.
2. *Ibid.*
3. *Ibid.*, p. 77.

opinion about the problem and all scholars agree on one finding.[1] He wrote in *Al-Risala*:

> "Wherever I or any other scholar hold that there is consensus on any point, it means that scholars whom we met said like that and they also ascribed that view to scholars who preceded them, as for example the four raka'ats (raka'at is a part of the prayer which comprises of standing, bowing and prostration) of the obligatory Zuhr prayer and prohibition of liquor etc."[2]

The argument against silence is that silence may be due to want of research or indecisiveness. It is also possible that he may be an opponent but does not want to express himself with finality without further consideration, or may be waiting for appropriate time to express his opposition...[3]

But Allama Bazoodi gives Ijma'a by silence an authoritative character. Because in his view silence on a matter which comes to the knowledge of another person represents speech.[4] But the Zahiris Jibanis among the Moautazila and some Hanafis do not consider it of any authority. Some say that silence is authoritative but does not amount to consensus. Some hold that it is not even authoritative if there be the finding of the person in authority in the field.[5]

Dr. Ahmad Hassan sums up the difference of opinion on this question in twelve points.[6]

Like other points there are divergent views on the scope of Ijma'a but that subject is not pertinent for this book. The most important point is that of sanctions for Ijma'a. The divine

1. *Asaar Imam Shafe'i* by Abu Zahra (Urdu trans.), p. 433.
2. *Imam Abu Hanifa* by Abu Zahra (Urdu trans.), p. 514.
3. *Imam Abu Hanifa, Ibid.*
4. *Imam Abu Hanifa, Ibid.*, pp. 514, 515; *Usul ul Bazudi*, p. 239.
5. *Imam Abu Hanifa, Ibid.*, p. 514 (note).
6. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hasan, pp. 115-117.

sanction for the Quran is that one who does not believe in it or denies its divine character is an unbeliever. Similarly one who denies the authority of the Sunnah of the Prophet pbh does so in clear violation of the Quranic injunctions and is not a believer. Some of the learned have given to Ijma'a that decisive character which has been the exclusive privilege of the Quran. According to the Hanafi Fiqh all the isolated traditions are treated as *zanni* or conjectural and only Sunnat Mutawatira is treated as certain and hence decisive. Ijma'a is accorded a higher status since it is generally considered a decisive authority. Explaining its value Al-Bazdavi remarks that Ijma'a established a rule of law with certainty. In other words, a speculative rule or a moot point becomes definite and certain by means of the approval of Ijma'a.[1] It stands parallel to a Quranic verse or mutawatir tradition in respect of certainty.[2] Some jurists have exaggerated the value of Ijma'a so much that they consider it prior to the Quran and the Sunnah. In favour of this view it is argued that both the Quran and the Sunnah are liable to abrogation and interpretation. But Ijma'a is infallible and decisive.[3] It is also said that if the Ijma'a on a certain point is found contradictory to a clear text, the text would be taken as abrogated or interpreted, because a decisive Ijma'a is not liable to abrogation or interpretation.[4] This would mean that what is decided by the majority of scholars in a particular age can override the Quran and the Sunnah of the Prophet pbh. The man made law which can only be called *wazai* (وضعی) can abrogate the divine law. What extraordinary or rather ultra-divine powers have these scholars appropriated for themselves?

Fortunately there are other scholars including Al-Razi and Al-Amidi who maintain that Ijma'a is a speculative (ظنی)

1. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hasan, p. 148.
2. *Ibid.*, p. 149.
3. *Ibid.*
4. *Ibid.*, p. 150.

authority and not decisive, as generally understood. Their contention is that Ijma'a is established on questions based on analogy or solitary traditions which entail uncertainty.[1]

A third view is that if Ijma's is established by unanimous agreement of competent scholars, it is decisive. In case it is preceded by disagreement, such as Ijma'a by silence or the dissenters are in a minority, it is then speculative (probable).[2]

Once Ijma'a is given the status of a decisive authority like the Quran and the Sunnah, the verdict of disbelief or heresy must follow against the denier thereof. The denial of the doctrine says Al-Bazdavi in principle (*fil-asl*) *i.e.* as a source of law and an autonomous valid authority, is disbelief.[3] There is, however a general agreement of the jurists on the point that rejection of speculative (*zanni*) Ijma'a, such as Ijma'a by silence or the one transmitted through a solitary report, is not disbelief. Besides some Mutazili scholars do not regard the rejection of even decisive Ijma'a, such as Ijma'a of the Companions, as disbelief. The reason is that Ijma'a in their opinion is speculative and uncertain (*zanni*) authority. The majority of the jurists maintain that rejection of the Ijma'a which involves questions that are known both to the masses and the scholars is disbelief. The following are cited as examples: the number of obligatory prayers, the number of their raka'at, the Hajj pilgrimage, fasting during Ramazan, unlawfulness of adultery, drinking, theft, usury. But rejection of Ijma'a which involves questions exclusively known to the scholars is not disbelief.[4]

The examples given above do not involve the denial of Ijma'a but are of denial of the verses of the Quran comprising of the injunctions or of the traditions of the Prophet pbh which elaborate some of those injunctions. The verdict of disbelief

1. *The Doctrine of Ijma'a in Islam* by Dr. Ahmad Hasan, p. 150.
2. *Ibid.*
3. *The Doctrine of Ijma'a in Islam*, p. 151; *Usul ul Bazdavi*, p. 245.
4. *The Doctrine of Ijma'a in Islam*, pp. 151, 152.

is attracted by the denial of the injunctions of the Quran or of the relevant Sunnah of the Prophet pbh. It cannot be attracted if someone voices his belief in them on account of their forming part of the Quran and the Sunnah and denies any share of Ijma'a in them. These cannot be examples of denial of Ijma'a amounting to disbelief.

Al-Juwayni and Al-Ghazali vehemently criticise the view about the consequences of rejection of Ijma'a. They are of the view that one should be very scrupulous in excommunicating a Muslim because the matter is not so easy as is generally understood. Al-Ghazali observes that violation of a rule of law based on Ijma'a is not disbelief, for there is a great deal of controversy over the doctrine of Ijma'a among the Muslims. When the jurists excommunicate a Muslim who violates Ijma'a they mean only the Ijma'a supported by the indub'table authority (*asl maqtu bihi*) which may be a Quranic text or a mutawatir tradition. This explanation is to some extent satisfactory but then the question remains, 'Why so much ado about Ijma'a, if ultimately what is actionable is not the voiolation of Ijma'a but the infringement of *nas* (Quranic verse or Hadith).[1]

It is one of the essential conditions of Ijma'a on any Sharia rule that it should be founded on Sharia authority (ان يكون قد بني على مستند شرعي) because there are limitations for a Mujtahid in Islam which he is not permitted to disregard.[2] Shaukani says in *Irshad-ul-Fahul*[3] that the scholars of various schools of thought agree that it is essential for Ijma'a that it should be founded on *mustanad* (مستند) (the authority for basing the argument) because Ijma'a does not have an independent status for proof of injunctions. It is therefore necessary that consensus on any injunction should be supported by authority (سند *sanad*) because if the Ijma'a occurs sans authority it would amount to

1. *The Doctrine of Ijma'a in Islam*, p. 15.
2. *Usul ul Fiqh* by Abdul Wahab Khallaf, p. 48.
3. p. 75.

the affirmation of a new source after the Prophet pbh and the creation of a new authority which is not correct and which is beyond every one's power.

It is clear from this that the authority should be either the Quran or the Sunnah of the Prophet pbh. This is more elaborately discussed by Ibn Hazm:

> "Rationally Ijma'a is specifically possible in three modes. No fourth mode is possible. One of the manners is that people reach a consensus about a matter respecting which there is no *nas* (نص Quranic verse or Hadith). This is nugatory and worthless, because as already stated, there should be *mustanad* (مستند) (authority as basis) for it. The other form is that the Ijma'a be in contravention of *nas* (Quranic verse or Hadith) which was neither abrogated nor particularised before the expiry of the Prophet pbh. Such an Ijma'a is disbelief. The third (possible) form is that the Ijma'a of the people be on something about which there is either a Quranic verse or Hadith. This is what we all say. This is the clear division as already mentioned by us from which we cannot digress. Therefore to conform with the Quranic verse or Hadith is obligatory whether people have reached a consensus on it or have differed regarding it. The Ijma'a of the people does not in any way improve the status of the *nas* in relation to its being obligatory. The difference of the people on it does not weaken its authority in respect of the believer's obligation to comply with it. Truth is undoubtedly truth despite differences over it, and what is void is a nullity even though those who agree with it be numerous."

The rest of the passage is to the effect that there can be no Ijma'a on a nullity and the reason for it is that according to the Prophet

1. *Al Ahkam* by Ibn Hazm, Vol. 4, p. 141.

pbh there shall always be a body in his Ummah which shall believe in truth. Despite this the passage quoted above clarifies that it is the *nas* and not the Ijma'a on it which is relevant; the Ijma'a on it does not improve its obligatory nature and opposition to it does not weaken the requirement of conformability to it. The position of Ijma'a according to this view is of an unwanted prop only.

Shaukani says that Abdul Jabbar has related from a group that Ijma'a is lawful even if it be without *mustanad* (مستند authority of *nas*) because the Almighty may vest them with the capability to arrive at the truth without reference to any *nas*. The learned consider this view to be weak and Allama Amidi considers it to be rare.[1]

Once it is held that Ijma'a should be founded on *nas* (نص the Quranic verse or Hadith), it would follow that any claim to Ijma'a which apparently is not so founded should be rejected, but in such a case the jurists appeal to the 'good sense' of the believers to have a favourable view and to presume that they must have reached the consensus in the light of some *nas*.[2] but this point is dealt with in a legal manner in *Mowsoo'atul Fiqh nl-Islam*.[3] The relevant portion is as follows:

> "The scholars differ in their views if the *nas* in the Quran or in Hadith is repugnant to Ijma'a. Among them are the jurists who say that it is an essential condition for Ijma'a that it should not be repugnant to any verse in the Quran or any Hadith. For this reason they do not rely upon such Ijma'a, assuming that such Ijma'a occurred. These are the Abazia and the Zahiri jurists.
>
> The author of *Tala'at-ul-Shams* says that the second condition is that no verse of the Quran or Hadith should

1. *Irshad ul Fahool*, p. 75.
2. See *Tala'at ul Shams* by Allama Abaazi, Vol. 2, pp. 83-84.
3. Vol. 3, p. 102.

be opposed to the rule on which the consensus has been reached because any such consensus is a deviation from the right path and the Ummah cannot reach consensus on error.[1]

And this is not the view of Abazias and Zahiris only that the Ijma'a should not be repugnant to *nas*. This is accepted generally by the jurists.[2]

Ijma'a, thus must be according to the verse of the Quran and Hadith. Any Ijma'a on a rule which is repugnant to the Quran is a nullity. From the principle laid down by the jurists that there can be no Ijama'a on error, it should follow that an Ijma'a on error is no Ijma'a and consequently an Ijma'a contrary to the specific meaning of the Quran is no Ijma'a. The proposition that the clear meanings of verse Q. 4 : 92 can be deviated from on account of Ijma'a is clearly untenable. It should not be treated Ijma'a if it makes you turn away from the clear meanings of the divine injunction.

The most astounding rule of Ijma'a is that Quran could be abrogated, Sunnah could be abrogated but Ijma'a is unalterable and can never be abrogated and on this assumption some scholars gave it priority over the Quran and the Sunnah.[3] According to the Classical theory, any rule established by Ijma'a can neither be abrogated by the Quranic injunction, or the Sunnah, or subsequent Ijma'a nor can it abrogate any rule based on them.[4] In opposition to this view Al-Bazdavi maintains that a previous Ijma'a can be abrogated by a subsequent Ijma'a in the same or the next generation.[5]

The arguments in favour of the absolutely authoritative

1. *Tala'at ul Shams*, p. 85.
2. *Al-Mustaafa* by Ghazali, Vol. 1, p. 215; *Hashia Kashful Asrar* by Abdul Aziz *Al-Bokhari*, Vol. 3, p. 985.
3. *The Doctrine of Ijma'a In Islam*, p. 149.
4. *Ibid.*, p. 153 cf. *Sharh Tauqih ul Fusool*, by Al Qarafii, p. 137.
5. *Ibid.*, cf *Usul ul Bazdawi*, p. 247.

character of Ijma'a which makes it completely immune from opposition and abrogation may be reproduced from *Ilm Usul-ul-Fiqh* by Abdul Wahab Khallaf:[1]

> "The arguments in favour of infallibility and authenticity of Ijma'a are as follows:
>
> Firstly the Almighty directed the Muslims in the Quran to obey Him, His Prophet pbh and the persons in authority among them... The word *amr* (امر order or direction) imports business or affair. It is general and includes religious affairs and temporal affairs. The persons in authority in matters temporal are the kings, rulers, and persons holding high offices in the Government (Bureaucrats). The persons in authority in matters religious are those who can exercise Ijtihad and can give decisions on matters concerning religious law. Some of the commentators who are led by Ibn Abbas say that the words 'persons in authority among you' in the verse mean the religious scholars but other commentators hold these words to refer to the rulers and bureaucrats. The clear meanings however include both and from it is proved the obligation to obey everyone in the affairs reserved for him. If the persons in authority in matters concerning religious law be the Mujtahids, their obedience becomes obligatory by the Quranic verse and their rules must be complied with. And for this the Almighty said:[2]
>
> و لو ردوه الى الرسول و الى اولى الامر منهم لعلمه الذين يستنبطونه منهم
>
> (Whereas if they had referred it to the messenger and such of them as are in authority, those among them

1. Pp. 47-48.
2. Q. 4: 83.

who are able to think out the matter would have known it). And said Almighty Allah[1]:

و من يشاقق الرسول من بعد ما تبين له الهدىٰ و يتبع غير سبيل المومنين نوله ما تولى و نصله جهنم و ساءت مصيرا

(And whoso opposeth the Messenger after the guidance (of Allah) hath been manifested unto him, and followeth other than the believer's way. We appoint for him that which he himself hath turned, and expose him unto hell, a hapless journey's end). He made opposition to the believers' way equivalent to opposition to the Prophet pbh.

Secondly any rule on which the consensus of all the Mujtahids of the Muslim community is reached in fact amounts to a rule made by the community which is represented by its Mujtahids. There are a number of traditions of the Prophet pbh and his Companions which prove the infallibility of the community. Among them is his utterance: 'My ummah (people) cannot unite on an error' and the saying: 'Allah does not unite my people on *dalahah* (ضلالة disbelief), and his saying: 'What the Muslims see as good, is good for Allah.' It is for this reason that the consensus of all these Mujtahids on one single rule despite the difference in their views and their arguments conserning it and notwithstanding the increase in causes of difference between them, is proof that it is the unity of truth and virtue which has united their talk and removed them from the causes of their differences.

Lastly he deals with the same argument in a circle which has already been noticed that the rule on which there is Ijma'a should be founded on *mustanad* (authority of Quran and Sunnah) and if it is not based on the verse or the tradition it is erroneous or

1. Q. 4 ; 115.

if based on analogy (*qiyas*) but the rules *inter alia* of Istihsan, Istishab, Masaleh Mursala and due weight to be given to customs and usage have not been followed, it is also erroneous. (But) the consensus of the scholars on any rule carries a presumption that it is based on *mustanad sharai* (verse or tradition). It has already been discussed that Mustanad must be apparent in Ijma'a.

Verse Q. 4 : 115 to which reference has been made in the above quotation is the verse which was discovered by Imam Shafe'i to support the doctrine of Ijma'a after reciting the Quran for three hundred times. The verse only indicates that the ways of the believers shall be the same as dictated by the Prophet pbh. There is not the remotest indication of the doctrine of Ijma'a in it. The other verses are about the injunction of obedience to persons in authority. The verse about obedience to persons in authority has been interpreted as creating two categories of *ulilamar* (اولی الامر persons in authority) one temporal and the other religious. I may be excused if I point out that this division is akin to the severance of the church from the state or the detachment of the religious from the secular. One factor which distinguishes Islam from the other religions is that Islam is a Deen and not a religion in the accepted sense of the term. It is a way of life in which the spiritual is merged with the secular. And the important point of distinction is that there is no church in Islam. To recognise the Mujtahids or scholars as persons in authority and to vest them with absolute legislative power in the guise of Ijma'a amounts to separation of the religious from the temporal.

Ijma'a rests on the principle that the opinion of a group or body of person (given after mutual consultation and deliberation) is nearer truth as compared to the opinion of an individual. While dealing with this aspect of the case Abdul Wahab Khallaf relates the practice of Hazrat Abu Bakr and Hazrat Omar that whenever a dispute was brought before them for decision and

they did not find anything in the Quran and the Sunnah they would collect the leaders of the people and seek their advice and conformed to their agreed opinions.[1] Now this is nothing but Shoora and does not mean that they surrendered their powers to those leaders. The persons in authority remained the rightful Caliphs. In the power of the State lay the sanction for execution of the orders or the rules. The word *ululamr* (اولی الامر persons in authority) envisages the sanction behind them of the State authority. The scholars being deficient in that power cannot be given the status of persons in authority. Making Ijma'a impeccable, infallible and unalterable and pronouncing its denial a sure proof of disbelief is vesting the scholars or the Mujtahids with power of excommunication and thus providing for their self-assumed authority a sanction and power where there was none.

The Federal Shariat Court considered the power of the Ummah or Muslim Community in its judgment on the Preventive laws, the legislation against anti-social elements in the society and the Press and Publications Ordinance. The Court held:

> *Para.* 120 : "The ruler is thus the supreme legislative authority. He is the authority to choose between the different opinions of the Mujtahids. If he is himself qualified to decide whether the legislative solution to the problem is good in Sharia and is not repugnant to the Holy Quran and the Sunnah of the Holy Prophet pbh, he can enforce it, no doubt in consultation with his Shoora. In other cases he must either have a body of the learned to decide the question whether a law is in accordance with Sharia or leave the matter to Courts of law."

Another question before the Court was whether the direction to the Ummah to enjoin good and to forbid the wrong was for the persons in authority or for the Scholars or it was obligatory

1. *Ilm ul Usul ul Fiqh* by Abdul Wahab Khallaf, p. 50.

on the entire Ummah. It was held that the injunction was for all. The duty in verse Q. 22 : 41, however, appears to be the obligation of those who are charged with the administration and the Government of the country since they had the sanction to *inter alia* punish the wrong doers. The citizen is also under obligation to enjoin good and to forbid the wrong. He could exercise the power in the way suggested in para. 104:

> "But the performance of this duty should always be subject to the condition that the method adopted for enjoining the good and forbidding the wrong should be persuasive and not offensive. In case it is offensive it may become the source of further mischief which is not allowed in Islam. This principle will hold good whether the person discharging the duty is from the party of the learned or the Ulema, or is not an *alim*."

It was also held that the advice of Shoora is binding upon the ruler in the legislative field. The legislative authority was therefore called 'the ruler in Shoora.'

Even if it is conceded that the verses and the traditions referred to by the jurists, establish a case in favour of Ijma'a of the people on which point also there is no consensus, the question remains how can the learned arrogate that power to themselves. The usual answer is that the scholars shall be treated as the representatives of the people but the claim is without any sharia support.

According to the Quran *Hukm* (حکم authority to rule, to judge and to decide *i.e.* sovereignty) and *Mulk* (ملک rulership or kingship) vests in Allah. There are verses in the Quran which show thats Allah bestows the *Hukm* and *Mulk* on His messengers because these messengers of Allah are the only divine representatives unto mankind and have the sole authority of expressing the divine will.[1] The authority exercised by the Prophet is there-

1. Q. 4 : 105; Q. 5: 42; Q. 6: 89; Q. 12 : 22; Q. 19 : 12; Q. 21 : 79; Q. 24; 51; Q. 24 ; 48; Q. 26 : 21; Q. 26 ; 83; Q. 28 : 14; Q. 39 ; 46.

fore the authority of Allah.[1] Alusi says

و ان حكمه صلى الله عليه وسلم فى الحقيقت حكم الله

(the rule of the Prophet pbh is in fact the rule of Allah).[2]

When a Messenger of Allah passes away the *Hukm* (God's special authority to rule) conferred upon him is automatically delegated to his followers. The Ummah thus becomes the trustee of the divine authority. Accordingly when the Holy Prophet pbh, the last messenger of Allah and the last of the prophets, passed away the Muslim Ummah automatically inherited the divine authority initially delegated to the Prophet pbh. As the entire Ummah can neither directly exercise this authority nor can meet all its implications, it was necessary that a leader of the Ummah be chosen to act as successor of the prophet pbh in all matters delegated to the Ummah as a whole. This elected leader was called the Caliph—the symbol of the practical vice-regency of the Ummah and the chief executor of the collective divine authority. He thus became responsible to the Almighty as well as to the Ummah. According to the Quran and the traditions the leaders of the Ummah are required to enjoy their confidence. This is the cardinal principle which underlies all the discussions of the Muslim jurists and thinkers on the issue. To quote a few traditions:

لعن الله امام قوم وهم له كارهون

(Allah curses that leader whom people curse).

خيار ائمتكم الذين تحبونهم ويحبونكم و يصلون عليكم و تصلون عليهم

و شرار اعمتكم الذين تبغضونهم و يبغضونكم و تلعنونهم و يلعنونكم

(The best of your leaders are those whom you love and who love you who pray for you and for whom you pray. And your worst leaders are those whom you hate and who hate you and whom you curse and who curse you).[3]

1. Q. 4 : 80.
2. *Ruh ul Ma'ani*, Vol, 2, p. 176.
3. *Muslim*, Hadith reported from Auf bin Malik.

Allama Sa'ad Uddin Taftazani therefore said:

و من صفاتهم الضرورية بحيث يتبعهم سائر الناس

(Among their *i.e.* the leaders' necessary qualification is that they should have such a position that the entire people follow them).[1]
Shah Wali Ullah wrote in *Hujjatullah ul Baligha*:[2]

المهم فى الخلافة رضاء الناس به و اجتماعهم عليه و توفيرهم ايه و ان يقيم الحدود و يناضل دون الملة و ينفذ الاحكام .

(The most important consideration in the matter of the Khalifah is the pleasure of the masses with the person concerned, their unity under him, their respect for him and that he enforces the Hudood, defends the Community of the believers and implements the commandments).

The methods of the appointment of the first four Caliphs have one thing in common and that is the expression of the will of the people in their choice, however restricted be the electorate, keeping in view the circumstances of that age and the position of the Caliphs was that of agents of the Ummah and its representatives.[3] From this it follows that the only legislative authority is the ruler as representative of the Ummah. Now that the Shoora, according to our Constitution is also elected, it is also the direct agent of the Ummah for purpose of legislation. The scholars on the other hand have never been so elected. It is difficult to invest them with the role of representatives of the Ummah.

The basis of Ijma'a is the authority of the Ummah. There is no cavil with this proposition since the role of the Ummah as the delegatee of *haakm* (rulership which includes legislation) is established. The other basis is و راى الجماعة اقرب الى الحق من راى الفرد

1. See *Sharh ul Maqsid*.
2. Vol. 2, p. 111.
3. *Al Tamheed* by Qazi Abu Bakr al Baqilani (printed Cairo, 1947, p. 18; *Badai al Sanai*, Vol. 7, p. 16; *Al Jami al Ahkam al Quran*, Vol. 1, p. 272.

(the opinion of a body or group arrived at after due consultation and deliberation is much nearer truthfulness as compared to the opinion of an individual). This exactly is the basis of Shoora in Islam and is an agreed proposition.

The practicability of two points remains to be determined—firstly the role of Mujtahid in the process of law making and secondly the infallibility and unalterability of Ijma'a which includes the exposure of the denier to the risk of ex-communication.

Regarding the first point it may be stated that the services of the Imams and scholars in the field of legislation cannot be minimised. Only they are responsible for the unique development and expansion in Islamic law. The difference of views among them was a blessing for the later generations. They are the pioneers in the field of jurisprudence. Many of the hypothetical questions to which they addressed themselves in the first three centuries might not have been of use during that era or might not have been put to use by monarchs deliberately, but they can prove to be of utmost benefit in the modern age and probably may be helpful in the ages to come. It has been my experience as a member and then Chairman and Chief Justice of the Federal Shariat Court that the opinion and reasoning of some Imam or the other guided the Court in finding out solutions to many problems which arose while the Court was seized of matters concerning repugnance or compatibility of the existing laws of Pakistan with the provisions of the Quran and the Sunnah of the Prophet pbh.

The development of law after the Prophet pbh was based on the principle of Ijtihad—a principle from which several principles were evolved and developed by these great jurists for the exercise in Ijtihad *e.g.* Qiyas, Urf and A'adah (custom and usage) Istihsan, Istislah, Istidlal, Masaleh Mursala and Ijma'a. But what is important to note is that the entire exercise of law making

was done at purely private level without the slightest intervention by the State.[1] The interpretation of the Quran and the Sunnah and discovery of new rules of law in response to new situations and requirement was undertaken by the scholars, teachers, academicians and the jurists while the Courts administered that law. In the early centuries it was upto the Judge to accept the most sound and the most rational of all such conclusions and to apply them to the questions in issue.[2] Subsequently the legal schools came into existence. It is no coincidence that the founders of the legal schools were private individuals who did not enjoy any official position or authority. On the other hand some of them were tortured by the Government of the day. The contribution of each of these founders to the field of research and Ijtihad and to evolving the rules for exercise of Ijtihad was immense. But then started the age of *taqlid* (following a school of thought in preference to other in all matters *inter alia* concerning law) and the door of Ijtihad was closed.

In the modern age in most countries of the world including Pakistan a sharp line is drawn between the Executive, the Legislature and the Judiciary. No power is vested in either the executive or the judicial organs of the State which is not conferred, controlled or regulated by the Legislative organ through Statute law which in modern Arabic parlance is called *Qanun-i-waza'i* (قانون وضعی) in contradistinction to the Divine law in the Quran and the Sunnah. This terminology is also used to distinguish the Statute law from the legislation which is the result of Ijtihad, but this distinction is not correct because the laws made by the Imams were also *Qawanin waza'i*. The private legislative authority is no more recognised now. The requirements in the legislative field have also undergone revolutionary change in this atomic age, while the religious scholars on account of their

1. *Usul ul Fiqh* by Abdul Wahab Khallaf, p. 50.
2. See for this discussion the judgment of the Federal Shariat Court on Preventive Laws etc., paras 111-116.

narrow outlook, complete ignorance about the requirement of the age and their extreme rigidity inhibited due to the doctrine of *taqlid* are not in a position to assist in law-making. Ijtihad is required at every stage in modern law-making but they impose such qualifications on a Mujtahid that it is impossible to find out anyone who may be so qualified. And in fact *Muqallids* by their temperament and training are unsuited to exercise Ijtihad. They cannot be expected to make any notable contribution to legislation. The ideal solution to the problem is that the Federal Shariat Court may be empowered to decide before the enforcement of a law, whether at the stage of bill or later, about its compatibility or incompatibility with the Quran and the Sunnah. Without calling the exercise of its functions as Ijtihad the Federal Shariat Court has successfully examined almost all the laws of the country within its jurisdiction except laws examined by the Council of Islamic Ideology.

The second point of difference is the assumed infallibility and unalterability of the rules on which there is Ijma'a which allows the denier thereof to be excommunicated on charge of apostacy. This view and the opposite views of Al-Bazdawi and Al-Ghazali have already been reproduced. Imam Shafe'i discussed the rule of abrogation in great detail in *Ar-Risala*. According to him a Quranic rule could be abrogated by another Quranic rule and the Sunnah by the Sunnah. The Sunnah could not abrogate the Quran as the Hanafis say, nor could the Quran abrogate the Sunnah but he is not clear on the point of abrogation of Ijma'a by another Ijma'a. According to Dr. Ahmad Hassan, 'this shows that the notion of the abrogation of the Ijma'a might have emerged in the post-Shafe'i period when the principles of law might have been formulated and finalized'.[1] This might have been in the fourth century or beginning of the fifth. The reasoning revolves round the decisive character of Ijma'a.

1. *The Doctrine of Ijma'a in Islam*, p. 153.

Those who concede abrogation only go to the extent that a former Ijma'a can be abrogated by a later Ijma'a. But this is also subject to condition. Ijma'a is *sareehi* (صریحی decisive). This is also called *Qatai'e* (قطعی decisive) and *sukuti* (by silence).[1] According to *Nur ul Anwar*, the first is called *azimat* and the second *rukhsat*.[2] In English their rendering is decisive and speculative. *Aziz-al-Bokhari* explained that a decisive Ijma'a can be repealed by a decisive Ijma'a while a speculative Ijma'a can be abrogated by a decisive as well as speculative Ijma'a.[3]

This condition which is a relaxation of the doctrine of unalterability of Ijma'a is impossible of fulfilment. One reason is the considerable number of scholars whose inhibition with the doctrine of *taqlid* leaves no room for them to depart from the principles and rules laid down by the Imams they follow in the exigencies of the situation arising in the early centuries of Islam. For this reason it is rightly said that a *muqallid* can never be capable of exercising Ijtihad. All the thinking and rationalisation has been done for them by their great Imams and no scope is now left for them to do this exercise or to reread Quran, Hadith and juristic literature in the light of the experiences of the present day. It has been pointed out in the Chapter on Family Planning that Maurice Bucaille departed from the tenor of the old translations of verses of the Quran regarding birth of a child and retranslated them in the light of latest discoveries of the Medical Science and the beauty of his work is that by sticking to the dictionary meanings of the language of the verses he so altered the customary meaning that they became harmonious with the language of the medical science. The word *Sakhkhara* (سخر) before the recent scientific discoveries was never understood in the sense in which it is now understood. The meaning of such declarations as Allah has made serviceable unto the human

1. *Ilm ul Usul ul Fiqh* by Abdul Wahab Khallaf, p. 51.
2. *Nur ul Anwar*, p. 223.
3. *The Doctrine of Ijma'a in Islam*, p. 156.

beings whatever is in heavens and whatever is in the earth (see verse Q. 31 : 20) and that Allah created the heavens and the earth, and rendered the sun and the moon serviceable (see Verses Q. 29: 61, Q. 16: 12 etc.), were never grasped before the atomic age as hinting at the possibility of man conquerring the space and reaching the planets. The scientific discoveries and the fabulous achievement of Science has proved that the language of the Quran refers to possibilities which it is not possible for human knowledge of any particular period to circumscribe. If the meanings of the Quran, and for the matter of that, of Hadith which have to guide the humanity till the Day of Judgement cannot be encompassed and are capable of being widely interpreted in a manner never thought of or speculated upon by the early jurists, how is it possible to treat their interpretation of the Quran and the Sunnah or their Ijtihad, however unanimous they may be, as the last word on the subject. This may be possible in matters of obligatory prayers, the prohibition of liquor, the punishments prescribed in the Quran, that is generally speaking the matters to which Imam Shafe'i limited unanimity and concensus, but not in other matters including those involving scientific truths and dealings between man and man, or man and corporate bodies including the State. The Quran and Sunnah which have to provide guidance for all ages cannot be allowed to be limited in scope by the unanimous interpretations of the Mujtahids of any one era. This would amount to frustrating the claim of the Quran and the Sunnah to be good for guidance of man in this ever-changing world.

The Almighty Allah declares unequivocally: "This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion Al-Islam."[1] It means that no addition is now required to the religion till the Day of Judgement. This is divine declaration which is infallible. The supporters of Ijma'a equate the divine infallibility, with

1. Q. 5: 3.

the assumed and self-styled infallibility of consensus of a few human beings and put it at par with the Quran. The injunctions in the Quran may be suspended on the principles evolved by the Jurists but if Ijma'a is reached on any injunction it becomes immune from suspension, and if Ijma'a is reached on its suspension it cannot be revived. To impose impossible conditions for removal of these disabilities amounts to perpetuating them.

The Almighty declared:

ولا تقولوا لما تصف السنتكم الكذب هذا حلال و هذا حرام لتفتروا
على الله الكذب انا الذين يفترون على الله الكذب لايفلحون

And speak not the lie which comes on your tongues that this is lawful, and this is forbidden so that you invent a lie against Allah. Those who invent a lie against Allah shall not prosper.[1]

This is more clearly stated in the Chapter Jonah that it is for Allah only to say what is lawful and what is forbidden and not for any human being. It is said:

قل ارئيتم ما انزل الله لكم من رزق فجعلتم منه حراماً وحلالاً قل الله
اذن لما ما على الله تفترون

Say! Have you considered what provision Allah hath sent down for you (for sustenance), how have you made it lawful and unlawful? Say: hath Allah permitted you (to pronounce that it is lawful and that is unlawful) or do you invent a lie concerning Allah.[2]

In the Chapter Cattle it is stated:

وهو الذى انزل اليكم الكتاب مفصلا والذين اتيناهم الكتاب يعلمون
انه منزل من ربك بالحق فلا تكونن من الممترين

He it is Who hath revealed unto you the Book

1. Q. 16 : 116.
2. Q. 10 : 59.

(which is) fully explained. And those whom We gave the Book know that it is revealed from thy Lord in truth. So be not thou of the waverers.[1]

The religion being complete it is not possible or permitted to make addition to it, or omit anything from it. It is now unalterable. It is not for anyone now to say that this is lawful and that is unlawful. The jurists, even if they are unanimous cannot alter it by addition, substitution or omission. They have the right to exercise Ijtihad but infallibility cannot be attached to it, nor can it be treated at par with the Quran and the Sunnah. When all the jurists say that there are four raka'ats in noon obligatory prayer (*Zohr* ظهر) the infallibility is of the Sunnah of the Prophet pbh and not of the jurists. As stated by Iban Hazm that: "the Ijma'a of the people must be founded on *nas* (Quranic verse or the Sunnah)... It is obligatory to follow *nas* whether the people may have reached a consensus on it or may have differed in respect of it. The consensus does not add to the status of the *nas* concerning the obligation to follow it and opposition to it does not weaken its status in that respect."[2] This is a good practical summing up that what is important is *nas* and not Ijma'a.

Ijma'a as already noticed is not an independent doctrine. The origin of Ijma'a is the practice of the first two Caliphs to collect the leaders of people for advice if they failed to find any guidance in the Quran or the Sunnah of the Prophet pbh, on any matter in issue before them. The best example of this is the decision of Hazrat Omar in respect of the issue of distribution of the conquered lands of Iraq. Hazrat Omar was opposed to the distribution while others favoured ti. The discussion continued till Hazrat Omar found the basis for his argument in the Quran in the Chapter Al Hashr or Exile in the following verses:

1. Q. 6 : 115.
2. *Al Ahkam* by Ibn Hazm, Vol. 4, p. 141.

ما افاء الله على رسوله من اهل القرىٰ فلله و للرسول و لذى القربىٰ و ليٰتمى و المساكين و ابن السبيل كى لا يكون دولة بين الاغنياء منكم

Q. 59 : 7.—That which Allah giveth as spoil unto His Messenger from the people of the townships, it is for Allah and His messenger and for near of kin and the orphans and the needy and the wayfarer, so that it may not remain circulating between the rich among you...

للفقراء المهاجرين الذين اخرجو من ديارهم و اموالهم

Q. 59:8.—And (it is) for the poor refugees who have been driven out from their homes and their belongings...

و الذين تبوو الدار و الايمان من قبلهم

Q. 59 : 9.—And for those who entered the city and faith before them...

و الذين جاء و من بعدهم

Q 59 : 10.—And for those who come (into the faith) after them...

He argued that according to this verse all land had become common for all including the shepherd who grazed his goats. Did they wish that those who came later should suffer absolute deprivation and nothing might be saved for them? This satisfied all the people and they agreed with Hazrat Omar.[1]

This is the best example of the consensus of the Companions. But it was an Ijtihad and it could change by the change of circumstances.

There are various principles which compel alteration in law. These principles which envisage change and Ijma'a which precludes change, cannot go together.

1. *Al Madkhal ila Ilm ul Usul il Fiqh* by Mohammad Ma'aruf Dwalbi, pp. 225, 226.

The first principle is that with the changes in time, and place and in customs and usages of the people the law also may change. If the conditions of suitability of an existing law becomes extinct the law must change. The change of law by the change in time and circumstances of the people is best illustrated by the various laws enforced by Hazrat Omar some of which appear to be contrary to the Quran and the Sunnah. In the illustration already cited about the refusal of Hazrat Omar to distribute among the fighters the conquered lands of Iraq the reliance of those who supported distribution was upon the Sunnah since the lands of Khyber were distributed by the Prophet pbh. The Quranic verse Q. 8 : 41 also enjoins distribution. It enjoins setting apart one-fifth of the spoils of war for 'Allah, and his messenger pbh and for the kinsmen and the orphans and the needy and the wayfarer.' The rest four-fifth was for distribution among those who participated in war.

Another instance of change and virtual suspension of the Quranic and the Sunnah law was of treating three divorces pronounced simultaneously as three and of making them effective though during the lifetime of the Prophet pbh more divorces than one so pronounced were held to be a single divorce. This point has been discussed in detail in the Chapter on Divorce.

Verse Q. 9 : 60 provides that the alms, which include *Zakat* fund are *inter alia* for 'those whose hearts are to be reconciled'. Hazrat Omar held that by his time Islam had gained sufficient strength and it was not necessary to spend alms for this purpose. He enforced this rule.

There are various such examples in which the rule "the law changes with the change in time" was enforced during the rightful Caliphate which was so close to the period of the prophet. How can then, laws be made static by Ijma'a.

Whenever I expressed my opinion to the religious scholars that if Hazrat Omar could in any way depart from the existing

law on account of the change in circumstances the present day Governments can also change the laws introduced by him provided the change in circumstances require alteration or the grounds which impelled him to introduce alterations cease to exist, I was always confronted with the answer that Ijma'a of the Companions cannot be disturbed. Such answers do not take into consideration the maxim:

ان الحكم الشرعى المبنى على علته يدور مع علته وجودا و عدما

(The enforcement of a *Sharia* law which is subject to cause depends upon the existence or non-existence of that cause), Maulana Alai said:

ان الحكم الشرعى مبنى على علته فبانتها نها ينتهى

(A *Sharia* law based upon cause is enforceable till the cause lasts).[1] The cause for amendment in the law of divorce having ceased to exist the Quranic and the Sunnah divorce should be restored. This was the view, as already seen, of Imam Ibn Taimiya and Ibn Qayyam.

Hazrat Omar suspended payment from the *Zakat* fund for reconciliation of heart. The Hanafi jurists are of the view that in view of the order of Hazrat Omar, it is no longer lawful to spend on this item. This is opposed by Yusuf Al-Qarzawi in *Fiqh ul Zakat*.[2] He is of the view that Muslims are no longer rulers and as strong as the non-Muslims. The object of this item of expenditure is that the financial assistance may incline people towards Islam. The Missionary organisations which are financed by the rich countries having overwhelming Christian population spend these finances on the amelioration of converts to Christianity. To the contrary no such financial help is given by any Islamic country for the betterment of the lot of the new converts to Islam so that they may become firm in their attach-

1. *Falasafat ul Tashri' fil Islam* by Dr. Subhi Mahmasani.
2. Vol. 3, p. 92 (Urdu trans. by Sajid ul Rehman Siddiqi).

ment to Islam. This item of expenditure from the *Zakat* fund can be utilised for this purpose.

The Muslim Governments should also give financial help to the non-Muslim Governments so that they may become sympathetic towards Muslims. Such assistance should also be rendered to certain organisations in order to incline them towards Islam. The writers and authors by distribution among them of *Zakat* fund may in like manner be persuaded to defend Islam against the false accusation made against the Muslim Ummah.

The other principle of law-making is that the custom and usage of the people should not be disturbed as far as possible. There are several legal maxims concerning the superiority of *urf* and *a'adah*:

١. الثابت بالعرف كالثابت بالنص

(What is established by *urf* is like what is established by *nas*)

٢. استعمال الناس حجة يجب العمل بها

(The popular practice is a legal proof that it must be acted upon).[1]

Ibn Khalidun rightly said that the usages of the peoples of the world can never be uniform. They are subject to change by lapse of time and by rotation of the cycle of circumstances. As changes occur in the people and cities by passage of time so they occur in all places in all ages and in all states of the world. This is the ever prevalent divine rule among His creation.[2] There is, therefore, no doubt that the consequence of these changes is that with the variation in the social set up, the standards of welfare and well-being of people are also altered, and since the amelioration of the people is the basis of laws, the changes in age and the social set-up should necessitate change in law. Ibn Qayyam therefore said that the change in law is dependent

1. *Majella*, S. 37.
2. *Muqaddama Ibn Khalidun*, p. 24.

upon the variation in time and place, circumstances, customs and usage of the people.[1] The *fatwa* changes with the change in *urf* (custom) and *a'adah* (usage) whether the change be the result of passage of time or alteration of place.[2]

If the sacrosanctity of custom of each place be the rule (no doubt subject to the condition that it should not be repugnant to the Quran and the Sunnah) the Arab customs of the Jahiliya maintained by the Prophet pbh cannot be obligatory on such place unless the Quran or the prophetic Sunnah made that custom obligatory on the Muslims. This question came up for consideration before the Federal Shariat Court in *Mohammad Amin v. Islamic Republic of Pakistan.*[3] According to most of the schools of thought only a cosharer has a right of pre-emption in undivided property. But the Hanafis recognise the rights of the neighbours and the owners of appendages. It was held that the law of pre-emption recognised in Islamic jurisprudence had its origin in the customs of pre-Islamic Arabia. In the Punjab in addition to the law of pre-emption emanating from the Islamic source, prevailed the customary law vesting such rights in the expectant heirs as well as the Occupancy tenants. Martial Law Regulation 115 conferred this right on other tenants of agricultural land. The important question which arose in the above case was whether the provisions of the Punjab Pre-emption Act so far as they are based on Punjab Custom, and the provisions of Martial Law Regulation 115 were repugnant to the Quran or the Sunnah of the Prophet pbh. The question was answered in the negative. It was stated:

> "Now it is established principle of interpretation of Islamic law that *fatwa* (order) changes with the change in *urf* (custom) and *a'adah* (usage) whether the change be the result of passage of time or alteration of place.

1. *Eilam ul Muwaqqeein* (Urdu trans.), Vol. 5, p. 822.
2. *Ibid.*, p. 843.
3. P L D 1981 F S C 23.

(*E'lam ul Muwaqqi'een* by Ibn Qayyam, Vol. 2, p. 843). The following principles about the validity of custom are laid down at pages 7 and 8 of *Mujella*.

(36) Custom is of force.

(37) The usage of men is evidence according to which it is necessary to act.

(38) A thing impossible in custom is as though it were in truth impossible.

(39) It cannot be denied that with the change in time, the requirements of law change.

(40) Under the guidance of custom the true meaning is abandoned.

(41) Custom is only given effect to when it is continuous or preponderant.

(42) That is esteemed preponderant which is commonly known and not that which rarely happens.

(43) A thing known by common usage is like a stipulation which has been made.

(45) What is directed by custom is as though directed by law.

These rules collected in *Mujella* demonstrate the weight and importance of custom and rule 39 depicts at least one aspect of the change of custom by passage of time. The principle that the requirements of law change with the change of times clearly refers to change of custom. This is the same rule as cited from *E'lam ul Muwaqqi'een*.

In a recent publication Mohammad Taqi Ameeni has considered the importance of custom as a virtual source of law in Islam. At page 274 of his book *Fiqh Islami ka Tareekhi Pas Manzar* he reproduces the following opinions of the jurists:

(1) The proof of anything by usage is like its being proved by *nas* (text of the Quran and the Sunnah).

(2) What is provable by custom will be treated in *Sharia* to be proved by *Sharia* reasoning.

At page 275 is stated the rule that 'order should be passed according to the usage of time even though it is against the opinions of jurists of the early ages (cited from *Raddul Muhtar*).

At page 277 the rule is thus stated:

"Orders based on custom shall change with the change in custom because they could last or endure with the custom." This principle which would naturally follow if custom is the rule, is of utmost importance.

Another question which arises is whether the Ummah is bound by Arabian customs even though its members have their own customs which may be different but are not repugnant with the Quran and the Sunnah. This is answered by Maulana Mohammad Taqi Ameeni on the authority of *Raddul Muhtar*, Vol. 4:

"The prevailing custom will be acted upon because it is not repugnant to *nas* but is in accord with it."

Maulana Mohammad Taqi Ameeni concludes from the opinion that it is not necessary for members of a country to adopt the customs of people belonging to other countries and for them commands may differ in view of their changed customs and usages."

The change in the environments and surroundings and the change in customs and usages of different peoples in the world naturally visualises variable laws. Permanent and unalterable laws may be enforceable and practical where they relate to matters obligatory or to things prohibited but not in any other matter. However this is also subject to الضرور ان تبيهو المحظورات (Necessities legalise the things prohibited).

The juristic principles of *Masaleh Mursila* and *Sadde Zarai* whose object is to keep constant vigilance for the betterment and welfare of the people and for closing all avenues of mischief envisage change in laws. It is not therefore possible to admit of unalterability in the laws on which there is a consensus. Subject to the exceptions already stated no concept of inflexibility is admissible for the flexible laws of Islam. It is for this reason that the Constitution of Pakistan, and for the matter of that all successive constitutions, subjects its laws to be free from repugnance with the Quran and the Sunnah only. The hands of the legislature are not tied down by such inflexible concept as Ijma'a.

No one can deny the principle underlying Ijma'a that the opinions of a body of people given after discussion on and consideration of the matter in issue, should be preferable to the opinions of an individual. This is the basis of the principle of Shoora. Saeedbin ul Musayyib reported from Hazrat Ali that he said: 'I inquired from the Messenger of Allah pbh what should we do if we are confronted with a matter on which no order is revealed in the Quran and no guidance is obtainable from your Sunnah'. He advised: 'For this you should hold a meeting of the scholars from amongst the Muslims and consult them. Do not decide according to the opinion of one man.' Acting on this principle Hazrat Abu Bakr and Hazrat Omar used to call in a meeting the leaders of the people whenever they did not find guidance on any matter from the Quran and the Sunnah. Evidently the tradition is an interpretation of the verses and direction for collective Ijtihad.

The word scholar obviously does not mean those who learnt and studied the Quran, the Sunnah, the *Fiqh* and other religious sciences in a religious institution. I would include, in the circumstances of the present age, other experts including experts in various sciences of the day, people who know how the issue was resolved or the problem was solved in other modern states, scholars of modern jurisprudence and laws of various countries,

international law and the subject of conflict of laws. Problems before the Shoora in the modern age are so diverse and the questions of *Maslaha* and *Sadde Zarai* are so complex that they are difficult to solve without proper statistics and expertise, which can be provided only by the Government and appreciated by modern experts. The Shoora is therefore the proper organization in each country which can act as the correct substitute for Ijma'a or concensus. Dr. Mohammad Iqbal also understood from Ijma'a the exercise of the power of Ijtihad by a body rather than an individual. While dealing with the subject of Ijma'a in his sixth lecture entitled "The Principle of Movement in the Structure of Islam" he wrote:

> "The third source of Mohammadan Law is Ijma'a which is in my opinion, perhaps the most important legal notion in Islam. It is, however, strange that this important notion, invoking great academic discussions in early Islam, remained practically a mere idea, and rarely assumed the form of a permanent institution in any Mohammadan country. Possibly its transformation into a permanent legislative institution was contrary to the political interests of the kind of absolute monarchy that grew up in Islam immediately after the fourth Caliph. It was, I think, favourable to the interests of the Umayyad and Abbaside Caliphs to leave the powet of Ijtihad to individual Mujtahids rather than encourage the formation of a permanent assembly which might become too powerful for them. It is, however, extremely satisfactory to note that the pressure of new world forces and the political experience of European nations are impressing on the mind of modern Islam the value and possibilities of the idea of Ijma'a. The growth of republican spirit, and the gradual formation of legislative assemblies in Muslim lands constitutes a great step in advance. The transfer of the power of Ijtihad from individual representatives of schools to a Muslim legislative assembly which, in view of the growth

of opposing sects is the only possible form Ijma'a can take in modern times, will secure contribution to legal discussion from laymen who happen to possess a keen insight into affairs. In this way alone we can stir into activity the dormant spirit of life in our legal system, and give it an evolutionary outlook..".[1]

According to Iqbal "Ulema should form a vital part of a Muslim legislative assembly helping and guiding free discussion on questions relating to law."[2] This may be so but in view of our experience of the previous Shoora the model arrangement would be to associate the Federal Shariat Court for deciding before the enforcement of a law whether any of its provision is repugnant to the Quran and the Sunnah and to substitute for the offensive portions what the Court suggests or advises.

The passage quoted above proves that so far Ijma'a is a mere idea and attention is again drawn to its impracticability as given by Shafe'i and others and the citation from *Al Ahkam* by Ibn Hazm that Ijma'a must be founded on *nas* or Mustanad which can neither be strengthened by Ijma'a nor weakened by consensual opposition.[3]

It had been the practice since the early centuries to claim Ijma'a on most matters. Imam Shafe'i refuted this tendency. According to one calculation he disproved such wide claims about four hundred matters.[4] Similar opinion, word by word, is found in the utterances of Ibn Abi Laila, Sufyan Sauri, Auzaie, Ziffer, Abu Yousuf, Mohammad bin ul Hasan, Al Hasan bin Ziyad and Ashhab.[5] It was generally said by those who were cautious enough to say that they did not know of any opposite

1. *The Reconstruction of Religious Thought in Islam* by Dr. Mohammad Iqbal, pp. 173-174.
2. *Ibid.*, p. 176.
3. *Al Akham* by Ibn Hazm, Vol. 4, p. 141.
4. *Al Ahkam fi Usul il Ahkam* by Ibn Hazm, p. 542.
5. *Ibid.*

view, but this is not Ijma'a.[1] Similar claims of Ijma'a are made about matters concerning women.

It is claimed that there is Ijma'a on the evidence of woman being half of that of male, on her evidence being inadmissible in cases of Hudood, on three divorces pronounced simultaneously amounting to irrevocable divorce after which remarriage is not possible without the woman marrying another man, and on half *diyat* of woman. In the first case it has been proved that neither the Quran nor the Sunnah justify the conclusion. Imam Ibn Taimiya also held that the express words of the verse (2 : 282) do not justify the interpretation that it is regarding the evidence in Court. The second view is based on the *marateel* of Zuhri which refers to the Sunnah of the Prophet pbh and his Companions but these *maraseel* are weak according to the traditionists though the jurists act upon them. To hold that the evidence of a woman is doubtful or creates doubt in Hudood cases is also against facts. In the present age cross-examination is indeed an art and the way that the women witnesses whose evidence is held truthful by the Judges, withstand the onslaught of the opposing lawyer in cross-examination is simply remarkable.

No Ijma'a can be based on weak traditions, as done in this case.

Talaq i bidat was enforced by Hazrat Omar for particular reasons, although it is not in accordance with the Quran and the Sunnah. Those causes having long ceased to exist the law of divorce enforced by Hazrat Omar which gave effect to what is admittedly a sin, should be treated as non-existent. It could only be justified on the principle of necessity and *Sadde Zara'i*. No question of Ijma'a arises in such a matter.

The fourth point on which Ijma'a is claimed is the *diyat* of women. The rule being contrary to the express meaning of the verse of the Quran (Q 4 : 92) the principle of Ijma'a cannot

1. *Al Ahkam fi usul il Ahkam* by Ibn Hazm, p. 542.

be invoked for holding what is contrary to the Quran. There is no authentic Hadith in support of the rule, nor any authentic tradition of Companions of the Prophet pbh.

It may have been evident by now that the unyielding rigidity and inflexibility is not a characteristic of Islam. In its essence Quran is rational and thought provoking. It counsels, urges and exhorts man to ponder, to think and to deliberate over it.[1] It is the final religion for the universe to guide the destinies of the people for all times to come. The world is evolutionary; so are its people. They are enjoined and commanded to exploit the sun and the moon, the skies or the space, the cosmos, the earth and the oceans.[2] This can be achieved by the acquisition of scientific knowledge as is amply demonstrated by the West in the modern age, though its foundation was laid during the glorious and golden age of advancement of scientific knowledge, research and experimentation in the world of Islam. Such exploitation and utilisation of natural resources is not possible without advanced dedicated study of various sciences and without sientific research and exploration of objects of nature. It is not possible by mere study of law including Quran, Hadith and Sunnah.

The bipolarity of religion and sciences is not a Quranic phenomenon. It is the contribution to the Islamic world of the doctrine of *taqlid* (imitation) of those who were well versed in the science of law only and were pioneer jurists and lawyers. They distinguished themselves in the study of the science of religion only. But is that a reason for limiting the acquisition of knowledge to the study of this science alone? No earlier jurist preached this. Theirs was the age when all the temporal sciences necessary for exploitation of the universe including physics, chemistry, mathematics, astronomy, philosophy, medicine, alchemy etc. were taught in the mosques like the religious sciences. All those who specialised in any of these temporal sciences started

1. Q. 4 : 82. 2. See *e.g.* Q. 43 : 32; Q. 45 ; 13.

their scholarly career as students of the science of religion. Some of them happened to be erudite scholars of religion.

The cleavage between the exponents of the science of religion and the doctors of other sciences, including mainly the experts of Greek philosophy who according to Iqbal 'read the Quran in the light of Greek thought',[1] is of later period. Ghazali who during the early scholastic period had specialised in philosophy revolted against it and became a philosophical sceptic. Iqbal[2] criticised both the trends—the first on the ground that Quran is anti-classical and the second for the reason that basing 'religion on philosophical scepticism (is) a rather unsafe basis for religion and not wholly justified by the spirit of 'Islam'.[3] Regarding *Fiqh*, Ghazali observed that it is the daily bread of believing souls; and yet he discussed the essentiality of *ilm* for a Muslim in the light of the Quran and the Sunnah in great detail in *Ihya ul Uloom* and held about the temporal sciences that acquisition of their knowledge is *Farz i Kifaya* which means that it is the duty of all Muslims but the duty is discharged if some persons obtain knowledge of those sciences. It may be explained that participation in the holy war is also *Farz i Kifaya* unless all Muslims are called upon to participate in it in which case participation becomes an absolute duty.[4] However it would be clear from a study of *Kitalb ul Sair* in each book of *Fiqh* that the laibility of *Farz i Kifaya* is discharged when the required number of persons participate in *Jihad*. By this analogy it would follow that the number of scientists in any country should be in accord with the number required for development of sciences. This is clear from he principle of *Farz i Kifaya* in relation to acquisition of scientific knowledge, relied upon by Ghazali. Obviously if the efforts of the entire community be required for technological

1. *The Reconstruction of Religious Thought in Islam* by Iqbal, p. 4.
2. *Ibid.*
3. *Ibid.*
4. *Ain ul Hedaya*, Vol. 2, p. 524; See *Fatawa Alamgiri*, Vol. 3, p. 335.

advance (as where an Islamic country is small or is surrounded by powers hostile to it) the acquisition of scientific and technical knowledge may, on the same analogy, become *Farz i Ain* (absolute duty).

For me there is no distinction between male and female as regards acquisition of scientific knowledge. But on the analogy of unwilling permission granted by the Ulema to all women to participate in actual fight if *Jihad* (holy war) is declared *Farz i Ain*[1] (absolute duty) without the permission of their husbands, must also apply to the abovementioned illustration of acquisition of knowledge by all persons at least in the circumstances noted above.

In spite of this emphasis on the necessity of scientific study upto the sixth century Hijra the word *ilm* (knowledge), by an evolutionary process, was restricted to the knowledge of the science of religion. The traditional dictum of the Prophet pbh that the acquisition of knowledge is the duty of all Muslim men and women came to be recognised in religious circles as confined to knowledge of the religious science.

The effect of this interpretation can be imagined. Long before the Renaissance and the Industrial Revolution the education in the Islamic world spiralled down to the level of one science only meaning Religious science. The doctrine of *taqlid* (imitation) refixed the priorities in the educational syllabi. The initial priorities comprised of Quran, then Sunnah and lastly *Fiqh*. Now *Fiqh* was given the first priority and the primary function of the teacher was to instil in the mind of the student unlimited reverence for the Imam he followed and excellence and superiority of the *Fiqh* of that Imam, in order to secure and ensure the unquestioned and blind following of the student for him. The infallibility attached to the views of the Imam turned *Fiqh* into an immutable law for the *Muqallid* (imitator).

1. *Ain ul Hedaya*, Vol. 2, p. 524, *Fatawa Alamgiri*, Vol. 3, p. 336.

The basic difference between the Quran and the Sunnah on the one hand and *Fiqh* on the other is that the former contain only a few immutable laws but the latter contains innumerable decisions on practically every subject whether dealt with by the jurists only hypothetically or in the light of facts placed before them. I will not call them 'facts ascertained' because they could be ascertained by the exercise of judicial functions only, which few jurists had ever had the opportunity to exercise. The books on *Fiqh* contain such details of appreciation of evidence which ought to be left to the discretion of the judicial officer dealing with a particular matter. But the details hardly leave any scope to the Judge to think, weigh the evidence and then decide. The *Fiqh* provides hidebound doctrines, rules and regulations rather than guiding principles. Contrary to this the Quran and, for the matter of that, the Sunnah generally lay down guiding principles governing legislation and human conduct and action, because subject to the fundamentals of the divine Constitution the laws of the society are required to be varied in order to keep pace with the progress in society. Various rules of jurisprudence have been enunciated by the jurists keeping in view the first two sources of Islamic law, which serve the same objective. But *taqlid* (imitation) upset the whole balance and subverted the norms of dynamism and flexibility which are among the fundamentals of Islam.

Taqlid put an end to *ijtihad* (free thinking as well as juristic exposition), abolished all scientific and technological education, substituted dynamism, flexibility and progress with its severe inflexibility and unspeculative, unimaginative, unprogressive and reactionary tendencies. *Taqlid* is the enemy of progress and has been helpful only in the stratification of the Muslim society.

The concept of *taqlid* was not new to the Muslim Ulema when the Tartars invaded Baghdad. It had already started spreading its tentacles in the third century Hijra as would be evident from the religious books written in later centuries. It,

however, emerged strong after the destruction of Baghdad as a vehicle for counteracting the apprehended disintegration of the Muslim society. According to Iqbal it was an organisational move for "preserving a uniform social life for the people by a jealous exclusion of all innovations in the law of *Shariat* as expounded by the early doctors of Islam." He berated the doctrine on a philosophical ground:

> "But they did not see, and our modern Ulema do not see, that the ultimate fate of a people does not depend so much on organisation as on the worth and power of individual men. In an overorganized society the individual is altogether crushed out of existence. He gains the whole wealth of social thought around him and loses his own soul. Thus a false reverence for past history and its artificial resurrection constitute no remedy for a people's decay. 'The verdict of history', as a modern writer has happily put it, 'is that worn-out ideas have never risen to power among a people who have worn them out.' The only effective power, therefore, that counteracts the forces of decay in a people is the rearing of self-concentrated individuals. Such individuals alone reveal the depth of life. They disclose new standards in the light of which we begin to see that our environment is not wholly inviolable and requires revision."[1]

Taqlid being inimical to progress, those who conform to it react vehemently to advancements and developments which are innovative and beyond their immediate understanding. Unheedful of their benefits *inter alia* to the community of Muslims and their immunity from evils, shortcomings and disadvantages, these conformists resist them with all emphasis at their command. This may be illustrated by the ban on printing and printed material and the destruction of the first observatory in Ottoman

1. *The Reconstruction of Religious Thought in Islam* by Iqbal, p. 151.

Turkey. These are described in Islamic Society and the West by Gibb and Bowen:[1]

> 1. ". . printing (by Moslems was forbidden down to early in eighteenth century; and this alone almost ensured that Ottoman learning should not progress."[2]
>
> . . . . . .
>
> 2. "But until the Tulip Age the Ulema, as we have mentioned, had set their faces against the printing of books by Moslems. Even when Ibrahim the Muteferrika was finally authorised to create his press—in collaboration with a certain Sa'id Mehmed Efendi who, having accompanied his father on a diplomatic mission to Paris, had returned much impressed with Western culture—it was laid down by Fatwa that he might publish only dictionaries and scientific and historical works; he was forbidden to publish anything that might be classified as religious."[3]
>
> 3. "That the wrath of the Ulema was easily aroused against unfamiliar investigations was shown under Murad III, when the first Ottoman observatory, erected on the heights above the Tophane in Galata, in which a narrow pit, 40 feet deep, served as a primitive telescope for the observation of heavens by day, was summarily destroyed with all its contents at the instance of the then *Sehu'l Islam* (Sheikh ul Islam) on the pretext that astronomical observations were unlucky."[4]

It is clear from the Chapter on Education[5] in the above book that Madrasa or school education in Turkey was limited to the

1. *Islamic Society and the West* by Gibbs and Bowen, Vol. I, Part II, pp. 148, 151, 153.
2. *Ibid.*, p. 151.
3. *Ibid.*, p. 153.
4. *Ibid.*, p. 148.
5. *Ibid.*, pp. 139-164.

teaching of religious science. The composition of works on mathematics, astronomy, geography and medicine continued during the seventeenth century also but their authors, were not as a rule madrasa trained. The most celebrated of such authors was Mustafa bin Abdulla known as Hacci Halife or the Katib Celebi, who deplored the neglect of the rational sciences by the Ulema of the madrasas, and contrived to acquire from other sources a wide knowledge of physics, astronomy, geometry and geography. He was disdained by the Ulema for his lack of Madrasa training.[1]

This is not at all surprising because similar tendencies were reflected in the Ulema of the Indian sub-continent after the British occupation. The disdain and contempt of the Madrasa educated for those educated in Schools, Colleges, Universities is noticeable even today. The only change of heart discoverable among the Ulema of this age is that they freely benefit from scientific inventions of the West including cars, frigidaires, deep freezers, electricity, air-conditioners, radio and televisions but their condemnation of the Western education has not subsided; a Mulla practically ignorant among them may taunt a highly qualified doctor, engineer, lawyer, judge of being under the influence of the West, and imbued and saturated with Western doctrines and concepts.

It must have been manifest by now that the bipolarity between religion and the rational sciences is the creation of those who conform to *taqlid* and consequently hate progress, advancement, modernism—in short all kinds of change in the social set up, usage, custom, law and even in the educational syllabi of the Madrasas (schools of religious instruction). In this there is a selfish strain too. What they do not know and do not understand ought to be reproved and censured, because they crave for nothing but to establish their own superiority over all others

1. *Islamic Society and the West* by Gibbs and Bowen, Vol. I, Part II, pp. 151-152.

and to reign supreme over them. Their supremacy cult and the insatiable lust for power for which, like all the priestly class in history, they have been accused for centuries, is compulsive enough for condemning and sometimes subjecting to Fatwas of heresy, men who are proficient in other fields of learning which they themselves shun. Such learning is generally the lot of people who do not go to religious schools for education.

This grim tendency of isolation caused the Ulema to prevent Muslims of the sub-continent from learning the English language and thus to push them backward by a century in comparison with the Hindus. The great Muslim reformer, Sir Syed Ahmad Khan, redressed this wrong only partially by his untiring and devoted efforts in the cause of Muslim education. It is on account of his farsighted policies that the Muslims of the Indian sub-continent could muster in sufficient number, experts in every field including members of the Civil service, who could run a modern state.

Again it was this trend of despising the Western educated Muslims and the absolute want of imaginativeness and political thinking which made the majority of Ulema of the Indian sub-continent reject the two-nation theory and opt for a Hindu dominated undivided India rather than for carving a Muslim dominated Pakistan. The simple argument of saving two-third of the Muslim population of India from Hindu domination and of making Pakistan a viable Muslim State where Muslims could live according to the dictates of their religion, had considerable appeal for the simple illiterate Muslims but not for the great majority of this group of the 'learned'. In matter of education history is repeating itself in India under the patronage of the Ulema and the interest of the Muslim minority in that country has by their kindness, again waned in other sciences. The school and college education is again on the decline among the Muslims of India.

The Ulema never realised that the study of sciences and expertise in technology is not possible without learning the English language. It, besides other European languages became the medium of instructions in various sciences after they became the exclusive preserves of the Europeans who carried on immense research for centuries and made innumerable discoveries and inventions. The medium of scientific understanding is in fact Latin which became the source of scientific terminology as a substitute for Arabic. Just as the rich and flexible tongue of Arabia was destined to become the scientific idiom of the Near East, so Latin grew into a medium of scientific understanding in the West.[1] It was thus a purely historical phenomenon that scientific knowledge became transmissible through *inter alia* the English language and was lost to Arabic. It was impossible for anyone to obtain scientific knowledge without learning the English language in the Indian sub-continent. Moreover just as in the Moghul period it was necessary to learn Persian to enter rather prestigious Government service, it became necessary after the colonization of India to learn English to enter civil service. By preventing the Muslims from learning the English language the religious scholars allowed the Hindus to have an advance over them and by and by to capture almost all administrative posts and positions of authority reserved for the Indians.

Unfortunately our scholars, on account of the inhibitions created by the doctrine of *taqlid* are so fossilised in conservatism that they treat modernism an abuse. They do not realise that every succeeding age is modern. The era of scientists, philosophers, legists, doctors etc. in Islam was the then modern era. It was an age of considerable intellectual development and achievement. The great jurists and legists performed miracles in law making which was in keeping with the requirements of that age. They were modernists when compared to the generations of believers before them. If the process of *Ijtihad* had not

1. *Legacy of Islam* by Arnold & Guilamm, p. 301.

been artificially put an end to, the modernism in law would have continued. But rigidity and conservatism which flourished under the shadow of *taqlid* or blind adherence to what was ruled by the old jurists made the succeeding generations forget the natural cult of modernism.

Before the Industrial Revolution in Europe the progress of humanity was extremely slow. It was rather imperceptible. People of that age could hardly have any perception of the slow moving modernism. That era of insensibility and apathy started for the Muslims after the dawn of *taqlid* with which culminated the period of development of legal thought. In fact all sorts of scientific knowledge which once was their monopoly was lost to them and was learnt, preserved and developed in the West. Their whole energy was conserved for and devoted to the stratified *fiqh*. Their ties with progress, intellectual development and evolutionary trends were completely severed, and their intellectual initiative was completely numbed. The curse of feudalism, political opportunism and the unstability of the governments (except for short periods) instilled in the Muslims an apathy towards politics and political and administrative affairs of their homelands.

Their unconcern and indifference to all but the desire of maintenance of *status quo* made them impervious to all improvement and progress. During the period of Muslim's colonisation by Western Colonial Powers, their interest centered round only a few non-developmental activities including the earning of their living and protecting their religion. The only tool for preservation of their religious identity and entity was blind adherence to the authority of their old jurists.

Islam as already pointed out is not a religion in the accepted sense of the term. It is a way of life which deals with the whole life of man, spiritual as well as temporal. It is a 'legal, political, economic and social system.' It guides the believer to act in a manner which leads to the progress, welfare and amelioration

of the lot of humanity. This guiding function has to be discharged by Islam till the Day of Judgement. Being the last of the religions it has to keep constant vigilance on the everchanging legal, political, social and economic orders in the world. The change of values and transformation of social orders involves the process of remoulding, reconditioning, reevaluating and reforming the social, political, economic, educational, and legal norms of societies which are often restructured. Obviously the static and immutable concepts, doctrines and laws cannot keep pace with the dynamism of the social orders in the world. Dynamism in the social, political, economic, educational and legal order can be co-ordinated, regulated, systematised, reconciled and rectified by permitting dynamism in rules, regulations and laws governing them. This is evident by the problems arising out of the rapid transformation of family life, industrial relations, agrarian systems, legal structure, political set up in various parts of the world today. These modern problems require modern solutions which must be in keeping with the spirit of the time.

The question is whether Islam impedes the progress of humanity or transformation of social and other values. The answer must be in the negative since progress and transformation are evolutionary processes which in the natural course of evolution cannot be halted. The object of Islam is not to prevent change but to mould each society and its political, legal, economic and social set up in each age on the pattern of spirituality and morality set up by it. Each change is to be so conditioned that it may remain in harmony with the guiding dictates of the Quran and the Sunnah of the Prophet pbh and may in no case be repugnant to them. It is for this purpose that Islam provides few laws and innumerable principles and rules for guidance.

Notwithstanding the supremacy of the doctrine of *taqlid* we find in the medieval ages the names of two great thinkers who made an attempt to resurrect free thought. They are Ibn

Taimiyya and his great pupil, Ibn Qayyam. Dr. Mohammad Iqbal refers to Refutation of Logic by Ibn Taimiyya and credits him with showing that induction is the only form of reliable argument.[1] He further wrote that "the spirit of Ibn Taimiyya's teaching found a fuller expression in a movement of immense potentialities which arose in the eighteenth century, from the sands of Najd, described by Macdonald as the 'cleanest spot in the decadent world of Islam.' It is really the first throb of life in modern Islam."[2]

Ibn Qayyam was the most outspoken opponent of *taqlid*.[3] His definition of *bayyena* (argument or proof) eroded—rather dynamatized—many impracticable concepts about the nature of evidence in court. The role of reasoning and welfare of the people *inter alia* in matters of legislation for determination of disputes may be appreciated from what he wrote in *Elam al Muwaqqieen*:

> "The Sharia is based on reasoning (*hikma*) and the interests (*Masaleh*) of God's servants in mundane affairs and in the affairs of the hereafter. It is all justice, it is all mercy and total wisdom. Therefore every matter which, from being based on justice turns into injustice and, from being based on mercy turns into the opposite and from serving the interests (*maslaha*) of the people becomes a source of corruption and, from being based on wisdom (*hikma*) becomes the negation of wisdom, is not a part of the (Islamic) Shariah."[3]

The originality of the thinking and teachings of these two great Masters is fully demonstrated in the following chapters. They can rightly be said to be the leaders of modernism.

1. *The Reconstruction of Religious Thought in Islam*, by Iqbal, p. 129.
2. *Ibid.*, p. 152.
3. See *Modern Reformist Thought in the Muslim World* by Mazhar Uddin, pp. 232-233.

Another great theologian who commands equal respect among the modern thinkers as well as the rigid Ulema is Shah Wali Ullah of Delhi. Dr. Mohammad Iqbal said about him that perhaps he was the first Muslim who felt the urge of a new spirit in him.[1] To this I will add, 'during the last two centuries and the present century,' since according to my estimation and assessment the laurels for resuscitation of thinking in the modern sense go to Ibn Taimiyya and Ibn Qayyam.

Dr. Mohammad Iqbal rightly said that the man who fully realised the importance and immensity of the task of rethinking the whole system of Islam, and whose deep insight into the inner meaning of the history of Muslim thought and life, combined with a broad vision engendered by his wide experience of men and women, would have made him a living link between the past and the future, was Jamal Uddin Afghani.[2]

Sir Syed Ahmad Khan performed the task of rethinking and has left a big legacy of articles on theology. He influenced the thinking of the modern Muslims on matters of religion though it may be difficult to agree with him on many things. What is of importance is that he set the course for reconstruction of religious thought which was later undertaken by Dr. Mohammad Iqbal whose lectures collected in book form in *Reconstruction of Religious Thought in Islam* are unique not only in content but also in furnishing guidance to the posterity.

The main work in this respect was done in Egypt. The credit for the consciousness of modern trends and requirements in that country goes to Mufti Abdohu and his pupil Allama Rashid Raza. It was under the influence of these two modernists that legal reforms as regards the status of women were pioneered by Egypt and under its influence were undertaken in other Islamic countries.

1. *The Reconstruction of Religious Thought in Islam* by Iqbal, p. 97.
2. *Ibid.*

The Aligarh movement and the Muslim League movement, both of which with few exceptions, were opposed by the Ulema, converged on the dynamism, flexibility and liberality of Islamic thought—the first aiming at the modernisation of the Muslims and the second planning to set up in Pakistan a veritable modern Islamic but untheocratic state in which all citizens, Muslims and non-Muslims, men and women, wealthy or poor may enjoy equality and other blessings of Islam. Its architect Quaid-e-Azam Mohammad Ali Jinnah was every inch a modern man and a leader whose heart throbbed only for the love of Muslims of India and Islam.

Dr. Mohammad Iqbal the great thinker of Islam and poet of the East who first formulated the idea of a separate homeland for the Muslims in the Indian sub-continent and articulated it from a political platform at the 1930 Allahabad Session of the All India Muslim League, was, as stated, a great religious thinker. His writings on Islam denote the depth of his knowledge of Islamic literature and his plea for modernism of the Muslim thought. He held that the concepts of theological systems, draped in the terminology of a practically dead metaphysics, cannot "be of any help to those who happen to possess a different intellectual background." He pointed out by way of guidance of the posterity the constructive method. He, however, warned that the "task before the modern Muslim is.. immense". The method is that a Muslim has to "rethink the whole system of Islam without completely breaking with the past."[1]

I successfully adopted this method as a member and later Chairman and Chief Justice of the Federal Shariat Court, since the day of its establishment in May 1980. The Constitutional requirement in Pakistan is that no law, future or existing should be repugnant to the Quran and the Sunnah of the Prophet pbh. While scrutinizing hundreds of laws for the purpose of bringing them in accord with the Quran and the Sunnah we did not

1. *The Reconstruction of Religious Thought in Islam* by Iqbal, p. 97.

confine our study and research to the Quranic and Hadith literature; we extended the scope of our scrutiny to *fiqh* also and to our surprise discovered that the one great advantage of the seemingly irreconcilable difference of opinion between the early jurists was that on most of the subjects, were available views which abundantly fulfilled the requirements of the modern age. It partly explains the great dictum of the Prophet pbh that the divergence of views between the scholars of his Ummah is a sign of divine mercy. To think in the second or third or even eighth century Hijra of solutions which could be given effect to in the thirteenth and fourteenth century Hijra is proof of the talent, hard work and ability of the great jurists of Islam. We accomplished the task of rethinking without breaking with the past. The method of adoption of the views of jurists other than those followed by them is conceded by the *Muqallid* Hanafi Ulema too and for this reason the Ulema members of the Court generally agreed with the Court judgments.

Since long I considered it necessary to reevaluate the Islamic law concerning the status of women. I decided various points related to the subject as judge of the Lahore High Court and the Federal Shariat Court. On other matters I did not wish to form final opinions as those matters were likely to be decided by me as a judge and forming an opinion on a subject might amount to prejudging it. I embarked upon the project after quitting my office and followed the same methodology in re-evaluating and restructuring the status of women in Islam as was adopted by me in the Federal Shariat Court, as a judge. I have given full consideration to all the views on any subject in the light of the Quran, Sunnah and the principles laid down by the jurists and other religious scholars. Even though my conclusions may differ but I have unquestionably followed the guiding principles laid down by them. This is a completely impartial and unbiased view of the rights of half the Muslim population in the world.

To be candid, this is not a book of law and therefore only a few authorities of the higher Courts are referred in it. Yet the Family Law in Islam has been discussed in some detail to determine how far the provisions of the Family Laws Ordinance, 1961 and the Dissolution of Muslim Marriages Act, 1939 are in harmony with the Quran and the Sunnah.

Another object of the book is to refute the criticism of the European and American authors regarding the position of women in Islam and to highlight the unique contribution made by the last message and messenger of Allah towards the amelioration of the lot of feminine population of the world. It can be claimed without any fear of contradiction that the movements of equality, liberty, fraternity and uplift of women owe considerably to the teachings of the Quran to which the West has not been a stranger.

Notwithstanding what I have said in these pages about the rigidity of our religious scholars, it would be relevant to point out that a section of the Ulema, though its membership is almost minimal, has stood in revolt against rigid adherence to the opinions of the early jurists or old masters on certain legal matters which have lost their efficacy and validity in modern societies. Three such names are of Allama Omar Ahmad Osmani, Maulana Qamar Ahmad Osmani sons of Allama Zafar Ahmad Osmani, the author of *Ila al Sunnan*, one of the universally acknowledges best work on *Fiqh*, and Professor Tahir-ul-Qadri. Others who are quite liberal in their approach are Professor Maulana Mohammad Mahmood Ghazi, Professor Maulana Mohammad Ghazali and Professor Maulana Mohammad Yousuf Faruqi. These are few selected names out of many others. Justice Peer Mohammad Karam Shah, a Judge of the Supreme Court Appellate Bench, can also be counted among the liberals in many respects as would be clear from his Article on the effect of three divorces pronounced simultaneously and referred to in the Chapter on Divorce. His commentary of the Quran entitled *Zia ul Quran* provides many examples of

liberal treatment of Sharia subjects, as would be evident from the following Chapters.

I wish to place on record my indebtedness and deep sense of gratitude for the assistance rendered to me by Allama Omar Ahmad Osmani who gave me his draft on the evidence and *diyat* of women, Mr. Khalid Ishaque Advocate whose articles on *diyat* of women and Family Planning and whose advice on other matters stimulated me in my research work, Professor Mohammad Tahir ul Qadri, who on my request sent to me his bulky notes on the subject of *diyat* of women, Professor Mahmud Ahmad Ghazi of the Islamic University, Islamabad who guided me at each step in the accomplishment of this project, Professor Anwar Ullah and Maulana Sajid ul Rehman advisors of the Federal Shariat Court who collaborated with me actively. My thanks are also due to Maulana Riaz ul Hasan Nuri whose assistance, though it came at a late stage, helped me in the preparation of the Chapter on *diyat*. I am also grateful to Mr. Mohammad Ismail Cheema, now Secretary to the Chief Justice, Federal Shariat Court for the typing work of a part of the manuscript.

وما علينا الا البلاغ

CHAPTER 1

EQUALITY BETWEEN MANKIND AND SEXES

Before dealing with the equality of sexes it would be more apt to deal with the universality of the message of the Quran as distinguished from all other revealed books each of which was revealed for a particular people who formed only a small part of the humanity. The Holy Quran is very specific on this point. It says :

ولقد بعثنا فی کل امة رسولا ان اعبدو الله و اجتنبو الطاغوت

(And verily We raised in every nation a messenger (proclaiming) serve Allah and shun false gods)[1]

It mentions some of the well-known Prophets individually each of whom was sent to his people.

لقد ارسلنا نوحا الیٰ قومه

We sent Noah unto his people.[2]

انا ارسلنا نوحا الیٰ قومه

Lo! We sent Noah unto his people.[3]

و الیٰ عاد اخاهم هود

And unto (the tribe of) A'ad (We sent) their brother Hud.[4]

و الیٰ ثمود اخاهم صالحا

And to (the tribe of) Thamud (We sent) their brother Salih.[5]

و الیٰ مدین اخاهم شعیبا

And unto Midian (We sent) their brother Shueyb.[6]

ولوطا اذ قال لقومه اتاتون الفاحشة ما سبقکم بها من احد من العالمین

And Lot when (We sent him as a Prophet) hesaid unto his folk: Will ye commit abomination such as no

1. Q. 16 : 36.
2. Q. 7 : 59.
3. Q. 71 : 1.
4. Q. 7 : 1.
5. Q. 7 : 73.
6. Q. 7 : 85.

creature ever did before you?[1]

واذ قال موسى لقومه اذ كروا نعمة الله عليكم اذ انجاكم من آل فرعون يسومونكم سو ء العذاب و يذبحون ابناءكم و يستحيون نساءكم و فى ذالكم بلاء من ربكم عظيم

And when Moses said to his people : Remember Allah's favour unto you when He delivered you from Pharaoh's, 'O folk who were afflicting you with dreadful torment and were slaying your sons and sparing your women; that was a tremendous trial from your Lord.[2]

It will be noticed that Lot and Moses were also sent to their people. The people of Moses were identified as the children of Israel who were tormented and chastised by Pharaoh and his people. The Holy Quran similarly speaks of Jesus as رسولاً الى بنى اسرائيل (a messenger unto the Children of Israel).[3]

But when it comes to mentioning the Holy Prophet Mohammad (pbh) it says:

و ما ارسلناك الا كافة للناس بشيرا و نذيرا و لكن اكثر الناس لا يعلمون

And We did not send thee save as a bringer of good tidings and a warner unto all mankind; but most of mankind know not.[4]

The words كافة للناس mean "for the entire mankind". The word *al nas* (الناس) conveys the same connotation. The addition of the word كافة is only to emphasise that no people are excepted or exempted. The word *al kifaya* (الكفاية) means something which fulfils the need. According to Ibne-Fars the fundamental meaning of this is the existence of some thing in a quantity which suffices for the fulfilment of the need to an extent that no more is needed. اليس الله بكاف عبده (Is not Allah all-sufficient for his slave)[5] or كفى بالله شهيدا (Allah is sufficient witness)[6] denote the full emphasis which the words *kaf* (كاف) or

1. Q. 7 : 80.
2. Q. 14 : 6.
3. Q. 3 : 49.
4. Q. 34 : 28.
5. Q. 39 : 36.
6. Q. 13 : 43.

kafa (كفى) express. The words كافة الناس (all mankind) have been used in verse Q. 34 : 28 to emphasise that the holy Prophet was sent as a messenger for all the people of the world *i.e.* the entire mankind.

The Quran says in verse Q. 7 : 158:

قل يا ايها الناس انى رسول الله اليكم جميعا

Say (Mohammad) O mankind I am an apostle of Allah for all of you.

Again in verse Q. 25 : 1 it says:

تبارک الذى نزل الفرقان على عبده ليكون للعالمين نذيرا

Blessed is He Who hath revealed unto His slave the Criterion (of right and wrong) that He may be a Warner to the people of the Universe.

While each of the earlier Prophets was sent to a particular nation or people, Prophet Mohammad (pbh) was commissioned as apostle of Allah for the entire mankind and a warner for the universe. Why this distinction? The reason is that Prophethood had to terminate on him[1] and some revelations of the earlier Prophets had to be verified while others had to be superseded[2] by a final revelation (the Holy Quran) which for this reason had to have a universal character. In the very nature of things the last Prophet had to be the bringer of a uniform consolidated message for all nations of the world who must seek guidance from it for all times to come. The last Prophet is thus a mercy to all nations. As stated in the Quran وما ارسلنٰک الا رحمة للعالمين (We sent thee not save as a mercy for (the people of) the world).[3]

The uniformity and universality of the final message is a concomitant of the finality of Prophethood and the doctrine of

1. Q. 33 : 40.
2. Q. 2 : 107.
3. Q. 21 : 107.

the unity of Allah. *Rabbul Alameen* (رب العالمين Lord of the worlds) must ultimately send *rehmat ul lil alameen* (رحمة" العالمين mercy for the worlds) with a universal message of mercy and hope and of warning. This was to stress the unity of mankind, the progeny of one father and mother (Adam and Eve). The Quran says: كان الناس امة" واحدة (Mankind were one community)[1] and وما كان الناس الا امة" واحدة فاختلفو (Mankind were but one community, then they differed).[2]

The object of a universal message is obviously to restore the unity of nationhood of the human race and to inculcate in them the sense of universal brotherhood which must be the hallmark of the one united international Ummah (community) as distinguished from the national *Umam* (امم) or communities of the earlier Prophets. The call for acceptance of the final message by the entire mankind is a call for forging an international Ummah (community) by obliterating all differences based on regional or national loyalties or differences of race, creed or colour.

We may enter a caveat here. Christianity has assumed the form of a world religion but this was far from the mind of Jesus who as stated in the Quran was a messenger to the children of Israel.[3] The position is the same in the New Testament in which Jesus made it clear "I am not sent but unto the lost sheep of the house of Israel" and voiced the correspondence of non-Israelites to dogs. The citation from Mathew[4] to this effect is as follows:—

> 15 : 22—And, behold a woman of Canaan came out of the same coasts, and cried unto him, saying,
> Have mercy on me, O Lord, thou son of David; my daughter is grievously vexed with a devil.

1. Q. 2 : 213.
2. 10 : 19.
3. Q. 3 : 49.
4. *The Bible* (Authorised Version).

15: 23.—But he answered her not a word,
And his disciples came and besought him, saying, send her away; for she crieth after us.

15: 24.—But he answered and said, I am not sent but unto the lost sheep of the house of Israel.
15: 25.—Then came she and worshipped him saying Lord, help me.

15 : 26.—But he answered and said, It is not meet to take the children's bread, and to cast it to dogs.

Jesus said that he had come to fulfil the law. From the word 'law' was meant the Jewish law which was applicable to the Jews only. He said:

"Mathew 5 : 17.—Think not that I am come to destroy the law or the Prophets; I am not come to destroy but to fulfil.
5 : 18.—For verily I say unto you; Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled.

Law thus bound Jesus to the Israelites.

Paul departed from the law and opened the door of the Christian faith to the Gentiles. (See Romans[1] 3 : 20 to 4 : 15; 6 : 14, 15; 7 : 6). Christianity could not have been a world religion if it had been confined to what Jesus said. Paul freed it from the shackles of law and converted Gentiles to Christianity. It became a world religion because of later developments and not because of the Scriptures.

But the Book of Allah 'Al-Quran' declared Islam to be a world religion and the Holy Prophet (pbh) as the bringer of good tidings and a warner for the entire human race (Q. 34 :28) a mercy for the world (Q. 21 : 107) and a Prophet for all the nations (Q. 7 : 158; Q. 25 : 1) Islam thus has the unique distinction of being the only religion divinely proclaimed for the

1. *The Bible* (Authorised Version).

Universe and for treating the whole world as one. Universalisation, internationalisation and cosmopolitanism are gifts of Islam and the finality of Prophethood of Mohammad (pbh).

No religion honours the human race to such a degree as Islam. Man is named by Allah as His Viceroy on the Earth (فى الارض خليفه). (Q. 2 : 30). Though he was fashioned from clay, angels were made to prostrate before him (Q. 2 : 34). He was so taught that his knowledge far exceeded the knowledge of the angels (Q. 2 : 21). Whatever is in heavens and whatever is on earth was made serviceable for him (Q. 31 : 20; Q. 45 : 13). The examples are rivers (Q. 14 : 32), oceans and seas (Q. 14 : 32; Q. 45 : 12; Q. 16 : 14) the sun and the moon (Q. 14 : 33; Q. 16 : 12).

The words سخرلكم (made serviceable unto you) have a much deeper significance than they appear to convey. The serviceability of a thing depends upon the extent to which it can be commandeered unto submission. The authority of man over all objects of nature is acknowledged supreme by the use of the words سخرلكم but the exercise of authority depends upon certain factors *e.g.*, will, knowledge and active control. The subjugation of sea is possible by the knowledge and practice *inter alia* of swimming, diving and fishing and by making boats and ships which may run through it. Resources can be exploited by some undertaking research and others making use of the additional knowledge so gained. If Allah made everything serviceable for mankind is it not its duty to continue opening new vistas of knowledge to conquer it and subordinate it to its wishes? It could be the height of ingratitude if the blessings of Allah are not availed of and none or little effort is made to put them to human use. Allah created man on His own nature. The Quran says:

فاقم وجهک للدين حنيفا فطرت الله التى فطر الناس عليها

So set they face to religion a man of pure faith—God's

original (nature) upon which he originated mankind.[1]

لقد خلقنا الانسان فی احسن تقویم

Allah created man of the best stature[2] and shaped him and made good his shape (Q. 64 : 3; Q. 40 : 64) though he is created from dust then from a drop then from a clot then is brought out as a child (Q. 40 : 67). See also Q. 15 : 28; Q. 23 : 12; Q. 32: 7; Q. 35 : 11 and Q 37: 11 for man's creation from dust. Also see Genesis[3] 2 : 7.

The dignity of man is reflected from the following verse of the Quran:

ولقد کرمنا بنی آدم و حملنٰهم فی البر و البحر و رزقنٰهم من الطیبات و فضلنٰهم علیٰ کثیر ممن خلقنا تفضیلا

> Verily We have honoured the children of Adam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a marked preferment.[4]

Man is thus the most preferred creation of Allah. He was conferred supremacy over other creations because everything on earth was created for him (Q. 2 : 29) and was made subservient to him (Q. 45 : 13). Unlike other species of creation he was endowed with free will اعملو ما شئتم (do what you like) (Q. 41 : 40) and knowledge (Q. 2 : 31, 32), wisdom, power to think and to act. Whoever accepts guidance accepts it for the good of his own soul and whoever errs and deviates errs against his own self (Q. 10 : 108) Allah has sent clear proofs. Whoso sees clearly, it is to his own gain, and whoso is behind, it is to his

1. Q. 30 : 30.
2. Q. 95 : 4.
3. *The Bible.*
4. Q. 17 : 70.

own loss. (Q. 6 : 105) Consequently there is no compulsion in religion (Q. 2 : 256). Whoever disobeys Allah and His messenger and transgresses His limits, will be made to enter Fire to dwell there for ever (Q. 4 : 14). On the other hand those who believe and do good works shall be the rightful owners of paradise (Q. 2 : 82). Having been endowed with knowledge, wisdom and free will mankind is exhorted in the Quran to think and to ponder because:

ان فی خلق السموات و الارض و اختلاف الیل و النهار و الفلک التی تجری فی البحر بما ینفع الناس و ما انزل الله من السماء من ماء فاحیاء به الارض بعد موتها و بث فیها من کل دابة و تصریف الریاح و السحاب المسخر بین السماء والارض لایت لقوم یعقلون

> Surely in the creation of the heavens and the earth and the alternations of night and day, and the ships that run in the sea with profit to men, and the water God sends down from heaven, therewith reviving the earth after it is dead and His scattering abroad in it all manner of beasts, and the turning about of the winds and the clouds obedient between heaven and earth—surely there are signs for a people having understanding. (Q. 2 : 164).

There is considerable emphasis in the Holy Quran on the use of sense, wisdom and understanding (*e.g.* Q. 2 : 170, Q. 5: 58; Q. 5 : 103; Q. 8 : 22; Q. 13 : 2, 4; Q. 2 : 44, 73, 76, 242; Q. 3 : 64, 117; Q. 12 : 2; Q. 2 : 219, 266). Those who do not understand are compared to cattle or even more astray than them (Q. 25 : 44).

In consequence of this supremacy, preferment, dignity, honour, understanding and knowledge the rulership of the earth is reserved for mankind (See Q. 24 : 55; Q. 7 : 129, Q. 6 : 134; Q. 11 : 57). It is clear that the position which Islam gives to man is but next to the Creator. Man is the axis of all the exist-

ing things. Since he has to achieve the ultimate goal of the assimilation of the divine attributes, he has been created of the goodliest of fabric and in the best of moulds (Q. 95 : 4). He has been given power to shape and direct the natural forces around him and to mould them to his own ends and purposes. The Quran repeatedly refers to *taskhir* (تسخير) and tells us that all the earth and the heavens with their resources have been put at the disposal of man who is free to utilise them for his sublime objectives. *Taskhir* is a life-long mission of mankind. "In this process of progressive change God becomes a co-worker with him, provided man takes the initiative."[1] Man has also been "endowed with the faculty of naming things that is to say, forming concepts of them and forming concepts of them is capturing them".[2] In a nutshell God created in man all his qualities and attributes on a limited scale and in suitable quantity created his body with His own hands and breathed into him His own spirit, taught him the names (and their nature) of all things, made the heavens, the earth, the planets and all the natural forces subject to and of service to man. He even commanded the angels to prostrate before man in order to demonstrate the superiority of mankind over the angels and to let them know that man's very appointment to the vicegerency demands the entire universe to be ready to provide all the environmental facilities to man for the execution of his duties and responsibilities as the vicegerent of God. Thus the Quran describes man's position between two extremities. Man should neither be so sublime as to reach the stage of deification nor be so degraded as to be levelled with animals, trees and such other inanimate things. His is the middle course.

Such is the description of the Quran about the mankind as a whole. No other religion of the world whether revealed or not can produce in its scripture or other religious literature such

1. Mohammad Iqbal, *Reconstruction of Religious Thought in Islam*, p. 12.
2. *Ibid.*, p. 13.

detailed and beautiful introduction and description of the creation of man and his qualities. The description reflects the divine love for the last of His creation. This reflection cannot be missed even in those verses and passages in which are enumerated his vices and evils *e.g.* that he is weak (Q. 2 : 153), he is a creature of haste (Q. 21 : 37, Q. 17 : 11), he is emotional, contentious (Q. 18 : 54) elated, boastful (Q. 11 : 9; Q. 11 : 10; Q. 28 : 76), he is anxious (Q. 70 : 19), fretful when evil befalls him (Q. 70 : 20) and grudging when good befalls him (Q. 70 : 21). The object of this enumeration is to set him on the right path and to advise him to reform himself. This objective has some similarity with the object with which the parents chastise their children and enumerate to their faces their weaknesses and vices.

Another important current which runs through the verses concerning mankind is the equality between one and the other, irrespective of any distinction on the basis of sex. The only criterion for superiority is one's virtuous conduct. The Holy Quran says:

يا ايها الناس انا خلقنٰكم من ذكر و انثى و جعلنٰكم شعوبا و قبائل
لتعارفو ان اكرمكم عندالله اتقٰكم ان الله عليم خبير

O' mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another. Lo! the noblest of you, in the sight of Allah is the most God-fearing of you. Lo! Allah is Knower and Aware.[1]

This verse puts it beyond the pale of doubt that all human beings whether male or female, belonging to any country, race or tribe and having any colour, are equal. There is only one criterion for judging the superiority of one over the other and

1. Q. 49 : 13.

that is the extent to which a person is more God-fearing and more virtuous. It would follow that a virtuous woman is superior, according to this test, to a male who does not qualify for that superiority. In respect of equality there is no distinction between a man or a woman.

It may be clarified that according to the Quran belief in Allah, His Prophets, including the Prophet Muhammad (pbh), His revealed books including the Quran, angels and the Day of Judgement is essential. To be counted among the God-fearing and to be included in the category of virtuous in the above Verse (Q. 49 : 13) one must profess, whether man or woman, the above faith. Verse Q. 9 : 71 reads:

و المومنون و المومنات بعضهم اولياء بعض يامرون بالمعروف و ينهون عن المنكر و يقيمون الصلوٰة و يوتون الزكوٰة و يطيعون الله و رسوله اولٰئك سيرحمهم الله ان الله عزيز حكيم

> And the believers, men and women, are protecting friends of one 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 those Allah will have mercy on them. Lo! Allah is Mighty and Wise.[1]

The reverse is the quality of the hypocrites.

المنافقون و المنافقات بعضهم من بعض يامرون بالمنكر و ينهون عن المعروف

> The hypocrites, both men and women proceed one from another. They enjoin the wrong and forbid the good.[2]

It will be observed that what mainly distinguishes Muslims, both men and women, from others is the qualification of the

1. Q. 9 : 71.
2. Q. 9 : 67.

former to enjoin what is good, to forbid what is wrong, to establish prayer, to pay *Zakat* and to obey Allah and His messengers. The hypocrites on the other hand do just the opposite. They enjoin the wrong and forbid the good. It must be assumed that a person who enjoins others to do good himself practises virtue, and one who forbids the wrong abstains from vice. This is the best way to stop vice from flourishing in the community and the society.

There are a number of such verses but I have referred to those only in which there is a specific reference to men and women both to prove that Islam places both of them at the same level in the performances of the most important function of enjoining good and forbidding wrong.

The onerous nature of this duty is revealed in a Hadith reported in *Ibne-e-Maja* that if any one amongst you see the commission of any sin he should attempt to prevent it with all his might. If this be not possible he should orally ask the perpetrator of sin to desist from it. And if even this be not possible he should at least consider it to be vice. This is the lowest degree of faith (ایمان). Enjoining good and forbidding the wrong may sometimes cause violent reaction in persons who are head strong and unruly and may often cause offence to others. The performance of the duty is sometimes fraught with danger. But it makes the Muslim community the best community.

كنتم خير امة اخرجت للناس تامرون بالمعروف و تنهون عن المنكر و تومنون بالله

You are the best community that has been raised from mankind. Ye enjoin right conduct and forbid the wrong; and ye believe in Allah.[1]

But this does not derogate from the general principle of equality of all mankind including both men and women. The division of mankind into two communities, of Muslims and non-

1. Q. 3 : 110.

Muslims, and the superiority of one over the other is nothing but application of the principle in verse Q. 49 : 13 ان اكرمكم عنداللہ اتقكم *i.e.* the noblest of you in the sight of Allah is the most God fearing of you. The Quran therefore enjoins a natural principle which emanates from the above Injunctions:

تعاونو على البر و التقوىٰ و لا تعاونو على الاثم و العدوان

But help you one another in righteousness. Help not one another in sin and transgression.[1]

This applies to dealing between Muslims *inter se* and dealings between Muslims and non-Muslims, alike.

The principle of equality finds elucidation in the traditions of the Holy Prophet (pbh). The inflexibility of the principle establishes that it is a fundamental human right.

The Prophet (pbh) said that people are like the teeth of a comb. الناس سواسية كاسنان المشط (Address at the last *Haj* or *Hajjat-ul-Wida*). This simile is very apt since combing the hair by a comb having unequal teeth is likely to injure the head and such a comb is not useable. The simile thus exemplifies the effect of inequality. In the same address the Prophet (pbh) said:

لا فضل لعربي على اعجمي ولا لاحمر على اسود الا بالتقوىٰ

No Arab has any superiority or excellence over any non-Arab and no red coloured man has any superiority or excellence over any black save in respect of piety and fear of Allah.

In *Sahih Muslim* this tradition is reported in the following words:

لا فضل لعربي على اعجمي و لا لا اعجمي على عربي ولا لابيض على اسود و لا لاسود على ابيض الا بالتقوىٰ

No Arab has any superiority over a non-Arab, nor any non-Arab over any Arab nor any white man over a

1. Q. 5 : 2.

black man, nor a black man over a white man, save in respect of piety and fear of Allah.

This fraternity and equality is not only a matter of form but is indeed a matter of substance. It ensures equality before law and equal protection of law. In respect of equality before law Sharia does not make a distinction between a citizen and head of the State. The head of the State cannot claim any immunity from prosecution or from appearance in Court during the tenure of his office. He has no royal prerogatives. There is no discrimination in the administration of justice between man and man. No juridical right can be reserved for any particular group on consideration of wealth, purity of blood, caste or colour.

The best example of equality before law and equal treatment and equal protection of law is furnished by the reaction of the Prophet (pbh) to a recommendation made by a companion in favour of a woman thief against the imposition of the severe sentence of amputation of hand. The Prophet (pbh) rejoined:

واللہ لو ان فاطمہ بنت محمد سرقت لقطعت یدھا

By Allah if Fatima daughter of Mohammad (pbh) had committed theft, I would have certainly cut off her hand. (Agreed).

Verse Q. 5 : 32 equates killing of any man with the killing of all mankind and saving of any man with the saving of all mankind. The laws of Hudood and Ta'azir are equally applicable to all. In the above Hadith he condemned the making of recommendation in favour of a thief. He also condemned in one of his addresses the different criteria of punishment between the wealthy and the poor which were prevalent among some earlier people. The relevant words of the address are :

ثم قام فاختطب فقال انما اھلک الذین من مثلکم انھم کانو اذا سرق فیھم الشریف ترکوہ و اذا سرق فیھم الضعیف اقامو علیہ الحد

1. *Jami ul Fawad* by Muhammad bin Suleiman Maghribi, Vol. 1, p. 499.

> The Holy Prophet (pbh) then stood and addressed the congregation and said: No doubt the earlier people were destroyed as they left unpunished those among them who committed theft but were influential, and imposed Hadd on those among them for commission of theft who were weak.

Equality before law and equal protection of law are the main principles inherent in the Islamic law and polity. They are the Fundamental Principles of Islam. This equality was taken to such a logical end that the Ist Caliph Abu Bakr in his first address after his election to the Caliphate said to the congregation that they would be within their right to disobey him if he did not keep to the straight path. This was a novel theory in the world of autocracy in which the word of the earthly sovereign was considered to be a law.

There are instances in the history of the Islamic people when the Caliph or the ruler had to stand as an ordinary party before the Court and even an uncultured person could hold the Caliph accountable not only to the Ummah but to him. The way Caliph Omar was asked in public how he could get a shirt prepared from the cloth distributed to each person when one piece of cloth was insufficient for a shirt, provides luminous example of this accountability. Another instance is of Mamun-ul-Rashid. A Bedouin Arab walked straight in his Court and on account of the unceremonious way in which he entered he was stopped by the guards. The Caliph ordered the guards to let him walk to him. He addressed the Caliph by his name without using any honorific title and asked him who appointed him the head of a Muslim State, whether he had assumed the responsibility himself or was elected by the consensus of the Muslim nation? The Caliph answered that he had shouldered the responsibility after the death of his father in the ordinary course of events. Consensus of the learned was the right method but it was not easy to secure. He would therefore appoint him an agent to travel

the realm and secure a consensus in favour of some one; if the consensus was in favour of some other person he would abdicate in his favour. The Bedouin left either satisfied or nonplussed and that was the end of the matter. May be this is an extreme example of امر بالمعروف ونهى عن المنكر (enjoining what is good and forbidding what is wrong), which is the hallowed hallmark of the principle of equality but it establishes without any doubt the scope of the concept of equality in Islam.

The equality between the sexes is maintained in the Quran at various places. The principle of law is that the word 'he' includes 'she', unless the context determines otherwise. This principle is followed in the Quran also. The word *Rajul* (رجل man) may include a woman. But sometimes the masculine and feminine both have been mentioned as being subject to the same injunction. Some examples have already been reproduced. Some of the others are as follows:

من عمل صالحا من ذكر او انثى و هو مومن فلنحيينه حيوة طيبة ولنجزينهم اجرهم باحسن ما كانوا يعملون

Whosoever doeth right, whether male or female and is a believer, him verily, We shall quicken with good life, and We shall pay them a recompense in proportion to the best of what they used to do.[1]

ان المسلمين و المسلمات و المومنين و المومنات و القانتين و القنتت و الصادقين و الصدقات و الصابرين و الصبرات و الخاشعين و الخشعات و المتصدقين و المتصدقت و الصائمين و الصائمات و الحافظين فروجهم و الحافظات والذا كرين الله كثيرا و الذا كرات اعدالله لهم مغفرة و اجرا عظيما

Lo! men who surrender unto Allah, and women who surrender, and men who obey and women who obey, and men who speak the truth and women

1. Q. 16 : 97.

who speak the truth, and men who persevere (in righteousness) and women who persevere, 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 just reward.[1]

و ما كان لمؤمن و لا مؤمنة اذا قضى الله و رسوله امرا ان يكون لهم الخيرة من امرهم و من يعص الله و رسوله فقد ضل ضلالا مبينا

And it becometh not a believing man or a believing woman, when Allah and His messenger have decided an affair (for them), that they should (after that) claim any say in their affair; and whoso is rebellious to Allah and His messenger, he verily goeth astray in error manifest.[2]

فاستجاب لهم ربهم انى لا اضيع عمل عامل منكم من ذكر او انثى بعضكم من بعد فالذين هاجرو و اخرجو من ديارهم و اوذو فى سبيلى و قاتلو و قتلو لاكفرن عنهم سيآتهم و لا دخلنهم جنات تجرى من تحتها لانهار ثوابا من عندالله و الله عنده حسن الثواب

And their Lord hath heard them (and He saith): Lo! I suffer not the work of any worker, male or female, to be lost. Ye proceed one from another. So those who fled and were driven forth from their homes and suffered damage for My cause, and fought and were slain, verily I shall remit their evil deeds from them and verily I shall bring them into Gardens underneath which rivers flow—A reward from Allah. And with Allah is the fairest of rewards.[3]

1. Q. 33 : 35.
2. Q. 33 : 36.
3. Q. 3 : 195.

و من يعمل من الصالحات من ذكر او انثىٰ و هو مومن فا ولائک يدخلون الجنة و لا يظلمون نقيرا

And whosoever 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 a single date-spot (at all).[1]

These verses point out that in all matters man and woman are equal. They are equally entitled to recompense for their virtuous deeds and equally liable to punishment for their vices and sins. They are both entitled to the same honour which is the right of mankind (Q. 17 : 70) and piety determines nobility and superiority of one over the other (Q. 49 : 13). The divine scheme is that all things are made in pairs.

و من كل شئ خلقنا زوجين لعلكم تذكرون

And all things We have created by pairs, that haply ye may reflect.[2]

سبحٰن الذى خلق الازواج كلها مما تنبت الارض و من انفسهم و مما لا يعلمون

Glory be to Him Who created all the sexual pairs, of that which the earth groweth, and of themselves, and of that which they know not![3]

The object of the creation of pairs or two sexes in mankind is revealed in some verses. They are multiplication of human beings, attraction to one another, making them help mate of one another and creation of feelings of love and mercy. Thus one complements the other. The Holy Quran says :

يا ايها الناس اتقوا ربكمالذى خلقكم من نفس واحدة و خلق منها زوجها و بث منهما رجالا كثيرا و نساء و اتقو الله الذى تساءلون به و الارحام ان الله كان عليكم رقيبا

1. Q. 4 : 124.
2. Q. 51 : 49.
3. Q. 36 : 36.

O mankind! Be careful of your duty to your Lord Who created you from a single soul and from it created its mate and from them twain hath spread abroad a multitude of men and women. Be careful of your duty toward Allah in Whom ye claim (your rights) of one another, and toward the wombs (that bore you). Lo! Allah hath been a Watcher over you.[1]

هوالذى خلقكم من نفس واحدة و جعل منها زوجها ليسكن اليها

He it is Who did create you from a single soul, and therefrom did make his mate that he might take rest in her (obtain comfort and tranquillity from her.[2]

The rest of the verse (Q. 7 : 189) is about pregnancy:

و من آياته ان خلق لكم من انفسكم ازواجا لتسكنو اليها و جعل بينكم مودة و راحمة ان فى ذالک الايات لقوم يتفكرون

And of His signs is that; He created for your help mates for yourselves that you might find rest in them (obtain comfort and tranquillity by succumbing to their attracting force), and He ordained between you love and mercy. Lo! herein indeed are portents for folk who reflect.[3]

The women are their helpmates, object of attraction and fit to love and to be loved. From the Quranic language it is clear that there is mutuality in love and mercy. There is also reciprocity in being a helpmate because corresponding liabilities of the mate make him as good a helpmate. The Quran says:

و لهن مثل الذى عليهن بالمعروف و للرجال عليهن درجة

And they (women) have rights (over men) similar to those which according to usage they (men) have

1. Q. 4 : 1.
2. Q. 7 : 189.
3. Q. 30 : 21.

over them. And men are a degree over them.[1]

This verse elaborates the equality of rights and liabilities of men and women. The scope of the edge men have over women shall be discussed later. The Holy Prophet (pbh) declared:

اعن لزوجک علیک حقا و لزورک علیک حقا

Your mates (husband or wife) also have rights over you and your visitors too have rights over you.[2]

He also said:

و لا هلک علیک حقا

And your wife and children have rights over you.

The word زوج (*zauj*) which may be used in the sense of pair or couple may connote equality as well as one being the complement of the other. The word is used both for husband and wife. Each shoe in a pair of shoes is the *zauj* (زوج) of another. Each of the two wheels in a vehicle is a *zauj* of the other.

The word *zauj* (زوج) is an antonym of *fard* (فرد) meaning individual. It means corresponding as well as converse. Winter is the *zauj* of summer.

In the present context we are more concerned with pairing, unity, similarity, correspondence and complemental quality which is the other aspect of *zauj* (زوج). The husband is the *zauj* (زوج) of the wife and the wife is the *zauj* (زوج) of the husband and each complements the other. و اذا النفوس زوجت (Q. 81 : 7) (when souls or persons are reunited) means when people of the same taste or group meet and unite with one another. The words ازواجا منهم (Q. 20 : 131) mean various types of people or things resembling one another.[3]

In the context of *zauj* meaning husband or wife there is a sense of one being complementary of the other very like two

1. Q. 2 : 228.
2. *Bakhari.*
3. *Lughat-ul-Quran* by Parvez, Vol. 2, pp. 819-821.

wheels of the vehicle which must be similar and equal. The sense of equality or companionship on equal basis is there in *zauj* (زوج) as in the English word 'mate'.

It is interesting to note that in order to emphasise this the Quran calls the husband and wife as raiments for one another.

هن لباس لكم و انت لباس لهن

They are raiments for you and you are raiments for them.[1]

While commenting on this verse Peer Muhammad Karam Shah writes in *Zia ul Quran:*

"This portion of the verse requires special consideration. What a stylish description is this of the man and woman relationship. As they are raiments for you so you are raiments for them. From this point of view both have equal rights and liabilities. How meaningful is the simile of clothes.

Briefly speaking dress is a covering. It hides blemishes. It is decoration. It is comfortable and secures from the effects of winter and summer. Is not a good wife for her husband and a good husband for his wife a covering, elegance and comfort? Surely they are ....."

In the commentary of this verse by Maulana Abdul Majid Daryabadi there is no specific observation about equality but in all other respects the same elaboration is to be found.

Generally the verse is understood as meaning that as there is nothing between the dress and the body so there is nothing between the husband and the wife. There is considerable secrecy between them.[2] But keeping in view the modern trends, the two abovementioned commentaries have given a more extended meaning. The view of Peer Mohammad Karam Shah

1. Q. 2 : 187.
2. *Lughat ul Quran* by Parvez, Vol. 4, p. 1477.

that the verse *inter alia* deals with equality of rights between man and woman is more acceptable.

There are specific instances of equality between sexes in the Holy Quran. Allah does not allow the deeds of any person, male or female, to be lost. (Q. 3: 195, Q. 4: 124; Q. 16: 97; Q. 33: 73, Q. 40: 40; Q. 57 : 12). The punishment and liability to punishment of male and female is not distinct. (Q. 2: 178, Q. 5 : 38, Q. 24 : 2; Q. 24 : 4 to 10). In the performance of duty of *amr bil maaroof wa nihi an il munker* (امر بالمعروف و نهی عن المنکر enjoining good and forbidding what is wrong), there is no difference between a male and female (Q. 9 : 71). Like the male, a female is also an individual with right to earn money or property and having full power of disposition over the same (Q. 4 : 32). Every one should be content with whatever be the sex of the child born to him/her. He bestows female upon whom He will, and bestows male upon whom He will (Q. 42 : 49). She is free to contract like a male and her consent for her *Nikah* or marriage is also essential. (See Q. 4 : 3, Q. 4 : 19). The only measure of superiority of one over the other is the extent to which one is more pious and God-fearing (Q. 49 : 13). Islam thus placed man and woman on the same footing in economic independence, property rights, right to contract and legal processes.

At this stage two verses, require consideration. In verse Q. 2 : 228 while declaring about the similarity of rights of man and woman it is stated:

وللرجال عليهن درجة (But men are a degree over them).

The other verse is Q. 4 : 34 which is as follows:

الرجال قوامون على النساء بما فضل الله بعضهم على بعض و بما انفقو

من اموالهم فالصلحت قنت حفظت للغيب بما حفظ الله

Q. 4 : 34.—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

other means, therefore the righteous women are devoutly obedient, and guard in (the husband) absence what Allah would have them guard.[1]

In this verse it is said الرجال قوامون على النساء (Men are *Qawwam* over women).

The word *Qawwam* (قوام) has been generally interpreted as incharge, an authority or ruler.

The root word of *Qawwam* is *Qawama* (قوام) or *Qawama* (قوم). *Qama* (قام) means he stood up; he balanced himself. But when used with *ba* (با) or *'ala* (على) it would mean 'maintain' or 'manage'. *Qama 'ala rajul al marata wa qama 'alaiha* (قام على رجل المرأة و قام عليها) means 'the man maintained the woman, fulfilled her needs and undertook to gratify them.[2] The words *qawama 'ala* (قوام على) mean to provide with means of subsistence. *Qawwam 'ala* (قوام على) would therefore mean a provider, a supporter or furnisher for another with the means of subsistence. It also means manager, caretaker, custodian or guardian. It is for this reason that Abdulla Yousuf 'Ali translates the word *qawwam* as protector. Pickthall translates it as incharge which is the same thing as caretaker or guardian. Arbury interprets it as one who manages the affairs of women. Arbury's translation is misleading since women have independent right to contract, to earn and to dispose of their property.

The sense of provider 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 that the superiorty 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 would not be *Qawwam*. And this is exactly what is

1. Q. 4 : 34.
2. *Lughat ul Quran* by Parvez, Vol. 3, p. 1399.

said in *Al Bahrul Moheet* by Abu Hayyan Undlusi with reference to Qurtubi.

The sense of a provider and protector is very much included in the verse. By calling the male a sovereign, the concept of his having full dominion over her life and property both will have to be imported which cannot 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 husband, the latter is under an obligation to provide for her maintenance, with due regard to his own means as well as the status of the 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. (فضل الله بعضهم على بعض) (Allah has given the one more excellence than the other) connotes the excellence in strength. The word 'strength' includes physical strength. The men are for such reasons in a better position to safeguard the interest of women.

I think the best commentary of this verse is in the tradition of the Holy Prophet (pbh.)

الا كلكم راعى و كلكم مسئول عن رعيته فالامام الذى على الناس راع و هو مسئول عن رعيته و الرجال راع على اهل بيته و هو مسئول عن رعيته و المرأة راعية على اهل بيت زوجها و ولده و هى مسئولة عنهم و عبد الرجال راع على مال سيدة و هو مسئول عنه الا كلكم راع و كلكم مسئول عن رعيته

(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 charge).

راعی (*Raee*) means protector, custodian or a person who is responsible for the development of the thing under his protection and thus he is required to be just and to (properly) look after its interests.[1]

It may be clarified that the word رعی (*Raee*) which is the root word of راع (*Ra'a*) and رعیۃ (*Ra'iyatun*) means to graze, to tend, to take care of, to guard, to protect.

راع (*Ra'ain*) means shepherd, herdsman, guardian, keeper, protector. رعیۃ (*Ra'iyya*) in that sense carries the meaning of 'herd' or 'flock'. The functions of the 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 also exercises the 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 light beating.

The meaning of the verse Q. 4 : 34 will bear out sense of a shepherd and it appears that a part of this Hadith is really a commentary of the verse.

It also appears from the Hadith that the mantle of shepherdhood is not for male only, a female may also be a shepherdess. She enjoys that role over her children. In a case where she is unmarried or a widow or her husband deserts her or there is separation between the spouses, she becomes *Qauwam* 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

1. *Fath ul Bari*, Vol. 13, p. 112.

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 amply clarified by the Hadith.

The same result can be obtained from a reference to Q. 2:223. "Your women are a tilth for you to cultivate." This verse has been generally interpreted as being prohibitory of the commission of unnatural sex act with one's wife. There is however no justification to confine or limit the interpretation. 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[1] has partly referred to this point while commenting upon this verse in *Tadabbur ul Quran*. He say:

> "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 it 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 the 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."

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

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

1. See his *Commentary Tadabbur ul Quran* on Verse 2 : 223.

religion which stresses upon extreme discipline. It is to advance this object that the Holy Prophet (pbh) advised that even during a journey the co-travellers should choose from amongst themselves a chief 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 the evil-doers. These are functions which can 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 of the family during his absence or even non-existence, as is clear from the above Hadith. In fact everyone is enjoined to look after the persons who are in his care.

In classical Roman law, a *patria potestas* 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.[1] The role of *Qawwam* being that of a protector, a manager, or maintainer, the position does not give him any particular dominion over the members of the family. The arrangement has been made to avoid chaos on the principle that each organization should have at the helm of its affairs a final authority or head. It is in this sense only that the man has been given such authority in the home organization.

In verse 2 : 228 on the one hand, mutuality of rights is mentioned and on the other hand, it is said وللرجال عليهن درجة (and men are a degree above them). It means that men excel them in a degree.

The word *daraja* (درجة degree) means to walk very slowly

1. Deuteronomy 21 ; 18-21.

as one walks while climbing up. *Aldaraja* (الدرجة) means one step up on a staircase. Raghib said in *Mufradat*[1] that (درجة) *daraja* and منزله (*manzila*, the place to descend) have the same meaning but *manzila* (منزله) becomes *daraja* when one climbs up. *Daraja* also means a high station for this reason, the word *darajaat* (درجات) means rank and dignity.[2]

Now if the rights of men and women are equal which is the degree by which man excels her. The answer is furnished by verse 4 : 34 that men are maintainers and guardians of women. Ibn Arabi said:

الرجال مشتركان فی الحقوق و للرجال علیهن درجة بفضل القوامها

Mankind are partners in rights (meaning equal partners). Men are a degree above women because of their position of *Qawwam* (maintainer and guardian).

The degree in which men excel women is thus their guardianship and their position as suppliers of their needs. But this degree of excellence does not reduce the position of the woman to slavery or subjection. The male is physically much stronger and has the capacity to protect her from those looking at her with an evil eye. In the division of labour he has been assigned the duty to earn and to spend his earnings on the wife and other members of his household. He has no rights in or claim to the earnings of his wife, her savings or other propetry. His is virtually a liability.

The physical strength is not to subjugate the wife. It is to protect her from other evil-doers. Payment of maintenance is not a sale consideration of the wife. It is to free her from want so that she may be able to devote her time and energy to procreation, bringing up and training her children, and to look after the welfare of the husband.

1. See *Mufradat* on the word درج.
2. *Lughat ul Quran* by Parvez, Vol. 2, pp. 643-644.

As already noticed one of the objects with which the two sexes were created is to produce and develop love among them.[1] This would require the elimination of causes of disruption in the family. There are several traditions which throw light upon this objective. It is related from Mugheera bin Sha'aba:

> "I intended to be betrothed to a woman. The Prophet (pbh) enquired from me, 'Have you seen her.' I said, 'No.' He said, 'See her because it is proper that the two strangers between whom love should be developed, may see one another."[2]

Another Hadith is related from Ibn 'Abbas that the Prophet (pbh) said: "You must not have seen any such thing except *nikah* (marriage) which produces so much love between two persons."[3] It is reported from Anas that the Prophet (pbh) of Allah emphasised the necessity of (institution of) marriage. He advised people to refrain from remaining unmarried. He used to say that one should marry a woman whom he may love and who may increase his progeny.[4] It is reported in Abu Daud that one of the qualifications of woman for marriage is that she should love her husband.[5]

To inculcate love it is necessary that the woman should be a willing party to the marriage. This is ensured in Islam.[6] On the same principle *shighar* (شغار) or exchange marriage is prohibited in Islam. In a *shighar* marriage a person marries his daughter to another on condition that the latter may give his daughter in marriage to the former; no dower is fixed for either marriage.

1. Verse Q. 30 : 21.
2. *Ahmad, Tirmizi, Nasai, Ibn Maja, Darmi, Mishkat,* Hadith No. 2972.
3. *Mishkat,* Hadith No. 2958.
4. *Bahugh ul Maram* by Ibn Hajar Asqalani (Urdu trans.), p. 197, Hadith No. 996.
5. *Mishat,* Hadith No. 2956.
6. *Mishkat,* Hadiths Nos. 2991, 2992, 2998.

There are various traditions allowing dissolution of marriage in which the woman was not a consenting party.

It is related by Khunsa bint i Khudam that her father married her during widowhood to someone. Being displeased with it she complained to the Holy Prophet (pbh) who dissolved the *nikah*.[1]

According to a Hadith related by Ibn 'Abbas a virgin girl appeared before the Holy Prophet (pbh) and complained to him about her marriage which was performed by her father and she was unhappy with it. The Holy Prophet (pbh) gave her the option (to dissolve the marriage.)[2]

Such option to dissolve marriage was given to a slave girl named Buraira after she was emancipated but her husband remained a slave. The most important point in this option was that Buraira refused to act according to the recommendation of the Prophet (pbh) in favour of her slave husband because it was not an order.[3]

In order to keep harmonious relations it is the duty of the husband to treat his wife well. The father of Hakeem Ibn Ma'awiya Qusheiri enquired from the Holy Prophet (pbh) about the right of women over men. He replied: "When you eat, feed her too, when you clothe yourself, clothe her too. You should not slap or abuse her or separate from her save in the house."[4]

Hazrat 'Aisha said that the best person is he who accords best treatment to his wife, children, relatives and servants and is most civil to them, he (the Prophet) (pbh) himself was unparalleled in his treatment to his wives and children.[5]

1. *Ibid.*, Hadith No. 2993.
2. *Ibid.*, Hadith No. 3000.
3. *Ibid.*, Hadiths Nos. 3059, 3060.
4. *Mishkat*, Hadith No. 3119.
5. *Ibid.*, Hadith No. 3113.

The popular opinion was that since the woman is created from a rib which is not straight, she cannot be upright and good. The Holy Prophet (pbh) used this concept as an argument for enjoining better treatment for women. It is reported from Abu Huraira that the Prophet of Allah (pbh) said: "Treat the women well since she has been created from the rib which is crooked. If you try to straighten the rib it will break. If you leave it as it is, the crookedness will not be cured. It is therefore better to behave well with women."[1]

The meaning of this Hadith clearly is that men should not be rough with women nor be indifferent to them. They should treat them well.

Hazrat 'Aisha said that the holy Prophet (pbh) observed that a perfect momin is that believer who has good disposition and is very kind to his wife and children.[2]

Love is thus a reciprocal attitude. It is not required to be one-sided. If both the spouses are actuated by a spirit of self-sacrifice engendered by love, harmonious relationship would be guaranteed. It is true that polygyny is permitted but it is subject to conditions of maintenance of equality between wives, a condition not imposed by any other religion. Consequently a second wife is forbidden to those who cannot accord equal treatment to more than one wife, or who cannot afford to maintain them. Allah enjoins:

و ان خفتم الا تقسطو فى اليتمى فانكحو ما طاب لكم من النساء مثنى و ثلاث و ربٰع فان خفتم الا تعدلو فواحدة او ما ملكت ايمانكم ذالک ادنىٰ الا تعولو

And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot

1. *Ibid.*, Hadith No. 3099.
2. *Ibid.*, Hadith No. 3123.

do justice (to many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice.[1]

One wife only is thus prescribed for those who cannot do justice between two or more.

Another verse is Q. 4 : 129 which enjoins equal treatment to all the wives.

فلا تميلو كل الميل فتذروها كالمعلقة

But turn not altogether away (from one), leaving her as in suspense.[2]

It is however explained in the earlier portion of the same verse that the real equality between wives cannot be maintained even by the best intentioned and most just man, because maintenace of equality and absolutely just treatment is not possible in matters concerning heart meaning love and attraction.

و لن تستطيعوا ان تعدلوا بين النساء و لو حرمتم.....

Ye will not be able to deal equally between (your) wives however much ye wish (to do so).[3]

Islam allowed divorce but considerably reduced its rigours for the unwilling wife. The holy Prophet (pbh) said that divorce was the most abominable of the permitted things near Allah.[4]

Similarly if a woman demands divorce without any cause or reason, the odour of paradise is forbidden for her.[5] Three divorces are provided, one to be pronounced each month and that also during the woman's period of purification. Resort to divorce should be the ultimate device when all doors of com-

1. Q. 4 : 3.
2. Q. 4 : 129.
3. *Ibid.*
4. *Mishkat*, Hadith No. 3139.
5. *Mishkat*, Hadith No. 3138.

promise and amicable solution are closed. In Q. 4 : 34, 35 is provided, the following scheme for reconciliation between quarrelling spouses when the wife is absolutely at fault.

و التی تخافون نشوزهن فعظوهن واهجروهن فی المضاجع واضربوهن
فان اطعنکم فلا تبغو علیهن سبیلا ان الله علیا کبیرا

As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and scourge them (but slightly). Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great.[1]

و ان خفتم شقاق بینهما فابعثو حکما من اهله و حکما من اهلها
ان یرید اصلاحا یوفق الله بینهما ان الله کان علیما خبیرا

And if ye fear a breach between them twain (the man and wife), appoint an arbitrator from his folk and an arbitrator from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware.[2]

These verses prescribe four courses for bringing about reconciliation between spouses to be followed in the same order. The first step is use of all manners of persuasion including admonition, the second is separation in the same home *e.g.* sleeping in different rooms, the third is awarding light physical punishment and the fourth is arbitration. These courses should be adopted only when the fault, is of the wife and she is rebellious. Divorce which is most abominable in the sight of Allah is only the ultimate recourse. Remedies for arbitration and dissolution of marriage are also provided when the husband is at fault and *inter alia* commits, particular wrongs which shall be elaborated later. Complete separation by a woman can be obtained

1. Q. 4 : 34.
2. Q. 4 : 35.

through Court. The woman can also contract at the time of marriage for delegation to her by the husband of the right to divorce herself. In such contingency her power to divorce herself is limited only by the conditions of delegation. *Khula* is another mode of complete separation but it can be obtained either by mutual consent of the spouses *inter alia* on the wife paying consideration to the husband or through Court if they cannot keep the limits of Allah.

Khula is prescribed in verse Q. 2 : 229.

ولا يحل لكم ان تاخذو مما اتيتموهن شيئا الا ان يخافا الا يقيما حدود الله فان خفتم الا يقيما حدود الله فلا جناح عليهما فيما افتدت به ـ تلك حدود الله فلا تعتدوها و من يتعد حدود الله فاولئك هم الظالمون

> And it is not lawful for you that ye take from women aught of that which you have given them except when both fear that they may not be able to keep within the limits of Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman pays consideration (for her liberty). These are the limits of (imposed by) Allah. Transgress them not for whoso transgresseth Allah's limits, such are wrong-doers.[1]

The right of divorce conferred on man is counter-balanced by award to women of right to seek dissolution of marriage and *Khula*, a right denied by other religions. Mutuality was thus maintained in matters of absolute separation too. The principle that divorce or dissolution of marriage might be taken recourse to as a last resort is for both husband and wife.

The right of the husband to divorce his wife unilaterally and the right of the wife to seek complete separation being subject

1. Q. 2 : 229.

either to the consent of the husband or to the imprimator of the Court do not impinge upon the concept of equality. There is wisdom in it which can be partly explained by the emotionalism of the woman which may affect her decisions in domestic matters. However, this problem may be solved by her contracting with the husband for delegation to her of the right to divorce him for reasons or without reasons.

The injunctions regarding divorce and *Khula* (Q. 2 : 229) were revealed to give relief to the woman from the highhandedness of the male. It was customary among the Arabs, and this custom remained in vogue during the early days of Islam, too, that the husband would divorce the wife and after keeping her under a state of suspense for an indefinite period would retract it. He would repeat this formula as many times as he liked and caused her untold mental agony by his neglect. The poor wife could not seek any relief from any quarter against the cruel and arbitrary conduct of the husband. This relief was provided by the Quran and the Sunnah in the form of injunctions which pertain to the stage of finality of divorce, the provision of arbitration, the right of the wife to seek dissolution of marriage or *Khula* and the right to contract for delegation of the right to divorce which is the natural consequence of the freedom of the right to contract.

The injunctions about *Zihar* and *Ela* are also meant to provide relief to woman against the arbitrary conduct of husband.

Ela was an oath to refrain from having carnal connection with one's wife perpetually, or for a time. Some men took such oath in order to cause harassment and torment to their deserted women. They maintained the marriage tie but refrained from the performance of marital obligations. Islam put an end to this tyranny by providing a period of 4 months during which the husband can break the oath on payment of expiation or the marriage shall stand dissolved. The Holy Quran dealt with this injunction with reference to oaths whether unintentional or

absurd and intentional. Verses Q. 2 : 226, 227 deal with the effects of the above-mentioned oath.

Opinions differ whether the marriage stands automatically dissolved after the expiry of four months, or the expiry of the prescribed period gives the wife a right to seek judicial divorce. The first is the view of the Hanafi lawyers while the second view was held by Shafei Jurists. This, however, is beyond the scope of this chapter. It would be sufficient to stress here that the two verses were revealed to provide relief to the women against the tyranny of the men.

Zihar is repudiating one's wife by likening her to the back of one's mother or of any other woman related to him within the prohibited degree, not by affinity, but by consanguinity or fosterage.[1] Islam treats it as an inchoate divorce since the wife has a right to refuse herself to him until he performs penance. In default of expiation by penance the wife has the right to apply for a judicial divorce.[2] In verse Q. 33 : 4 the pre-Islamic concept that calling wife as mother amounts to repudiation of the marriage, was disavowed on the ground that just as existence of two hearts in one man is an impossibility so existence of two mothers for one man is not possible. The verse is as follows:

ما جعل الله لرجل من قلبين فى جوفه و ما جعل ازواجكم الئ
تظهرون منهن امهٰتكم و ما جعل ادعياءكم ابناءكم ذالكم قولكم
بافواهكم والله يقول الحق و هو يهدى السبيل

Allah hath not assgined unto any man two hearts within his body, nor hath He made your wives whom ye declare (to be your mothers) your mothers, nor hath He made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But Allah saith the truth and He showeth the way.[3]

1. *Al Sharia* by Sarkar, Vol. 2, p. 916.
2. *Mohammadan Law* by Mulla, para. 318.
3. Q. 33 : 4.

Such immediate divorce is contrary to the scheme of divorce in the Quran, according to which a number of opportunities are provided for reconciliation. Express injunctions were therefore, revealed to discredit as well as to discourage the practice. The disavowal was made in verse Q. 58 : 2 that to call one's wife as one's mother is a lie because the mother is one who gives birth. To discourage the practice penance is provided in the next two verses, for resumption of relationship. It is freeing of a slave, or fasting for two months successively or feeding sixty needy ones.

Prior to Islam the marriage of a widow was looked upon with disfavour though a widower could marry as many wives as he liked. Often after the death of the husband, the widow was bound to go with any of his heirs who covered her with his covering cloth. Islam abolished this custom by enforcing the injunction in verse Q. 24 : 32 وانكحوا الايامى منكم (and marry the widows from among yourselves).

The Holy Prophet (pbh) favoured the widow's re-marriage much before he received the commission for Prophethood. He himself married a widow namely Hazrat Khadija tul Kubra who was older to him in age. Of his ten wives whom he married after her death, nine were widows while only one, namely Hazrat 'Aisha was a virgin. By providing for widow's remarriage an important cause of inequality was eliminated.

The worst custom among the Arabs, which was common among some other peoples of the world too, was that of murdering their children, particularly the girls. These murders were actuated by three main causes. The first cause was sacrificing the children to idols, the second was killing them for economic reasons on account of poverty and the third cause for which only daughters were singled out, was the false concept of shame which they were likely to undergo when giving them in marriage and thus virtually selling their chastity to a bidder. Sometimes the apprehension of their being taken away in captivity during

depredations by stronger warring tribes, also served as a motive for murdering daughters.

Islam put an end to this macabre and gruesome tendency. The Quran condemned the killing for the first reason in the following verse:

وكذالك زين لكثير من المشركين قتل اولادهم شركا ؤهم ليردوهم و ليلبسو عليهم دينهم و لوشاء الله ما فعلوه فذرهم و ما يفترون

Q. 6 : 138.—Thus have their (so-called) partners (of Allah) made the killing of their children to seem fair unto many of the idolators, but they may ruin them and make their faith obscure for them. Had Allah willed (it otherwise), they had not done so. So leave them alone with their devices.[1]

قد خسر الذين قتلو اولادهم سفها بغير علم

They are losers who besottedly have slain their children without knowledge.[2]

In verses Q. 17 : 31 and Q. 6 : 152 is pointed out the grave error and sin of murdering one's children for economic reasons and poverty :

ولا تقتلو اولادكم خشية املاق نحن نرزقهم و اياكم ان قتلهم كان خطأ كبيرا

Slay not your children fearing a fall to poverty. We shall provide for them and for you. Lo! then slaying of them is great sin.[3]

و لا تقتلو اولادكم من املاق نحن نرزقكم و اياهم

Q. 6 : 152.—And that ye slay not your children for penury. We provide to you and for them.[4]

1. Q. 6 : 138.
2. Q. 6 : 141.
3. Q. 17 : 31.
4. Q. 6 : 152.

The Quran describes disapprovingly the feeling of rage and sorrow which the Arabs entertained on account of apprehension of shame on hearing of the birth of a daughter. It says:

و اذا بشر احدهم بما ضرب للرحمان مثلاً ظل وجهه مسوداً و هو كظيم

Q. 43 : 17. And if one of them hath tiding of that which he likeneth to the Beneficent one his countenance becomes black and he is full of inward rage.[1]

و اذا بشر احدهم بالانثى ظل وجهه مسودا و هو كظيم يتوارى من القوم من سوء ما بشر به ايمسكه على هون امريدسه في التراب الا ساء ما يحكمون

When if one of them receiveth tidings of the birth of a female, his face remaineth darkened and he is wroth inwardly. He hideth himself from the folk because of the evil of that whereof he hath had tidings, (asking himself): Shall he keep it in contempt or bury it beneath the dust. Verily evil is their judgment.[2]

By condemning the feeling of rage the Quran condemns the slaying of female children.

The murder of a girl is murder of an innocent child. The condemnation of murder is best illustrated by the query of Allah to the murdered girls.

And when the girl-child that was buried alive is asked. و اذاالموءدة سئلت[3]

For what sin she was slain. باى ذنب قتلت[4]

Verses Q. 16 : 58, 59 and Q. 43 : 17 portray the correct feelings of the Polytheists of Arabia. When a child girl was

1. Q. 43 : 17.
2. Q. 16 : 58, 59.
3. Q. 81 : 8.
4. Q. 81 : 9.

born the house became a house of mourning. The face of the father was darkened by intense sorrow. He hid himself on account of shame. The tribes of Muzir, Khaza'a and Tameem buried their daughters alive fearing that they might be sought in marriage by persons belonging to different tribes or brotherhood of lower status or that poverty overtake them. It was customary with them that when the girl child was six years' old the father would dig a pit, and order the child's mother to bathe and clothe her in beautiful raiments. He would then take her with him and push her inside the pit and bury her in it. Sometimes girls were strangulated mercilessly.

Islam placed the woman on a high pedestal and engendered in the hearts of her parents sentiments of love, affection, mercy and sacrifice. Some of the traditions of the Holy Prophet (pbh) are most pertinent in this respect:

1. It is related from Hazrat 'Aisha: If daughters are born to a person and he treats them benevolently and beneficently, he will be secured by them from the fire of hell.
2. It is reported by Anas bin Malik: He who brings up two girls till they attain puberty, will come on the Day of Judgement and he and I will be like this. Saying this the Prophet (pbh) joined his fingers (*Muslim*).
3. It was reported by Abdullah that: If a girl child is born to some one and he brings up her well and educates and trains her well and whatever mercy is shown to him by Allah is showered by him on his daughter, that girl will be a screen and a curtain for him from the fire of hell.[1]

In the last Hadith stress is laid not only on keeping them alive but also upon their nice upbringing, good education and excellent training. This is in contrast to the slaying of the girl. The reverse of slaying is keeping alive. But why this emphasis on nice upbringing and education? The answer is furnished

1. Qurtubi—See *Ziaul Quran*, commentary on verses Q. 16 : 58-59.

by the meanings of the word *Qatlun* (قتل). The word signifies slaying or slaughtering. It also means to abase, to insult, to debase, and to make one bow before him.[1] Ibne Fars said that it means to humiliate as well as to kill.[2] The Quranic verse Q. 80 : 17 قتل الانسان ما اكفره (Man is destroyed, how ungrateful he is?) describes the abasement, humiliation, insult, destruction and ruin of those who deny the divine law. Similarly قاتلهم الله (Q. 63 : 4) (Allah confound them) means that Allah humiliate and disgrace them; Allah destroy them; Allah subdue them. The Quranic phrase قتل الخرامون (Q. 51 : 10) (accursed be the conjecturers) has the same meaning.

Similarly Raghib writes that in the verse (Q. 17 : 31) لا تقتلو اولادكم خشية املاق (do not slay your children for fear of poverty) and (Q. 6 : 152) و لا تقتلو اولادكم من املاق (Do not slay your children for penury) the words *La taktalu* (لا تقتلو) do not mean the actual murder of the children but connote their deprivation of education and upbringing. As compared to this keeping them alive (*Istehya* استحياء) means to educate them and to confer on them sagacity and intelligence.

In the context of degradation and abasement the word قتل (*Qatlun*) means to reduce one to such a state that none cares for him or pays attention to what he says and he is absolutely ineffective. اقتلو فلانا (*uqtulun fulanan*) means make him as if he is one among the dead.

It therefore appears from the last Hadith that in order to keep away the children from *Qatl* (قتل slaying) it is necessary that they should be well bred, well educated and well disciplined. In this sense of the word the Muslims in the world generally appear to be guilty of *Qatle aulad* (قتل اولاد virtual slaying of the children).

Thus Allah reformed or abolished all customs which victimised the women and enjoined that they be given their rights

1. *Mufradat ul Quran* by Raghib.
2. *Lughat ul Quran* by Parvez, Vol. 3, p. 1328.

and be treated well. It is forbidden to inherit forcibly from the women (Q. 4 : 19) or to take away from them a part of what they have given to them (*Ibid.*), to marry more than one wife if he (the husband) cannot do justice between two or more (Q. 4 : 3) to enter their houses without permission (Q. 24 : 27) to restrain a divorcee from remarriage (Q. 2 : 232) or to harass women (Q. 65 : 6). It is enjoined to pay women their dower (Q. 4 : 4; Q. 4 : 24; Q. 5 : 5; Q. 60 : 10) and to pay half of the dower to them if marriage is dissolved before consummation (Q. 2 : 237) to give full dower even to orphan girls (Q. 4 : 127), to pay maintenance to wives and during *iddat* to divorced women (Q. 2 : 241) to pay to divorced women at the time of divorce according to one's means, to lodge such woman where he dwells and if they are with child to provide for them till they bring forth their burden (deliver), then if they suckle the child for them to give them their due payment (Q. 65 : 6) to be kind to women (for if you hate them it may happen that you hate a thing wherein Allah hath placed much good) (Q. 4 : 19) and to pay the appointed heirs their due share (Q. 4 : 33).

These directions whether in the nature of injunctions or prohibition and similar other orders were clearly recorded to resuscitate her dignity as a human being, to make her conscious about her equality with the male species, and of her general as well as specific rights and if need be to fight for them, to remove from her the feeling of inferiority complex engenderd in her by the highhandedness of man for thousands of years and to make her as dignified and self-respecting a member of the society as her male counterpart. And it is the duty of man to assist her in the achievement of these objects and not to place restrictions in her way. He should avail of his physical might in defending his mate, in providing for her maintenance and the maintenance of her children and in safeguarding her rights. His strength is not for suppressing or exploiting her.

The women in the villages have customarily to work not

only for keeping the house but also in helping the male in cultivation and agriculture. They prepare meals for the male members of the house, take their food to the fields, graze the animals, cut grass for them and feed them, help them in harvesting the crops, fetch water in big jars from the wells and sometimes from long distances and also they perform scores of other duties with the result that sometimes in their early thirties they look quite old and die prematurely. Among tribes instances are not rare where the men only roam with guns in hands and the women do everything including tending of flocks and herds of animals. Sometimes in hilly tracts where water is scarce they have to fetch water from long distances on their heads. But it is strange that the religious leaders who are never tired of reminding women of their duties to their Qawwam, their duty to remain closetted in the house and to confine their activities to the household work do not raise their little finger against injustices to women.

Quran put an end to all the customs which victimised the wife and daughter. This amounts to stopping discrimination between a male and a female. The children have also been persistently enjoined to be kind to their parents.[1] Some of the verses are reproduced below:

و وصينا الانسان بوالديه حملته امه وهنا على وهن و فصاله فى عامين
اناشكرلى ولوالديک الى المصير

And We have enjoined upon man concerning his parents. His mother beareth him in weakness upon weakness and his weaning is in two years—Give thanks unto Me and unto thy parents. Unto Me is the journeying.[2]

و قضى ربک الا تعبدو الا اياه و بالوالدين احسانا اما يبلغن
عندک الكبر احدهما او كلهما فلا تقل لهما اف ولا تنهرهما و قل لهما
قولا كريما

1. Q. 29 : 8; Q. 31: 14, 15; Q. 46 : 15; Q. 2 : 83, 180; Q. 17: 23-24.
2. Q. 31 : 14.

> Thy Lord hath decreed, that ye worship none save Him, and (that ye show) kindness to parents. If one of them or both of them attain to old age with thee say not "Fie" upon them nor repulse them but speak into them a precious word.[1]

The importance of the injunction in verse Q. 17 : 23 is evident from the fact that the injunction about parents follows immediately the injunction to worship none save Allah. The Holy Prophet (pbh) also kept this order in view when he said as reported by Abi Bakr "(O' companion) May I tell you which is the worst sin? We said yes! (do tell us). The Prophet of Allah (pbh) said the biggest and worst sins are to make partners of Allah and to disobey the parents.[2]

The Holy Prophet (pbh) ordered his Ummah not to abuse another person's parents because he might retort by abusing his parents and this would amount to abusing his own parents. It is reported from Abdullah bin Amar that the holy Prophet (pbh) said: "The greatest sin for a person is to condemn his parents. He was asked! O Prophet of Allah (pbh) how can a person condemn his (own) parents. He said "by abusing the father of another person who in turn abuses his father and mother."

As between parents priority is to the mother obviously for the reason given in verse Q. 31 : 14. It is reported from Abu Huraira that: A person came to the Holy Prophet (pbh) and enquired: 'who among the people is most worthy of my good treatment'. The Prophet (pbh) said: 'Your mother.' He asked: 'who else'? The Prophet (pbh) said 'Your mother'. He asked 'who else'! The Prophet (pbh) said: 'Your mother'. He (again) asked 'who else'! The Prophet (pbh) replied 'then your father').

1. Q. 17 : 23.
2. *Sahih Bukhari.*

This Hadith determines the position of a woman *vis-a-vis* her sons and daughters.

In another Hadith the Holy Prophet (pbh) said that even after the death of the parents this good treatment should not cease. The sons etc. should continue to pray for their salvation. This prayer is also prescribed in the Holy Quran:

ربنا اغفرلی ولوالدی و للمومنین یوم یقوم الحساب

Our Lord! forgive me and my parents and believers on the Day of Judgement.[1]

This is Abraham's prayer but is meant for every Muslim.

The Quran is also explicit about the scope of obedience to the parents (Q. 31 : 15, Q. 46 : 15): that it should not extend to making partners with Allah.

In view of the mutuality as discussed above if the male has certain duties to discharge towards the female, the latter is also required to discharge certain obligations towards the male. Verse Q. 4 : 34 underlines the qualities of good women, "So good women are the obedient, guarding in secret that which Allah hath guarded *i.e.* their chastity and husband's property."

The Holy Prophet (pbh) said: "The best wife is one that when you see her (you) are delighted, if you ask her to do something obeys you and when you go out guards her chastity and your property." (Abu Huraira, Ibn Jareer).

It is reported by Anas that the Holy Prophet (pbh) said that a woman who offers regularly her five times daily prayer, fasts during Ramazan, guards her chastity can enter paradise from any of its doors according to her wish.[2]

In another report it is said that if her husband is pleased with her she shall enter paradise.[3]

1. Q. 14 : 41.
2. *Mishkat*, Hadith No. 3114.
3. *Ibid.*, Hadith No. 3116.

Another duty which a woman owes to her husband is to abide by his wish in matters of sex as approved by the Quran. She should not be unwilling to meet his demands (except for valid reasons), however inopportune and untimely they may be.[1]

There is much wisdom behind this injunction. The main object of *nikah* (marriage) is to keep the man and woman from having any extra marital relationship. This can be achieved by full satisfaction of sexual craving. Sometimes a man is momentarily attracted towards another woman. Carnal relationship with the wife may be the remedy for the ill that such attraction may entail. For this reason the Holy Prophet (pbh) enjoined: When someone from you is attracted towards a woman and his heart is affected by her, he should go to his wife and have carnal relations with her. This will relieve him of his fancies.[2]

This is the reason why so much emphasis is laid on sexual satisfaction. The Holy Prophet pbh admonished that "if a man calls his wife to make love to her and she does not comply with the demand and as a result the husband is unhappy with her, the angels condemn such woman till morning."[3]

This is not however something unilateral. It is the duty of male also to keep his wife fully satisfied in this respect. This is his foremost duty which is more important than the supply to her of her other requirements.[4] The laws as enunciated by the four Sunni Schools of thought (Hanafi, Shafie, Maliki and Hanbli) make it incumbent upon a man to keep his wife chaste according to his capacity and potentiality.[5]

The fitness of a woman for *nikah* can be adjudged from the following factors: (1) she is virtuous, (2) she is obedient, (3) she

1. *Ibid.*, Hadith No. 3117.
2. *Muslim*, Kitab ul Nikah.
3. *Bukhari, Muslim and Abu Daud*, Kitab ul Nikah.
4. *Fatawa Ibn Taimiya*, Vol. 1, p. 56.
5. *Kitab al Fiqh al al Mazahib ul Arba'a*, Vol. 4, p. 4.

is pleasing to the sight, (4) she fulfils her oath and (5) she guards her chastity and husband's property during his absence.[1]

Verse Q. 4 : 34 deals with some corrective chastisement to the women. The first portion of the verse deals with mutuality of rights of men and women. The second part deals with the qualifications of good women. Both these parts have already been commented upon. The third part deals with the methods of dealing with rebellious women who hate or do not like their husbands. It reads:

و التی تخافون نشوزهن فعظوهن و اهجروهن فی المضاجع وا ضربوهن
فان اطعنکم فلا تبغو علیهن سبیلا ان الله علیاً کبیرا

As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and beat them. Then if they obey you, seek not a way against them. Lo! Allah is ever High, Exalted, Great.[2]

This is applicable to women who are rebellious and extremely bad tempered and do not act on the instructions of the husbands because of their haughtiness and contempt for them. The word *nashooz* (نشوز) in the context of marital relationship means such conduct of the husband or wife as is evidence of opposition, hatred, disobedience, maltreatment of and extreme peevishness for the other.[3] The word *Takhafoon* (تخافون if you fear) does not mean only apprehension, imagination or conjecture but connote knowledge and certainty.[4] The course prescribed in this verse can be followed only if there is actual rebellion on the part of woman. The first alternative is of oral admonition, the second is to keep the woman away from his bed, and the third is to inflict some physical punishment.

1. *Mishkat*, Hadith No. 2960.
2. Q. 4 : 34.
3. *Lughat ul Quran* by Parvez, Vol. 4, p. 1622.
4. Qurtubi, *cf. Zia ul Quran* by Peer Mohammad Karam Shah, on verse Q. 4 : 34.

Now what is the extent of this punishment. While enumerating the rights of a wife or her husband the Holy Prophet (pbh) observed that she should not be hit at her face or abused or separated except in the house itself.[1] The Holy Prophet (pbh) forbade beating one's wife in the manner that a slave is beaten as they may have to make love together in the later part of the day.[2] This clearly indicates that if one is compelled to use corrective bodily chastisement, it should be slight and trifling so that at the time of love making the memory thereof is erased. Ibn Abbas interpreted this verse as meaning that the beating may be given with some light article like tooth brush (*miswak* مسواك). No mark of injury should be left on the body. According to Qurtabi the beating in this verse is corrective beating and not violent and severe beating.[3]

In the modern age those people who have till recently been retrogressive in their behaviour towards women and have now started championing their cause are abundantly critical of private violence of the husband against the wife and to such people the Quranic verse permitting beating may be a matter of disapprobation. But this criticism overlooks the nature of the dominant male for whom thrashing an obedient wife may be a matter of little consequence. To administer physical punishment to women in societies in which the woman is not treated with the respect due to her, may be an every day affair. It is not, therefore, difficult to understand how the Arabs of the pre-Islamic period who considered the birth of a daughter a matter of disgrace for them, treated their women. The fate of a rebellious woman is much easier to understand on this anology. The Quran permits light beating of rebellious women only. Where beating, and cruel beating for the matter of that, might have been the immediate alternative only merciful beating has

1. See *Mishkat*, Hadith No. 3119.
2. *Mishkat* Hadith No. 3103.
3. *Zia ul Quran*, on verse Q. 4 ; 34.

been allowed and in order of priority is made the third alternative after firstly the admonition and secondly separation from the marital bed. The jurists allow such beating by a tooth brush only.

Another important point to consider is that this is only a permission granted with the object of minimising the chances of divorce, or irrevocable separation. It is not obligatory but is allowed only keeping in view the human nature. The habitual beating of woman by the husband is cruelty which is a good ground for dissolution of her marriage through court.

I can speak with confidence about the Pakistani society. Among the unlettered and poor people one may find instances of occasional beating of women but it is extremely rare in cultured, educated and civilised middle and upper classes. On the other hand, in the West, the beating of women has provoked an outcry in the Press. In the United States of America articles on private domestic violence were published in the *Time Magazine* dated 5th September, 1983. Although there were no statistics but it was estimated that at least six million women are beaten by their husbands. In one Article it is said:

> "There is nothing new about wife beating. It has always happened everywhere. Often it is accepted as a natural and regrettable part of a woman's status as her husband's property. Throughout history unlucky women have been subjected to the whims and brutality of their husbands. The colloquial phrase "rule of thumb" is supposedly derived from the ancient right of a husband to discipline his wife with a rod 'no thicker than his thumb'. In the U. S. the statistics reflect no unprecedented epidemic of domestic violence, but only a quite recent effort to collect figures—often inexact but startling even when allowances are made for error—on what has always existed.
>
> Nearly six million wives will be abused by their husbands in any one year.

Some two thousand to four thousand women are beaten to death annually..."

What has lately happened in the U. S. is that: beating is no longer widely accepted as an inevitable and private matter, 'and private violence is becoming less private!' because women have started talking.

Islam thus enjoins to put an end to private violence by allowing a little leeward for corrective but very light retribution of women when they are rebellious and the two measures of admonition and separation from the marital bed have failed. Keeping in view the dominant and aggressive nature of man it plans for the amelioration of the fate of women. In brutality it stands no comparison with the ancient 'rule of thumb' in the West. The object of the verse clearly is to put an end to merciless and brutal battering of women by enraged husbands.

The next verse (Q. 4 : 35) concerns arbitration between the husband and the wife in order to bring about compromise between them.

It may be reiterated that verse Q. 4 : 34 provides the procedure for correcting the rebellion of a woman. Verse Q. 4 : 128, on the other hand deals with a case in which the husband is at fault and ill-treats the wife or deserts her. The Quran commends peace between husband and wife in that case too, but if this is not possible it allows them to separate through the process of Khula.

A question may arise! Why so many options have been given to the husband to correct the wife's rebellion and the wife has been given only the last option of reconciling with the ill-treating husband through dialogue or arbitration. One answer is that the husband has the right to unilaterally divorce the wife and the options described in verses 34 and 35 of Chapter 4 are meant to delay the exercise of that right by the husband so that some way may be found to reconcile the differences between the spouses

to enable them to live in peace and harmony in future. The options are decidedly advantageous to the woman who does not like to be divorced. Another ground may be that man is physically strong while a woman is weak in physique and is tender. She is not generally strong enough to beat him. Her admonition or keeping away from the marital bed may only exacerbate matters and provoke him to batter her with fist and sticks. In the case of a woman the sanctions necessary for the applicability of rule in verse 34 are missing.

Certain traditions are ascribed to the Holy Prophet (pbh) on the lines of the following proverbs:

(1) A man can bear anything but the mention of his wives.
(2) Trust neither a king, horse, nor a woman.
(3) Women are the whips of Satan.
(4) What has a woman to do with the councils of nation.
(5) Obedience to a woman will have to be repented.[1]

These are really the ancient Arabic proverbs of the people about whom verse Q. 16 : 58, 59 says:

"When any one of them has tiding of a female child, his face is overclouded and black, and he has to keep back his wrath. He skulks away from the public for the evil tidings he has heard. Is he to keep in disgrace or to bury it in the dust."

It is reported from Ibne Umar that the Holy Prophet (pbh) said that ominousness is (to be found) in women, house and horse.[2]

Abu Saeed Khudri reports that the Holy Prophet (pbh) said "the world is very sweet and green Allah make you a vicegerent in it. He will see how you act. Save yourself from the world and save yourself from women because they were the first mischief among the children of Adam.[3]

1. *Dictionary of Islam* by Hughes.
2. *Mishkat*, Hadith No. 2952, *Muslim, Bukhari.*
3. *Mishkat*, Hadith No. 2951; *Muslim.*

A nation which entrusts the affairs of its Government to women cannot be prosperous.[1]

The last mentioned tradition will be dealt with during the discussion of lawfulness for a woman to hold a public office. The first tradition that women are ominous may be a *jahilya* concept but it cannot be the utterance of the Holy Prophet (pbh) who had to say nothing but good about women and who raised them from the most lowly state to the state of humanity. Moreover to take omen was the practice of polytheists and not Muslims.

The other tradition reiterates indirectly the Christian belief of the original sin obviously no reliance can be placed on such traditions which appear to be spurious and to have been forged by those who had a bias against women. If the womenfolk were ominous and source of mischief the Divine revelations would not have been what they are and such prayer could not be for women:

ربنا هب لنا من ازواجنا و ذريتنا قرة اعين واجعلنا للمتقين اماما

Our Lord! Vouchsafe us comfort of our wives and of our off spring, and make us patterns for (all) those who ward off evil.[2]

Traditions which are disparaging to the women in general are directly in conflict with the Quran, which makes them equal with men. At the end of this chapter may be cited a passage from *The Social Structure of Islam* by Reuben Levy[3] whose bias against Islam is proved from the book:

"Women were obviously not meant by the Quran to be excluded from religious duties, and, so far as they are good believers, they are regarded as the equals of men, being like them offered the reward of paradise for true faith. A

1. *Bukhari.*
2. Q. 25 : 74.
3. Pp. 129-130.

significant passage in the Quran enumerates the persons whom the Prophet (pbh) regards as possessing the qualities of the faithful... (quotes verse Q. 33 : 35)... Trustworthy historical tradition shows that even after the Prophet's (pbh) time all Muslims without regard to sex were treated alike by authority. Thus the Prophet's (pbh) 'substitute (Khalifa) Abu Bakr, divided the spoils of war equally between all the members of the community of Islam, young or old, bond or free, male or female."[1]

The correct position is that Islam does not discriminate between man and woman.

1. *Cf. Kitab ul Kharaj* by Abu Yousuf (Bulaq 1302), p. 24.

SEGREGATION OF WOMEN OR PARDAH

The question whether Islam enjoins segregation of women or their confinement within the four walls of houses has assumed importance in this age because of the conflict between two extremes. The educated women under the Western influence are on one extreme while the religious scholars are on the other. The problem requires reassessment and reconsideration in the light of the requirements of the modern age when the old customary *pardah* stands virtually abolished.

The following two injunctions furnish a clue to the *raison d'etre* and the scope of the verses about what is ordinarily known as seclusion of women:

قل للمؤمنين يغضو من ابصارهم و يحفظو فروجهم

Tell the believing men to lower their gaze and be modest...[1]

و قل للمؤمنات يغضن من ابصارهن و يحفظن فروجهن

And tell the believing women to lower their gaze and be modest...[2]

What is common in them is the equality in matter of chastity and in lowering their gaze on seeing one another which postulates the possibility of each crossing the path of the other. If the women are required to be covered from head to toe as the religious scholars would like them to be on their visit to public places no occasion would arise for the menfolk acting according to the injunction in verse Q. 24 : 30. A woman can see men from inside her covering. But in that case by complying with the letter of the injunction and keeping her gaze lower she incurs the risk of stumbling or knocking against other passers-by. Evidently the two verses assume that the male and female

1. Q. 24; 30.
2. Q. 24: 31.

can see one another which is possible only when the woman is not in a veil or does not cover her face. The *raison d'etre* is that both the sexes should remain chaste and with this object in view they should avoid gazing at one another. The responsibility is reciprocal and not of the women alone to observe strict veiling of her face in order to save men from opportunities of being attracted towards them.

The women do have certain additional responsibilities but they are not in the nature of those proposed and stressed upon by the religious scholars. These liabilities are provided in the remaining portion of verse Q. 24 : 31 which may be reproduced below:

ولا يبدين زينتهن الا ما ظهر منها وليضربن بخمرهن على جيوبهن ولا يبدين زينتهن الا لبعولتهن او آبائهن او اباء بعولتهن او ابنائهن او ابناء بعولتهن او اخوانهن او بنى اخوانهن او بنى اخواتهن اونسائهن او ما ملكت ايمانهن او التابعين غير اولى الاربة من الرجال او الطفل الذين لم يظهرو على عورت النساء ولا يضربن بارجلهن ليعلم ما يخفين من زينتهن و توبو الى الله جميعا ايه المومنون لعلكم تفلحون

And to display of their adornment only that which is apparent (*illa ma zahara minha*) and to draw their veils over their bosoms, and not to reveal their adornment save to their own husbands, or fathers or husband's fathers, or their sons or their husband's sons, or their brothers or their brother's sons or their sisters' sons, or their women or their slaves, or male attendants who lack vigour, or children who know nought of women's nakedness. And let them not stamp their feet so as reveal what they hid of their adornment. And turn unto Allah O believer, in order that ye may succeed.[1]

1. Q. 24 : 31.

In addition to lowering their gaze women are required:

(1) to desist from making a show of their ornamentation and adornment except to the extent of that which is apparent (*illa ma zahara minha*),

(2) to cover their bosoms, and

(3) to stop from stamping their feet to reveal of what they hide of their adornment.

The verse includes the list of persons before whom all adornments may be revealed. But it provides an exception to this rule. There are some adornments which may be revealed before others too. The exception is indicated by the words *ma zahara minha* (that which is apparent) which, according to the Hanafi jurists, includes face and hands. The principle may be summarized thus that only the face and hands (and according to one view, the feet) may be left uncovered before strangers which means those who do not appear in the list.

Another verse (Q. 33 : 59) commands women to use an outer garment while going out.

يا ايها النبى قل لازواجک و بنتک و نساء المومنين يدنين عليهن من جلابيبهن ذالک ادنىٰ ان يعرفن فلا يؤذين و كان الله غفور رحيا

O Prophet (pbh)! Tell the wives and thy daughters and the women of the believers to draw their gowns or outer garments close round them (when they go abroad). That will be better so that they may be recognised and not annoyed. Allah is ever Forgiving, Merciful.[1]

It may be explained that 'gown or outer garment' is the translation of the word '*Jilbab*' plural of which is '*Jalabeeb*' and has been used in the verse. The orthodox interpret the word as veil which may cover the face also. This point shall be attended to later.

The reason for revelation of the verse is important. A large number of Jews and polytheists were residents of Madina. The young people among them who were dissolute were unconscious

1. Q. 33 : 59.

of the values of modesty and chastity. Debauchery and dissipation was their pastime. One of their mean habit was that they would follow the women to long distances or would stand hidden beneath the trees and other such spots after dusk when the women customarily came out of their houses to attend to the call of nature. They would try to court and entice any woman who passed that way. After the Prophet's pbh migration these elements persisted in their conduct in relation to Muslim women also. When questioned about this they would pretend that they had not identified them as Muslim women. Complaints against this conduct were ultimately lodged before the Prophet pbh on which this verse was revealed that as a mark of their identification as Muslims the women, while going out, should cover themselves with an outer garment (*Jilbab*). They would thus be saved from annoyance.[1] Punishment for those who persisted in their nefarious conduct notwithstanding the use of this distinctive dress by believing women, was prescribed in the following verses:

لئن لم ينتهى المنافقون و الذين فى قلوبهم مرض والمرجفون فى المدينة لنغرينك بهم ثم لا يجاورونك فيها الا قليلا

If the hypocrites and those in whose hearts is a disease, and the alarmists in the city do not cease We verily shall urge thee on against them, then they will be your neighbours in it but a little while.[2]

ملعونين اينما ثقفوا اخذو و قتلو تقتيلا

Accursed, they will be seized, wherever found and slain with a (fierce) slaughter.[3]

A point of apparent distinction may be pointed out between the two verses Q. 24 : 31 and Q. 33 : 59. In the first verse the addressees are all believing women but the order in the second

1. *Ziaul Quran* by Peer Mohammad Karam Shah, Vol. 4, on Verse Q 33: 59.
2. Q. 33 : 60.
3. Q. 33 : 61.

verse is addressed to the Prophet's pbh wives and daughters in addition to the believing women. The reason for this distinction is the presence in the Quran of verses exclusively for the wives of the Holy Prophet pbh (Q. 33 : 32, 33), verses for believing women in general and verses which are common to both though the scope of the latter two categories may overlap. Verse Q. 24 : 31 is applicable to Muslim women in general. Verse Q. 33 : 59 is common to the Muslim women and *inter alia* to the mothers of the Muslims (wives of the Prophet pbh. The verses exclusively revealed for the wives of the Prophet pbh may now be reproduced:

يا نساء النبي لستن كاحد من النساء ان اتقيتن فلا تخضعن بالقول فيطمع الذي في قلبه مرض و قلن قولا معروفا

O ye wives of the Prophet! Ye are not like any other women. If ye keep your duty to Allah then be not soft of speech, lest he in whose heart is a disease aspire (to you) but utter customary speech.[1]

و قرن في بيوتكن ولا تبرجن تبرج الجاهلية الاولىٰ و اقمن الصلوة و اتين الزكوة و اطعن الله و رسوله انما يريد الله ليذهب عنكم الرجس اهل البيت و يطهركم تطهيرا

And stay in your homes. Do not display your finery like it was displayed in the Time of Ignorance. Be regular in prayer, and pay the poor due, and obey Allah and His messenger. Allah's wish is to remove uncleanliness far from you! O folk of the (Prophet's) household and cleanse you with a thorough cleansing.[2]

It will be observed that the order of living in seclusion or *pardah* is special for the wives of the Prophet pbh who are directed to stay at home. The order not to be soft in speech to strangers is also for them. The order prohibiting display of finery appears to be similar to the injunction in Verse Q. 24 : 31 which is general for all women.

In pre-Islamic society the women appeared in public with all their finery with the avowed object of attracting the atten-

1. Q. 33 : 32. 2. Q. 33: 33.

tion of men and receiving from them acclaimation and appreciation for their beauty and charm. Such display was prohibited on the part of the wives of the Prophet pbh who in addition were directed to stay at home. The object of verse Q. 24 : 31 is also to make believing women in general refrain from making a display of their ostentatiousness and ornamentation. Despite this resemblance between the general and special orders, the injunctions specifically enforced for the wives of the Prophet pbh are exclusive for them. This is made manifest by the opening words of verse Q. 33 : 32: *ya nisa an nabiyyw lastunna ka ahadim min an nisa* (O Wives of the Prophet pbh you are not like any other women). This is the reason advanced in the Quran for the revelation of verses 32 and 33 of chapter 33 and establishes that those injunctions are not for the women in general. The same conclusion is inevitable from the last portion of verse 33 about their thorough cleansing. There are other such injunctions too which are exclusive for the wives of the Prophet pbh, and point out their distinctive position. Thus for every act of transgression they were liable to double the punishment admissible for other women. (Q. 33: 30) Similarly double would be their reward for their obedience to Allah and His messenger (pbh). (Q. 33 : 31):

يا نساء النبي من يات منكن بفاحشة مبينة يضٰعف لها العذاب ضعفين
و كان ذالک علی الله يسيرا

O ye wives of the Prophet pbh ! whosoever of you committeth manifest lewdness, the punishment for her will be doubled, and that is easy for Allah.[1]

و من يقنت منكن لله و رسوله و تعمل صالحا نوه تها اجرها مرتين
و اعتدنا لها رزقا كريما

And whosoever of you is submissive unto Allah and His messenger pbh and doth right, We shall give her her reward twice over, and We have prepared for her a rich provision.[2]

Q. 1. 33 : 30. 2. Q. 33 : 31.

The main reason for their being different from other women is that the wives of the Prophet pbh had to be a model for others just as their husband pbh was an ideal for the entire humanity. A transgression by an ordinary woman can affect her or at most a few persons connected with her but such transgression by a wife of the Prophet pbh had the potential of sabotaging the Prophetic mission and of shattering the public confidence in Islam. This is the main reason for prescribing double punishment for transgression by them. The double reward for doing right and for obeying Allah and His Prophet pbh is obviously to maintain a balance. It would be illogical and a gross injustice if the reward for virtue is maintained at a level of equality while the punishment for sin is doubled.

The other point is that all widows can remarry but the wives of the Holy Prophet pbh could not remarry (ولا ان تنكحو ازواجه من بعده (Q. 33 : 53) as they were the mothers of all Muslims وازواجه امهتهم (Q. 33 : 6).

Another distinction lies in the rules of entry in other persons' houses and the house of the Prophet pbh and the rules of conduct. Comparison of the verses can throw light on this point:

About the dwelling of the Prophet (pbh):

يا ايها الذين آمنوا لا تدخلو بيوت النبي الا ان يوذن لكم الىٰ طعام غير نظرين انٰه ولٰكن اذا دعيتم فادخلو فاذا طعمتم فانتشرو ولا مستانسين لحديث ان ذالكم كان يوذى النبي فيستحيى منكم و الله لا يستحى من الحق و اذا سالتموهن متاعا فسئلوهن من وراء حجاب ذالكم اطهر لقلوبكم و قلوبهن و ما كان لكم ان توذو رسول الله و لا ان تنكحو ازواجه من بعده ابدا ان ذالكم كان عند الله عظيما

O ye who believe! Enter not the dwellings of the Prophet pbh for a meal without waiting for the proper time, unless permission be granted you. But if ye are invited, enter, and, when your meal is ended, then disperse. Linger not for conversation. Lo! that

would cause annoyance to the Prophet (pbh), and he would be shy of (asking) you (to go); but Allah is not shy of the truth. And when ye ask of them (the wives of the Prophet pbh anything ask it of them from behind a curtain. That is purer for your hearts and for their hearts. And it is not for you to cause annoyance to the messenger of Allah, nor that ye should ever marry his wives after him. Lo! that in Allah's sight would be an enormity.[1]

About other dwellings:

يا ايها الذين آمنوا لا تدخلوا بيوتا غير بيوتكم حتىٰ تستانسو و تسلمو
علىٰ اهلها ذالكم خيرلكم لعلكم تذكرون

O ye who believe! Enter not houses other than your own without first announcing your presence and invoking peace upon the folk thereof. That is better for you, that ye may be heedful.[2]

فان لم تجدوا فيها احدا فلا تدخلوها حتىٰ يوءذن لكم و ان قيل لكم
ارجعو فارجعو هو ازكىٰ لكم و الله بما تعملون عليم

And if ye find no one therein, still enter not until permission hath been given. And if it be said unto you: Go away again, then go away, for it is purer for you. Allah knoweth what ye do.[3]

ليس عليكم جناح ان تدخلوا بيوتا غير مسكونة فيها متاع لكم
والله يعلم ما تبدون و ما تكتمون

(It is) no sin for you to enter uninhabited houses wherein is comfort for you: Allah knoweth what ye proclaim and what ye hide.[4]

To obtain permission to enter other persons' house is essential. It is immaterial whether the house was of the Prophet pbh or be of any other person. This conclusion is derivable from the study of the last three verses quoted above. The distinctive

1. Q. 33: 53.
2. Q. 24 : 27.
3. Q. 24 : 28.
4. Q. 24 : 29.

feature of verse 33 : 53 is that it lays down conduct to be displayed whenever permission is granted to a person or he is invited to take meal in any house of the Prophet pbh, or he has to talk to any wife of the Prophet pbh. It is provided that he can talk only from another side of a curtain between him and the wife of Holy Prophet pbh.

It may be observed that the injunction to talk to strangers from behind a curtain is the only unambiguous and clear order from which may be inferred the rule of a woman veiling her face while going out on business. But it is exclusive for the wives of the Prophet pbh and is inapplicable to other women. The orthodox view favours its applicability to women in general but there is no rationale behind it, and is unjustifiable for obvious reasons. Like verses 32 and 33 of Chapter 33, verse Q. 33 : 53 is also exclusive for the wives of the Prophet pbh and deals with the etiquette required for a visit to a house of the Prophet pbh and for conversation with the wives of the Prophet pbh. This is also clear from the reason of its revelation. It is reported by Ibn Abi Hatim that the Messenger of Allah was once eating something sweet. He invited Hazrat Omar who also began to eat. Hazrat Aisha was already there. During the course of eating the fingers of Hazrat Aisha and Hazrat Omar touched. Hazrat Omar who favoured the seclusion of the wives of the Prophet pbh, wished immediately that they had been secluded. This verse was then revealed.[1] The wish was for segregation of the wives of the Prophet pbh and it was fulfilled.

Here some digression may be relevant. If it is assumed or established that the order of observance of *pardah* is exclusive for the wives of the Prophet pbh only, the Hadith related above would be sufficient to justify the participation of the men and women of the household jointly at meals attended by strangers.

1. *Tafsir Ibn Kathir* (Urdu trans.), on verse Q. 33 : 53.

As regards verses 32 and 33 of Chapter 33 it is related that Ikrima proclaimed in public places that they were revealed for the wives of the Prophet pbh (Ibn Jareer). Same view is ascribed to Ibn Abbas by Ibn Abi Hatim. It is said that Ikrima swore that they were revealed for the wives of the Prophet pbh only.[1] Undoubtedly on the same analogy, verse 53 of the same chapter has been revealed for the house and household of the Prophet pbh. There is no exception to the rule of seclusion and-segregation of the wives of the Prophet pbh. The other women, as shall be noticed later, can keep their hands and face open before strangers but not the wives of the Prophet pbh.

Another order from which veiling of *inter alia* other women is inferred is in verse Q. 33 : 59, but it is subject to the exception described in verse Q. 24 : 60. It provides that it is no sin for women past child bearing who have no hope of marriage to discard their (outer) clothing in such a way as not to show their adornment. According to the orthodox view they are exempted from taking the veil.[2] But this exception is not applicable to the wives of the Prophet pbh. It is an exception to the injunction in verse Q. 33 : 59 which also applies to the wives of the Prophet pbh but since it cannot be read as an exception to verse Q. 33:53 which provides for a curtain, the wives of the Prophet pbh could not be benefited from the exemption. The above rule in verse Q. 33: 53 cannot be extended to the generality of women.

It appears to be the scheme of the Quran to make special provisions forthe wives of the Prophet pbh, even though there be overlapping. Verse Q. 24: 31 furnishes a list of near relatives and others before whom adornments generally may be revealed by women. It prohibits them from displaying their adornments except 'to their own husbands, or fathers, or husbands' fathers or their sons or their husbands' sons, or their

1. *Tafsir Ibn Kathir* (Urdu trans.), on Verses 32-34 of Chopter 33.
2. *Ibid.*, on verse Q. 24 : 60.

brothers, or their brothers' sons or sisters' sons, or their women, or their slaves or male attendants who lack vigour, or children who know not of women's nakedness.' All the relations described in the list are within the prohibited degree of marriage. Almost a similar list of persons, though with slight difference, is furnished in verse Q. 33 : 55 for the wives of the Prophet pbh which provides that 'it is no sin for them to appear freely before their fathers, or their sons, or their brothers, or their brothers' sons, or the sons of their sisters or of their own women or their slaves.

This verse is also held to be general in character and effect. But the context and the language of the verse does not justify this interpretation. The provision of the verse is in continuation of the subject-matter of verse 53 of Chapter 33 relevant portion of which is the injunction about talking to a stranger from behind the curtain. The injunction firstly permits the wives of the Prophet pbh to talk to strangers subject to some conditions, and secondly provides in unmistakable terms for the seclusion of the wives of the Prophet pbh and their remaining hidden from the gaze of strangers. It is in the context of this second provision that a list of those persons has been given in verse 55 (Q. 33: 55) who are not subject to the rule of seclusion and before whom the wives of the Prophet pbh could appear.

The list is shorter than the list prescribed in verse Q. 24 : 31. The husband, his father, his son and attendants who lack vigour are missing from the list and with a purpose. The husband was not required to be mentioned in the context of verse 53 (Q. 33 : 53) where he pbh was already mentioned and the injunction about concealment was in relation to other persons. The father and sons of the husband pbh were not required to be mentioned because there were none. Their omission was therefore purposeful and leaves no doubt that the verse of *hijab* (screening)[1] and this verse lays down special rules which are exclusively directed against the wives of the Prophet pbh.

1. Q. 33 : 53.

This conclusion is further reinforced by the omission from verse 55 of 'male attendants who lack vigour' (*awittabe'ina ghair e uli il irbate minal rijal*). This would require some explanation. As provided in verse 31 of Chapter 24 this is a category before whom women can display their finery. Maulana Fateh Mohammad translates it as those attendants who do not desire women. These words may indicate eunuchs and 'Ikrima held likewise. But Qatada interpreted it as a poor person who is attached to the family for making two ends meet,.. Sha'abi held him to be a person who is subordinate and lingers about the head of the family for the satisfaction of his wants and does not possess the courage to look at the women. Ibn Zaid said that he is a person who hankers after the family regularly till he is treated a member thereof, who resides in that house and does not have the courage to look at the women nor gazes at them. He is concerned with his daily meals.

Ibn Abbas, Mujahid, Taoos and Zuhri consider that he is an idiot, or stupid person who is not interested in women. Mujahid adds that he only desires his meals. Taoos and Zuhri say that he does not even have the courage to desire women.[1]

Obviously such a person has neither any kinship worth mentioning with the women of the family nor he is their slave. He is a total stranger. The injunction about screening of the wives of the Prophet pbh, in view of its objective could not admit of such exception. There is a tradition of the Prophet a eunuch was allowed by the wives of the Prophet pbh to come pbh that to them. The Prophet pbh found him in the house of Umme Salma talking to her brother Abdulla. He was telling him that he would show him the daughter of Gheelan after the conquest of Taif; when she comes there are four creases on her belly and when she retraces her steps there are eight creases. The

1. *Tafhim ul Quran*, Vol. 3, pp. 391-392 on verse Q. 24 : 31, *Tafsir Ibn Kathir*, on the above verse.

Prophet (pbh) prohibited his entry in the house.[1] Thereafter he expelled him from Madina and prohibited the entry of other eunuchs also in the houses.[2] On the other hand there is a tradition which contradicts the above-mentioned Hadith which gives the reason for prohibiting the entry of the eunuch in the Prophet's pbh household. It is regarding the entry of Ibn Umme Maktum a blind companion of the Prophet pbh in the house of one of his wives. The wife was directed to retire but she objected that he was only a blind man. But the Prophet pbh retorted that she was not blind. It therefore appears that no male except near relatives as described above and the slaves were allowed inside the Prophet's pbh household. Even eunuchs were prohibited from entering there.

The position of other women is different. This is evident from an incident involving the same Ibn Umme Maktum. For some reasons Fatima bint e Qais could not remain after divorce in the house of her husband. Arrangement had therefore to be made for her lodging during the waiting period. The Prophet pbh first asked her to remain in the house of Umme Sharik a wealthy and philanthrophic lady of the Ansars but then he changed his mind because her house was crowded often with the companions who were invited there to take their meals. The Prophet pbh then lodged her in the house of Ibn Umme Maktum, the blind companion where she could live informally. These two incidents in which Ibn Umme Maktum was involved demonstrate and confirm the distinction between the wives of the Prophet pbh and other women in respect of screening. The eminent wives of the Prophet pbh could not even be present in the company of a blind man who visited their distinguished husband. Another woman was allowed to stay in his house because she need not have observed any formality in his presence because of his absolute disability to see. The second incident cuts at the root of

1. *Mukhtasar Tafsir Ibn Kathir*, on verse Q. 24 : 31, Vol. 2, p. 601.
2. *Tafhim ul Quran* on Verse Q. 24: 31.

the concept of isolation of women in general. The special injunctions in the Book of Allah concerning the wives of the Prophet pbh are not applicable as such to other women.

On the assumption that the injunction about screening of the wives of the Prophet (pbh) are applicable to the women in general many jurists and commentators of the Quran have by their interpretation widened the scope of verses Q. 24 : 31 and Q. 33 : 59. Verse 31 of Chapter 24 consists of the following injunctions:

(1) The believing women should lower their gaze and be modest.

(2) They may display out of their adornments '*ma zahara minha*' (that which is apparent) and should not reveal their (other) adornments save to the near relatives listed in the verse; their women, their slaves, male attendants who lack vigour or children who know naught of women's nakedness.

(3) They should draw *khomor* (upper cloth worn by women) over their bosoms.

(4) They should not stamp their feet so as to reveal what they hide of their adornments.

In verse 59 of Chapter 33 the wives and daughters of the Prophet (pbh) and all believing men are directed to use *Jalbab* (outer garment) and wrap it round them when they go out so that they may be recognised and not annoyed.

Both these verses are interpreted by various scholars as commanding the believing women to veil their faces outside their homes. Others are of the view that the exception clause *ma zahara minha* (that which is apparent) permits them to keep their face and hands open. According to one view feet are also included in what is exempted from being covered. These conflicting views now require to be considered. Before interpreting the two verses, however, it would be expedient to explain two words which may occur repeatedly. Verse Q. 24: 31 deals with the privities of a woman meaning those parts of the body

which must be hidden from strangers. In Arabic they are called *satr* or *aurah*. *Satara* means to cover or to hide; to veil; to screen; to shield. *Satar al Shaei* means he concealed that thing. The word *satr* means parts of the body of a person which should not be revealed to any one, male or female. The word *aurah* is also used to denote *satr*. *Al aurah* means a breach or weak spot in the defences of the country from which enemy attacks are apprehended. The term is therefore used to mean everything which requires to be guarded because of its defences being weak or because of its emptiness. It may mean a thing having such defect or flaw which may engender apprehension of fear. It includes anything which brings bashfulness or shyness, or which may bring shame. It is also used for that part of the body of a man or woman which should be kept concealed.[1]

The Prophet of Allah pbh said *la yanzor ul Rajul ila aurat il Rajul wala tanzor ul Maraa ila aurat il maraa* (Man should not look at the *aurah* of man and woman should not look at the *aurah* of a woman *i.e.* parts of the body of a man or woman which are required to be kept concealed).[2] The words *satr* and *aurah* may be translated as privities in English.

The *satr* of a woman for males is her entire body except her face and hands and cannot be revealed.[3] This is borne out by a tradition of the Prophet pbh.[4] It is related from Hazrat Aisha that once her sister Asma bint Abu Bakr came wearing thin clothes. The Prophet pbh turned away his face and said: O Asma! It is not proper for a woman who attains puberty that she should reveal anything except this and this and pointed out towards his face and hands.

Ibn Kathir[5] says that this tradition is *mursal* (disconnected)

1. *Lughat ul Quran* by Parvez, Vol. 3, p. 1311.
2. *Ahmad, Muslim, Abu Daud, Tirmizi, Tafhim ul Quran*, Vol. 3, p. 382.
3. *Ahmad, Tafhim ul Quran, ibid.*
4. *Abu Daud, Tafhim ul Quran, ibid.*, p. 384.
5. *Tafsir Ibn Kathir*, on verse Q. 24 : 31.

but it is relied upon by the Hanafis and has been quoted without comment in various commentaries like *Rooh ul Ma'ani* by Aloosi[1] and *Tafhim ul Quran* by Maulana Maudoodi.[2] Ibn Jareer relates similar tradition in respect of the daughter of 'Abdulla bin ul Tufail who also came before the Prophet (pbh) in objectionable dress.[3] The *satr* of a man extends from the navel to the knee[4] and the same is the *satr* of a woman for a woman.[5]

The prohibition is against revealing of a woman's adornments and the exception *illa ma zahara minha* (except that which is apparent) is also about the display of adornments which cannot be concealed. Allama Aloosi interprets this exception as *illa ma jarat il'aadah wal jibilla ala zahoorihi* (except that which by nature or habit is revealed). The exception is said to denote rings, eye powder or palm dye and there is no blame in their display to the strangers. The blame lies in revealing adornments which should be kept concealed such as bracelets, anklets, bangles or armlets, necklace, head crown or garland, hand, ear-ring etc.[6]

Allama Aloosi explains that mention of adornments instead of parts of the body which is adorned is by way of hyperbole, used to emphasise what should be kept concealed. These adornments are on those parts of the body on which glance should not be cast like arms, upper arm, neck, head, chest and ears. No doubt some parts of the body are exempted. The prohibition is of display of adornment so that it be known that glance is not permitted on those parts of the body which are covered by the ornaments. The glance on what is not worn or put on is like the glance on a bracelet of a woman purchased by her in

1. Vol. 18, p. 141.
2. Vol. 3, p. 384.
3. *Tafhim ul Quran*, Vol. 3, p. 384.
4. *Ibid.*, p. 385; *Rooh ul Ma'ani*, Vol. 18, p. 140.
5. *Tafhim ul Quran, ibid.*
6. *Rooh ul Ma'ani*, Vol. 18, p. 140.

the market. In fact the glance on that part of the body is prohibited where it could be worn. It is not therefore material if the object of adornment is not put on.[1]

The writer of *Alfaraiz* said that from the word 'adornment' is meant its place and the prohibition is about the parts of the body on the principle of *ibarat ul nas* (direct conveyance of that meaning by the text).[2] The portions which are permitted to be revealed are those which are adorned with rings (hand), palm dye (palms) and eye powder (face).[2]

In the opinion of Ibn Abbas, Mujahid, Ata, Ibn Omar and Anas *ma zahara minha* (that which is apparent) means *ma kana fil wajh wal khizab wal kohl* (the adornment which is in the face and palm dye and eye powder or antimony). Hassan Basri said that it meant *wajhoha wa ma zahara min siyabiha* (her face and what remains apparent in her clothes), Saeed bin ul Musayyab said: *wajhoha ma zahara* (that part of the face which is apparent or uncovered). Ibrahim said *alzinat ul zahira alsiyab* (the apparent adornment means clothes).

The last two views obviously give a restricted meaning to the exemption clause. After reproducing the various interpretations Abu Bakr Jassas summarises the Hanafi view: *Qala ashabona almurad al wajh wal kaffan li annal kohl zinat ul wajh wal khizab wal khatim zinat ul kaf* (According to our doctors meaning Hanafi school it means the face and the palms of the hands because the eye powder adorns the face and the dye for palms and the rings adorn the hands). The word *zeenah* (زینة adornment) has been given a more liberal interpretation by others. They define it as *alzeenah ma zayyanat behil maraa* (by *zeenah* or adornment is meant what makes the excellence of features or their embellishment prevail in woman), that is anything which causes extreme longing or desire in man. It may consist of physical beauty or prettiness of the face or the style of walking

1. *Rooh ul Ma'ani*, Vol. 18, p. 140.
2. *Ibid.*

or the external bedizenment with the aid of powders, creams, dress or fragrance.[1]

The Hanafi jurists also include feet in *ma zahara minha* (that which is apparent). They interpret it as *ayye illa ma jarat il'adah wal jibillah ala zahurehi wa hazal wajh walkaffan wal qadman* (that is except that which by nature or habit is kept revealed like face, hands and feet).[2] Ibn Omar included feet because according to him it brings more hardship to cover them than to cover the hands, since most of the Arab women were poor and had to traverse the road (with bare feet) for the performance of what was expedient for them.[3] For this reason the Hanafi commentators and jurists consider it lawful to cast a glance on the face, hands and feet of a stranger woman. They said: *"Yajuz ul nazar ila wajhil ajnabiyya wa kaffoha wa qadamaiha."*[4]

On the other hand Imam Shafe'i, as stated in *Alzawajir* held that the face of a woman and her hands including the palm and the outer side upto the elbow are *aurah* (privity) for a manly gaze but is no so for the purpose of prayer... But some Shafe'i jurists consider a glance lawful on face and hands if it keeps secure from corruption.[5] It is obvious that they do not treat the face and hands as *aurah* of the woman. The rationale of their thinking is based on possibility of corruption or apprehension of mischief.

Ibn Rushd summed up the two conflicting views in *Bidayat ul Mujtahid*[6] that the majority of the learned agree that except the face and hands the entire body of a woman should remain covered. Imam Abu Hanifa held that the feet may also remain uncovered. But Imam Ahmad bin Hanbal and Abu Bakr bin Abdul Rehman treat her whole body as *aurah*.

1. *Tafsir-i-Majidi*, Vol. 2, p. 717, commentary on Verse Q. 24 : 31.
2. *Ibid.*
3. *Rooh ul Maani* by Aloosi, Vol. 18, p. 141.
4. *Tafsir-i-Majidi*, Vol. 2, p. 717 on Verse Q. 24 : 31.
5. *Rooh ul Maani* by Aloosi, Vol. 18, p. 141.
6. Vol. 1, p. 115.

Ibn Jarir[1] after reproducing the conflicting views in his commentary of the Quran adopted the liberal view that the exception to the injunction of concealment of adornments is of the hands and face. He said that the utterance nearer the truth is of those persons who hold it (the injunction about *ma zahara minha*) to mean face and the two hands which include eye powder, rings, wrist bracelet, and palm dye. "We consider this view truer because of the Ijma'a of the Ummah that it is necessary for every person offering prayer to hide his *satr* (privities). The prayer is not correct without its concealment. As for women it is lawful for her—rather it is necessary for her—that during her prayer she should keep her face and hands exposed. It is obligatory on her that she should hide the rest of her body. It is stated about the Prophet pbh that he held it discretionary with women to keep half of their hands upto the elbows exposed. Now that this is proved by the Ijma'a of the learned, it becomes evident that it is lawful for a woman to keep uncovered those parts of the body which are not her *satr* in the same manner as it is for men to cover their *satr* because it cannot be prohibited to uncover what is not *satr*. And since it is lawful for the women to expose their face, hands and feet it is evident that by laying down *illa ma zahara minha* Allah has made an exception in their respects, because these parts of the body are (always) subject to exposure (during the discharge of their functions)."[2]

Imam Fakhruddin Razi said that the entire body of a woman should be covered before a stranger except her face and hands since she is obliged to open her face and hands at the time of entering transactions of sale and purchase.[2]

Allama Mohammad Nasiruddin Albani writes in his book *Hijab ul Maratul Muslima fil Kitab wal Sunnah*:

> "Ibn Atiyya said, 'it appears to me in the injunction of the language of the verse that the woman is obligated to con-

1. *Tafsir Ibn Jarir*, Vol. 18, p. 84.
2. See *Tafsir i Majidi*, Vol. 2, p. 717 on Verse Q. 24 : 31.

ceal all her adornments. The exception in the verse is of those adornments which become apparent in every day expediencies and in the necessary movements required for improvement of circumstances. Exposure of adornments which become apparent on the principle of necessity is excusable.'

Qurtubi said: 'I say that this view is better and preferable. But since the face and hands are subject to exposure by habit and for prayer (and *Haj*) which happens during the offering of prayer and in performance of the rituals of *Haj*, it would be right to conclude that the exception turns towards the face and the hands. It finds support from that tradition which is reported by Abu Daud on the authority of Hazrat Aisha that Asmaa bint Hazrat Abu Bakr appeared before the Prophet pbh, clothed in a thin dress. The Prophet pbh turned his face from her and observed, "O Asmaa! when a woman reaches the age of menstruation (puberty) it is not proper that any part of her body except this and this be visible' and he pointed towards his head and hands. As a matter of caution, and in the interest of (elimination of) mischief, therefore, it is better that a woman should not exhibit any part of her body except what becomes apparent of her face and hands."

At another place he writes: 'This is worth mention that during the prophetic period it had been the practice of the women to keep their face and hands uncovered. They appeared before the Prophet pbh in this state but he never raised any objection. There are various traditions to this effect out of which only a few may be mentioned. Jabir bin Abdullah is related to have said, 'I was present in Eid prayer with the Prophet pbh on the day of Eid. He led the congregational prayer before delivery of his sermon. No prayer call (*azan*) was in it nor any call to the congregation to rise for prayer (*iqamah*). He then stood with the

support of Bilal and commanded people to be pious and persuaded them to obey Allah. He delivered his sermon and preached to the people. Then he went to the women and preached to them. He reminded them of Allah and observed: 'Give in charity because most of you are the fuel for the fire of hell.' A woman who was sitting among the ladies and whose colour had changed and turned black asked: 'O Prophet pbh of Allah how is this?' He replied: 'Because you complain too much and show ungratefulness to your husbands. Jabir says that they gave in charity their ornaments and began to throw their ear-rings and rings in the cloth (spread by) of Bilal.[1]

Jabir says in this tradition that the colour of the woman who was sitting among the ladies, faded and turned black which proves that her face was not covered, and for this reason Jabir noted the change of colour of the cheeks and then described it.

It is related from Ibn Abbas that a woman who belonged to Khas'am tribe came for the solution of a problem on the day of sacrifice on the occasion of the last *Haj* (of the Prophet pbh). Fazal bin Abbas sat behind the Prophet pbh. He was a handsome young man. He began to gaze at the woman of Khas'am tribe. The woman was also quite attractive. She also began to look at Fazal. The Prophet pbh took Fazal's chin in his hand and turned him to the other side.[2] .... (after reproducing two other versions of the tradition)..... It is related from Sahl ibn Sa'ad that a woman appeared before the Prophet pbh and said: "O Prophet of Allah pbh I have come to gift my person (*nafs*) to you. The Prophet pbh looked towards her for some time and then lowered his head. When the woman

1. *Muslim, Nasai, Darmi, Baihaqi, Ahmad bin Hanbal.*
2. *Bokhari, Muslim, Abu Daud, Nesai, Ibn Maja, Malik, Baihaqi.*

saw that the Prophet pbh did not show any reaction to her offer, she sat down.[1]

It is related from Hazrat 'Aisha that the believing women usually came to offer their morning prayer with the Prophet pbh wearing their outer garments. After the prayer they returned to their homes but could not be identified because of darkness."[2]

Maulana Omar Ahmad Osmani[3] adds the following to this:

"In Musnad Abu Ya'ala the tradition is related in these words: We could not identify the faces of some other women on account of darkness.[4] The chain of relators of this version is right.

From these various traditions it is clearly established that the women during the period of the Prophet pbh appeared before the Prophet pbh with their faces uncovered. The Prophet pbh never showed any disapproval. It, therefore, appears that the verse *illa ma zahara minha* (except the adornment which becomes apparent) denotes the exception of face and hands, and the commentary of this verse by Ibn Abbas, Hazrat 'Aisha and other companions is correct. What is ascribed to Ibn Masud and Zuhri is based on caution and is not a divine order."

Allama Nasiruddin Albani concludes that "it is proved that it is not necessary to cover the face. This is the rite (*mazhab*) of majority of the learned as stated by Ibn Rushd in *Bidayat ul Mujtahid*.[5] They include Imam Abu Hanifa, Imam Malik and Imam Shafe'i. In one report this view is also ascribed to Imam

1. *Bokhari, Muslim, Nasai, Baihaqi.* See *Hijab ul Marat ul Muslima fil Kitab wal Sunna* by Nasiruddin Albani, pp. 26-29.
2. *Bokhari, Muslim, Abu Daud.*
3. *Fiqhul Quran*, Vol. 3, p. 323.
4. *Musnad Abu Ya'ala*, Vol. 2, p. 214.
5. Vol. 1, p. 89.

Ahmad.[1] Imam Tahavi reproduces the same view of two disciples of Imam Abu Hanifa in *Sharh Ma'ani ul Asar*[2] and has traced it in Almohimmat from the books of Shafe'i school of thought. He also held this view to be correct. Sheikh Shariini described it in *Aqn'a*.[3]

From various commentaries can be discovered the historicity of the change of the Hanafi view.[4] The Hanafi jurists of later times prohibited the uncovering of face under apprehension of corruption.[5] They applied to the generality of women what was revealed exclusively for the wives of the Prophet pbh.[6] For avoidance of corruption they contributed to the principle that a woman is all *aurah* from head to foot and no part of her body can be visible except for necessity. Even her voice was declared *aurah* (privity) which could not be made audible to a stranger. Qurtubi said: *almarato kulloha aurah, badanoha was sautoha kama taqaddama fala yajuzo kashf zalika illa lilhajah* (Woman in her entirety is *aurah*, her body as well as her voice as already stated. It is not lawful to uncover her except for necessity).[7]

The prohibition against stamping of feet 'so as to reveal what they hid of their adornment' is availed by the jurists for the argument that if the sound of ornaments is not allowed to be heard by others, there is stronger reason that the voice of a woman should not be audible to men.[8] From the injunction to the wives of the Prophet pbh not to be soft in speech to strangers it is inferred that the woman should not speak so loudly

1. *Almajmu*, Vol. 3, p. 169.
2. Vol. 2, p. 9.
3. Vol. 2, p. 110, See for the discussion *Hijab ul Marat ul Muslima* by Nasiruddin Albani, pp. 41-42.
4. See *Tafsir i Majidi*, Vol. 2 on Verse Q. 33 : 32.
5. *Ibid.* with reference to *Jassas, Mujahid, Qurtubi* etc.
6. *Ibid.* See notes 61 to 64.
7. *Ibid.*
8. *Ibid.*

that she may be audible to men. It is also inferred from it that a woman cannot call *azan* (call to prayer).[1]

It is strange that Verse Q. 33 : 32 which is exclusive for the wives of the Prophet pbh and allows them to talk to men from behind the screen, is being used for inferring what is an absolutely contradictory proposition that women should not be audible to strangers. Similarly the prohibition against stamping of feet was used for the same end though the reason for that injunction is only that what they hide of their adornments should not be revealed. By stamping of feet the *satr* is also likely to be revealed. Moreover stamping of feet is not the normal behaviour of a woman. It is obviously to attract attention of men which is not permitted. All the inferences are too remote. The order to the wives of the Prophet pbh to desist from being soft in speech is based on the principle that they are not like other women which clearly means that the restrictions are not meant for other women.

Islam opts in favour of ease and convenience rather than hardship. This is borne out by the verse under consideration.[2] The male slaves in those days had to work in the houses. Similarly there used to be other attendants who were dependent upon the family for their daily meals. This would be clear from the controversy about the interpretation of *au ma malakat aimanohunna* (or their slaves) and *awittabeein ghaire ulil irbate minal rijal* (or male attendants who lack vigour). It has already been noticed that the latter portion has been interpreted to include not only eunuchs but also able-bodied males who serve the family. Some of the learned consider stupidity to the extent of insensitiveness towards female presence as their qualification, but others do not impose idiocy or feebleminded-ness as an essential requirement. For this reason Maulana Maudoodi who treats woman as *satr* from head to foot is quick

1. *Ibid.*
2. Q. 24 : 31.

to point out that domestic servant or chauffeur is not included in the category.[1] According to Qatada, Sha'abi and Ibn Zaid[2] this category includes those subordinates who serve the family for making two ends meet and not for women—in fact they do not have the courage to have an eye on women which would mean an expectant eye. The word *tabeein* means subordinate, attendant or a servant. Maulana Maudoodi himself translates this portion of the verse as *woh zerdast mard jo kisi aur qism ki gharaz na rakhte hon*[3] (those servants, subordinates and attendants who have no other object). Obviously the domestic servants generally seek service as cooks, waiters, chauffeurs, sweepers etc. for earning their bread. Their object is not to court women of the family. There is no reasons why they should be excluded from the scope of this category of person before whom the women are not required to cover their adornments.

The other category is of slaves who before the abolition of slavery, were found in many families. Many of the learned interpreted the word slaves as confined to slave girls but Hazrat 'Aisha, Hazrat Umme Salma, some learned among the descendants of the Prophet pbh and Imam Shafe'i hold that the word is general and includes male slaves too.[4]

There is a tradition in support of this view. Once the Prophet pbh in the company of a slave, visited the house of his daughter Hazrat Fatima. She had covered herself with a cloth of such size that when she covered her head the feet remained uncovered and if she tried to cover the feet her head was uncovered. Seeing her in this quandary at the time of his visit he observed: 'It does not matter, I, your father and your slave only are here.'[5]

1. *Tafhim ul Quran* on the above Verse, Vol. 3, p. 392.
2. *Ibid.*
3. *Ibid.*, pp. 388, 391.
4. *Ibid.*, p. 391.
5. *Abu Daud, Ahmad, Baihaqi.* See *Tafhim ul Quran*, Vol. 3, p. 391, *Mukhtasar Tafsir Ibn Kathir*, Vol. 2, p. 601.

Thus on the one hand Verse Q. 24 : 31 provides that a woman shall not display her adornments with the exception of her face and hands and on the other hand, in the list of persons before whom she was allowed to be informal, are included strangers who are either not related at all or are not related within the prohibited degrees. Such are persons who serve her or the family. This is only for the purpose of convenience of women who are spared the hardships of remaining formal in dress in their homes. They are allowed to remain as informally in the presence of male slaves and male servants as in the presence of their fathers and fathers-in-law. It would transpire from this that the verse should be interpreted keeping in view the convenience of the women as human beings and not with a view to confine them within the four walls of their houses, so as to save men from apprehension of corruption.

The earlier usage may also be an aid to interpretation. It was customary among women before the revelation of this verse that they wore only a shirt and made no effort to cover their bosoms. Their necks and the upper part of the chest also remained uncovered. Two or three plaits of hair hung behind. In this dress they freely moved among men.[1] By the verse they were directed to cover their bosoms with a separate cloth called *khimar* and were also directed to desist from the display of their adornments except that which is apparent. The intention clearly was that covenience should be the rule and not fashion. The object was to curb the tendency among women to attract men and thus to act as step in aid for the breeding of corruption.

Much controversy has ranged round the interpretation of *Jilbab* used in Verse 33 : 59. It may be recalled that the verse which applies to the believing women in general is Verse Q. 33 : 59 which ordered them *yudneena alaihinna min jalabeebihinna* (to draw their cloaks close round them) when they went

1. *Tafhim, Ibid.*, p. 386, *cf. Tafsir Kashshaf*, Vol. 2, p. 90 and *Tafsir Ibn Kathir*, Vol. 3, pp. 283-4.

abroad. The verse gives the reason for the injunction 'so that they may be recognised (as believing women and may not be harassed)'. The order was to save Muslim women from the annoyance caused by the flirtation and licentious proclivities of the profligates among non-Muslims who usually pleaded in their defence that they thought that they were slave girls.

It is interesting to note that those who held that the face and hands of a woman could remain uncovered before strangers, interpreted this injunction as a mandate for covering her from head to foot. They thus created a conflict between the two verses,[1] although there is none. The wrapping of a cloak round the body was sufficient to distinguish the believing women from non-Muslim women particularly the slave girls owned by the non-Muslims who revealed their adornments in public. Among the polytheists there were people who sent their slave girls for prostitution and pocketed their earnings from this source. The women engaged in such profession must have been more shameless in their make up, their dress and the suggestive style of their walking. The outer garment of the believing women which covered their entire body except the hands, face and feet created sufficient distinction between them and the non-believing women.

It may be noticed that the Quran orders the women in Verse Q. 24 : 31 to cover their bosom with *khimar* (cloth used for covering the head).[2] This would mean that they were required to cover their heads as well as their bosoms. In Verse Q. 33 : 59 they are ordered to wrap their *jalabeeb* (plural of *jilbab*) when going out. Maulana Anwar Shah Kashmiri said that both these verses are about *Hijab* (screening or covering), *khimar* is for use within the home and *jilbab* is to be used when going out.[3] *Jilbab*, according to Ibn Kathir,[4] is a covering sheet worn over

1. Q. 24 : 31 and Q. 33 : 59.
2. See *Lught ul Quran* by Parvez, Vol. 2, p. 619.
3. *Fathul Bari* by Maulana Anwar Shah Kashmiri, Vol. 1, pp. 256, 388.
4. *Tafsir Ibn Kathir* on Verse Q. 33 : 59.

khimar (*wal jilbab howar rida fauq ul khimar*) Raghib says: *aljilabeeb* singular of which is *jilbab* means sheets (for covering) or shirts.[1] Ibn Fars said that another basic meaning of *aljilbab* is anything which covers another thing. *Aljilbab*, therefore means a cloth bigger than *khimar* and smaller than a bedsheet, with which women cover their heads and bosoms.[2] The women of Ansar used to wear a black dress (like overcoat) over their clothes. It was also known as *jilbab*.[3] The word therefore means such a covering sheet or dress which may be wrapped or worn over other clothes so that the adornments may not be revealed.[4] Ibn Fars also said that among the Arabs *jilbab* or such other loose garment also connotes (metaphorically) dignity or prestige and tranquillity.[5] Qurtubi said: *waheya saub i akbar min al khimar wal sahih innahu yastirru jami ul badan* (It is a sheet of cloth bigger than *khimar* and the correct thing is that it covers the entire body). In the *Dictionary and Glossary of the Quran* by John Penrice[6] it is explained as 'an outer garment worn by women'. In Cowen's *Arabic Dictionary* it is translated as garment, dress, gown, women's dress.

In *Rooh ul Ma'ani*[7] it is said that "it is, as related from Ibn Abbas, something which covers from head to foot. It is said that it means *miqna'a* (veil or mask). It is also stated that it is a cloak,. a dress which is worn over the dress of a woman. Some say that with it are concealed the dress and other things, as said in the couplet: 'She was covered with a cloak by the darkness of the night'... It is bigger than *khimar*."

It will be clear from the meaning of *jilbab* that it is the upper

1. *Almufridat*.
2. *Lughat ul Quran* by Parvez, Vol. 1, p. 435 with reference to *Taj*, *Moheet* and *Al Mufridat*.
3. *Lughat ul Quran, ibid.*
4. *Ibid.*
5. *Ibid.* with reference to Taj.
6. p. 28.
7. *Roohul Ma'ani* by Aloosi, Vol. 22, p. 88.

garment of a woman which not only covers her dress, her ornaments but also her head. It is not possible to interpret it as a cloak or veil which covers the face and hands or even feet of one who has to walk barefooted. Veil or mask (for the face) appear to be the meaning given to it when the usage of veiling the face had held strong roots in the society.

Another word in Verse Q. 33 : 59 which has attracted the attention of the commentators is *yudneena*. The order is *yudneena alaihinna min jalabeeb i hinna* (Draw their cloaks close round them). Allama Zamakhshari interpreted this word as meaning: "Put your covering sheet over you and cover your shoulders and faces with it." The way in which this is written gives an impression that *yudneena alaihinna* bears the meaning of covering the shoulders and face and this is how the writer of *Zia ul Quran* understood it.[1] But this does not appear to be correct. *Dana, danau* means to be near, *adna al shai* means 'drew something near'. *Adanat saubaha alaiha* means 'she put on her cloth on her'. *Yudneena alaihinna min jalabeeb ihinna* would therefore mean 'they should put on their *jilbab* over them.'[2]

In *Rooh ul Ma'ani*[3] it is stated that "*aladna*" means nearness. If it is said *adnani* it would mean 'come near me' and includes the meaning of lowering down...

"Abu Hayan reports from Alkasai that he said: It means veiling with their cloaks wrapping them. He said joining together also amounts to *adna* (nearness). In *Kashaf* the meaning of *yudneena alaihinna* is given as *yurkheena alaihinna* (covering themselves with). When the cloth is removed from the face of a woman, it is said: *adna saubak ala wajhik* (put your cloth on your face). Saeed bin Jabeer interpreted it as *yasdulna alaihinna* (lower down on them). As far as I am concerned this appears to be the implication. Apparently the meaning is to cover the entire

1. *Zia ul Quran*, Vol. 4, p. 95.
2. *Lught ul Quran* by Parvez, Vol. 2, pp. 669-670.
3. *Roohul Ma'ani*, Vol. 22, p. 89.

bodies. It is said that the head and the face should be covered because what remained open during *Jahiliyya* was the face."

It would be clear from this discussion that the dictionary meaning of *yudneena alaihinna* are only wrapping round, putting on, lower down. The phrase does not imply the parts of the body which should be covered. This is only an inference of Zamakhshari who must have taken other circumstances into consideration for arriving at that meaning. The opinions quoted by Aloosi in the above quotation are also based on inference from various circumstances. The truth is that if the cloth is not covering the face and direction is required to be given to put it on the face the phrase *adna saubak ala* (put your cloth on) would not be sufficient unless the word *wajhik* (your face) is added. The sentence would not be complete and would be meaningless without the word *wajhik*.

It is also incorrect that in *Jahiliya* (pre-Islamic period) only the face of a woman remained open. She unhesitatingly donned thin dress which revealed parts of her body which are required by *Sharia* to be covered. An example of the dress of Asma bint Hazrat Abu Bakr has already been cited that seeing her in such dress the Prophet pbh turned away from her and observed that it is not proper for a woman to reveal after puberty, any part of her body except this and this and pointed towards his face and hands. During *Jahiliya* the woman's head, ears, neck, and upper part of the bosom were generally revealed. Only shirts were worn on the bosom till the same was ordered by the Quran to be covered by *khimar*. All the finery was revealed and she stamped her feet to disclose her adornments. All these were required to be covered by Verse Q. 24: 31. Nothing therefore turns on the words *yudneena alaihinna* for drawing an inference concerning the covering of the face.

There is difference of opinion about the manner of covering with *jilbab*. Ibn Jareer, Ibn ul Munzir etc. say that Mohammad bin Seereen said that he asked Obeida al Salmani about this verse.

He took a covering sheet which was with him and covered himself with it. He covered his head fully till it reached his eyebrows. Then he covered his face and only left an opening in it for the left eye. Suddi said: 'cover the forehead and one eye and leave a hole for the second eye.' To Ibn Abbas and Qatada is ascribed the opinion that the *jilbab* should be brought from above on the forehead, then it should be drawn on the nose leaving only the eyes open. The chest and most of the face should be covered. Another opinion is attributed on the authority of Habar. It is related by Ibn Jarir, Ibn Abi Hatim and Ibn Marduya that the face should be covered with *jilbab* from above the head and only one eye should be left open. Abdul Razzaq and others related from Umme Salma that after the revelation of this verse the women of Ansar emerged from their houses in such condition that it appeared as if there were birds on their heads. They were covered with black clothes. In another tradition related from Ibn Marduya it is stated that Hazrat 'Aisha said that when this Verse (Q. 33 : 59) was revealed the women of Ansars tore their sheets and put them on in two parts... and it appeared as if on their heads were the birds.[1] In *Tafsir Ibn Kathir* is given the opinion of Ikrima that the neck should be covered with the sheet.[2]

These opinions are so conflicting that it is not possible to rely upon them. The opinions ascribed to Ibn Abbas are directly in conflict with his interpretation of *ma zahara minha* (that which is apparent) in Verse Q. 24 : 31. His interpretation favoured revealing the face and hands. It is important to note that Ikrima only considered the covering of neck necessary. In the traditions of Hazrat 'Aisha and Hazrat Umme Salma the simile of birds on the head does not necessarily mean the covering of the face. It is possible that either the women of Ansar tied a knot or more than one knot of their hair on their

1. *Rooh ul Ma'ani*, Vol. 22, p. 89.
2. *Mukhtasar Tafsir Ibn Kathir*, Vol. 3, p. 114.

heads and the covering of the head by *jilbab* accentuated them. It is also possible that they tied the knots of the *jilbab* over their head to stop it from sliding.

It is noticeable that exactly similar traditions from Hazrat 'Aisha are attributed as a consequence of the revelation of Verse Q. 24 : 31 by which the women were commanded *waljadribna bi khomurihinna ala joyubihinna* (and to draw their *khomur* (plural of *khimar*) on their bosoms). These traditions are reported in *Tafsir Ibn Kathir*.[1] One tradition is related by Ibn Abi Hatim from Safia bint Shaiba who said, that they were with Hazrat 'Aisha and talked about the women of Qureish and spoke highly about their excellence. Hazrat 'Aisha said that 'there was no doubt that the women of Qureish had excellence but she did not see any one more superb and more strict in their conformity with Quran than the women of Ansar... When the Chapter (of the Quran) entitled *Nur* (light) was revealed *i.e., waljadribna bi khomur i hinna ala juyubihinna* (and to draw their *khomur* on their bosoms) and their men communicated it to them, they appeared next morning before the Prophet pbh with their *khomur* on as if on their heads were birds.[2] Another tradition is reported by Ibn Jarir from Hazrat 'Aisha who said: Allah have mercy on the women who migrated first, when this verse was revealed they tore their sheets and made *khomur* from them.[3]

These two versions are almost identical with the traditions on Verse Q. 33: 59. The simile of birds or crows is there in the traditions related about both the verses. The covering of face and hands being exempted in the Verse Q. 24 : 31, it cannot be stressed by any stretch of imagination that the identical simile of birds on the heads might mean the covering of face also. In fact the identical traditions are proof of reconciliation of the two verses and not of conflict, which is the rule in the interpreta-

1. *Mukhtasar Tafsir Ibn Kathir*, Vol. 2, p. 600.
2. *Ibid.*
3. *Ibid.*

tion of the Quran. It is nobody's case that any of the two verses is abrogated. The interpretation of conflict cannot therefore stand scrutiny.

Another conflict created by our jurists is about the applicability of Verse 59 of Chapter 33 to the slave girls. The verse does not make any distinction between the free women and female slaves. It is an injunction for *nisa il momineen* (the believing women). The reason for revelation also confirms that female slaves could not be exempt from the injunction concerning putting on of *jilbab* when going abroad. They could not be left to be a prey to the lecherous advances of the libertines among the polytheists, Jews and others. Adultery and fornication was as much prohibited for them as for the free women. Distinction is made only in matter of sentence. The two verses are for plugging the loopholes of corruption and lewdness and must apply to both—free women as well as female slaves. But when Zuhri was asked whether *khimar* is for female slaves—married or unmarried, he replied, 'She shall take *khimar* if she is married but *jilbab* is prohibited to her because it does not appear proper that they should resemble free women,' he then cited the injunction of Allah *ya ayyohan nabio qul li azwajik wa banatik wa nisail momineena yudneena alaihinna min jalabeebi hinna* (O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloak round them).[1] The women of the believers obviously mean believing women, because the verse is not applicable to women who are non-believers. And among the believers were male and female slaves. According to *Rooh ul Ma'ani*[2] Hazrat Omar passed order that the female slaves should not veil themselves. He held that the dress of female slaves should be distinct from the dress of free women. Abu Hayyan said that the phrase meaning believing women includes free women as well as female slaves, but since the slave may be a source of

1. *Mukhtasar Tafsir Ibn Kathir*, Vol. 3, p. 115.
2. Vol. 22, p. 88.

more mischief on account of her possession changing from one owner to another, contrary to free women, her exclusion from the generality of women is necessary.[1]

Some rule like the rule of *ejusdem generis* appears to have been used for the interpretation of the verse that since the first two categories of women described there namely the wives and daughters of the Prophet pbh were free women the third following category must also mean free women. But this interpretation is not justifiable in view of the reason for revelation which aimed at curbing a tendency which affected free women and women slaves alike.

It appears that what was originally in essence an order for distinguishing the believing women from non-believing women to save them from annoyance or harassment at the hands of the profligate non-Muslims, developed into a usage after the reason for injunction had ceased to exist, and later on the principle of the verse was availed to distinguish between free women and women slaves. It thus became a mark of prestige.

After discussing the position of slave girls as stated above Allama Aloosi says:

> "You should know that in our view the face of a woman is not *aurah* (privity to be covered) and it is not required to cover it, and glance on her by a stranger is lawful if it is free from lewdness otherwise it is prohibited."[2]

The view of Allama Aloosi confirms what is stated above about reconciliation between the two verses. Maulana Maudoodi a staunch protagonist of veiling of face held that there is distinction between the verse concerning *satr*[3] and the verses of *hijab* (covering). In the latter category he includes the verses about seclusion of the wives of the Prophet pbh which as already

1. *Rooh ul Ma'ani*, by Aloosi, Vol. 22, p. 89.
2. *Ibid.*
3. Q. 24 : 31.

discussed are not applicable to the women in general. That there is no distinction between the two types of verses is clear from the above view of Allama Aloosi as also the view of Allama Anwar Shah Kashmiri, which has already been quoted that the distinction between the two verses[1] is that in one a smaller cloth known as *khimar* is enjoined to be used (for covering the head and the bosom) and in the other the body is required to be covered by a bigger sheet (*jilbab*).

Those who held veiling of face essential exempted the female slaves probably on account of necessity without saying it. The grounds given by them are not at all convincing, which means that they considered seclusion of working women in the age of slavery impracticable. This amounts to a concession of impracticability of putting the women under veil. By the use of the principle of necessity the overwhelming majority of the women in Pakistan would be exempted from the rigidity of the rule of later orthodox jurists.

Islam prescribes marital sexuality and forbids adultery, fornication, incest and all other extra-marital sexual activities. It forbids pre-marital liaison—in truth all types of liaison involving sex or even apprehension of future sexual relationship except between husband and wife. Its regulatory laws aim at closing all avenues of unchastity and immodesty. The unchastity taboo is quite rigorous but it is uniform for male and female alike. Adultery and fornication are punishable and no party is exempt from the penalty of flogging or lapidation. This is the penal sanction.

But *Sharia* is not a system of law in the accepted sense of common law, Swiss Code, Code Napolean, Civil Code or Criminal Code. Nor is it confined to Equity, Admiralty or Matrimonial jurisdiction. For it penal legal sanctions come last. It concerns itself basically with the reform of the society for which it lays

1. Verses Q. 24 : 31 and Q. 33 : 59.

down a comprehensive code of behaviour, and its modalities. The pre-Islamic society represented a standard permissive society of that age. As a first step permissiveness in sexual matters was forbidden by *Sharia*. The next step was to set familial and other behavioural patterns for males and females which would eradicate chances of corruption and turn the Ummah into a society of chaste believers. Marital ties were encouraged after puberty. The Sunnah of the Prophet pbh laid down rules for creating love and harmony among the spouses. The prohibition of infancticide increased the number of women for eligible males. The proteins against maladjustment and physical voience of the husband was ensured by laying stress on equality of women and men. An independent status to own, earn and dispose of property was conferred upon women. They were given rights to inherit, to enter into contracts and to manage what belonged to them. Islamic society, like the generality of cultures being patrilineal the male was made symbolic head of the family but the consideration of this small concession is to support his wife and children according to his means irrespective of the wealth or means of his mate.

There are a number of traditions which enjoin upon the wife to cooperate with her husband in the satisfaction of his sexual desire. The object is his immunization from tapping other resources for his satisfaction. Otherwise there is mutuality in that obligation too. The rule does not make the wife a servile retainer; it is preventive in character. There may be disparity in the sexual desire of the husband and the wife. The wife may often not be interested in coitus, but 'the husband who has been seeing attractive women periodically during his work day and who may have had an opportunity to relax on his way back from the office or store is naturally more interested in coitus than his married wife who has remained at home caring for children and doing household work. Another cause of disparity is a difference in viewpoint. Often a male will anticipate coitus as a palliative to compensate for the trials and tribulations of

life, whereas many females are interested in sex only if the preceding hours have been reasonably problem-free and happy."[1] To prevent the husband on such occasions from the fulfilment of his desire may lead to domestic disharmony and may persuade the husband to find other but often illegitimate means for his satisfaction. The wife is therefore, required to honour the wishes of the husband and suppress her unwillingness in a spirit of selflessness.

The effect of seeing attractive women on a man has been noticed. It is in this context that the Prophet pbh advised a man who sees a woman and feels interested in her to go to his wife without losing time. The tradition is based upon an understanding of the sex psychology of man and the advice in it is a preventive measure.

The bahavioural pattern prescribed by the above-mentioned verses of the Quran for male and female both is also preventive. Women are prevented from making them look prettier and more attractive by revealing their adornments. They are directed to use *khimar* to cover their heads and bosoms. The use of *jilbab* was made compulsory while going out to save them from harassment, at the hands of those persons who among the non-Muslims were profligates. They vexed and annoyed women in order to trace those who were sexually available. *Jilbab* thus assumed the role of a sign of sexual non-availability and chastity. It served as a defence against corruption and corruptibility.

It is possible to argue that the injunction about the use of *jilbab* was for a particular eventuality and when that contingency ceased it became inoperative till analogous eventuality arises. The argument may have weight only if the women go abroad without revealing their adornments. The use of fashionable and ostentatious dresses which besides being gaudy and attracting male attention also accentuate the bodily curves and physical

1. *Encyclopaedia Britannica*, Vol. 16, p. 598.

beauty of the women, the use of *dupatta* (*khimar*) in a manner that the bosom and head remain uncovered, the cut and style of the shirt in which the hands upto a little below the shoulder joints and some part of the upper bosom and the neck are revealed, the hairdo and the make up on the face shall have to be abandoned in consideration for abandoning *jilbab*. If the woman puts on a simple dress which covers the *satr* fully and uses *khimar* of unostentatious cloth which covers her head, neck and the bosom the use of *jilbab* may become unnecessary. In the present age *jilbab* is required to cover the adornment of the fashionable dresses which are common in Pakistan in the wealthy or middle strata of the society. The feminine fashion in public is undoubtedly repugnant to Islam. For their voice to be heard sympathetically the feminist leadership among women should seriously act upon the injunctions in Verse Q. 24 : 31. In their drive for amelioration of the lot of women they rely upon Islamic values and equality of man and woman taught by the Quran but by the contrast in their practice and profession they make themselves vulnerable to the wanton and arrogant attacks of the orthodox *ulema* (religious scholars) against their dresses and western ways. Many a thing that they say about the emancipation of women are correct but they expose them to unwarranted and unbridled criticism since they are not equipped with *Sharia* reasoning.

The women organizations have rendered valuable service to the cause of women in Pakistan but they could achieve much more if their members had learnt the art of simple living and of appearance in public in simple dress as required by Verse Q. 24 : 31, and had equipped themselves with the knowledge of *Sharia* on the rights of women.

As already noticed the word adornment in the above verse has been interpreted by the learned in various ways. Some say in *illa ma zahara minha* (except that which is apparent) the word adornment would include the eye powder or antimony, the

ring, bracelet and palm dye. The other view is that every part of the body of a woman being an adornment the reference in the above phrase is to the face and hands which may be left uncovered before strangers. A third interpretation is that the word *zeenah* (adornment) in the verse (Q. 24 : 31) is a hyperbolic expression to vivify the parts of the body which shall be covered and those which may be left uncovered. If the adornment on any part of the body is to be covered, *a fortiori* that part of the body cannot be kept uncovered.

From the first interpretation, as pointed out ironically by Maulana Maudoodi,[1] it may follow that to reveal even intensive make up of the face is permitted. On the other hand in support of his assertion that women remained veiled even during the period of the Prophet pbh, he cites a tradition from Abu Daud on the authority of Hazrat 'Aisha that a lady submitted an application to the Prophet pbh from behind the curtain. The Prophet pbh enquired from Hazrat 'Aisha whether it was the hand of a male or female. When informed that the hand was that of a female the Prophet pbh was pleased to observe that at least the nails should have been dyed. If the *Hadith* be correct it provides ample justification for revealing the hands having nail polish. However this can be justified on the analogy of the use of palm dye. The nail polish is as generally used now by women as the palm dye was used in those days. It was known as *khizab*. In the Sub-continent of India it had been customary to dye the palm with leaves of henna plant. The hair were also dyed with them. But the dying of hand is falling into disuse, except occasionally, particularly among career women who have to go out for work. The use of nail polish while going out does not appear to be open to any objection.

In my view the use of other make-up on the face while going out is not permissible. During the period of the Prophet pbh and till centuries later only the eye powder was used as an adorn-

1. *Tafhim ul Quran*, Vol. 3, on Verse Q. 24 : 31.

ment. It could not add much to the attraction of women. But the powders and creams sometimes completely transform the woman and add excessively to her facial beauty. Going abroad in such make up is a conclusive presumption of one intending to attract men and to compel the indifferent among them to gaze at her which is contrary to the direction to men and women both to lower the eyes on seeing the members of the other sex. The object of the injunction not to reveal the other adornments including ostentatious dress is that women when going before strangers or when going abroad should not draw extra male attention. This analogy shall apply to extra womanly attempts to dazzle men which is not permitted except for the husband.

The implication of the orders[1] to men and women to lower gaze may now be considered. Imam Razi said that the looking at a woman might be fraught with three consequences: A man may look at a woman,

1. aimlessly and no danger of corruption and mischief may arise from it,
2. aimlessly but creating apprehension of corruption, and
3. with corrupt intention which creates apprehension of corruption and mischief.

Even in the first case staring is prohibited. After the first glance the man should lower his gaze. According to Imam Abu Hanifa it is lawful to see once when no corruption is intended and it is not permitted to repeat the look.

The illustration of the second case is provided by a person who looks at a woman wishing to marry her. He can see her face and hands. The Prophet pbh said: 'If somebody wishes to be betrothed to a woman it would not matter if he sees her. Mugheera bin Sha'aba was betrothed to a woman. The Prophet pbh asked him if he had seen her. He replied in the negative. The Prophet pbh advised him to first see her because in this way their relations might be more lasting.

1. Q. 24 : 30, 24: 31.

The third case is of gazing at a woman with a lewd gaze. In such case there is absolute prohibition of his looking at her.

Imam Razi gives certain exceptions to the rule obviously for reasons of necessity. Thus any part of the body of a woman may be examined by a medical man or physician if the same be necessary for treatment, but he should be a trusted man. If a woman be found drowning or burning it is not probibited to touch any part of her body.

It is reported by Buraida that the Prophet pbh said to Hazrat 'Ali, "O Ali! do not cast another glance. The first glance is excusable, the second is not."[1] 'Jarir bin 'Abdulla Bajali said that he inquired from the Prophet pbh, 'what should be done if the gaze is unintentional.' He advised that it should either be lowered or turned.[2] According to a report by 'Abdulla bin Mas'ud the Prophet of Allah pbh was pleased to observe that Allah enjoins, 'a gaze is like a dart from the impassioned darts of *Iblis* (Satan). Anyone who fears Allah and avoids it, I shall give to him such faith the sweetness of which he shall relish in his heart.'[3] Abu Amama is reported to have said that the Prophet pbh observed: 'Allah will make his devotion and piety doubly delicious and enjoyable who glances at the beauty of a woman and turns his eyes (from her).'[4] The story of Fazal bin Abbas has already been related how his face was turned to another side by the Prophet pbh when he found him gazing at a lady who had come to the Prophet pbh on the occasion of the last *Haj* for advice.

But some of the learned do not prohibit gaze without lust. In support of this view they rely upon the *Hadith* that on *Eid* day the Ethiopians made a display of their feats in sword play. The Prophet pbh made Hazrat 'Aisha stand behind him to see the games till she felt tired and retired.[5]

1. *Ahmad, Tirmizi, Abu Daud and Darmi.*
2. *Muslim, Ahmad, Tirmizi, Abu Daud* and *Nasai.*
3. *Tabarani.*
4. *Musnad Ahmad.*
5. *Tafsir Ibn Kathir* on Verse Q. 24 : 31.

One view of the scope of the verses[1] enjoining men and women to lower their gaze at sight of one or the other sex, is that the prohibition is against gazing at the privites (*'aurah*) of a male or female. Maulana Maudoodi cited this as a rule in *Tafhim ul Quran*.[2] He said that the object of lowering of the gaze is that a man should not cast his glance on the privities of a woman meaning parts of the body which should not be left uncovered, before strangers. For this he relied upon two traditions. According to one tradition the Prophet pbh said: 'No man ought to see the privities of a man, nor a woman should see the privities of another woman.'[3] The second tradition is reported by Hazrat 'Ali that the Prophet pbh said to him, 'Do not look at the thighs of a person whether alive or dead.'

The argument appears to be that if a man is not allowed to see those parts of the body of a man which are required to be covered and a woman is prohibited from seeing similar parts of the body of a woman, *a fortiori* a man cannot be allowed to see the coverable parts of the body of a woman and *vice versa*. This may imply that gazing at uncoverable parts is not prohibited. But this interpretation should not be imputed to Maulana Maudoodi who treated every part of a woman's body as '*aurah*' (privity or coverable).[4] The principle formulated above and the principle underlying the two traditions is not applicable to *illa ma zahara minha* (except that which is apparent).

Staring at women is also generally embarrassing for them. In all civilised societies it is considered to be an uncivilised act. In the west the orientals are criticised for this habit. Islam particularly ordains lowering or turning of eyes as a preventive measure.

1. Q. 24 : 30, 31.
2. Commentary on Verses, 24 : 31, Vol. 3, p. 382.
3. *Muslim, Abu Dawd, Tirmizi.*
4. *Tafhim ul Quran*, on verse Q. 24 : 31, Vol. 3, p. 385.

But does this amount to a complete ban of looking at one another? The answer is clearly in the negative. It is the gaze of lust that is absolutely prohibited. A gaze without lust of which an illustration is furnished by the *Hadith* of Hazrat 'Aisha about watching the sword play of the Abyssinians, is not prohibited. What is prohibited is either a gaze of attraction towards the other sex or a purposeless gaze which may create misunderstanding. Thus lowering of the gaze on the part of man is essential because he is generally attracted to female beauty, and the attraction may engender corrupt ideas in his mind. The woman is generally more modest and is seldom attracted to a man at sight. By nature she does not like to stare at men. But her meaningless glances towards a man are likely to be misinterpreted as signs of sexual availability. Despite all this potential for misinterpretation she can talk to any male face to face whenever it is necessary for the due discharge of her functions for example while shopping, entering into other contracts, managing one's property, discharging of official functions of a doctor, engineer, judge or administrator etc. A male medical practitioner is allowed not only to see the face of a female patient but also, if necessary, such parts of her body which can be made visible before her husband only. According to the jurists the doctor must be a trusted man but this condition may often be impracticable because sometimes one may be compelled to consult the first available medical practitioner who may not be personally known to her.

Some incidents have already been reproduced which prove that during the regime of the Prophet pbh the women except the wives of the Prophet pbh did not veil their faces. But Maulana Maudoodi relies upon three events which according to him prove that the veiling of women had become the rule. One of those events relates to Hazrat 'Aisha which is not relevant since it concerns the wives of the Prophet pbh for whom veiling of the face was ordained. The second event is the one already

related in connection with the legality or illegality of using nail polish that a woman submitted an application from behind the curtain, to the Prophet pbh who inquired from Hazrat 'Aisha whether she was a female or a male and when Hazrat 'Aisha told him that the applicant was a woman, he observed that she should have dyed her nails. This *Hadith* proves nothing. It only demonstrates something which *ex facie* looks queer and strange that a man could also be expected to make an application to the Prophet pbh from behind the curtain. The third event pertains to one Umme Khallad whose son was assassinated in a battle and thus became a martyr. She came to the Prophet pbh to inquire about her son with a veil over her face. The Companions were surprised that she was veiled, and asked her how it was that her face was veiled though on hearing about the death of her son a mother loses senses. She said in reply that she had lost her son but not her bashfulness. This incident is reported in Abu Daud, *Kitab ul Jihad* under the heading "Excellence of fighting with Romans than others" and does not appear to have been correctly interpreted. The report is as follows:

> "It is related... that a woman came to the Prophet pbh. Her name was Umme Khallad. She had a veil over her face and inquired after her son, who was killed. Some of the Companions of the Prophet pbh said to her, 'You have come asking about your son and you have put on a veil.' She replied: 'I have lost my son but not my bashfulness.' The Prophet pbh observed, 'Your son's reward is of two martyrs. She asked, 'Why, O Prophet of Allah?' He said, 'He was killed by the people of the Book?'"[1]

It appears that this is the only tradition which enunciates the reward of double martyrdom for a person killed by the people of the book since while formulating this principle Ibn Qudama relies upon this tradition only.[2] This is not a rule

1. *Abu Daud* (Urdu translation with Arabic version), Vol. 2, pp. 282-3.
2. *Almughni*, Vol. 8, p. 350.

subscribed to by all the learned. The reliability of the *Hadith* depends upon the reliability of this rule. Moreover the chain of narrators has been adversely commented upon in various books. The chain of relators in *Abu Daud* is as follows:

> "Abdul Rahman bin Salam related to us from Hajjaj bin Mohammad from Faraj bin Fazalah from Abdul Khabir son of Thabit son of Qais son of Shimas from his father who related it from his grandfather..."

According to Hafiz al Manzari[1] the grandfather of Abdul Khabir was Thabit son of Qais son of Shimas and not Qais son of Shimas (as related in the *Hadith*). Bokhari said that Faraj bin Fazalah related from Abdul Khabir.. His *Hadith* do not stand scrutiny. His *Ahadith* are not acknowledged (*manakir*). Abu Hatim al Razi said that the *Hadith* of Abdul Khabir is not acknowledged and is disavowed. Ibn 'Adi said that Abdul Khabir is not well known. Same observations which are attributed to Bokhari and Ibn 'Adi are reproduced in *'Aun al Ma'abud*.[2] Same remarks of Abu Hatim are there in *Tahzib ul Tahzib*.[3] In *Mizan al 'Itidal*[4] is reproduced the same opinion of Abu Hatim. The subject is discussed in much more details on the same lines in *Bazlul Majhud*.[5] These commentaries are sufficient to prove the unreliability of the *Hadith*.

In any case it is not clear whether she used the veil as a matter of custom or pursuant to any *Sharia* order, because the word *haya* (bashfulness or coyness) is significant. As already seen the injunctions to put on *khimar* or *jilbab* in the two verses[6] of the Quran do not refer to this requirement. The following

1. *Mukhtasar i Sunnan Abu Daud* by Hafiz ul Munzari, Vol. 3, p. 359.
2. *Aun al Ma'abud* (printed Multan), Vol. 2, p. 314.
3. Vol. 6, p. 124.
4. *Mizan al 'Itidal*, Vol. 2, p. 544.
5. *Bazl al Majhud* by Khalil Ahmad Saharanpuri, Vol. 11, p. 286 (printed Beirut).
6. Q. 24 : 31 ; Q. 33 : 59.

extract from the *Social Structure of Islam* by Reuben Levy throws some light on the custom of veiling in some tribes in Arabia :

> In ancient Arabia custom appears to have varied; the women of the desert-dwellers going unveiled and associating freely with men while the women in the cities were veiled."[1]

He has referred to the veiling of the women of Quraish in general but this does not appear to be correct. There may, however, be some truth in the proposition that veiling the face was customary in the cities among some people. It is possible that this might have been adopted by some Arabs who might have been influenced by Persian manners on their business trips to that land. It was unusual for the Companions of the Prophet pbh that a woman in distress should veil her face, which might signify that veiling the face as such was not considered essential. None of the traditions relied upon by Maulana Maudoodi establishes that veiling was then a rule.

The question is whether this isolated *Hadith* can be relied upon for a principle of such far-reaching effect. No such principle or rule was declared by the Prophet pbh at the time of other battles with the people of the book.

It is said that the women covered their faces in Spain but this reference is most irrelevant because historically it is established that seclusion of women was introduced during the Omayyad rule and took roots during the regime of Kadir Billah, a Caliph of the house of 'Abbas. Seclusion of women had been the rule in some Greek States and Persia. Persian influence is more to account for veiling them and completely excluding them from society. This largely affected the attendance of the women in congregational prayers in the mosque because during prayer the face could not be masked. The historicity of these restric-

1. *Social Structure of Islam* by Reuben Levy, p. 124.

tions on women has been dealt with by Ameer Ali in the *History of the Saracens*. He writes:[1]

> "As I have already mentioned, the custom of female seclusion which was in vogue among the Persians from very early times, (compare the story of Esther, Verses 9 and 12) made its appearance among the Moslem communities in the reign of Walid II. And the character and habit of the sovereign favoured the growth and development of a practice which pride and imitation had transplanted to the congenial soil of Syria. His utter disregard of social conventionalities, and the daring and coolness with which he entered the privacy of families, compelled the adoption of safeguards against outside intrusion, which once introduced became sanctified into a custom. To the uncultured mind walls and warders appear to afford more effective protection than nobility of sentiment and purity of heart.
>
> Despite these unfavourable circumstances, women continued down to the accession of Mutawakkil, the ninth Caliph of the house of Abbas, to enjoy an extraordinary amount of freedom. The old chivalry was yet alive among men. Byzantine licence and Persian luxury had not destroyed the simplicity and freedom of the desert. Fathers were still prone to assume surnames after their accomplished and beautiful daughters; and brothers and lovers still rushed to battle acclaiming the names of their sisters and lady-loves. The highbred Arab maiden could still hold converse with men without embarrassment and in absolute unconsciousness of evil. To her the beautiful lines of Firdausi were still applicable—lips full of smiles, countenance full of modesty, conduct virtuous, conversation lively."

She entertained her guests without shyness, and as she knew her own worth she was respected by all around her. A well-known author relates that once returning from Mecca he

1. *History of the Saracens*, pp. 199-202.

halted at a watering place near Medina. The heat of the sun drove him to seek shelter in a neighbouring house which appeared to be of some pretension. He entered the courtyard and asked the inmates if he might alight from his camel. A lady's voice gave him the sought for permission. He then asked for leave to enter the house, and receiving permission he entered the hall, where he found 'a maiden fairer than the sun,' engaged in some household duty. She bade him to be seated and they conversed, and the 'words like pearls were scattered from her lips'. Whilst they were conversing, her grandmother entered and sat down by their side, laughingly warning the stranger to beware of the witchery of the fair girl.[1]

Another incident related by the father of this author throws further light on the manners and customs of the age. He was proceeding to Mecca, and halted in the way at the house of a friend who asked him if he would like an introduction to Kharka, the famous lady whose praise had been sung by one of the greatest poets of the Omayyad times. On his expressing a desire to meet the beauty, he was taken to her residence, where he was received by a tall and extremely beautiful woman 'in the force of age'. He saluted her and was asked to sit down. 'We conversed for a time', continues the narrator, 'when she asked me laughingly, 'didst thou ever make the pilgrimage?' 'More than once' said I, 'And what then has hindered thee from visiting me?' Dost thou not know that I am one of the objects to be visited during the pilgrimage?'—'And how is that?'—'Hast thou never heard what thy uncle Zu'r Rahma said: 'To complete a pilgrimage, the caravan should stop at Kharka's (abode) whilst she is laying aside her veil.'

Under the early Hakamites flourished es-Syeda Sukaina or Sakina, the daughter of Husain, the Martyr of Kerbala who was regarded as 'the first among the women of her time

1. Abu Tayyeb Muhammad Al-Mufazzal al-Dibbi (d. 308 A.H.).

by birth, beauty, wit, and virtue'. Her residence was the resort of poets, *Faqihs* (jurists) and learned and pious people of all classes. The assemblies in her house were brilliant and animated, and always enlivened by her repartees.

Ummul Banin the wife of Walid I, and sister of Omar II, was another remarkable woman of her time. Her influence over her husband was considerable and was always exercised for the good of the people..." (pp. 199 to 202).

Amir Ali further says:[1]

"Under the early Abbasides the position of women was in no way different from that under the Ommayyads. In fact the system of absolute seclusion and segregation of the sexes does not appear to have become general until the time of Kadir billah, who did more to stop the progress of the Muslim world than any other sovereign. In the time of Mansur we hear of two royal princesses (the cousins) going to the Byzantine war clad in mail, in performance of a vow taken during the struggle with Merwan... In Rashid's time we have seen how Arab maidens went to fight on horseback and commanded troops. The mother of Muktadir herself presided at the Court of Appeal, listened to applications, gave audiences to foreign dignitaries and envoys. Reunion and conversations at the residence of cultured women did not cease until the time of Mutawakkil."

Reuben Levy[2] writes:

"Until the third century of the *hijra*, and even later, women enjoyed with men the right to pray in the mosque: Omar is said to have appointed a Koran reader especially for them at public worship.[3] They were not required then to be veiled; but the law-books prescribe the kind of dress to be worn, which consists of at least two pieces—a chemise, and a cloak for the upper of the head and the body. The face, hands and upper side of the feet need not be covered, though

1. *History of the Saracens*, p. 455.
2. *Social Structure of Islam* by Reuben Levy, p. 126.
3. *Tabari*, Vol. 1, p. 2649 *cf., ibid.*

on the last detail there is some controversy."

He further writes:[1]

> "It is not possible to say when the harem system and the seclusion of women began to be general. The early interpreters of the Koran were men who originated in Persia, a land in which the women had long been secluded, and it is probable that their authority in Islam began to make itself felt after the close of the rule of the Umayyad Caliphs of Damascus. By the time of Harun al Rashid, one-and-a-half centuries after the death of the Prophet pbh, the system was fully established, with all the appurtenances of the harem, in which, amongst the richer classes the women were shut off from the rest of the household under the charge of eunuchs. By the Middle Ages the system had normally taken so firm a hold that pious visitors were shocked when they came to lands where there was free social intercourse between men and women. The Moorish traveller Ibn Batuta found amongst the Massufa tribe at the oasis of Awalatan in the Sahara that, although they were Muslims."

Levy then cites Ibn Batuta:[2]

> "Their women showed no modesty in the presence of men and did not veil. Yet they were assiduous in their prayers. Anyone who wished to marry them could do so, but they would not go a journey with a husband. Even if one of them wished it her kinsfolk would prevent her. The women there have friends and companions amongst men who are not related to them. So also the men have friends amongst women or men not related to them. A man may enter his house and find his wife with her (male) friend and yet will not disapprove."

Levy then gives further examples of countries in which the women

1. *Social Structure of Islam* by Reuben Levy, p. 127.
2. *Voyages*, Vol. IV, p. 388 ff; *cf., Ibid.*

do not veil their faces. But these are instances of women who are prevented from veiling by economic conditions.[1]

The impracticability of completely secluding the women in the privacy of their homes is manifested by the considerable number of women in the rural areas and in the economically backward societies being obliged to work outside their houses. The nature of work they have to perform renders it not only inconvenient but impossible for them to veil their faces and absolutely avoid contact with strangers. About seventy-five per cent. of the people in Pakistan live and work in villages. They comprise of land-owners, farmers, agricultural labour, village artisans and industrial labour of industries located near the villages. Leaving aside a few landlords and some persons whose places of business are in the urban areas all others either live on agriculture or have to work in industries. Their women also have to work either on the fields or in industries. Generally the women in the rural areas have to attend to many outdoor duties which include grazing the cattle, fetching fodder for them and cutting it, bringing water in pitchers on their heads from the wells and ponds, taking breakfast and meals to the male members working in the fields, harvesting the crops, etc. There are places where the women virtually yoke themselves to the plough along with a single head of cattle, which is the only ploughing animal owned by the family, and plough the field with the male member handling the excavator of the plough. Among some hill tribes the men loiter or while away their time in idleness while the women have to do everything from house cleaning, cooking, sewing, child rearing to bringing water from big distances, grazing sheep and goats and sometimes cultivating small pieces of land. In the cities it is a common sight that Ode women climb upon buildings under construction with a number of bricks over their heads and their men only collect their day's earnings. And despite the discharge of these arduous duties they are said to be

1. *Social Structure of Islam* by Reuben Levy, p. 127.

weak, and the man is given the right to rule over them by our religious scholars.

It is interesting to note that this has been going on for centuries but none of our religious scholars has ever called upon the rural women to take the veil or to confine them to their houses, nor a religious scholar has ever condemned their men for making them work like beasts of burden.

Women have to work as industrial labour too irrespective of whether they reside in cities or in villages. In fact women belonging to the labour class and living in the cities do not fare better. In addition to attending to their household duties which are never performed by a man having a family, they have to work to enhance the income of the family to make two ends meet. To save money on fuel some women are found collecting the cattle dung on the city streets with which they prepare dung cakes for cooking their meals.

Such is the lot of more than eighty-five per cent. women in Pakistan. One of the main causes of the polygyny among agriculturists is the acquisition of cheap labour having the capacity to work dumbly and ungrudgingly from early morning till late in the night, for the security of only two or three meals a day. Has any of the religious scholars ever advised these women to veil their faces and their men to keep them in seclusion in their houses. The answer is an emphatic 'No'. All their energies are directed towards preaching the veiling and seclusion of the city-dwellers among women and of the middle and the higher classes to boot. No religious scholar (*alim*) has ever reaised a single voice of protest against the inhuman treatment meted out by men to the women of the working class. Their preachings are directed only to the obedience by a woman of her husband. It appears from their teachings from the pulpit and platform that the women have only liabilities in store for the few morsels of food that their husbands have to provide for them. What is most callous and inhuman is that if members of some women

organizations sympathise with the ugly lot of working women these religious scholars condemn them for their unveiled faces and for being under the western influence. They conjure up all types of *fatwas* against them.

Let us assume for the sake of argument in favour of veiling and seclusion of women. The only inference then would be that these injunctions are meant only for a very small percentage of women who hail from the middle and higher echelon of Muslim society. Such unavoidable inference would demonstrate what the enemies of Islam allege about the impracticability of the religion of Islam. Among the fifteen per cent. women belonging to the middle or wealthy classes, who generally appear in public, many are career women. They are generally well educated and are doctors, engineers, nurses, school teachers, professors, police officers, lawyers, judges, administrators, business women, business executives, bankers, etc. Many work on computers, others pursue a host of professions. It is true that their religion does not compel them to work to earn money but the permission to earn is implied in verse Q. 4 : 32, "Unto the men's lot is that which they earned and unto the women's lot is that which they earned." Earning certainly includes the reward of good deeds but it also includes earning of money. The educated women are therefore within their rights to work in different fields for earning. These avenues of career, vocation and work have been opened for them by higher education which half a century ago was forbidden to them. Living as they did in seclusion the only education permitted to them, and that also at home, was reading of the Quran and a bit of vernacular. I remember the disapproval with which the few Muslim girls who went to girls' schools were looked at by the men and women in general and how rumours full of scandals were spread about them in order to discourage parents from sending their daughters to schools.

Education has demonstrated the fallacies in the theories current among the Muslims about the calibre, mental outlook, memory, adequacy and perfection of the women. They are as good, and sometimes better doctors, professors, judges, etc. as men. Though the percentage of educated women is quite low but our country has progressed a lot as a result of female education. The question is whether this is attainable in seclusion and the women can pursue their careers in veils and masks. To answer this in the affirmative is to close one's eyes to its impracticability, irrationality and unworkability. It would be realistic to acknowledge that it is achievable by letting the face and hands remain uncovered, and this is exactly what the practical religion of Islam enjoins in *Illa ma zahara minha* (except that which remains apparent).

Careerism among women is not a hobby. The object of some in choosing a career is to make themselves useful to the society. For them money is a secondary consideration. For others there are economic compulsions. The uneducated widows or deserted wives generally earn money by sewing and needle work but literate women avail of their talents in finding many vocations for living honourably. During this age of inflations and unpredictable rise in the costs of living many an educated women assist their husbands, parents, brothers and sisters by putting to use their talents for earning honest money, to make the two ends meet. And then the question is why they should not turn out to be useful members of the Ummah or society. One thing which is common among these ladies is that with few exceptions, in fact much fewer than males, they entertain considerable love and reverence for Islam, the Prophet pbh and the saints. They are generally chaste and guard their modesty. No scandal is attached to them. They marry, have children but persevere in their careers. Above all they are conscious of their rights, to the perturbation and irritation of our *ulema* (religious scholars). Those who have time devote their energies

to the uplift and reform of the members of their sex. All these are the blessings of college and university education.

Another drive by the orthodox is for complete separation of the educational institutions for girls. This is nothing but implementation of the plan for their sequestration. If the object be to prevent free mixing of the sexes and not their seclusion, it can be achieved in the colleges and universities where both girls and boys are admitted. The best mechanism for this is provided by the Prophet pbh. The women could participate in congregational prayers in the mosques but their rows were behind the rows of men; sometimes the Prophet pbh came to the rows of women to preach to them. This was only a method of teaching. The university authorities can prescribe uniforms for the girl students which may cover their adornments except the face and the hands and they may be seated behind the boys. Another alternative is to seat them on the right or left of the professor. To satisfy the orthodox a curtain may be hung between them and the boys and a separate entrance and exit be made for them. I remember that while dealing with some University Act the Federal Shariat Court had recommended the use of curtain to separate boys from girl students. The number of women professors and teachers in the country is not sufficient to cater to the needs of separate institutions for women. There is no reason why the girl students be deprived of instruction by capable male teachers and the boys be prevented from learning from capable female teachers. The other drawback in separate education is that on account of the peculiar financial position of the country the science laboratories of new institutions are likely to remain inadequate for many a years.

And then why should not the boys and girls work together in group in a laboratory? What is really prohibited is seclusion of a man and a woman for no purpose except friendship or companionship. Their company in groups for experimentation and learning or for other work of valid nature cannot be

held undesirable except by those who are haunted by the *harem* system. No objection can on the same analogy be taken to the women working in the same offices with men.

Some of the orthodox consider it undesirable for a woman officer to sit alone in a separate room and to call her male subordinates one by one in the course of official business. *A fortiori* her sitting in the same room alone with a clerk is considered more inexpedient. This is on account of the obsession of these champions of segregation concerning women. The subordinates or clerks of a woman officer are subject to her authority and their only interest in service is to earn a living for maintaining their families. Their position is analogous to the position of strangers other than slaves who are described in verse Q. 24 : 31 as *awittabeeina ghair-e uli il irbate minar rijal* (Or male attendants who lack vigour). It has already been explained that men belonging to this category need not necessarily be eunuchs; they are required to be such subordinates whose interest lies in securing their meals. If such persons be working at home the ladies of the house can be as informal before them in matter of dress as before their fathers or brothers.

Most of these objections emanate from the doctrine that a woman cannot travel except in the company of a *mahram* (a person related to her within the prohibited degrees). But opinions differ on the scope of the principle. Some scholars insist that a woman should not go on a journey without a man who is related to her within the prohibited degrees (محرم *mahram*). There are rather inconsistent traditions in this respect. It is related from Ibn Abbas: "I heard the Prophet pbh saying that a man and woman should not remain together unless with her is a *mahram* nor should a woman travel unless there be with her a *mahram*." Another report is from Abu Huraira who said: "The Prophet pbh said: 'It is not lawful for a woman who believes in Allah and the Day of Judgement to travel to a distance of more than one day's journey unless there be a *mahram* with

her." Abu Abdullah said that Abu Huraira said, 'one day and one night' (and not one day only). But in the *Hadith* of Abu Saeed it is said: 'Three days.' When we enquired: 'What do you say.' He said: 'She should not travel either far or near except with a *mahram*.' A *Hadith* is also related by Dar ul Qutni from Ibn Abbas that the Prophet pbh said: "A woman should not perform *Haj* unless there be *mahram* with her."[1]

The scholars differ on the point whether a woman who is rich but has no *mahram*, can perform *Haj*. The Hanafis and Hanblis rule out the obligation of performing *Haj* for her. But Imam Shafe'i and Imam Malik and also Ibn Seereen and Auzai hold otherwise. They say that she must perform *Haj*, because in her case presence of *mahram* is not a condition. Ibn Seereen said that she can go for *Haj* with a man and there is no harm in it. Malik said she should go with a group of women. Shafe'i said that she can go with a virtuous free woman. Al Auzai held that she can travel in the company of a number of just people, but she should not allow any male to come near her.[2]

In reply to a question whether a woman can travel with her slave, it is said that the Prophet pbh said that voyage of a woman with a slave is a loss. This is related by Saeed. Shafei said that her slave is her *mahram* because it is lawful for him to look at her. He is as good a *mahram* as a person within prohibited degree to her.[3]

In expediency, however, she can travel without a *mahram*. Thus if a woman is a prisoner of unbelievers and she is freed, her journey (to her people) being expedient, the analogy of optional journey cannot be applied to her. She can travel alone.[4]

1. *Almughni* by Ibn Qudama, Vol. 3, pp. 237-238. Also see *Tirmizi* (Urdu trans.), Vol. 1, p. 229.
2. *Almughni*, p. 237, *ibid.*
3. *Almughni*, p. 239, *ibid.*
4. *Ibid.*, p. 238.

Ibn al Munzar said that Shafe'i, Malik etc. have made a departure from the express meanings of *Hadith*.[1] There is no departure if there is a cause, express or implied, for the command and the *Hadith* is interpreted in the light of that cause. Ibn Qudama who follows the *Hadith* in letter only says that undoubtedly the *mahram* is for her security and he is as if the roads have been left vacant (without travellers) making it possible to make (uninterrupted) journey.

The view of Imam Shafe'i is clearly based upon the principle that the idea underlying the command to travel with *mahram* is to provide security for her person and property. A *mahram* is the best possible security *inter alia* for preservation of her chastity. If her safety is otherwise vouchsafed there is no harm in her travelling with strangers, men or women. A slave who enjoys the confidence of the woman on account of his faithfulness and can attend to her, is like *mahram*, according to Imam Shafe'i. A virtuous person going for *Haj* is as good a guarantee for her in the opinion of Ibn Seereen. The company of another woman who is virtuous and free warrants her safety as much as the company of *mahram* according to Imam Shafe'i. Similar safeguard is ensured by the company of a number of women, according to Malik or a number of men according to Al Auzai.

The question of safety and security cannot be alien to the dangers on the road, particularly in those days when means of travel were slow; there were hardly any roads and the travellers were few. In Arabia one had to travel sometimes for days before he reached another habitation. The opportunities for men to assault a lone woman were too many.

Even in these circumstances permission was granted to a woman according to one *Hadith*, to travel without *mahram* for a day and night and according to another *Hadith*, for three days which means sufficient distance even on a camel's or horse's back.

1. *Ibid.*, p. 237.

In modern times the journey on aeroplane, train, bus or car is quite safe. So is the voyage by sea. During three days a woman can travel to distant parts of Europe or the Far East and return. A woman going alone for *Haj* is as safe on her journey to Saudi Arabia and back as at home. In Makka and Madina her security is guaranteed not only by large crowds of men and women who go there for performing *Haj* but also the strict laws of the country. Women going alone for study abroad for education have no apprehension in regard to their security. The wider interpretation of the traditions of the Prophet pbh by eminent scholars of the early centuries should be accepted in this age.

The rule of *mahram* is designed to prevent *fitna* (mischief). If there be no such apprehension the rule shall not apply. The harem system was justified by the old jurists with the same apprehension. But its feasibility except in the case of a small percentage of women has generally been doubtful. It is no more practicable now. We are living in an era in which the women are also required to work to earn money. They have to be educated and are required to be useful members of the society in every field of nation building.

Some women also are extremists and the duty of the people including the religious scholars and the state to make them conform to the Quranic injunctions about concealment of their adornments cannot be denied. The state, however is in a position to apply legal sanction for the purpose but the people and the *Ulema* have no such power. They can only persuade. Unfortunately the *Ulema* have only one device and that is of condemning the deviationist. But this device has never succeeded. They should be human in dealing with human beings. Gone are the days when they virtually treated the women as chattels. In some commentaries of the Quran it is stated that just as we guard our valuable things from thieves, so we should guard our women from the thieves of chastity.

This type of thinking reflects that women are considered by the *ulema* like things *i.e.* chattels. It is time that they should be treated as human beings, who should be relied upon for the safeguard of their chastity. The preaching to them should be persuasive and not condemnatory. The preaching should not, moreover, be a one-way traffic. The *ulema* should also simultaneously raise their voices against the cruelties, indignities and inhuman treatment meted out to women by the men.

WOMAN'S RIGHT TO HOLD PUBLIC OR JUDICIAL OFFICES

There is no prohibition in the Quran against the election of a woman to the high office of head of the State or against her appointment to public or judicial offices. The principle which is very well known الاصل فی الاشیاء الاباحة حتی یدل الدلیل علیٰ عدم الاباحة (lawfulness is inherent in every thing unless there be reason for its unlawfulness or prohibition) should therefore determine the question. The Quran allows a member of the fair sex to be an earning member of the family like members of the other sex. Q. 4 : 32 reads:

ولا تتمنوا ما فضل الله به بعضكم علیٰ بعض للرجال نصیب مما اکتسبو و للنساء نصیب مما اکتسبن وسئلوالله من فضله ان الله بکل شئی علیما ۔

Q. 4 : 32.—And covet not the thing in which Allah hath made some of you excel others. Unto men a fortune from that which they have earned, and unto women a fortune *from that which they have earned.* (Envy not one another) but ask Allah of His bounty. Lo Allah is ever Knower of all things.

The words italicised are very significant and amount to an express permission to the woman to earn. The woman's earning and her fortune being her own, abrogates the rule prevailing in all other religions and societies which invest the husband with power of control over the earning and fortune of his wife.. The Quran lays down in unambiguous terms that the property of a woman as well as her earnings before or after her marriage are exclusively her own and her husband or any other guardian does not have any interest in or seisin over it. In ancient Israel the husband had a proprietary right over his wife.[1] The father

1. *Encyclopaedia of Religion and Ethics*, Vol. 5, p. 724.

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.[1]

The property rights of women were as limited in Talmud as in eighteenth century England; their earnings and the income from their properties belonged to their husbands.[2] In law, according to one Rabbi, 'a hundred women are equal to only one witness'.

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.[3] The Property reforms in most States started after 1839. In England[4] the first Act 'The Married Women's Property Act', was promulgated in 1882. As late as the 18th century Sir Wiliam Balckstone 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 the husband. 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 Tortfeasers) 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

1. *Encyclopaedia of Religion and Ethics*, Vol. 5, p. 728.
2. *The Age of Faith* by Will Durant, p. 363.
3. *Bonds of Women* by Nancy F. Cott, p. 5.
4. English Statutes referred:
   (*a*) The Married Woman's Property Rights Act, 1882.
   (*b*) Law of Property Act, 1925.
   (*c*) Law Reforms (Married Woman and Tortfeasers) Act, 1935.

of rendering herself and being rendered liable in respect of any tort, contract or debt or obligation (S. I.). 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 female sole.

Among the Greeks the woman was 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.[1]

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

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.

In Japan after the coming of Confucian and Buddhist teachings woman's duty became that of obedience to her father, her husband and her son; when married her property became the possession of her new family.[2]

Thus generally the women were not considered economic individuals. 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 husbands. Their position was of subjugated individuals.

Islam on the other hand placed woman and man both on the same footing in economic independence, property rights

1. *Story of Civilization* by Will Durant, Vol. II, p. 305. *See also Encyclopaedia of Religion and Ethics*, Vol. 5, p. 735.

2. *Encyclopaedia of Ethics and Religion*, Vol. 5, p. 740.

and legal process. She might follow any legitimate profession, keep her earnings, inherit property and dispose of her belongings at will (Q. 4 : 32).[1] The concept of equality ensured for her the highest political office as well.

But then reliance is placed for the opposite view on verse 34 of Surah Nisa (Chapter IV), "الرجال قوامون على النسا" (Men are incharge *of* women). In some of the commentaries the word "قوام" (*Qawwam*) is used in the sense of a ruler or master or a person having an authority, for example *Maarif ul Quran* ("معارف القرآن") by Mufti Mohammad Shafi. In *Rooh ul Maani* ("روح المعانی")[2] by Aloosi the position of man is of *al Walayat ul Ra'aiyya* ("الولایت الرعیہ") *i.e.* sovereign power over the subject. The word *Walayat* ("ولایۃ") (sovereign power) in respect of women is also used in *Tafseer ul Manar*. ("تفسیر المنار")[3] Maulana Fateh Muhammad of Jullandhari[4] translated the said verse in the same meaning "مرد عورتوں پر حاکم ہیں" (*Mard aurton per hakim hain*) *i.e.* men are rulers and have absolute sovereignty over women.

In other commentaries,[5] however, the word "قوام" (*Qawwam*) is interpreted as a guardian or head of the family. Maulana Abul Kalam Azad[6] translated the word as "سربراہ اور کارفرما" (*Sarbarah and kaarfarma*) *i.e.* a manager and a ruler but it appears from his commentary that he has used the word "سربراہ" (*ruler*) in the sense of 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*[7] by John Shakespeare, one of the meanings of *sarbrahi*

1. *The Age of Faith* by Will Durant, p. 180.
2. *Rooh ul Ma'ani* by Allama Aloosi, Vol. 5, p. 27.
3. *Tafseer ul Manar* by Rashid Raza on Q. 4 : 34.
4. *Translation of the Quran* by Maulana Fateh Muhammad Jullandhri, on Q. 4 : 34.
5. See *Tadabbur ul Quran* by Maulana Amin Ahsan Islahi on Q. 4 : 34.
6. *Tarjuman ul Quran* by Maulana Abul Kalam Azad on Q. 4 : 34.
7. *Urdu English Dictionary* by John Shakespeare.

(سرانجامی) is the act of providing supplies. It is in this sense that Maulana Umar Ahmad Usmani interprets it in *Fiqh-ul-Quran*.[1]

In support of the diluted meaning Maulana Abul Kalam Azad[2] referred to the pre-Islamic concept about the members of the other sex being entitled to subservient status only and their duty being to serve the members of the male sex, to obey them and satisfy their desires. The Quran has improved and raised this status.

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

The root word of "*qawwam*" in Arabic is "قوام" or "قوم" (*Qawama*). The words "قوم علیٰ" (*Qawama ala*) means to provide with the means of subsistence. "قوام علیٰ" (*Qawwam ala*) will, therefore, mean a provider, a supporter or furnisher for another with the means of subsistence. It also means manager, care-taker, custodian or guardian. It is for this reason that Abdullah Yousuf Ali has translated the word *Qawwam* as meaning protector. Pickthal has translated it as incharge, which is the same thing as care-taker or guardian. Arberry interprets it as one who manages the affairs of women.

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[3] says 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 Undlusi with reference to Qurtubi.[4]

1. *Fiqh ul Quran* by Maulana Umar Ahmad Usmani, Vol. III, p. 382
2. *Tarjman ul Quran* by Maulana Abul Kalam Azad on Q. 4 : 34.
3. *Al Islam deen ul Fitrat wal Hurriya* by Abdul Aziz Jaweesh, p. 98.
4. *Al Bahr ul Moheet* by Abu Hyyan Undlusi, p. 239.

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 cannot 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 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. "Allah has given the one more (strength) than the other" (فضل الله بعضهم على بعض) connotes this excellence in strength. The word strength includes physical strength. Men are for such reasons in a better position to safeguard the interest of women.

I think the best commentary of this verse is in the tradition of the Holy Prophet (p.b.h.):

الا كلكم راع و كلكم مسؤل عن رعيته فالامام الذى على الناس راع وهومسؤل عن رعيته والرجل راع على اهل بيته وهو مسؤل عن رعيته والمرأة راعيته على اهل بيت زوجها و ولده وهى مسؤلة عنهم و عبد الرجل راع على مال سيدة وهو مسؤل عنه الا كلكم راع و كلكم مسؤل عن رعيته ـ

(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, 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).[1]

"راعى" (*Raaie*) means protector, custodian or a person who

1. *Saheeh Bukhari.*

is responsible for the development of what is protected by him and thus he is required to be just and to look after his interests.[1]

It may be clarified that word "رعی" (*Raie*) which is the root word of "راع" (*Raa*) and "رعیته" (*Raiyyah*) means to graze, to tend, to take care of, to guard, to protect. "راع" (*Raa*) means shepherd, herdsman, guardian, keeper, protector. "رعیته" (*Raiyyah*) 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.

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

الرجال قوامون علی النسآء بما فضل الله بعضهم علیٰ بعض و بما

انفقو من اموالهم فالصٰلحٰت قٰنتٰت حٰفظٰت للغیب بما حفظ الله

Q. 4 : 34.—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."

It also appears from Hadith that the mantle of shepherdhood is not for the male only; a female also may be a she-

1. *Fath ul Bari*, Vol. 13, p. 112.

pherdess. She enjoys that role over her children. In a case where she is unmarried 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 Hadith.

The same result can be obtained from a reference 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 unnatural 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.[1] 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

1. *Tadabbar ul Quran* by Amin Ahsan Islahi on Q. 2 : 223.

pleased by its verdure, and freshness and when the time comes, he may reap excessive crop."

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

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 adavnce 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 evildoers. These are functions which can be more satisfactorily 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 as 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.

In classical Roman Law, a patria potestas or the elder of the family was given the right even to kill the children. In the Old Testament in case of the 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.

On the other hand there is mutuality in the relationship of the spouses. The Quran says : هن لباس لكم و انتم لباس لهن

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

It further lays down:

والمومنون والمومنات بعضهم اولياء بعض يامرون بالمعروف و ينهون عن المنكر و يقيمون الصلوة و يوتون الزكوة و يطيعون الله ورسوله اولئك سيرحمهم الله ان الله عزيز حكيم

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 temptoress and the other acting under the enchanting influence of the other. According to the story in Genesis[1] the woman first yields to temptation. But the Quarnic 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 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).

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

1. Genesis, 3 : 1-6.

may be regarding the duties or they may be regarding reward or punishment:

ان المسلمين و المسلمٰت و المومنين و المومنٰت والقٰنتين و القٰنتٰت والصٰدقين والصٰدقٰت والصٰبرين والصٰبرات والخٰشعين والخٰشعٰت والمتصدقين والمتصدقٰت والصائمين والصائمٰت والحٰفظين فروجهم والحٰفظٰت والذاكرين الله كثيرا والذاكرات اعدالله لهم مغفرة و اجرا عظيما ۔

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 persevere, 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."

ليعذب الله المنٰفقين والمنٰفقٰت والمشركين والمشركٰت و يتوب الله على المؤمنين والمؤمنٰت و كان الله غفورالرحيما

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."

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. Some of them are cited.

والذين كسبو السيأت جزاء سيئة بمثلها وترحقهم ذلة ما لهم من الله من عاصم كانما اغشيت وجوههم قطعا من الليل مظلما اولئك اصحب النار هم فيها خالدون

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 are 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."

واما من امن و عمل صالحا فله جزاء من الحسنى وسنقول له من امرنا يسرا ثم اتبع سببا

Q. 18 : 88 :—But as for him who believeth and doth right, goodwill be his reward, and We shall speak unto him a mild command."

جزاء بما كانوا يعملون

Q. 56 : 24.—"Reward for what they used to do."

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

These verses prove the measures of equality between men and women. In Q. 3 : 195 and Q. 4 : 25 it is stated بعضكم من بعض 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 *e.g.* 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 Hisham, whenever the Holy Prophet heard something from people touching his rejection that grieved him, she reassured and supported him.[1] The high opinion of

1. *Women in Muslim History* by Charis Waddy, p. 9.

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 withholding of others."[1]

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

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, that he cleaned his teeth. She was asked what did he do at home, and promptly she answered that he helped his wife.[2]

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

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 and women are equal. Any one of them 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)

1. *Women in Muslim History* by Charis Waddy, pp. 18-19.
2. *Ibid.*, p. 21.

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'.[1] It is not thus possible to infer any prohibition of appointment of woman to high offices in the State from verse Q. 4 : 34 about Qawwam.

Those who insist on conferring upon the woman a subordinate position rely upon two traditions. The first Haidth includes a direct injunction regarding prohibition about the rule of women. It is to the following effect.

عن ابی بکرة قال لقد نفعنی الله بکلمة ایام الجمل لما بلغ النبی صلی الله علیه وسلم ان فارس ملکوا ابنة کسرای قال لن یفلح قوم ولو امرهم امرائة

(Abu Bakra said that Allah caused me considerable benefit from one sentence. When news reached the Prophet (p.b.h.) that the Iranians had made the daughter of Chosroe their ruler, he observed : 'that nation can never prosper which has assigned its reign to a woman). It was on account of this Hadith that in the twenty-two points of the Ulema of Pakistan, which were presented to the Government as essential guidelines for the framing of a constitution it was specifically stated that the Head of the State will be a Muslim male.

This point was re-examined during the campaign for the Presidential election of 1964 in which Miss Fatima Jinnah, the

1. *Ihya ul Uloom*, Book II, p. 38 (translation by Maulana Fazal Kareem).

revered sister and companion of Quaid-e-Azam, was nominated by the opposition parties to fight the election to the office of the President of Pakistan against Field Martial Muhammad Ayub Khan. After a research the view about disqualification of women to hold 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 Jamaat-e-Islami, Pakistan endorsed this view after retracting its earlier stand on the matter which was reflected in the abovementioned point No. 12. Maulana Maudoodi was severely criticised for this by Kalim Bahadur in his book *Jamaat-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 'رجوع' (Raju or retreat).

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 generality 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 popular Republican Government in which the *de facto* and *de jure* 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.

In this connection reference was made by Maulana Ashraf Ali to Bilqees of Saba about whose rule the Quran raised no objection. There is a verse in the Quran ماكنت قاطعة امراحتى 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, as Head of State and States with such Governments are free from the taint of deficiency pointed out in the Hadith.[1]

Allama Syed Suleiman Nadvi, another great scholar of this century, wrote :

> "Hazrat Aisha must have felt extremely shocked on receiving information about this calamity and must have suffered agony and distress on seeing the Muslims in this state of confusion, particularly when she must have realised that there was no one else to solve this puzzle or complicated problem. By nature she was endowed with boldness, courage and qualities of head and heart. She sought the permission of the Prophet (p.b.h.) to participate in Jihad (battles). He replied that the women's Jihad was Hajj pilgrimage. Prior to the revelation of the injunction about seclusion she participated in various battles in which the Prophet (p.b.h.) took part. According to one narration she had gone in the battle of Badr. During the battle of Uhd when Muslims were in danger and when men of valour were losing heart, with the legs of her trousers turned upwards and with a water bag on her back she was running from place to place in the

1. *Imdad ul Fatawa*, Vol. V, pp. 91-93.

battlefield distributing water among the wounded combatants. During the siege and the battle of the Ditch (when Muslims had dug a ditch round Madina to fortify their defences) when the Muslims were in a state of siege, Hazrat Aisha used to come out of the fortifications prepared for women, to look to the position of war. This is correct that the natural tendencies of the women make her unfit for discharging the duties of Imamat (government or chieftainship) and it is not possible for the fair sex to comply with the conditions which Islam has imposed for the governmental role. For this reason the women are exempted from assumption of the authority of the Head of State or the vice-gerency of Allah. But from this it cannot be concluded that it is not lawful for a woman to ever lead the public politically or to assume the leadership of the army, particularly under such conditions in which the entire millat (nation) is in a state of tumult and turbulence and in her view no man is available among the Muslims to curb the transgression. Iman Malik, Tabari, and according to one version, Imam Abu Hanifa and some other jurists, conceded a woman's qualification to hold the office of Imam (ruler) and of a judge. Hazrat Omar had, during his regime, accredited a woman to hold the office of Inspectress of Markets. Hazrat Aisha, whenever she was in the assembly of women, would lead the prayer."[1]

Maulana Omar Ahmad Usmani raised objection to the formulation of Syed Sulaiman Nadvi in which he held the women to be incapable and naturally disqalified to assume the office of a ruler because no such disqualification is established from the Quran and Sunnah.[2]

1. *Seerat-I-Aisha* by Syed Sulaiman Nadvi, p. 126.
2. *Figh ul Quran* by Maulana Omar Ahmad Usmani, vol. 3, p. 292.

Professor Doctor Abdul Hameed, author of *Mabadi Nizam al Hukm al Islami* has *inter alia* considered this Hadith from different angles. He held it to be unreliable but he proceeded on the assumption that the Hadith is authentic and held that this is no more than an information and not an injunction for the Muslims for all times to come. In the alternative, he assumed the Hadith to be in the nature of an injunction against appointment or election of a woman as Head of State, and held that it does not bar a woman from holding other offices in the Government or from possessing the political rights of participating in elections or from being elected as Member of the Parliament. However he added that the settled principle of Sharia is of complete equality between men and women except in matters about which there be a specific injunction revealed in the Quran or given by the Prophet (p.b.h.)[1] He treated the Hadith as isolated (*ahaad*) which is conjectural only.

Maulana Zafar Ahmad Usmani was of the view that the Hadith does not amount to prohibition against the appointment of a woman as Head of the State. According to him it is by way of '*Istehsan*' only that this view is given[2] which means that generally it may not be advisable to appoint a woman (to that office).

Maulana Omar Ahmad Osmani holds that the Hadith is not at all reliable. He argues that the Hadith was not known till the battle of Camels was fought. Abu Bakra, according to his own version was reminded of this tradition only when the battle between Hazrat Aisha and Hazrat Ali had started and Hazrat Aisha assumed command of the army. He did not remember the Hadith before that time which is proof enough of the fact that the Hadith was fabricated later. The

1. *Mabadi e Nizam al Hukm al Islami* by Doctor Abdul Hameed, pp. 876-878.

2. *Ila us Sunnan* by Maulana Zafar Ahmad Usmani, vol. 15, p. 28.

best proof of this Hadith being forged and fabricated is that Abu Bakra—and there is consensus of the historians as well as the learned in Hadith on this point—was himself in the rank and file of Hazrat Aisha till the end of the battle and never disclaimed allegiance to her. It may be recalled that he said that Allah caused him considerable benefit from one sentence and then he repeated the Hadith. Now what was the benefit that he incurred after being reminded of the Hadith? It is not possible to believe that a companion of the rank of Abu Bakra would continue his allegiance to Hazrat Aisha and his participation in the battle against Hazrat Ali notwithstanding his being reminded of the Hadith.

The Hadith has obviously been forged to weaken the position of Hazrat Aisha; it is, however, a denunciation of Abu Bakra too that notwithstanding it he did not review his stand vis-a-vis Hazrat Ali and remained attached to Hazrat Aisha.[1]

This in short is the criticism of Maulana Omar Ahmad Usmani on the Hadith. This criticism may be compared with the comments of Ibn Hajar Asqalani who makes reference to the comments of Hafiz Ibn Battal on this Hadith. Ibn Hajar Asqalani writes in *Fath ul Bari* :

> "Ibn Battal relates from Mohallab that it appears from the Hadith of Abu Bakra that apparently it weakens the stand and conduct of Hazrat Aisha. It is well known about the rule of conduct of Abu Bakra that he supported the view of Hazrat Aisha about the demand of reform and amelioration among the people. He did not intend to participate in fighting. But when the fighting started those who were with Hazrat Aisha had no choice but to fight. Abu Bakra did not retract from his support of Hazrat Aisha but he realised that Hazrat Aisha shall be overcome, because he had seen that those who were with

1. *Fiqh ul Quran* by Maulana Omar Ahmad Usmani, vol. 3, pp. 286-289.

Hazrat Aisha were fighting under her command. This is (he inferred this from) what he had heard about the Iranians. Ibn Battal said that the proof of it (that Hazrat Aisha and her followers did not want to fight) is that no one related that Hazrat Aisha or any one who was with her had any contention with Hazrat Ali about the Caliphate or that any of them might have canvassed for his own election to the Caliphate. Hazrat Aisha and her followers only were not in agreement with the stand of Hazrat Ali that he was not willing to assassinate the murderers of Hazrat Osman in Qissas (retaliation)."[1]

According to this comment the only benefit that accrued to Abu Bakra from recalling the Hadith was that realisation dawned upon him that Hazrat Aisha would be defeated because people were fighting under the command of a woman, however brave, intelligent and revered she was. The question still remains why did he not abandon fighting under the command of a woman, however great and revered she might be. Why did he not inform Hazrat Aisha about it and beseech her to relieve herself of the command and to appoint some male commander. Only two explanations are possible. Either the Hadith is a complete forgery because if it is an injunction against the appointment of a woman *inter alia* to the command of the army Abu Bakra would have repented and corrected his stand in obedience to the injunction. The other explanation may be that Abu Bakra did not treat the Hadith to be an injunction against appointment of a woman, but simply held it to be either in the nature of an information or *khabar* (خبر) or a warning that the appointment of a woman to the offices of command might bring disappointment and defeat. It cannot be expected of Abu Bakra that he would disobey an injunction of the Prophet (p.b.h.). At most the Hadith contains an observation : 'How can a nation which appoints a woman or has to

1. *Fath ul Bari*, vol. 16, p. 166, Kitab al Fatah.

appoint a woman to such an office of authority as that of the Iranian monarch, prosper.' May be that the Prophet knew the ultimate fate that the Iranian monarchy must some day meet at the hands of the Muslims, and made the observation in that context.

The second Hadith which is relied upon as an impediment to the appointment of the women as Head of the State or to responsible positions in the executive or in the Judiciary is :

قال النبي صلى الله عليه وسلم انهن ناقصات العقل والدين قلن وما نقصان عقلنا و دينا قال اليس شهادة النسا' مثل نصف شهادة الرجل قلن بلى قال فذا لكن من نقصان عقلها ثم قال تقعد احد لكن شطر دهرها في قعر بيتها لا تصوم ولا تصلى قلن بلى قال فذالك من نقصان دينها

Professor Doctor Abdul Hamid Mutawalli said about this Hadith that it is very much apparent and irrefutable that this Hadith is one of the thousands of forged and fabricated traditions, which have been ascribed to the Prophet (p.b.h.) falsely. As stated by those who are well versed in discriminating between authentic and forged traditions the forgery can in most cases be detected from the subject-matter of the tradition. Thus a Hadith cannot be accepted as authentic if (i) it describes what is impossible of occurrence and which is not acceptable to human reason, (ii) it is contrary to the Quran, or (iii) it is contrary to historical facts.

Professor Abdul Hameed adds that this Hadith contains all the three defects. If the Hadith is assumed to be true it would not only establish the deprivation of political rights but would pave the way for innumerable alarming and critical consequences, which may be repugnant to many Quranic injunctions, and other traditions of the Prophet (p.b.h.). They will also be contradictory to historical facts pertaining to the period of the Prophet (p.b.h.) and his rightful Caliphs. Their antagonism

to reason will render them unacceptable to prudence, logic and rationality.

If it be correct that women are defective in reason and religion it would be necessary to restrict their power to dispose of their property and at least to make it subject to the approval and permission of their husbands or guardians. But Islam has acknowledged the absolute competence of women in this respect and has allowed her full rights of disposition over their properties. To be a woman is not therefore a ground in Islam for taking over her property for management by a Court of law, as was the case under the Germanic law or under the French law upto the year 1928 even in this modern era.

If it is assumed correct that the women are imperfect in reason and religion, the statements ascribed to the historians should not be correct that the rightful Caliphs sought counsel from the women and gave importance to their opinions.

And if there had been truth in the principle that the women are inadequate in intelligence and religion, Imam Abu Hanifa would not have permitted women to accept judicial offices in circumstances and Tabari would not have allowed this unconditionally. None of the women would have been treated as one of those Companions of the Prophet (p.b.h.) who were held in such high esteem, for solving Islamic law problems (فتوی *fatwa*), and no woman in Islamic history would have acquired such great renown in the subjects of commentary of the Quran, Hadith, Fiqh and literature.

How the human intelligence can accept this Hadith authentic when the first person to believe in Prophet (p.b.h.) was a woman, *i.e.* the first wife of the Prophet (p.b.h.) Lady Khadija When the Quran was compiled in book form it was given in the custody of a woman, *i.e.* Hazrat Hafsa daughter of Omar ibn ul Khattab and wife of the Prophet (p.b.h.). She remained its trustee from the time of its compilation during the reign of

Hazrat Abu Bakar till the reign of the third Caliph, Hazrat Osman. The Book was taken from her and copies were made from that text. These copies were sent to various cities for correction of the Books in possession of the people there. What a great confidence in Hazrat Hafsa was thus demonstrated?

How can the authenticity of this Hadith be acknowledged that women are defective in reason and religion when God Himself said about a woman namely lady Mary (peace be upon her) :

و اذ قالت الملئكة يٰمريم ان الله اصطفٰك و طهرك واصطفٰك علىٰ نساء ألعالمين

Q. 3 : 42.—And when the angels said O Mary! Lo! Allah hath chosen thee and made thee pure, and hath preferred thee above (all) the women of the earth.

The truth is that the Hadith is not in consonance with the spirit of Islam which conferred such an honour on woman and alleviated her from the depth of such abject distress and ignominy which was her fate among the Arabs of the per-Isalmic era and other nations of the age. They would give her in marriage to anyone they liked, they compelled her to lead a life of prostitution. They could inherit from her but did not allow her to inherit from them. She could be owned by others but could own nothing. Her right to deal with and dispose of her property was subject to the permission and approval of the husband.

And there is a Hadith from the Prophet (p.b.h.) :

ما اكرم النساء الا كريم ولا اها نهن الا لئيم

(Only gentlemen honour the women and mean fellows insult them).

This Hadith is related by Ibn Asakir on the authority of Hazrat Ali Ibn Abi Talib.[1]

1. See for the *Hadith Al Wahi al Mohammadi* by Syed Rashid Raza, p. 280.

Doctor Professor Abdul Hamid then added :

"We have already stated that in view of the importance and magnificence of Constitutional matters it is not lawful that any such agrument may be relied upon in matters of constitution which is conjectural or breeds uncertainty. The reference is here to isolated Hadith. It is well known—and there is consensus among the scholars on this point—that the isolated tradition (خبر احاد *khabar i ahad*) is based on surmise though its reporter may be the great Imam Bokhari. We have already stated that Mufti Mohammad Abduhu did not usually accept such traditions and abandoned them, even though the tradition be one reported by Imam Bokhari. We have also stated that Abu Hanifa also did not accept isolated traditions ; he only accepted traditions reported by a number of relators in every age (احادیث مشهوره *ahadith i mashhura*) and both these traditions are isolated.[1]

Secondly assuming that these traditions are certain *i.e.* they are liable to be considered among *Ahadith Mashhura* or *Mutawatur* (احادیث متواتر *i.e.* a continuous tradition reported by a large number of reporters in every age so that it may not be possible to reject it as uncertain), to which we have attached an express condition that such Hadith should have been reported on the authority of two of the great Companions, even these Ahadith or traditions cannot be conclusive for us in this age. Because as already stated by us Sunnah is not treated to be a binding law in constitutional matters meaning thereby that it is not considered ever binding so that the Muslims may be bound to act accordingly in each age.

Thirdly it can be stated in addition that none of the two traditions are mandatory in character or couched in language demanding that they must be acted upon and followed. In

1. See for the citation of Dr. Abdul Hameed, *Mabadi Nizam al Hukm fil Islam*, pp. 870-872.

other words they are not legal injunctions."[1]

In the marginal note of Maulana Abdul Haleem in *Nur ul Anwar* are reproduced the opinions of great scholars on this Hadith. The opinion of Maulana Abdul Halim is that this Hadith has no origin. Baihaqi said, 'We do not see any such thing in the books of Hadd.' Ibn al Jauzi said that this is a Hadith which is not known. Nawawi said, it is *batil* (باطل fabricated and false).

In *Fath ul Qadeer*, Vol. 6 margin of page 391 it is observed that defect in intelligence of women does not affect her aptitudes in other matters so as to deprive her absolutely of rights to be appointed as a judge. It is further observed that the deficiency in intelligence is related to the sex of a woman. There may be women having more intelligence than men.

Clearly the commentator is not convinced that the women are defective in intelligence. He concedes what is a truth discernible in everyday life that sometimes women are more intelligent than men. In fact intelligence or rationality is not the preserve of men or their monopoly. A large percentage of the male species is not intelligent enough. The intelligence of a human being is polished and improves as a result of literacy and education and by attending to outside business. The urban people are more intelligent than the rustics whose simplicity or lack of intelligence is mainly due to their ignorance. Their innate intelligence gets a shine when they are educated and have an opportunity to mix with people entertaining different ideas.

Ibn Hazm also tried to dilute the effect of ناقصات العقل (deficient in intelligence) by restricting its scope to the competence about evidence. Acording to him it did not apply to any other function or attribute. But this limitation is also contrary to the general observation. For a judge or a lawyer there is no differ-

1. *Mabadi Nizam al Hukm ul Islami* by Dr. Abdul Hamid, pp. 876-878.

ence between a man and a woman in this respect. If in some cases women fail as witnesses, so do men. If men are trustworthy as witnesses in other cases, so are women. Sex does not determine the credibility of a witness. If the evidence of one man may be convincing enough for the decision of a litigation, so may be the evidence of one woman. This is a matter of every day experience in Courts of law and their judgments. The Hadith does not appear authentic and cannot stand scrutiny. In fact one view voiced by some eminent scholars is that it may be a joke like the joke that the Prophet (p.b.h.) said that old women shall not enter paradise and when the old ladies felt perturbed the Prophet (p.b.h.) explained that those who enter paradise will become young.

Maulana Akmal Uddin al Babarti, commentator of *Al Hedaya* divides the mental capacity of a human being into four categories. The first category is that a person should have the competence to think and understand. By nature this is found in each human being. The second category or stage consists of his capacity to discover things by the use of senses (the five senses of hearing, seeing, smelling, tasting and touching), and to acquire, circumscribe form and evaluate opinions by the process of thought and discernment. This is known as *al aql bil malika*. It is after the achievement of this competence that he becomes subject to Sharia responsibilities. The third stage is when one feels no difficulty in the comprehension of the notions discovered from these specific and actual facts (which are found by the use of senses and formation of factual opinions in respect thereto). This is known as *al aql bil fael* (العقل بالفعل). The fourth stage is when these notions are ever present in the mind as if they are visible to the eyes.

The women are not deficient in the intellect of the second category because they can find out facts by the use of senses and the required thought process. If they forget anything they can be reminded about it. If this had not been a fact

their liabilities in Sharia would have been different from the liabilities of men on account of their deficiency. It appears that the deficiency lies in the third and fourth categories.[1]

Whatever merit there be in this classification, it is clear that Al Babarti had no experience or idea of the intellectual capacities of educated women. I am in complete agreement with the view of Maulana Omar Ahmad Usmani that the above thesis is proved worthless and incorrect by the achievements of the women lawyers, barristers, engineers, philosophers, scientists, medical practitioners, flight engineers etc. in our developing country.[2] The experience of the modern age falsifies the theory completely.

The question of equality of sexes has been discussed from various angles in the chapter on Equality. Here it may be stressed that the duty to enjoin the right and forbid the wrong is of men and women alike. The Quran says :

والمومنون والمومنات بعضهم اولياء بعض يامرون بالمعروف و ينهون
عن المنكر و يقيمون الصلوٰة و يوتون الزكوٰة ويطيعون الله و رسوله
اولئك سيرحمهم الله انا الله عزيز حكيم

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 and Wise.

To enjoin the right and forbid the wrong is primarily the duty of the State which is in a position to discharge it effectively.[3] The verse makes women as much protecting friends of

1. Al Inayah printed as margin of *Fath ul Qadeer*, vol. 6, p. 8.
2. *Fiqh ul Quran*, vol. 3, p. 239.
3. Judgment of the Federal Shariat Court on Press and Publications Ordinance and Detention Laws.

men as men are of women. It further orders women to discharge the duty of enjoining good and forbidding wrong which can be discharged effectively by the *ulil amr* (اولی الامر) (person in authority) who symbolises the State. The verse paves the way for the women to become the repository of State authority including the authority of the Head of the State.[1]

This difference of opinion on the question of appointment of woman as the Head of a State or a 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 *Fath ul Bari*,[2] 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 Maliki jurists have also given verdicts in favour of this view.

In the opinion given by Maulana Ashraf Ali Thanvi,[3] 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 a condition precedent for legitimacy in headship of the State, it is not a condition precedent for judgeship. This is, however conditioned with avoidance of sin. Nor is there any 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 (*Al Isaba fi Tamizi's Sahaba*),[4] *Mohella*,[5] *'Ila ul Sunnan*[6] and *Seerat-i-Aisha*.[7] It may be stated

1. *Fiqh ul Quran* by M. Omar Ahmad Usmani, vol. 3, pp. 258-261.
2. *Fath ul Bari* (Printed in Beriut) vol. VIII chapter regarding "Letter of the Holy Prophet to Kisra", p. 128.
3. *Fatawa i Imdadia*, vol. V. pp. 91-93.
4. *Al Isaba fi Tamizis Sahaba* by Ibn e Hajar Asqalani, vol. IV, p. 333.
5. *Mohella* by Ibn-e-Hazam, vol. VI. p. 429.
6. *'Ila us Sunnan* by Maulana Zafar Ahmad Usmani, vol. XV, p. 27.
7. *Seerat-i-Aisha* by Syed Sulaiman Nadvi, p. 126.

that Ibn e 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.

There are also a number of historical instances 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.[1]

It appears that she decided criminal cases. Razia Sultana as a Head of the State also decided cases.[2] The name of Shajarut-ul-Durr is frequently mentioned in this connection by the jurists.

It is unnecessary to quote many examples, it may be sufficient to cite the summing up in the *Introduction to Islam*" by Dr. Hamidullah[3] 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 e Abdullah as inspector in the market at the capital (Madinah) as Ibn e Hajar (Isabah) records. The same lady had taught Hafsah, 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

1. *History of Saracens* by Ameer Ali, p. 455 ; *Tarikh ul Khulafa* by Sayooti, p. 381.
2. *Administration of Justice in Medieval India* by M. B. Ahmad, p. 94.
3. *Introduction to Islam* by Dr. Hamidullah, p. 13.

could collaborate with men in Muslim society to earn her livelihood and to develop her."

There is a Hadith from Buraidah 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 (قضى على الناس على جهل).[1]

Imam Ibn Taimiya[2] argued that the appointment of a woman as Qazi is not correct since the word "رجل" (men) has been used in relation to the Qazi at all the three places in the Hadith. 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.[3]

Abu Bakar bin Tayyab Shafai opposed the view of Imam Abu Hanifa and Imam Ibne Jarrir 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

1. *'Ila us Sunnan*, vol. XV, p. 25.
2. *Al Muntaqi* (المنتقى) by Imam Ibn Taimiya.
3. *'Ila us Sunnan*, vol. XV, p. 26.

to appear amongst men without pardah or to look towards them.

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.[1] 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 Ghalba-i-Shaukat ("غلبۂ شوکت" *i.e.* her awe-inspiring magnificence) she decides some dispute, her judgeship will be unobjectionable.

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 cosideration. 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 Section 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 Qazi is also immune from the disrespectful conduct of others.

1. *I'la us Sunnan*, Vol. XV, p. 28.

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 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*.[1] He says:

> "But sometimes one has to have a look at the other woman, *e.g.* a female patient who may be 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 parts which one is ashamed to open before strangers 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 arms. The Law-giver commands that as far as 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

1. *Pardah* by Maulana Abul Ala Maudoodi, p. 181.

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 the 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 instead."

The intention of prohibiting the wives of the Holy Prophet from being soft in their speech towards men was that they might not entertain any false hope. There is no prohibition about speaking. In a Court of Law while discharging one's duty in the manner as enjoined by the Holy Prophet *inter alia* in the Hadith of Buraidah 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.

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 do away with their "Ehram" (unsewn cloth which covers the body during Haj or Umra which they were wearing for the purpose of Umra). Hazrat Umme Salma advised the Holy Prophet to take precedence in sacrifice and taking of his 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 it can be successfully concluded that if there had been a defect in their intelligence they would not have been consulted by the Prophet pbh and his companions nor Imam Tabari and Imam Abu Haneefa would have given opinion in favour of their appointment as judge.

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 a historical fact that people used to come from far and near to consult ladies who were learned in Hadith.

The question about the relevancy and worth of the evidence of one woman is considered in another chapter. A brief resume may be given here.

66. The view that woman cannot appear as a witness in matters of Hudood and Qisas is only a juristic view and is not based either on 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.[1] Some support is sought for this juristic view from the words "و اشهدوا ذوی عدل منکم" (and call to witness two just men

1. *Al Mohalla* by Ibn Hazm, Vol. 6, p. 430.

from amongst you) (Q. 65 : 2) in Chapter 'The Divorce' and the words "فاستشهدوا عليهن آربعة منكم" (call to witness against them four from amongst you) (Q. 4 : 15) in Chapter entitled 'The Women'. But the word "منكم" cannot necessarily be said to be confined in its scope to men. On the principle of masculine being used on account of habit or *taghlib* so as to include the feminine, the word "منكم" is susceptible of being interpreted as inclusive of men as well as women. In this connection the analysis made by Maulana Umar Ahmad Usmani[1] is quite revealing and weighty.

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 it is said that immediately thereafter he was executed in the same manner as he had killed that girl[2] (2 versions in Muslim, Jamial Fawaid Hadith Nos. 5231, 5233 and 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 unknown 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

1. *Fiqh ul Quran* by Maulana Umar Ahmad Usmani, Vol. III, p. 87 and onward.

2. *Saheeh Muslim*, Jamial Fawaid Hadith No. 5231, 5233, 5234.

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[1] 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 Qayyim placed reliance upon the version in *Abu Daud*.

There is 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.

One important point is that there appears to be a consensus 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.[2] In *Bidaitul Mujtahid*,[3] 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 consensus in respect of headship of the State. There are several opinions in *Musannaf Abdul Razzaq*[4] 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 Zina (adultery) because it does not behove them to look at that act. The same view is ascribed to Hashim bin Hujaira.[5] Also see *At Turuq*

1. Abu Daud, Hadith 974.

2. *Al Bahrul Raique Sharh Kanz ul Daqaiq*, Vol. 7, pp. 5 and 6, *Fath ul Qadeer*, Vol. 6, p. 391, *Durr ul Mukhtar*, Vol. 3, p. 253, *Hashiat ul Tahtawi*, Vol. 3, p. 213.

3. *Bedayat ul Mujtahid*, Vol. 2, p. 344.

4. *Musannaf Abdul Razzaq*, Vol. 8, p. 331.

5. *At Turuq ul Hukmia* by Imam Ibn-e-Qayyim, p. 135.

ul Hukmia by Imam Ibne Qayyim,[1] in which similar opinions are collected. He *inter alia* says that Hamad bin Abi Sulaiman has also considered the evidence of a man and two women admissible in matters of Hudood and Qisas.

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.

Ibn-e-Shihab 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.

It should be noticed that firstly admission is equal to evidence 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 its 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 women 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.

It is said that two women are proved to be equal to one man by the principle of inheritance. The inheritance[2] in the male line generally has been the rule. The Quranic

1. *At Turuq ul Hukmia* by Imam Ibe-e-Qayyim, pp. 134-136.
2. *Encyclopaedia of Religion and Ethics*, Vol. VII on Inheritance.

Legislation giving the daughter half as much of the estate as went to a son was an innovation.[1] The sons also did not always get equal share. In some countries and culture 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.[2] 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.

There appears to be no reason to make the admissibility of evidence a criterion for appointment as Qazi (as is the view of Imam Abu Hanifa) and in this connection the opinion of Ibne Jarir supported by Ibne Hazm is preferable. The functions of a Qazi and of a witness are quite different. Any one who has the necessary knowledge of law and training in that field can act as Qazi. 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.[3]

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

1. *Encyclopaedia of Religion and Ethics*, Vol. VII, on Inheritance, p. 306.
2. *Ibid*., p. 293.
3. *Fath ul Qadeer*, Vol. 6, p. 391.

just and to do justice. Thus in Q. 4 : 58 it is said. inter alia that :

ان الله يامركم ان تؤدوا الامنٰت الىٰ اهلها و اذا حكمتم بين الناس ان تحكموا بالعدل

"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:

و ان حكمت فاحكم بينهم بالقسط

"If thou judgest, judge between them with equity."

In Q. 57 : 25 it is said:

لقد ارسلنا رسلنا بالبينت .... ليقوم الناس بالقسط

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

or as Arberry[1] says 'may uphold justice'. Pickthall[2] translates the words "يقوم الناس بالقسط" 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."

The words عدل (*Adl*) or قسط (*Qist*), no doubt, are used in 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 one's conduct towards his fellowbeings, relatives, friends or subjects or in the decision of 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

1. *The Quran Interpreted* by Arberry on Q. 57 : 25.
2. The *Glorious Quran* by Pickthall on Q. 57 : 25.

connection between man and woman. In view of this ; particularly in the absence of any prohibition in Quran or Hadith in respect of appointment of a woman as head of the State, judge or legislative or executive functionary, the generality of these verses cannot be cut down.

The Quran allows a woman to earn money. In the Chapter relating to Women (Q. 4 : 32) it is declared, "Unto women 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 beeds to sell to earn money for the poor.[1]

There is no dispute on the question of the right of women to acquire education. There is also no dispute that in respect of Ilm (علم knowledge) 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 pursue 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 Gynaecologist should be better left to a woman. The importance of education in the present age cannot, therefore, be denied or even minimised.

A Booklet known as *Universal Islamic Declaration of Human Rights* has been published by Mr. Salem Azzam, Secretary-General, Islamic Foundation, London. It gives

1. *Women in Muslim History* by Charis Waddy, p. 19.

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 dealt with above.

Islam does not allow discrimination on ground of sex in matters of appointment to high offices, executive, legislative or judicial. The competence for each office is determinable by relative merits and qualifications of candidates.

EVIDENCE OF WOMEN

The question of admissiblity of the evidence of one woman generally and the question of admissibility of evidence of women in matters concerning Hudood and Qissas are quite controversial these days. The Ulema or religious scholars hold that to prove matters generally the evidence of a woman or women only is not sufficient ; there should be the evidence of either two men or at least one man and two women. According to them the evidence of women in matters of Hudood and Qissas is not admissible which means that neither Hadd can be imposed nor Qissas can be ordered on the basis of evidence of women. Practically they are *persona non grata* in Courts in such matters. Hafiz Ibn Qayyim made an onslaught on some of these concepts and some of the Ulema (religious scholars) and all the intellectuals of this age, who according to the generality of the orthodox and rigid religious scholars are modernists and who would like to change Sharia with impunity, have re-evaluated this problem in the light of the experiences of the present age.

The rigidly conservative view about the necessity of the evidence of two women and one man is based upon verse 282 of Chapter 2 which is reproduced in full for the proper appreciation and understanding of its purport and object :

يايها الذين امنو اذا تداينتم بدين الى اجل مسمى فا كتبوه وليكتب
بينكم كاتب بالعدل ولا ياب كاتب ان يكتب كما علمه الله فليكتب
وليملل الذى عليه الحق وليتق الله ربه ولا يبخس منه شئا فان
كان الذى عليه الحق سفيهاً او ضعيفاً او لايستطيع ان يمل هو فليملل

وليه بالعدل واستشهدو شهيدين من رجالكم فان لم يكونا رجلين
فرجل وامراتن ممن ترضون من الشهداء ان تضل احدهما فتذكر احد
هما الاخرى ولا ياب الشهدا اذا ما دعو ولا تسئمو ان تكتبوه صغيراً
او كبيراً الى اجله ذالك اقسط عند الله و اقوم للشهادة و ادنى الا
ترتابو الا ان تكون تجارة حاضرة تديرونها بينكم فليس عليكم جناح
الا تكتبوها و اشهدو اذا تباء يعتم ولا يضار كاتب ولا شهيد و ان
تفعلو فانه فسوق بكم واتقو الله و يعلمكم الله والله بكل شئ عليم

Q. 2 : 282.—O ye who believe ! when ye contract a debt for a fixed term record it in writing between you. Let a scribe record it in writing between you in (terms of) equity. No scribe should refuse to write as Allah hath taught him, so let him write and let him who incurreth the debt dictate, and let him observe his duty to Allah his Lord, and diminish naught thereof. But if he, who oweth the debt is of low understanding or weak, or unable himself to dictate, then let the guardian of his interests dictate in (terms of) equity. And call to witnesses, from among your men, two witnesses. And if two men be not (at hand) then one man and two women, of such as you approve as witnesses so that if the one erreth (through forgetfulness) the other may remind her. And the witnesses must not refuse when they are summoned. Be not averse to writing down (the contract) whether it be small or great with (record of) the term thereof. That is more equitable in the sight of Allah and more sure for testimony, and the best way of avoiding doubt between you, save only in the case when it is actual merchandise which ye transfer among yourselves from hand to hand.

In that case it is no sin for you if you write it not.

> And have witnesses when you sell one to another, and let no harm be done to scribe or witnesses. If you do (harm to them). Lo! it is a sin for you. Observe your duty to Allah. Allah is teaching you and Allah is Knower of all things.

The injunction contains orders, their reasons and their exceptions. One order is that all contracts of debts, whether the amount be big or small should be written and attested. The scribe should write the contract correctly. The written contract should be witnessed or attested by two male witnesses approved by the parties or one male and two female witnesses so that if one of them errs due to forgetfulness the other may remind her.[1]

It is the duty of the scribe to act honestly and write on the dictation of the debtor and if the debtor be of low understanding or weak or unable to dictate then on the dictation of his guardian. Neither the scribe nor the witnesses should demonstrate any unwillingness in writing or in attesting the contract.

The writing is for testimony and for removal of doubts.

The scope of the verse is confined to the law about reducing to writing the contractes of debt or of sale and purchase. The witnesses required are for the attestation of documents. The only reference to any future contingency is in the reasons of the execution of document or for having two women as attesting witnesses. The reason for execution of the document is that it avoids doubt and becomes testimony or evidence of transaction while the reason for having two women is that if one forgets in future the other may remind her. It does not necessarily follow from this that the need to remind must arise in court proceedings

1. The translation in Pickthall that the other may remember is not correct. The correct translation is that if one errs the other may remind her.

only. Assuming that the need arises in court proceedings only, the verse nowhere says that a matter cannot be proved there except by the testimony of two male witnesses or one male and two female witnesses. On the plain reading of the verse it appears that it does not formulate or prescribe the method of proof of the document. In case of denial of execution of the document by the debtor the only proof required would be whether it was executed by him. This may be established by the evidence of one man, of the scribe only, of the expert of questioned documents who compared the signature or thumb-impression of the executant with the signature or thumb-impression on the document. Even the evidence of one woman may be sufficient for that purpose. The object is that if one of the two women forgets the other may remind her. What is, therefore, visualised by the verse is the evidence of one woman only. The presence of the other is required only when the woman witness forgets or errs in her testimony on account of forgetfulness. The only role which the Quran mentions of that other woman is that she may remind the female witness.

The jurists differ whether at the time of examination in court both women should be present before the Qazi or the other should stay out until summoned for her own evidence. If both women are appearing simultaneously in court, obviously the role of one is to remind the other and the only witness is the one who is reminded to correct herself. If on the other hand one of them is to stay out to be summoned when the other woman errs on account of forgetfulness and she merely discharges the function of one who reminds, in that case also the evidence would be of the woman who had erred. If in either of the two cases the independent evidence of the two women is recorded, one of whom erred and the other made a correct statement then the Qazi would in effect be relying upon the evidence of one woman and not two. If the principle be that an issue can be proved by the evidence

of one man and two women it would obviously mean that all the three should prove the matter fully. But if one of the three says that he does not remember or pleads ignorance, he cannot be held to be a witness or at least a reliable witness. The exclusion of his evidence from consideration would reduce the number of witnesses to less than the required number. The principle of the essentiality of two male witnesses or of one male and two female witnesses before a court of law cannot be read in the verse[1] on any principle. The principle must have been evolved by the jurists by resort to analogy or Qiyas but for the reasons given above and the reasons to follow that analogy is not possible.

Ibn Taimiya said that the Quran does not lay down the rule of decision that the judge can decide only on the evidence of two men or two women with one man. This procedure has been prescribed so that a man may protect his right.[1] This also appears to be the view of Ibn Qayyim. Maulana Omar Ahmad Usmani did not agree with the jurists that the verse at all deals with the minimum number and sex of the witnesses to be produced in court of law. This is very succinctly stated in the volume of *Fiqh ul Quran* in *Kitab ul Shahadat* (كتاب الشهادة Book on Evidence).[2]

There is difference of opinion on the question of this verse being mandatory.[3] Some of those who held it to be mandatory later held that it had become directory because of a Hadith,[4] Ibn Taimiya said that it was an advice. The generally held view is that it is not mandatory but is simply directory. If a person files a suit on the basis of an unwritten

1. *At Turuq ul Hukmia*, p. 83.
2. *Fiqh al Quran*, Vol. VI, p. 66.
3. *Commentary* by Ibn Kathir, on verse 282 of Chapter 2.
4. *At Turuq ul Hukmia*, p. 84.

contract and proves his case by reliable evidence, the suit cannot fail on ground of the contract being oral. In the verse reference is to the writing of the contract by a scribe but no one can say that a document written by one of the parties to the contract, is not legal. If the contract is dictated by the creditor in the presence of the debtor who understands and agrees with every term of it, there is no reason why it should not be acted upon. It would follow that if only two women attest the document, the court cannot throw it off as illegal and some thing which cannot be acted upon. If this be the case how can analogy help in evolving a mandatory rule from a mere advice or from what is only discretionary. It is strange that in most of the writings on Fiqh reference is made to two male witnesses or two female witnesses along with one male witness as if this is the mandatory minimum of evidence required to prove a case and yet those who rely upon this verse for the purpose concede that the verse lays down a discretionary rule. This is contradiction in terms.

There are traditions according to which the plaintiff's case can be proved by the evidence of one witness and the plaintiff's oath. There are other traditions and the practice of the companions justifying the sufficiency of one witness in proof of a claim.

Since verse 282 of chapter 2 relates to debt transctions the minimum standard of witnesses prescribed there has been applied by the jurists to matters relating to property and has been extended to usurpation, embezzlement, inheritance, waqf, lease, gift, compromise, partnership of all types, will, torts, etc.[1]

A number of jurists are of the view that claims concerning property can be proved by the evidence of one witness and *yameen* (يمين oath of the plaintiff). This view is also ascribed

1. *Al Mughni* by Ibn Quadama, Vol. 9, p. 151.

to the four rightful Caliphs, Omar bin Abdul Aziz, Imam Hassan, Shuriah, Ilyas, Abdullah bin Utba, Abu Salma, Ibn Abdul Rehman, Yahaya bin Y'aamar, Malik. Ibn Abi, Laila, Abul Zanad and Shafe'i. But Al Sh'aabi, Al Nakh'aai, Al Auzai and the people of opinion (اصحاب الراى)[1] hold that one witness and oath of the plaintiff is not sufficient to prove a claim in view of Q. 2 : 282. Whoever adds to the injunction adds to the verse and the addition repeals the verse. Moreover the Prophet (p.b.u.h.) said البينة على المدعى واليمين على من انكره (The burden of evidence or the burden of proof is on the claimant and *yameen* (يمين oath) is on the defendant who denies the claim). Reliance on *yameen* (يمين oath) from the side of the claimant amounts to restricting or circumscribing the burden of evidence on the plaintiff.[2]

Ibn Qudama writes[3] that, "we rely upon the traditions that Abu Huraira said that the Prophet (p.b.u.h.) decided a claim on the evidence of one witness and *yameen* or oath (of the plaintiff)." This is related by Saeed bin Mansur in his *Sunnan* (book on traditions) and many Imams in their collections of Hadith (in many of the *Masanid*).[4] Tirmizi said that the Hadith is Hassan Gharib. It is also related by Ali, Ibn Abbas, Jabir and Masruq. Nasai said that the support for the Hadith of Ibn Abbas about the sufficiency of one witness and oath is excellent which means that the relators are truthful and not subject to any Sharia objection. It is accepted that the requirement of two male witnesses or two females and one male is the requisite stipulated by the verse but it is not correct that the dictum of the sufficiency

1. The jurists of Iraq were so called on the ground that they preferred opinion to Hadith.

2. *Al Mughni*, Vol. 9, p. 152.

3. *Ibid.*

4. *Musnad* is a collection of Hadith in which the traditions related by one relator are collected at one place. The collection is not subjectwise.

of the oath and one witness amounts to repeal of the verse. Repeal is elimination, abolition or addition of something. The injunction about sufficiency of a witness and oath does not amount either to the prevention of production of two witnesses, or to its abolition of the injunction of the verse.[1]

In what has been stated above it will not make any difference if the plaintiff be a Muslim or non-Muslim, just or unjust, male or female because as held by Imam Ahmad, in matter of Yameen or oath these distinctions cannot affect the decision of the matter.

It is not possible to agree with the above proposition that the dictum reducing the number of witnesses can stand with the rule of requirement of more than one witnesses. If there had been any such rule the rule of reduction would amount to its amendment or substitution which would at least amount to partial abrogation. If there had been any such Quranic rule it could not have been superseded or abrogated by the isolated traditions reducing the number of witnesses.

It is argued that the oath is a substitute for the second witness. This would make the position more anamolous. In Fiqh the word witness is not applied to the party to the suit because of his being interested. In matter of oath no discrimination is made between a male or a female party while the rule that the evidence of two women is equivalent to the evidence of one man is clearly discriminatory. If the principle that the oath is a substitute for evidence of one witness be correct, it would negate the rule of discrimination evolved from Verse Q. 2 : 282.

Ibn Qayyim says that it is lawful for the judge to decide in matters other than those of Hadd on evidence of one witness if he knows that he is truthful. Allah did command the judge originally not to decide except on the evidence of two witnesses.

1. *Al Mughni* by Ibn Qudama, Vol. 9, p. 152.

He directed the person possessing rights, to protect these rights by two male witnesses or one male and two female witnesses. But it does not lead to the conclusion that the judge cannot decide on lesser evidence. On the other hand the Prophet (p.b.h.) ordered to decide on the evidence of one witness and *yameen* or oath, or of one witness alone. Ibn Abbas said that the Prophet (p.b.h.) decided on the evidence of one witness and *yameen*. This is related in Muslim. Abu Huraira said that the Prophet (p.b.h.) decided on the evidence of one witness and *yameen*. This is so related by Ibn Wahab from Suleiman who related from Rabi'a who stated it on the authority of Suhail. This is reported in Abu Daud. Jabir bin Abdulla said that the Prophet (p.b.h.) decided on the evidence of one witness and *yameen*. This is related by Shafe'i, from Al Saqafi, who related it from Ja'afar bin Mohammad who so stated on the authority of his father. Ali bin Abi Talib said that the Prophet (p.b.h.) decided on the evidence of one man and the *yameen* or oath of the person claiming the right. This is so related by Al Baihaqi in his *Hadith* (book). Abdul Aziz bin Al Majishun related from Ja'afar bin Mohammad who reported it on the authority of his father who came to know it from his grandfather that the Prophet (p.b.h.) decided on the evidence of one witness and *yameen*. It is so related by Yaqub bin Sufian in his *Musnad*.[1] Al-Munzari said that the sufficiency of one witness and *yameen* in decision of disputes is also related from Omar Ibn Khattab, Ali bin Abi Talib, Ibn Omar, 'Abdullah bin Amar, Saad bin Obada, Al Mugheera Ibn Sh'aba, a body of Companions of the Prophet (p.b.h.), Amar bin Hazm, Al Zabib bin S'aalba. Matters were decided according to this rule by Omar bin al Khattab, Ali bin Abi Talib, from among them (the above named persons) the renowned judge Shuraih, Omar bin Abdul Aziz, Al Lais bin Sa'ad said : 'This for us is the well known Sunnah'. Abu Obaid said that Sunnah is to be found in a number of Hadith and the practice of others.[1]

1. *At-Turuq ul Hukmia* by Ibn Qayyim, pp. 79-80.
2. *Ibid.*, p. 89.

A body of the learned and renowned judges hold that the matter can be proved even by the evidence of one witness. It is not necessary that it should be accompanied by *yameen* or oath of the plaintiff. Abu Obaid said that it is related from renowned and illustrious judges from Iraq that Shuraih, and Zararah bin Ibn Aufa decided disputes on the evidence of one witness ; no mention is made of *yameen* in their traditions. Al Haseem bin Jameel related from Sharik who related it from Abi Ishaq that Shuraih allowed my evidence only. Al Qasim bin Hamid related from Hammad bin Salma who related it from Imran bin Jadar that Abu Minalaz appeared before Zarara bin Aufi (as the only witness). Abu Majlaz said that 'he permitted my sole evidence.'[1]

Ibn Qayyim said[2] that it is lawful for a judge to decide on the evidence of one witness if he knows that he is truthful. *Yameen* or oath of the plaintiff is not a condition for its acceptance but is meant only to reinforce it. When the Prophet (p.b.h.) ordered a matter to be decided on the evidence of one witness and *yameen*, he did not impose the condition of *yameen*, but strengthened with it the evidence of one witness. Abu Daud has added to his *Sunnan* (book of traditions) a chapter headed, 'If the judge knows about the truthfulness of a witness it is lawful for him to decide on its basis.'

باب اذا علم ان حاكم صدق الشاهد الواحد يجوز له ان يحكم به

He then reproduced the Hadith of Khuzaima bin Sabit that the Prophet (p.b.h.) bought a horse from an Arab of the desert, and then hastened on foot. The Arab lazily followed. The people began to stop the Arab and bargain with him over the price of the horse. They did not know that the Prophet (p.b.h.) had already purchased it. The Arab said loudly to the Prophet (p.b.h.) 'Either you buy this horse or I will sell it.'

1. *At Turuq ul Hukmia* by Ibn Qayyim, pp. 88, 89.
2. *Ibid.*, p. 89.

The Prophet (p.b.h.) stopped when he heard this from the Arab and enquired: 'Didn't you sell it to me.' The Arab said: 'By God, no, I did not sell it to you.' The Prophet (p.b.h.) said 'you have already sold it to me.' The Arab said, 'Bring two witnesses.' Khuzaima bin Sabit said 'I am witness that you sold it to him.' The Prophet (p.b.h.) embraced Khuzaima and asked : 'how you become a witness.' He said: 'To verify and confirm you' and the Prophet (p.b.h.) made his evidence equivalent to the evidence of two men. This is also reported by Nassai'.

Ibn Qayyim added that it is clear from this that the evidence of one witness is sufficient if his veracity is known. The Prophet (p.b.h.) did not make it necessary to have another witness with Khuzaima and made his evidence equal to the evidence of two witnesses because his evidence guaranteed the generally known veracity of the Prophet (p.b.h.), from what he transmitted from Allah. And the Muslims are like him in this testimony. Khuzaima became unique in his evidence which was about the contract of sale with the Arab in which no one (excepting the contracting parties) was present, and which included such information also in the category of informations truthfulness of which it is the duty of every Muslim to confirm. The verification of his veracity is part of the faith.....[1]

Some jurists distinguish here between an information (خبر) and evidence (شہادت) and do not call it information. The Prophet (p.b.h.) accepted the evidence of one Arab of the desert about the sighting of the moon. This is called by the jurists as an information only, and not evidence. Ibn Qayyim refutes it as a play on words, which is not relevant in arguments. The words of the Hadith belie this distinction.[2] The Prophet (p.b.h.) allowed the evidence of single witness in matter of booty (during war the victorious assassin who assassinated the

1. *At Turuq ul Hukmia* by Ibn Qayyim, p. 90.
2. *Ibid.*

enemy was entitled to his horse dress and accoutrement). The dispute was about these things before the Prophet p.b.h.). He did not ask the assassin to bring another witness, nor gave him oath.[1] It is reported in *Bokhari* and *Muslim* that Abu Qatadah related: 'We came out with the Prophet (p.b.h.) in the year of Hunain. When we met (the enemy in the battlefield) there grew panic among the Muslims. Then I saw one of the polytheists over-coming one of the Muslims. I struck him with my sword on his back over the chord of the shoulder, and cut off his coat of mail. He approached me and caught hold of me so vehemently that I perceived the air of death therefrom, but the death overtook him and he gave up his hold on me. I then met Omar bin Khattab. I said: What is the matter with the people. He said: Decree of Allah. Then they (who were fleeing away from the battlefield) returned. The Holy Prophet said: Whosoever kills a man, he will get his belongings on proof. I said who will bear witness for me. Then I sat down. The Holy Prophet repeated similarly. I said who will bear witness for me? I then sat down. The Prophet (p.b.h.) again reiterated it. I again got up. The Prophet (p.b.h.) asked: What is the matter with you. O! Abu Qatadah? I informed him. A man said: The man has spoken the truth, and his booty or *salb* (سلب of the murdered man) is with me. He may be gratified so that he may relinquish his claim. Then said Abu Bakr: By Allah, it is not fair to influence the will of that lion (brave man) from among the lions of Allah who kills in the way of Allah and his Prophet (p.b.h.) that he give his booty as a gift to you.

The Prophet said: 'It is true. Give him back what is His'. Abu Qatada said: 'I received (the goods). I sold from it one coat of mail and purchased from it (the proceeds therefrom) an orchard in Bani Salma. This is the first item of property which I received after my conversion to Islam.'[2]

1. *At Turuq ul Hukmia* by Ibn Qayyim, p. 91.
2. *Muslim* Kitab ul Jihad

After reproducing this Hadith Ibn Qayyim added that it is proved from it that the proof consisted of the evidence of one witness alone and the Prophet did not even administer oath.[1]

Another instance of sufficiency of evidence of one witness, and for the matter of that a woman too, is of fosterage. It is related in *Bokhari* and *Muslim* that Uqba bin Al Haris married Umme Yahya daughter of Abi Ahaab. A woman came and told them that she had suckled both of them and hence they were foster brother and sister meaning that their marriage was prohibited. The matter was referred to the Prophet (p.b.h.) and he separated them on the basis of the sole evidence of the woman who claimed to have suckled them.[1]

One of the principles found out by the jurists is that the evidence of one woman is sufficient, in matters concerning the privacy of women. This rule was applied as a matter of explanation by the jurists to the dispute about fosterage too, although it is not something which is hidden from view and there may be numerous witnesses, male as well as female. Imam Abu Hanifa was of the view that the analogy of matters concerning privacy of women was not applicable to fosterage because those among men who are within the prohibited degrees to the women concerned may have knowledge about it. He, however raised this contention in opposition to the principle of sufficiency of evidence of one woman in proof of the issue.[2] But this view cannot be accepted because of this Hadith which according to Trimizi is Hasan Saheeh.[3] Ibn Abbas only added that the sole woman witness should be given oath. Imam Ahmad and Imam Ishaq held the same view.[4] Abul Khattab reported on the authority of Ibn Omar that the Prophet (p.b.h.) observed, "The evidence of one woman alone is lawful in fosterage."[5]

1. See also *Tirmizi* (Urdu trans.), Vol. 1, p. 225.
2. *Al Mughni*, Vol. 9, p. 156.
3. *Tirmizi, Ibid.*, p. 226.
4. *Ibid., Tirmizi.*
5. *Al Mughni*, Vol. 9, p. 157.

Some jurists held that the evidence of at least two women is required in a dispute about *riza'at* (رضاعت fosterage). Imam Shafe'i held the same view. Wake'ei said that the evidence of one woman is not sufficient but the husband should separate as a matter of piety and caution on the evidence of one woman alone. These views can also not be accepted.[1]

It is established from this discussion that fosterage is not a matter which as remarked by Imam Abu Hanifa can be witnessed by women alone. And yet it may be proved by the evidence of one witness who may belong to the fair sex.

It is related that Hazrat Ali admitted the evidence of midwife alone regarding post birth matters on the birth of a child. This was related by Imam Ahmad and Saeed bin Mansoor, Shuraih, Al Hasan, Al Haris Al Ukali and Hammad also permitted this.[2]

Imam Abu Hanifa opposed the evidence of a single woman in disputes about post birth matters (استهلال *istihlal*) but his pupils did not agree with this, because it is a condition of birth (continuation of the birth process) and is like the birth of the child.[3]

The evidence of a woman is similarly admissible in cases of hurt caused to woman in Hammam (public bath) meant for women only. It is also admissible about menstrual courses, virginity, miscarriage etc. *i.e.* all matters on which only the women can have the necessary knowledge.[4]

But how the evidence of one woman can be sufficient if the principle is that generally the number of male witnesses

1. *Tirmizi, ibid*, p. 226.
2. *Al Mughni*, Vol. 9, p. 156.
3. *Ibid.*
4. *At Turuq ul Hukmia* by Ibn Qayyim, p. 92.

should not be less than two and they should be three (one man if the woman witnesses be also there)? This anamoly held the attention of the jurists also who came out with different solutions, but each of them contravenes the above principle. Ibn Qudama summed them up :

> "We say that (in these matters) the evidence of a single woman would be admissible. Taoos said that in *al riz'aa* (الرضاع fosterage) the evidence of one woman would be sufficient even though she is black. There is a later opinion of Ahmad that the evidence of not less than two women should be admitted. This is the view of Al Hakam, Ibn Abi Laila, Ibn Shabrama, Malik and Al Sauri also adopted it on the ground that in every matter in which proof of truthfulness is necessary, there should be two witnesses like males because males are more proficient in wisdom than them (women) and among males less than two are not accepted. Osman al Batta said there should be three witnesses because the number where the witnesses are women alongwith a male goes up to three and Ata, Al-Sh'aabi, Qatada, Al Shafe'i and Abu Saur said that (the evidence of) less than four should not be accepted."[1]

The difficulty in which the eminent jurists landed is the outcome of two incorrect assumptions, one that verse 282 of chapter 2 fixes the minimum of witnesses for decision of a dispute of civil nature and the other that the Prophet (p.b.h.) held the women to be deficient in intelligence and wisdom. The unreliability of the Hadith has been commented upon in detail elsewhere. The views about the sufficiency of one woman witness alone frustrates the reliance on the rule of minimum number of witnesses and the abovementioned concepts of the sufficiency of two or three or four women cuts at the root of the concept

1. *Al Mughni. Ibid.* see also *At Turuq ul Hukmia* for full discussion, pp. 92-98.

that women alone cannot be witnesses unless accompanied by male.

According to a number of jurists of the early centuries judicial determination is allowed on the evidence of women except in matters of Hudood and Qissas.[1] The view which is generally held is that women cannot be competent witnesses in matters of divorce and *nikah*. But 'Ata held the evidence of women valid in *nikah*.[2] Shuraih held the evidence of women competent in divorce.[3] Abu Obeid said on the authority of Abi Ubaid that a person divorced his wife thrice under the influence of liquor. The dispute was taken to Hazrat Omar. Four women appeared as witnesses and Hazrat Omar separated them *i.e.* made the *talak* effective.[4] It may be noticed that there was no male witness in a matter of *talak* although according to the Hanafis women are competent witnesses in all matters except Hudood and Qissas, including *nikah* (marriage) and *talak* (divorce), but only with a male witness and according to Malik and Shafe'i the evidence of women is not competent in matters other than those concerning property or matters subsidiary to it like trust, lease or license etc.[5]

The reasoning of Imam Shafe'i is that what inheres in the evidence of women is that it should not be accepted, because in their intelligence is defect, in their memory deficiency and her appointment to an office of authority as of king or chief is disapproved. For this reason their evidence is not acceptable in an offence punishable with Hadd. The evidence of four women only is not competent because it is inherent in their evidence that it should not be relied upon. It is accepted in property because of necessity or expediency. But the

1. *Al Turuq ul Hukmia*, by Ibn Qayyim, p. 92.
2. *Ibid.*
3. *Ibid.*
4. *Ibid.*, p. 92.
5. *Ain ul Hedaya*, Vol. 3, p. 341 (Urdu translation by Maulana Ameer Ali).

dignity of *nikah* or marriage is great and its occurrence scarce. The analogy of property cannot be applied to it, because its position (of property) is lowly and its occurrence frequent.[1]

The argument of the Hanafis who extend the competence of the evidence of a woman to all matters except offence punishable with Hadd or Qissas is that it is inherent in the evidence of woman that it should be relied upon because in it (evidence) are found characteristics on which depends its capability and reliability. These are the powers to observe, to remember and to reproduce. Whatever knowledge a witness obtains through observation, is retained through memory, and is reproduced before the Qazi and communicated to him. It is for this reason that the information transmitted by women is accepted in traditions (احادیث *Ahadith*) and whatever defect in memory of women is there on account of forgetfulness is made up by the presence of another woman. All the defects are eliminated except doubt for which the evidence of two women becomes equivalent to that of a man. For this reason the testimony of women is not accepted in offences punishable with Hadd since Hadd punishment is negatived by the doubt. In matters which are proved despite doubt, whether they pertain to right or not, her evidence is competent. The rejection of evidence of four women only is contrary to Qiyas (but it is rejected) so that they may not have to come out of their homes frequently (to go to courts of law). Qiyas on the other hand demands that their evidence should be acceptable.[2]

Regarding the non-admissibility of woman's evidence in offences punishable with Hadd or Qissas reliance is placed upon the Hadith of Zuhri that it had been the practice from the

1. *Ain ul Hedaya*, Vol. 3, pp. 342 (Urdu trans. by Maulana Amer Ali).
2. *Ibid*, pp. 341-342.

time of the Prophet (p.b.h.) and his rightful Caliphs that the evidence of women is not there (admissible) in Hudood and Qissas.[1] But in *Musannaf* by Ibn Abi Sha'ba there is no mention of Qissas. Apart from this it is Mursal Hadith. The Hadith is as follows:

صنت السنة من لدن رسول الله صلى الله عليه وسلم و خليفتين من بعد
ابي بكر و عمر بان لاتجوز شهادة امرأتين مع الرجل في القتل والطلاق
و النكاح و الحدود

(The practice from the time of the Messenger of Allah (p.b.h.) and the two Caliphs after him *i.e.* Abu Bakr and Omar had been that the evidence of two women with one man was not lawful in matters of murder, divorce, marriage and Hudood).

It is worth consideration that this statement of Zuhri is treated incorrect and contradictory to authentic traditions in respect of inadmissibility of the evidence of women in marriage and divorce. Before commenting upon this disconnected Hadith it will be batter to deal briefly with the definition of a Mursal (disconnected) tradition and its reliability or unreliability according to traditionists and jurists. Marasel is the plural of Mursal which means a report which is defective as it does not set out the authorities. It can be translated as a disconnected tradition. Being disconnected it is counted among the category of weak traditions. The experts in the science of traditions do not rely upon mursal traditions. Imam Shafe'i and his followers say that it is nothing. The jurists however differ in regard to their reliability. This is summed up in *Mohammadan Jurisprudence* by A. Rahim.[2] He writes :

> "A disconnected narration from a Companion is accepted by all the Schools, because of the presumption in favour of its authenticity, arising from the high character of the Companions and their regard for accuracy, as well as from their close proximity to the Prophet. The Hanafis and

1. *Aimul Hedaya*, Vol. 3, pp. 341 (Urdu trans.) by Maulana Amer Ali.
2. P. 75

Malikis would also accept disconnected reports of successors and of successors of successors, but not so the Shafe'is. A disconnected tradition narrated after the expiry of the third period is not accepted except by some Hanafi doctors."

Imam Nawawi writes in *Al Taqrib* that the majority of the experts in traditions treat Mursal Hadith as weak. Many of the jurists and experts in jurisprudence say that if the Hadith of a reporter who is anonymous and obscure is held unacceptable, the Hadith related from a reporter who is unknown is in a worse position. Another reason is that when a reporter reports from the Prophet (p.b.h.) through a successor whose name is omitted, the possibility cannot be eliminated that he (the relator whose name is omitted) may be a companion or successor, and in case he is a successor it is possible that he may be truthful and reliable or he may be weak. It is also possible that the reporter whose name is not mentioned may have reported from a companion or the source of his information be a successor who may be truthful or weak. On account of these doubts a Mursal Hadith cannot serve as evidence.[1]

Imam ul Haramain said that according to some Imams (great scholars) of Hadith if the successor (to the companions), said: that 'the Messenger of Allah (p.b.h.) said' he does not by his silence about the name of the reporter affirm it to be the utterance of the Prophet (p.b.h.) because his heart quakes with doubts, and is knocked with misgivings.[2]

Imam Ahmad bin Hanbal equates Mursal Hadith with weak Hadith and since in case of necessity he acts upon a weak tradition, he acts upon Mursal too on the same analogy.[3] Imam

1. *Imam Abu Hanifa* by Abu Zahra (Urdu trans.) pp. 496-497.
2. *Al Burhan* by Imam ul Haramain, Vol. I, p. 634, S. 575.
3. *Imam Ahmad bin Hanbal* by Abu Zahra (Urdu trans.) pp. 336-337; *Hayat Imam Ibn Qayyim* by Abdul Azim Sharfuddin (Urdu trans. by Syed Rashid Ahmad Arshad), p. 285.

Ibn Qayyim never acted upon Mursal Hadith nor treated it as evidence in Sharia.[1]

Imam Shafe'i is said to have adopted a middle course. He neither rejects Mursal traditions outright nor accepts them like the Hanafis. He imposes certain conditions for its acceptance. He did not act upon the Mursal tradition reported by a successor who did not associate with many of the companions. His condition is that the reporter must have benefited from the association of a number of the companions of the Prophet (p.b.h.). He also accepts Mursal if any Hadith with full intermediary authorities has been reported from those who are relied upon for their memory in respect of traditions. If the Mursal also accords with the statement of a companion, it can be accepted. If some groups of scholars give findings on the basis of the Mursal it may also be a ground for accepting it, though not as strong as the other ground.[2] To accept Mursal on the basis of a Hadith with complete authorities or on account of its harmony with the saying of a companion is in truth the acceptance of the authoritative Hadith or the tradition of the companion and not acceptance of the Mursal.

Imam Malik accepts Mursal Hadith if in his opinion the reporter was trustworthy.[3]

All these Imams who accept Mursal Hadith subject to conditions accept it only if it is reported on the authority of a named successor. But Imam Abu Hanifa accepted Mursal traditions even from successors to the successors.[4] The Hanafis act upon the same principle.

The Mursal traditions of Zuhri are adopted by the Hanafis and Malikis, but others reject them. Imam Shafe'i rejected his

1. *Hayat Imam Ibn Qayyim, Ibid.*, p. 278.
2. *Asar i Imam Shafe'i* by Abu Zahra (Urdu trans.) pp. 396-398.
3. *Imam Ahmad bin Hanbal* by Abu Zahra (Urdu trans.), p. 334.
4. *Imam Abu Hanifa* by Abu Zahra (Urdu trans.), pp. 496-498

Hadith that during the period of the Prophet (p.b.h.) *diyat* of a Jew and a Christian used to be equal to the *diyat* of a Muslim, on the ground that it was Mursal and added that his Mursal traditions were Qabihah (قبيحة repulsive or infamous).[1] It is in *Tahzib* that Ibn Sannan said that Yahyah bin Saeed held the Mursal traditions of Zuhri and Qatada to be nothing (of no value), and said that they are among the people who commit things to memory and transmit with annotations what they hear.[2]

The above tradition of Zuhri is not even treated as the Sunnah of the Prophet (p.b.h.) or his companions. It is taken to describe the practice of the people of Madina. A passage from *'Ila ul Sunnan* on this point would be relevant :

> "Those who believe that the evidence of women is not admissible in any other matter except matters relating to money or property or matters knowledge of which is exclusive for them, for example child birth, have no proof in support either from report or from rational argument. As far as report is concerned they rely upon the tradition reported by Zuhri that the practice has been that the evidence of two women with one man is not admitted in cases of murder, divorce, marriage, and Hudood. This is related by Sahnun from Ibn Wahab, who reported it from Younus bin Yazid who related it from Zuhri. (In another manner) it is reported by Sahnun on the authority of Ibn Wahab who related it from Aqil who reported it from Zuhri, that it had been the practice from the time of Messenger of Allah etc. (In yet another version) it is reported by Sahnun from Ibn Wahab who said on the authority of Ismail bin A'yyash who related from A'yyash who reported from Zuhri that it had

1. *Neil ul Autar* by Shaukani, Vol. 7, p. 70.
2. *'Ila ul Sunnan*, Vol. 15, p. 167.

been the practice from the time of the Prophet (p.b.h.) and his two Caliphs etc.

There is no evidentiary value in this for these people because this is from among the Mursal traditions of Zuhri whose Mursal traditions have no value (لیس بشئی). It is in Tahzib that Ahmad bin Sannan said that Yahya bin Saeed thought nothing of the Mursal traditions of Zuhri and Qatada, and said that they belong to the group of those who commit to memory what they hear and transmit it with annotation. It is also possible that from the word Sunnah Zuhri might have meant the practice of the people of Madina and Aqil etc. might have misunderstood it to mean the Sunnah of the Prophet (p.b.h.) and related the sense which they understood. Whatever traditions we have and related from the Prophet (p.b.h.), Hazrat Omar, Ibn Omar Hazrat Ali have preference over what Zuhri stated. Consequently there is no support for them (those who reject woman's evidence in *nikah* etc.) As far as the principle of Darayat (test of rationality and logic) is concerned, why should they not admit the evidence of women in marriage and divorce, if they admit it in child birth and such other matters which do not concern financial affairs. . It is preposterous to make any distinction on ground of necessity or otherwise . . . . . .[1]

The author of *'Ila ul Sunnan* then argues in favour of admissibility of the evidence of women in cases of marriage and divorce. Regarding Hudood and Qissas, he says that the evidence is considered inadmissible on account of Ijma.[2] Then he turns back to the Hanafi fiqh according to which the Mursal traditions of Zuhri should be acted upon and adds that their rejection may be "correct according to the doctrine of the

1. *'Ila ul Sunnan*, Vol. 15, p. 167.
2. *Ibid.*

traditionists who do not rely upon Zuhri's Mursal traditions. This is also the view of Imam Shafe'i and his followers. Imam Malik has frequently relied upon his Mursal traditions. Imam Ahmad also does not reject Mursal tradition. The friends should therefore say that the Mursal traditions of Zuhri are worthless only for the traditionists." A caveat may be entered here that Imam Ahmad considered them weak but had no objection to avail of them in the same manner as he was wont to use weak traditions by way of expediency. Maulana Zafar Ahmad Usmani then comes to the same conclusion that the Hadith of Zuhri did not deal with the Sunnah of the Prophet (p.b.h.) or his companions but described the practice of the people of Madina only. He further added that the Hadith, in so far as it related to the inadmissibility of the evidence of women in marriage and divorce, was contradicted by another tradition of Hazrat Omar.[1]

It is clear from this discussion that Mursal traditions are rejected by the traditionsts whose word should have more weight than that of jurists. Among the jurists also there is difference of opinion. Only Imam Abu Hanifa and Imam Malik accept Mursal traditions. As far as the Mursal traditions of Zuhri are concerned Imam Shafe'i rejects them totally. Whoever accepts Mursal traditions generally or Mursal traditions from Zuhri does it conjecturally and not as a matter of evidence, although conjecture should be excluded in Sharia. The conjectural acceptance of Zuhri's Hadith is not correct. Half of it is rejected by the Hanafis outright because it is contradicted by authentic tradition. How can the other half be then accepted? It is said that it is on account of Ijma' but it would be seen in the discussion of Ijma' that it should be founded on Mustanad *i.e.* the Quranic verse or the Hadith. Where is its Mustanad? In fact the Mustanad contradicts Zuhri's Mursal tradition because it is proved that the solitary

1. *'Ila ul Sunnan*, Vol. 15, p. 167.

evidence of a woman complainant was found sufficient by the Prophet (p.b.h.) for passing the sentence of stoning to death and a Jew was killed in Qissas on the evidence of the victim girl. Moreover judicial experience shows that no doubt is admissible simply on account of the difference in sex. The evidence of a woman is to be weighed on merits. It cannot be excluded on the ground of sex only. This tradition cannot, therefore, be relied upon.

The reasoning of Imam Shafe'i is based upon firstly the alleged tradition that women are defective in intelligence which has been adversely commented upon, at another place and secondly the Quranic verse[1] in which there is a reference to attestation of document by two women and one man, and thirdly, the tradition in which the Prophet (p.b.h.) is said to have made observation against the fate of the people who are ruled by women, which has been interpreted by Maulana Ashraf Ali Thanvi as being applicable to authoritarian rule of women and not rule based upon consultation and advice (as is the rule in Islam). The Hanafi argument concedes that women have the power of observation and the power of transmission of what is observed by women. It also concedes that their memory is not as defective as held by Imam Shafe'i; it can be cured by the presence of another woman so that if one forgets the other may remind her. However even Hanafis hold that where benefit of doubt goes to the accused the evidence of women is not admissible since in view of the slight defect in memory their evidence creates doubt.

It may be stated that the Muslim jurists confine the benefit of doubt to the trial of offences punishable with Hudood and Qissas because the Prophet (p.b.h.) is reported to have said *idraool hudood bil shubhat* (ادرؤ الحدود بالشبہات) remove Hadd punishments if there be doubt). But if the sentence leviable on

1. *Ain ul Hedaya*, Vol. 3, p. 341, translated by Maulana Ameer Ali, in Urdu.

the accused is of *ta'azir* quantum of which is in the discretion of the judge to determine in the circumstances of a particular case, benefit of doubt cannot be extended to the accused. The Federal Shariat Court held this rule to be incorrect and found that benefit of doubt equally accrues to the accused in cases punishable in *ta'azir*. In the case of Federation of Pakistan v. Hazoor Bakhsh[1] after going through the text of all the Ahadith about administration of criminal justice by the Prophet (p.b.h.), I held that the distinction between Hadd (as meaning specific punishment ordained by the Quran or the Sunnah for any particular offence like adultery, theft, Qazf etc.) and *ta'azir* was a creation of later day jurists. It did not exist during the period of the Prophet (p.b.h.) who used the two words interchangeably.[2] This is an additional reason why the word Hudood (حدود) in the above Hadith about benefit of doubt cannot be interpreted as pertaining to criminal cases for which specific punishments are ordained in the Quran and the Sunnah only as distinguishable from cases in which the judge is vested with discretion to pass any suitable sentence. Therefore, there appears to be no basis for allowing the evidence of women in *ta'azir* and making it inadmissible in Hudood or Qissas cases. The principle of uniformity of law, which is a cardinal principle in the laws of Quran and the Sunnah demanded that the evidence of women should either have been allowed in all criminal cases or should have been universally excluded from them.

It is clear from the discussion on the scope of verse 282 of chapter 2 that it does not pertain to evidence of women in court nor, is it susceptible of being interpreted as requiring in court, the evidence of two women with one man as the minimum. The important question to be considered is of the forgetfulness of women which may render their testimony

1. PLD 1983 FSC 255.
2. PLD 1983 FSC 255 (286-290).

doubtful where benefit of doubt accrues in criminal cases. A simple question may resolve this issue. If the women are by nature forgetful as is assumed by these great jurists why the evidence of a single woman is made admissible in matters concerning the privacy of women? The answer may be that there are Ahadith according to which the Prophet (p.b.h.) decided cases on the evidence of one woman and there is a Hadith laying down the principle that in matters concerning the privacy of women, the evidence of one woman should be sufficient. The Prophet (p.b.h.) is reported to have said: "The evidence of women is admissible in matters in which it is not possible for men to see or observe."[1]

The Hadith mentioned above is reported in *Musannaf Ibn Abi Shaiba* but it is held to be unreliable (ضعیف *zae'ef*). It is also reported in *Musannaf Abdul Razzaq* but the chain of narrators is not complete as the name of the companion is not mentioned (*i.e.*) مرسل (*mursal*).[2]

The Hadith is not really helpful in the evolution of the rule described above. It is ascribed to Zuhri, as reported in *Musannaf Abdul Razzaq*, that Sunnah (practice) became so prevalent that the testimony of women became admissible in matters in which no one except they can have any knowledge *e.g.*, the child birth or inner defects.[3] Obviously this is a conclusion of Imam Zuhri drawn from the traditions on the erroneous assumption that the evidence of women is generally inadmissible. But for this assumption it is not possible to draw from the Ahadith such conclusions. The Hadith about Khula proves that the Prophet (p.b.h.) separated the husband and wife simply on the evidence of the wife that she had nothing but hatred for her husband.[4] Another Hadith is about fosterage

1. *Ain ul Hedaya* translated by Maulana Ameer Ali, Vol. 3, p. 342.
2. *Ibid.*
3. *Ibid.*
4. *Ibn Maja* ; *Bulughul Maram*, Ahadees Nos. 1095, 1097.

in which a black woman claimed to have suckled during their childhood a newly married couple and the Prophet (p.b.h.) ordered their separation.[1] As observed by Imam Abu Hanifa suckling of the child is not a matter of which knowledge may be peculiar to women. For purposes of inheritance the evidence of midwife only that the child cried after birth is held admissible by Imam Abu Yousaf and Imam Mohammad but according to Imam Abu Haneefa men can also hear the cries of a newly born child.[2] His objection is obviously correct.

Talak is not a secret matter and the same was made effective by Hazrat Omar on the evidence of women only.[3]

A decision of Amir Muawiyah is reported by Alqama bin Abi Waqqas that he decreed a suit of Muhammad bin Abdullah bin Zubair and his brothers regarding some houses on the sole evidence of Ummul Mominim Umme Salma who deposed that the Prophet (p.b.h.) had given those houses to them.[4]

A similar decision was given by Marwan on the claim of Sohaib on the sole evidence of Abdullah bin Omar. Sohaib had averred that the houses claimed by him had been given to him by the Prophet (p.b.h.)[5]

There are several cases of Hudood and Qissas which were decided on the evidence of one woman. The most important case is of a lady who was raped by an unknown person while she was coming to the mosque for offering her morning prayer. He ran away after committing the offence. The woman raised an alarm on which a person ran after him. In the meanwhile some other men came there and

1. *Al Mughni*, Vol. 9, p. 156.
2. *Ain ul Hedaya*, Vol. 3, p. 343, *Fatawa-i-Alamgiri*, Vol. 5, p. 271.
3. *At Turuq ul Hukmia*, p. 92.
4. *Musannaf Abdul Razzaq*, Vol. 8, Hadith No. 15240.
5. *Ibid.*, Hadith No. 15441.

they also pursued the culprit. They caught the man who had gone in pursuit of the culprit. The woman on seeing him said that he committed rape with her. The man protested that he was running after the culprit but the people presented him before the Prophet (p.b.h.). The woman accused him of committing rape with her. The Prophet (p.b.h.) ordered him to be stoned to death. When people took him for execution of the sentence, the real culprit appeared before the Prophet (p.b.h.) and confessed his crime. The Prophet (p.b.h.) addressing the woman said that she was innocent and had committed no fault. He praised (and acquitted) the man who had pursued the victim but who was ordered to be punished. Regarding the person who had confessed Hazrat Omar demanded that he should be stoned to death in view of his confession. But the Prophet (p.b.h.) refused to pass such order on the ground that he had repented. Nassai reproduced this Hadith as related by Alqama bin Wail on the authority of his father. Imam Ahmad reproduced this Hadith on the same authority but some other relators are different. According to that version the Prophet (p.b.h.) observed that he had made such repentance that if all the people of Madina had repented likewise their repentance would have been accepted by Allah. The Hadith is reported in *Abu Daud* and *Tirmzi* too. Tirmizi said that the Hadith is Hassan Gharib Saheeh (a Hadith chain of relators of which was unbroken up to the Prophet (p.b.h.), all the relators were men whose veracity is established but in some age one relator is the sole reporter). Ibn Qayyim places reliance upon the Hadith in his book *At Turuq ul Hukmia.*[1]

Another case is of the Jew who robbed a girl of her ornaments and then caused her grievous injuries to which she later succumbed. He crushed her head with two stones. She was taken to the Prophet (p.b.h.) in an injured condition. The Prophet (p.b.h.) asked her who had done this to her. She

1. *At Turuq ul Hukmia* by Ibn Qayyim, pp. 68-70.

named several persons successively but she shook her head in denial. Ultimately he named the Jew and asked whether he was the offender. The girl then nodded in assent. The Jew was brought there and was put to death by the crushing of his head in the same manner. Bokhari reproduced this Hadith on the authority of two different set of relators.[1] There are two versions in *Bokhari* and *Muslim*. One is the same as above but in the other it is stated that the Jew confessed after which he was executed.[2]

The version in which the confession of the offender is not mentioned establishes that the evidence of one woman who is also the victim or complainant is sufficient in Qissas. The second version does not make much difference. Obviously there was no witness of the occurrence except the victim, on whose testimony alone the Jew was ordered to be brought to the Prophet (p.b.h.); her testimony was not rejected as being the testimony of a woman.

Hazrat Naila wife of Hazrat Osman was the only witness of his murder. It is well known that there was a general demand about Qissas but Hazrat Ali avoided only on ground of expediency and not on the ground that there was no male witness and Qissas could not be ordered on the evidence of a woman.

In the matter of scandal against Hazrat Aisha the Prophet (p.b.h.) asked the advice of Hazrat Ali. He advised him to inquire from Buraira about her chastity. Buraira was called by the Prophet (p.b.h.) and asked if she had seen any deviation on the part of Hazrat Aisha. She stated on oath of Almighty that she had not witnessed anything (deviation) on the part of Hazrat Aisha and she could verify not the correctness of any accusation against her. She added that she was

1. *Saheeh Bukhari*, Vol. 3 (Urdu translation—Muhammad Saeed & Sons), p. 655.

2. *Jame ul Fawad*, Hadith Nos. 5231, 5233, 5234.

such a simple young girl that she would go to sleep after kneading the flour and the goat would eat it up. Hearing this the Prophet stood on the pulpit and asked who would take revenge from Abdullah bin Ubaie who had been responsible for the scandalous rumours against Hazrat Aisha. The Prophet (p.b.h.) thus clearly acted on the evidence of one woman for refutation of the charge against Hazrat Aisha.[1]

There is no bar in the Quran or the Hadith against the admissibility of the evidence of a woman or against her being a competent witness without a male witness. This question came up for consideration before me as a Judge of the Lahore High Court in Fida Husain v. Naseem Akhtar[2]. It was held that a suit of dissolution of marriage could be decreed in favour of the plaintiff on her evidence alone. It was also held that Islam does not fix any particular number of witnesses to prove a case (of civil nature). I observed that "traditions of the Holy Prophet (p,b.h.) also do not lay down any fixed or rigid rule. The Holy Prophet (p.b.h.), decided a case—

1. on the testimony of a woman plaintiff,
2. on the testimo ny of onefemale witness,
3. on evidence produced by both the parties,
4. on the evidence of witness and oath (*yameen*) of the plaintiff,
5. on the oath of the defendant, and
6. on the evidence of two or more witnesses and on the oath of the defendant.

The jurists have differed widely on the scope of admissibility of the evidence of women. Many such instances have alread been cited. A resume of these juristic views may be given from *Musannaf Abdul Razzaq*.[3]

1. *Saheeh Bokhari*, Vol. 2, pp. 77-78, (Urdu trans. Muhammad Saeed & Sons).
2. PLD 1977 Lah. 328.
3. Vol. 8, pp. 329-338.

One view was that the evidence of women was not admissible except in cases of emancipation, loan and will but in that case the evidence of man is essential with them.[1] The view of Al Zuhri,[2] Qatada,[3] and Ibrahim[4] and one opinion ascribed to Hazrat Ali[5] and Hazrat Omar[6] is that it is not admissible in *Talak*, and marriage even with men. But the Hanafis, as already noticed, take a different view and hold women to be competent witnesses with man in *Nikah* and *Talak*. Hazrat Omar made *Talak* effective on the evidence of four women. According to another version Hazrat Omar accepted the evidence of one woman in *Nikah*.[7]

Shuraih accepted the evidence of two women in a case of emancipation of slave.[8] But according to Ibn Juraij, the evidence of women is not admissible unless there be a male witness with them.[9] Qatada is reported to have held the opinion that the evidence of women is not competent unless they are four in number.[10] Al Sha'abi said that in matters not expected to be seen by a male there should be four women witnesses,[11] but Hamad said only one woman was sufficient. Al Hasan, and according to another version, Al Sha'abi held that the evidence of only one woman is sufficient.[12] This is the view held by many others also.[13]

1. *Musannaf Abdul Razzaq*, Vol. 8, Hadith No. 15409.
2. *Ibid.*, Hadith No. 15402.
3. *Ibid.*, Hadith No. 15403.
4. *Ibid.*, Hadith No. 15404.
5. *Ibid*, Hadith No. 15405.
6. *Ibid.*, Hadith No. 15408.
7. *Ibid.*, Hadith No. 15416.
8. *Ibid.*, Hadith No. 15417.
9. *Ibid.*, Hadith No. 15420.
10. *Ibid.*, Hadith No. 15421.
11. *Ibid.*, Hadith No. 15422.
12. *Ibid.*, Hadith No. 15423.
13. *Ibid.*, Hadith No. 15424 (Miscarriage), 15425, (Pregnancy and menstrual course) 15426, 15427 (birth and miscarriage), 15428 and 15429 (miscarriage), 15430 and 15431 (evidence of midwife only).

It is said that Hazrat Omar and Ibn Abi Laila did not accept the evidence of one woman in fosterage.[1] Ibn Omar is reported to have held the view that the evidence of one man and one woman can be admitted in fosterage.[2] As already seen Imam Abu Hanifa held two women along with one man to be competent witness to prove fosterage. But in the reports of Abdul Razzaq there were others who held the evidence of one woman as sufficient.[3]

The generally held view is that the evidence of women is not competent in Hudood and Qissas but according to Taoos a woman is a competent witness in all matters except Zina (adultery and fornication) because it does not befit a woman that she should be a witness of such offence.[4] 'Ata held the view that woman is competent witness in all matters including Zina but in that case, along with women there should be three male witnesses.[5] Ibn Shahab held that women are competent witnesses in murder cases.[6] Ibn Qayyim said that some jurists held the evidence of women to be lawful in Hudood.[7]

If women had been so short of memory as a rule and forgetful by nature and this had been a mark of distinction between them and men whose memory should be sharp as a rule, the Prophet (p.b.h.) and the rightful Caliphs or later judges would not have decided cases on the sole testimony of a woman. If the principle laid down in verse 282 of Chapter 2 'and two women.... so that if the one erreth the other will remember' had any general application to make two women equal to one man in memory, it should have been applied by

1. *Musannaf Abdul Razzaq*, Vol. 8, Hadith No. 15415.
2. *Ibid.*, Hadith No. 15437.
3. *Ibid.*, Hadith Nos. 15433, 15439.
4. *Ibid.*, Hadith No. 15413.
5. *Ibid.*, Hadith No. 15414.
6. *Ibid.*, Hadith No. 15415.
7. *At Turuq ul Hukmia* by Ibn Qayyim, p. 92.

the Prophet (p.b.h.) to cases of fosterage, dissolution of marriage and matters pertaining to privacy of women. If the principle of minimum two male witnesses in each case had been the rule of evidence in court and not simply a rule of attestation, in each case about privacy of women the evidence of four women should have been requisite as two women have been made equal to one man. The rule of sufficiency of the evidence of one woman in so many matters approved by the jurists is destructive of the general rule evolved by them from the above mentioned verse. On the other hand it appears that the jurists believed that a woman's testimony can be relied upon in matters which relate to her field of interest *e.g.* female body, birth, miscarriage, pregnancy, menstrual courses etc. It is an everyday observation that because of their engrossing interest in fine clothes and jewellery the women's memory never fails in recalling what clothes or jewellery were worn by them or their friends on any past occasion. They remember many things which men are apt to forget easily. In cases of theft they can be better relied upon to identify the stolen household goods than men. I have seen women in my own family whose capacity to retain information about matters of genealogy and other family matters which transpired decades ago, was axiomatic. On the other hand the memory of man fails in such matters. There may be women who may not remember many things. So is the case with men. If there are persons whose power of retention is of high level there are others whose power to recall is very elusive. An agriculturist may remember minute details about crops, weather conditions, quality of soil of different lands but for a person unconnected with agriculture it may not be possible to remember the particulars of an agreement relating to agriculture. In localities in which people are of violent nature, the particulars of any fight or quarrel is easier to remember for people living there. Readiness to recall is associated with use. What is not reinforced by use tends to recede from consciousness but it can be relearnt more

rapidly than if it had never been learnt. Things experienced together tend to be stored as an inter related pattern so that the recall of a part may bring back the whole.[1]

There are factors which may facilitate or block recall, but sex is not one of them. The fact that recall depends on stimulating cues can lead to confusion because more than one memory stores may be tapped by the same stimulus, leading to conflict. Recall may also be facilitated or blocked by emotional factors associated with the matter it is sought to remember. Memory can be deceptive in so far as past events may be disordered on call. Some of what happened may be forgotten, and some things that did not happen may be unconsciously added.[2]

In Courts of law such instances of confusion, forgetfulness which in some cases may be cured by refreshing of memory, and unconscious addition are so frequent that the Courts had to evolve the rule of sifting the chaff from the grain. But this has nothing to do with sex. The principle which emerges from "If one erreth the other may remind her is that of refreshing the memory." This is achieved in the present day Courts by showing the document to the witness or by reading its contents to him. The memory of the male witness is as much required to be refreshed as the memory of the female witness.

As stated above the readiness to recall is associated with use and is reinforced by use. Where the women deal in borrowing and lending or business or other fiscal matters their memory in those matters can seldom elude them. But in societies in which the women are required to confine themselves to their own domain of house keeping and children rearing and never have the opportunity to indulge in loan or other financial transactions, they cannot be expected to

1. *New Caxton Encyclopaedia*, Vol. 12 on 'Memory'.
2. *Ibid.*

remember particulars of such transactions if per chance and rarely they have to be witness to them. It is in this limited sense only that the verse is to be understood. In matters in which the women have opportunity to put to use their capacity to recall, the jurists themselves concede the sufficiency of the testimony of one woman. In the ultimate analysis it becomes a matter of appreciation of evidence, and not a rule of law.

It appears that the jurists were also actuated by motives of what they considered to be for the welfare of the women. The reason of Taoos in making their evidence inadmissible in cases of Zina (adultery and fornication) is that it is not befitting for women to witness such occurrence. Another motive is that it may not be necessary for women to go out frequently.[1] In *Durrul Mukhtar*[2] it is said that: "the evidence of four women without a male is not acceptable so that the women may not have to go out frequently which means that if the evidence of women alone be made admissible they shall have to go to the Capital each time for evidence. ." In this sense it is nothing but positive law (قانون وضعی) as distinguished from the divine law, and can be changed.

In addition it is said that there is nothing in Sharia justifying the admissibility of evidence of women. This is a negative proposition and is not equivalent to saying that Islam prohibits the evidence of women. The presumption in the absence of prohibition is of lawfulness and not of unlawfulness. Moreover it ignores the Ahadith of the Prophet (p.b.h.).

The view that women are not competent witnesses in Hudood and Qissas was commented upon by the Federal Shariat Court in Ansar Burney *v.* Federation of Pakistan.[3] It was observed :

1. *Ain ul Hedaya*, Vol. 3, p. 342 (Urdu translation by Maulana Ameer Ali).
2. *Durr ul Mukhtar*, Vol. 3, p. 276 (Urdu translation).
3. P L D 1983 F S C 73.

"69. The view that woman cannot appear as a witness in matters of Hudood and Qissas 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 (p.b.h.) in which he might have refused to accept the evidence of a woman in such matters.[1] . . . Some support is sought for this juristic view from the words "واشهدو ذوا عدل منكم" (and call to witness two just men from amongst you)[2]. .in Chapter 'The Divorce' and the words "فاستشهدوا عليهن اربعة منكم" (call to witness from amongst them four from amongst you)[3]. . in Chapter entitled 'The Women'. But the word 'منكم' cannot necessarily be said to be confined in its scope to men. On the principle of masculine being used on account of habit or *taghlib* so as to include the feminine, the word 'منكم' is susceptible of being interpreted as inclusive of men as well as women. In this connection the analysis made by Maulana Omar Ahmad Usmani in *Fiqh ul Quran*, Vol. 3, p. 87 onwards is quite revealing and weighty."

The precedents from the traditions of the Prophet (p.b.h.) in the rape case which was decided on the evidence of the victim alone, and of the murder case in which a Jew was punished fully support the view of those jurists who hold the evidence of woman to be admissible in Hudood and Qissas cases. As already stated that the jurists barred the evidence of women on such matters on grounds that women may be saved the trouble of visiting the Courts, or that it is not befitting for them to be witness of such offences as Zina. These are the grounds of positive law and can be brushed aside by the State Legislature in any Islamic country for enforcement of the law as it is, in the Quran and the Sunnah as well as in the interest of the public so that the offenders

1. *Al Mohalla* by Ibn Hazm, Vol. 6, p. 430.
2. Q. 65 : 2
3. Q. 4 : 15

may not escape punishment in cases where an offence is witnessed by women alone. The jurist realised this difficulty at an early period of development of Islamic jurisprudence and tried to circumvent the principle evolved by them by establishing a rule that if the evidence falls short of that required for imposition of Hadd or Qissas and there is reason to believe that the accused had committed the offence, he can be convicted and sentenced in *ta'azir* for which there is no limitation of number of witnesses or their sex.

There are seven other verses about evidence. An analogous verse which also deals with creation of evidence of transaction is Q. 5: 106:

يايها الذين آمنوا شهادة بينكم اذا حضر احدكم الموت حين الوصية
اثنن ذوا عدل منكم او اخران من غيركم ان انتم ضربتم فىالارض
فاصابتكم مصيبة الموت تحبسونهما من بعد الصلوٰة فيقسمٰن بالله ان
ارتبتم لا نشترى به ثمناً ولو كان ذا قربىٰ ولا نكتم شهادة الله انا
اذا لمن الاثمين

Q. 5:106.—O ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at the time of bequest—two witnesses from among you, or two others from another religion in case ye are campaigning in the land and the calamity of death befall you. Ye shall empanel them both after the prayer, and, if ye doubt, they shall be made to swear by Allah: We will not take a bribe, even though it were (on behalf of) a near kinsman nor will we hide the testimony of Allah, for then indeed we shall be of the sinful.

The interpretation of this verse is relevant from the view of number and sex of witnesses of attestation of the document since the word *minkum* (منكم from among you) in regard to the witnesses occurring in other verses of the Quran have been

interpreted as referring to male witnesses only. This controversy does not arise in this verse regarding the sex of the testator because the addressees are 'O who believe' and include male and female both. The word *'ithnan i zawa adlim minkum* (اثنان ذوا عدل منكم two witnesses just men from among you) have been used to distinguish them with *wa akharan i min ghairekum* (واخران من غيركم or two others from another religion *i.e.* from among the people of the Books) and mean that if it is not possible to secure Muslim witnesses, two witnesses from among the people of the Book may act as attesting witnesses. The verse does not exclude the women from being witnesses. If such a claim is made the interpretation would become anamolous, firstly for the reason that it would mean that the verse does not apply to female testators, and the addressees 'O who believe' only apply to men; secondly if it is held that they apply to men and women alike, but if the testator be a male the word *minkum* (منكم from among you) would mean male witnesses, it would follow that if the testator be a female the word *minkum* should mean witnesses of her sex, which would not be correct. The correct meanings, therefore are that the sex of the testator would not determine the sex of the witnesses. The verse applies to men and women alike and consequently the word *minkum* means witness, of both or either sex. This interpretation is supported by the verse that follows.[1]

In the above verse it is stated that the witnesses may be asked to take oath that they shall be truthful. The verse which follows provides that if it is afterwards ascertained that both of them merit the suspicion of sin *i.e.* of falsehood, two others from among the near relatives of the deceased take oath that their testimony is truer than the testimony of those witnesses who were with the testator. If women are excluded they will not be able to take oath and their rights will not be guarded, in case there are no male heirs. Verse 106 of Chapter 5 and the verse that

1. Q. 5 : 107.

follows it, apply to members of both sexes and women are competent witnesses according to them.

The above verse mentions two witnesses who may be of either sex. There is no such distinction as in verse 282 of Chapter 2 which requires two male witnesses or one male and two female witnesses. Two female witnesses are therefore as good as two make witnesses. The reason is amply clear. In matters of succession and inheritance women are as much interested as men. Both are at par in respect of memory in regard to that matter and if forgetfulness or the need of retaining one who may remind is not ascribable to men it is not attributable to women either.

Another verse in which the word *minkum* has been used in relation to witnesses is Q. 65 : 2 which is as follows :

فاذا بلغن اجلهن بمعروف او فارقوهن بمعروف واشهدو ذوا عدل منكم و اقيمو الشهادة لله

Q. 65 : 2.—Then, when they have reached their term, take them back in kindness or part from them in kindness, and call to witness two just men among you and keep your testimony for Allah.

The verse deals with the last stage of Quranic divorce when two persons may be made witnesses. There is nothing to suggest that the principle of interpretation that the male includes the female is not applicable to the word *minkum* (منكم from among you).

The third verse using similar language is Q. 4 : 15 which is reproduced below :

والّتى ياتين الفاحشة من نسائكم فاستشهدوا عليهن اربعة منكم فان شهدوا فامسكوهن فى البيوت حتىٰ يتوفهن الموت او يجعل الله لهن سبيلاً

Q. 4 : 15.—As for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the alle-

gation) confine them to the house until death take them or Allah appoint for them a way.

This is one of the verses on the basis of which it is said that four witnesses are required to prove a case of adultery or fornication. The order in the verse is no longer in force. It was substituted by the specific punishment for adultery.[1] But there is nothing in this verse to denote that the word *minkum* (منكم from among you) is for males only. The verse is obviously addressed to Muslims and the word *minkum* would mean 'from among Muslims'. The verse cannot mean that only men can complain against lewdness. Women are also charged with the duty to eliminate from the Muslim society the curse of unchastity.

Verse Q. 4 : 6 charges those who hold the management of the property of the orphans to deliver the same to them on reaching the age of maturity and discretion, and directs them to "have (the transaction) witnessed." The verse is completely silent about the sex of the witnesses and the exclusion of women cannot be read in it.

Another verse mentioning the necessity for witnesses is Q. 24 : 4. The verse deals with the punishment of those who slander and accuse honourable women of unchastity. It provides that such persons shall be punished with eighty stripes if they do not bring four witnesses in support of their accusation. In this verse too the sex of the witnesses is not pointed out and there is no reason for excluding the testimony of women.

Verses 6 to 9 of Chapter 24 deal with the procedure of *lia'an*. The purport of these verses is that if a man accuses his wife of unchastity but has no witness to support him, he has to take oath four times in support of the charge and invoke the fifth time the curse of Allah on him 'if he is of those who lie.' After such oaths are taken the woman, in order to avert the

1. Q. 24 : 2.

punishment of Zina which may be stoning to death, shall have to take oath four times that the accusation is false and is bound to invoke the fifth time the wrath of Allah if the husband spoke the truth. These oaths are called testimony by the Quran. They are really the substitute of witnesses. The refusal or failure of the wife to take the prescribed oaths, according to the Shafe'i School makes her liable to be punished and this is what appears from verse 8 which provides that 'it shall avert the punishment from her if she bear witness before Allah four times that the thing he saith is indeed false.'

The verses prove that four oaths of the man are frustrated by the four oaths of the wife. Thus the testimony of a woman is not unequal to that of man.

The jurists have rather overemphasised the number and sex of the witnesses. This may be due to their being under the influence of the Jewish law on evidence. It is said in Numbers[1] that : "A man accused of murder may be found guilty and put to death only on the evidence of two or more witnesses; the evidence of one witness is not sufficient to support an accusation of murder." From the cases already cited from Hadith and the history of Caliphate it ppears that the Prophet (p.b.h.) decided a murder case on the evidence of the victim girl alone and sentenced her murderer, a Jew, to Qissas, Hazrat Naila was the only witness of the assassination of Hazrat Osman and on the basis of her evidence alone demand for Qissas was made by the people, but this was not rejected on the ground that the evidence was not sufficient. Hazrat Ali tried to pacify the people by laying stress on expediency.

Under the Jewish law two witnesses are required to convict the accused of a crime.[2] As far as the weight of testimony of women witnesses is concerned it was treated with contempt

1. Numbers 35: 30; Also see Deuteronomy, 17 : 6.
2. Deuteronomy, 19 : 15.

and one view was that even the evidence of one hundred women cannot be equal to the evidence of one man. Islam did not retain these principles. The jurists no doubt formulated the principle of the evidence of two women being equivalent to the evidence of one man on the basis of verse 282 of Chapter 2 and excluded the evidence of women in the trial of offences punishable by Hadd or Qissas, but they made the evidence of one woman alone as sufficient for decision of certain category of cases. They ruled that if an offence was proved against an accused by witnesses who did not conform to the essential requirements prescribed by them he could be convicted in *ta'azir*. Thus by experience, they softened down the rigours of the rules prescribed by them.

The Prophet (p.b.h.), as already seen, decided disputes and criminal cases without resort to technicalities. His objects were that the rightholders may not be deprived of their rights and the culprits may not be allowed to thwart the ends of justice and may not escape punishment.

For the safeguard of the rights of the rightholder, he evolved the rule *al bayyenato alal muddai wal yameen ala man ankara* (البينة على المدعي واليمين على من انكر. The burden of proof is on the plaintiff and the oath is on him who denies the claim). But he also allowed the plaintiff to take oath where he had only one witness. He resolved the disputes on the evidence of one female witness. He decided the case of Hadd only on the evidence of th evictim of the rape. It is a different matter that he had to review the judgment when another man confessed the crime. These instances are explanatory of the word *bayyena*. The word *bayyena* (بينة) which I have translated as burden of proof has also been narrowly interpreted by the jurists. It is made subject to the rules of evidence formulated by them, about the number and sex of the witnesses. Moreover they understand the term as meaning evidence of witnesses required to prove a matter. But Ibn Qayyim differs from them on this narrow interpretation;

he understands the term as meaning evidence or manifest proof. Any proof which satisfies the judge of the truthfulness of claim is included in *bayyena* (بينة). He writes :

> "The object of Shariah is that *bayyena* is that which evidences and manifests the truth. It is sometimes (achieved) through the evidence of four witnesses, sometimes three, as has been declared by the *nass* (verse) regarding the *bayyena* of the bankrupt; sometimes two witnesses and sometimes one, sometimes (the consequence) of refusing to take oath and sometimes taking oath, or taking fifty oaths, or four oaths. Sometimes the circumstances provide proof, for example those which we have already stated. So the meaning of that (the rule) stated by the Prophet (p.b.h.) *i.e., al bayyenato alal muddai* (البينة على المدعى) the burden of proof is on the plaintiff) only means that which manifests what makes the truth evident, and the judge must determine according to the truth (which may be) manifested in any way."[1]

At another place he writes :

> 'It transpires from this that if the truth becomes manifest to the judge from (the evidence of) only one witness, he should pass order accordingly (in all matters) except in Hudood. Allah did not make it obligatory on the judges to decide only on the evidence of two male witnesses nor did He oblige the rightholder to secure the evidence of two male witnesses or one male and two female witnesses. It does not prove that the judge cannot determine on lesser evidence. The Prophet (p.b.h.) gave judgment on the evidence of a witness and oath or on the evidence of a sole witness.'[2]

Ibn Qayyim then proceeds to illustrate his point by the traditions.

1. *At Turuq ul Hukmia*, p. 28.
2. *Ibid.*, p. 79.

Ibn Qayyim discussed this point much more elaborately in his renowned book *Eilam ul Muwaqqe'ein*. It will be useful to cite some passages from that Book. After explaining the meaning of Bayyena (بينة) as something which manifests truth and after providing that the word has never been used in the Quran in the sense interpreted by the jurists he proceeds to elaborate:

> "Now we say that the question of the Prophet", as reproduced in Hadith whether you have *bayyena* and the sentence in the order of Hazrat Omar that *bayyena* is on the plaintiff . . . . only indicate that *bayyena* means something required for manifestation of truth, whether it be in the form of oral evidence of two witnesses or in the form of argument. The object of the law-maker is that in whatever manner it be possible, the truth and the fact as it is, be revealed and the argument and evidence in its favour make it evident. The authentic fact and reality may not be rejected. When reality is ascertained and elucidated it should be treated as fact established otherwise the rights of Allah and the rights of the creation of Allah (حقوق الله و حقوق العباد *Huquq ullah and Huquq ul 'ibad*) will be rendered of no value. The manifestation of truth does not depend on the use of any particular method. There may be many standards and procedures of its ascertainment utility of which may be undeniable and it may not be possible to reject them. . . .It is not passible that the Prophet (p.b.h.) as law-giver may render such a procedure (for ascertainment of truth) worthless and thus assist in the extermination and violation of rights (of people). These consequences are so well known to everybody that when people realised them, they began to dissipate real objective of the Sharia order and many a rights were violated at their hands, because they knew only the one prescribed method of ascertainment of truth. In these circumstances misconduct and wickedness became easier for the wicked to sustain such person spread corruption openly and (when) the time for

accountability arrived he demanded the evidence of two witnesses. Since the witnesses were not obtainable the rights of Allah and His creation were wasted. . .[1]

Ibn Qayyim further deals with the methods interoduced by the Prophet (p.b.h.) one of which is the sufficiency of one witness and the plaintiff's oath, alternatively in the absence of the plaintiff's evidence or argument the duty of the defendant to take oath, the consequence of the latter's refusal to take oath being that the plaintiff's suit is decreed. Ibn Qayyim holds that the evidence of two women is equal to that of a man but concedes on the basis of his interpretation of *bayyena*[2] (بينة).

"When the woman be perfect in retaining in memory what she observes, is wise and is also religious minded the object is served by her evidence alone. . . On many an occasions the evidence of one woman alone is considered sufficient. The better proposition, therefore, would be that a matter be decided on the evidence of two women and the oath of the rightholder plaintiff (which means that it should not be necessary to produce a male witness with them). This is what is stated by Imam Malik and it is one of the views attributed to Imam Ahmad. Our revered teacher (Imam Ibn Taimiya) however say's[3] *that it would also be correct if decision is given on the basis of the sole evidence of a woman and the oath of the plaintiff, because two women have been made representative of one man only at the time of procuration of witnesses so that one may not forget. There is no (such) thing in the Quran and the Sunnah that unless there be two female witnesses their evidence should not be admitted, and the order about (procuration) of two female witnesses does not mean that if the number be less no judgment can be rendered on that evidence. . .*"! (*Italicising is mine*).

1. *Eilam ul Muwaqqe'ein* by Ibn Qayyim (published Ahl Hadees Academy, Kashmiri Bazar, Lahore), Vol. 1, pp. 71-72.
2. *Ibid.*, pp. 72, 75.
3. *Ibid.*, pp. 76, 77.

On the analogy of the admissibility of the evidence of one witness and the plaintiff's oath, Ibn Qayyim favoured the opinion of Imam Malik that if the witnesses be women only the evidence of two and the plaintiff's oath shall suffice to discharge the burden of proof of the plaintiff. But Imam Ibn Taimiya treats the evidence of one woman only as sufficient with the oath of the plaintiff. The arguments of Imam Ibn Taimiya which have been italicised above support closely what has been stated by me on the interpretation of verse 282 of Chapter 2.

Ibn Qayyim repeats again and again that a matter may be decided on the evidence of a solitary witness, if his truthfulness be beyond doubt.[1] This is the principle evolved by some of the Imams.[2]

Ibn Qayyim's thesis on circumstantial evidence is exemplary. According to him it is not necessary that there should be eye-witnesses' account of an occurrence. If the matter is proved irrefutably by circumstantial evidence, it can be decided on its basis. He puts such evidence into two categories. The first category consists of cases of manifest evidences of circumstances, such as those in the story of Joseph in the Quran. She in whose house Joseph lived in Egypt desired her. Once Joseph had to race to the door to escape her and she followed him and tore his shirt from behind. When question arose of determination who was at fault, a witness of her own folk testified that if his shirt is torn from the front, then she spoke the truth but if his shirt is torn from behind then she had lied 'and he is of the truthful'.[3] In this manner the innocence of Joseph was proved, though there were no eye-witnesses. Ibn Qayyim writes that the rightful Caliphs awarded the Hadd sentence of Zina (adultery)

1. *Ellam ul Muwaqqe'ein, supra,* Vol. 1, p. 81.
2. *Ibid.*, p. 82.
3. Q. 12 : 23-27.

on woman merely on ground of her pregnancy and awarded sentence for the offence of drinking on the basis of smell of liquor in his mouth. Similarly the sentence of offence of drinking was imposed because the accused vomited liqour. There is no reason why a thief from whose possession stolen property is recovered intact should not suffer the sentence of amputation of hands.[1]

The second category consists of cases in which a judge has to use his imagination and intelligence to find the truth. A decision of Solomon provides an apt illustration of this category. Two women came to him each of whom claimed the same child as her son. Solomon said that he would cut the child into two pieces with a knife and distribute them to both of them. One of the women kept quiet but the other raised an alarm and admitted that the child was of the other woman and may be given to her. Thus Solomon knew the truth and decided the dispute in favour of the woman who raised the alarm[2].

The purport of all these arguments is that the number or sex of the witnesses does not determine the truth. The evidence of even one woman can be decisive. It would follow that the matter of appreciation of evidence should be left to the judge, who should not be bound by these juristic technicalities.

Many an assumptions are proved untrue in this age. The examination results of the students furnish the best proof of the superiority or at least equality of memory of the girl student as compared to the memory of male students. Thousands of girls in Pakistan secure high division in such subjects as Sciences, Mathematics and are admitted to the Medical Colleges and other professional institutions on sheer merit in competition with boys. The way they withstand the onslaught of the cross-

1. *Eilam ul Muwaqqeen*, p. 84.
2. *Ibid.*, p. 83.

examiner while in the witness-box proves that their importance as witnesses cannot be minimised. They may falter in matters with which they are not accustomed to deal but so do the men. The present day experiences fully authenticate the wisdom and truthfulness of the provisions about female witnesses regarding matters with which they had seldom any occasion to deal. The theory that women are weak in memory is proved erroneous by the Quran which does not make any distinction in matters of evidence between man and woman, Sunnah of the Prophet (p.b.h.) which proves that the Prophet (p.b.h.) decided disputes on the solitary evidence of a woman, the juristic tendency in finding out indirect ways and means to ease the situation brought about by their emphasis on the number and sex of the witnesses, and finally by the modern age when women have been provided with opportunities to acquire higher academic and professional education in competition with men.

DIYAT

The rule propounded by the jurists is that the blood money payable for the murder of a woman is half of what is payable for the killing of a man. The justifiability of the rule requires consideration, in view of the equality of the sexes in Islam and the principle laid down by the Prophet (p.b.h.) that the blood of the entire humanity is similar. The Quran declares that to kill one person amounts to the killing of the humanity and saving the life of one person amounts to saving the life of all human beings.

In order to appreciate the Quranic verses and other relevant material on the subject it is necessary to understand the meaning of *diyat* (دیۃ). In *Al Munjid*[1] it is explained as that property which is given as compensation (بدل *badal*) for the slaying of the murdered. Same is the definition of *diyat* in *Mufradat ul Quran, Taj, Moheet, Gharib ul Quran and Lughat ul Quran* by Parvez.[2] In the *Dictionary and Glossary of the Quran* by John Penrice[3] it is defined as a fine to be paid for manslaughter.

In *Lisan al Arab* by Ibn Manzur al Afriqi and *Taj al Arus min Jauhir al Qamus* by Mohammad Murtaza al Zabidi it is stated that *diyat* is the right of the deceased victim (الدیۃ حق القتیل) which means compensation to the victim.

Diyat is defined as *Badal al Nafs* (compensation for manslaughter (قتل خطا)) in *Tanvir al Absar* which is the text of *Radd ul Muhtar*,[4] *Fath ul Taqdeer* by Imam Ibn Humam[5], *Hashia Kitabul Hajja*[6] *Mirqaat* by Mulla Ali Qari,[7] *Hashia Hedaya*,[8]

1. P. 895.
2. See the word *waday*.
3. P. 158 on *waday*.
4. Printed in Beirut, Vol. 5, p. 368.
5. Printed in Sukkur, Vol. 9, pp. 204-205.
6. Vol. 4, p. 255.
7. *Mirqaat*, Vol. 4, p. 25.
8. *Bab ul Diyat*, Vol. 4, p. 583, Hashia No. 9.

Tafseer i Kabir,[1] *Rooh ul Bayah*.[2] Abu Bakr Jassas defines it as Qeemat un Nafs (قیمت النفس price for human life).[3] In *Tafseer i Kabir*[4] it is defined as (المال الذی تودی فی مقابلة النفس) property which is given in return for human life. Sarakhsi[5] says that it is that property which is made obligatory by the divine law in case of manslaughter with the object of preservation of the human life from bloodshed.

ما وجب الشرع المال فی حالة الخلاء لصیانة النفس عن الاهدار

It means that the apprehension of one's being made liable for the payment of the property should guarantee the preservation of human life from danger of assassination. This gives it the sense of penalty or fine. In his *Fiqh ul Sunnah*[6] Sayyid Sabiq has called it *al Aqubat ul Maliyah* (العقوبات المالیه fine). In *Badai al Sanai*[7] and *Nail ul Maram*[8] it is defined as *Daman al Dam* (ضمان الدم compensation for blood). Mohammad Ali Sabooni[9] says that it is paid in exchange for the blood of the murdered man. The word *Khun Baha* (خون بہا price of blood) is used for Diyat in all Urdu translations of the Quran.[10] Abu Zahra[11] translated *diyat* in a much more technical language to give it the analogy of Qissas *i.e.* *Diyat* is Qissas not in actuality but in import and significance. (الدیة هی القصاص

1. Vol. 10, pp. 234, 236.
2. Vol. 5, p. 259.
3. *Ehkam ul Quran*, Vol. 2, p. 237.
4. Vol. 10, p. 234.
5. *Al Mabsoot*, Vol. 27, p. 63, ; Vol. 26, p. 67.
6. Vol. 2, p. 512.
7. Vol. 7, p. 257.
8. By Siddiq Ali Khan, p. 166.
9. *Rawa'i ul Bayan*, Vol. 1, p. 492.
10. *Tafseer ul Hasanat* by Maulana Abul Hasanat Qadri Barelvi, Vol. 1, p. 811 ; *Tafseer i Naeemi* by Mufti Ahmad Yar Khan Naeemi, Vol. 5, p. 343, and page 346 ; *Translation of the Quran* by Maulana Ahmad Raza Khan Sahib on verse 92 of Chapter 4 ; *Tafheem ul Quran* by Maulana Maudoodi; *Tarjuman ul Quran* by Maulana Abul Kalam Azad, *Al Quran ul Hakeem*, commentary by Maulana Ashraf Ali etc. on Q. 4 : 92.
11. *Al Jareema*, p. 636.

(في المعنى دون الصورة) Rashid Riza[1] defined it as what is given to the heirs of the victim of manslaughter as compensation for his blood or in lieu of their right in it (الدية ما يعطى الى ورثة المقتول عوضا من دمه او عن حقهم فيه). From these definitions of *diyat* which are practically uniform it would follow that if there be no difference between the blood or life of a man and woman, there should be no variation in the compensation or price of blood or of life or penalty or fine for shedding of the blood or depriving one of life.

The relevant verses which lay down the rule about Qissas and payment of *diyat* may now be reproduced :

ولا تقتلوا انفسكم

Q. 4 : 29 And kill not one another.

و من يقتل مومناً متعمداً فجزاؤه جهنم خالداً فيها وغضب الله عليه و لعنه و اعدله عذاباً عظيماً

Q. 4 : 93.—Whoso slayeth a believer of set purpose, his reward is hell for ever. Allah is wroth against him and He had cursed him and prepared for him an awful doom.

There are some exceptions to the rule. They are as follows :

ولا تقتلوا لنفس التى حرم الله الا بالحق

Q. 6: 151.—And that ye slay not the life which Allah hath made sacred, save in the course of justice.

ولا تقتلوا لنفس التى حرم الله الا بالحق و من قتل مظلوماً فقد جعلنا لوليه سلطاناً فلا يسرف فى القتل انه كان منصوراً

Q. 17 : 33.—And slay not the life which Allah hath forbidden save with right. Whoso is slain wrongfully, We have given power unto his heirs but let him not commit excess in slaying. Lo ! he will be helped.

و اذا تولىٰ سعىٰ فى الارض ليفسد فيها و يُهلك الحرث والنسل والله لا يحب الفساد

1. *Tafseer al Mariaar* on Q. 4 : 92.

Q. 2 : 205.—And when he turneth away (from thee) and his effort in the land is to make mischief therein and to destroy the crops and the cattle ; and Allah loveth not mischief.

The punishment of those who spread corruption on the earth is in Q. 5 : 33.

انما جزاؤ الذين يحاربون الله و رسوله و يسعون فى الارض فساداً ان يقتّلو او يصلبو او تقطع ايديهم و ارجلهم من خلاف او ينفو من الارض ذالك لهم خزى فى الدنيا ولهم فى الاخرة عذاب عظيم

Q. 5 : 33 The only reward of those who make war upon Allah and His Messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands or feet on the alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the hereafter theirs will be an awful doom.

The jurists have confined the applicability of this verse to persons accused of sedition or highway robbery or utmost robbery within the city, but as held by some other jurists including Maulana Shabbir Ahmad Usmani in the commentary of this verse, the generality of these provisions cannot be cut down and the sentence provided therein can be awarded *inter alia* for unjustified murder, criminal conspiracy or seditious propaganda.

Now these verses clarify the distinction between a justified homicide *e.g.* slaying with right 'in the course of justice' or in exercise of the right of self-defence of person and property or for removal of corruption in the earth because mischief is a bigger perversion than murder (الفتنة اشد من القتل). In all matters other than those of legal justification slaying is accursed and intolerable. Killing of one person is like killing of all mankind and saving the life of one is like saving the life of all mankind.

من اجل ذالكٔ كتبنا علىٰ بنى اسرائيل انه من قتل نفساً بغير نفس
او فساد فىالارض فكانما قتل الناس جميعاًـو من احياها فكانما احيا
الناس جميعاًـولقد جائتهم رسلنا بالبينت ثم ان كثيراً منهم بعد ذالكٔ
فىالارض لمسرفون

Q. 5 : 32.—For that cause we decreed for the Children of Israel that whosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind, and whoso saveth the life of one, it shall be as if he had saved the life of all mankind.

Shah Wali Ullah[1] wrote that worst of the tyranny is murder. There is consensus on the reasoning that to murder is to obey the call of indignation (خواهش غضب) which is the worst means of spreading corruption (فساد) among people". Keeping in view the enormity of the offence the Holy Quran prescribes the most severe punishment for it *i.e.* death in retaliation. Hurt is the first step towards causing murder. Retaliation or Qissas is therefore provided as punishment of hurt also as in Torah. But contrary to the Torah Quran gives the right to forgive. .

وكتبنا عليهم فيها ان النفس بالنفس والعين بالعين والانف بالانف
والاذن بالاذن والسن بالسن والجروح قصاص فمن تصدق به فهو كفارة
له و من لم يحكم بما انزل الله فاولئٔك هم الظالمون

Q. 5 : 45.—The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear, and the tooth for the tooth and for the wounds retaliation. But whoso forgoeth it (in the way of charity) it shall be expiation for him. Whoso judgeth not by that which Allah hath revealed : such are wrongdoers.

1. *Hajjat ullah ul Baligha*, Vol. 2, p. 431 (trans. by M. Abdul Haq Haqqani.)

Jesus (p.b.u.h.) preached the cult of forgiveness while Torah provided for retaliation. Islam provides a middle course. Retaliation has been maintained as the rule in Islam but privilege is bestowed upon the heirs of the deceased in case of murder and upon the victim of the hurt in case of hurt, to forgive. The reason for the rule of retaliation is that forgiveness as a rule is likely to encourage the mischief mongers to spread corruption in the earth without fear of retribution. Retaliation on the other hand has the tendency to check aggravation—rather to prevent the commission of murders and to save the lives of the people. The Quran therefore proclaims:

ولكم فى القصاص حيوة ياولى الالباب لعلكم تتقون

Q. 2 : 179. . . . there is life in retaliation, O ! men of understanding that you may ward off (evil).

Thus on the one hand the Holy Quran deals with the gravity of the offence and gives warning of eternal damnation to its perpetrators and provides for them extremely severe punishment, on the other hand in order to maintain balance in the society which is its primary aim, it describes the virtues of clemency and forgiveness.[1] It is in this context that the prescribed punishment of retaliation is allowed to be substituted by pardon on payment of blood money.

Q. 2 : 178 which deals with the punishment of retaliation and allows the heirs of the deceased to forgive on payment of blood money may now be reproduced :

يا ايها الذين آمنوا كتب عليكم القصاص فى القتلى الحر بالحر والعبد بالعبد والانثى بالانثى فمن عفى له من اخيه شئى فاتباع بالمعروف و اداء اليه باحسان ذالك تخفيف من ربكم و رحمة فمن اعتداى بعد ذالك فله عذاب اليم

1. See Q. 2 : 134, 263. Q. 4 : 17; Q. 7 : 199; Q. 24 : 22 : Q. 42 : 53; Q. 45 : 14.

> Q. 2 : 178.—O ye who believe ! Retaliation is prescribed for you in the matter of the murdered the free man for the free man, and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord. He who transgresseth after this will have a painful doom.

There was no uniform rule of Qissas before the advent of Islam. But it alway inclined towards the stronger. Ibn Kathir says that after the defeat of Banu Quraiza in a battle with Banu Nuzair it became customary that in case of murder of a Qurzi by Nuzairi the latter was liable to pay only *diyat* of one hundred Wasq of dates. But in case of murder of a Nuzairi by a Qurzi the rule of Qissas was followed or double the *diyat* was paid. The verse repealed this rule of inequity and inequality and established the rule of justice and equality. Another version is that there was a fight between two tribes. After the advent of Islam a scheme was formed to take revenge by killing the free man of the other tribe for the death of slave or a man for the murder of a woman. The verse rendered it impossible. Ibn Abbas said that people did not kill a man for the murder of a woman on which verse Q. 5 : 45 'the life for the life and the eye for the eye' was revealed.[1]

Sometimes the murder of any person in a tribe was avenged not necessarily by causing the death of the actual murderer who might be a woman or a slave, but by assassination of innocent persons of rank, position or strength in the other tribe. Such laws were abrogated by the Quran and it was ordained that retaliation could be wreaked against the

1. *Commentary of Ibn Kathir*, on Q. 2 : 178.

actual murderer, whether freeman, woman or slave. The consideration for forgiveness is not called *diyat* in the verse but this expression is used by the learned in Hadith and others. It is reported in *Shaheeh Bokhari* that Ibn 'Abbas said that pardon means that even in premeditated murder blood money may be accepted.[1] He also stated that *Ittibaun bil ma'aroof* (اتباع بالمعروف prosecution according to usage) means that the demand (of blood money) should be according to custom and should be paid in a good way.

It may be stated here in passing that there are traditions of the Prophet pbh in favour of the two alternative *i.e.* Qissas (retaliation) and *diyat* while in some traditions the third alternative of absolute forgiveness without payment of *diyat* is also mentioned. Opinions differ on the point whether pardon may be subject to or without payment of *diyat* but I took the view in Mohammad Riaz *v.* The Federal Gevernment,[2] the first matter decided by the Federal Shariat Court after its establishment, that pardon can be subject to payment of *diyat* only, a portion of which may, however, be remitted by the heirs.

The next verse which mentions the word *diyat* specifically is Q. 4 : 92 which would require elaborate discussion.

وما كان لمومن ان يقتل مومنا الاخطأ و من قتل مومناً خطأً فتحرير رقبة مومنة ودية مسلمة الى اهله الا ان يصدقوا فان كان من قوم عدو لكم و هو مومن فتحرير رقبة مومنة و ان كان من قوم بينكم و بينهم ميثاق فدية مسلمة الى اهله و تحرير رقبة مومنة فمن لم يجد فصيام شهرين متتابعين توبة من الله و كان الله عليماً حكيماً

Q. 4 : 92. It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave

1. Vol. 3, Hadith 1775.
2. P L D 1980 F S C 1 (23).

> and pay the blood money to the family of the slain, unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then (the penance) is to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant, then the blood money must be paid unto his folk and (also) a believing slave must be set free. And whoso hath not the wherewithal must fast two consecutive months. A penance from Allah. Allah is Knower, Wise.

The verse deals with the punishment of manslaughter or culpable homicide not amounting to murder as well as accidental death. *Diyat* is to be paid to the heirs of the deceased victim while as a penance it is obligatory to free a believing slave and if he does not have the wherewithal to do this penance to fast consecutively for two months. The verse is applicable to all cases whether the deceased victim is a male or female. Same is the penance and fine if the deceased belongs to people with whom the Muslims have a covenant, meaning thereby non-Muslims. Here also no distinction is made between a man and a woman. The third category is of a Muslim living among people hostile to the Muslim community. If the victim be that Muslim, no *diyat* is required to be paid; only the penance is obligatory.

All the three categories are mentioned in the masculine gender. But it does not mean that the penance and penalty is provided in respect of a male victim only. Similarly verse Q. 2 : 178 is addressed to those who believe. It is also couched in the masculine gender but it does not signify that Qissas is not prescribed for the murder of a woman. The rule is that in the absence of intention to the contrary the masculine includes the feminine. There is therefore no dispute that the murderer of a woman is liable to be executed in Qissas like the murderer of a male. Similarly penance and *diyat* is prescribed for

manslaughter whether the victim of the offence is a male or a female. Qissas and penance are not divisible either and the methodology prescribed for both is uniform. The subjects of controversy are, however, two. Except for Abu Bakr Al Asam and Ibn 'Ulayya it is generally held that the *diyat* of a woman is half of that of the male. Another point of controversy is that according to the Hanafis the *diyat* of a Zimmi or Muahid (معاهد one between whose people and the Muslims there is a covenant) is the same as that of a Muslim, but acting on certain traditions then current, Imam Shafe'i and others held the *diyat* of Jews and Christians to be half of that of Muslims and of Magians even less. Ibn Abi Hatim related from Ibn Shihab that the *diyat* of one with whom there is a covenant was equal to that of a Muslim but in later times it was prescribed as one half. Abu Daud related from Amr bin Shoaib who related it from his father that during the time of the Prophet pbh the *diyat* of people of the Book was half of that of a Muslim and Malik also held likewise.[1] This controversy has flourished notwithstanding the clear language of verse Q. 4 : 92, the generally acknowledged authenticity of two traditions: *al muslimuna tatakafa' dimaauhum* (المسلمون تتكافا دماوهم the blood of all Muslims is equal) and *diyat ul insaan me'aton min al-ibil* (دية الانسان مائة من الابل the *diyat* of each human being is one hundred camels), and the weakness of the traditions to the contrary. It is admitted that the verse about retaliation or Qissas, *inter alia*, repealed the rule of inequality followed before the advent of Islam according to which Qissas was often not taken of the murder of a woman. Notwithstanding this the rule then prevalent among Arabs of the period of ignorance about the *diyat* of a woman (being half) is followed.

Traditions are reported in the classical books of traditions of the Prophet pbh that the *diyat* of a person with whom there is a covenant or of a Jew or Christian is only half of that

1. *Rooh ul Ma'ani* by Aalusi, Vol. 5, p. 114.

of a Muslim. Similarly there are some traditions to the effect that the *diyat* of a Magian is eight hundred dirhams only. The Shafe'is as already stated, hold the *diyat* of the people of the book to be equal to half of that of Muslim and that of a Magian to equal 800 dirhams only. Imam Malik favours half the *diyat* for all non-Muslims. This is also said to be the practice of the Companions of the Prophet pbh. But there is a contradictory Hadith about equality in *diyat* of Muslims and non-Muslims. It is further stated there that the practice of Hazrat Abu Bakr, Hazrat 'Omar and Hazrat 'Osman was identical. Hanafis do not act upon either of the traditions. Evidenly they judge their authenticity in the light of the Quranic injunction in Q. 4: 92. In that verse the payment of *diyat* of Muslims living with combatants is prohibited, but there is no prohibtion regarding the people of the covenants. The order of *diyat* regarding them and the Muslims is couched in identical terms, which is a pointer to equality. Equality in the *diyat* emanates from covenant itself, as is the view of Ibn 'Abbas and Al Sha'abi.

Abu Bakr Jassas said in *Ehkam al Quran* :

"Abu Bakr says that the best argument favouring equality between those with whom the Muslims have entered into covenant and the Muslims in matter of *diyat* is the divine injunction from 'He who hath killed a believer by mistake must set free a believing slave and pay the blood money to the family of the slain unless they remit it in charity' to 'And if he cometh of a folk between whom and you there is a covenant then the blood money must be paid unto his folk . . .' *Diyat* is that known quantity of property which is the price of life of a freeman. *Diyat* had been well known and prevalent before Islam as well as after. It therefore appears that the reference in the divine injunction concerning the slaying of a Muslim by mistake is to that well-known and prevalent quantity and when the Almighty connected his injunction 'And if he cometh of a folk between whom and

you there is a covenant, then the blood money must he paid unto his folk' with that earlier injunction it would clearly imply that (the quantity) of *diyat* for this category is also the same. If it is not so, it would not be correct to call it *diyat* because *diyat* is that known quantum of compensation for life which can neither be increased nor diminished. They had known the quantum of *diyat* earlier too and never a distinction had been made between the *diyat* of a believer and an unbeliever. It would therefore necessarily follow that the *diyat* of an unbeliever should be the same as of a believer, and the command of Almighty "the blood money must be paid unto his folk should be conjunctively connected with similar command which concerned the *diyat* of believers and which had been known and prevalent. If it is not so the word would become ambiguous which would require explanation and clarification, although it is not so".[1]

Two points are clearly established from this quotation from *Ehkam al Quran*. The first is that the quantum of *diyat* was well known in the pre-Islamic Arab society. The fact is that *diyat* in that society was originally fixed at 10 camels which was raised to one hundred camels by Abdul Muttalib, grandfather of the Prophet pbh. The word *diyat* was well understood as connoting one hundred camels, and is obviously used in the same sense in the Quran thus guaranteeing equality in its respect between a Muslim and a non-Muslim. It was also well known that no distinction had ever been made between the *diyat* of a believer and unbeliever. The second point which leads to the same conclusion is the use of identical language while dealing with the blood money of a believer and unbeliever.

The word *momin* (مومن believer) includes both sexes on the well known principle of interpretation of the Quran that the

1. *Ehkam-al-Quran*, Vol. 2, p. 290.

masculine includes the feminine except when the context expresses or implies the contrary. The word *momin* (believer) is in a way defined in the Quran. It says من عمل صالحاً ذكر او انثى فهو مومن which means that whoever, whether male or female, performs virtuous deeds is a *momin* (مومن believer). The injunction اقيمو الصلوة واتوا الزكاة (Establish prayer and pay Zakat) is couched in masculine gender and is for men and women both. The form of address 'O! those who believe' (يا ايهاالمومنون) though masculine, is for both the sexes. An interpretation to the contrary would create anomalies, and most of the injunctions in the Quran would cease to apply to women. It would then follow that the killing of a woman by mistake would not make the killer liable to *diyat* at all. The first portion of the verse (Q. 4 : 92) is, It is not for a believer to kill a believer unless (it be) by mistake." "If *momin* means male believer it would follow that killing of woman is not prohibited. Once it is conceded that the word momin (believer) includes females it must follow that the word *diyat* meaning one hundred camels is as much applicable to her to the male.

Abu Bakr Jassas Razi author of *Ehkam ul Quran* realised this difficulty. Being of the opinion that *diyat* of a female was half that of a male, he had to adopt the anomaly and to assert contrary to the opinions of the other commentators of the Quran that the word *momin* in verse Q. 4 : 92 had a limited scope and applied to men only. He said :

> "If it is stated that the divine law 'and pay the blood money to his family' (family of the slain) ودية مسلمة الى اهله does not prove the equality in the quantum of *diyat* of a believer and unbeliever, and just as the *diyat* of a woman despite being half of the *diyat* of a male is treated to be her full *diyat*, similarly the *diyat* of an unbeliever between whom and the Muslims there is a covenant, in spite of being half of that of a Muslim should be considered his full *diyat*, the assertion would be erroneous for two reasons. Firstly

the Almighty mentioned in this verse only the male (believers). Allah says 'whoever killed a believer by mistake (من قتل مومناً خطاء) (here the word *momin*, according to Jassas, connotes a male only). As the language used for a *momin* (believer) can only be interpreted as relating to full *diyat* so the identical language used for those who have covenant with Muslims would signify full *diyat*. And the *diyat* among the Arabs was well known. The other reason is that the word *diyat* when used about the *diyat* of woman is not used in its general and absolute sense but is used in a restricted sense. Do you not see that it is said that the *diyat* of a woman is half the *diyat* (دية المراة نصف الصية). When the word *diyat* is used in an absolute sense it signifies the well known and prevalent *diyat i.e.* full *diyat*."[1]

The finding about the word *momin* as used in verse Q. 4 : 92 being exclusive of women, appears to be based on its opening words "Whoever killed a *momin* by mistake" (من قتل مومناً خطاء). The word *man* (من whoever), according to the Hanafis, is used to denote males only. This is attributed to them by Suyuti and he refutes this by irrefutable inherent evidence.[2] He says :

"The fourth point of difference rests on the word *man* (من whoever) whether it includes feminine gender or not. The most correct opinion is that it includes both, masculine as well as feminine. But the Hanafis differ from this view, They consider the word *man* to be exclusive for males only. But we rely upon what is stated by Him 'Whoever acts virtuously whether male or female (is a *momin*.) (من عمل صالحاً من ذكر او انثى فهو مؤمن). In this verse the Almighty Allah applied that word for commission of virtuous and pious deeds by both male and female. This is sufficient to establish that

1. *Ehkam ul Quran* by Jassas Razi, Vol. 2, p. 291.

2. *Al Itqan fi Uhum il Quran*, Vol. 1, p. 52 (Urdu trans. by Maulana Muhammad Halim Ansari).

the word *man* (من whoever) includes both masculine and feminine. Similar is the phase 'And whosoever is submissive unto Allah.[1] و من يقنت منكن لله

This irrefutable evidence of the Quran provides sufficient proof that the word *man* (whoever) is common to both masculine and feminine gender. To confine its scope to males would amount to laying down that the Quran does not make the slaying of woman an offence, which would not be correct. Another error which is too apparent in the above paragraph cited from *Ehkam-ul Quran* that the interpertation is subjective and is based upon some adage that the *diyat* of a woman is half of that of male. It appears that the commentator was influenced by the aphorism then current.

The passage cited from *Ekham al Quran*, however makes it clear that when the word *diyat* is used it means full *diyat* which is equivalent of one hundred camels. The other term for half the *diyat* is *nisful diyat* نصف الدية. This proves the assertion of those persons incorrect who say that full *diyat* is *diyat i kamilah* (دية كاملة) and is not denoted by the word *diyat*. The Prophet pbh also used the word *diyat* and not *diyat-i-kamilah* to mean full *diyat*.

It is reported that the Messenger of Allah wrote a letter to the inhabitants of Yemen in which instructions were given about *diyat*. It is stated in that letter that the diyat of every human being is one hundred camels. (وفيه فى ا لنفس الدية مائة من الابل) Thits Hadih is reported in various books. A commentary of *Mowatta* is written by Abdul Wahab Abdul Latif of Egypt in which he said like Jassas that the word *nafs* (نفس) soul or human being in this Hadith connotes a male.[2]

This is not an objective interpretation of the Hadith and is opposed to all canons of interpretation. It is obvious that the

1. *Al Itqan fi Uhum il Quran*, Vol. 2, p. 52 (Urdu trans.).
2. See *Minhaj, Halsiyat i Niswan* Number, Part 1, p. 194.

interpretation is motivated by the assumption that the *diyat* of a woman is half of that of a man and consequently *nafs* should not mean a human being but should signify a male only.

The interpretation of the word *momin* by Jassas is opposed to the view taken by other renowned commentators. The views of Mufti Abduhu are reproduced and reflected in *al Manar* by Rashid Riza. It is said:

> "The *diyat* of a woman and in the same manner of an eunuch is half that of a man. What is fundamental in this is that the benefits obtained from a male during his life-time and lost from his death are much in excess of the benefits which are lost to the members of the family from the death of a woman. These losses have been estimated after keeping into view the law of inheritance, *although the manifest meaning is the verse are that there is no difference between a man and a woman.*[1] (italicized is mine).

Maulana Zafar Ahmad Osmani wrote in *I'la' al Sunnan*:

> "Since the traditions (about the *diyat* of an unbeliever with whom Muslims have covenant, are contradictory, we accepted those traditions which were identical with the manifest meaning of the verse of the Quran,[2] since Allah made *diyat* obligatory on the commission of the offence of manslaughter of an unbeliever in the same manner as he made its payment obligatory for the slaying of a believer. The manifest meaning of the verse is equality because similar words have been used at both places. If you say that a woman is also included in the injunction in the verse but her *diyat* is not equal to that of a male, why is it not possible for the *diyat* of a believer and an unbeliever to be unequal, our reply would be that we treat the *diyat* of a woman to be less on account of *ijma'* (on the subject) and the traditions of the Companions in this connection which

1. See *Al Manar* on verse Q. 4 : 92.
2. Q. 4 : 92.

have been reported. The traditions to the contrary however, are not in such number. If such traditions had been reported for the covenanted unbelievers we would (certainly) have accepted them. But you have seen that the traditions of the Prophet pbh and his companions are pro and con the manifest meaning of the Quranic verse.[1] In these circumstances it is better and more appropriate to accept those traditions which accord with the manifest meanings of the Quran. From this *it is evident that the manifest meaning connote equality between man and woman in matter of diyat* but on account of traditions and *ijma'* we have twisted the verse[1] from its evident meanings."[2]

In *Badai as Sanai* it is stated that 'Allah Almighty used the word *momin* (مومن believer) in its general sense.[3]

Imam Razi after reproducing the views of the jurists about the inequality in the *diyat* of a male and female and the views of Asam and Ibn Aliyya to the contrary, says that :

"There is consensus that both men and women are included in the (injunction of the) verse. On this score it becomes incumbent that the law about both of them (both the sexes) should be based on equality."[4]

According to Imam Razi there is consensus on woman being the object of law in the verse. Mahmud Shaltut said that the order of diyat in the Quran is general and absolute. It does not single out a man against a woman in any matter.[5]

Mufti Ahmad Yar Khan Gujrati says in *Tafseer i Naeemi*[6]

1. Q. 4 : 92.
2. *I'ila' al Sunnan*, Vol. 18, p. 142.
3. *Badai as Sanai*, Vol. 7, p. 253.
4. *Al Tafseer al Kabir* by Imam Fakhruddin Razi, Part 10, p. 333.
5. *Al Islam 'Aqiditan wa Shari'tan* by Mahmud Shaltut, p. 236.
6. Vol. 5, p. 348.

that the *diyat* of a male and female is identical as appears from the generality of the verse.

The opinion of Jassas about confining the verse[1] to men is thus an isolated opinion. He adopted this as a methodology to get out of the difficulty of justifying an inequality.

The law of equality in the quantum of *diyat* of believers and unbelievers in the Quran is thus uniform, but in order to wriggle out from it it is said that this equality extends only to the liability to pay *diyat* whether the victim of the offence is male or female; the Quran does not as such fix the quantum of *diyat*. This argument has already been partly examined in the light of the opinion of Jassas Razi who pointed out that *diyat* in verse Q. 4 : 94 meant the *diyat* which was then prevalent and was well known and could neither be reduced nor increased. This itself is proof of the word *diyat* being used in the sense of one hundred camels. This was the *diyat* fixed by Abdul Muttalib and was retained by Sharia. There are many traditions of the Prophet pbh in which the principle of *diyat* being equal to one hundred camels has been reiterated. It is reported from Abdullah bin Amar that the Messenger of Allah said that '..the *diyat* of manslaughter . . . is hundred camels.'[2] It is reported from Abu Bakr that the Messenger of Allah wrote to the inhabitants of Yemen and there was in this letter . . . . "for the *nafs* (نفس human being or soul) there is indemnity of hundred camels. . . ."[3] It means that no rule other than the one already in force was enforced by the Prophet pbh. This was not a rule prescribed by the Sunnah of the Prophet pbh but was an interpretation of the Quran "then the blood money must be paid unto his folk (the blood money which was already fixed and known among them)" (فدية مسلمة الى اهله) Al Syed Sabiq said in *Fiqh al Sunnah*[4] that The system of *diyat* was

1. Q. 4 : 92.
2. *Mishkat* translated by Maulana Fazal Karim, Vol. 2, p. 501.
3. *Ibid.*
4. *Fiqh al Sunnah* by Syed Sabiq, Vol. 2, p. 551.

prevalent among the Arabs and Islam maintained it and its origin is the declaration by Allah that '*diyat* must be paid'. Abdul Rahman Al Jaziri said in his *Kitab al Fiqh alal Mazahib al Arba'ah*[1] that "Abdul Muttalib, the grandfather of the Prophet pbh, fixed the quantum of *diyat* as hundred camels and the Sharia of Islam retained it". Qurtubi wrote in his commentary of the Quran[2]:

> "Ibn Abbas, Al Sha'abi and Al Nakha'i said that in the period of the Prophet pbh no distinction in the matter of manslaughter was made between a believer and an unbeliever. His (unbeliever's) *diyat* was like the *diyat* of a believer. This is what was stated by Abu Hanifa, Al Sauri, Usman al Batta and Al Hassan bin Hayee. They made the *diyat* of each person equal to that of Muslim whether he was a Jew, Christian, Magian, person in covenant with Muslims or a zimmie. It was also stated by 'Ata, Al Zuhri and Saeed bin Al Masayyab and their argument is based on *fa diyatum* (فديه *then diyat*) *the requirement of which is that it should be full diyat* (*for an unbeliever*) *like the diyat of a believer.* They support this from what is related by Muhammad bin Ishaq in the matter of Bani Quraiza and Bani al Nuzair that the Messenger of Allah pbh made their *diyat* equal to full *diyat*."

Thus according to Qurtubi too the requirement of the injunction in verse Q. 4 : 92 is that the *diyat* of persons of both categories mentioned there should be full *diyat* which means the full *diyat* which was very well known, as hundred camels.

In his *Al Muntaqa Sharh ul Mowatta* Abul Walid al Baji has clearly stated:

> "And the argument of what has been stated is the declaration by Allah, "And pay the blood money to the family of

1. *Kitab al Fiqh alal Mazahib al Arba'a*, Vol. 5, p. 694 (Urdu trans.).
2. *Tafseer al Qurtubi*, Vol. 5, p. 327.

the slain"[1] The requirement of applying the word *diyat* is that it is the *diyat* already prescribed and not any other *diyat*. . ."[2]

From these various citations it is established that by using the word *diyat*, the Quran had fixed the quantum of blood-wit and the Sunnah of the Prophet pbh only gave effect to it. The argument that the *diyat* of different categories of persons was fixed by the Prophet pbh and that the Quran maintained equality in the liability to pay *diyat* and not in its quantum is not valid and is refuted by the above quotations. Thus as far as the Quran is concerned it treats the Muslims of either sex and the covenanted unbelievers of either sex on a level of absolute equality in matter of *diyat*.

One of the reasons advanced for the equality between a believer and an unbeliever in matter of *diyat* is that like the Muslim freeman the unbeliever is also a freeman though protected. There is no reason why this analogy should not be applied to a free woman.

Another argument which is advanced by the supporters of half *diyat* for women is that *diyat* is not price of blood and they concede that if it had been so, the blood of each human being whether male or female being equal, there could be no discrimination on the basis of sex in the quantum of *diyat*. It only entails a guarantee for compensation for loss suffered by the heirs by death (تکافل مالی). The loss suffered by the death of the male, the bread winner is much in excess of the loss suffered by the death of the female. In this connection they rely for assessment of compensation upon the rule of inheritance under which in most cases female is entitled to half the share reserved for the male. The argument is obviously erroneous. It has already been noticed that the dictionary meaning of *diyat* is price of blood, compensation, indemnity, fine or punishment for the

1. Q. 4 : 92.
2. Vol. 7, p. 107.

shedding of blood of the slain and the commentators of the Holy Book as well as the jurists have understood it in the same sense. . All those who read in Q. 4 : 92 equality in the quantum of *diyat* for a believer as well as unbeliever rely firstly upon the identical nature of the language used for both categories in the above verse and secondly on the absolute generality of the word *diyat* in the sense of fixed quantum which can neither be increased nor reduced. The rule for compensation or indemnification for loss was not relied upon and rightly so, because in that case the rule could not sustain the fixed number of camels as *diyat*. The rule for compensation for loss as compared to compensation for blood must allow increase or decrease in the quantity of *diyat*, because in each individual case the compensation can be assessed by taking into consideration the benefit obtained by the heirs during the lifetime of the deceased, the expected amount of maintenance receivblae from the deceased, his expected life span and the current worth of the amount lost to the beneficiaries. The amount of compensation so assessed would differ keeping in view the age of the deceased, his earnings at the time of his death and his expected future earnings, the contribution that he made or would have made, if alive towards the maintenance of the heir and various other things. Obviously then poverty would reduce the loss and prosperity and richness of the deceased would increase it. Those heirs of the deceased who receive no benefit from the deceased during his lifetime would not be entitled to any compensation. In the present age many women are either the bread winner of the family or contribute their earnings to the family pool for making two ends meet or for maintenance of a particular standard of living. In case of death of any such woman the compensation would sometimes be in excess of the compensation assessable on the death of a male member of the same family. This must evidently nullify the basis of the rule of half *diyat* for women. If it is a compensation for loss of benefits, no *diyat* should be payable

for the death of a newly born or a permanantly sick or invalid person. Shariah on the other hand prescribes full *diyat* of male child who is slain soon after his birth. The rule propounded above is only an attempt to justify, somehow or other, the discrimination between the *diyat* of man and woman. It is repugnant to the Quran as well as logic.

It is not that there was no concept of manslaughter (قتل خطاء) among the Arabs before Islam. Dr. Jawwad Ali has dealt with this point in his celebraced work *Al-Mufassal fi Tarikh il Arab Qabl al Islam.*[1] He writes that murder is of two kinds, intentional murder and manslaughter (القتل العمد ، القتل الخطاء). The people of the Jahilliya period distinguished between the two kinds that it was not possible to equate in degrees culpable homicide and homicide by error or manslaughter. The jurists in Islam divided murder into five categories. . Dr. Jawwad also gives details which it is unnecessary to reproduce here. It proves that the *diyat* of murder committed by error and not intentionally was quite customary among them. The rule was of ten camels which was raised by Abdul Muttalib to one hundred camels but this rule admitted of exceptions as it was variable in certain circumstances dictated by 'might is right'. This will be amply clear from an extract from Dr. Jawwad Ali's book:

> "*Diyat* was originally received from the murderer if he could afford it. But if he could not afford it was made the liability of the residuaries, near relatives and distant kindred between whom and the killer a female intervened (ذوى الرحمة) according to the degree of blood relationship. The residuaries were in like position in *diyat* as in inheritance. The (quantum of) *diyat* varied with the divergence in degree of the status of the tribes and the station in life of the people. It was (fixed at) ten camels and could reach a thousand. If the murdered was from

1. Vol. 5, p. 580-1 ; also see *Sunan Nasai*, Vol. 2, p. 204.

among the common people or if he belonged to a small and weak tribe his *diyat* was scanty and meagre. But if he ranked among those who held positions of honour in the tribe his *diyat* increased according to the degree of his ennoblement, and his place (in society). If the murdered person was a chief or sovereign his *diyat* was one thousand camels and it was known as *diyyat ul Muluk* (دیۃ الملوک *diyat* of chiefs), or kings)....

The specific *diyat* was the full *diyat* and it was (equal to) ten camels which as stated was payable if the murdered person belonged to the common run of people....

If the murdered man was an ally his *diyat* was half of the specific *diyat i.e.* five camels.... if he was lowly his *diyat* was half of the specific *diyat*....The *diyat* of a woman was half the *diyat* of a male..[1]

The injunction in the verse Q. 4 : 92 was revealed to put an end to this discrimination between the high and the lowly, between people of rank and the common people, between allies (with whom there existed some covenant) and the generality of men. The verse, when it mentions *diyat*, refers to specific *diyat* (دیۃ الصریح) which as stated above was raised to one hundred camels by the grandfather of the Prophet pbh. It was made abundantly clear that there will be no difference in the *diyat* of the believers and the non-believers with whom the believers have covenant thus abolishing the distinction in matter of *diyat* between a *haleef* (حلیف ally with whom there is covenant) and others, between man and man. It would follow that that by using the word *momin* (مومن believer), in its general sense as inclusive of women it also removed the discrimination on the basis of sex and the *diyat* of a woman became *diyat ul sareeh* (دیۃ الصریح specific *diyat* of one hundred camels).

1. *Al Mufassal fi Tarikh il Arab Qabl al Islam* by Dr. Jawwad Ali, Vol. 5, pp. 592-93.

Sunnah of the Prophet pbh

The traditions of the Prophet pbh found generally reported in most books of traditions are as generally worded as the Quranic verse. The Prophet pbh said : Verily the *diyat* of *nafs* (نفس soul or human being) is hundred camels.[1] The word *nafs* is used in the Quran many times and is common in its applicability both to male and female.[2] According to the Hadith the *diyat* of both men and women is one hundred camels.

Another Hadith is that *diyat* of *insan* (انسان human being) is one hundred camels. To say that this refers to male amounts to depriving women of the status of humanity. I have come across the opinion of a well known Mufti, who when confronted with this propsition remarked that it is not essential that a woman may be included in (the category of) *insan*.[3]

Another Hadith couched in the same general form is that the Prophet pbh said that the *diyat* of unintentional murder is one hundred camels.[4] It is reported from Uqba bin Aus that the Prophet said that the *diyat* of a victim of unintentional murder whether killed as a result of whipping or by stick, is one hundred camels.[5] In another version the same *diyat* is prescribed for *Qatl Shibh i Amd* (قتل شبہ عمد murder resembling intentional murder).[6]

1. *Sunan Nasai*, Vol. 2, p. 221 ; *Sunan Darmi*, Vol. 2, p. 114 ; *Bulugh al Maram*, pp. 48-49 ; *Neil al Autar*, Vol. 2, pp. 212-213 ; *Jami al Usul*, Vol. 5, p. 165 ; *Al Mabsut*, part 26, p. 75 ; *Nasab al Raya* by Zailai, Vol. 4, p. 357 ; *Al Taj al Jamia al Usul* by Al Sheikh Mansoor Nasif, Vol. 3, p. 85 ; *'Ila al Sunan*, Vol. 18, p. 5 ; *Badai al Sanai*, Vol. 7, p. 254.

2. Q. 2 : 286 ; Q. 2 : 123 ; Q. 2 : 48 ; Q. 2 : 233 ; Q. 2 : 281 ; Q. 3 : 25 ; Q. 3 : 30 ; Q. 3 : 16 ; Q. 3 : 185 ; Q. 5 : 45; Q. 6 : 5 ; Q. 6 : 70 ; Q. 31 : 34 ; Q. 36 : 54 ; Q. 82 : 5 ; Q. 82 : 19.

3. *Minhaj, Halsiat i Niswan Number*, Part 1, p. 191.

4. *Ehkam al Quran*, Vol. 2, p. 233.

5. *Sunan Nasai*, Vol. 2, p. 216.

6. *Ibid.* ; *Abu Daud*, Vol. 2, p. 269 ; *Mishkat al Masabeeh* (English translation by Fazal Karim), Vol. 2, p. 501.

In another Hadith the injunction about Qissas on the intentional murder of a woman is so quickly followed by the general injunction about *diyat* that it can be interpreted as inclusive of women. It is reported from Abu Bakr that the Messenger of Allah wrote to the inhabitants of Yemen and there was in his letter : "Whosoever killeth a believer, he will meet destruction (death) at his hand unless the relatives of the murdered man consent to receive blood wit. And therein it was : Man shall be slain for (murder of) woman. And therein it was : For the (murder of) human being (نفس *nafs*) there is *diyat* of a hundred camels, and on the owners of gold, one thousand dinars. . . ." The Hadith deals with the sentence of Qissas in general and its remission by consent of the heirs of the deceased, then the sentence of Qissas for the murder of woman and then again with the sentence of *diyat* in general. The Qissas of woman is mentioned obviously by way of resolving all doubts and as a commentary of the Hadith *tatakafa dimaahum* (تتكافا دماؤهم their bloods are equal). Since *diyat* is the indemnity for blood which is equal, the injunction about *diyat* is general which points out that the injunction about one hundred camels is for men and women both.[1]

There is specific Hadith about the *diyat* of a woman. Two women of Huzail fought with each other. One of them threw a stone on the other and killed her and what was in her (womb). The Prophet pbh decided that *diyat* of the unborn child is a slave or slave girl. As regards the murdered woman he decided that the *diyat* of the murdered woman was payable by the Alaqila of the murderer and made it heritable by her, the children of the deceased and those with them.[2]

It has already been seen that the Sunnah uses the word *diyat* in the sense of full *diyat*. On the other hand there are

1. *Mishkat ul Masabeeh*, Vol. 2, p. 501 (English translation by M. Fazal Karim).
2. *Ibid.*, p. 500.

traditions, whether authentic or not, in which the *diyat* of non-Muslims is said to be half of that of a Muslim. This is described as *nisfuddiyat* (نصف الدیہ half the *diyat*). The Hadith would obviously mean that the diayt of a woman is full diyat, otherwise the word Nisfuddiyat would have been used to specify half *diyat*.

It is clear from these traditions that equality is maintained between men and women both in matters of Qissas and *diyat*. If for the purpose of Qissas the blood of man and woman is equal there is no rational principle which may permit discrimination in the price, compensation, indemnity of what represents blood.

The reliance of the supporters of half *diyat* for women is on the Hadith reported from Ma'az bin Jabal that the Prophet pbh said that "the *diyat* of a woman is half the *diyat* of a man."[1] Baihaqi who reported the Hadith and Al Jauhar un Naqi held this Hadith weak or unreliable.[2] It is strange that despite this the supporters of half the *diyat* rely upon it by resort to conjectures and to the principle of Talaqqi bil Qubul that if despite any weakness in the Hadith or its relator, the Hadith has been accepted by the jurists of early ages, it becomes reliable and dependable and the weakness condoned.

The unscrupulous application of this principle is the crudest example of the malady of the doctrine of Taqleed. Similar is another assertion that even if what is stated by these jurists is not supported by any express authority, it should be presumed that they had in view some tradition while making that statement. What has no evidentiary value cannot be treated as evidence and cannot be relied upon as proof of a matter. Traditions which according to the experts in Hadith are un-

1. *Neil ul Autar*, Vol. 7, p. 71.
2. *Ibid.*

reliable cannot be turned into reliable traditions by acceptance by the jurists. They can at most be treated as personal opinions of the jurists, which may be subject to errors as many other opinions. If the Hadith is unreliable it is not a tradition of the Prophet pbh and that is the end of it.

Another Hadith is the one related on the authority of 'Amar bin al A'as and which is reported in *Nasai*. It is to the effect that عقل المرأة مثل عقل الرجل حتى يبلغ الثلث من ديته the (*diyat* of a woman is equal to that of a man till it reaches its one-third).[1] This Hadith contradicts the first Hadith which completely denies equality between the *diyat* of a man and a woman.

According to Shaukani, Ibn Khuzaimah treated this Hadith to be correct. The Shafe'is rely upon the opinion of Saeed bin Musayyib which he is said to have expressed on some queries put to him by Rabiy'a bin Abi Abdul Rehman. The questions and answers as related are as follows :—

> "Rabiy'a said, 'I asked Ibn ul Musayyib, what is the compensation for one finger? He said, 'ten camels'. I asked, 'Of two fingers?' He said, 'twenty.' I asked, 'And of three fingers?' He replied, 'thirty.' I said, 'And what about four fingers?' He said, 'twenty'. I said, 'how is it that when her injuries and suffering increased, her compensation was reduced?' Saeed asked, 'Are you an Iraqi?' I said, 'No, but I am seeker after knowledge'. On this he said', 'this is the Sunnah, my cousin.'[2]

As about the principle that the *diyat* of injuries received by a woman is equal to the *diyat* of a man upto one-third of *diyat* and is equal to half if it exceeds one-third, Ibn 'Abdul Bar said that this is what is stated by people of Medina generally and this is stated to be the old view of Shafe'i.[3]

1. *Sunan Nasai*.
2. See *Mowatta Imam Malik* (Urdu trans.). p. 661; *Bulugh ul Maram*, (Urdu trans.). p. 245, Hadith 1214; *Al-Mughni* by Ibn Qudama, Vol. 7, p.798.
3. *Al-Mughni, ibid.*, p. 797.

But this is not all. Al Hassan said : 'Both (the *diyat* of man and woman in injuries) is equal upto one-half.[1] But Hazrat Ali is reported to have said that it is half whether they (the injuries) are few or numerous.[2] Another opinion attributed to Hazrat 'Ali is that if the head is so shaved that the hair do not thereafter grow, it is a case of liability to pay full diyat. Sarakhsi says that 'from this our jurists concluded that..... in this the man and woman are equal.[3]

Abul Walid Baji writes in *Al-Muntaqa* that the principle of equality upto one third was stated by Imam Malik. He writes that it is related from Ibn Masud that in Muzaha injuries (injuries in which the flesh is so cut that the bone becomes visible) there is equality between man and woman. There is a contradictory view ascribed to Hazrat 'Omar and Hazrat 'Ali that the *diyat* of man and woman is equal in few or many (whether the injuries are few or numerous). And Abu Hanifa and Shafei also said accordingly. There is, however, a tradition supporting our belief. The reference in the last line is obviously to the tradition ascribed to Hazrat Ali that the *diyat* of a woman is half whether the injuries be many or few.[4]

The tradition about half *diyat* is reproduced in *Al Sunan ul Kubra* by Baihaqi[5] on the authority of Sha'abi and Ibrahim. The second one is stated to be *munqata* (some relator from the chain of relators is omitted). The version about equal *diyat* is quoted not only in *Al Muntaqa Sharh ul Mowatta* but also in *Musannaf Ibn Abi Shaiba* (makhtuta *i.e.* manuscript).[6]

1. *Al Mughni, ibid.*, p. 797.
2. *Ibid.*
3. *Al-Mabsut*, by Sarakhsi, Vol. 26, p. 71.
4. *Al Muntaqa* by Abul Waleed Baji, Vol. 7, p. 98.
5. *Al Sunan ul Kubra* by Baihaqi, Vol. 8, p. 96.
6. *Musannaf Ibn Abi Shaiba* (Manuscript), Vol. 3, p. 751.

Abul Walid Baji wrote in *Muntaqa* that according to Ibn Masood *diyat* of man and woman is equal in Muzihah injury but a different version is attributed to Ibn Masud, Qazi Shuraih and Hazrat Osman in *Neil ul Autar*.[1] 'It is stated in *Nihayat ul Mujtahid* that it is well known from Ibn Masud, 'Osman and Shuraih and their followers that the express *diyat* of a woman is like the express *diyat* of a man except in Muzihah injury in which it is (only) half.'

The version reported on the authority of Sha'abi in *Al Sunan ul Kubra* is related from Zaid bin Sabit that the *diyat* of both sexes is equal up to one-third only. In *Neil ul Autar*[2] a different version is attributed *inter alia* to Zaid bin Sabit. The version reproduced there is : 'It is related in *Al Bahr* also from Zaid bin Sabit and Sulciman bin Yasaar that both of them are equal till the arsh (*diyat* of injuries) reaches the extent of fifteen camels' which is even less than one-sixth. Another version in the same book[3] and at the same page is quoted from Hassan Basri that the *diyat* of both is equal up to half whereafter it is half.

There is difference of opinion between the Hanafis and the Shafe'is about the *diyat* of a person killed within the precincts of Makkah. The Shafe'i view is that the *diyat* would exceed the normal *diyat* by one-third. The Hanafis hold that it would remain identical. Baihaqi reproduces a tradition from Hazrat Osman :

> 'It is related by Ibn Abi Bajeeh from his father that a man killed a woman in Makkah after raping her and Hazrat Osman decided (or ordered) payment of eight thousand dirhams as *diyat* and one-third thereon in excess.[4]

1. *Neil ul Autar*, Vol. 7, p. 226.
2. *Ibid.*
3. *Ibid.*
4. *Al Sunnan ul Kubra*, by Baihaqi, Vol. 8, p. 95.

Shafe'i said that Hazrat Osman ordered additional *diyat* for murder in the area where killing is prohibited absolutely.

It appears that the value of full *diyat* was assessed during the period of Hazrat Osman as eight thousand dirhams. This is evident from a tradition cited in *Ehkam al Quran* that Hazrat Osman ordered four thousand dirhams to be paid for the murder of an unbeliever having covenant with the Muslims[1] which is equal to half *diyat*. The above tradition proves that Hazrat Osman ordered payment of full *diyat* for the murder of woman.

This tradition is also reported in *Kanz al 'Ummal*,[2] Hashia *Kitab al Hujjah*[3] and *Neil al Autar*.[4] In Neil al Autar the order is attributed to Hazrat 'Omar.

There are a large number of traditions of the Companions and some of the Prophet pbh in *Musannef Abdul Razzaq*, (Kitab al Diyah). Some of the traditions pertaining to the *diyat* of injuries are reproduced to prove that in many cases full *diyat* for injuries to women was awarded. The traditions, however, are widely discrepant :

Manqula (Injury which dislocates the bone)

Abdul Razzaq related from Juraij who stated on the authority of Anas bin Shoaib that the Prophet pbh said, 'In Manqula fifteen camels or its equivalent in gold, silver or goats.'

Omar bin Khattab decided accordingly in Manqula of man as well as woman.[5]

1. *Ehkam al Quran* by Jassas, Vol. 2, p. 240. See *Al Sunan al Kubra*, by Baihaqi, Vol. 8, p. 95.
2. Vol. 15, p. 112.
3. Vol. 4, p. 278.
4. Vol. 7, p. 241.
5. *Musannef Abdul Razzaq*, Hadith No. 17369.

Eye

Abdul Razzaq related from Ibn Juraij on the authority of 'Abdul Aziz bin 'Omar from 'Omar bin al Khattab that half *diyat* is prescribed for an eye or its equivalent in gold or silver. For the eye of a woman (is payable) half her *diyat* or its equivalent in gold or silver.[1] The tradition supports the theory of half *diyat* for a woman.

But there is another tradition almost from the same source that Hazrat 'Omar awarded full *diyat* for the eye of a one-eyed woman. It is related by Abdul Razzaq from Ibn Juraij that 'Abdul 'Aziz bin 'Omar said on the authority of Omar bin 'Abdul 'Aziz that 'Omar bin al Khattab said that full *diyat* is payable for the loss of eye (of a one-eyed person) if his eyesight is completely lost, and for the loss of eye of woman (who is one-eyed) if the sight is completely lost, full *diyat* (is payable).[2]

Nose

From the same chain of relators it is stated from 'Abdul 'Aziz bin 'Omar that the *diyat* for cutting of the nose is full *diyat*. . .For the cutting of the nose of a woman full *diyat* (is payable).[3]

Lips

Abdul Razzaq related from Juraij who said that he was informed by Ibn Abi Najeeh on the authority of Mujahid that the *diyat* for each lip is fifty camels and the nether lip in case of both man as well as woman is preferred to the upper lip for the purpose of *taghleez* (intensification or enhancement of *diyat*).[4]

1. *Musannaf Abdul Razzaq, Kitab ul Diyat*, Hadith No. 17419.
2. *Ibid.*, Hadith No. 17430.
3. *Ibid.*, Hadith No. 17465,
4. *Ibid.*, Hadith No. 17481.

Teeth

'Abdul Razzaq related from Ibn Juraij that he asked 'Ata whether the *diyat* of all teeth of a woman was full. He said fifty camels (half).[1] But in another tradition from Ibn Juraij, he related it from 'Abdul 'Aziz bin 'Omar that according to a letter of 'Omar bin 'Abdul 'Aziz quoting from 'Omar bin al Khattab the *diyat* of a tooth was five camels and the same was the *diyat* of woman. . .[2]

Tongue

Similarly full *diyat* was held payable by 'Omar bin al Khattab for cutting of tongue of man and woman alike.[3]

Nipple and Breast

Hazrat Abu Bakr prescribed fifty dinars for cutting of nipple of breast of a man and hundred dinars for that of a woman.[4] In another tradition it is reported that Hazrat Abu Bakr awarded for the breast of a man five camels if only the nipple is cut off.[5] But it is related on the authority of Sha'abi that full *diyat* is payable for both the breasts of a woman and half for one breast. .[6] There is another tradition about the decision of Hazrat Abu Bakr that he awarded ten camels when only the nipple of a woman's breast was cut off and fifteen camels if it was cut from the root.[7] There is yet another tradition related on the authority of Zaid that one quarter *diyat* is prescribed for nipple of breast.[8]

1. *Musannaf Abdul Razzaq, Kitab ul Diyat*, Hadith No. 17506.
2. *Ibid.*, Hadith No. 17512.
3. *Ibid.*, Hadith No. 17560.
4. *Ibid.*, Hadith Nos. 17586, 17587.
5. *Ibid.*, Hadith Nos. 17585, 17588, 17589.
6. *Ibid.*, Hadith Nos. 15890, 15891.
7. *Ibid.*, Hadith No. 17594.
8. *Ibid.*, Hadith No. 17592.

Bladder

The *diyat* for injury to the bladder of man or woman is full *diyat* if as a result of it the urine is not retained..[1] This is stated by 'Abdul Razzaq on the authority of Thauri.

Pubic Region

The *diyat* for cutting of the pubic region is full *diyat* since it prevents a woman from enjoyment and sex.[2]

Ifda (Injury to the private parts of a woman which makes the two ways common)

Omar bin 'Abdul 'Aziz for the same reason held that full *diyat* is payble for *ifda* of a woman.[3] Zaid bin Sabit said that if she is able to retain the child, the urine and the stool she is entitled to one-third *diyat* and if this is not possible full *diyat* is payable.[4] Other traditions of this type are regarding the award of one-third *diyat inter alia* by Hazrat 'Omar.[5]

The traditions are so discrepant—or rather contradictory—that it is not possible to place reliance upon them. There are traditions about full *diyat* for a woman, there are traditions about half *diyat*. Traditions about part equality also vary. Some are of equality in matter of injuries upto one-third, some upto fifteen camels, some regarding all injuries except Muzihah, some regarding Muzihah only, some in relation to all injuries and some about some of the injuries. The fairer comment to make would be that the traditions are *muztarib* (confused or conflicting) in each matter. In fact it is not the traditions from the Prophet pbh or his Companions that have played the deter-

1. *Musannaf Abdul Razzaq, Kitab al Diyat*, Hadith No. 18657.
2. *Ibid.*, Hadith No. 17665.
3. *Ibid.*, Hadith No. 17666.
4. *Ibid.*, Hadith No. 17667.
5. *Ibid.*, Hadith Nos. 17668-17670.

minative role in the division of a woman's *diyat* into half. As observed in *Al Manar* the factors are the assumptions about the evidence and inheritance of a woman being half, and support is sought for the conclusion from these weak traditions of half the *diyat* for a woman's murder or for her injuries although the rule is the acceptance of traditions which are reconcilable with and not repugnant to the manifest meaning of the Quran. This has been done by the Hanafi jurists in the case of *diyat* for slaying of non-Muslims.

There are traditions reported in all the books of Hadith about the *diyat* of people of the Book and Magians with whom the Muslims have covenants. It is attributed to the Prophet pbh that the *diyat* of a Jew or a Christian is half. Some times he is reported to have said that the *diyat* of the People of the Book or of unbeliervers is half that of a Muslim while often it is reported that the *diyat* of people with whom there is covenant is half the *diyat* of a freeman.[1] In a tradition it is reported that the Prophet pbh said that the *diyat* of a Magian is only eight hundred dirhams. The same view is ascribed to Hazrat Omar,[2] Hazrat Ali[3] Ibn Masud,[4] Suleiman Ibn Yasaar.[5] According to Hazrat 'Omar the *diyat* of a Jew or Christian was four thousand dirhams and of a Magian eight hundred dirhams.[6] It is reported from Amar bin Shuaib who related it from his father who reported from his grandfather that the Prophet fixed the *diyat* at one hundred

1. *Tirmizi*, (Urdu translation), Vol. 1, p. 284, traditions 1311, 1312; *Mowatta Imam Malik* (Urdu trans.), p. 166; *Abu Daud*, (Urdu trans.) Vol. 3, p. 428; 443; *Bulugh ul Marom* by Ibn Hajar Asqalani, p. 345 (Urdu trans.); *Al Mughni*: Vol. 7, pp. 793, 794; *Neil ul Autar*, Vol. 7, p. 221, *Ibn Maja*, p. 194; *Sunan Al Nasai*, Vol. 2, pp. 214, 217 ; *Masnad Ahmad* as cited in *Fiqh ul Sunnah*, Vol. 2, p. 564.

2. *Al Sunnan ul Kubra* by Baihaqi, Vol. 8, p. 101.

3. *Ibid.*

4. *Ibid.*

5. *Al Mughni*, Vol. 7 p. 796; *Al Muwatta.*

6. *Al Sunan ul Kubra*, Vol. 8, p. 101.

camels . . which (in terms of money was eight thousand dirhams. He fixed *diyat* of the people of the Book at half the *diyat* of Muslims. This remained the *diyat* during the period of the Prophet pbh and Hazrat Abu Bakr. When the price of a camel rose to one hundred twenty dirhams, Hazrat Omar raised the *diyat* to twelve thousand dirhams, but he maintained the *diyat* of the people of the Book as it was and fixed the *diyat* of a Magian at eight hundred dirhams.[1] On this point is said to be the Ijma' of the Companions, as stated in *Al Mughni* :[2]

> "*Problem—He said that the Diyat of Magian is eight hundred Dirhams and of their women half.*
>
> This is the statement of many of the learned . . . . This is what was stated by 'Omar, 'Osman, Ibn Masood, Saeed bin ul Musayyib, Sulciman bin Yassar, 'Ata, 'Ikrima, al Hasan, Malik, al Shafe'i and Ishaq. It is related that Omar bin Abdul Aziz said that it is half that of a Muslim like that of the people of the Book. Al Nakha'ai, Al Sha'abi and men of opinion (those who prefer opinion to Hadith) say that his *diyat* is like that of a Muslim because in his capacity of a protected freeman he resembles Muslim.
>
> "As for us is the view which comes to us from the Companions. We do not know of any opposite view in their age. *On this was (their) Ijama'*.

I have translated only the relevant portion to prove that on this subject is said to be the consensus of the Companions of the Prophet pbh which must have a great persuasive value. The traditions of the Prophet pbh on the subject of *diyat* of Jews, Christians and Magians are also said to be authentic. Despite this the Hanafi jurists do not rely upon this material which includes the traditions of the Prophet pbh, of the Companions and the Ijma' of the Companions because of the manifest mean-

1. *Dar Qutni*, Vol. 3, p. 129.
2. Vol. 7, p. 796.

ing of the Quran which equates in matter of *diyat*, believers and unbelievers both.

There are some traditions reported from the Prophet pbh that he fixed the *diyat* of unbelievers with covenant as equal to that of a believer. These are reported by 'Ikrima from Ibn Abbas[1] and from Ibn Omar.[2] The other source is Zuhri who mentions it as a precedent of the period of the Prophet pbh and the rightful Caliphs. He also mentions a tradition of the Prophet pbh to that effect on the authority of Amar bin Shoaib. The citation from *Tafseer i Qurtbi*[3] is quite revealing :

> "Ibn Abbas, Sha'abi and Nakha'i said : No distinction was made originally between the victim of an inintentional murder whether he was a believer or unbeliever . . For him the *diyat* was like the *diyat* of a believer. This is what was stated by Abu Hanifa, Sauri, Osman al Batti, Ata, Zuhri; and Saeed bin ul Musayyib stated that, 'The *diyat* of all whether Muslim, Jew, Christian, Magian, Zimmi and person with whom there is covenant, were fixed equally. Their reliance is on the divine injunction (which starts with the word *fadiyatun* فدية). (Then *diyat*) which requries (payment of) full *diyat* identical with the *diyat* of a believer. They seek *support* for this from what is related by Ibn Ishaq on the authority of Ibn Abbas from the story of Bani Quraiza and Bani al Nuzair that the Prophet pbh fixed their *diyat* equal to the fixed *diyat*."

Sayed Sabiq said in *Fiqh ul Sunnah*[4]

> "Abu Hanifa and al Sauri hold according to what is attributed to Omar, Osman and Ibn Masood that their *diyat* is like the *diyat* of Muslims as enjoined by Allah Almighty. And if he cometh of a folk between whom and you there is

1. *Neil ul Autar*, Vol. 7, pp. 223, 224.
2. *Ibid.*
3. Vol. 5, p. 327.
4. Vol. 2, pp. 564, 565.

a covenant, then the blood money must be paid unto his folk, and a believing slave must be set free. Zuhri said, "The *diyat* of Jew, Christian and each member of a protected people is like that of Muslim. He said that this was the rule in the period of the Prophet pbh, Abu Bakr, Osman and Ali . . till Muawiyah ordered deposit of half in the Bait ul Mal (public treasury) and the payment of the balance half to the heirs of the victim."

The discussion of this point by Ibn Qudama in *Al Mughni*[1] throws light on the contradictory nature of the traditions from the same source :

"Alqama, Mujahid, Sha'abi, Nakha'i, Sauri, Abi Hanifa say that his *diyat* is identical to that of a Muslim. This is also related from Omar, Osman and Ibn Masood, and Muawiyah. Abdul Bar says that this is what was stated by Saeed bin ul Musayyib and Al Zuhri. Amar bin Shuaib related from his father who related from his grandfather that when the Messenger of Allah pbh said that the *diyat* of a Jew and a Christian is like the *diyat* of a Muslim in so far as Allah Almighty described the *diyat* of a Muslim and said 'And pay the blood money (*diyat*) to his family' and enjoined in identical terms about the protected persons, he did not discriminate and this leads to the conclusion that their *diyat* is the same as He mentioned about the protected freeman and equated his *diyat* with that of a Muslim.

"And for us what was related by Amar bin Shuaib from his father who related it from his grandfather who quoted the Prophet pbh that he said that the *diyat* of a person having covenant is half the *diyat* of a Muslim."

Both the contradictory traditions emanate from the same source *i.e.* Amr bin Shuaib who related it from his father, who

1. Vol. 7, pp. 791, 792.

stated on the authority of his grandfather who heard it from the Prophet pbh. Zuhri relies upon one tradition while the Hanbalis as well as others except the Hanafis seek support of the interpretation of the Quranic injunction from the other. Another feature of this elaborate discussion by Ibn Qudama is that both the contradictory views are attributed to Saeed bin ul Musayyib,[1] 'Ikrima is reported to have related from Ibn 'Abbas who said that the Prophet pbh fixed the *diyat* of those having covenants, as that of Muslim freemen, since there was a covenant between them.[2] But 'Ikrima is also reported to have related the Hadith about the *diyat* of Jews and Christians being four thousand dirhams only (half the *diyat*).[3] Both the contradictory views are similarly attributed to Hazrat Omar and Hazrat Osman.[4]

Zuhri's historical view about the rule of equality in *diyat* is also reported in *Badai' al Sana'i* by Kasani,[5] *Bidayat ul Mujtahid*,[6] *Fath ul Qadeer*.[7]

It appears from a tradition that Zuhri also relied mainly upon the verse of the Quran (Q. 4 : 92) for equality in *diyat* of a believer and unbeliever. It is stated in *Al-Jauhar ul Naqi*[8] that Ma'mar stated : "I said to Zuhri that it has reached me that *Ibn ul Musayyib* said that the *diyat* of a protected unbeliever is four thousand (dirhams). He said that the best authority is the Book of Allah. Allah Almighty said, 'Then the *diyat* or blood money shall be paid to his folk.' Thus even for Zuhri this is the ultimate argument.

1. *Al Mughni* by Ibn Qudama, Vol. 7, pp. 791, 792.
2. *Neil ul Autar*, Vol. 7, pp. 223, 224.
3. *Al Mughni*, Vol. 7, p. 793.
4. *Ibid.*, pp. 793, 794.
5. Vol. 7, p. 254.
6. Vol. 2, p. 315.
7. Vol. 9, p. 211.
8. *Al-Sunan ul Kubra* by Baihaqi, Vol. 8, p. 102; *I'la' ul Sunan*, Vol. 18, 162.

This is further clarified in *Ilā al Sunan*[1] in which it is said that "since the traditions differ we accept those traditions which are about full *diyat* (for unbelievers) because they are in accord with the manifest meaning of the verse because Allah Almighty ordained the payment of *diyat* on the murder of an unbeliever in the same manner as He ordained *diyat* on the murder of a believer. Evidently there is equality in the similarity of language."

At another place while dealing with the *diyat* of Magians which according to Shafe'i is eight hundred dirhams it is stated: "For us the conclusive proof is the manifest meaning of the verse. . .and the answer to those traditions regarding Hazrat 'Omar which are repugnant to and irreconcilable with the traditions in which, as stated above, it is related that during his regime the *diyat* of the protected people was full, is that they (the latter) are in harmony with the manifest meaning of the verse and are therefore preferable."

It may be noticed that the traditions of equality in *diyat* are proved by the traditionists as unreliable. Baihaqi[1] held some such traditions *munqati'* or *munqati' mauquf* (in which some relator whether in the beginning, in the middle or in the end, is omitted). *Shafe'i*[2] rejected *maraseel* (مراسيل) of Zuhri as infamous (قبيحة). Some of the relators are said to be *matruk* (متروک or discarded *i.e.* no more relied upon). In the Hadith of Ibn Omar one of the relators is Abu Kurz who is *matruk* (متروک no more relied upon).[3] In the Hadith of Ibn 'Abbas one of the relators is Abu Saeed al-Baqqal whose traditions are not relied upon.[4] In the second Hadith of Ibn 'Abbas the same Abu Saeed al-Baqqal is one of the relators.[5] In another Hadith one of the relators is Al Hassan bin Ammara who is also *matruk* *i.e.* he is no more reliable.[6]

1. *Al-Sunan ul Kubra*, Vol. 8, 103.
2. *Ibid.*
3. *Neil ul Autar*, Vol. 7, p. 70.
4. *Ibid.* 5. *Ibid.* 6. *Ibid.*

This set of traditions is thus held weak and unreliable by the supporters of half *diyat* for unbelievers ; while the other set of traditions, in the ultimate analysis are rejected by the supporters of equality on ground of their repugnance with the verse of the Quran (Q . 4 : 92). The rule which emerges from this is that where there are two sets of traditions contents of which are irreconcilable with one another those which are in harmony with the Quranic verse may be accepted as correct, and not those which are repugnant to it.[1] The Hanafis vehemently follow this rule in respect of *diyat* of unbelievers.

Imam Abu Yousuf cites in his book *Al Radd ala Siyar ul Auzai*,[2] a Hadith which enlarges this principle of rejection of traditions which are contrary to the Quran. It is related that the Prophet pbh once said : "Hadith in my name will spread ; so what comes to you in my name and agrees with the Quran, take it as coming from me while what comes to you in my name but is in conflict with the Quran cannot be from me." The Hadith establishes the rule that Hadith should not be in conflict with the Quran. The rule was however, relaxed by the legists who evolved the principles firstly that Quran can be particularised by the Hadith and secondly that it can be abrogated by *Khabar-i-Mutawatir*. The first was accepted by nearly all legists while the second is evolved by the Hanafi jurists.

There would be no difficulty in arriving at the conclusion if the rule applied by the Hanafis to the *diyat* of non-Muslims is applied to the *diyat* of women because the traditions on the subject of *diyat* of women are also sharply discrepant.

The language of the verse being general and inclusive of women there is no reason why it should not be given effect to. Like the verse of the Quran there are authentic traditions

1. *I'la' al-Sunan*, Vol. 18, p. 162.
2. P. 25.

couched in absolutely general language one of which on account of its generality has been held to be applicable to men and women alike. This Hadith is related by a number of companions of the Prophet pbh and is proved in many ways. It has acquired so much renown that its authenticity has become undernable. Ibn 'Abbas relates that the Prophet pbh said *almuslimuna tatakafa dimaohum* (المسلمون تتكافا دماؤهم the blood of all Muslims is equal). It is reproduced in *Ibn Maja*[1] on the authority of Ma'aqal bin Yasaar and Abdullah bin Amr bin ul A'as. Hazrat 'Ali related it from the Prophet pbh and it is related in many ways from Qais bin Ubada.[2] In the *Musnad* of Imam Ahmad and in *Nasai* it is related on the authority of Hazrat 'Ali. It is reproduced in *Al Muntaqa* by Ibn Jarud,[3] *Al-Sunan al-Kubra* by Baihaqi.[4]

Ibn Taimiya held it authentic in *Al Muntaqa*. Imam Shaukani mentions its correctness in *Neil ul Autar*[5] with reference to Hakim. Ibn Hajar 'Asqalani categorises it as Hassan in *Feth ul Bari*.

According to the learned in Hadith and others the Hadith includes equality not only in Qissas but also in *diyat*. Ibn Aseer writes in *Jamia al Usool*[6] that the object of the Prophet pbh is that all Muslims are equal in Qissas and *diyat* and there is no excellence or superiority of one over the other on the criteria of honour or lowliness, elderliness or youth or of being male or female. According to Sheikh Mohammad Fwad Abdul Baqee (See *Hashia Ibn Maja*[7]) and Al Syed Sabiq (see *Fiqh ul Sunnah*)[8] the equality is in respect of Qissas and *diyat* both. Sheikh Abdul Haq Mohaddith Dehlvi (See *Ash'as*

1. Vol. 2, p. 295.
2. *Abu Daud*, Vol. 2, p. 267.
3. P. 260.
4. Vol. 8, p. 29.
5. Vol. 2, p. 280.
6. Vol. 11, p. 179.
7. Vol. 2, p. 895.
8. Vol, 2, p. 528.

ul Lama'at[1]) has virtually translated the quotation from *Jamia ul Usool* by Ibn Aseer in Persian. Yousuf bin Moosa (See *Almo'tasar min al Mukhtasar*[2]) considers it to apply to Qissas and *diyat* of male and female equally. Sheikh Mohammad 'Abdullah al 'Alwi says in *Miftah ul Haja Hashia Ibn Maja*[3] that it relates to equality in matters of Qissas and *diyat* both and rejects and abolishes in their respect the inequality as improper and intolerable concepts of discrimination of the period prior to Islam.

A citation from *Mushkil al-Asar*[4] by Imam Tahavi clinches this point. He says :

> "We gave full consideration to the Hadith of the Messenger of Allah pbh that the blood of all believers is equal. We found agreement of all men of knowledge on its interpretation that it pertains to equality in matters of Qissas and *diyat*. This (meaning) negatives the theory that the high up has any superority over the lowly. In it lies the refutation of the pre-Islamic practice that they did not kill a nobleman for the murder of a man of low status. From this we understand that a woman is also like a man in this respect. The man will be put to death for the murder of a woman as a woman is slain for the murder of a man."

It is strange that having conceded that the Hadith pertains to equality in matters of *diyat* and Qissas and that the woman is also like a man. Tahavi stopped short at the illustration of Qissas. He did not take the matter to its logical conclusion and had reservations about mentioning the equality in payment of

1. Vol. 3, p. 233.
2. Vol. 2, p. 126.
3. P. 197.
4. Vol. 2, p. 90.

diyat. But this is a matter on which every Hanafi jurist found himself in difficulty. The above cited passage does imply the concept of equality of *diyat* of a man and woman and this is the only logical conclusion. Like verse Q. 4 : 92 the Hadith about equality in blood is absolutely general and admits of no exception, particularisation or restriction.

The reasoning of Hanafi jurists about equality of *diyat* of believers and unbelievers is unexceptionable. The Quranic verse (Q. 4 : 92) expressly proves that equality by the use of identical language for the injunctions about Muslims and non-Muslims and by use at both places, of the word *diyat* which was understood by the Arabs as meaning the bloodprice of one hundred camels. To prefer traditions contrary to the express meaning of the Quranic injunction is nothing but abrogation of the Quran by Hadith. This is not an acceptable proposition. If the meanings of the Quran are unambiguous and its injunction is express the Muslims have no option but to act upon it as is clear from the Hadith of Ma'az bin Jabal who on his appointment as Qazi was asked by the Prophet pbh, 'how would he decide and he said, 'according as ordained in the Quran'. The reference to Hadith was made by him in answer to the question of the Prophet pbh, 'if there be nothing in the Quran.' The Hadith lays down the priorities which would connote that if an injunction in the Quran is express and unambiguous, it must be followed and reference to Hadith would not be necessary because it cannot be in disharmony with the Quranic injunction. Reference to Hadith would be necessary as external evidence for clarification of an injunction or rule or elaboration of a *Mujmil* (مجمل brief) order in the Quran or where it lays down supplementary rules, orders or injunctions. The rule laid down in *I'lā ul Sunan*, already referred, is the logical rule, that if there are two sets of traditions, one of which is in harmony with the Quranic text and the other is discrepant with it, that which is harmonious should

be preferred. Those traditions, whether emanating from the Prophet pbh or from his Companions which are repugnant to the express meaning of the Quran, cannot be accepted.

Once it is conceded or held that the Quranic verse maintains equality in matter of *diyat* between man and woman and the Hadith about equality in blood mentions equality in Q'ssas and *diyat* both it would follow that there can be no discrimination between the *diyat* of man and woman. To hold in favour of equality in matter of *diyat* of a believer and an unbeliever and to lay down a rule of discrimination between a man and a woman is to use different standards which must land the jurist necessarily in difficulty. And this is what may be generally noticed. Abu Bakr Jassas Razi tried to extricate himself out of the difficulty by interpreting the word *momin* or believer as a male only. Maulana Zafar Ahmad Osmani, the renowned author of *I'lā ul Sunan* finding himself in a mesh tried to disentangle himself from it by pleading :

> The conclusion is that the verse expresses equality in the *diyat* of man and woman as it expresses equality in the *diyat* of a believer and an unbeliever having covenant. We have turned away from the express meaning on account of traditions and consensus (*Ijma'* اجماع). Such is not the case of an unbeliever having covenant. In this respect the traditions vary. Some of them turn away, from (or are repugnant to) the express meaning and others are in harmony with it, and only those traditions are acted upon which are in accord with the express meaning and not those which are repugnant to it."[1]

The argument is clearly untenable. It is not the number of traditions pro and con which is relevant. What is relevant is the authenticity of a tradition. If out of discrepant traditions

1. *I'lā ul Sunan*, Vol. 18, p. 162.

those repugnant to the text of the Quran are liable to be rejected, on what principle can traditions inconsistent with manifest meaning of the Quran be acted upon or accepted as authentic simply because *inter se* they are not discrepant? This is also not factually correct that traditions in respect of the *diyat* of woman are not discrepant, though Maulana Zaffar Ahmad Osmani does not mention them in the chapter about the *diyat* of woman which starts from page 166 of volume 18 of his book. But the moot question remains whether Sunnah of the Prophet can abrogate the Quran. The question is sometimes answered affirmatively but it is explained that this refers only to *takhsees* (تخصیص particularisation) of a general order of the Quran by the Sunnah. But then the Hanafi rule is that such particularisation is possible by Hadith Mutawatir (a Hadith which has been related in all ages by a large number of persons so that its reputation and fame even in distant places is guarantee of its authenticity). This subject shall be reverted to later but it may be observed in passing that the fame of the Hadith cited by Maulana Zafar Ahmad Osmani is such that they are not reported in many standard books of Hadith including the six well known standard classical books. The Hadith as reported in *Al Sunnan ul Kubra* is rejected by Baihaqi, the compiler thereof as weak. It is at the most an isolated tradition, which is rejected by Baihaqi as weak.

The other qustion is whether Ijma'a or consensus of the learned can override the Quran. The answer must be in the negative. Obviously Allama Sahib had to say this because he found himself in a dilemma on the logical plane.

Another method adopted to get out of a difficult situation is to say that the Quran does not deal with the quantum of *diyat* in verse Q. 4 : 92 and the injunction is *majmil* (مجمل brief) which means that it could not be implemented without elucidation by the Prophet pbh. From the various opinions of the commentators of the Quran it is established that the Almihgty

ordained payment of *diyat* which was already known to be one hundred camels. Jassas clearly said that the order in the verse was not *mujmil* or requiring further clarification or elaboration.

Yet another method adopted to extricate oneself from the quandary is to deny that *diyat* is compensation, or price for blood. It is conceded that if it is compensation for blood there should be no difference between the *diyat* of a man and woman but then it is called compensation for the loss suffered by the death (مالی تکافل *mali takaful*). The fallacy in the argument has already been pointed out.

Like Jassas who said that the word *momin* in verse Q. 4 : 92 does not include women, others have to deny while interpreting the Hadith that *diyat* of *insan* (انسان human being) is one hundred camels, that the word *insan* includes a woman.

All these are escape routes. Such arguments are fallacious and have to be invented to justify what on the basis of the propositions laid down by them, is obviously unjustifiable.

The Hadith about half *diyat* of a woman is not reproduced in any standard work of traditions. Baihaqi reproduces it on the authority of Ma'az bin Jabal but says 'in it is weakness.'[1]

This view is criticised in *I'lā ul Sunan*[2] on the ground that Baihaqi does not advance reason for holding the Hadith related from Ma'az bin Jabal, as weak ; consequently the evidentiary value of the Hadith is not reduced. Maulana Zafar Ahmad Osmani seeks support from a tradition reporting a similar dictum of Hazrat 'Ali and reproduced by Baihaqi and a similar report relied upon by Imam Shafe'i in *Kitab ul Umm*.

But the weakness of a Hadith is not removed by other traditions. Each tradition is liable to be tested independently. Maulana Zafar Ahmad Osmani does not test the Hadith of Ma'az bin Jabal according to the criteria laid down by the

1. *Al Sunnan al Kubra*, p. 95.
2. Vol. 18, p. 166.

learned in the art of traditions. It is worth consideration that this Hadith is not relied upon in *Al Mughni* by Ibn Qudama.[1] He relies on another Hadith. It is stated in *Al Mughni* :

> "Ibn ul Munzar and Ibn Abdul Barr said, that the learned are unanimous on the point that the *diyat* of a woman is half of that of a man. To the contrary it is stated only by Ibn 'Uliyya and Al Asam both of whom said that her *diyat* is like the *diyat* of a man as stated by the Prophet pbh : 'For the murder of *momin* (مومن believer) one hundred camels.' But this statement is rare and is opposed to the *ijma'* (اجماع concensus of the Companions) and the Sunnah of the Prophet pbh. In the letter of Amar bin Hazm it is said that the *diyat* of a woman is half *diyat* of the man..."

In *Al Mughni* reference is only to the letter of Amar bin Hazm to which we shall advert later. The same view is repeated in *Al Muhde' fi Sharh il Muqna* by Ibn Muflah.[2] Shaukani reproduces the finding of Baihaqi on the Hadith of Maaz bin Jabal[3] and the names of those who relied upon it, without any further comment.

It may be pointed out at this stage that Ibn Qudama held the Hadith relied upon by Ibn Uliyya and Al Asam, as rare but Kasani said in *Badai al Sanai*,[4] that it is like Hadith i Mashhoor which has been accepted by the learned widely. Hadith i Mashhoor is a Hadith which is reported by more than two relators in each age. Obviously such Hadith cannot be dubbed as rare.

As about the acceptance of the Hadith by a number of Imams it would be sufficient to state that a Hadith having

1. See Vol. 7, p. 797.
2. Vol. 8, p. 350.
3. *Neil ul Autar*, Vol. 7, p. 71.
4. Vol. 7, p. 254.

no evidentiary value cannot improve its status by its acceptance by men of status.

It appears from the letter of 'Amar bin Hazm as quoted in *Al Mughni* and *Al Mubde'* that it contained the injunction about half *diyat* for a woman. But such injunction is not there in *Mowatta Imam Malik* or *Mowatta Imam Muhammad* where the letter is reproduced. Baihaqi[1] reproduces it or its extracts in the chapter on *diyat*. It contains the general principle that for murder of a human being (نفس *nafs*) one hundred camels is the *diyat* but no reference is made to *diyat* of a woman. Doctor Muhammad Hameedulla has compiled the various versions of the letter in *Al Wasaiq ul Siyasa* but there is no reference in either of the versions to woman's *diyat*. Hafiz Ibn Hajar said in *Al Talkhees ul Jabeer*[2] that the portion that the Prophet pbh said that the *diyat* of a woman is half of the *diyat* of man is not there in the lengthy Hadith of Amar bin Hazm. Baihaqi narrated this portion in the Hadith of Ma'az bin Jabal but then he observed that its authority is such that no such thing is proved from it.[3] Ali bin Husain ul Ahmadi in his book *Kitab i Mukatib al Rasul*[4] has exhaustively dealt with the books in which reference to this letter is made and their contents but this dictum is not at all traceable. No reliance can therefore, be placed upon what Ibn Qudama says about the Hadith of Amar bin Hazm. The rarity of what he says is established.

The third Hadith is of Zaid bin Sabit that the *diyat* of injuries upto one-third is equal and thereafter it is one-half. In that context is reproduced the opinion of Saeed bin ul Musayyib that the *diyat* of three fingers of a woman is thirty camels but if the fourth finger is also cut it is reduced to twenty

1. *Al Sunan ul Kubra* by Baihaqi, Vol. 8, pp. 73-81.
2. Vol. 4, p. 64.
3. *Neil ul Autar*, Vol. 7, p. 71.
4. Pp. 196-197.

camels only. On this point the views of Ibn Qudama[1] have already been reproduced in detail. He holds that the Companions are unanimous on this point that the *diyat* of injuries of a woman is equal upto one-third and thereafter is half of that of a man. But Zailai[2] says about the report of Saeed bin ul Musayyib that it is not Sunnah of the Prophet pbh; what Ibn ul Musayyib meant by Sunnah was the practice of the people of Madina. Sarakhsi[3] is unwilling to accept it on ground of its being rare and contrary to intelligence. Maulana Zafar Ahmad Osmani also dubs it as unreasonable.[4]

As already seen there are so many different versions on this point that the principle cannot be accepted. The Hanafis are of the view that the *diyat* whether in case of murder or injuries is half that of a male. To Hazrat 'Ali is attributed the view that *diyat* of woman, whether the number of injuries be great or small, is the same, *i.e.*, in the case of woman half that of man, and Imam Abu Hanifa preferred this to Hadith of Ibn Sabit.[5]

There is therefore no correct Hadith in favour of discrimination between a man and a woman. On the other hand there are traditions of the Prophet pbh that the blood of all Muslims is equal. There is agreement on the point that it refers to men and women both and to Qissas as well as other traditions are that *diyat* for murder of a human being (*insan* which is common gender) is one hundred camels ; the *diyat* for *nafs*, which again is common gender and means human being, is one hundred camels etc. It is established that *diyat* means the *diyat* of one hundred camels which was

1. *Al Mughni*, Vol. pp. 797-798.
2. *Nasab ul Raya* by Zailai, Vol. 4, p. 364.
3. *Al Mabsoot* Vol. 26, p. 97.
4. *I'lā ul Sunan*, Vol. 12, p. 168.
5. *Al Sunnan ul Kubra* by Baihaqi, Vol. 8, p. 71.

customarily fixed and the Prophet also used the word *diyat* in the same sense. In the Hadith about the murder of a women of Huzail and the miscarriage of her pregnancy, the Prophet pbh ordered payment of *diyat* to the heirs of the murdered woman and *ghurrah* (غرة *i.e.* blood money for the embryo) for the miscarriage or death of the child in the womb. This would mean one hundred camels for the murder of the woman. Hazrat 'Usman awarded *diyat*, and according to one version, eight thousand dirhams[1] which was treated to be *diyat* when reduced in terms of dirham, for the murder of a woman. He ordered payment of an additional amount of one-third *diyat* since the murder was committed in Makkah. All these traditions establish equality in the *diyat* of man and woman.

Verse Q. 4 : 92 is very clear on this point. It is generally conceded that Qissas is the punishment for the intentional murder of a woman. There is no disagreement on the point that in addition a believing slave should be freed as in the manslaughter of a female victim.[2] There is no difference in the case of compensation for miscarriage whether the child is male or female and is identifiable as such. There is no earthly reason why there should be discrimination in the case of *diyat* between a male and female, although *diyat* is nothing but Qissas in the abstract sense. Assuming for the sake of argument that the Hadith of Ma'az bin Jabal is not *zaeef* or weak it would hardly make any difference. According to the Hanafi Fiqh, the rule is that the generality of a verse of the Quran cannot be cut by an isolated Hadith. An isolated Hadith is not capable of particularising what is general in the Book of Allah.

The Shafe'i view is different. He says that an isolated Hadith is capable of truncating the generality of a verse of the Quran as well as of the Sunnah of the Prophet pbh. The Shafe'i rule is often relied upon by the Hanafi Ulema

1. *Al Sunnan al Kubra*, by Baihaqi, Vol. 8, p. 95.
2. *Al Mubde' fi Sharh Il Muqne* by Ibn Muflah, Vol. 9, p. 27.

in justification of the rule of inequality in the *diyat* of man and woman. Despite the doctrine of *taqlid* which binds the Hanafi Ulema to apply the principles of their own Fiqh for determination of a legal question, it is not my object to question their right to fall back upon the Shafe'i rule, if it is more reasonable. I would therefore like to discuss the principle of particularisation of any general rule in the Quran and the Sunnah as followed by the Hanafis and Shafe'is in order to trace their *raison d'etre* and to determine which is more logical and rational from an objective point of view.

Many of the injunctions and dicta of the Quran are couched in general language and relate to a genus or a whole class. But sometimes the generality is cut down by express language and the applicability of the rule is restricted say to fewer persons of that class. In such case the rule *Generalia specialibus non derogant* which is a natural rule applies. If there be a conflict between something general and something special, specific or particular the latter shall override the former. 'Allah is the creator of all things' means that there is not a single thing which Allah has not created. 'Everything shall be destroyed by order of its Lord' (تدمر كل شئى بامر ربها) It is as general. But the verse 'Hajj is obligatory from Allah on the people, that is on those who have the capacity for it and can afford it', ceases to be general by the addition of the words about capacity and ability to afford (من استطاع اليه سبيلا). The youth and the insane are excluded from the general order on account of incapacity. Those who do not have the wherewithals to make a journey to the holy land for performance of pilgrimage are exempted because of inability to afford.

This is an instance where the generality is expressly restricted in the same verse. Shaukani defines *Takhsis* (تخصيص particularisation) as taking away of some which were included

in the meaning of the general word for want of particularisation.[1]

Verse 24 : 2 when read with verse 4 : 25 provides an example of the exception to the general rule provided in a different Chapter of the Quran. The general rule is in verse 2 of Chapter 24 : "The adulterer and the adulteress, scourge ye each one of them (with) a hundred stripes." The Quranic exception to this rule was created by verse Q. 4 : 25; which permits the believers to marry slave girls. The exception is that : "And if when they are honourably married they commit lewdness they shall incur half of the punishment (prescribed) for free women (in that case)."

The illustration of this general rule is significant from another point of view also. There are traditions of the Prophet pbh which direct married adulterers to be stoned to death. According to Imam Shafe'i these traditions, which according to him are only isolated traditions, also cut the generality of the rule laid down in Verse Q. 24 : 2, and restrict its application virtually to unmarried fornicators. In the language used by the Hanafis the traditions enjoining stoning to death of married adulterers and adulteresses abrogate to that extent the punishment of one hundred stripes as provided in the above verse. The rule laid down for slave girls is not, however, affected since there is no manner of halving the punishment of death.

There are some other verses also which are relied upon by Imam Shafe'i, as laying down the rule of particularisation of the general rules laid down by the Quran by isolated traditions. Before dealing with those illustrations it will be useful to explain the distinction between several kinds of traditions.

From the point of number of relators the learned in traditions categorise Hadith into three kinds. They are Al Khabar

1. *Tafseer ul Nuns fil Fiqh il Islami* by Muhammad Adib Saleh, p. 665 from *Usul ul Bazdawi*, Vol. 2, p. 368.

ul Mutawatir, Al Khabar ul Mashhoor and Al Khabar ul Wahid (continuous well-known and isolated respectively).

A continuous or Mutawatir Hadith is that tradition which undoubtedly originates from the Messenger of Allah pbh till it becomes as if its meanings have been (directly) heard (from him) on account of its having been related by such a large number of persons in different places that it may be difficult to imagine that such a large number of just and truthful persons living so far off from one another may unite on (in the publication of) a lie or falsehood. The chain of relators must, however, be complete.

In the opinion of the learned Khabar i Mutawatir has the elements of certainty. The knowledge obtained from it is like knowledge obtained from self-observation. There are others who say that it only provides tranquillity of mind but the probability of apprehension of doubt remains lurking because Mutawatir or continuous is a combination of Akhbar ul Ahad (isolated traditions) and there is always possibility of falsehood in them.

The fact, however, remains that the number of relators in each age and even distant countries should be treated as a guarantee against the publication of falsehood particularly when the chain of relators is complete and their truthfulness is assured.

Khabar i Mashhoor or well-known tradition is that which though, isolated during the first age (the age of the Companions) has thereafter achieved renown on account of having been transmitted by a number of relators that the possibility of its being based upon a lie, is excluded.[1] But according to the principles of Science of Hadith it means a tradition which is related by more than two reporters in each age among all categories of reporters but falls short of being called Mutawatir.

1. *Tafseer ul Nusoos fi Fiqh il Islami* by Muhammad Adeeb Salch, p. 665; *Hashia Ibn A'abideen*, Vol. 11, pp. 176-177.

The Hanafies say that this category lies between Mutawatir and Ahad. The learned scholar of traditions generally do not recognise this category.

Khabar ul Ahad or isolated tradition is Hadith reported by one or two relators. According to many, by itself it is not of much utility or benefit but is liable to be acted upon.[1]

It is necessary that Hadith in order to be categorised as Mashhoor, should have become well known at most upto the third century Hijra because in later ages even isolated traditions attained that degree of renown. There are people who do not distinguish between Mashhoor and Ahad (the well known and the isolated). There are those who think that Mashhoor only gives satisfaction. But other Hanafi Ulema say that the distinction between Mutawatir and Mashhoor is that while the former is equivalent to self-observation the latter is utilised for achieving the knowledge necessary for guidance.

All the schools of thought hold that Hadith is capable of particularising a general proposition, dictum or injunction of the Quran. The difference lies in this that according to the Hanafis Quran is certain and its particularisation is possible only from what is certain and not conjectural. Such traditions are only either Akhbar i Mutawatir or Akhbar i Mashhoor and not Khabar i Ahad which is never relieved of its conjectural attributes. Allama Bazdawi points out:[2] that its connection with the Prophet pbh remains doubtful both from the point of view of external evidence as well as internal significance. From the external evidence its liasion with the Prophet pbh is never absolutely complete and from the point of view of its internal significance it lacks the guarantee of general acceptance by the Muslim Ummah. The excess in the number of reporters cannot remove it from the category of Khabar i Ahad

1. *Tafseer ul Nusoos Ibid. Usul ul Bazdawi* with *Khasful ul Asrar*, Vol. 2, p. 270.

2. See *Imam Abu Hanifa* by Abu Zahra (Urdu trans. by Raees Ahmad, Jafri), p. 457 from *Kashf ul Asrar*, Vol. 2, p. 990.

or isolated tradition unless it reaches the stage of renown achieved by Mashhoor or Mutawatir.

Hanafis do not treat as lawful, particularisation of generality of the Quran by isolated traditions because the generality of the Quran as well as Sunnat i Mutawatira (سنة متواتره continuous traditions from the Prophet pbh) are certain and conclusive and the cutting of this generality of the conclusive (by particularisation) with the help of conjectural or what is not definite or conclusive is not correct.[1] Imam ul Haramain puts the reason thus:

> "It is not lawful to pronounce judgment on what is conclusively proved from that origin of which is doubtful."[2]

Abdul Aziz al Bokhari said :

> "The generality in the Book of Allah and Sunnat i Mutawatira or continuous Sunnah of the Prophet pbh is not capable of particularisation which means that their particularisation by Khabar i Wahid or isolated Hadith or Qiyas is not permitted because both are conjectural, and the particularisation by them of what is definite or conclusive is not lawful because particularisation is a method of (creating) conflict (taking away something from what is general) and the conjectural (or what is inconclusive) is not capable of opposing what is definite and conclusive."[3]

The reference to Khabar i Mutawatira in this citation and one earlier citation from the book of Muhammad Adib Saleh means that like the Quran, the generality of Hadith i Mutawatira also cannot be cut down by the process of particularisation with the help of Khabar i Ahad (isolated tradition) though it is permissible among other Schools of thought.

1. *Tafseer ul Nusoos fil Fiqh il Islami* by Adib Saleh, p. 666.
2. *Al Burhan* by Imam ul Haramain, Vol. 1, p. 327.
3. *Kitab ul Asrar* by Abdul Aziz Bokhari, p. 294, *Tafseer ul Nusoos, Ibid.*

The Hanafis support their opinion with the statements of Hazrat Aisha, the first two Caliphs and Ibn 'Abbas, particularly the story of Fatima Bint Qais who when she said to Hazrat Omar that the Prophet pbh fixed for her maintenance and (separate residence), the latter retorted: "How can we abandon the Book of Our Lord on what is stated by a woman". Reference in this story is to Q. 65 : 6 'Lodge them where ye dwell'.

Those entertaining the different point of view say that after detailing the list of women with whom *nikah* is prohibited, Almighty Allah legalised *nikah* with others but the Prophet pbh prohibited simultaneously keeping in marriage the paternal or maternal aunt of the wife. Similarly the divine injunction to make a will was particularised after the revelation of the injunctions regarding inheritance, by the Hadith of the Prophet pbh prohibiting will in favour of an heir and limiting the will to one-third property of the propositus. The traditions ordering stoning to death, a married person for commission of adultery particularised the general order of scourging an adulterer and adulteress with one hundred stripes. The general verse containing injunction about amputation of hand of a thief, whether male or female, was particularised by fixing the minimum value of stolen property upto which this sentence could not be imposed. It was said that all these traditions were Akhbar i Ahad (isolated traditions).

The Hanafis rejected this argument on the ground that to begin with the traditions were Akhbar i Ahad but by lapse of time they had acquired the status of Akhbar i Mashhoor (well known traditions), and such traditions are capable of particularising the general dicta and commands of the Quran.[1]

The subject has been elaborately discussed but the short reasoning of the different schools of thought is sufficient for our

1. *Tafseer ul Nusoos fil Fiqh il Islami* by Muhammad Adib Saleh, p. 668.

purpose. It may be explained that the last argument of the Hanafis that in the illustrative cases cited above the generality of the verse of the Quran was restricted by the traditions which though isolated in the beginning had later acquired the status of well known traditions amounts to begging the question. The date of particularisation should be the date of Hadith and not the date when the Hadith acquires general acceptability and renown by the jurists.

In my view none of these illustrations provide instances of *takhsis* (particularisation) of general injunctions of the Quran. I dealt with this point briefly in my judgment Federation of Pakistan v. Hazoor Bakhsh,[1] I held in that case that the punishment of Rajm or stoning to death, for married adulterers and adulteresses was not a punishment of Hadd but was an additional punishment by way of *ta'azir* for the aggravated offence. I said :

> "My learned brother Maulana Muhammad Taqi Usmani has come to the same conclusion at which I arrived that the verse in Surah Noor is general and applies to both married and unmarried adulterers and that the punishment of Rajm is in addition prescribed by the Holy Prophet in view of the aggravation of the offence. If the concept of Hadd and *ta'azir* as presented by the jurists is taken to its logical conclusion it would follow that what is provided by Allah can only be called Hadd. The dictum of Imam Abu Hanifa in an analogous case will apply to such a case. In respect of the punishment of expiation he said that it was in excess of the Quran and was, therefore, a *ta'azir*. The sentence of Rajm also being in excess of the Book of Allah can only be said to be *ta'azir*.
>
> Great emphasis was laid on the distinction between *takhsees* or particularisation on the one hand and *naskh* or repeal

1. PLD 1983 FSC 255 (294, 295).

on the other. Several cases were cited in support of the principle of *takhsees*. But the conclusion that verse 2 of Surah Noor applies equally to married and unmarried persons makes any discussion on the question of *takhsees* irrelevant since Rajm will then have to be treated as additional punishment and not *takhsees* of Quran (Q. 24 : 2). However the illustrations relied upon are hardly sufficient to establish the principle.

"It was urged that the verse about punishment of theft includes all types of theft whether of articles of small value or of valuable things but the Holy Prophet excepted a child and a lunatic from the operation of the verse. . . Rather he fixed the minimum value of the article which could make its theft liable to the cutting of hands.

"It is undeniable that there should be *men's rea* or criminal intention for commission of crime. A child and lunatic being incapable of forming such intention the Hadith (only) gives effect to this basic principle of criminal law and cannot be said to be a particularisation of a Quranic injunction.

"Theft as such is not defined in the Quran and there being a vacuum it had to be filled by Hadith. However the language of the verse proves that it is applicable to a case of Zulm (ظلم cruelty) when the victim can be said to entertain the feeling of being victimized and of being treated cruelly. This generally happens in the case of loss of something valuable. It is in order to give effect to this principle of the Quran that the Holy Prophet pbh fixed the minimum valuation.

"The other example given in this connection is that of will. Before the revelation of the verses about inheritance will was ordered to be made in favour of parents and relatives (Q. 2 : 180). Thereafter particular shares in inheritance were fixed for certain categories of relations, descendants and ascendants, spouses and descendants of ascendants.

"It is established that the verses laying down the share in inheritance repealed the order in respect of making a will in favour of the heirs and this repeal is further proved by the Hadith وصية لوارث (there is no will for an heir). See *Kanzul Kabir* by Shah Waliullah, p. 42. In these circumstances the Hadith of Holy Prophet that there can be no will in favour of an heir is merely a clarification of this principle. It can hardly be called *takhsees*.

"The other principle laid down by the Hadith is that no more than one-third of the property can be willed away in favour of non-heir. The permission to create a will in favour of strangers and the injunctions fixing the right of heirs in inheritance can only be reconciled by fixing the quantity from the assets that can be the subject-matter of will so that the permission may be acted upon and there be no possibility of the heirs being deprived of inheritance. This is also clarificatory and cannot be held as an illustration of *takhsees*.

"My learned brother Pir Mohammad Karam Shah, J. illustrated *Takhsees* by reference to the injunctions of Zakat. But that is also a case of vacuum left by Allah for the Prophet to fill. Another instance given by him is about Qissas (قصاص) being inoperative in the murder of a son by father. The basis of the order is not *takhsees* but the natural instinct of the father not to kill the son. Such a killing can hardly be covered by the offence of *Qatle A'mad* (intentional murder). Rather the presumption would be that the murder is not intentional but may be due to some unavoidable causes."

The subject was briefly dealt with in the judgment though it can be elaborated at much greater length. But those details are not relevant for the purpose of this chapter. What is pertinent to point out is only this that the illustrations from the

Quran and the Sunnah on which Imam Shafe'i founded the rule of *takhsees* (particularisation of the Quran by Sunnah) are explainable in another manner and cannot support this new rule. It appears from *Tafseer fil Nusoos fil Fiqh il Islami*[1] that Abu Zahra, who can rightly be called Imam of the present age, was of the view that many of the illustrations of *takhsees*, truly speaking, do not furnish proof of *takhsees*.

The *mujmil* (brief) verses of the Quran like the injunctions to establish prayer and to pay Zakat required elucidation by the Sunnah of the Prophet pbh. Many of the verses required clarification and interpretation. These are the rules on which all these illustrations may be explained. And to say that *Khabar i Mashhoor* or well-known traditions meaning traditions which were *ahad* or isolated originally and acquired renown by lapse of decades or centuries would mean that to pronounce judgment of any tradition being *mokhassas* of the Quranic verse or an earlier tradition, one should wait for decades or centuries till the Hadith is fit to be categorised as *Khabar i Mashhoor*; the date of *takhsees* or particularisation should be the date on which the words in the Hadith were uttered by the Prophet pbh, and heard and published to a large number of persons. However, the argument of the Hanafis that Quran being definite and conclusive its *takhsees* should be possible only by equally definite and conclusive *nas* verse or Hadith is much more preferable than a rule laying down the possibility of *takhsees* of something definite by indefinite and something conclusive by a thing inconclusive. *Takhsees* is a restriction on generality and may *inter alia* either adopt the form of an exception which must be in conflict with generality or assume the form of an amendment which may require limiting or cutting of the generality, and legislation introducing exceptions as well as amendment should be as definite as the original general legislation.

1. *Tafseer ul Nusoos al Fiqah il Islami* by Mohammad Adib Saleh, p. 650.

It may be explained here that as per Hanafis *takhsees* or particularisation does not include exceptions, or imposition of conditions because there is no conflict between them and the general verse. On the face of it the proposition may not appear to be correct. But the fact is that there may be saving clauses or provisos which may not be inconsistent with or repugnant to the main legislation but may be explanatory of it and may expose what is implied in the text. The reference in the Hanafi rule is obviously to such explanations, provisos or exceptions. Creating an exception which is obviously repugnant to or inconsistent with what is general in the Quran would not be covered by the rule.

This brings us to another qualification which according to the Hanafis is required for a valid *takhsees*. This will be evident from the restriction on the definition of *takhsees* by Abdul Aziz al Bokhari :[1] "It is restricting of the generality to some of all the units constituting it, by means of independent proof (verse) correlated to them. قصر العام على بعض افراده بدليل مستقل مقترن The two conditions, that firstly one is independent of the other and not bound as a part to the whole, and secondly that the general rule and the independent matter are correlated to one another, are the criteria for *takhsees* in Hanafi jurisprudence. The divine injunction is that Allah made (transaction of) sale lawful but prohibited *riba*. In this injunction the two portions are independent of one another and also joined together both by ties of nearness in time and place. This is an apt illustration, according to the Hanafis, of particularisation of the general injunction of lawfulness of sale by the prohibition of *riba* or interest *i.e.* sale of goods conditional on *inter alia* payment of the excess price in future which would not be payable if price had been immediately paid. This is really an exception which was not implicit in the general injunction and is repugnant to it.

1. *Tafseer ul Nusoos* by Adib Saleh, p. 651.

Another instance is of the injunction that whoever finds or evidences the month (of Ramazan) shall fast. And whoever is ill or is on a journey shall keep them (fasts) later. The two portions, one prescribing the rule and the other prescribing the exception are independent of one another and are also correlated in respect of time and space. If the two portions are independent of one another but are not so correlated it would not be a case of *takhsees* but of *naskh* or repeal. Its illustration, according to the Hanafis, is the injunction that if you marry believing women and then divorce them before you touch them there is no period of waiting for you. The other order which though independent of it is not correlated and joined in time and space is that for the divorcees there is the waiting period of three monthly courses. This according to the Hanafis is an example of partial repeal. The word repeal is not controversial if the question be of interpretation of the general and special language of the Quran only. But it becomes outrageous for many when the special rule is in a Hadith and the general rule in the Quran. The use of the word repeal would then indicate that Hadith may repeal the Quran. The other schools of thought therefore use the word *takhsees* where the term repeal is used by the Hanafis.

It would be evident from this discussion that according to the Hanafis *takhsees* or particularisation of a general rule is possible by an independent rule having correlation with the former in terms of the time of revelation and the place in any chapter where it is fixed by the Prophet pbh. The general rule, however, is that the general cannot be treated as fettered. The rule described in *Nur ul Anwar*[1] is as follows :

> "Our view is that the general cannot be treated to be fettered though it may relate to the same event, because it may be possible to act on both of them, as there is no inconsistency or repugnance between them. For this

1. P. 159.

reason in Zihar the fasting will be completed and the slave shall be manumitted before having privacy with the wife. The feeding of the poor is something general which may be done before or after having privacy with the wife. . If such a possibility be there in one single event, it will be easier for it to happen in two events. Therefore in a case of murder the slave to be freed must be a believer. In other rules of expiation the order is general and the slave to be freed may be a believer or an unbeliever."

Abu Zahra said that :

"contrary to the Shafe'is, the Hanafis say that the preference of the general word for the generality is absolute. It cannot be fettered by Khabar i Ahad because the Quran is definite and conclusive and what is general in it carries a conclusive presumption of generality while Khabar i Ahad (isolated Hadith) carries a presumption of being conjectural. ."[1]

Professor Mohammad Ma'aruf Dawalibi writes in *Al Madkhal ila Ilm Usul il Fiqh* :[2]

"In the opinion of the Hanafis the combination of a general rule with the special rule does not lead to the particularisation of the general rule meaning thereby that it may become the cause of the general being transferred to the special, something which the Shafe'is believe. The special rule cannot fetter the general rule except on two conditions : firstly that the general rule and the special rule are correlated in terms of the time of revelation which means that it (the special rule) is not later in time, and secondly that both of them taken separately are independent of one another, *i.e.* its correlation with the general rule is not

1. *Asrar Imam Shafe'i* by Abu Zahra (Urdu trans. by Rees Ahmad Jafari), pp. 265-266.

2. Pp. 199-200.

like a part (with the whole), and the particular rule, if separated, may still be meaningful.

A person directs another not to give anything to others and give it to Zaid. In this direction the order 'and give it to Zaid' is particular and is attached to the general command, 'do not give anything to any one.' It is also independent and is not a part of it."

From this discussion the reasoning of each of school of thought is manifest. If I am to exercise an option in favour of either of the two concepts I will opt for the Hanafi definition of *takhsees*. There is no bar for the Hanafi Ulema to argue on the basis of the Shafe'i rule but then they must accept the preference of the Shafe'is for the traditions favouring half *diyat* for Christians and Jews and of eight hundred dirhams for the Magians as against the Quranic verse (Q. 4 : 92) which ordains equal *diyat* for all. They should also clarify for the benefit of their Hanafi readers or audience that in this particular matter they are preferring the Shafe'i rule and should give reasons for it.

Applying the Hanafi rule of interpretation of general and special it would be clear that the Hadith relied upon by the Hanafis is not reported in any standard book of traditions. If it is reported by Baihaqi he has denounced it as weak. It is no more than Khabar i Ahad (isolated Hadith) and also found *zaeef* for the matter of that, by its reporter which means that even as something conjectural it cannot be relied upon. It is not thus capable of particularising the general rule of the Quran which is definite and conclusive. In addition to the general rule of equality in matters of *diyat* laid down in the Quran there are authentic traditions laying down similar general rule. The weak isolated Hadith has no correlation either with the Quranic verse or the general authentic traditions and can in no way be said to be capable of fettering their generality.

It appears that the learned among the Hanafis have made a departure from the Quranic rule of equality because of their concept of woman being half of the male in evidence and inheritance about which much has been said in the chapters concerning those subjects to prove that both these conclusions are not correct.

The objection about Ijma'a has been considered in detail in the Introduction. It cannot be an impediment in the matter of reconsideration and reevaluation of the various problems including the question of *diyat* of woman. The author of *I'lā al Sunan* wrote that the meanings of verse Q. 4 : 92 are turned away by the traditions and Ijma'a. As regard traditions including those of the Companions of the Prophet pbh it has been pointed out that they are weak and conflicting. They are both pro and con. Ijma'a is the last defence. In it again is included the argument about Ijma'a of the companions. But after the proof of weakness of traditions emanating from them the point loses its significance. As regards the general theory of Ijma'a it may be reiterated that the rule about half *diyat* of woman is repugnant to verse Q. 4 : 92. The principle of Ijma'a cannot be invoked for supporting what is contrary to the Quran.

Moreover it is conceded that two of the Scholars at least stood in opposition to the generally held notion that it is half that of a man. The statement in *Al Mughni*[1] is pertinent :

> "Ibn ul Munzir and Abdul Bar say that the scholars are unanimous (on the point) that the *diyat* of a woman is half that of a man. A different view is related to have been held by Ibn Uliyya and Al-Asam both of whom said that her *diyat* is like the *diyat* of man since the Prophet pbh said : For the murder of a *momin* one

1. Vol. 7, p. 797.

hundred camels but this is a rare saying which is contrary to the traditions of the Companions as well as the Sunnah of the Prophet. . ."

The relevant point to be considered in this citation is that at least two scholars were opposed to the rule. It does not consequently fall within the definition of Ijma'a as defined by Imam Shafe'i and other classical writers. Nor is it Ijma'a according to the definition of Ibn ul Munzar (died 318 A.H.) who held that the opposition of one scholar did not invalidate Ijma'a but the opposition of two invalidated it. This is Tabari's view which he accepted.[1] Yet he included the rule as consensual.[2] According to Tabari whose view he followed the opposition of one only was not sufficient to invalidate Ijma'a.

Ibn Qudama said that the Hadith relied upon by Ibn Uliyya and Al Asam was rare but he did not comment against these two persons nor denied their position as scholars whose opinion was worth weighing in the scale of Ijma'a. But unfortunately the present day Ulema in Pakistan have the courage to call them scholars of inferior status. Another ground they give for disregarding them is that they were Motazila.[3] It may also be stated that the version of Ibn Qudama is repeated in *I'lā ul Sunan*[4] but without any such comment. Other Hanbli writers have similarly related the version of Al Mughni but none of them tried to belittle the scholarship of these two persons.[5]

Imam Fakhruddin Razi said that most of the jurists follow the doctrine that the *diyat* of a woman is half that

1. *Al Ijma'a* by Ibn Munzar, pp. 12-13.
2. *Ibid.*, p. 147, section 670.
3. *Tarjuman ul Quran*, June 1984, p. 183.
4. Vol. 18, pp. 166-167.
5. See *Al Mubde' fi Sharh il Muqne*, Vol. 8, p. 350.

of a man but Al Asam and Ibn Uliyya said that her *diyat* is like the *diyat* of man[1] Razi thus equates these two including Al Asam with other jurists.

Shah Wali Ullah said that most of the scholars said that *diyat* of woman is half the *diyat* of man.[2] Most of the scholars would mean that there are some scholars who oppose the proposition and are equally great scholars.

It appears that some scholars who support the theory of half *diyat* for woman raised a dispute about the identity of Ibn Uliyya. Maulana Gauhar Rahman said that he was Ibrahim bin Uliyya who had strayed from the right path. Another scholar referring to *Lisan ul Mizan* said that he is described as the most wicked person. These statements were made in a meeting arranged by Maulana Muhammad Matin Hashmi, Editor of *Minhaj Quarterly*. (See *Minhaj*, Haisiat i-Niswan Number, Part 1). This was disputed by Maulana Riaz ul Hasan Nuri who said that he was a teacher of Imam Ahmad bin Hanbal. Maulana Gauhar Rahman intervened that the teacher of Imam Ahmad was Ibrahim ibn Uliyya. M. Riaz ul Hasan Nuri said that he was known as Ibn Uliyya only and referred to *Alilal* by Imam Ahmad and *Tabaqat ul Kubra* by Ibn Saad. He referred to *Lisan ul Mizan* in which it is recorded that Ismail bin Uliyya was from the traditionists (Muhaddithin). He also referred to traditions related from him in *Tabari*.

This controversy ought not to have been raised because the way Ibn Qudama mentioned the name of Ibn Uliyya proves that he was not a man who had gone astray or was most wicked.

Thus Al Asam is mentioned as the most pious and most eloquent person, writer of a marvellous (عجیب) commentary and one of the greatest jurists.

1. *Tafsir i Kabir*, Vol. 10, p. 233.
2. *Musawwa Sharh Mowatta*, p. 115.

The deadliest attack against them in *Tarjuman ul Quran* is that they were from among the Motazilas. But is this charge sufficient to discredit them or belittle their position? This question shall be answered almost verbatim from the volume VI of *Fiqhul Quran*[1] by Maulana 'Omar Ahmad Usmani recently written on *diyat*. He writes :

> "Were the Motazila scholars of the first few centuries depraved, unbelievers and infidels. If it is so, what do you say about *Hujjat ul Islam* Abu Bakr Ahmad bin Ali Al Razi Al Jassas (died 370 A.H.) who is among the Hanafi jurists and is a well known Motazili. Besides this what do you say about Imam Bokhari who is considered the leader of the traditionists because it is said about him also that he held the same views as the Motazila. Shaikh Abdul Fattah Abu Ghudda writes in his annotation on *Qaeaid fi Ulum il Hadith* by Sheikh ul Islam Allama Zafar Ahmad Osmani :
>
> 'This is a reference to the incident which occurred between Imam Bokhari and his teacher Muhammad bin Yahya Zaili. When Imam Bokhari visited Neshapur and people inquired from him about the words of the Quran, he said that Quran is the word of God and is uncreated (eternal) but our actions are created. Abu Hamid Sharqi said that he heard Imam Zaili saying that Quran is the word of God and is eternal but whoever says that my words of the Quran (the words that I speak) are created, is an innovator. He should not sit with us. We shall not talk to anyone who goes to Muhammad bin Ismail Bokhari.
>
> All the people except Muslim bin ul Hajjaj and Ahmad bin Salma boycotted Bokhari. Muslim sent to Bokhari on the back of a labourer all that he had written from Bokhari.. Imam Zaili also said that Muhammad bin Ismail Bokhari

1. Pp. 303-307.

could not stay with him in the same city of Neshapur. Imam Bokhari apprehended danger to his life and left Neshapur. After this Imam Muslim neither related any Hadith from Zaili nor from Bokhari.

Imam Zahabi states in *Tazkirat ul Huffaz* in the biography of Hafiz Abu Walid Hassan bin Muhammad Neshapuri :

"Hakim stated that I heard Abul Walid saying that my father asked me : Which book are you compiling ? I said I am preparing additional references (*Takhrij* تخريج) on the book of Bukhari. My father said : "take the book of Muslim because in it are more blessings since Bokhari had affinity with the word (meaning that he held that his own words when he recited the Quran were created). Ibn ul Zahabi said that Muslim had also affinity with the word. This is a very difficult problem".[1]

Shaikh Abdul Fatah Abu Ghuda has given many examples in his annotation of *Qowaid fi Ulum il Hadith*. For example persons like Imam Ali bin al Madini, Imam Yahya bin Main, Imam Abu Nasar ul Tamar, Ali bin Abi Hashim al Laisi Baghdadi, Husain bin Ali al Karabisi, Naim ibn al Hammad al Marwazi, Imam Muzani, the renowned pupil of Imam Shafe'i who is considered among the celebrated scholars of traditions, all are blamed for being Motazilis in respect of the theory of Quran being created (and not being eternal).

"Just as it had become a fashion fifty or sixty years ago in undivided India to label religious scholar Wahabi (follower of Abdul Wahab Najdi) in order to defame him to gratify one's dislike of him, and he was really defamed in this manner, and just as in Pakistan after Partition of the sub-continent it became a tendency and practice to call such names as denier of Hadith or of Prophethood to

1. *Imam Zahabi ; Tazkirai-ul-Huffaz.*

any one with whom there were differences so as to lower his prestige in public and to disparage him, exactly in the same manner a device was adopted in the third century after Hijrah generally and to some extent in the second century after Hijra to defame a scholar in tradition or jurisprudence with whom there cropped up any differences by labelling him as Motazili and thus to belittle him in the estimation of the public.

"The bone of contention between the Motazilis and the traditionists is the theory of Quran being eternal or created. So far as I understand that no one in the whole subcontinent of India agrees with the traditionists whose view is thus explained by Imam Ibn Taimiya :

'It is the settled view of Imam Shafe'i and the jurists of all towns that Quran is the word of Allah and is uncreated (eternal) and whoever says that it is created is an unbeliever. Gabriel heard the Quran from the Almighty and transmitted it and the Messenger of Allah pbh heard it from him. The companions heard it from the Prophet pbh and it is the same which we recite. And it is between the two covers and is safe in our memory, which is heard, written and preserved. Every letter of it is the word of Allah and is uncreated (eternal) and whoever says it is created is an infidel."[1]

"With great respect and utmost humbleness I ask the ten members Committee of Jamaat-i-Islami if it is your belief that the Quran which Gabriel transmitted from Allah, which the Messenger of Allah pbh heard from Gabriel, which the companions heard from the Prophet pbh, which we recite orally, which is written between the two covers, which is preserved in our memory, which we hear, write and commit to memory, every word of it is uncreated

1. *Majmua tul Rasail wal Masail* by Ibn Taimiya, Vol. 3, p. 112.

(eternal) and one who believes it to be created is an unbeliever? Who is that scholar in the whole of the subcontinent who believes this? If this is not his belief—and undoubtedly it is not—then he is an unbeliever and Motazili in the opinion of the traditionists. This is not the belief of anyone in the entire Muslim Ummah. So all are Motazilis and unbelievers. Why should then Abu Bakr Al Asam be singled out for label of Motazili and be disgraced."

Maulana Omar Ahmad Usmani says applying the principle explained by Imam Ibn Taimiya that every one in the Muslim Ummah is a Motazili. The word 'Motazili' has therefore lost all its venom. To try to disparage a person with that epithet is no longer rewarding. On the other hand it only amounts to confusing an issue.

It is said by Razi that Qazi Ibn Atiyya also favoured the equal *diyat* for woman. According to the orthodox definition of Ijma'a the claim of Ijma'a is, therefore, not valid. Such invalid claims have always been made by the scholars almost on every point on which there is difference of opinion and they are hardly worthy of any consideration.

It appears clear that in their Ijtihad about the *diyat* of women the Imams of the early centuries were influenced by the customary *diyat* of women which prevailed prior to Islam, the assumption about the evidence of a woman being half according to the Quran and the presumption that in matter of inheritance a woman's share is half that of male. These postulates received tremendous reinforcement from the concept of man being Qawwam or ruler over women. On each subject were current, traditions which were contrdictory to one another.

The Imams accepted those traditions which supported the above presumptions, even though they were declared by the

traditionists as weak. The express meanings of the Quran were held overridden by these traditions and the result is that woman is now equal to half of a man. This is the result of erroneous Ijtihad but no blame can attach to those great men whose ul-flinching efforts developed law and jurisprudence to such an extent that most of their theories and findings on hypothetical matters, and their rational thinking and logical approach on many a matters provide guidance to the Muslim thinkers of the twentieth century when the development in every field of knowledge is phenomenal. It further appears that what prompted their findings regarding women was latter's low intellectual position. During the period when the rate of literacy in the world of Islam was very high and there were large number of educational institutions even in small towns there were no such institutions for women, and female literacy was generally confined to a few lessons learnt at home to enable women to recite the Quran. The high education and calibre of the Imams and the insatiable hunger for knowledge of Muslim males during the early centuries of Islam could hardly inculcate in them a sense of intellectual equality with women closetted within the four walls of the harem from the time of Umayyads who neither had any education nor developed any keenness to acquire knowledge. Their small talk limited to domestic affairs or some family gossip could only be boring to their husbands, and other male members of the family. In rich and prosperous families number of slave girls with whom the male owners could have sexual relations must also have contributed the creation of feelings of jealousy and distrust and development of domestic quarrels which might have made the cleavage between male and female more pronounced. There was also no social organisation to take up cudgels on behalf of women, and, to make women conscious of their rights.

The conditions in the modern world are entirely changed. The strong information media including radio and television has

raised the intellectual level of children—male and female both—and increased their knowledge several fold. The female education in mixed as well as separate educational institutions helped in accelerating the potential of competition with men in women in every field of knowledge. Their I.o. Q., their memory and their zest for pursuit of knowledge in general is in no way inferior to that of males. In some cases their memory and intellectual achievements have been found remarkable. They are now scientists, medical practitioners, engineers, lawyers, judges, professors, teachers, artists, philosophers and what not. Now they are also bureaucrats and even ambrssadors. Those who had the opportunities to venture in the field of politics to become parliamentarians proved their mettle in such positions of trust. Some held the office of Ministers. As Prime Ministers they turned out to be successful politicians, and administrators. Rather they displayed that they could rule more confidently than men and could fulfil the aspirations of their countrymen. The art of cross-examiuation of witnesses proved them to be as good and reliable witnesses as men. All the old theories of the religious scholars against women have been proved erroneous by the women of this age.

For maintaining the status of a despotic ruler over the family it is said by the scholars that men have to bear the express of the women whose duty is only to attend to domestic affairs and bear children. This is not true in the modern age. In the villages the women in addition have to work on the farms and fields, take meals to the male members of the family in far off fields, tend the cattle and also graze them. They work more than their men for only a few clothes to cover their body and for the left over in food. The cream is for the men and almost nothing for her. In addition she has to bear the tyranny of the father, brothers, husband and sometimes even sons. Such is the life in villages and no religious scholar has ever raised a voice against this social injustice. In the urban areas the women do

not fare better in the poor section of the population. Among the middle class educated people women have to work to improve the economic condition of the family and do some job. In the West every member of the family whether male or female, Muslim or non-Muslim has to be an earning member of the family to make two ends meet. This claim of the scholars is also not correct. And yet the evidence of women in most matters is considered half, and in Hudood is inadmissible; their *diyat* is treated half of that of men though their blood is equal to their blood, and they are considered intellectually and in religious matters deficient.

The Quran is very specific that *diyat* shall be paid in *Qatle Khata* of *momin* and *muahid* (believer and unbeliever with whom there is a contract). Despite so many traditions to the contrary published in the six classical books of Hadith, the Hanafis hold that (1) in view of the similarity of language regarding the *diyat* of both, there can be no discrimination between them and (2) the traditions to the contrary are unreliable, but they disregard the similarity of that language for women on account of some weak traditions which are not even published in the classical books of traditions and many other books. They also ignore authentic traditions. Others ignore the clear language of the Quran even in respect of the *diyat* for unbelievers. All agree that the *diyat* for slaying of a child in the womb is the same whether the child be a male or a female but if the female child is murdered soon after birth her *diyat* becomes half of that of a male child similarly placed. It is also agreed that the *diyat* of a slave or slave girl is equivalent of his/her price.[1] Imam Malik adds that it will be according to the price even though it be one hundred thousand Dirhams.[2] In this principle also there is no discrimination between a male slave and a female slave. These double standards cannot be upheld.

1. *Al Mughni*, Vol. 9, p. 534.
2. *Al Mudawwina*, Vol. 6, p. 397.

The clear and logical answer to the question about the *diyat* of a woman should be that it is the same as that of a man and discrimination is not justified on any ground whatsoever.

A question was posed by the Government, whether assuming the *diyat* of woman to be half of the *diyat* of man, the same can be increased by way of *ta'azir* or any other principle so as to become equal with the *diyat* of man. One example of the increase in *diyat* is of the commission of murder within the precincts of Haram (when it is completely prohibited). The Hanafis do not agree with this but the Shafe'is hold that it should exceed by one-third. Another is a juristic opinion of Jamaluddin Qasmi who keeping in view the ttaditions about the lesser *diyat* of an unbeliever, held that it is half that of a Muslim but it should be equated with that of a Muslim as a measure of kindness, benignity and grace. In the meeting of the scholars arranged by Maulana Muhammad Matin Hashmi, Editor of *Minhaj*, it was unanimously resolved that on the principle enunciated by Jamaluddin Qasmi it should be left to the courts to impose in case of murder of women (*Qatle Khata*) in addition to the *diyat* equivalent to half the *diyat* of man, fine *inter alia* to equate the *diyat* of men and women.[1] This is the same solution which had to be found out in respect of the evidence of woman under the Evidence Act in the previous shoora. It is provided there that the Judge may decide on the evidence of two men or two women and one man, but if necessary he can also decide on the evidence of one woman alone. This is a *via media* which is the consequence of the stiff stand taken by women organisations of the country. In Egypt, however, the law based on equality of believers and unbelievers, men and women has been enforced. Reference has already been made to the opinions of Abu Zuhra, Ali Ali Mansur and Sheikh Shaltut in favour of equality of men and women, in matter of *diyat*. In order to determine *inter alia*

1. *Minhaj Quarterly*, Haisiat Niswan Number, Part I, pp. 219, 221.

this issue a high powered Committee of the following was set by the Government of Egypt:—

Permanent Members

1. Sheikh Jad al Haq Ali Jad al Haq, Mufti Azam (the Grand Mufti).
2. Professor Ahmad Hasan Heikal, Judge Supreme Court and Adviser to the Government.
3. Professor Dr. Muhammad Anis Ubada, Professor of the Faculty of Sharia and Law, Al Azhar University.
4. Justice Syed Abdul Aziz Hindi, Judge of the High Court.
5. Professor Dr. Ahmad Fathi Sarwar, Professor of Criminal Law, Faculty of Huqooq, Cairo University.
6. Justice Salah Younus, Judge and Vice-President, High Court.
7. Professor Dr. Jamaluddin Mahmud, Secretary-General, Supreme Council of Islamic Affairs and Judge of the High Court.
8. Professor Muhammad Rafiq Bastaweesi, Professor of Sharia in the Faculty of Huqooq, Cairo University.
9. Professor Masood Saadadi, General Secretary, High Court.

Associate Members.

10. Professor Dr. Muhammad Din Ewaz, Vice-President, Mansurah University.
11. Professor Dr. Abdul Aziz A'amir, formerly Professor of Islamic Law, Cairo University.
12. Professor Dr. Muhammad Saeed Abdaba, Dean Faculty of Sharia and Law, Al Azhar University.
13. Professor Dr. Tantawi, Professor of Sharia, Faculty of Huqooq, University of Ain Shams.

14. Professor Dr. Abdul A'zim Mersy Wazir, Assistant Professor, Law of Torts.
15. Dr. Taimur Fauzi Mustafa Kamil, Member and Advisor to the Parliament.
16. Professor Muhammad Al Jery, Wakil Vizarat in Parliament.
17. Professor Shybil Al Syed Badwi, incharge Technical Research, Parliament.

This high powered Committee produced a bill which has been presented to the Egyptian Parliament. The bill in its S. 212 fixed four thousand two hundred fifty grams of pure gold as the *diyat* of man, woman, Muslim and non-Muslim alike. In column 2, p. 223 of the Book of Law is the explanation that for fixing the *diyat* of non-Muslims the Hanafi view had been preferred but for fixation of the *diyat* of women the view of Ibn Ulayya and Al Asam had been adopted because the Prophet pbh said : the *diyat* for life of Muslim is equivalent to one hundred camels. It is thus parliamentary Ijma'a of Egypt in respect of *diyat* of women, and sets a worthy and imitable example for other Muslim states.

FAMILY PLANNING AND ABORTION

The question of vires of the family planning vis-a-vis the Quran and the Sunnah of the Prophet pbh has assumed importance in Pakistan because of the apprehension that by the year 2000, the population of the country may be doubled and the means of production may become insufficient to cope with the increasing demand *inter alia* of food products. This question is relevant in the subject under consideration because of the problem of the health of women. One of the grounds on which Imam Ghazali justified birth control is the maintenance of health and beauty of women. It is with this end in view that the subject requires detailed consideration.

Birth control was not unknown to the Arabs in the time of ignorance. They practised generally *'Azl* (عزل *coitus-interruptus*). *'Azl* means 'he put it or set it apart, away or aside ; removed it or separated it (a thing from another thing or things) meaning when he did not desire her (having) offspring.[1]

عزله عن العمل و عزله means separated or removed him from the work عزل means he separated. واذا عزلتموهم in verse Q. 18 : 16 means 'And when you withdrew from them.' The phrase فاعتزلو النساء in connection with menstruation means in verse 2 : 222 'keep away from the women.'[2] In the context of family planning the word *'Azl* means to separate during coitus before seminal discharge in order to evade pregnancy. Ibn i Aseer defines it[3] يعنى عزل الماء عن النساء حذرالحمل. It conveys the same sense.

The question which arises is whether *'Azl* or any other method of family planning is repugnant to the Holy Quran or

1. *Arabic English Lexicon* by Lane.
2. *Lughat ul Quran* by Parvez, Vol. 3, p. 1158.
3. *Al Nihaya fi Ghareeb il Hadith*, Vol. 3, p. 230.

the Sunnah of the Prophet pbh. This will require consideration of the following questions:

(1) Does the Quran provide any guidance in respect of family planning or planned parenthood?
(2) Does Hadith provide any guidance in this respect?
(3) If it is permissible, are there any guiding principles to regulate it or is the permission subject to any condition?
(4) Do the conduct or the opinions of the Companions of the Prophet pbh justify it.

The Quran

It is a well known fact that the Quran does not as such permit or prohibit family planning. However the interpretation of two verses by some commentators provides justification for avoiding the birth of children. It is provided in Surah Nisa:

وآتو اليتمى اموالهم ولا تتبدلوا لخبيث بالطيب ولا تاكلوا اموالهم الىٰ اموالكم انه كان حوباً كبيراً

Q. 4 : 2.—Give unto orphans their wealth. Exchange not the good for the bad (in your management thereof) nor absorb their wealth into your own wealth. Lo ! that would be a great sin.

و ان خفتم الا تقسطو فى اليتمىٰ فانكحوا ما طاب لكم من النساء مثنىٰ وثلث و رٰبع فان خفتم الا تعدلوا فواحدة او ما ملكت ايمانكم ذالك ادنىٰ الا تعولو

Q. 4 : 3.—And if ye fear that you will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice.

The words ذلک ادنىٰ الا تعولوا mean that (you should not marry more than one wife) if you are afraid of failing in doing

justice. The other interpretation of this phrase is that (you should not marry more than one wife) if you fear you may be burdened with liabilities by having many children.

In view of this difference in the interpretation of these words it would be better to explain the different meanings of the word *aul or al'Aul* (عول العول). The word *Al 'Aul* is used for everything which burdens a man and he be squeezed under its weight. There is an idiom, ما عالک فهو عائلٌ لی which means that what burdens you is also burdensome for me. From the same origin is the word *'Aul* which means to do injustice by grabbing what is in excess of one's right. The words *Zalika adna al la t'aoulu* (ذلک ادنٰی الا تعولوا) in the Quran means that from this you will be saved from injustice.[1] The word *Al'aiyal* (العیال) means dependents whose maintenance is one's liability, or under the pressure of whose liabilities one is. *'Aalahu* (عاله) means he bore the burden of such an one's expenses. *Ibd'a bi nafsik summa bi man t'aoulu* (ابدا بنفسک ثم بمن تعولوا) means: First spend on yourselves then on those whose expenses you are liable to bear. *A'aal al rajul* (اعال الرجل) means that man had many children,[2] and also that he became a pauper.[3] In *Lughat ul Quran* both the meanings of the verse *Zalika adna al la t'aoulu* (ذالک ادنٰی الا تعولوا) are given, that is, those given by Raghib in *Almufradat* as already noticed regarding injustice, and the other that you may avoid the burden of having too many dependents.[4] In *Lissan ul Arab* the following interpretation is given :

> "*Zalika adna al la t'aoulu* has also been interpreted as meaning that you may not have many children. Al Azhari says that Imam Shafe'i adopted this meaning. It is well known among the Arabs that *'aala y'aoulu* mean to commit excess or injustice while the words *'aala y'aeelu* (عال یعیلو)

1. *Almufradat* by Imam Raghib, on the word *'Aul*.
2. *Almufradat, ibid., Lughat ul Quran* by Parvez, Vol. 3, p. 1212.
3. *Lughat ul Quran, ibid.*
4. *Lughat ul Quran, ibid.*

mean the abundance of offsprings but Kissai says that *'aala y'aoula* means to become pauper, while the eloquent among the Arabs use the words *'aala y'aoulu* within the meaning of many children. This supports the opinion of Imam Shafe'i. Moreover Kissai reproduces the same meaning which in Arab language are correct and in use. Imam Shafe'i is also an eloquent Arab and what he says is the last word."[1]

Ibn ul Aseer said :

"The words *ibdaa bi man t'aoulu* have been used in the Hadith about maintenance, which means 'begin with those who are your responsibility and whose maintenance is your liability and then give to others. It is said *'aal al rajul 'ayalohu* (عال الرجل عياله) which means to fulfil the requirements of food and clothes of those for whose maintenance you are responsible. Kissai said *'aal al rajul* means to have many children (dependents). The better language is *A'aala y'aeelu* (اعال يعيل) and from this it is said that one should fulfil the requirements of a girl if he has any and should educate her and spend on her."[2]

Qurtubi[3] refers to the interpretation of Shafe'i that the verse means 'do not add to your children.'

Ibne 'Aarabi[4] also refers to the same view of Imam Shafe'i. Mohammad Bin Jarir[5] reproduces the opinion of Ibn e Zaid, that the words *al la t'aoulu* mean *ahucana 'alaik fil 'ayaal* (اعون عليک في العيال) *i.e.* 'do not add to your dependents'. Al Suyuti[6] reproduces the opinion of Zaid bin Aslam in these words *'Zalika adna al la yaksiru min t'aoulu'* (ذالک ادنیٰ الا یکثرو من تعولوا)

1. *Lissan ul Arab* on the root word *'Aul.*
2. *Al Nihaya fi Gharib il Hadith.*
3. *Qurtubi,* Vol. 5, p. 21.
4. *Ehkam ul Quran,* Vol. 1, p. 314.
5. *Al Tabari,* Vol. 3, p. 161.
6. *Al Durrul Mansoor* by Suyuti, Vol. 2, p. 119.

which means that the number of such persons may not increase who may be your dependents. He then quotes from Sufyan bin Yu'ainia that *al la t'aoula* means *al la taftaqiru* (الا تفتقرو) *i.e.* that you may not turn pauper.

Qazi Abul Saud[1] referred to the same interpretation and added that the reduction of dependents is obtained by the principle that it is not necessary to seek permission of a bondmaid or concubine before practising *'Azl* (*coitus interruptus*) with her.

Rashid Raza writes :

"Some of the commentators adopted the meaning of excess of dependents for the word *t'aoulu* (تعولوا) because the phrase *'aal al rajul* (عال الرجل) is used in the Arabic language when some person undertakes the liability of another person and spends on him. The meaning of the verse, therefore, is that the number of your dependents may not increase."[2]

The Hanafi commentators mainly are inclined towards interpreting the phrase *Zalika adna al la t'aoulu* as meaning that it is nearest to you that you avoid injustice. They criticised the interpretation of Imam Shafe'i as contrary to Arab usage and idiom and some accused him of ignorance.

Those who differed from the interpretation of Imam Shafe'i are led by Abu Bakr Razi al Jassas[3] (980 A D), Qazi Abu Bakr al Arabi[4] (1148 A D) and Ibn al Kathir (1372 A D)[5] all of much later time.

Jassas said that according to the Arabists the basic sense that the word *'aal* (عال) connotes is to transgress the limits. If

1. *Tafseer i Abi al Saood*, Vol. 2, p. 143.
2. *Al Manar*, Vol. 4, p. 280.
3. *Ehkam ul Quran.*
4. *Ehkam ul Quran.*
5. *Tafseerul Quran ul Azeem.*

considered in terms of shares it would mean going beyond the prescribed fixed shares. If the word is understood to mean inclination it would convey the idea of deviation from justice. The word *Ta'aool* (تعول) means either when injustice is committed or evaporation takes place or a man becomes impoverished.[1] Jassas raised three objections against Imam Shafe'i.

He said that none of the earlier writers understood the verse in this meaning ; secondly philologists agree that the word is not used in the sense of excess of dependents ; and thirdly that the fear of having too many children would be the same for excess of concubines as for the excess of wives. But it is acknowledged by all exegists that the number of slave girls is not fixed.

Qadi Abu Bakr Ibn ul Arabi a famous exegist of the Maliki School first deals with the various meanings of the word *t'aoulu* and with various aspects of the verse (Q. 4 : 3), before advancing his own opinion. He said that the followers of Imam Shafe'i were charmed by the explanation given by him about this verse. They treat it authoritative because he was an Arabist, an acknowledged philologist. According to them the meaning of the verse is that if one is afraid of having too many dependents, he may marry only one wife. Shafe'i concluded from this verse that men have to provide sustenance for their wives. Those who supported him argued that if the word *'aal* (عال) is used in the sense of excessive inclination, it would be redundant because the number of wives, whether more or less, is no criterion for determining the question of inclination. This question is more relevant in regard to the quantum of liabilities and the capacity to discharge them. More wives would mean more liability. He laid a challenge that the word *'aal* carried seven meanings according to the Arabic dictionaries but 'dependent' was not one of them.

1. *Ehkam ul Quran* by Jassas on verse Q. 4 : 3.

Therefore the meaning given by Imam Shafe'i to the word was not correct.

Ibn al Kathir quotes from the Quran that Allah says that if you fear that you will not be able to do justice among more wives, then marry one. At another place He says : و لن تستطيعوا ان تعدلو بين النساء ولو حرصتم meaning that you will not be able to do justice between women even if you so wish; do not put yourself in trouble by inclining towards one only.

He then refers to another meaning which is adopted by some exegists. According to them *'Aiyal* means indigence. *wa in khiftum 'ailatun* (و ان خفتم عيلة) means if you are afraid of impoverishment. He cites the following couplet in which the word *yaeelu* (يعيل) is used to mean pauper :

ما يدرى الفقير متى غناه — ومايدرى الغنى متى يعيل (A pauper does not know when he will be rich, nor a wealthy person knows when he will become indigent) and says that when a person turns poor or pauper the Arabs say *'aal al rajul* (عال الرجل).

Ibn e Kathir then adds that this meaning does not suit the verse (Q. 4 : 3) under consideration because if the excess of women results in penury so can be the result of excess of concubines. The correct meaning is, therefore, that adopted by the majority that it would be nearest if you are spared from doing injustice.

Ibn e Kathir then cites some examples in which the word has been used as meaning injustice and proceeds to say that in the *Saheeh Ibn e Hayyan* there is a *marfu'* Hadith which interprets the expression under consideration as an order not to do injustice. Abu Hatem reports from Hazrat 'A'isha that she said that *la t'aoulu* means 'do not be cruel (unjust).' Hazrat 'A'isha, Imam Hassan, Ibn e 'Abbas, Mujshid, 'Ikrima, Abu Zareen, Nakh'ai, Sh'aabi, 'Ata Khurasani, Qatada, Maqatil bin Haban etc. held the same view. Ibn e Jareer also approved of this.

The commentators of the Quran in the Indian sub-continent seldom refer to the opinion of Imam Shafe'i. Pir Muhammad Karam Shah appears to be among the exceptions who have reproduced the opinion and interpretation of Imam Shafe'i on verse Q. 4 : 3.[1] The reason is that these commentators follow Jassas and Ibn e Kathir.

Various renowned exegists and commentators of the Quran refuted these objections. Alauddin al Baghave (1122 A D) said[2] that such objections came from those persons who themselves were not, well versed in Arabic. They raised objections for objections sake. Azhari in his book *Tahzib ul Lughat* gave the same meaning from Abdul Rehman bin Zaid bin Aslam. Kissai also said that *aal al rajul* is used for a man in financial distress. The word *aala y'aoulu* connotes in eloquent Arabic 'having too many children'. Azhari said after referring to the above-mentioned references that they reinforced and supported the view of Imam Shafe'i who was an eloquent Arabist and was an authority on philology. He cited Abu Hatem that Imam Shafe'i was more learned in philology than he.

Baghavi was very stern in his criticism of the critics of Imam Shafei for their 'recklessness' in raising objections without conducting proper research and investigation.

Zamakhshari (1144 A D) in his exegesis[3] wrote in defence of Imam Shafe'i that he considered *'aal al rajul 'ayalohu y'aoulohu'* like the words *manaaohum yamnaohum*[4] meaning he spent over them. The increase in the number of dependents adds correspondingly to the liabilities of providing sustenance for them which task is rendered more difficult. If the expenses on the maintenance of dependents increase his finances would be com-

1. See *Zia ul Quran* on the verse.
2. *Maalim ul Tanzil.*
3. *Tafseer ul Kashef.*
4. [illegible].

paratively affected and it would be harder for him to meet their increasing expenses, from honest earnings and to discharge his liabilities of providing sustenance by keeping himself within the limits of virtuous and upright conduct.

Zamakhshari paid tribute to Imam Shafe'i as a great scholar of Arabic who could not be expected to deliberately misinterpret a verse of the Quran. He refuted the objection that there is no difference in regard to the increase of the number of dependents since the number of concubines is not restricted like the number of wives which cannot exceed four. Zamakhshari pointed out that wives were meant for lineage while the object of having concubines was entirely different. This was the reason why their permission or consent was not required for practising *'Azl* with them.

The assertion is that fewer children will be born to him. In the case of concubines there is thus lesser reason to fear. In the case of wives fear is lesser with one, than with two, three or four. Zamakhshari also pointed out that Imam Shafe'i had given a meaning which was metaphorically implied.

Some of the other commentators also adopted the same view. They were Imam Sherbini (1569 A D),[1] Imam Abi Barkat Nasafi[2] (1310 A D) and Abi as Saoud[3] (1574 A D). The refutation by Imam Fakhruddin Razi (1210 A D)[4] is more vigorous. He dealt with the subject more comprehensively than others. The three objections of Jassas have already been noticed. Dealing with his first point that no other, writer earlier or later, interpreted the verse like Imam Shafe'i he said that Taous recited the verse as '*Zalika adna al la t'aeelou*[5] which means this is nearer that you do not have many children'. The

1. *Tafseer ul Siraj ul Muneer* by Muhammad al Khatib Sherbini.
2. *Tafseer ul Nasafi.*
3. *Tafseer ul Irshad ul Aql al Saleem.*
4. *Tafseer ul Kabir.*
5. ذالک ادنیٰ الا تعیلو

earlier scholars accepted the recitation as correct. The adoption of the same meaning of the verse was more likely. Imam Razi termed the above objection of Jassas as based on sheer ignorance. He made an alternative point that it is not a fault or something objectionable to make out a new point or to discover a new dimension for it. Imam Shafe'i did not contradict the earlier exegists. He gave a new dimension to the verse which only a blind imitator or follower can resent. From what follows it would be clear that according to Razi not to have too many dependents is the means to avoid injustice as envisaged in the verse.

Regarding the second objection he said the same thing as Zamakhshari that the explanation of Imam Shafe'i is not literal but is based on what is implicit in the text and is metaphorically conveyed by it. He gave examples from Arab idioms and usage to prove how the literal sense was avoided, and the metaphorical sense which the language conveyed was preferred. He established that undertaking of too many liabilities which one is not able to discharge is itself injustice. Having too many dependents involves injustice. Shafe'i has thus clarified what injustice and excessive inclination would imply in case one married more than one wife.

Razi adopts yet another argument of Zamakhshari that excess of dependents may compel a person to deviate from the righteous conduct and honest earnings because it is difficult to bear the expenses of too many dependents from money earned through honest means.

The third contention of Jassas was that the verse or for the matter of that Sharia does not restrict the number of concubines which a man may have at a time. The fear of having more children or more dependents in either case should be the same whether a person possesses slave girls or marries more than one wife. In reply to this Razi relies upon the answer to that

objection given by Imam Qaffal that the pressure of liability can be reduced by making the slave girls earn money by working and their earning would naturally go to the master. A free woman on the other hand cannot be forced by the husband to earn money by labour because he himself is bound to maintain her. The consideration for interpreting the verse can be only of a wife and not bondsmaid.

Razi marks another distinction between a wife and a slave-girl. The master can sell out the latter and thus reduce or get rid of his responsibilities in respect of her. But he cannot achieve the same end by divorcing a free woman since he is bound to pay her dower. Jurjan author of *Al Nazm* was also a critic of Imam Shafe'i on the ground that any condition in the nature of restraint or permission must have nexus with the object of the verse. This principle can avoid any possible contradiction between the verse and the condition to which the restraint or permission therein is subject. The object of verse Q. 4 : 3 is disclosed by the phrase *Fa in khiftum al la t'aadilu fawahidatan* (فان خفتم الا تعدلوا فواحدة) which means that 'If ye fear that ye cannot do justice' (to so many) then one (only). 'In order that nexus be maintained between the object which is the fear of not being able to do justice the resultant portion of the verse must also relate to injustice and not to economic constraints or hardships.

Razi replies to the line of the answer given by Al Kazi that if *t'aoulu* is taken to mean injustice it would be a needless repetition of that term. By the exegesis of Imam Shafe'i the objection about repetition is removed.

Razi's own reply to the objection is the same as already noticed that assuming the principle relied upon by Jurjan to be true its violation is not involved in the interpretation of Imam Shafe'i because what he said is not the literal translation of the verse but it only amounted to bringing forth what was implied in it.

Qurtabi (1272 A D)[1] refuted the objection of Qazi Abu Bakr ibn ul Arabi that the word *'aal* is used in only seven meanings in the Arabic language; and 'dependents' is not one of those meanings. Another critic to the same effect is Thaalibi who also alleged that this meaning was given to the word by Imam Shafe'i only.

Qurtabi controverted the plea on the ground that Imam Daa'r Qutni in his *Sunnah* had mentioned that the same meaning was preferred by Zaid bin Aslam and Jabir bin Zaid, who belonged to an era earlier than that of Imam Shafe'i. Thaalibi and Ibn ul Arabi both were in error that Imam Shafe'i was the pioneer in introducing the said meaning. Qurtabi mentioned four other usages of the word *'aal* in addition to the seven enumerated by Ibn ul Arabi. He said that the sense relied upon by Imam Shafe'i had the support of famous philologists of the calibre of Imam Abu Umar Doori, Imam Kissai and Ibn ul Eirabi. According to Imam Kissai Arabs used the word to mean too many dependents. This was so stated by Ibn ul Eirabi too.

Talha bin Muarrif is stated to have recited the verse in a manner as to give it the meaning: 'you will be saved from having too many children'. The recitation is an argument in support of Imam Shafe'i.

Qurtabi referred to Ibn Atiyya who refuted the objection of Zujjaj (which was the same as the third point of Jassas) about the limitlessness of the number of slave girls, but held it to be unjustified on the ground that the slave girls were like property and could be sold out. The danger of too many children arose from wives only.

Ibn ul Hayyan Undlusi (1345 A D) in his commentary *Nahr ul M'aad*[2] which is an abridgement of his larger work[3] pre-

1. *Tafseer ul Jama li Ehkam il Quran.*
2. *Al Nah rul M'aad.*
3. *Al Bahr ul Muheet.*

ferred the meaning adopted by Imam Shafe'i and in his large work *Al Bahr ul Muheet*, after considering the objections against that interpretation gave the same answers as given by Imam Fakhruddin Razi, Zamakhshari and Qurtabi.

Nizamuddin al Qummi al Neshapuri (1327 A D)[1] supported the views of Zamakhshari and said that the accepted meaning of '*La taoulu*'. '*La taeelu*' and '*La taj'aru*' (avoid injustice) is a metaphorical reference to the excess of dependents because by the increase in their number the chances of inclining to one side and doing injustice will increase.

Imam Baidawi (1388 A D)[2] sustained Imam Shafe'i because his explanation was based upon the metaphorical sense implied in the verse.

This was quoted with approval by Qazi Sanaullah Panipati (1810 A D).[3]

Imam Shaukani (1834 A D)[4] pointed out that scholars of the position and calibre of Zaid bin Aslam, Jabir bin Zaid and Imam Shafe'i could not interpret a verse of the Quran without support from philology.

Nawab Siddiq Hasan Khan (1889 A D),[5] after quoting Shaukani and Fakhruddin Razi dismissed the objections as the outcome of ignorance and foolishness.

Allama Muhammad Jamaluddin Qasmi (1913 A D)[6] upheld Imam Shafe'is interpretation and observed that with a limited number of dependents one can live a life of contentment within his means and is not driven to injustice.

1. *Gharaib ul Quran wa Raghaib ul Furqan.*
2. *Tafseer i Anwar ul Tanzil.*
3. *Tafseer ul Mazhari.*
4. *Tasfeer i Fath ul Qadeer.*
5. *Tasfeer ul Bayan.*
6. *Mahasin ul Taaweel.*

Abdul Karim Khateeb[1] connects the two interpretations of sexcess of injustice and of children to establish their identical nature. *'Aul* also means increase or excess which may be of injustice, children or (in requirement of) maintenance. The excess of either would cause an accretion of needs and consequently of poverty.

The meaning of the words *t'aoulu ay taflaqiru* (you become poor) is also attributed to Imam Sufyan bin Uy'aina and Imam Shafe'i. Suyuti[2] writes that Abu Hatim quoted Sufyan bin Uy'aina for the meaning : 'Thus you will be saved from hunger and poverty.'

Abu Hayan al Undlusi quotes similar meaning from Imam Shafe'i in his commentary of the Quran.[3] According to him Imam Shafe'i indicated the meaning of *al la taflaqiru*. Thus you will be saved from becoming penniless because the increase in wives and children must result in relative poverty and ultimately in injustice.

As already noticed Ibn e Kathir also reported the meaning of poverty. Jassas, Imam Razi, Kazi Ibn ul Arabi, Qurtabi, Shaukani and Nawab Siddiq Hasan Khan gave the same meaning.

Makhdoom Ali Mohaini (1431 A D)[4] combined economic constraint which would be the result of wedding more than one wife with the usurpation of the property of orphans which is the subject-matter of verses Q. 4 : 2 & 3.

وآتو اليتمى اموالهم ولا تتبدلو الخبيث بالطيب ولا تاكلو اموالهم الىٰ اموالكم انه كان خوباً كبيرا

Q. 4 : 2.—Give unto orphans their wealth. Exchange not the good for the bad (in your management thereof)

1. *Tafseer ul Quran ul Karim.*
2. See *Tasfeer ul Durrul Mansoor.*
3. *Tafseer ul Bahr ul Muheet.*
4. *Tafseer Tabseer ul Rahman.*

nor absorb their wealth into your own wealth. Lo! that would be a great sin.

و ان خفتم الا تقسطوا فی الیتمی فانکحوا ما طاب لکم من النساء مثنی وثلث و ربع فان خفتم الا تعدلوا فواحدة او ما ملکت ایمانکم ذالک ادنیٰ الا تعولوا

Q. 4 : 3.—And if ye fear that you will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that you will not do injustice.

The reason for the revelation is clear from these verses. It was customary among the Arabs that after the death of the father, the property of the orphan children was taken in possession by his near relatives. They did not return the property to the orphans even after the attainment of puberty by them. They would appropriate their fine cattle to their use and give in exchange to the orphans lean cattle of little value. Some times they would absorb their property with their own and misappropriate the whole of it under the excuse of its proper administration. Hazrat 'A'isha clarified the third verse in the same context that sometimes these guardians would marry the orphan girls in order to embezzle their property and would neither pay or fix proper dower nor would fulfil their obligations towards them after the marriage. These two verses are meant to restrain such marriages and suppress misappropriation and embezzlement of the minor orphan's property.[1]

Makhdoom Ali Mohaini probably on the principle of Isharat ul Nas[2] also reduced the number of slave girls to one on the analogy of the number of wives. He said that by keeping

1. *Zia ul Quran* by Pir Muhammad Karam Shah.
2. Meaning derived indirectly from connotation or suggestion.

one wife or 'one slave girl' one will be saved from having too many dependents so that contentment is available to him, and he would not thereby be compelled to usurp the properties of orphans.

Allama Alusi (1853 A D)[1] refers to the meanings of the word *'aal* (عال) given by some lexicologists. They are *mala* (مال to incline), *jara* (جار commit injustice), *iftaqara* (افتقر to become poor), *kasurta 'aiyaloha* (كثرت عياله to increase his dependents), *mana* (مان to stock provision). *Anafaqa* (انفق spend) and (*Aajaza* اعجز to disable or to be deficient). After reproducing the criticism against Imam Shafe'i he refers to *Mufradat* by Raghib in which the basic meaning of the word *'aul'* is *thiql* (ثقل burden). From this point *'aal* would mean "he bore the burden of maintenance." Such burden can be felt if the expenditure be heavy. *La t'aoulu* لاتعولوا would mean to save from the excessive burden of maintenance. And the greater the number of dependents, the greater would be the burden of maintenance.

Abu Zahra (1973) one of the greatest jurists of the modern age discussed the conditions under which only one wife can be taken. He agreed with the view of Imam Shafe'i.[2]

A Hadith is reported in the *Sahih* of Ibn Abi Hatim. It is reported from Hazrat 'A'isha that the verse *Zalika adna al la t'aoulu* (ذالک ادنیٰ الا تعولوا) was interpreted by the Prophet pbh as meaning avoidance of injustice.

It has already been noticed that Ibn Kathir referred to this interpretation of Hazrat 'A'isha. He called it *marfu'*.[3] The tradition is not reported in any of the six canonical books of Hadith. Ibn Abi Hatim refers to a statement by his father that

1. *Rooh ul Ma ani*, Vol. 4, p. 197.
2. *Al ahwal ul Shakhsia*, 3rd edition published Egypt, Dar ul Fikr al Arabi, p. 95.
3. Tradition traceable to the Prophet.

those who reported this tradition with a link upto the Prophet pbh are in error. It is related only upto Hazrat 'A'isha and is *mursal*.[1]

It would appear that in substance there is no contradiction between the two points of view, though on account of the doctrine of *taqlid* (following opinion of another person without knowledge of the authority for it) the Hanafis do not accept the elaboration by Imam Razi, Zamakhshari or Qurtabi. There is consensus that the permission for polygyny or plurality of wives is subject to the condition of *'Adl* (عدل) or justice. There is also unanimity on the point that if one fears that he will not be able to do justice he can marry only one wife. According to this view *'Adl* is maintenance of equality between wives in matters of maintenance and sleeping with them, since in matter of love and affection the maintenance of equality between wives is not possible. Allah says ولن تستطيعو ان تعدلوا بين النساء ولو حرصتم (You will not be able to deal equally between your wives, however much you wish Q. 4 : 129). Those who confine the meaning of the word *aal* to justice, consider it sufficient that justice be related to the distribution of the existing means between the wives, whether two or more.

The supporters of Imam Shafe'i interpret justice widely so as to include in it the sufficiency of means to maintain more than one wife and their children. The principle which they urge is that undertaking liabilities which cannot by satisfactorily discharged is a negation of justice. Marriage burdens man with liability of the maintenance of the wife as well as children, who may be born out of the wedlock. A man having means to maintain one wife and her children only cannot marry another *wife* and add to his liabilities which he cannot obviously discharge. Multiplication of liabilities which he cannot discharge is doing injustice to all his dependents, present as well as future. Income being the same, multiplication of responsibilities would

1. Disconnected tradition.

cause reduction in the amount of maintenance of the dependents. The graph of per capita distribution shall go on falling and once it falls below the subsistence level it will make each member of the family indigent.

The question whether this ground is sufficient for restricting people to monogamy shall come up later for consideration. But one thing is significant in all the discussion about the meaning of *al 'la taoulu* (الا تعولوا). According to a large number of the renowned exegists, thinkers and jurists it is permissible to take steps against the increase in the number of dependents including children. The interpretation controverts and refutes the fatalism of those who oppose family planning. The interpretation of Imam Shafe'i justifies family planning by restricting oneself to one wife and thus avoiding the birth of unwanted children who may upset his prosperity and financial credibility. If the objective of having fewer children is achievable by this device, there is no reason why that objective may not be achieveable by use of other devices provided they are not prohibited.

Some of the Companions of the Holy Prophet pbh justify *'Azl* (*coitus interruptus*) on the basis of verse Q. 2 : 223.

نساؤكم حرث لكم فاتو حرثكم انى شئتم

Q. 2 : 223.—Your women are a tilth for you (to cultivate), so go to your tilth as you will.

The opinion that the justification for *'Azl* is established from this verse is attributed to Ibn Abbas, Abdulla bin Omar and Zaid bin Thabit.

Zaid bin Thabit was questioned about the lawfulness of *'Azl* and he interpreted *anna sheitum* (انى شئتم as you will) as meaning :"If you wish you may saturate her or keep her thirsty" (at the end of the act of coitus.)[1]

1. *Tafseer ul Durr ul Mansur* by Suyuti; *Tafseer ul Fath ul Qadir* by Shaukani; *Tafseer Jami ul Bayan* by Tabari; *Tafseer Gharib ul Quran* by Neshapuri; *Tafeer Mafatih ul Ghaib* by Razi.

The opinion of Ibn 'Abbas is quoted by Suyuti.[1] According to him it was also quoted by Waki, Ibn Abi Sheba, Ibn Munis, Abd bin Humaid, Ibn Jarir, Ibn ul Munzir, Ibn Abi Hatim, Tabrani, Hakim, Ibn Marveh and Zia in their books.

According to Suyuti[1] the opinion of Ibn Omar is quoted by Waki and Ibn Abi Sheba. Jassas said that Imam Abu Hanifa also related the opinion of Ibn Omar and Ibn 'Abbas. Imam Muhammad al Shebani reproduces this opinion Ibn Omar.[2]:

> "Abu Hanifa informed us on the authority of . . . . Abi Zara'a who related it from Ibn Omar that he was questioned about the (interpretation of) the verse that your women are a tilth for you, so go to your tilth as you will. Ibn Omar said, if you want to practise, *'Azl* you may do so; if you do not want to practise it, do not do so. Mohammad said that he also held the same view and so is the opinion of Abu Haneefa.

This interpretation of the verse by Ibn 'Umar is accepted by Imam Abu Hanifa and Imam Mohammad.

This same interpretation of Verse Q. 2 : 223 is also attributed to Said bin Musayyeb and has been reproduced by Tabari, Khazin, Ibn Jawzi and others.

These two verses of the Quran, one (Q. 4 : 3) as interpreted by Imam Shafe'i and a large number of commentators of the Quran, many of whom are acknowledged scholars of great renown, and the other (Q. 2 : 223) as interpreted by some Companions of the Holy Prophet pbh and approved by Imam Abu Hanifa and Imam Muhammad, amply justify family planning. It is true that there is no direct verse concerning the subject but what has not been directly stated is indirectly communicated. There is, however, sufficient material in Hadith, *Aasar* and the weighty opinions of great jurists.

1. *Tasfeer ul Durr ul Mansoor*, on versas 2 : 223.
2. *Kitab ul Aasar* by Imam Muhammad (Quran Mahal, Karachi), p. 170.

Hadith

(1) It is reported from Abu Saeed Khudri that a person came to the Prophet pbh and said that he had a slave girl with whom he practised *'Azl* (*coitus interruptus*). He desired from her what other men desired (from women) but he did not like her to conceive. The Jews said that *'Azl* was only a form of burying alive. The Prophet of Allah said that the Jews were liars. If Allah wished to create any member of his creation none could prevent it.[1]

(2) It is reported by Jabir that a person came to the Prophet pbh for advice that he had a slave girl who served him and managed his affairs. He visited her but did not like her to conceive. The Prophet pbh told him to practise *'Azl* but added that he must bring forth what was destined.

After some time that person returned and said that his girl had conceived.

The Prophet pbh reminded him that he had already acquainted him that she must bring forth what was destined.[2]

(3) It is reported from Saad bin Malik that someone came to the Prophet pbh and said that he practised Azl. The Prophet pbh asked him the reason. He replied (that he practised it) on account of fear of (birth of) child. The Prophet pbh said that it did not matter. It (the practice) did not cause any harm to the Romans and the Persians.[3] This principle is laid down more clearly in the next Hadith.

(4) It is reported from Saeed bin Abi Waqqas that a person came to the Prophet pbh and said that he practised *'Azl* with his wife. He enquired from him why did he do it. The man replied that he was afraid of children. The Prophet pbh observ-

1. *Musnad*, Vol. 3, p. 51; *Abu Daud*, Chapter about *'Azl*, Dar ul Kutub *Beirut*, Vol. 1, p. 338.
2. *Muslim* Sharh Nawawi, Dar ul Fikr, Beirut, Vol. 10, p. 13.
3. *Musnad*, Vol. 5, p. 203; *Muslim*, Sharh Nawawi, Vol. 10, p. 17.

ed that if the act had been harmful it would have caused harm and damage to the Persians and the Romans.[1]

(5) It is reported by Ishaq from Sufyan from 'Amar from 'Ata from Jabir that they practised *'Azl* (*coitus interruptus*) during the time of the Prophet pbh and the Quran was being revealed. Ishaq said that Sufyan added "if it were something to be prohibited Quran would have stopped us from it."[2]

(6) It is reported from Jabir that we practised *'Azl* during the lifetime of the Prophet pbh. This (information) reached the Prophet pbh but he did not prohibit us.[3]

(7) Hazrat 'Omar is reported to have said that the Prophet pbh prohibited the practice of *'Azl* with one's wife without her permission.[4]

(8) It is reported from Abu Saeed Khudri, "we received slave girls (captives), we practised *'Azl* with them, and asked the Prophet pbh about it." He asked thrice, "why do you do it if one is destined to be born till the Day of Judgement, he shall be born."[5]

(9) It is reported from Abu Saeed Khudri, "we received captives in the battle of Hunain. We practised *'Azl* with them. We intended to return them on ransom. Someone asked us what we were doing when the Prophet of Allah pbh was amongst us. I then asked the Prophet pbh. He said, "not every water can produce a child. If Allah wishes to create a child who can prevent it."[6]

1. *Muslim Sharh Nawawi*, Vol. 10, p. 10.
2. *Musnad Ahmad bin Hanbal*, p. 309 ; *Fath ul Bari*, Vol. 9, p. 305, Dar al Fikr, Beirut. Also see *Saheeh al Muslim*, Egypt, Muhammad Fuad Edition, Vol. 2, p. 1065.
3. *Muslim, Sharh Nawawi*, Vol. 10, p. 14.
4. *Al Musnad*, Vol. 1, p. 31.
5. *Fathul Bari*, Kitab ul Nikah, Vol. 9, p. 305.
6. *Almusnad*, Vol. 3, p. 49.

(10) Anas bin Malik said that a person came to the Prophet pbh and inquired about *'Azl*. He said, even if you throw the water with which child is born, on some stone Allah will create whatever soul is destined to be born.[1]

(11) It is reported from Abu Sarmad Almazni and Abu Sa'eed Khudri: "We received captive women in the battle of Bani Mustaliq. This was the battle in which Hazrat Jawairya was received by the Prophet pbh. Some among us wished to make them their slave girls while others wished to enjoy and then sell them. We talked among ourselves about practising *'Azl*. It was then mentioned before the Prophet pbh. He was pleased to observe : 'there is nothing on you in the practice of *'Azl* because Allah has already destined whoever is to be born till Resurrection.[2]

(12) It is reported from Abu Sa'eed Khudri that we enquired from the Prophet pbh about a person who practises *'Azl* when he visits his slave girl because he does not wish her to be pregnant or visits his wife whom he does not wish to conceive. The Prophet pbh observed, 'It does not matter if you do not practise it. It is destiny (which must prevail).'[3]

(13) It is reported from Ma'ad bin Sa'eed that he asked Abu Sa'eed Khudri whether he ever enquired from the Holy Prophet pbh about *'Azl*. He replied in the affirmative and said: "We asked the Prophet about *'Azl*. He enquired what it was. We informed him that if somebody's wife has a suckling child and he visits her but does not wish her to conceive, he then practises *'Azl*; or he has a girl slave and no property and when he visits her he practises *'Azl* with her because of his dislike of her

1. *Musnad*, Vol. 3, p. 140.

2. *Muslim, Sharh Nawawi*, Dar al Fikr, Beirut, Vol. 10, p. 9, *Saheeh Sunan ul Mustafa*, Dar al Kitab, Beirut, Vol. 1, p. 338.

3. *Sunan al Darmi, Nashrul Sunnah*, Multan, Vol. 2, p. 72.

conception. The Prophet pbh said: It does not matter if you do not do it. It is destiny."[1]

(14) It is reported from Abu Sa'eed that the subject of *'Azl* was mentioned before the Prophet pbh. He asked : 'why do you do it (and did not say do not do it) because whoever among the creation is destined to be born shall be born."[2]

(15) Jabir bin 'Abdullan reported that a person came to the Prophet pbh and said that he had a slave girl with whom he practised 'Azl. He said that the device cannot circumvent the will of Allah. That man came again and said that the slave girl whom he mentioned earlier, was pregnant. The Prophet said that he was the slave of Allah and His Prophet pbh.[3]

(16) It is reported from Hazrat 'A'isha who reported it from Juzama bint e Wahab ul Asadiya who was one of the first migrants, that she heard it from the Prophet pbh who was asked about *'Azl* that it was *waad ul khafi* هو واد الخفی (secret burial of a living person).[4]

It is significant that in Tradition No. 1 there is strong refutation of the Jewish concept that *'Azl* or *coitus interruptus* amounted to infanticide by burying the child alive. This amounts in the context of the tradition to specific permission to practise that recognised form of family planning.

In Tradition No. 2 there is a direction to practise *'Azl* and not simply a specific permission although reference is also to destiny.

The Prophet's pbh reply in Traditions Nos. 3 and 4 amounts to specific permission on the ground that *'Azl* was a harmless device. Same is the effect of Tradition No. 7 reported from

1. Musnad, Vol. 3, p. 68.
2. *Saheeh Suman al Mustafa*, Vol. 1, p. 338.
3. *Muslim Sharh Nawawi*, Dar al Fikr, Beirut, Vol. 10, p. 10.
4. *Musnad*, Vol. 5, p. 36.

Hazrat 'Omar which means that *'Azl* can be practised with the permission of the wife only.

Traditions Nos. 5 and 6 imply permission of the innocuous device. These seven traditions are important as they contain either express permission or direction or permission can be implied from them.

Traditions Nos. 8 to 10 emphasise rather strongly the role of destiny in the creation or birth of the child, but they do not prohibit the practice. Traditions Nos. 11 to 15 lay stress upon destiny but lightly. There are two cases in which what the Prophet pbh observed about the birth of the child and destiny proved true. The female partners conceived despite the practice of *'Azl*.

One thing is important to note that in none of these traditions is there any denunciation or prohibition, express or implied of the prevailing practice of *'Azl*. The only tradition bearing this characteristic is Tradition No. 16, which specifically contradicts the principle of Tradition No. 1. It is clear from Tradition No. 1 that the Jews condemned the practice of *'Azl* as infanticide by burying alive but the Prophet pbh held this concept in the strongest possible language to be based on complete falsehood, but in Tradition No. 16 words are attributed to the Prophet pbh which support what the Jews said. It is this last mentioned tradition which is the sheet anchor of those who are opposed to family planning.

The argument of those who oppose birth control is that the words *al wad ul khafi* (الواد الخفی secretly burying alive) in the Hadith of prohibition have reference to the verse in the Quran: *wa izal mauudato soailat* (واذا لمؤدہ سئلت). And when the girl child that was buried alive is asked). This Hadith, it is argued, abrogates all the traditions about *'Azl* which permitted, expressly or impliedly, the practice.[1] Hassan Basri was of the view that the

1. *Zad ul M'aad* by Ibn e Qayyam, Beirut, Vol. 4, p. 16.

traditions in which the emphasis is on destiny (لا عليكم ان لا تفعلوا meaning it does not matter if you do not practise it) are in the nature of rebuke, because the object of marriage is progeny.[1]

It is generally held that the authentic traditions permit the practice. The Hadith of Juzama is held to be unauthentic for various reasons. Some say it is abrogated by the traditions about permission. Some of those who consider it unauthentic argue : how is it possible that after denouncing the Jews as liars, the Prophet pbh should himself say what the Jews said about *'Azl*. This would amount to confirming what he himself belied.[2] Moreover these crucial words are not there in *Abu Daud*, *Tirmizi*, *Ibn-e-Maja* and *Nassai*.[3]

Tahavi treats the Hadith of Juzama to be the earliest in time and to be based on Jewish notions. It was the practice of the Prophet pbh to follow the Jewish practice in matters in which he received no revelation. When the question was put for the first time the Prophet pbh might have been informed about the Jewish practice, but when the Prophet received information from Allah he denounced the Jews as liars.[4]

Ibn Hazm who believed in complete[1] prohibition of *coitus interruptus* relied upon Tahvi in proof of the Hadith about prohibition being authentic, but he conceded that the other traditions about permission were authentic.[5] The difference between the view of Tahavi and Ibn Hazm lies in this that Ibn Hazm treats the tradition about prohibition to be later in time, and abrogative of the traditions about permission while Tahavi considers it earlier in time and abrogated by the traditions about permission.

1. *Zad ul M'aad* Ibn e Qayyam, Beirut, Vol. 4, p. 16.
2. *Neil al Autar* by Shaukani, Vol. 6, pp. 210-211.
3. *Ibid.*, p. 211.
4. *Kitab Mushkil ul Asar* by Tahavi, printed Dacca, Vol. 6, pp. 371-374.
5. *Al Muhalla*, printed Egypt by Mohammad Khalil Harras, Vol. 10, pp. 87-88.

No time about the utterance of the Prophet pbh in the tradition of prohibition is fixed by any authority. However assuming the Hadith to be authentic the reasoning of Imam Tahavi is much stronger and reliable. The Prophet pbh did make inquiries about Jewish law sometimes because the Jews were people of the Book. One such instance to which Tahavi referred is about the punishment of lapidation for Zina which was found in Torah although the Jews claimed that it was whipping and dishonouring the culprit. The Jews came to the Prophet pbh with a request to judge in the matter of Adultery under the impression that the Prophet would punish the culprits with whipping. The Prophet pbh questioned them about the Jewish law which they tried to conceal but it was found out and the Prophet pbh judged according to that law.

The subsequent opinions and the conduct of the Companions of the Prophet pbh establish the lawfulness of the practice of *'Azl*, but before coming to them some comments may be made on the traditions in which reference was made to destiny. It was observed by the Prophet sometimes that "it doesn't matter if you do not do it" because it is the divine will and destiny which regulates the birth of a child. If a child is destined to be born the birth cannot be prevented by adoption of the device of *'Azl*. If birth of offspring is not destined, none will be born if the device is not adopted. It would follow from this principle that 'it cannot amount to burying alive the child.' If the birth of the child is destined *'Azl* would certainly fail. In view of this how can it be laid down as a principle that the device of *'Azl* amounts to infanticide. This argument would expose the fallacy in the Jewish notion of burying alive.

Verses Q. 23 : 12 to 14 lay down the stages through which human reproduction is to pass. They describe in the first instance the stages through which the drop of semen has to pass as embryo before assuming the form of foetus. They are as follows:

ولقد خلقنا الانسان من سلالة من طين

Q. 23 : 12.—Verily We created man from a product of wet earth.

ثم جعلنه نطفة فى قرار مكين

Q. 23 : 13.—Then placed him as a drop (of seed) in a safe lodging.

ثم خلقنا النطفة علقة فخلقنا العلقة مضغة فخلقنا المضغة عظما فكسونا العظم لحما ثم انشانه خلقا آخر فتبرک الله احسن الخالقين

Q. 23 : 14.—Then fashioned We the drop a clot, then fashioned We the clot a little lump, then fashioned We the little lump bones, then clothed the bones with flesh, and then produced it as another creation. So blessed be Allah the Best of Creators.

It means that sperm which is a lifeless object passes several stages before it is turned into a foetus and again some stages before being born. To throw away the sperm cannot thus be said throwing away the child or to bury it alive. It is reported from Raffa'a bin Raf'e, that a number of companions of the Prophet pbh were present in the company of Hazrat Omar. They included Hazrat 'Ali, Zubair bin ul 'Awam, Sa'ad bin Abi Waqqas. The conversation was about *coitus interruptus*. Hazrat Ali said that there was no harm in it. Some one said that some people held that it is *maoodat ul sughra* (مودة الصغرا burying a child alive in a lesser degree). Hazrat 'Ali said that it cannot amount to burying alive unless the sperm passes the seven stages of *sulal* (سلالة extract), *nutfa* (نطفه life-germ), *alaqa* (علقه a clot), *mudgha* (مضغه a lump of flesh), *azzama* (عظمه bones), *lahm* (لحم flesh) and *khalqan akhar* (خلقا اخر another creation). Hazrat 'Omar observed that Hazrat 'Ali was right. He wished God's blessings for him for a long life.[1]

Ibn 'Abbas was asked about *'Azl* (*coitus interruptus*). He called his slave girl but she felt abashed. Ibn 'Abbas then said

1. *Sharu Maani ul Aasar* by Tahavi, printed by Saeed Company, Karachi, p. 21; *Al Islam wa Tanzeemi ul Usra*, article by Ahmad al Sharbasi, Vol. 2, p. 15.

that he practised it. He also relied upon these verses (Q. 23 : 12 to 14).

Sa'ad bin Abi Waqqas, Zaid bin Thabit, Abu Ayub Ansari, Malik bin Anas, Khubab, Hassan bin 'Ali, Alqama, and 'Abdullah bin 'Abbas practised *'Azl*.

Sayeed bin Musayyib said that the Ansars (original residents of Medina) considered *'Azl* harmless.[1]

Abu Ja'afer Tahawi deduced from the traditions of the Prophet pbh that *'Azl* was permitted and legal and involved no revulsion.[2]

The Hadith of Jabir has already been cited that the Prophet pbh never prohibited his companions from the practice of *'Azl* though he had information about it. Quran was being revealed when *'Azl* was practised and yet there is no prohibition about it in any revelation. On the other hand as noticed already, Imam Shafe'i and a large number of renowned commentators of the Quran deduced the permission of having fewer children from Verse Q. 4 : 3 and some companions of the Prophet pbh including Ibn 'Abbas, the first renowned exegist of the Quran, found the permission of *'Azl* implied in verse Q. 2 : 223. The opinion of Ibn Omar to this effect was reproduced by Imam Abu Hanifa who agreed with it and Imam Sh'ebani noted his assent with it.[3]

Ibn 'Abbas answered a question: "If the Prophet pbh spoke about the subject (*'Azl*) then it must be as he spoke, but if he did not speak about it I say about the verse of (Surah) Nissa (Chapter 4) that (it means) if you wish you can practise *'Azl* but if you do not want it you are free not to do so". This is quoted

1. *Al Islam wa Tanzim ul Usra*, article by Dr. Hasan 'Atai, Vol. 2, p. 180.
2. *Ibid., Sharh Maani ul Assar*, Vol. 2, p. 22.
3. *Kitab ul Aasar*, p. 170.

by Wakee, Ibn Abi Sheba, Ibn Monie, 'Abd bin Humaid, Ibn Jair Ibn ul Munzir, Ibn ul Hatim, Tabrani, Al Hakim, Ibn Mardivi.[1]

Ibn e Qayyim has dealt with the subject extensively. After reproducing the traditions about permission of *'Azl* he wrote :

> The traditions in justification of *'Azl* are correct and in them permission is reported by the following companions:
>
> 1. 'Ali, 2. Sa'ad bin Abi Waqqas, 3. Abu Ayub Ansari, 4. Zaid bin Thabit, 5. Jabir, 6. Ibn 'Abbas, 7. Hassan bin Ali, 8. Khabab bin Irs, 9. Abu Sa'eed Khudri, 10. Ibn Mas'ood.
>
> Ibn Hazm says that permission is reported in the authentic traditions from Jabir, Ibn 'Abbas, Sa'd bin Abi Waqqas, Zaid bin Thabit and Ibn Mas'ood. This observation is correct. Some jurists like Abu Mohammad bin Hazm held it to be prohibited. It is reported from Imam Ahmad and his pupils that the only condition precedent for practising it is the permission precedent of the wife.
>
> Those jurists who treat it to be prohibited argue that in the Hadith of Hazrat 'A'isha (reported from Juzama) in the words *al waad ul khafi* (الواد الخفی burying alive of children) the reference is to verse *almaoudato soailat* (المؤدة سئلت and when the girl child that is buried alive is asked) (Q. 81 : 8). This Hadith is thus abrogative of the traditions about permission of *'Azl*.
>
> But there is the Hadith of Jabir that we practised *'Azl* and the Quran was being revealed, which proves that if the practice were prohibited the prohibition would somehow or other have been made manifest in the Quran.
>
> Hasan Basri treats the tradition of Abu Sa'eed Khudri as prohibitive. He was questioned about that Hadith of

1. *Durrul Mansoor* by Suyuti, Vol. I, p. 267.

Abu Sa'eed Khudri in which the Prophet pbh advised: 'it does not matter if you do not do it because it is destiny.' Ibn Hazam said that he mentioned it before Hazrat Hassan who said that this is a reprimand because the object of marriage is progeny while *'Azl* is the source of cutting down of offsprings. It is reported by Sh'aaba bin 'Asim that Hazrat 'Ali considered it odious. It is correctly reported from Ibn Masud that he considered *'Azl* as burying alive (of child). It is proved from Ibn Amama that when asked he said that no Muslim should practise *'Azl*. Nafees reports from Ibn 'Omar that Hazrat 'Omar chastised some of his sons for practising it. Yahyah bin Sa'eed reported from Sa'eed bin Musayyeb that Hazrat 'Omar and Hazrat 'Osman prohibited people from its practice. These orders are repugnant to the traditions in which there is express permission of *'Azl*.

There is no doubt that the traditions of Jabir about the legality of *'Azl* are categorical and unexceptionable. Imam Shafe'i said that many companions reported from the Prophet pbh specific permission for the practice and that it is harmless.

Baihaqi said that he found such reports from Sa'ad bin Abi Waqqas, Abu Ayyub Ansari, Zaid bin Thabit, Ibn 'Abbas etc. Imam Malik and Imam Shafe'i also followed this rule. The people of Kufa and a great majority of the learned held the same view.

The Hadith reported from Jazama is treated by a body of people as weak. They said how was it possible for the Prophet pbh to belie the Jews and then to justify them. This is not plausible.

The other group of people held the Hadith of belying the Jews as doubtful and the Hadith of Juzama as correct.

A third group combined the purport of both the traditions. They said that the Jews thought that *'Azl* stopped

conception. This was belied by the Prophet pbh and the traditions of the Prophet pbh support this: 'you cannot circumvent the will of Allah'. The Prophet's order about *wad-i-khefi* (واد خفی secretly burying alive) is not an absolute restraint on pregnancy; it is possible from it to reduce the possibility (of pregnancy). It is like having no intercourse with the wife.

Another group thinks that both the traditions are correct. But the tradition of probihition abrogates that of permission. This rule is of Abu Muhammad bin Hazm. He said that before the order of prohibition all orders were of permission. This claim of theirs requires the fixation of the period from which the traditions date.

Ibn Qayyim collected both the views, pro and con, and agreed with the rule of lawfulness of *'Azl*. The translator of *Zad ul Ma'ad*, Syed Rais Ahmad Jafri pointed out the conflict of views on the subject and the conflicting reports about the opinions held by the companions of the Prophet pbh and agreed with the view in favour of the legality of the practice of *'Azl*.

One thing is patently brought out from these references that SOME OF THOSE WHO OPPOSED[1] 'AZL and based their reliance on the Hadith of Juzama had no doubt about the authenticity of the traditions of lawfulness of the practice. Only a negligible percentage of the jurists appear to doubt the authenticity of the Hadith about belying the Jews on their theory of burying alive. The matter is reduced to the determination of the question of time of utterance of the two conflicting traditions. This can be the only absolute and concrete criterion for settlement which tradition was abrogative of the other. The impossibility of the task leaves the ascertainment of the final and the lasting rule to logic, rationality and reasoning for which there is ample material in the Quran and the Hadith. Credibility of

1. *Zad ul Ma'ad*, vol. 4 (Urdu translation), Nafees Academy, pp. 102-105.

the rule of legality can be established by a consideration of the Hadith material only. The traditions about specific permission of *'Azl* supported by the tradition of Jabir that people resorted to *'Azl* when Quran was being revealed, and this was within the knowledge of the Prophet pbh, and yet there is no prohibition in the Quran, invigorated by the unanimous opinions of the jurists of practically all schools of thought, and the argument of Tahavi that the Hadith of Juzama pertained to the early period when in the absence of revelation the Prophet pbh acted upon Jewish law and practice, clinch the matter.

The views of Imam Malik and Imam Shafe'i have already been noted. As stated above the views of Imam Ahmad, Imam Abu Hanifa, and others are not different. Ibn Qudama says that Imam Ahmad's opinion is that *'Azl* with the concubine is lawful without her permission but if practised with the wife her permission would be required. This is also the view of Malik, Abu Hanifa and Shafe'i.[1]

Allama Ibn Abideen Shami says that the husband is allowed to practise *'Azl* with the permission of the wife and the wife can get the womb sealed with the consent of the husband. But keeping in view the corruption of the age it would be lawful on both sides, without the permission of either spouse.[2]

In *Sharh Maani ul Aasar* it is stated that "there is no harm in practising *'Azl* with the permission of the wife. But some of the jurists hold that permission is not necessary. 'We consider the first view as correct. The same is the view of Imam Abu Hanifa, Imam Abu Yousuf and Imam Mohammad'."[3]

Ibn Abdul Bar said that there is no difference among the jurists on the point that the practice of *'Azl* with the permission of the wife is lawful. 'There is difference of opinion among the

1. *Alnaghani*, vol. 7, p. 24.
2. *Radd ul Mohtar*, vol. 2, pp. 411-412, *Hashia al Tahavi alal Durrul Mukhtar*, vol. 2, p. 76.
3. *Sharh l Ma'ani ul Aasar*, printed Karachi, vol. 2, p. 20.

Shafe'i jurists about the absolute requirement of permission of a free woman for *'Azl*. Ghazali said that it is lawful without permission.[1] There is unanimity among the other three schools of thought about permission of the wife being condition precedent.[2]

Shairani says that the Shafe'is consider *'Azl* lawful without the permission of a free woman. According to another version Imam Shafe'i forbade it in the absence of her consent. The proper course is to practise *'Azl* with permission. The other three Imams consider the consent of the wife necessary.[3]

Shaukani reproduced these opinions in *Neil al Autar*.[4] In *Shark ul Zarqani* the view that 'Azl without the permission of the wife is not unlawful is supported.[5]

Jassas laid down the same dictum in his commentary of verse Q. 2 : 223 about women being a tilth.[6]

Ibn Hummam writes that the majority of the learned considered *'Azl* lawful. Some companions considered it Makruh (abhorrent) but the correct position is that it is legal.[7]

Imam Ibn Taimiya said that the Imams of the Sunni School held the practice lawful with the permission of the wife.

Some jurists favour the relaxation of the rule about permission when times are bad, inauspicious and unfavourable for a virtuous society. A reference to the view of Allama Ibn 'Abideen Shami has already been made. His further explanation is as follows :

1. *Fath ul Bari*, vol. 9, p. 308.
2. *Ibid.*
3. *Al Mizan ul Kubra*, Egypt—*Eissa al Babi al Halabi*, vol. 2, p. 118.
4. Vol. 6, p. 22.
5. Vol. 3, p. 229. *See also* for the same view *Al Islam wa Tanzeem ul Usra*, vol. 2, p. 16.
6. *Ehkam ul Quran*, Egypt—*al Bahiya*, vol. 1, p. 470.
7. *Fath ul Qadeer*, vol. 2, p. 494.

But in *al Fatawa* it is laid down that if one fears that due to wickedness prevailing in any age there is possibility of the child being a delinquent or his proper upbringing is likely to be frustrated it would be lawful to practise '*Azl* without the permission of the wife.[1]

Ghazali is unique in his exposition of the subject. He said :

"According to us there is no excellence in it because for prohibition either there should be some Nass (divine order or Hadith) or foundation for Qiyas (analogy) from which prohibition may be inferred. None of the two is present here. On the other hand there is sufficient foundation for Qiyas to the contrary from which its legitimacy may be deduced. It (the foundation for legitimacy) is absolute in one, desisting from marriage or in abstinence from sexual indulgency or impregnation. They are all lawful but not excellent or meritorious. If you say that '*Azl* itself is not disapproved but abhorrence is attracted to it on account of the taint or suspicion of intention verging on unbelief which underlies it, I would say, that there may be five objects of the practice of '*Azl*."

Ghazali enumerated the following five objects :—

(1) Avoidance of birth of child to a slave girl who may thereby obtain a right to manumission.

(2) Preservation of wife's charm, beauty, vitality, complexion and health.

(3) Abstention from having many children and dependents for escaping the increase in liabilities.

(4) Apprehension of birth of daughters.

(5) Abstention of women for guarding against uncleanliness.

1. *Radd ul Mohtar*, vol. 3, p. 176. *See also Al Islam wa Tanzeem ul Usra*, Article by Naseeruddin Lateef, vol. 2, p. 35.

The first object is irrelevant now, the second and third according to Ghazali are legitimate objects, while the fourth and fifth are against Sunnah.[1]

The second object, according to Ghazali includes not only the protection of the pleasing characteristics of a woman but also her safeguard from the pangs of labour. Syed Mustafa Zubaidi, the commentator of *Ehya ul Ulum ul Din* adds to it the protection of a woman's figure. (Literally saving a woman from loosening her breasts).[2]

The third object which is lawful is the apprehension of economic distress by the increase in the number of dependents. Economic constraints may be the root of many evils. For these reasons *'Azl* is not unlawful because decrease in economic hardship is an aid to religion.

Shah Abdul Aziz Dehlvi son of Shah Wali Ullah while commenting on verse Q. 81 : 8 concerning the burying alive of girl child held *'Azl* to be perfectly justified on the basis of the authentic traditions of the Prophet pbh. On the analogy of *'Azl* he considers it lawful to use any device of birth control whether before or after sexual intercourse.[3] According to him (avoidance of) (1) Labour pangs, (2) excessive number of children, (3) economic hardship, (4) hardship due to frequent journies, are valid objects for the practice of *'Azl*.

In *Fiqh ul Sunnah*,[4] Subh Sadiq considers it legally justified to use contraceptives for family planning if one has many children whom he cannot bring up properly or the woman is weak or she conceives quickly or successively or when the man is not economically sound. He explains that when the woman's charm and beauty is affected by successive births either of the spouse

1. *Ehya ul Ulum ul Din*, vol. 2, p. 51—Beirut.
2. *Ithaf ul Sadd ul Muttageen*—Beirut, vol. 5, p. 382.
3. *Tafsir Fath ul Aziz—Persian*, part 30 of the Quran, p. 77.
4. Vol. 7, p. 146—Egypt, 1966.

is entitled to control fecundity. Most of the scholars, according to him, favour family planning unconditionally.[1]

During the lifetime of the Prophet pbh and till many centuries later *'Azl* was the only method used for family planning. In later times the method of sealing the womb of the woman was discovered. The jurists applied the analogy of *'Azl* to it and held it to be a legitimate method of birth control. As already noticed Ibn 'Abideen permitted the sealing of the womb of a woman, (يجوز لها سد فم رحمها).[2]

The principle of *'Azl* and its analogy has been extended to all forms of birth control for planning a family. One reason for justification is that there is no bar or prohibition against it. The other reason, no doubt, is that there are explicit arguments in favour of the practice of *'Azl* which then was the only method of family planning.

The legality of birth control as a means of family planning legalises all other methods for achieving that end. Some of the methods can be adopted by the husband while others are for the wife to adopt. Operation of the woman may be one such method.

The methods which may be adopted by the husband include *'Azl* or use of such other mediums which may prevent the semen from entering the womb or the use of such drugs which may annihilate the fertility of the semen.[3]

One view is that procreation is not a marital obligation of the husband. The husband is free to undergo an operation by which his sexual urge and capability is not affected but the ability to impregnate is suspended or finished. An operation

1. *Fiqh ul Sunnah* by Subha Sadiq, Vol. 7, p. 146—Egypt, 1966.

2. *Radd ul Muhtar*, vol. 2, p. 414, *Al Islam wa Tanzeem ul Usra*, article by Rafi Ullah Shahab, vol. 2, p. 217.

3. *Al Islam wa Tanzeem ul Usra*, article by Fateh Mehdi Shamsuddin, vol. 2, pp. 281-2.

which may affect the male's faculty to procreate is not illegal.[1]

The use of medicines which may prevent pregnancy is lawful on the analogy of *'Azl*.[2] The view of Shah Abdul Aziz that any device may lawfully be used to prevent conception has already been noticed.

Sheikh Ibrahim concluded on the basis of the opinions of the early jurists that it is lawful to put any drug or device in the innermost part of the uterus in order to kill the sperm. He refers to the opinions of some jurists that a woman can even abort her pregnancy by the use of medicines before the birth of foetus that is before 120 days of the pregnancy. She may get the passage to the womb permanently scaled with the permission of the husband, so that the sperm may not reach the uterus.[3]

Sheikh Abdul Majeed Salim, Mufti of Egypt gave a Fatwa (legal opinion according to Sharia) in 1937 that each of the spouse may, with the permission of the other take measures to ensure that the sperm is prevented from entering the uterus. The later Hanafi jurists held that such measures can be taken unilaterally and no permission of the other spouse is required for any reasonable excuse already discussed.

The Fatwa Committee of Al Azhar University held in 1953 that according to the Shafe'i jurists the use of contraceptives is not unlawful for the time being and the same was the opinion of the committee because in it lay convenience and elimination of harm. The use of contraceptives would be justified when there is apprehension of successive conception which may affect or impair the woman's health.

Sheikh Shaltut gave his opinion in 1959 that family planning is to fulfil certain objectives for example, saving a woman conceiving quickly and successively from the pangs of labour,

1. *Al Islam wa Tanzeem ul Usra*, article by Fateh Mehdi Shamsuddin, vol. 2, pp. 281-2.

2. *Ibid.*, p. 113, article by Mohammad Nabhi.

3. Reproduced by Sherbasi Al Ahmad in *Al Islam wa Tanzeem ul Usra*, p. 185.

stopping the transmission of infectious disease from one to the other and preventing the birth of children of weak muscles and weak nerves who may not be enabled to discharge their duties in the society. In this sense family planning is a remedy for elimination of harms and injury to the individuals and their progeny and the latter may be stronger and healthier. Family planning thus is neither repulsive to one's nature nor obnoxious to natural consciousness nor repugnant to Sharia.[1]

The Fatwa of Dar ul Ifta of Palestine (Gaza) is mainly notable for its reasoning and may be reproduced in some detail from an article of Mr. Khalid Ishaq :

> For further clarification, our explanation is this that under certain circumstances use of drugs for controlling birth is lawful. This is based on the general principle of Islam that harm should neither be inflicted nor suffered.
>
> The Holy Quran has limited the period for breast feeding of the child up to two years. It says: 'If the husband wants completion of the child's breast-feeding, the mother should feed the child for full two years.' According to the Prophet pbh one should avoid breast-feeding of the child by a pregnant woman. Thus, the Quran and the Sunnah have both expounded to people (a) principle regarding family planning, which is possible only by controlling birth during the period of breast-feeding. The Sharia desires the fulfilment (*saadat*) of the individual as is being honoured and respected, and (therefore) calls him towards conduct that would bring about that fulfilment. One such way would be for him to plan his family in such a way that his offspring is healthy and free from physical and mental deficiency or psychological diseases. This is possible only when he is capable of giving his child proper care, education and upbringing. Quite naturally, these facilities would

1. *Al Islam wa Tanzeem ul Usra*, article by Ahmad Al Sharbasi, vol. 2, pp. 22-23.

not be available unless the parents can feed, train and educate their children morally and professionally. These requirements are not widely fulfilled, and not every one has (even the minimum).

For these reasons, the use of contraceptives is lawful when the parents or either of them is sick, because the disease is also transmitted to the offspring; or when the parents are so poor that they are unable to fulfil their parental obligations and there is none to shoulder their responsibilities; or when they are capable of providing necessities only to the existing children, but unable to provide for additional children whose birth would put them to unbearable hardships or when they have the capacity to provide necessities of life to the existing children but the wife fears that if she becomes pregnant, she would lose her charm and beauty or she would be faced with unpleasant situations; or the excessive number of children would not get proper attention; or when her oversexed husband is inclined to her and to his wives for more sexual pleasure indifferent to the pregnancy that he produces whether they are moral or immoral or follow the religion of Islam which shall make life good; in such cases, if she begets more children, she would not be able to attract her husband.

"It is rather surprising that the educated and well-to-do class of people practises birth control on large scale but the class which needs birth control—does just the opposite of it... We find that the needy or the sex-hungry people are prone to produce more children, and for this object they indulge in polygamy. They just want that large number of children should be born, no matter whether they are well-bred or ill-bred. Anything which provides pleasure of life cannot prove to be better than the guidance given by *din* (دین). He may think over it and practise accordingly."[1]

1. Reported from, *Noor ul Yaqeen* Monthly, Ramadhan.

Some eminent and renowned Shia exegists also approved the Shafei view of the interpretation of the verse *Zalika adna alla taoulu* (ذالک ادنیٰ الا تعولوا. That is nearest to you to avoid many dependents) Abdul Hassan Ali bin Ibrahim al Qummi (307 A.H.) adopted the same interpretation of the verse,[1] that one should not enlarge his family to the extent that he may be unable to provide the necessities of life to it.

Mohammad Jwad Manghina shares the same view in matters of limiting the number of wives to one.[2]

Maulana Fateh Ullah Kashafi (580 A.D.) held the interpretation of avoiding too many dependents to be in accord with Arab usage.[3] Tabrasi (1053 A.D.) also fully endorsed this view.[4]

Hazrat 'Ali is reported to have said that having a few children (only) is one of the conveniences of life.[4]

As reported by Al-Qudai in *Musnad Al Shihab*, 'Ali said : 'A small family is one of two states of well being while a large family is one of two states of want'. This saying although considered 'weak' as regards its chain of authorities is substantiated by actual facts.[5]

It has already been noted that Hazrat Imam Hassan approved the practice of *'Azl*. Important renowned Shia jurists also accept *'Azl* as permitted. The agreement of the above mentioned exegists from among the Shias with the interpretation of Imam Shafe'i on verse Q. 4 : 3 is one proof of it. There are other specific opinions of jurists on the subject.

Kulaini (940 A.D.) who is the most authoritative source

1. *Tafsir ul Qummi.*
2. *Tafsir i Kashaf.*
3. *Tafsir ul Kabir, Manhaj ul Sadiqueen*—Tehran, 3rd Edition, vol. 2, p. 430.
4. *Tafsir i Majma al Bayan*, Tehran, 1379 A.H., 2nd Edition, vol. 3, p. 4.
5. *Islam and Birth Planning*, vol. 2, p. 127, Article by Al Dasuqi Misri and Al Syed 'Ali.

of Shia law deals with the point on chapter on *'Azl*[1] that Abu Abdulla (Imam Ja'afar al Sadiq) held that it depended upon man's own choice. Abu Ja'afar held it lawful with the consent of the wife if the husband wished to practise it. 'Ali bin al Hassan (Imam Zain ul 'Abideen) did not see any harm in it.

Tusi (1067 A.D.) also quoted these opinions of the Imams. He added about Imam Baquir that he saw no harm in the practice of *'Azl* with a slave girl, but he considered the permission of the wife as an essential condition precedent with an additional stipulation that the consent should form part of the marriage contract.

The additional condition appears to have been imposed by way of caution (*exabundanti cautela*) so that a post marriage sanction or consent may not be actuated by duress, fraud or undue influence.

One of the questions which requires clarification is what is meant by the Prophet's pbh advice that it does not matter if you don't do it (*'Azl* or *coitus interruptus*). Does it mean prohibition of the act or permission or just indifference or immateriality of it. Hassan Basri interpreted it as prohibition. One of the opinions attributed to Imam Hassan is that it is *zajr* (زجر reproof or restraint), though this opinion is in contrast to the opinion attributed to him by all others which is in favour of the lawfulness of *'Azl*.

Another version is that the Jews considered *'Azl* to be fully effective for controlling the birth and this direction of the Prophet pbh was a refutation of this concept and for this reason the Prophet pbh stressed the effect of destiny. From this it would appear that the direction of the Prophet pbh only points to the immateriality of the act because ultimately the divine will is to prevail.

1. *Al Kafi* (*al Furu*)—Tehran, 1278 A.H., vol. 5, p. 504.

One thing is very clear from the explicit reference to destiny that the direction should be understood in that sense, and its scope may be determined by the scope of other orders regarding *taqdir i ilahi* (destiny). The rule of Providence is: 'Surely God does what He pleases (Q. 22 : 18, Q. 22: 14) God orders what he desires (Q. 5 : 1); Surely thy Lord is the mighty doer of what He intends (Q. 11 : 107); God creates what He pleases (Q. 24 : 45); and thy Lord chooses and creates whom He pleases (Q. 28 : 68). In verse 11 of Ch. 35 it is stated:

و ما تحمل من انثى ولا تضع الا بعلمه ومايعمره من معمر ولا ينقص
من عمره الا فى كتب ان ذالك على الله يسير

No female beareth or bringeth forth save with His knowledge. And no one groweth old who groweth old, nor is aught lessened of his life, but it is recorded in a Book.
Lo that is easy for Allah.

The observation of the Prophet pbh is only an application of the principle that birth or death is in the Hands of Allah. But does it mean that if during pregnancy the woman falls ill, a Medical Practitioner should not be consulted and no medicine should be administered to her or that no Doctor or helper should be called in labour? No step should be taken to relieve her of pains.

Such concepts of inaction and fatality are contradicted in the Quran. According to the Quran, Allah is the bestower of sustenance (Q. 51 : 58). But it does not mean that the sustenance is to be showered on men from above as it was showered on the Children of Israel for some time. There are definite rules for its acquisition and production. One of those rules is to look after the indigent and the poor in the society, this is charity. Those who whimsically or on account of opposition to Allah say that the feeding of such poor is not their responsibility are contradicted by the following verse :

و اذا قيل لهم انفقو مما رزقكم الله قال الذين كفروا للذين آمنو انطعم
من لو يشاء الله اطعمه ان انتم الا فى ضلل مبين

Q. 36 : 47.—And when it is said to them, spend of that wherewith Allah hath provided you, those who disbelieve say unto those who believe: Shall we feed those whom Allah, if He willed would feed? Ye are not else than in error manifest.

This is not the subject requiring an elaborate discussion of the doctrine of predestination. It would be sufficient to say that wisdom, knowledge, intelligence, understanding and all other powers have been conferred upon man to enable him to work to advance his learning and to use his faculties for his own good and for the good of humanity and if ultimately an individual or a group or nation, in spite of best human efforts, does not succeed he/they should be patient in bearing the failure because it happened as it was destined and ultimately Allah's will prevailed. His actions are a part of predestination. If an ailing person consults a doctor and uses medicine, or to seek employment or good employment a person acquires the knowledge or technique for it, it is also predestination. If nations in order to gain supremacy over others prepare weapons of superior quality, it is also Taqdeer. Someone said, 'O, Prophet of Allah inform me respecting . . the medicine which I swallow and the shield which I make use of for protection, whether they prevent any decree of Allah.' The Prophet said 'these are also by the decree of God.'

Consequently if a person uses any contraceptive device and the birth of children is prevented, it is also a decree of Allah. It is as Allah willed. But if Allah does not will it the device shall fail. May be that the medicine used is not effective. In the case of *coitus interruptus* the possibility of the birth of the child is greater because the withdrawal may be delayed and though

most of the semen may fall outside but a little of it may go in the passage and may be sufficient for fertilisation.

From this elaborate discussion no scope is left for doubt about the lawfulness of the practice of *'Azl*, and on the same analogy of the use of other devices for frustrating pregnancy as a measure of family planning. All contraceptive devices can be used priorto conception. They may consist of drugs for example jellies for the motility of the sperm, use of I.U.D. (Inter Uterine Device), the tube legation operation of the woman which is the same device as sealing of the womb, vasectomy of the husband which is cutting of the spermatic cord, the tube which brings sperm from the testicles at the time of seminal discharge.

The condition of permission precedent of the wife before use by him of any device is a requirement on which there is considerable agreement between the jurists. It would follow as a matter of analogy that the use of such devices by the wife must be subject to the consent of the husband. But the Hanafi jurists favour relaxation of the condition on grounds which are valid for mandatory family planning.

Abortion is also allowed according to some jurists within one hundred twenty days of the conception. Some jurists impose conditions for abortion which are of the same nature as the grounds for mandatory family planning by use of contraceptive devices before pregnancy. In the illustration given in justification of the same by Abdul Majid Salim, Mufti of Egypt, it is implied that for special and stronger reasons abortion would be justified in Sharia even after the expiry of 120 days of the pregnancy. The illustration leaves a wide scope for such justifiable grounds since even danger to the infant (and not to the woman herself) may necessitate it. This brings in *Maslaha* (مصلحة consideration of good) as the guiding principle as is evident from the following summing up:

> "The principle of permission to practise *'Azl* applies to the use of timely devices (which are contraceptive) and to

abortion or pregnancy after the inspiriting or animation (of the child)."[1]

The Prophet's pbh own decree permitting *'Azl* was preceded by consideration of grounds placed before him in justification of the act, but the ruling factor was the wish of the husband against the impregnation of either the wife or the concubine. The traditions make the individual a judge of the justification of the practice. It was left to his choice to do as he wished. The only condition which was imposed for the exercise of the option was the consent of the wife where *'Azl* was intended to be practised with her. The reference by the Prophet pbh to the Persians and the Romans, proves its harmless nature. The Prophet pbh observed that the practice of *'Azl* did not cause any harm to those people which clearly meant that it was harmless for the Muslims too. According to Jabir the Muslims practised *'Azl* within the knowledge of the Prophet pbh and there was no revelation prohibiting it. The inference is clear that no interference as such was required with the exercise of discretion.

The Companions of the Prophet explained one of the purports of the verse that 'women are tilth for you, go to your tilth as you will' (Q. 2 : 223) as a permission to practise *'Azl*, at his option which means that the exercise of discretion was not regulated by any rule. Imam Abu Hanifa and Imam Mohammad agreed with the explanation to that effect given by Ibn 'Omar.[2] Imam Zain ul 'Abidin, was positive that it was harmless which clearly means that it did not require any regulatory rules for exercise of the option. Imam Ja'afar al Sadiq put it beyond the pale of doubt by saying 'it depends upon a man's choice.' Thus the *maslaha* or consideration of good by the Prophet pbh was not impelled with the object of regulating the act except to the extent of making the practice of it subject to permission of

1. *Al Taj ul Usool*, vol. 2, p. 345, *Al Islam wa Tanzeem ul Usra*, vol. 2, p. 217.

2. *Kitaab ul Assar* by Imam Mohammad, p. 170.

the wife; the question why *'Azl* was practised was only to understand its significance whether it was in any wise damaging.

It is clear from this historical perspective of the interpretation of the verses of the Quran, the traditions of the Prophet, the conduct and opinions of the companions and others that a ground of the lawfulness of reducing the number of dependents was mooted out and discussed when Imam Shafe'i interpreted verse Q. 4 : 3 *zalika adna al ∫a taoulu* (ذالک ادلیٰ الا تعولوا) as referring to the reduction of children and dependents. Grounds given by various exegists and jurists in defence of the interpretation placed by Imam Shafe'i on the verse led to the discovery of various reasons in justification of the practice of *'Azl*. Maintaining the charm of women was held a worthy object. From the objective of the birth control which was first discovered *i.e.*, the amelioration of economic condition of the people by protecting them from economic hardship, a number of other objectives were noted, some of which were discarded as either repugnant to the Quran or the Sunnah. Thus Imam Ghazali rejected two of the motives of (i) avoidance of the birth of daughters only or (ii) the uncleanliness and impurity of the sexual act.[1]

Up to the Middle Ages the jurists illustrated the need of avoiding too many dependents, of birth control and of family planning by reference to actual events which reflected the condition of the society. The illustrations were neither exhaustive nor meant to limit its scope. Their purpose was only to construe the verses of the Quran and the traditions of the Prophet pbh objectively to determine the legality of birth control. But most probably under the stress of the doctrine of *taqlid* the latter day jurists, particularly some in the modern age, used those illustrations to limit the practice of *'Azl* or birth control to the categories of cases discovered by the early jurists. The option and discretion thus came to be threatened with the imposition of regulatory

1. *Ehya ul Uloom ul Din*—Beirut, Vol. 2, p. 51.

process through Fatwas of the learned. The simple answer regarding the legality of *'Azl*: 'it is as you wish' was altered into one involving study and consideration of complexities in attitudes, needs and behavorial patterns of a few categories of the people, the poor, the sick, the one subject to successive pregnancies with brief intervening period, the one who may transmit disease etc.

The broad question is whether all this analysis or this confusing approach is necessary. The simple answer of a person who plans a family, however casually, is that he does not want many children. Is this answer not sufficient to satisfy the interrogator. It satisfied the Holy Prophet pbh when he was informed by his companion that he practised *'Azl* with his wife because he did not wish her to conceive. Why should there be any further probe in his motives or objects underlying the practice. If the Prophet pbh went into the question of *maslaha* (good of the individuals practising *'Azl*) he was satisfied in one case from the illustration of a woman having a suckling child and in another case by the simple wish of the husband not to have his wife pregnant.

And if properly analysed it would be manifest that the scope of each of the grounds which have ultimately been resolved by the jurists is very wide. Let us first consider the case of economic stress. A very large majority of the people are either poor or very poor. The middle class consists mostly of fixed or limited income group which is the worst hit by inflation partly on account of his limited income or inflation in cost of living. Among this group are to be found the white collared people who have to maintain a certain standard of living. All these face problems which can be remedied only by reduction of liabilities. The low income group or to be more specific, the labour class does not mind having children because its members have to feed the mouths or share the food with them for some time and after a few years their sons and daughters become either a source of cheap labour at home or become earning members. Education

is not their worry and generally they resist the attempts of social and government agencies for the education of their children. Polygamy among them is rare but its main object is to add a willing worker to the domestic task force. Practically speaking there are very few people in our own nation who are well up enough to accept the liability of half a dozen or more children on their honest income. The high income group are extremely westernised and are prone to accept all those vices which abundance of wealth brings with it. Though well educated they are seldom close to Islam or Islamic ideals.

The question is: can such a society advance the Islamic objectives? It may be recalled that in some legal opinions on interpretation of the verse about avoidance of birth of many children (Q. 4 : 3) reference is made to the advisability of having such number of children only who may not only be brought up properly but also properly educated and made useful members of an Islamic society. The Hanafi Jurists held for this reason that in times of corruption when the environment is not congenial to the growth of piety and morality the consent of the wife to practise birth control is unnecessary. From this two principles are inferable. They are: firstly that it is the duty of the parents to bring up and educate their children to make them incline towards morality and piety; and secondly that if the social surroundings are on account of corruption and mischief of the age, grossly unsuited to the growth and structuring of an ethical society or in other words it is a society in which the aggregate of persons are prone to promote mischief and to seduce and debauch others, it is more apt to desist from procreation of children. The human reproduction in such an age is most ill-advised.

This may be an idealistic—fantastic for some—approach but it makes manifest the principles on which an Islamic society should be developed. One of the most important considerations should be to desist from having more children or dependents than one can take care of. From this emerge many points.

Economic viability is, no doubt, one of them; the second being the protection of health of the wife from the ill-effects of successive briths; and the third being the upbringing of the child in an atmosphere of at least religious education which may be free from perversion and impiety.

It may be recalled from the discussion on infanticide that the word *qatala* (قتل) does not mean only killing. It also means to curse (see Q. 9 : 30; Q. 80 : 17) to confound (Q. 63 : 4; Q. 5 : 10) to destroy, despair etc. For this reason Raghib[1] says that by the verse about the killing of children on account of poverty (Q. 6 : 153; Q. 17 : 31) only the physical killing or murder is not meant. It would also apply to other matters which are no less sinister. To deprive the children of education and good upbringing or to fail to provide for them what is necessary for their growth and development also amounts to killing. Birth control is not infanticide. Infanticide is to deprive children of sound upbringing.

Reference has been made several times in this chapter to *maslaha* (consideration of good). Now what is *maslaha*? Its dictionary meaning is just the opposite of *mufsida* which connotes everything which is bad and unacceptable, *i.e.* corruption, deterioration, depravation, peutrefaction, perversion, degradation, decadence.[2] The elimination of such mischief opens the field for *maslaha*, since the two cannot stand together in Sharia. *Maslaha* and *mufsida* both are in our *nafs* (soul, psyche, spirit, mind, essence, nature, inclination, desire), and *badan* (body), in affairs temporal and matters pertaining to the hereafter.[3] According to Ghazali *maslaha* lies in utilisation of good and elimination of mischief (*Jalb e manfe'a wa dafei' muzarrah* جلب منفعہ و دفع مضرۃ) and these are the objectives of creation.

1. *Al Mufridat* on Qatala (قتل).

2. *Al Qamoos ul Moheet*, Vol. 1, p. 277; *Taj ul Urvos Sharh ul Qamoos*, Vol. 2, p. 183, *Mukhtar ul Sihah*, p. 75.

3. *Nazariyat ul Maslaha fil Fiqh il Islami* by Dr. Husain Hamid Hassan, p. 5.

The advancement of the people in the acquisition of these objectives is *maslaha*. What is required through them is the protection of the Sharia objectives which are five—protection of *din* (religion). *Nafs* (self, soul, spirit, desires as already explained). *Nasl* (progeny), *'aql* (understanding, intelligence, reasoning, rationality, memory are all included in the word) and their *mal* (wealth and property). Whatever ensures the protection of these five is *maslaha* and whatever arrests, or oversteps, these five and goes beyond them is *mufsida*.[1] *Maslaha* in view of its importance and scope is of three kinds:

(1) Necessities (ضروريات *zaruriyat*), (2) conveniences (حاجيات *hajiyyat*), and (3) refinements (تحسينات *tahsiniyat*).

Necessities are the highest form of *maslaha* and the protection of the above mentioned five species of Masaleh (plural of *maslaha*) falls in this category. Punishment to an innovator of religion is protection of *din*. Qissas ensures protection to life. Punishment of drinking liquor protects rationality and intelligence which is affected, (for however short a duration by intoxication). Punishment for adultery guards the legitimacy of progeny and punishment of thieves affords protection to the property.

Conveniences (حاجيات *hajiyat*) is the second category of *maslaha*. This can be illustrated by the authority of the *wali* (ولی guardian) over a minor. Though it is not a necessity but it is a means of attainment of *maslaha*. The authority of the *wali* may, however, differ from case to case. When the authority extends to securing for the wards food, clothes, and training and education (تربیت *tarbiyat*) etc. it becomes a part of necessities (ضروريات *zaruriyat*). In other matters it may fall within the category of conveniences.

The third category of refinements or excellences (تحسينيات *tahsiniyat*) may be illustrated by the adoption of better means

1. *Nazariyat ul Maslaha fil Fiqh Il Islami* by Dr. Husain Hamid Hassan, pp. 5, 6; *Almustasfa*, Vol. 1, p. 286.

in matters of worship and public and private dealings[1] (معاملات *mu'amilaat*).[2]

The moot question now is whether the protection of *zaruriyat* (necessities) which would undoubtedly include their advancement and extension towards all individuals of the community or nation including those recently born is the responsibility or discretion of the individuals or of the community or of both. The answer is already implied in the above discussion that the liability is of both, but the mutuality has been elaborated in *Nazariyat ul Maslaha fil Fiqh il Islami*.[2] The principle is thus laid down:

> There are rights of the community on the individual. It is one of those rights that he shall protect his *'aql* (understanding, intelligence, rationality and memory) and his *jism* (body) for the good of the community, as you see. The community exists with the rights of all its individual members. In Islam it (the community) has a right to the protection of his (individual's) *'aql*, as there is nothing in Islam like purely individual rights in the sense that it prohibits the exercise of any human right which may harm the community. .....The well recognised and known examples of these (restrictions) are prohibition of squandering waisting one's wealth, prohibition against suicide, and the permission to take away the property of a prodigal for proper administration. It is not permitted to any person to place himself voluntarily in peril ..... The rights in Islam are not entirely for the individual.
>
> Some of these rights are rights of Allah which are absolute for Him and some are those on which the rights of Allah preponderate. It is rarely that one finds an absolute individual right which may be freely exercisable without the exercise of right being regulated by Sharia.[3]

1. *Al Mustasfa* by Ghazali, Vol. 1, pp. 286, 293.
2. By Dr. Husain Hamid Hassan, p. 27.
3. *Nazariyat ul Maslaha fil Fiqh il Islami* by Dr. Husain Hamid Hassan, p. 27.

Another example is furnished by the manner in which the right to spend one's wealth is regulated. In addition to payment of *Zakat* and *Ushr*, one may spend his wealth upon himself, his family, his dependents, and ultimately upon human good. *Expense on self* :

للرجال نصيب مما اكتسبوا وللنساء نصيب مما اكتسبن

Q. 4 : 32.—For men is the benefit of what they earn, and for women is the benefit of what they earn.

وما من دابة فى الارض الا على الله رزقها

Q. 11 : 6.—And there is no animal on earth but on God is his sustenance.

ان لك الا تجوع فيها ولا تعرى

Q. 20 : 118.—It is (vouchsafed) unto thee that thou hungerest not therein nor art naked.

وانك لا تظمؤا فيها ولا تضحى

Q. 20 : 119.—And thou thirstiest not therein nor art exposed to the sun's heat.

The last three verses define the fixed destiny of all animals to receive sustenance which include, food, clothing, water and shelter. The first verse points out the concept of benefiting from what one earns. There is a guaranteed share for those who seek and endeavour (Q. 41 : 10) clarifies the intent of Allah that one has to work for receiving the sustenance which he is destined to receive.

The duty of looking after the poor and destitute neighbour, relations and members of the Ummah then rests upon all others who are rich or prosperous. Even the less fortunate should work not only for feeding themselves but also for alleviating the misery of others. In every community there are men and women who are unable to look after themselves or who have none to look after them. Such are entitled to financial assistance from others. The Prophet pbh said:

> O son of man! That thou give with your own hands the superabundance (of thy wealth) is better for thee; and that thou withhold it is bad for thee, thou ought not to blame for insufficient subsistence; and begin with him who is of kin (to them).[1]

He also said:

> None deserves to be envied except two men, (1) he whom God has given wisdom and who decides according to the same, and teaches it to others; and (2) the man whom God hath given wealth and he spends it usefully.[2]

Thus the mutuality between the individual and the State in *maslaha* is established. Now it is the duty of both to eliminate *mufsida* (mischief or transgression). The Ummah or the community is for the individuals constituting it and the individuals are for the Ummah. What is prescribed for the individual is ultimately for the benefit, the growth and the development of the Ummah. The welfare and the well-being of the individuals is ultimately beneficial to the Ummah. The economic, educational and moral progress or uplift of the individuals leads to the corresponding progress, uplift or development of the Ummah. The two are inseparable. It is for this reason that laws are framed and rules prescribed for the greatest good of the society as a whole on the principle of *maslaha*. The necessity of the Muslim State and other States or of their rulers (اولوالامر *ulul Amr*) on which Islam insists, is based on the same principle. In fact the principle is laid down in the Quran in these words:

وما من دابة فى الارض ولا اطئر يطير بجناحيه الا امم امثالكم

> Q. 6 : 38.—There is not an animal in the earth or a flying creature flying on the wings but have community like you.

1. From *Abu Umarah, Muslim, Tirmizi, Sayings of Mohammad pbh* by Abul Fazl, N. 97.

2. By *Ibn Masood, Bukhari, Muslim, Sayings of Mohammad pbh* by Abul Fazl No. 430.

The migratory birds, the bees, the ants are the best examples of the communal solidarity, cohesion and harmony. The objective of Islamic solidarity could not be achieved without welding all the Muslims into one Ummah with common forms of submission to Allah, common ideals, aspirations and ideologies, who 'direct with truth and dispense justice therewith' (Q. 7 : 181) and 'enjoin what is right and forbid what is wrong.' (Q. 3 : 104). The Quran therefore, calls the Muslims as the best community:

كنتم خير امة أخرجت للناس

Q. 3 : 110.—You are the best community that has been raised for mankind.

It would be amply clear from this concise discussion about the Ummah and the individual rights that it is the duty of all Muslims to contribute their mite for the welfare, well-being, development, aggrandisement and might of the Ummah in all spheres to which the principle of *masaleh* (plural of *maslaha*) apply, including the moral and the material. The vitality of the Ummah lies in the health, morality, education, proper upbringing as well as the economic strength and viability of its individual members. Economic strength and vitality of the members of the Ummah cannot *inter alia* be ignored, since it is one of the most important factors in the life of the community. From economic stability may emerge the importance of preservation and maintenance of the health and vitality of the members of the Ummah, including the women who procreate and the children reproduced, and their moral and educational training and progess. The consequence is that even if we start with only one of the few factors considered by the later jurists as being the only grounds for family planning, all others which are within the scope of *maslaha*, would be included in it. There is no logic in trying to limit the scope of the family planning, nor is it from the Sharia point of view called for.

The division of *maslaha* into *zaruriyat* (necessities), *hajiyyat* (conveniences) and *taksiniyat* (refinements and excellences) are of very wide significance and apply to a man's every walk of life. When applied to economics they are proved to be the precursors of the necessity, comfort, and luxury of the theory of modern economics. The classification has apparently been borrowed from Ghazali and applied to the subject of economics. But the scope of *zaruriyat* in Sharia is much wider. It includes, as seen above, food, clothes, shelter and *tarbiyat* (تربیہ training and education). From one point of view it also includes marriage. This is the minimum of necessities. The maximum would include all the various species of *maslaha*.

Now if the parents cannot provide the minimum for their dependent from honest family income, they have no right to procreate and to add to the number of the indigent and the starving. Is it preferable to plan a family and resist the temptation of having children or dependents or to increase one's income from corrupt and dishonest means? Is it preferable for a poor person to add to the number of the starving or of those who live much below the minimum subsistence level or to prevent the birth of unwanted children. The logical answer on consideration of Maslaha would certainly be in favour of planning a family. For the affluent and wealthy also it is preferable to have few children who may be brought up as good Muslims rather than a large number of those whose upbringing may be neglected and who may become a source of mischief for the community.

Let us remember the advice of Hazrat 'Ali:

> Hazrat 'Ali was questioned about the meaning of being well off or well provided for. He replied: Your welfare does not lie in your having enormous wealth and numerous children but it rests in your being highly educated and forbearing and in your being proud of your obedience to God. If you do a good deed then thank God for it, and

> if you commit a sin then atone and repent for it. In this world there is real welfare for two kinds of people, one is the person, who when commits a sin atones for it and the other is the man who is anxious to do good as much as possible.[1]

And the matter is not without historical precedent. Amar bin Aath the conqueror of Egypt, while addressing the people after the conquest said:

> 'O People beware of four practices because they cause to you distress after comfort, hardship after affluence and disgrace after honour. Avoid having too many children, too low a standard of living, squandering of wealth and useless talk.'

This persuasive advice was given during very early age of Islam to the people *inter alia* to practise birth control.

There have been such remarks from the learned that procreation or progeny is the main object of marriage. Others said that no such marital obligation attaches to the husband-wife relationship. The question would require some consideration. *Nikah* or marriage is the direct means to the safeguard of modesty, protection of chastity, and exaltation and ennoblement of morality and virtue in mankind. The opposite of *nikah* is *zina* (adultery and fornication). Living in adultery might have been tolerated in an immoral society but it has never been approved by any civilised people. The consequence of *zina* (adultery) is the birth of illegitimate and bastard children which are unwanted in the East and whose presence is endured in the West on account of insensitiveness of the members of Western Society to the problems of other and their lack of inquisitiveness in other's affairs. But however broadminded and tolerant be the people in the Wes they still treat illegitimacy or bastardy

1. *Nehj ul Balagha* translated by Sayed Mahammad Askari Jaffar. p. 282.

a taint and a stigma. They have a respect for the institution of marriage and the birth of legitimate children. The test of this disapproval is furnished by the European and American journalists and authors. Whenever I mentioned to them in justification of the Hudood Laws in Pakistan the trend in the West towards extra marital sexual excesses, they defied my statement as an exaggeration of the conditions there. It is a fact that in that society also which is considered extremely immoral from the Islamic point of view, the sanctity of marriage scores very high marks and often chronic bachelors cannot resist the blessings of wedlock. And how interesting is the phenomenon that for those for whom premarital chastity is meaningless after wedlock marriage binds the spouses in mutual promises of fidelity to one another and each party expects the other to keep his/her words, and be chaste for the duration of matrimonial alliance. This is the requirement, or rather the attraction of the marriage tie. Chastity has a glamour, a romance even for those and an appeal too, who are indifferent to pre-nuptial unchastity.

In some religions the sexual urge was suppressed by monasticism and monkery. But this has been dismissed by Islam as impracticable. The Prophet pbh commanded marriage and prohibited its abandonment, if one could afford it[1] (per Anas). Similar prohibition is reported by Samra that 'abandonment of marriage is not there in Islam'.[2]

Islam adopts a middle course and strives at maintaining equilibrium between the two extremes, the monkery and promiscuity, abstinence and abnegation on the one hand and adultery on the other. Adultery has been compared to uncontrolled flow of water. The Quran calls adulterers by the name of *musafaheen* (مسافحون) and married men as *muhsaneen* (محصنين). *safhaa* (سفح) the origin of *musafih* (مسافح) means to flow. *Zina*

1. *Sunan ul Darmi*, Kitab ul Nikah.

2. *Tirmizi, Nasai*, Kitab ul Nikah, *Mumad Ahmad*, Vol. 1, p. 312; *Abu Daud*, Kitab ul Mumarisatt, *Mustadrak* by Hakim, Vol. 2. p. 159.

(adultery) is known as *safaah* (سافح) لانه كان من غير عقد اكان بمنزله الماء الذى لايحبسه شئى (because it is without *nikah*. It resembles water flow of which is not controlled or restricted by anyone).[1]

On the other hand *hasana* (حصن) means a citadel or fortress, fine horse, weapon etc. The word *mohsin* (محصن) or *mohsanat* (محصنات) which means chaste man or woman, connotes that a man (or woman) is safe from what is prohibited and is so armed that he can resist any attack on him by cravings of lust and licentiousness. He is, as if in a citadel and immune from such attacks.[2]

The Prophet pbh expressed this sense succinctly when he is related to have said:

> When any one of you feels towards a woman and his heart is stirred by her he should repair to his wife and make love with her. In this way his mind shall be free of those fancies.[3]

The channelisation of sex and inculcation in man and woman ideas of modesty and chastity are the main objects of *nikah*. All traditions commanding woman to obey her husband for the satisfaction of his sexual urge and juristic opinions about the corresponding duty of man towards woman advance this object only. On the other hand the tradition about the mischief of men towards women and of women towards men reflect the destructive power of adultery:

مامن صاح الا و ملكان بنادیان ویل للرجال من النساء و ویل للنساء من الرجال

(Each morning two angels proclaim that women are destructive for men and men are destructive for women).[4]

1. *Al Lissan ul Aarb* on root word *safaha*.
2. *Lughat ul Quran* on the word *hasana*, vol. 2, p. 518.
3. See *Aurat Islami Maashre Men* by Syed Jalal Uddin Ansar Umri, pp. 381-2.
4. *Ibn Maja*; *Mustadrak* by Hakim, vol, 2, p. 159.

The primary object of *nikah* is protection from immorality, immodesty, and sexual corruption. The role of procreation in this relationship cannot be denied. It is undoubtedly the secondary object of *nikah*. In verse Q. 2 : 223 of Chapter 2 women are compared to a tilth. نساؤكم حرث لكم (Your women are a tilth for you). As a field, when properly cultivated, gives good produce so women bear children, as a result of sex. Procreation is thus an object of marriage. The point is only this that it is not the primary object. This is further established from the fact that there is definite command of shunning lewdness and of not going near *fahisha* (فاحشه lewdness) but there is no such command that a person must go to his tilth. Procreation being one of the objects of marriage the practice of *'Azl* was made subject to consent of the wife. It means that she has a right or stake in procreation or in its prevention. In either alternative there is discretion in the spouses. No principle of prohibition can be violated by the exercise of discretion and by practising family planning, if they so like.

Family planning is opposed by some of the learned in the modern age. Without naming anyone some of their objections may be stated briefly:

1. The traditions of the Prophet pbh permitted *'Azl* under peculiar circumstances explained before him by each questioner.

2. Islam does not allow any one to become barren just as it does not permit any Muslim to commit suicide.

3. The Government has no Sharia right to start what is really a movement for family planning.

4. Even if permission of *'Azl* be read in the traditions of the Prophet pbh it cannot justify the movement for family planning.

5. The use of contraceptive methods is likely to increase immorality among the people since pregnancy which is

an effective bar against it, can be completely checked by use of contraceptives.

The first, third and the fourth objections have already been considered in detail. It is clear from the discussion in this chapter that *'Azl* was permitted by the Prophet pbh and he found no harm in it; and the use of other contraceptive methods has been justified on the basis of Qayas from *'Azl*. This also includes the sealing of the womb which is the same as the tube ligation operation of a woman. On the same analogy vesactomy of a male is justifiable. Both these operations are reversible though the reversal of the operation of the female requires a delicate operation. Even otherwise these operations cannot be equated with cases of suicide, which is absolutely prohibited but to prevent one's wife from conceiving is an act or exercise which is permitted and discretionary. Imam Ghazali equated the exercise of *'Azl* with desistence from marriage or abstinence from sexual indulgence which are lawful but not excellent or meritorious.[1] Obviously the operation cannot be held to be unlawful.

The fifth objection appears to have been taken from the writings of westerners some of whom held these methods to be helpful in flourishing promiscuity and adultery. It is strange that those who are proficient in promoting accusations against their opponents of being under Western influence are, usually most prone to justify their opinions by the quotations from authors in the West without realising the conditions of the society or the background of what was written or said by them.

The important difference between the Western concepts and ours in relation to sex is that fornication is permitted in the West. Before the enforcement of the Hudood Laws in Pakistan, it was not an offence when committed by adults after a fixed age. Now it is an offence. In Islam it is absolutely prohibited

1. *Ehya ul Ulum ul Din*, Vol. 2, p. 51—Beirut.

and is now made an offence in law, punishable with severe sentence and those laws have now been enforced in this country.

The contraceptive devices are available in the market at costs, to those who wish to avail of them and despite this no deterioration of morals is observable. The free availability of the devices cannot make much difference particularly when it hardly made any difference during the past regimes, when the efficient service of the Family Planning Departments ensured its easy accessibility. Anyhow this by itself cannot be ground for preventing the Government from persuading people to plan their families according to their needs or the needs of the community or nation. If some evil is germinated there are legal provisions, substantive and procedural, to deal with it and correct it.

'Lastly is the objection to the right or power of the Government to start a movement for persuading the people to plan their family. It is not understandable, nor the proposition is based on any logic, how what is allowed to the individuals in the society may become forbidden by the persuasive intervention of the community or the State whose duty it is to educate the people about the permission and the necessity of availing of that permission in the national interest. There can be no harm if the Ulema educate the people about the blessings of the exercise of family planning for the betterment of or improvement in the condition of the family in the economic field and the field of health, education, and nourishment of the child besides cherishing the vitality, strength, charm and beauty of the woman. If this is permitted, the Government's action to the same effect cannot be challenged as being repugnant to Sharia. This is the only objective manner of determination of the vires of the Government action.

Such uncontrolled judgments are passed by those persons who tend to minimise the legislative power of the State, and to invest that power in the jurists. This approach cannot be encouraged during this age of exercise of statutory legislative

authority by the Legislature in its capacity as legislative *Ulul Amr* or by the head of the State enjoying both legislative and executive powers of the State. After considering the genesis of Fiqh, the influence of and confidence enjoyed by the Jurists in the field of law making and the trends of the modern age it was held by the Federal Shariat Court in its judgment of Detention laws and the law about Press and Publication in Pakistan:[1]

> 'The ruler is thus the supreme legislative authority. He is the authority to choose between the different opinions of Mujtahids. If he is himself qualified to decide whether the legislative solution to the problem is good in Sharia and is not repugnant to the Holy Quran and the Sunnah of the Holy Prophet pbh, he can enforce it, no doubt in consultation with his Shoora. In other cases he must either have a body of the learned to decide the question whether a law is in accordance with Sharia or leave the matter to Courts of law.'

In the exercise of the legislative authority, the *Ulul Amr* has to take into consideration several principles *e.g.*, neither one should cause damage nor encounter damage with damage, (لاضرر ولا ضرر)[2] damage should be avoided as far as possible,[3] (الضرر يدفع بقدر الا مكان), damage or harm should be removed,[4] (الضرر يزال), a damage cannot be removed by inflicting another damage,[5] (الضرر لايزال بمثله او الضرر لايزال بالضرر), a major damage may be removed by incurring a minor damage,[6] (الضرر الا شد يزال بالضرر الاخف), private damage can be incurred

1. Shariat Petition No. K-3 of 1983, Tamseel Javed *v.* Federation of Pakistan, dated 27th March, 1984.
2. See for this Hadith, *Mowatta* by Imam Malik, *Mustadrak* by Hakim, *Al Sunan u Kubra* by Baihaqi.
3. *Mujella*, S. 31.
4. *Ibid.*, S. 20.
5. *Ibid.*, S. 25.
6. *Ibid.*, S. 27.

to avoid a public damage[1] (يتحمل الضرر الخاص لدفع الضرر العام), in case of conflict, to avoid mischief is better than the acquisition of profit,[2] (درء المفاسد اولىٰ من جلب المنافع), and a damage will not be overlooked on account of being old[3] (الضرر لا يكون قديماً).

Then there are principles of *Fath ul Zarai* and *Sadd ul Zarai*, which means opening of means or closing of means (for objectives). This requires some explanation, which is there in the same judgment of the Federal Shariat Court:

> Literally the word *dhari'ah* means medium, instrument means or device. Some jurists for example the Maliki jurist Qarafi, use the term *wasilah* instead of the term *dhari'ah*. The term *dhari'ah* or *wasilah* means anything or action which becomes a means or an instrument for the existence of another thing or the occurrence or the commission of an act. If it becomes a means or serves as an instrument for the occurrence or the commission of something evil or unlawful, it will also be considered evil and unlawful; if it is the only means or instrument for an obligatory thing or act, it will be considered obligatory.
>
> Imam Qarafi says:
>
> '.....An act which is a means to the (realisation of the best objective is the best of means; an act which is a means to the realisation of) the worst objective is worst of means; and an act which is a means to the (realisation of) a middle-type objective is the middle of means. This is briefly the meaning of the principle of Sharia.
>
> Applying this principle the legislature can issue a law either prohibiting something lawful which has become a means to the commission of unlawful act or the occurrence of an unlawful thing, or requiring the citizen to do something

1. *Mujella*, S. 26.
2. *Ibid.*, S. 30.
3. *Ibid.*, S. 7.

which, though not compulsory or obligatory, has become the only available means to the realisation of an objective of the Shariah or to the compliance of an order/commandment of the Shariah.[1]

The principle laid down above is that under certain conditions or in order to achieve some end the legislature can prohibit by law what is lawful and command the citizens to do something which is not obligatory. Thus the discretion can legally be substituted by obligation.

The principle that what is permitted cannot be prohibited is subject to the State's power of legislation which has absolute seisin over all that has been said about *maslaha* and *mufsida*. The philosophy of *maslaha* in the field of *Siyasat i Shariah* is couched in the following legal maxim :

تصرف الامام على الرعيه منوط بالمصلحه او التصرف على الرعيه منوط بالمصلحه

There is no doubt that no fixed or uniform rule can be laid down on the question of family planning. The answer to the question must change with the change in circumstance and conditions of a particular community, nation or the State. Sometimes the Ummah or the group living in a particular country may be faced with undesirable reduction in the size of the community and it may be necessary to stimulate the people to multiply. But there may be circumstances in which this position may have to be reversed, the pendulum may swing to the other side and diminution in the birth rate may have to be prompted for the good of the community. These are not matters to be regulated by the whimsical opinions of those who cannot be expected to be possessed of the objectivity which is generally the result of compilation of the data necessary for determination of the policy. The only authority which is in position to make

9. Shariat Petition K-3 of 1983, Tamseel Javed v. Federation of Pakistan, decided on 27th March 1984.

an authoritative pronouncement on the subject is the *Ulul Amr* (Government).

It is not possible for the jurists or the learned however, intellectual, knowledgeable and discerning they be, to give a final verdict about the necessity of such complicated legislation as that of family planning. The determination of the necessity is dependent upon data of various character and facts and figures. The Government is in a position to collect such data and in fact possesses it. It is therefore in a position to resolve with certainty in the light of the Sharia principles mentioned above briefly and other principles whether it is necessary to educate the public in the field of family planning. This will be a guide to the public whether and how far the discretion in the matter of birth control should be exercised by them. The Government has the power to command also but obviously such power can be exercised with circumspection. The learned are not expected to substitute themselves for the legislature. Their duty ends after pointing out the lawfulness, unlawfulness, permission or prohibition of such a matter. The application of the principle for legislation is for the legislature only. There is another reason too for the same conclusion. The opinion of the Ulema is mostly subjective. Subjective opinion based upon one's personal prejudices or inclinations, and opinions of the Westerners supporting it is as unreliable as the opinion of a pseudo liberal impressed by Western thoughts and concepts who has little knowledge of the treasure of learning and scholarship within his approach. Both attempt at quibbling. Ibn-e-Qayyim said, 'The basis and structure of law, is wisdom and people's best interest in this world and the world to come. Law is all justice, mercy, interest and wisdom.' The next portion of the citation is significant and is an obvious call for objectivity and compilation of data, 'Each question which deviates from justice to injustice, from mercy to its opposite, from advantage and from wisdom to wantonness, is alien to the law of Islam,

even though it has been introduced therein by attempts at interpretation or quibbling.[1]

Whether a drug or device is suited or unsuited, and for which the opponents of family planning rely on the opinions of doctors and experts on the subject, is undoubtedly a relevant matter but in this respect too the best judge is that cell of experts and planners which every Government in the modern age must maintain. Every member of the public can draw the attention of the Government to shortcomings, deficiencies, needs for reform and improvement in a particular set up; and in the case of those who are learned, this becomes a duty, but this discretion or duty should be performed or exercised in a matter on which two opinions are possible, in a manner that the advice may not have the appearance of being the last word on the subject. A stern rebuke to which our learned have been accustomed for a long time now or an unflinching or inflexible attitude of saying 'the last word' on the subject has the propensity to promote confusion in other minds and to compel those who are concerned, to forget and eschew detachment, impartiality and openmindedness which are the requirements of sound planning for the good of the people.

The Quran says that, 'Thus have We made you a central people'. How can such behaviour accord with the direction of steering a middle course. 'Ours is the last word' which I have often heard from those who have at most a right to advise, whether gratis or therwise, is psychologically the display of a mentality of deep prejudice, self-satisfaction, self-pride and ambition. The motive force of such claims is to gather a host of followers, and to compel others acknowledge him as an expert whose opinion cannot be questioned. And this ambition opens a door for mischief as indifference to his views provokes him as well as his followers. The only true course open before

1. *'El Iam ul Muwaqqein* by Imam ibn Qayyim, vol. 3, p. 27.

unquestioned experts too is to present views to the *Ulul Amr* and let him determine with the help of the Shoora and in the light of data, the most appropriate course to be adopted. There as no harm in using the information media for educating the people and for bringing before the authorities what in one's opinion is good for the people but the language used should be argumentative and conciliatory. It should be a piece of education and persuasive advocacy and not of incitement and provocation against the determinant authority.

And there is no finality in matters of acquisition of knowledge. The principles of legislation referred to above about elimination of damage, advancement of utility and benefit, preference of eradication of corruption over the acquisition of benefits, and the changeability of a law or instruction with the change of epoch negative the possibility of any finality in the temporal law for the Muslims.

Abortion

The success of the practice of *'Azl* was largely dependent upon the strong will and power of resistance of the husband and its chances often were not bright. Sometimes pregnancy could not be prevented although there might be grounds for it, for example the weak health of the woman. The Muslim Jurists did not lag behind in discovering by resort to Ijtihad, an alternative remedy. This was the legalisation of abortion.[1]

Zailal (1342 A.D.) said that according to the jurists a woman is free to abort her pregnancy until foetus is clearly formed. It is formed after one hundred twenty days.[2]

Ibn Hummam referred to the same rule. He said that

1. *Tahzib ul Ehkam*, Najaf 1961, part 7, pp. 416-7.

2. *Tabeen ul Haqaiq, Sharh Kanz ul Daqaiq*, Egypt, Bolaq, 1313 A.H. Vol .2, p. 166.

abortion is lawful till no part of the child is formed and it is formed after 120 days.[1]

In *Fatawa Hind'ya* it is laid down that '*Azl* with the consent of the wife is not disapproved. It is lawful for the woman to abort the pregnancy within 120 days of conception. Allama 'Abideen says:

يباح الاسقاط مالم يتخلق منه شيأ ولن يكون ذالک الا بعد مائه و عشرين يوما

(Abortion is lawful until something is born for which the period fixed is one hundred twenty days).[2]

He said that the jurists considered it lawful even without the permission of the husband.

The opinion of Sh. Ibrahim to the same effect has already been noticed. Abdul Majid Salim, Grand Mufti of Egypt referred to the difference of opinion on this question among the Hanafi jurists and said that it appeared from the texts that its lawfulness depended upon valid reasons in support of its justification. One reason may be that the woman has an infant, but her milk dries up, the husband cannot afford the services of a woman to breast-feed the child, and there is danger to the life of the above child. If there be no such justification, it is perefrable not to take to abortion after the foetus is formed.[3]

Abortion within one hundred twenty days is thus allowed by some jurists. They appear to act on a Hadith of the Prophet pbh. The Hadith is as follows:

> It is reported from Ibn Masood that the true Prophet pbh said that the *nutfa* (drop of fluid or sperm) of everyone from amongst you remains in the mother's womb (uterus)

1. *Al Fatawa al Hindiya*—Egypt, Bolaq, 1310 A.H. vol. 1, p. 335.
2. See *Ibn 'Abideen*, vol. 2, p. 412.
3. *Al Islam wa Tanzeem ul Usra*, article by Ahmad al Sharbasi, vol. 2, pp. 22, 23.

for forty days. It then becomes *alaqa* (a clot) (not blood clot as translated in Urdu or generally understood by the commentators) in the same manner, then it becomes in it *madgha* (lump of flesh or chewed flesh) in the same manner.

Allah then sends an angel who blows the soul in it .....[1]

The words *misla zalik* (مثل ذالک in the same manner) in two places have been understood as referring to forty days.[2] If this version is taken to be correct, the total period up to the blowing of the soul become one hundred twenty days. It is on the basis of this calculation that the jurists fixed the same period of seventeen weeks for abortion of pregnancy which according to them is justified before the body of the child is inspirited.

But there are two other traditions of *Sahih Muslim*. In one the angel is said to visit after forty or forty-five days for writing the destiny of the child[2] while in the other (reported from Huzaifa who related from the Prophet pbh that) the angel is sent after forty-two days (six weeks) of the pregnancy. He fashions the form, eyes, ears, skin, flesh and bones of the child.[3]

All the three traditions pertain to determination and writing of destiny of the child and they confirm a uniform theory of predestination. They differ in the fixation of the period of various stages of human reproduction. In the first tradition the period of the preparation of *mudghah* (مضغه chewed flesh or lump of flesh) is one hundred twenty days while in the third tradition it is only forty-two days for passing through all stages of reproduction including the preparation of bone and inspiriting. This difficulty needs to be resolved in view of the modern discoveries in the field of human biology. May be the words *mislo zalik* (مثل ذالک) used twice to mean forty days each time were misunderstood by the reporter.

1. *Sahih Muslim with Sharh Nawawi*, Urdu translation—Sh. Ghulam Ali & Sons. vol. 2, p. 1675.
2. *Ibid.*, p. 1676.
3. *Ibid.*, p. 1677.

The question whether the immunity regarding abortion lasts one hundred twenty days or less was considered by the jurists of other schools, though on grounds altogether different. This discussion which also gives details of the views of different schools may be cited and referred to from an Article of Mohammad Salam Madkur in *Islam and Family Planning*,[1] which is a translation of *Al Islam wa Tanzeem ul Usra*.

Haskafi of the Hanafi School of Jurisprudence states that a woman is allowed to abort before the completion of four months of pregnancy even without her husband's consent. Commenting on this statement, Ibn 'Abidin, the Hanafi scholar, basing himself on *Tahtavi* and *Kitab ul Nahr*, said, "Is abortion allowed after conception? Yes, it is, unless an embryo is already formed and this does not happen except after one hundred and twenty days.

By embryo formation they must have meant animation, otherwise the statement would be incorrect because embryo formation takes place before the end of this period. This is stated in *Fath*.

The author of *Khaniyya* who is a Hanafi, as quoted by Ibn 'Abidin, considered abortion as disfavoured (*makruh* مکروہ) but made exception in cases where there is valid excuse such as the interruption of lactation after conception, or feeling of debility or inability to endure pregnancy, or inability to deliver naturally and the need to undergo a Caesarean Section operation particularly if this recurs.

Similar is the view of Ibn Wahban another Hanafi scholar as reported by Ibn 'Abidin.

Dr. Madkur said in regard to these two opinions that it can be said that the question of reason or excuse ought not to be a point of controversy and dispute except in

1. *Islam and Family Planning*, vol. 2, p. 272 Article by Dr. Mohammad Salim Madkur.

the evaluation of the kind of occasion which necessitates abortion. If this represents a necessity, then one can have recourse to the rule that necessity knows no law, as well as to the rule that the greater evil should be warded off by the lesser evil.....

The statements quoted from the scholars of the Hanafi school of jurisprudence show that there is a view that abortion before the expiry of the fourth month is permissible in all cases, with or without a valid excuse. Some of these scholars maintain that abortion is an excusable object of disfavour.

The scholars of the Malikiyya school of jurisprudence are on the whole more strict than their Hanafi compeers. According to them as is reliably approved, abortion should be prohibited even during the first forty days. According to another view, however, abortion, if carried out during the first forty days, is considered to be an object of disfavour, but all are unanimous in prohibiting abortion after animation where there is no valid excuse. Dardir and Dasuqi[1] of the Malikiyya school of jurisprudence, said in this connection: 'It is not allowed to expel the zygote formed in the womb, even before the expiry of the first forty days'. Dasuqi said: 'This is the generally accepted view, but it is said that abortion before the expiry of the first forty days is the object of disfavour.' The indication here is that Dardir inclines towards prohibition. All accounts of the Malikiyya school of jurisprudence indicate that there is no provision which permits abortion before animation. Hence, *afortiori*, abortion after animation is certainly not permissible. It should be noted that the expression 'formed in the womb' indicates that it is permissible to take out the sperm before it is formed into a clot. In other words it is permsisible to dispose of the fertilised ovum while it is in

1. *Hashiat al Dasuqi alal Sharh al Kabir*, vol. 2, p. 266.

the uterine tube and before it definitely assumes the form of a sucking clot or gastrula cleaving to the wall of the womb. This is evidence and confirmed by Qurtubi of the Malikiyya school of jurisprudence, who said : 'The sperm is not subject to any legal provision if it is discarded by the woman before it settles inside the womb. At this stage it is as though still a part of man in his loins.' It is, therefore, explicit that the wife can get rid of the sperm by any means as long as it is not yet settled in the womb, with impunity.

Ibn Rushd, a Maliki scholar, reports that Imam Malik recommended atonement or expiation in case the embryo is expelled. However, he does not prescribe atonement as an obligatory measure, because of his hesitation concerning whatis done deliberately or inadvertently, whereas the recommendation of atonement should be consequent upon whether a sin has actually been committed or not.....[1]

The definition of the term 'embryo' together with that of the stage of conception to which this term can be applied, supports the view that, the term embryo can be applied rightly to the stage after the expiry of forty days. Nuwairi says that some scholars applied the term 'embryo' to the stage after animation.[2]

Qurtubi relying upon Verse Q. 53 : 32 explains, 'embryo' as the infant as long as it is in the womb (belly).[3] In his *Encyclopaedia*, Bostani defined 'embryo' as 'the infant so long as it is in the womb (belly)': It is first a zygote; then it develops into a clot, a lump of flesh (gastrula) and later into an embryo.[4] According to Dr. Najib Mahfuz[5] the clot

1. *Islam and Family Planning*, vol. 2, pp. 273, 274, Article by Dr. Mohammad Salam Madkur.
2. *Nihayat al Arab*, Vol. 2, p. 11.
3. *Al Jame al Ehkam al Quran*, vol. 17, p. 110.
4. *Bostani's Encyclopaedia*, vol. 6, p. 569.
5. *Fann al Wiladah* (4th Edition), p. 88, by Dr. Najib Mahfuz.

is called 'embryo' at the end of the fourth month. In his book *Human Body*, Dr. Edith Scroll says that the developing organism in the womb is called a small lump of flesh (gastrula) between the third and the eighth week of its life, but is called embryo from the eighth week till the conclusion of the period of gestation.

Some books on jurisprudence, however, assign the term 'embryo' to the organism in the womb as from the stage of impregnation. But Imam al Muzni quotes Imam al Shafe'i as having said that the term 'embryo', strictly speaking, should be assigned to the stage after that of the small lump of flesh, and its use to denote the prior stage should be understood only figuratively in the sense that the lump of flesh (gastrula) is a prelude to the real embryo. Here is the text of the quotation accredited to Imam al Shafe'i,[1] 'As for the embryo, the least that can determine the embryonic stage is the point where the organism departs from being a clot and a lump of flesh until it manifests an indication or a semblance of being a human creature'. We ought to appreciate the quotation because Imam Shafe'i apart from being a renowned scholar in jurisprudence, is also a language expert and an authority on linguistic expressions and their uses.

Hence we are inclined to support the view that Ibn Rushd's citation of Imam Malik does not apply to the initial and final stages of pregnancy, but to the stage after expiry of the firs forty days when the organism is called 'embryo'.

The Shafe'i doctrine is expounded by Bijarmi, a Shafe'i scholar, who based himself on Ibn Hajar, also of the Shafe'i school of jurisprudence. According to him the Shafe'i scholars differed as regards the expulsion of the foetus before animation. As to abortion after animation

1. *Kitab ul Umm*, vol. 5, p. 143.

there is a tendency to prohibit it, in compliance with the views of Ibn Imad and others....[1] Shabrimaassi confirmed the existence of differences among the Shafe'i scholars... He said: 'They differed as to whether or not it is permissible to cause the removal or expulsion of the zygote or the clot, after it settles in the womb....' He himself held: 'It is presumable that abortion is prohibited in all cases after animation, and allowable before animation.'

It would appear that the Maliki and Shafe'i jurists who supported abortion fixed a period of forty days from the date of conception for it. Imam Shafe'i gave the best lead in this direction, by indicating the criterion of the lump of flesh assuming the resemblance of being a human creature. The definition of 'embryo' attempted by different persons is different and would be rather confusing but the difficulty is removed by the elaboration of Imam Shafe'i and it can be said with certainty in the language of modern embryology that the determining factor is the assumption by the embryo of the form of foetus.

As already noted the period of forty days, forty-two days or forty-five days is fixed for animation in two other traditions of the Prophet pbh.

The authenticity of these traditions may be tested on the well recognised principle of *darayat* (test of authenticity of the Hadith) that it should not be contrary to (proved) facts and observations. This will include scientific observation. A rather different but spectacular interpretation of the Quranic verses concerning human reproduction by Maurice Bucaille may be reproduced here from his book *The Bible, the Quran and Science*. He recalls the basic concepts which were unknown at the time of the Quranic revelation and the centuries that followed and then compares those concepts with the statements

1. *Al-Bijarmi Ala al Iqna'*, vol. 4, p. 30, also see *Hashiyat al Shabrimalatsi ala Nihayat al Muhtaj*, vol. 6, p. 179 and *Hashiyat al Rashidi*, vol. 8, p. 416.

in the Quran about human reproduction. He explains the modern notions as follows:

> Human reproduction is affected by a series of processes which we share in common with mammals. The starting point is the fertilisation of an ovule which has detached itself from the ovary. It takes place in the Fallopian tubes halfway through the menstrual cycle. The fertilising agent is the male sperm, or more exactly, the spermatozoon, a single fertilising cell is all that is needed. To ensure fertilisation therefore an infinitely small quantity of spermatic liquid containing a large number of spermatozoons (tens of millions at a time) is required. This liquid is produced by the testicles and temporarily stored in a system of reservoirs and canals that finally lead into the urinary tract; other glands are situated along the latter which contribute their own additional secretions to the sperm itself.
>
> The implantation of the egg fertilised by this process takes place at a precise spot in the female reproductive system; it descends into the uterus via a Fallopian tube and lodges in the body of the uterus where it soon literally implants itself by insertion into the thickness of the mucosa and of the muscle, once the placenta has been formed and with the aid of the latter. If the implantation of the fertilised egg takes place, for example, in the Fallopian tubes instead of in the uterus, pregnancy will be interrupted.
>
> Once the embryo begins to be observable to the naked eye, it looks like a small mass of flesh at the centre of which the appearance of a human being is at first indistinguishable. It grows there in progressive stages which are very well known today; they lead to the bone structure, the muscles, the nervous system, the circulation and the viscerae, etc.[1]

1. *The Bible, the Quran and the Science*, by Maurice Bucaille, p. 199.

Maurice Bucaille refers to verses Q. 16 : 4 and Q. 75 : 37 which prove that the first step in the reproduction of a child is sperm, 'only a small quantity of it fashions the man.' In both the verses the word *nutfa* (نطفہ) is used. It is translated by Pickthall as 'a drop of fluid'; by Arbury as 'spermdrop' and by Mohammad Ali as a 'small life germ'; while Bucaille translates it as 'a small quantity (of sperm)', to make it correspond to the first process of reproduction as recognised by Medical Science, that to ensure fertilisation an infinitely small quantity of spermatic liquid is required. The translation is fully justified in Lexicon. *Nataf al Maa* (نطف الماء) means trickled in small quantity. *Nutfa* (نطفہ) means according to Azhari a little water as well as water in larger quantity but (in usage) it is limited to a small quantity.[1]

Bucaille also commented upon verse Q. 76 : 2 which is translated by Pickthall as 'We created man from a drop of *thickened fluid*'; by Arbury 'by a sperm-drop a mingling' and by Mohammad Ali 'from a small life germ by union (of sexes)'. Bucaille translated the words *'nutfatin amshaj'* (نطفہ امشاج) as 'mingled liquids' and corrects a fallacy from which many commentators and learned like Dr. Hameedullah (and Mohammad Ali too) have been misled in interpretation. These commentators thought that the mingling is of male and female liquids. He criticises this mistake as committed on account of lack of knowledge of the physiology of fertilisation, specially the biological condition in the case of the woman. They thought that the word امشاج (*amshaj*) simply meant the unification of the two elements. He then refers to the modern authors like the author of *Muntakhab* edited by the Supreme Council for Islamic Affairs, Cairo who note that the small quantity of sperm is made up of various components. But in this commentary also the details are not given. He himself furnishes the information that the spermatic liquid is formed by various secretions which come from the following glands:

1. *Lughat ul Quran* by Parvez, vol. 4, p. 1630.

(*a*) the testicles: the secretion of the male genital gland contains spermatozoons, which are elongated cells with a long flagellum; they are bathed in a sero-fluid liquid;

(*b*) the seminal vehicles: these organs are reservoirs of spermatozoons and are placed near the prostate gland; they also secrete their own liquid but it does not contain any fertilising agents;

(*c*) the prostate gland: this secretes a liquid which gives the sperm its creamy texture and characteristic odour;

(*d*) the glands annexed to the urinary tract: Cooper's or Mary's glands secrete a stringy liquid and Littre's glands give off mucous. He adds that these are the origins of 'the mingled liquids' which would appear referred to.

Verse Q. 32 : 8 says '*summa jaa'al naslahu min sulalatin min maa in maheen*' (ثم جعلنا نسله من سلالة من ماء مهين) meaning that "then he made his progeny of an extract, of a liquid held in light estimation. The word *Sulalah* (سلالة) means quintessence or extract. Bucaille explains this that it signifies 'some thing which is extracted, the issue of something else, the best part of a thing.' In whatever way it is translated it refers to a part of the whole. He then proceeds to explain the reason for laying stress on the word extract or its being part of a whole. "Fertilisation of the egg and reproduction are produced by a cell that is very elongated; its dimensions are measured in ten thousandths of a millimeter. In normal conditions, only one single cell among several tens of millions produced by a man will actually penetrate the ovule; a large number of them are left behind and never complete the journey which leads from the vagina to the ovule, passing through the uterus and the Fallopian tubes. It is therefore an infinitesimally small part of the extract from a liquid whose composition is highly complex which actually fulfils its function."[1]

The next process in the scheme of human reproduction is '*alaqah* (علقة) which has been translated by the translators and

1. *Bucaille*, p. 203.

commentators as a clot or blood clot. According to Science man has never passed through the stage of being a blood clot. In order to clarify this Bucaille translates the word as 'something which clings'. The word *'alaqah* has been used in verses, Q. 96 : 1 and 2; Q. 22 : 5; Q. 23: 14; Q. 40 : 67, Q. 75 : 37-38, in the same sense. He explains:

> "Once the egg has been fertilised in the Fallopian tube it descends to lodge in the uterus; this is called the implantation of the egg. The Quran names the lodging of the fertilised egg, womb: Surah 22 verse 5 says:
>
> 'We cause whom We will to rest in the womb for an appointed time'.
>
> The implantation of the egg in the uterus (womb) is the result of the development of villosities; veritable elongation of the egg, like roots in the soil, draw nourishment from the thickness of the uterus. These formations make the egg literally cling the uterus. This is a discovery of modern times.[1]

This passage clarifies the significance of 'something which clings' as the translation of *'alaqah* (علقہ) by Bucaille. This meaning of the word *'alaqah* is not far-fetched or remote; in fact it is the basic meaning of the word, as stated by Fars. According to him the basic meaning of the word is to tie or fasten a thing with some other thing, which is higher, the clay which sticks on the hand. The word *alm'alaq* (المعلق) means anything with which something is hung. *Al 'alaqah* (العلاقہ) means love which clings to the heart. *Almu'allaqah* (المعلقہ) means a married woman who is neither divorced by the husband nor is treated well and has thus to hang on or cling to him. According to Alasri[2] the word, *alaqah* means 'to cling, cleave or stick to'.

The next few stages in the Quran are given in verse Q. 23 : 14 *'Fa khalaqna al alaqata mudghatan, fa khalaqnal mudghata izaman*

1. *Bubaille*, p. 204.
2. *Ibid.*, pp. 204-205.

fakasaunal izama lahma' فخلقنا العلقة مضغة فخلقنا المضغة عظاماً فكسونا العظام لحماً which means: Then fashioned We the clot a little lump or lump of flesh then fashioned We the little lump or 'lump' of flesh bones, then clothed the bones with flesh. With the word lump the words 'lump of flesh' have been used in this translation of the verse alternatively because the translators sometimes use the word lump only for *mudghah* and sometimes they use the phrase 'lump of flesh' for it. Bucaille, however, translates the word *mudghah* (مضغة) as chewed flesh to make it conform to the scientific meaning. It may be clarified that the word *madagha* (مضغ) means to chew, to masticate and the word *mudghah* (مضغة) means anything chewed. The word *almudghah* (المضغة) also means a piece of flesh. The meaning given by Bucaille are correct. Moreover he used the expression 'chewed flesh' in contrast to the expression 'intact flesh' which is the translation of *'lahm'* used for the stage after the next one. The same is the sense of 'lump of flesh'.

Bucaille then explains the significance of the use of the expression 'chewed flesh':

> "'Chewed flesh' is the translation of the word *mudga*; intact flesh is *'lahm'*. The distinction needs to be stressed. The embryo is initially a small mass. At a certain stage in its development, it looks to the naked eye like a chewed flesh. The bone structure develops inside this mass in what is called mesenchyma. The bones that are formed are covered in muscle; the word *lahm* applies to them."[1]

The words, 'embryo' and 'foetus' now require to be explained:

Embryo in human biology is an unborn offspring from the time of fertilisation until two months later when it is sufficiently developed to be unmistakably human, after which it is known as foetus. During the first month a human embryo much

1. *Bubaille*, pp. 204-205.

resembles that of any other vertebrate; during the second month that of any other mammal.

An embryo starts as a fertilised ovum, a single cell 0.1 mm in diameter, just large enough to be seen with the naked eye. This small object is much larger than any other cell of the human body. By the time it has travelled down the Fallopian tube and implanted itself in the lining of the uterus it is about a week old. Until then it has no means of growing larger, but its one large cell divides into two smaller cells, then the two into four and so on until a colony of 100 or more cells is formed, the whole mass (blastocyst) the size of the original ovum. The embryo gets its nourishment from the mother through the outer layer of cells of the blastocyst. Later this layer forms the placenta and one of the enveloping membranes of the foetus, the *chorion*.

In the inner cell the mass of the blastocyst, two bubbles are formed side by side, with a double layer of cells between. One bubble will form the inner enveloping membrane of the foetus, the *amnion*. The two membranes chorion and amnion make up a two layered bag in which the foetus floats during pregnancy. The second bubble is the yolk-sac.

The embryo proper, the new human being, grows from the cells between the two bubbles. At first this is simply a two layered disc. The layer belonging to the amnion forms the *ectoderm*. The layer belonging to the yolk sac forms the *endoderm*.

At a very early stage the midline-longitudinal axis of the embryo is marked off by a straight rod of cells the *notochord*. Later growth is practically symmetrical on either side of the notochord. In man, as in all vertebrates, the notochord disappears as the backbone grows but trace persist in the intervertebral discs. For a time the developing backbone is longer than the rest of the embryo and forms a distinct tail.

A new layer of cell appears at either side of the notochord, between the ectoderm and the endoderm. This is the mesoderm.

Ectoderm, mesoderm and endoderm are the three germ-layers discovered by Von Baer from which all other tissues are derived.

The disc has now three layers. The ectoderm now grows fastest and spills over the edges to form outer wrapping for the embryo. The endoderm curls to form an inner tube. The mesoderm remains between the two. Along the future back of the embryo a deep group appears in the ectoderm, which then grows over to convert the groove in the neural tube. The front end of the neural tube is later folded and expanded to form the brain; the rest keeps its original shape as the spinal chord. Thus the ectoderm provides both the skin and the nervous system.

The endoderm lines the whole digestive tract. Offshoots form the digestive glands (liver, pancreas etc.), and also lungs.

Muscles, bones, connective tissues and blood vessels are all derived from mesoderm. The heart is formed in mesoderm at the head of the embryo next to the developing brain, it is displaced towards its final position as the mouth grows between heart and brain.

In the first few weeks the nerves grow outwards from the developing brain and mind cord. As the various parts of the body take up new positions they keep their original nerves. In adult anatomy, the source of a nerve indicates the origin of the part it supplies. For example the diaphragm—a muscle separating the heart from the abdomen—gets its nerves from the spinal cord high in the neck, because this muscle is first formed just below the original position of the heart.

By the end of the second month all of the main structures of the body are more or less in place. The proportions are strange. The head is relatively large and the legs are small. There is little bone but the whole skeleton already formed is cartilage. The backbone no longer extends beyond the but-

tocks as a tail. The embryo is now about four cm. (1½ inch) long.[1]

Unborn infant has now developed from an embryo to a stage where it is recognisably human *i.e.* from about the eighth month of pregnancy. At this time the foetus is about 4 cm long measured from crown to rump. Nearly half of it is head and the limbs are very small. The skeleton is of cartilage—gristle—but the first flecks of bone are just appearing. Its heart is pumping blood through its body and out to the placenta to receive the ingredients of growth filtered from the mother's blood. The lungs are still rudimentary. Neither they nor the intestine serves any purpose until birth. The liver grows quickly; as the main centre of chemical synthesis and storage it has much to do. For a time liver is so large relative to the abdomen that part of the intestine is pushed through the umblical cord.

The various organs grow at different rates and the proportions of the foetus gradually change to those of a new-born baby. At sixteen weeks the foetus is about 10 cm long, crown to rump, and weighs about 100 grams (4 ins. and 3½ oz.). At 24 weeks it has grown to 20 cm. and 650 and it is approaching the stage at which it would stand a chance of survival if it should be born early. At 28 weeks from the start of the mother's last period—after 26 weeks after conception—it is considered viable under English Law, although in practice it would still be premature and will survive only with expert nursing. A foetus of this age has very little fat, and therefore great difficulty in keeping warm and very little stored fuel. Its reflexes for breathing and other vital functions are not yet wholly reliable. During the remaining ten weeks of pregnancy the foetus—now definitely a baby—grows about 50% longer and increases its weight five-fold.

The scintillating approach of Maurice Bucaille in the translation of the Holy Quran highlights in the modern age, an age

1. *The Penguin Medical Encyclopaedia on 'Embryo'.*

of scientific discoveries and inventions, the essentiality of the reading and interpretation of the Quran in the light of scientific knowledge.[1] The same can be said about Hadith literature involving scientific problems. The first Hadith reproduced from *Muslim* does not stand scrutiny since it is established that the foetus is formed in eight weeks time and then it is a human in identifiable form. The other traditions in one of which the period of forty or forty-five days is fixed for all stages to pass till the blowing of the spirit and in another a period of six weeks is fixed for the same purpose are nearer the mark. The opinions of the jurists who fixed a period of one hundred twenty days for safer abortion which according to them is lawful before the preparation of the child in human form requires to be reviewed. The jurists and the learned of this age should undertake to consider the question. From the scientific point of view at most a period of eight weeks can be fixed. It may however be noted that the Pakistan Penal Code does not justify abortion or miscarriage and it is illegal, before the quickening of the child, or after, except to save the life of the woman.[2]

1. *Pakistan Penal Code*, S. 312.
2. *Ibid.*, S. 312.

CHAPTER 7

EXAMINATION OF MUSLIM FAMILY LAWS ORDINANCE, 1961 AND DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

SECTION 1—THE STATUS OF MARRIAGE

'Marriage' says the Ashbah, 'is an institution ordained for the protection of society, and in order that human beings may guard themselves from foolishness and unchastity . . .'

'No sacrament but marriage has maintained its sanctity since the earliest time (the days of Adam). It is an act of *ibadat* or piety for it preserves mankind free from pollution . . .'

'It is instituted by divine command among members of the human species. . . .'

'Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a legal union. . .'

'It does not give the man any right over the person of the wife except for mutual relationship according to the law of nature and not contrary to it. This is clearly laid down in the *Hedaya*. . .'

'And being ordained among members of the human species a man cannot marry a being of another kind.'

'Marriage is obligatory on a person whose passions cannot be restrained from the commission of wrongs or from hankering after what has been prohibited, and who can provide the maintenance of his wife. But it is not sinful for one who is content and, has no means, to abstain from it. . .'

'If two people of different sexes intermarry with the object of guarding themselves from foulness and unchastity and procreating children and rearing them up tenderly, the act is pious. If it is only for self-indulgence, the act is not pious. . .'

'It is unlawful to oppress or coerce a woman into marriage or to obtain her consent by force or coercion, or to compel her to marriage. . .'[1]

These citations describe briefly the nature and scope of marriage in Islam.

Regarded as a social institution, marriage, under the Muslim Law is essentially a civil contract. Its validity depends upon proposal on one side and acceptance by the other. The law does not insist upon any particular form in which the contract should be effected and completed. Before the promulgation of the Family Laws Ordinance which provides for compulsory registration of marriage[2] it was not necessary in Pakistan that the union should be evidenced by any writing.

A marriage-contract, as a civil institution, rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers ; and according to the majority of schools, have power to dissolve the marriage tie, should circumstances render this desirable.

'Marriage like other contracts' to use the words of Baillie, 'is constituted by *ijab wa kabul* or declaration (offer) and acceptance', but it confers no right on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband ; she retains the same powers of using and disposing of her property, or of entering into all contracts regarding it, of suing and being sued without his consent, as if she were still unmarried. She can even sue her husband without the intervention of a trustee or next friend and is in no respect under his legal guardianship.[3]

1. *Muhammadan Law* by Ameer Ali, Vol. 2, pp. 241-242 ; *cf. Durrul Mukhtar* Vol. 2, pp. 1-2 and *Raddul Mohtar*.

2. See S. 3.

3. *Muhammadan Law* by Ameer Ali, Vol. 2, pp. 243-244.

On the other hand in England, by the rules of Common law, husband and wife were regarded as one person ; during the marriage the legal existence of the wife was incorporated or consolidated or merged into that of the husband and from this it followed that a married woman was in general incapable of acquiring, enjoying or alienating, independently of her husband, any property, real or personal.[1] There was some relaxation in equity under which some property could be considered her separate property.[2] She could carry on separate trade and become entitled to the business and its profits for her separate use, but only subject to agreement between her and her husband.[3]

The law has been completely altered by statute and a married woman now ranks as regards her proprietary rights as a person wholly separate from her husband, notwithstanding the common law rule.[4] This change was effectively made for the first time at the end of the first quarter of the twentieth century by the Law of Property Act, 1925 (15 & 16 Geo. 5c. 20).[5]

The Law Reforms (Married Women and Tortfeassors) Act, 1935 (25 & 26 Geo. 5 c. 30, S. 1 (b)) made a married woman capable of rendering herself, and being rendered liable in respect of any contract, debt or obligation in all respects as if she were a feme sole.[6] Section 1 (c) of the Act conferred upon her the right to sue and be sued.[7]

Even in the nineteenth century in America (New England) a married woman had no legal existence apart from her hus-

1. Halsbury's *Laws of England*, Lord Simonds Edn., Vol. 19, p. 822.
2. *Ibid.*, pp. 822-823.
3. *Ibid.*, p. 823.
4. *Ibid.*
5. *Ibid.*, note (l).
6. *Ibid.*, p. 852, note (*r*).
7. *Ibid.*, note (*s*).

band's. She could not contract, or even execute a will of her own; her person, estate and wages became her husband's when she took his name.[1]

Treating the two as one would mean the merger of the woman with the husband because she has to remain under his authority. The woman is required to have a covering over her head to show that she is under her husband's authority.[2]

It would thus be evident that the Muslim Law of marriage was extremely progressive in the beginning of the seventh century A. D. and that progress is still to be achieved in the West, notwithstanding their claim for liberality and modernism. The reason is that Islam treated both the sexes as equal when subservience of woman has been the rule in other religions.

In ancient Israel the husband had a proprietary right over his wife,[3] The father could sell his daughter into bondservice (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.[4]

The property rights of women in Talmud were as limited as in eighteenth century England; their earnings and the income from their properties belonged to their husbands.[5]

Among the Hindus a woman cannot alien or devise her Stridhan other than the Saudayik (gifts from close relations) during converture without her husband's consent.[6] This is due to the woman's subjection to her husband during her converture. The general spirit of Hindu Law is not to allow women independ-

1. *Conds of Women* by Nancy F. Cott, p. 5.
2. 1 Corinthians 11 : 10.
3. *Encyclopaedia of Religion and Ethics*, Vol. 5, p. 724.
4. *Ibid.*, p. 728.
5. *The Age of Faith* by Will Durant, p. 363.
6. *The Hindu Code*, p. 1196, S. 292.

ence as regards disposition of property. In the case of female's property the ownership has reference to the right of possession and right of enjoyment.[1] The wife's subjection to her husband is evidenced by a right conferred on the husband to seize the property of the wife in case of extreme necessity.[2]

Marriage under the Hindu Law also is a holy union for the performance of religious duties. It is not a contract ; the mere fact, therefore, that a marriage was brought about during the minority of either party thereto, does not render the marriage invalid.[3] The marriage of Hindu children is brought about by their parents, and the children themselves exercise no volition.[4] The Sastras enjoin the marriage of a female before she arrives at puberty, and prescribe rules for guardianship in marriage.[5] The primary duty and the correlative right, of giving a girl in marriage, rests with the father.[6]

As a general rule, under the Islamic Law, however, the capacity to contract a valid marriage rests on the same basis and depends on the same conditions as the capacity to enter into any other contract.

(1) In the first place the parties must be able to understand the nature of their act. For, if either of them is *non compos mentis* or is incapable of understanding the nature of the contract, it is void.

(2) In the second place they must be adult and

1. *Hindu Code*, pp. 1196-1197.
2. *Ibid.*, p. 1197.
3. *Hindu Law* by Mulla, p. 518, S. 427
4. *Ibid.*
5. *Ibid.*, p. 520, S. 433.
6. *Ibid.*, p. 522, S. 434.

(3) In the third place they must be acting of their free will and not under compulsion.[1]

"Among the conditions which are requisite for validity of a contract of marriage", says the *Fatawai Alamgiri* "are understanding, puberty and freedom in the contracting parties, with this difference that while the first requisite is essentially necessary for the validity of the marriage, as a marriage cannot be contracted by a majnun (*non compos mentis*), or a boy without understanding; the other two conditions are only required to give operation to the contract as the marriage contracted by a (minor) boy (possessed) of understanding is dependent for its operation on the consent of his guardian."[2]

The question of marriage of minors shall be considered at another place in this chapter. It may be stated at this stage that though no particular age of majority is fixed in the Quran and the Sunnah and the criteria for majority are puberty which starts with menstruation in women and nocturnal emission in males, and understanding, the jurists have fixed the age of puberty. Imam Abu Hanifa fixed the age of puberty for females at seventeen years and for males as eighteen years. Imam Abu Yousuf, Imam Muhammad and others fixed the age of puberty of both sexes at fifteen years. Ibn Shabrama fixed the age of marriage for girls as sexteen years and for boys as eighteen years.

Views differ on the question whether the marriage of an adult girl requires her consent only or the consent of her *wali* or guardian also. Among the Hanafis and the Shias, the capacity of an adult woman to contract her marriage is absolute.[3] The Shia law says that "in the marriage of a discreet female (*rashida*

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p .245.
2. *Ibid., Fatawai Alamgiri*, Vol. 2, p. 125.
3. Ameer Ali, *ibid.*, p. 263.

or adult) no guardian is required.[1] *Hedaya* says that: "A woman who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians ; and this whether she be a virgin or *sayyeba*."[2] (*Sayyeba* is a woman who had once been married and lived with her husband.)

Among the Shafeis and the Malikis, although the consent of the adult virgin is as essential as among the Hanafis and the Shia to the validity of the contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a *wali* (guardian).[3] The presence of the *wali* or guardian is essentially necessary to give validity to the contract.[4] They argue that the end proposed of the marriage is the acquisition of benefits which it produces, such as procreation and so forth ; and if the performance of the contract were in any respect committed to women its end might be defeated, they being of weak reason, and open to flattery and deceit.[5]

It is a fact that owing to the privacy in which eastern women generally live and the difficulties under which they labour in the exercise of their own choice in matrimonial matters the Shafe'i Law lays down such principles by which they could be protected from being victimised by an unscrupulous adventurer, or from marrying a person morally or socially unfitted for her.[6]

Al Kafat or equality of marriage

The Arab jurists view with disapprobation ill-assorted

1. *Muhammadan Law* by Ameer Ali, p. 263.
2. *Hedaya* by Hamilton, p. 34.
3. *Ibid., Muhammadan Law* by Ameer Ali, Vol. 2, p. 263
4. *Ibid.*
5. *Hedaya, ibid.*
6. *See* Ameer Ali, *ibid.*, pp. 263-264.

marriages. They have laid down different criteria of equality for purposes of marriage, because adds the *Hedaya* "Cohabitation, society and friendship cannot be completely enjoyed excepting by persons who are each other's equals (according to the customary estimation of equality), as a woman of high rank and family would abhor society and cohabitation with a mean man ; it is requisite therefore, that regard be had to equality with respect to the husband, that is the husband should be the equal of the wife."[1]

According to the pure Hanafi doctrine the guardian may apply to the judge to set aside an ill-assorted union,[2] but it is doubtful if in this age the courts may exercise such a discretion and interfere with the consent of the spouses, if they are adults.

It is unnecessary to reproduce different points of view on the extent of equality except to observe that the jurists laid that an Arab is the equal of an Arab only, a Qureishi of a Qureishi only and a Banu Hashim of Banu Hashim only, which simply proves the bias of the Arabs *inter se* and against non-Arabs. The Quran says :

يا ايها الناس انا خلقناكم من ذكر و انثى وجعلناكم شعوبا و قبائل لتعارفو ان اكرمكم عند الله اتقاكم ان الله عليم خبير -

Q. 49 : 13—O mankind ! Lo ! We have created you male and female, and have made you nations and tribes that you may know one another. Lo ! the noblest of you in the sight of Allah is the best in conduct. Lo ! Allah is Knower, Aware.

It says : "The believers are naught else than brothers"[3] (انما المومنون اخوة). It also lays down that: "And the

1. *Hedaya, ibid.*, p. 40.
2. *Ibid.*, p. 34.
3. See *Zad al M'aad*, (Urdu trans.), Vol. 4, pp. 115-119.

believers, men and women, are protecting friends of one another" (والمومنون والمومنات بعضهم اولياء بعض). In the Chapter named 'Family of Imran' it is said, : "And their Lord hath heard them (and he saith) Lo ! I suffer not the work of any worker, male or female to be lost". (فاستجاب لهم ربهم انى لا اضيع عمل عامل منكم من ذكرا و انثى).

The Prophet pbh said that no Arab has any superiority over a non-Arab or any non-Arab over an Arab, nor a white man over a black man, nor a black over the white except on the basis of piety. All people are the descendants of Adam and Adam was made of soil. He also said that "no one is my friend on account of being a descendant of such and such. My friends are the pious, whoever they may be and wherever they may be."

It is reported in Tirmizi from the Holy Prophet pbh that he said, "If a person comes to you whose religious practice and profession and whose conduct are to your liking, marry him (in your family). If you do not do this there will be considerable mischief on the earth." Some one asked, "if there be such and such (deficiency) in him"? The Prophet pbh repeated the same thing thrice.

The Prophet pbh said to Bani Biyaza : "Perform the *nikah* of Abu Zanad who was a barber."

The Prophet pbh married Zainab bint Hajash, a Qureishi to his slave, Zaid bin Harth, Fatima bint Qais Qaharya to Osama bin Zaid and the sister of Abdur Rahman bin 'Auf to Bilal bin Rabah.

Allah says : الطيبات للطيبين والطيبون للطيبات (Good women are for good men and good men are for good women) and فانكحوا ما طاب لكم من النساء (marry of the women who seem good to you).

After reproducing the verses from the Quran and the traditions of the Prophet pbh, Ibn Qayyim concluded that

basically the religious profession and practice determines equality. A Muslim woman cannot be married to a non-Muslim, nor a chaste woman to one who is not of good conduct. Progeny or profession, wealth, prosperity or holding a high temporal office do not form the measures for equality. A Qureishi girl can be married to a non-Qureishi and a Hashmi to a non-Hashmi. Similarly a wealthy female can be married to a bankrupt and poor person. He disputed those who ascribed an opinion to Imam Ahmad that the marriage of a poor person with a wealthy woman is void, or that the marriage of a Qureishi or of a Hashmite with a non-Hashmite is void. He said that neither Imam Ahmad nor any other learned said this.[1]

This is the correct position in Sharia. *Kufw* or equality in any other sense would be a degeneration or rather desecration of the Islamic concept of equality. On the legal plane progeny, wealth, profession or office cannot be the touchstone of equality. It is a different matter that while selecting the groom the girl or her parents or near relatives may have different considerations in view *e. g.* the financial position of the family, their standard of living, their education and their manners. But an ill-assorted marriage by itself is not void or objectionable in Sharia.

Sharaya al Islam says that it is not unlawful for a free woman to marry a slave, for an Arabian woman to marry a Persian or for a woman of the tribe of Hashim to marry a non-Hashimite and *vice versa*. What is abominable for a woman is to marry a profligate, and the abomination is aggravated by his being a habitual drunkard.[2] Thus among the Shias equality has reference only to the Islam of the husband and his ability to support the wife.

1. *Zad al M'aad* (Urdu trans.). Vol. 4, pp. 115-119.

2. *Sharaya al Islam*, p. 278 ; *Muhammadan Law* by Ameer Ali, Vol. 2, p. 329, notes.

In fact as stated in the *Fatawa-i-Alamgiri* 'Except equality and freedom equality in any other respect is not invariably observed in a country other than Arabia'.[1]

Dower and Dowry

"In most parts of the world marriage is accompanied by pecuniary transaction. In some cases payments are made by the husband or his relatives to the relatives of the woman, this payment being usually known as the bride price. In other cases payments are made by the relatives of the bride, these being usually known as dower. . . . In India and in some parts of Europe, the dower or payment to the husband is the more usual custom." This, in short, is how the payment of dower by the husband to the wife and the wife's relatives to the husband is described in the *Encyclopaedia of Religion and Ethics*.[2]

Among the Muslims it is the duty of the husband to gift the marriage portion to the wife. The Quran directs :

وآتوا النسآء صدقٰتهن نحلة فان طبن لكم عن شئى منه نفسا فكلوه هنيئا مرئيا

Q. 4 : 4.—And give unto the women (whom ye marry) free gift of their marriage portions ; but if they of their own accord remit unto you a part thereof, then you are welcome to absorb it (in your wealth).

فما استمتعتم به منهن فٰاتوهن اجورهن فريضة

Q 4 : 24.—And those of whom ye seek content (by marrying them) give unto them their portions as a duty. . .

In the first verse the words *sadaqa* (صدقة) and *nehla* (نحلة) are used for a marriage portion or nuptial gift and in the second verse the word *ujur* (اجور) plural of *ajr* (اجر) is used to connote the same thing. Other terms used in the same meaning

1. Ameer Ali, *Ibid.*, p. 329.
2. Vol. 8, p. 429 on Marriage (Introductory and Primitive).

are *atiyya* (عطیہ gift), and *fariza* (فریضہ something obligatory or appointed portion). The root word of *saduqa*, *sudaq* and *sidaq* all conveying the sense of dower is *sadaqa* meaning 'he was truthful.' *Sadeeq* (صدیق) means friend. The word *saduqa*, therefore carries the sense of sincerity, friendship and companionship. It is therefore a gift which is and must be given willingly[1], to cultivate new relationship of intimacy and companionship.

The word *nehla* (نحلۃ) means *al 'atao bila ewaz* (العطاء بلا عیوض) *i.e.*, that which is given as a gift, and is not a consideration for anything.[2] Raghib wrote that the word *nehla* originates from *nahl* (نحل) meaning bee and signifies that as the bee makes a gift of such a useful thing as honey without any consideration, in the same way *nehla* is that sweet gift which is given to the woman willingly without any idea of consideration by the husband.[3] The word *ajr* has a two-fold meaning. It means wages as well as reward.[4] Reward also does not carry any sense of consideration. Keeping in view the sense of the three words *saduqa*, *nehla* and *ata* or *atiyya* the word *ajr* cannot mean wage in verse Q. 4 : 24. It must mean something given as a gift and not for a consideration.

Mahmud, J. of the Allahabad High Court clarifed this point in Abdul Q adir *v.* Salima.[5] He wrote :

> "Dower can be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. It is not the exchange or consideration as understood in the technical sense in the Contract Act, given by the man to the woman for entering into the contract, but an effect of the contract imposed by the law on the

1. *Lughat al Quran* by Parvez, Vol. 3, p. 1013.
2. *Ibid.*, Vol. 4, p. 1594 ; *cf. Lataif al Lughat*, Taj and Ibn Fars.
3. *Lughat al Quran*, *Ibid.*, *Al Mufradat* on the word *nahl* (نحل).
4. *The Dictionary and Glossary of the Koran* by John Penrice.
5. I L R 8 All. 149.

husband as a token of respect for its subject, the woman. If dower were the bride price a postnuptial agreement to pay would be void for want of consideration, but such an agreement is valid and enforceable."

The Lahore High Court observed in Nasiruddin Shah *v.* Amtul Mughni Begum[1] that the husband's duty to pay dower flows from the tie of marriage similar to his duty of providing maintenance and raiment. And if the latter two cannot be regarded as consideration for marriage and are only given out of consideration and respect for the wife, equally is dower not to be regarded as its consideration as that term of art is understood in the English language....Had it been so the omission to specify any dower would have affected the validity of marriage.

In the *Dictionray of Islam* by Hughes[2] the principle is summed up as follows :—

"Dower is considered by some lawyers to be an effect of the marriage contract, imposed on the husband by the law as a mark of respect for the subject of the contract the wife ; whilst others consider that it is in exchange for the usufruct of the wife, and its payment is necessary, as upon a provision of support to the wife depends the permanency of the matrimonial contract. Thus it is indispensable *a fortiori*, so much so, that if it were not mentioned in the marriage contract, it would still be incumbent on the husband, as the law will presume it by virtue of the contract itself, and award it upon demand being made by the wife. In such case the amount of dower will be to the extent of the dowers of the women of the rank and of the ladies of her father's family."

1. A I R 1948 Lah. 135; I. L. R. 1947 Lah. 565. *Also see Mst.* Fatima Bibi *v.* Lal Din, A I R 1937 Lah. 145 ; Jahuren Bibi *v.* Suleman Khan A I R 1934 Cal. 210.

2. P. 91.

Sautarya thinks that the custom originated in ancient times with the payments which the husbands often made to their wives as a means of support, and as a protection against the arbitrary exercise of the power of divorce.[1]

For the second point there is evidence in the marriage contracts or (*Kathubbah*) among the Jews. Ameer Ali writes[2] that the Jewish Law insisted upon the specification of the total debt prior to the contract of marriage, and considered all the marriages without consideration, as invalid. But among the Hebrews, the dower settled on the wife was never made over to her for her exclusive use and enjoyment ; she acquired, in fact, no right over it until the marriage was dissolved either by the death of the husband or by divorce in which case the dower was made over to her, in order to enjoy or to dispose of, according to her own desire.

According to *The Encyclopardia of Religions and Ethics*,[3] "A regular preliminary of the (marriage) ceremony is the signing by the bridegroom of the *Kathubbah* (lit. 'writing') or marriage contract . . which sets forth the amount payable to the wife in case of the husband's death or the wife's divorce, and in olden times often rehearsed the wife's dowry, in respect of which, as of the husband's settlement the *Kathubbah* conferred on her an inalienable claim on her husband's property, . . . the *Kathubbah* . . . formed a potent restraint against rash divorces."

The distinction between the Jewish Law and the Islamic Law is two-fold. Firstly the marriage in Islam is not invalidated if the dower is not settled while under the Jewish law it is invalid. The invalidity, no doubt can rest upon the settlement being a consideration of the marriage in

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 391.
2. *Ibid.*
3. Vol. 8, p. 462 on 'Marriage (Jewish)'.

the sense that term is used in English Law. The marriage of a Muslim is not invalidated by omission about settlement of dower because as pointed out by Mahmud, J. in Abdul Qadir *v.* Salima it is not a consideration for marriage in Islam in the sense that the word consideration is used in English Law. And yet the contract to pay dower is implied in the manner that the payment of maintenance to the wife is implied because in both, the obligation arises on account of legal injunctions. Another point which destroys the theory of consideration (in the English sense) is that the dower can be settled after the marriage and can also be increased. Obviously increase cannot be a consideration of marriage—rather there would be no consideration for it which on principles of English Law should render the contract void ; but it is valid and legal under Islamic Law. The concept of bride price cannot thus apply to dower.

Moreover the expression 'bride price' connotes the virtual sale of the wife to the husband and points out to her perpetual subservience to the husband. This is possible where the wife has virtually no separate existence and is only incorporated in the husband, has no independent rights over her property and cannot exclusively enjoy and dispose it of and possesses no right to claim separation from the husband. But in Islamic Law the position of the wife is very different. As summed up in the *Age of Faith* by Will Durant,[1] "Islam . . placed woman and man on the same footing in economic independence, property rights and legal process. She might follow any legitimate profession, keep her earnings, inherit property and dispose of her belonging at will." To this may be added her right to claim separation from the husband on various grounds,[2] to refuse to do even household work[3] and

1. P. 180.
2. *See* Chapter "Right of Woman to Separate."
3. *See* under the heading 'Maintenance'.

act as a completely independent character with a will of her own.[1] Islam elevated a woman to a pedestal of complete equality with man and it can be said without any fear of contradiction that all other religions treated her virtually as a chattel or a slave. Dower is the right of the wife as seen in the verses of the Quran. This is her right even if she is a bondswoman.[2]

Dower or *mahr*, whatever be its amount, must be paid by the husband to the wife unless it is remitted by her willingly. If the dower is not fixed and there is no condition either in the marriage contract regarding it, it must be paid according to the standard in the family. *Hedaya* says: "that a marriage is valid although no dower has been mentioned because literally *nikah* signifies a contract of union which is fully accomplished by the performance of the marital rites. Dower is obligatory as a mark of respect for the subject (*al-mahal*) ; therefore its mention is not essential to the validity of the marriage. For the like reason, a marriage is valid although the man were to engage in the contract on the special condition that there should be no dower."[3] In such a case the condition would be void.[4]

Similarly the *Shia Sharaya* and the *Jama-ash-Shitat* declare that, the mention of dower is by no means a condition precedent to the validity of a contract of marriage, so that if a man were to marry a woman without any mention or specification of dower, or with the express stipulation that there shall be no dower, the contract shall be valid and the law will award the woman the customary dower.[5]

1. *See* Chapter on Equality.
2. Q. 4 : 25.
3. *Hedaya* by Hamilton, p. 44.
4. *Zad al Maad*, Vol. 4, p. 65 (Urdu trans.) by Ibn Qayyam.
5. *Sharaya al Islam* (Urdu trans.), p. 629 ; comp. the *Mafatih*, the *Irshad-al Allamah* and the *Kitab man la Euhazzar-il-Fakih* ; See *Muhammadan Law* by Ameer Ali, Vol. 2, p. 397.

There is consensus of the jurists on the point that the wife can refuse to perform her marital obligations unless prompt dower is paid.[1] They differ on the point whether once having surrendered herself the wife can refuse performance of such obligations but we are not concerned with such details. It would be sufficient to say that according to Imam Abu Hanifa she would be within her rights to do so and would be entitled to maintenance notwithstanding her refusal to do so till her prompt dower is paid. This view has prevailed with the Courts in Pakistan. The same rule of law is followed in Egypt, Tunis, Syria etc.[2]

The widow's claim for dower is realisable from the husband's property as a debt and has priority over legacies and the rights of heirs.[3] When she has obtained actual possession over his husband's property under her claim for dower she cannot be dispossessed from it unless the dower is paid to her or is paid up from the income of the property. This is known as widow's lien. But she cannot alienate or mortgage it.[4]

Under strict Islamic principles there is no concept of dowry which in India and Pakistan is customary and is given by the parents of the wife to her and which she brings to her husband's house. This custom is borrowed in the Indian sub-Continent from the Hindus. A Hindu family has to bear enormous expenses at the marriage of the daughter. Unlike the dower which is to be paid by the husband to the wife, cash payment of money is made by the bride's relatives to the bridegroom and clothes, ornaments, furniture and household effects are given to the bride. In effect the worth of the bride is measured by the dowry she brings with her.

1. *See Fatawa Alamgiri*, Vol. 2, pp. 217-218.

2. *See Mujmua Qawanin Islami*, by Dr. Tanzil-ul-Rehman, Vol. 1, pp. 205, 302 ; *Also see Fatawa Alamgiri*, Vol. 2, pp. 217-218.

3. *Muhammadan Law* by Ameer Ali, Vol. 2, pp. 408-409.

4. *Ibid.*, p. 411.

It is said that the custom originated because among the Hindus the daughter is not entitled to inherit from her parents or their family and she is compensated by the parents for this loss at the time of marriage. The custom of dowry was firmly entrenched among the Muslims in India who were governed by customary law under which daughters did not inherit. Such was the case in the Punjab. The Customary Law has been statutorily abolished in Pakistan and its remnants were given a nice burial by a judgment of the Federal Shariat Court, but the custom of dowry is gaining strength day by day with the result that it is difficult for a man of moderate means to wed his daughters. Dowry is now a social evil which is cursed by those who do not have sufficient means to satisfy the hopes and demands of the bridegroom and his family. And this, notwithstanding the Islam allowing a share in inheritance to the daughters also.

In order to curb the evil the Parliament in Pakistan passed Dowry and Bridal Gifts (Restriction) Act, 1976 which provided that "neither the aggregate value of the dowry and presents given to the bride by her parents nor the aggregate value of the bridal gifts or of the presents given to the bridegroom shall exceed five thousand rupees" (s. 2). The display of the dowry was absolutely prohibited (s. 7) because this tempts others. It was further provided that "the total expenditure on a marriage, excluding the value of dowry, bridal gifts and presents, but including the expenses on *mehndi*, *barat* and *walima*, incurred by or on behalf of either party to the marriage shall not exceed two thousand and five hundred rupees.

It was made obligatory on the parties to the marriage to furnish to the Registrar list of dowry, bridal gifts and presents given or received in connection with the marriage (s. 8).

The contravention or failure to comply with the Act or any of its provision is a criminal offence.

The Act was widely welcomed when it was enforced. But unfortunately its compliance was in its breach and contravention. The dowry passed hand quietly without display, some time before the actual marriage. The invitation Card for marriage began to be accompanied by a fictitious Invitation Card for lunch or dinner on some other ceremony *e.g.* the birth day of some member of the family. Those who ought to have desisted from participation in such marriages including those who had to shoulder the responsibility of ensuring compliance with the law freely participated in them. The law as a result of all this exists on paper only.

The existence of the law on the statute book and its non-compliance or contravention has opened the way for other complications for the wife and her family. Prior to the enforcement of the Act lists of articles of the dowry were prepared and were duly signed by the bridegroom and senior member of his family as proof of receipt of dowry. This included the lists of the ornaments and clothes given to the bride. After the enforcement of the Family Laws Ordinance, 1961 which made registration of marriage compulsory, the list was incorporated in the *nikahnama*, copies of which were given to the parties to marriage and were also retained by the *nikah* registrar and other allied Government office. After the enforcement of the Act of 1976 the practice ceased. The result is that the bride or her family have no documentary evidence with them about the quantum or value of the dowry given by them and in case of misappropriation of the same by the husband or members of his family the wife is virtually left without a remedy. Even the decree of dissolution of marriage is not possible to obtain on ground (d) of section 2 of the Dissolution of Muslim Marriages Act, 1939 that the husband disposes of her property or prevents her from exercising her legal rights over it. If strict compliance with the law had been ensured no such difficulty would have arisen. On the other hand within a few years the system would have

been uprooted. It is time for the Government either to enforce the law strictly so as to make its benefits accessible to the people or to abrogate it to save people from the harmful consequences which its supineness has engendered. To enforce an Act and then to let it remain in a state of suspended animation breeds contempt and indiference for the legislative process and frustrates the object of law making.

SECTION 2—MARRIAGE DURING MINORITY AND OPTION OF PUBERTY

There is some difference of view on the question whether child marriage or marriage of minor males and females is permissible in Islam. There is consensus on the illegality of such marriage or of the marriage being void, if it is performed by the minors themselves without the consent and participation of the guardians. Similar result will follow if one of the party to the marriage contract is a minor. The reason is the inability of the minor to enter into a contract. But except a few all other jurists belonging to each school of thought hold that the guardian recognised by it for the purpose can marry the minors. It is not necessary that the marriage solemnised by the authorised guardian may always be binding on the minors.

The first question is about the validity of the marriage during minority of one or both the parties. The opinions differ on this point. Guidance is obtainable on this point from the following verse :

وابتلوا اليتٰمٰى حتى اذا بلغوا النكاح فان انستم منهم رشدا فادفعوا اليهم اموالهم

> Q. 4 : 6.—Test well the orphans till they reach the marriageable age ; then, if ye find them of sound judgment, deliver over unto them their fortune. . . .

The relevant words are 'test well the orphans till they reach the marriageable age' which means that there is an age for

marriage. Such age obviously is the age of maturity of intellect and puberty when a person may be able to look after his property. The age prior to that time will not be a marriageable age. In Urdu commentaries and translations *e.g. Zia ul Quran, Tarjaman ul Quran, Tafheem ul Quran*, the translation by Mulana Mahmood ul Hassan, the translation and commentary of the Quran by Maulana Ahraf Ali, the words حتى اذا بلغو النكاح are translated as meaning 'till they reach the age of *nikah*.'

But Sarakhsi interprets the word *nikah* as meaning physical puberty.[1] According to him this verse cannot be relied upon in support of opposition to the marriage of the minor. Sarakhsi, however, reproduces the argument in favour of the other view main exponents of which were Imam Ibn Shaberma, a contemporary of Imam Abu Hanifa, and Kazi Abu Bakr al Aasim يقول ابن شبرمه و ابو بكر الاصم انه لا يتزوج الصغير والصغيرة حتى يبلغا لقوله تعالى اذا بلغو النكاح فلو جاز التزوج قبل البلوغ لم يكن لهذا فائده (If the *nikah* or marriage of a minor boy or girl were permissible during minority the words in the Quran حتى اذا بلغو النكاح i. e. till they reach the age of *nikah* would be meaningless.)[2]

Jassas wrote: عن ابى شبرمه ان تزويج الاباء على الصغار لا يجوز وهو مذهب الاصم (It is related from Ibn Shabrama that if the ascendants marry the minors, it is not lawful. This is also the opinion of Abu Bakr al Aasim).[3]

This view of Ibn Shabrama and Abu Bakr Aasim was cited with approval by Maulana Omar Ahmad Osmani in *Fiqh ul Quran*, vol. 1.[4] This was criticised by Maulana Taqi Osmani in *Hamare 'Aili Masail* on which Maulana Omar Admad Osmani came out with a strong rejoinder in Vol. 2[5] of his book.

1. *Al Mabsoot*, Vol. 4, p. 212.
2. *Ibid.*, p. 193.
3. *Ahkam ul Quran*, Vol. 2, p. 64
4. pp. 530-531.
5. *Fiqh ul Quran*, Vol. 2, pp. 73-78.

Maulana Muhammad Taqi Osmani had tried to prove that the word *nikah* according to the lexicon was used in the meaning of coitus.[1] Maulana Omar Ahmad Osmani referred to all the verses of the Quran in which the word is used about twenty-three times and pointed out that if this be the meaning of the word in which it has been used so many times in the Quran, all the sexual permissiveness would become lawful.[2]

The Hadith which is the basis of lawfulness of marriage of minors is about the age of Hazrat Aisha at the time of her *nikah* and subsequently at the time of her being brought to the house of the Prophet pbh as his wife. The correctness of the different versions of this Hadith is disputed by Maulana Omar Ahmad Osmani. According to these various versions, the age of Hazrat 'Aisha at the time of *nikah* was only six years and at the time of her departure for the house of the Prophet, pbh was only nine years.[3] Maulana Omar Ahmad Osmani's thesis is that she was sixteen or seventeen years of age at the time of *nikah* and nineteen or twenty years' old when she was taken by the Prophet pbh to his own house.[4]

A book named *Tahkik-i-Umar 'Aisha Siddiqa* consisting of about six hundred pages was published recently by Hakim Neaz Ahmad of Sargodha. According to his thesis Hazrat 'Aisha was twenty-eight years old at the time of *nikah* and twenty-nine years old at the time of departure for the house of the Prophet pbh.[5] Most of the versions about minority emanate from Hasham bin Urwa who related it on the authority of his father. Hasham was a resident of Medina.[6] The compilers of Hadith considered him to be reliable. Imam Malik reproduced his

1. *Fiqh ul Quran* by Maulana Omar Ahmad Osmani, Vol. 2, pp. 72-73.
2. *Ibid.*, pp. 75-77.
3. *Ibid.*, p. 21 from *Bokhari*.
4. *Ibid.*, p. 22.
5. *Tahkik i Umar 'Aisha al Siddiqa*, by Hakim Neaz Ahmad, p. 12.
6. *Ibid.*, p. 5.

traditions in *Mowatta* but later he started doubting him and did not rely upon the traditions related by him on account of his falsehood.[1] Hasham travelled to Iraq thrice. The Hadith about the age of Hazrat 'Aisha was related by him during the course of the third journey,[2] in 145 A. H. Those who died before that either did not accept it, or it was not known to them.[3] Thereafter the names of other relators were added to it.[4]

It has already been discussed that Ibn Shabrama and Abu Bakr al Aasim held minor's marriage unlawful. Ibn Shabrama fixed the marriageable age in the case of females at sixteen years and in the case of males at eighteen years.[5] He was a distinguished person of the early age. He was appointed Governor of Yemen but was later removed. Moammar, the well known doctor of Hadith accompanied him at the time of his departure to some distance. When all others left and the two were left alone, he said to Moammar that he was thankful to Allah that he was going back in the same shirt which he had with him on his arrival to Yemen. It means that he earned nothing which was unlawful. He fixed the age of marriage for girls as sixteen years and for males as eighteen years. The Egyptian Government enforced this Fatwa through law.[6]

The age of puberty, if not of marriage, has been fixed by other jurists too. Generally the age of puberty is governed by menstruation in the case of girls and nocturnal emissions or sweet dreams in the case of boys. But there may be cases in which it may be difficult to secure evidence. Imam Abu Hanifa therefore, fixed the age of puberty of a girl at seventeen years

1. *Tahkik i Umar 'Aisha al Siddiqa*, by Hakim Neaz Ahmad, p. 5.
2. *Ibid.*, p. 6
3. *Ibid.*, p. 7.
4. *Ibid.*
5. *Hazrat Imam Abu Hanifa ki Siyasi Zindgi*, by Manazir Ahsan Gilani, p. 407.
6. *Ibid., cf. Al Kaza fil Islam*, p. 67.

and of a boy at eighteen years.[1] Imam Abu Yousuf and Imam Muhammad fixed fifteen years for both. The Shia jurists also fixed the age of fifteen years for both.[2] Imam Shafe'i agreed with the opinion of Imam Abu Yousuf and Imam Muhammad.[3]

Laws have been passed in various countries making child marriage a criminal offence. Such a legislation known as the Child Marriage Restraint Act, XIX of 1929 was passed in India. This was popularly known as the Sharda Act and was opposed by the Ulema of the country as undue interference with Islam.

The term 'child' was defined in the case of a male, as a person under eighteen years of age and in the case of a female, under fourteen years of age. This clause was amended by S. 12 of the Muslim Family Laws Ordinance, 1961, and the marriageable age of the girl was raised from fourteen years to sixteen years, thus bringing it in line with the *Fatwa* of Imam Ibn Shabrama. The marriageable age in Iraq was fixed at eighteen years for male and female both.[4] In Syria[5] and Jordan[6] the age of the boy was fixed as eighteen years while that of a girl was fixed at seventeen years obviously giving effect to the view of Imam Abu Hanifa in regard to the age of puberty. In Morocco[7] the law fixes the age of a girl as fifteen years, while the age of the boy is the same as in the other countries mentioned above.

Whatever be the benefits of child marriage in the view of religious scholars, the concession, if any, of marriage of minors

1. *Hedaya* by Hamilton, pp. 529-530.
2. *Jamia al Ahkam fi fiqh il Islam*, printed Lucknow, Vol. 1, p. 510.
3. *Hedaya* by Hamilton, p. 529.
4. *Qanun al Ahwal al Shakhsia, Iraq* ; *Majmua Qawanin i Islami* by Dr. Tanzil-ur-Rehmbn, Vol. 1, p. 113.
5. *Qanun al Ahwal al Shakhsia, Syria*; *Majmua, ibid.*
6. *Huquq al Alla of Jordan*; *Majmua, ibid.*
7. *Mudawwinat al Ahwal al Shakhsia, Morccoo* ; *Majmua, ibid.*

by their guardians, was always misused in India long before Independence. The institution of child marriage was availed as an instrument of exchange marriages a form of which known as *nikah-i-shighar* is prohibted in Islam. The institution helped the parents financially since they virtually sold their daughters to the bidders. In fact the poor people in the villages and also in the urban areas treated their womenfolk as little better than chattels. While marrying the daughters in their minority they seldom acted for the advancement of the interest of the girls ; they served their own interest. For the last several years that the law of Qissas has been on the anvil and more particularly since the Shariat Bench of the Peshawar High Court[1] and later the Federal Shariat Court[2] ordered the Government of Pakistan to amend the Penal Code to give effect to the principle of *afw* (pardon عفو) on payment of compensation in cases of murder punishable with death, a number of cases of reconciliation and compromise came to my notice in which one of the conditions of agreement between the heirs of the deceased victim and the friends or relatives of the convict was that a girl from the family of the convict shall be married to some male in the family of the deceased victim. This is because the people in the villages generally have no regard for the benefit or consent of their girls in matters of their marriage. Is this not sufficient justification for restraining child marriages by legislation? The legislative power of the State in Islam extends to prohibiting or placing of restriction on what is permitted or discretionary for the elimination of mischief. According to those who believe in the legality of child marriage, it is not mandatory ; it is only discretionary. The Child Marriage Restraint Act, 1929 is not in any way contrary to Sharia.

By its section 12, the Muslim Family Laws Ordinance, 1961 raised the age of marriage of a female from fourteen years to

1. Gul Hassan's case, P L D 1980 Pesh. 1.
2. Muhammad Riaz *v.* The Federal Government etc. P L D 1980 F S C 1.

sixteen years. This is in accordance with the age of marriage of a girl fixed by Imam Ibn Shabrama and less than the age of puberty fixed by Imam Abu Hanifa. No exception can be taken in Sharia to these provisions also.

Marriage during minority of the spouses can be performed only by the *wali* (ولی guardian). In the absence of the *wali* the authority rests with the person in authority or Kazi.

The law is quite clear on the point that the marriage should be for the benefit of the minors. Even where repudiation is not allowed after the minor spouses attain majority, some rules for the safeguard of the interest of the minors have been laid down. The *wali* or guardian must be major, sane and free. He must not be a minor lunatic, with or without lucid intervals.[1]

If a father who is not 'just' or who is addicted to evil ways were to marry his infant daughter to the manifest disadvantage of the infant, or to a *ghair kafu* (unequal غیر کفو) *i.e.* one unequal to her in birth and position, such marriage will not be operative or valid, and the judge will have the power to set it aside at the instance of another *wali*, although remote (ولی بعید).[2]

A *wali* who is *fasik ul Mutahattik* (فاسق المتحتق) that is addicted to evil ways and extravagance is not entitled to the *wilayet ul ijbar* (ولایت الاجبار the guardianship in marriage)—*Wilayet ul ijbar* means the right of a guardian to impose on his ward the status of marriage.[3]

If the Kazi in exercise of his right of acting a *wali* (in the absence of another *wali*) marries a minor, he cannot marry her to his own son or any other relative whose evidence would not

1. *Muhammadan Law by* Ameer Ali, Vol. 2, p. 264.
2. *Raddul Mohtar*, Vol. 2 p. 486; Ameer Ali, *ibid.*, pp. 264-265.
3. Ameer Ali, *ibid.*, p. 265.

under the Muslim Law be admissible against himself. Nor can he marry her himself. And so is the case with the Sultan.[1]

Among the Hanafis there are a host of guardians from among the paternal relations and then among the maternal relations who have the right to marry the minor as *wali* subject to the condition that a remote *wali* cannot act in the presence of the nearer *wali*. The Malikis and the Hanblis vest the right of solemnisation of marriage of a minor in the father only. According to the Shafe'is the right vests in the father and the grandfather. The same principle is laid down in Shia Fiqh.

According to the Shia and Shaf'ei fiqh a *nikah* performed by a *wali* or guardian other than the father and the grandfather of the minor is not valid. The Hanafis treat the *nikah* as valid but give an option of repudiating it to the minor on her attaining majority. This option of repudiation is called *khiyar ul bulugh* (خيار البلوغ option of puberty). The option is, however not available to the minor where the marriage is performed by father and grandfather.[2] This is also the view of the Shafe'is and the Shias.[3]

The Hanafi jurists justify this concept on two grounds.[4] Firstly it is said that the Prophet pbh performed the marriage of Hazrat Fatima with Hazrat Ali on less than the customary dower but she did not exercise the option of puberty, and Hazrat Aisha was married to the Prophet pbh during minority but she was not informed about the option by the Prophet pbh though he later informed his wives that they could opt in favour of separation. Secondly it is said that the father and

1. *Radd ul Mohtar*, Vol. 2, p. 514, Ameer Ali, *Ibid.*, p. 267 ; *Fatawa Alamgiri*, Vol. 2, p. 157.

2. *Muhammdan Law* by Ameer Ali, Vol. 2, p. 332.

3. *The Muslim Law of Divorce* by K. M. Ahmad, p. 139.

4. *See Majmuai Qawanin-i-Islami* by Dr. Tanzil-ur-Rehman, Vol. I, pp. 233-240.

the grandfather cannot act otherwise than for the benefit of the daughter or granddaughter and consequently no question of any option can arise in such a case.

But the *nikah* of Hazrat Fatima was not performed during her minority. It was obviously performed with her consent. Secondly the non-exercise of the right does not negate the right. The argument on the basis of the *nikah* of Hazrat Aisha is in *Almabsoot* by Sarakhsi.[1] The argument can be met by distinguishing between the option of puberty and the extraordinary circumstances in which was revealed the injunction :

يا ايها النبي قل لازواجک ان كنتن تردن الحيوة الدنيا و زينتها
فتعالين امتعكن واسرحكن سراحا جميلا .

Q. 33 : 28.—O Prophet ! Say unto thy wives : If ye desire the world's life and its adornment, come! I will content you and will release you with a fair release.

وان كنتن تردن الله و رسوله والدار الاخرة فان الله اعد
للمحسنت منكن اجرا عظيما

Q. 33 : 29.—But if ye desire Allah and his Messenger and the abode of the Hereafter then Lo! Allah hath prepared for the good among you an immense reward.

It was the duty of the Prophet pbh to inform his wives including Hazrat Aisha about this divine injunction. Moreever in matters of *Ehkam* even *Hadith Taqreeri* is not considered sufficient for drawing a definite conclusion much-less other kind of silence. This does not even fall within the definition of *Hadith Taqreeri* (that which was done in the Prophet's presence and which he did not forbid). It is strange that simple silence or inaction of the Prophet pbh is made a basis of an important injunction.

The other ground is that on account of their love of daughter or granddaughter the two must be presumed to have

1. *Al Mabsoot* by Sarakhsi, Vol. 4, p. 218.

acted in the interest or for the benefit of the minor. This argument is belied by the circumstances related above which necessitated the passing of the Child Marriage Restraint Act, 1929. Moreover the Hanafi and the Shia jurists themselves laid down exceptions to the rule.

It is held that a contract of marriage entered into by a father or any person standing in *loco patris*, must not be prejudicial to the interest of the minor. When a father is not just or is a *fasik ul Mutahattik i.e.* extravagant in his habits or immoral in his life, enters into a contract of marriage for his child, it is invalid;[1] so also if it is manifestly to the disadvantage of the child. If the father were to contract a child to a eunuch,[2] or to a slave, or a leper, or to one suffering from elephantiasis, or any other malady of such a nature as would prevent connubial relationship, the marriage would be invalid, and would be set aside at the motion of any friend of the infant or the guardian, next in degree to the father of the child or of the mother.[3] If the father were to marry the child to one very much beneath him or her in rank or quality or to one who cannot maintain the wife, such marriage would also be invalid.

Although Imam Abu Hanifa is stated to have held that where it is not known that a father has acted carelessly or wickedly in marrying his infant child to one not an equal or for an unsuitable dower, the marriage is lawful, the enunciations of the Disciples are explicit; they declare such a marriage to be unlawful. "If a man were to marry his young child to one who is not an equal . . . or to contract the child for improper dower as for instance, if the child be a daughter at less than her (proper) dower or if the child be a son at a dower in

1. *Muhammadn Law* by Ameer Ali, Vol. 2, p. 325 ; *Radd ul Mohtar*, Vol. 2, p. 484.
2. *Ibid.*
3. *Ibid.*

excess of the wife's proper dower, the marriage is lawful according to Imam Abu Hanifa . . . . but unlawful according to the other two . . . . The difference between them has reference to a case where it is not known that the father acted carelessly or wickedly in the matter; when this is known, the marriage is void according to all their opinions; and in like manner there is consensus that if he were drunk (*sakran* سكران) (at the time of contracting the marriage), it would not be valid (لايصح), this according to the *Siraj-ul-Wahaj*.[1]

The *Radd ul Mohtar*[2] lays down that by consensus a contract of marriage entered into for a minor child by a father or grandfather whilst inebriated, is invalid and unlawful. Similarly if the child is a girl and the father or grandfather were to marry her to a man who is either immoral, or wicked, or in want, or who cannot pay her maintenance or dower or who carries on a low profession, such as that of scavenger or cobbler or weaver the contract would be unlawful.

Under the Shaia Law also though there is no option for the minor on attaining puberty, if the contract is to the manifest disadvantage of the minor, or has been carelessly or wickedly entered into the contract is subject to the minor's option on attaining puberty.[3]

It would be clear that even in a much more virtuous society as it was during the time of Imam Abu Hanifa or his two distinguished disciples, it was considered necessary to lay down some rules for sparing *zarar* (ضرر harm) to the minors. Obviously the rule against the option of puberty in case of marriage performed by father or grandfather cannot apply to a society in which the sale of girls has assumed the form of custom or the motive for the marriage of the minor by the father or grandfather is other than the welfare or good of the minor.

1. Ameer Ali, *Ibid.* ; Baillie, p. 74.
2. Vol. 2, p. 499 ; Ameer Ali, *ibid.*, p. 326.
3. Ameer Ali, *ibid.*, p. 332, *cf. Jami ush Shittat.*

As correctly pointed out by Dr. Tanzil-ur-Rehman,[1] the principle laid down by the jurists (in the early centuries of Islam) must have been laid down keeping in view the circumstance and the condition of society in that age. Clearly, therefore with the change in condition of the society the rule must also undergo a change. There being nothing specific in the Quran or the Hadith concerning this matter, resort must be had to Qiyas or Istehsan and as written by Sarakhsi in *Mabsoot*,[2] Ibn Sama'a held that the principle of Qiyas necessitated the giving of option of puberty in case of minor's marriage being performed by the father and grandfather. After reproducing this opinion Sarakhsi says that "We have abandoned Qiyas on account of Sunnah". This conclusion proves that but for Sunnah he also agreed with the above opinion. It has already been held that there is no Sunnah on this point. The rule should therefore be Qiyas and Istehsan.

The lawfulness of the prohibition of child marriage in the conditions of society justifies the rule of vesting minor girls with option of puberty where they are married by the father or the grandfather and this rule has been laid down in clause (vii) of S. 2 of the Dissolution of Muslim Marriages Act, 1939 which entitles a girl to sue for dissolution of marriage if she was given in marriage by her father or other guardian before she attained the age of sixteen years and repudiated the marriage before she attained the age of eighteen years.

Prior to the enforcement of the Muslim Family Laws Ordinance, 1961 the provision was that the girl could exercise the option if she was married by the father etc., before the age of fifteen years. Section 13 of the above Ordinance of 1961 substituted the word 'sixteen' for 'fifteen' obviously to bring it in line with the fixation of marriageable age of girls at sixteen years in

1. *Majmua Qawanin-i-Islami*, Vol. 1, p. 235.
2. *Al Mabsoot*, Vol. 4, p. 212.

the Child Marriage Restraint Act, 1929 by virtue of S. 12 of the same Ordinance. As already discussed the age of sixteen years as the marriageable age of the girl is based upon the *fatwa* of Imam Ibn Shabrama which is less by one year than the age of puberty of a female fixed by Imam Abu Hanifa.

There is an objection against some authorities of the High Court that a woman who marries another person after exercising her option of puberty but without getting a decree of dissolution of marriage from the courts, is not guilty of bigamy. The objection is that according to the jurists the exercise of option cannot be effective without the *imprimatur* of the Court. But this objection need not detain us since the purpose of this discussion is only to find out the consistency of the provision of the law with Sharia and it is clear that the clause about option of puberty is not repugnant to Sharia.

SECTION 3—THE REGISTRATION OF MARRIAGE

The registration of *nikah* was made compulsory in Pakistan by S. 5 of the Family Laws Ordinance, 1961 which is as follows :—

> S. 5 *Registration of marriages.*—(1) Every marriage solemnised under Muslim Law shall be registered in accordance with the provisions of this Ordinance.
>
> (2) For the purpose of registration of marriages under this Ordinance the Union Council shall grant licences to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.
>
> (3) Every marriage not solemnised by the Nikah Registrar shall for the purpose of registration under this Ordinance, be reported to him by the person who has solemnised such marriage.

(4) Whoever contravenes the provisions of subsection (3) shall be punishable with simple imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees, or with both.

(5) The form of Nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which the marriage shall be registered and copies of Nikahnama shall be supplied to the parties and the fees to be charged therefor, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under subsection (5), or obtain a copy of any entry therein.

The provision about registration of marriages was considered necessary because of the numerous disputes about *nikah* and is one of the most salutary provisions. But it has also been criticised by the religious scholars, because it has not been customary to reduce the terms of the marriage contract to writing. But this is no ground for opposing a good measure. The Caliphs, notably Haroon ar Rashid, insisted on all Muslims and Zimmies, subjects of the Caliphate, registering their marriages before the Kazis.[1] In Algeria, the deed of marriage is required to be registered and a copy kept in the *mahkama* (محكمة Court).[2]

Deeds of contracts are required to be written according to the Quran[3] though the provision is not held mandatory. By analogy the contract of marriage should be in writing and there

1. De Sacy, *Christomathie Arabe*, p. 22 ; *Muhammadan Law* by Ameer Ali, Vol. 2, p. 288.
2. Ameer Ali, *ibid.*
3. Q. 2 : 282.

can be no Sharia objection to it, if the provision is made mandatory by law. As regards recognition of the validity of marriage not so registered it may be observed that after the enforcement of the law it would be difficult to prove an oral *nikah*, because it would be difficult to satisfy the court about the requirement of an oral *nikah*, if the parties did not wish to conceal it, and secrecy is something opposed to the nature of *nikah*.

SECTION 4—POLYGAMY (POLYGYNY)

Certain conditions have been imposed on polygamy by the Muslim Family Laws Ordinance, 1961, S. 6 of which is relevant and is reproduced below:—

> S. 6. *Polygamy.*—(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.
>
> (2) An application for permission under subsection (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.
>
> (3) On receipt of the application under subsection (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such conditions, if any, as may be deemed fit, the permission applied for.
>
> (4) In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may,

in the prescribed manner, within the prescribed period and on payment of the prescribed fee, prefer an application for revision, in the case of West Pakistan to the Collector and in the case of East Pakistan (now Bangla Desh) to the Sub-Division Officer concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall (a) pay immediately the entire amount of the dower whether prompt or deferred, due to the existing wife or wives, which amount if not so paid, shall be recoverable as arrears of land revenue; and (b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees or both.

With few exceptions this amounts to prohibition of polygamy. The exceptions are to be determined by the Arbitration Council and in case of Revision against the order of the Arbitration Council, by the Collector who may allow the husband to contract another marriage if it is found necessary and just. The section provides that to marry in contravention of the section is a punishable offence and the husband is liable to pay immediately the entire dower, whether prompt or deferred, of the existing wife or wives and the same is recoverable as arrears of land revenue. A third consequence of such marriage is provided in clause (ii-*a*) of section 2 of the Dissolution of Muslim Marriages Act, 1939 which has been added to that Act by virtue of S. 13 of the Muslim Family Laws Ordinance, 1961. The existing wife or wives can file suit or suits for dissolution of marriage on this ground.

Several questions arise, answers to which may determine the validity of these provisions of the two pieces of legislation. Does Islam allow Polygamy unconditionally

or it makes it subject to limitations and restrictions ? This brings us to the question of the nature of polygamous marriage in Islam. Can the state place restrictions on or prohibit polygamy? Can the wife stipulate at the time of marriage against the husband contracting another marriage during the subsistence of marriage with her? Is it permissible to the couple to obstruct polygamy of the husband by the delegation of the husband's authority to divorce, to the wife, in case the husband contracts another marriage during the subsistence of that marriage ?

The only verse which deals with plurality of vives is Q. 4:3 but it is better to read it in the context of verse 2 of the same chapter. The two verses are as follows :

واتوا اليتمى اموالهم ولا تتبدلو الخبيث با لطيب ولا تاكلوا اموالهم الى اموالكم انه كان حوبا كبيرا ـ وان خفتم الاتقسطوا فى اليتمٰى فانكحوا ما طاب لكم من النساء مثنى و ثلث و ربع فان خفتم الا تعدلوا فواحدة او ما ملكت ايمانكم ذلک ادنى الا تعولوا ـ

Q. 4 : 2.—Give unto orphans their wealth. Exchange not the good for the bad (in your management thereof) nor absorb their wealth into your own wealth. Lo! that would be a great sin.

Q. 4 : 3.—And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice.

The purport of these two verses can be understood and appreciated in the context of the ill-treatment meted out to the orphans by the Arabs. After the death of the father his brothers or uncles and such other near relatives used to take into possession the property of the children of the deceased, and did not

return it to them even after they attained majority. They used to misappropriate their good cattle and give in exchange lean and emaciated cattle from their own herd. Sometimes they would mix the property of the orphans with their own properties and misappropriate the same. They would marry the female orphans without payment of dower according to their status and were not particular about discharging their liabilities towards them since they were friendless.

The first verse deals with the three forms of misappropriation of the property of the minors. The verse enjoins the Muslims to return the property of the orphans under their guardianship to them and to abstain from exchanging their bad property with the good property of the orphans or mixing their property with theirs so as to make it unidentifiable in order to facilitate its misappropriation because that would be a great sin.

The third verse enjoins upon the guardians to deal fairly with the female orphans under their guardianship even though they be friendless. Marry them only if you can deal with them justly and fairly and not to take advantage of their helplessness. And if you cannot deal with them fairly, do not marry them but marry other women upto the limit of four. This permission is subject to the condition of treating all the wives equally. If maintenance of equality in treatment be not possible, you are allowed to marry only one wife. In this manner you will not commit injustice. There is reference to captive girls too but it is unnecessary to dwell upon that aspect since after the abolition of slavery, it is impracticable in this age.

The word, *fa in khiftum alla taooloo* (وان خفتم الا تعولوا) have also been interpreted in a different manner by Imam Shafe'i. According to him the words mean that 'if you are afraid of having many children', then marry only one. This interpretation is different from the interpretation 'and if you fear that you cannot do justice', then marry only one. Even if the interpreta-

tion of Imam Shafe'i be adopted the injunction of doing justice will have to be read as a condition precedent for more than one wives. The words 'And if ye fear that ye will not deal fairly' read with the last words 'Thus it is more likely that ye will not do injustice' lead to the same inference about the necessity of justice and equality between the wives because no justice is possible between them without the maintenance of equality. Even the last words which follow the order to marry only one wife are sufficient for the same conclusion. This point has been dealt with in detail in the chapter on Family Planning.

Verse 3 is therefore restrictive of polygyny or the custom or practice of having plurality of wives. Firstly it forced the Arabs to renounce unrestricted polygyny and to reduce the number of wives to four and secondly it made another marriage conditional on the competence of the man to treat each wife justly.

There are various traditions in which the Prophet pbh is said to have commanded the Muslims to have not more than four wives at one time. It is reported from Ibn Omar that when Ghailan bin Salama al Saqafi embraced Islam, he had ten wives of the days of ignorance. They also embraced Islam. The Prophet pbh ordered : 'Keep four and separate the others.'[1] Another tradition is reported from Naufal bin Muawiya. He said : 'I accepted Islam ; I had five at that time. I enquired from the Prophet pbh about it and he said: 'Separate one and keep four. I inclined (for separation) towards one with whom I associated first and this association had continued for sixty years, and separated her.'[2] Thus Islam brought the Arabs down from unlimited polygyny to the limit of having four wives only.

There was no concept of justice among the Arabs of the pre-Islamic era. Islam made justice obligatory and enjoined

1. *Mishkat ul Masabeeh*, (translation by Fazal Karim), Vol. 2, p. 682.
2. *Ibid.*, p. 685.

upon them not to marry more than one wife, if they feared that they would not be able to do justice between them. As stated by Maulana Zafeeruddin Nadvi this injunction 'is a clear pointer to the fact that monogamy is the rule in the Islamic Law and only as an exception it was considered necessary to keep the door open for more than one in case of genuine need.[1]

Ibn ul Humam said :

> 'Four women are allowed only on condition that there be no apprehension of any injustice with them. But if there be such apprehension marriage with more than one is prohibited. It is established from this that if there be many wives, it is essential that there should be justice between them.'[2]

Peer Muhammad Karam Shah al Azhari says in *Zia ul Quran* that this is not an injunction (to have more than one wives); it is only a permission. The permission is also not without restraint ; it is subject to harsh restrictions and conditions. The discretion, if any, can therefore be exercised only in time of need.[3]

These three opinions furnish illustrations of how this question has been dealt with by the commentators, but the purport is the same that the rule in Islam also is monogamy while polygyny is only an exception. The truth of this assertion is proved from the general observation about the number of people having more than one wife, among the Muslims in the world. The number of such persons forms an insignificant minority in Pakistan. The same can be said with conviction about the people of most of the Islamic countries. In fact among the urban population in Pakistan plurality of wives is looked upon with disfavour and the scandals about the disharmony and

1. *Modesty and Chastity in Islam*, by Maulan Zafeeruddin Nadvi, p. 85.
2. *Fathal Qadir*, Vol. 2 p. 216.
3. *Zia ul Quran*, Vol. 1 commentary on verse Q. 4 ; 3

dissensions in the relations between the husband and his wives or between the wives *inter se* are enjoyed by their friends, relations and neighbours. Thus they treat generally such families as objects of fun and jest.

Maulana Zafeeruddin Nadvi illustrates the genuine need of more than one wife in the following paragraph, in his book *Modesty and Chastity in Islam* :

> "If a man's need is genuine and he is sure that in case of abstention from the second marriage, he is likely to be involved in sin, the simple permission becomes a law for him so that he may protect his chastity which is otherwise threatened. But such needs are not common to every-day life. The wife may be sterile and the natural desire for progeny may compel the husband to seek an alternative ; she may come to suffer from an incurable disease and the sexual desire of the husband and also the need for nursing of the ailing wife demand immediately that he should marry a second wife. At times the sexual urge of the husband is very strong and the fragile health of the wife cannot stand too frequent pregnancies and child births, necessitating a second marriage in the presence of the first wife, to relieve her burden. And there are so many emergencies that can arise and force one to take advantage of the Quranic permission of more than one wife."[1]

Pir Muhammad Karam Shah adds to this an important consideration of war emergency, when men are killed in large numbers thus reducing the number of males and increasing the number of the widows and the unmarried women in the countries which are at war.[2] The only way to cope with this situation is either to suffer the spread of adultery

1. *Modesty and Chastity in Islam* by Maulana Zafeeruddin ; p. 85.
2. *Zia ul Quran*, commentary on verse Q. 4. 3.

licentiousness and debauchery in the society, or to permit polygyny.[1] This situation arose in the early days of Islam but the law allowing more than one wife did not leave any scar on the Muslim society which retained the values of chastity and modesty uninterfered with. On the other hand in the strictly monogamous society of the West, the Victorian values of feminine propriety and modesty were eroded by World War I. The post World War II era almost destroyed the values of sexual morality and chastity till virginity generally came to be regarded as an object of jest or at least indifference. A dispassionate and unbiassed analysis in retrospect of the post war problems and study of the remedial measures in the Quran would be sufficient to lead to the conclusion that the introduction of polygyny as an emergency measure would have prevented the break down of the norms of sexual morality by filling up the widening gap between a depleted male population and the growing number of young widows and young women.

Islam does not give a licence for marrying more than one wife. On the other hand it does not force a man to remain content with one wife who *inter alia* on account of ill-health or sickness is unable to fulfil her marital obligation and condemns the husband to live a life of virtual celibacy, which may compel him to seek adulterous connections, and possibly to end in profligacy and debauchery. Marriage in every society and religion is considered essential as it guards against unchastity, against which there are a large number of injunctions in the *Quran* and the *Sunnah*.[2] In his first letter to the Corinthians, Paul wrote:

> 'Do not fool yourselves ; people who are immoral or who worship idols or are adulterers, or homosexual perverts or who steal or are greedy or are drunkards or who slander others or are thieves—none of these will possess God's Kingdom.'[3]

1. *Zia ul Quran*, commentary on verse Q. 4 : 3.
2. See Q. 17 : 32; Q. 25 : 68, 69 as examples.
3. 1 Corinthians, 6 : 9, 10.

Paul preferred celibacy but held marriage to be necessary for protecting the Christians from immorality. He further wrote in the same letter:—

> 'A man does well not to marry. But because there is so much immorality, every man should have his own wife, and every woman should have her own husband. A man should fulfil his duty as a husband, and a woman should fulfil her duty as a wife, and each should satisfy the other's needs. A wife is not the master of her own body, but her husband is ; in the same way a husband is not the master of his own body, but his wife is. Do not deny yourselves to each other, unless you first agree to do so for a while in order to spend your time in prayer ; but then resume marital relations. In this way you will be kept from giving in to Satan's temptation because of your lack of self-control.
>
> I tell you this not as an order, but simply as a permission. Actually I would prefer that all of you were as I am; but each one has a special gift from God, one person this gift, and another one that gift.
>
> Now to the unmarried and to the widows I say that it would be better for you to continue to live alone as I do. But if you cannot restrain your desires, go ahead and marry—it is better to marry than to burn with passion."[1]

The permission to marry, though given unwillingly, does not meet the situation in which the woman is unable on account of illness, or even insanity to perform the marital obligations. To carry the principle to its logical conclusion another marriage should have been provided for the male instead of his having been left 'to burn with passion' or to lead an immoral life.

1. 1 Corinthians, 7 : 1-9.

Polygyny was practised among the Hindus, Jews and in Europe too. There is nothing evil in it, if it is practised with justice and to save oneself from sins of immorality and fornication and other such ends which are approved in each society. Islam, therefore, adopted a middle course. It did not approve of unhindered polygyny as practised among other people and reduced the number of wives to four, thus restricting the plurality of wives. It regulated the exercise of this right by making it subject to the norms of justice, equal or rather satisfying treatment to each wife and kindness to all of them. Since it is not possible for the generality of the people to be just, it admonishes them against injustice and orders them to be content with one wife only.

It is also necessary that the husband who marries more than one wife should be possessed of means to bear the expenses equally of each wife. It would not be justice to add to the family a wife whom he cannot provide her maintenance or to feed and maintain whom he has to curtail the expenses of the other wife and members of his family. This is what is meant by Imam Shafe'i who interpreted the words *al la taooloo* (الا تعولوا) as meaning that you should not marry more than one wife if you fear that you will be adding to the number of your dependents.

Islam does not countenance arbitrariness in this matter. Divorce is the most despised in the sight of God among things lawful. It would follow that to divorce a woman with a view to marry another wife cannot be something approved. This is evident from a hadith reported in Bokhari and Muslim on the authority of Abu Huraira.

He reported that the Prophet pbh said, 'No woman shall seek the divorce of her sister to make cup empty and then to get married. For her is what has been destined for her.[1]

The Quran explicitly commands men to do justice between

1. *Mishkat ul Masabeeh*, by Fazal Karim, Vol. 2, p. 685.

the wives and to avoid injustice.[1] It explains the scope of this injunction in verse Q. 4 : 129 which is reproduced:—

ولن تستطيعوا ان تعدلوا بين النساء ولو حرصتم فلاتميلو كل
الميل فتذورها كالمعلقة وان تصلحوا وتتقوا فانّ الله كان
غفورا الرحيما ۔

Q. 4 : 129.—Ye will not be able to deal equally between (your) wives, however much ye wish (to do so). But turn not altogether away (from one) leaving her as in suspense. If ye do good and keep from evil, Lo! Allah is ever Forgiving, Merciful.

The word *t'adiloo* (تعدلوا) has been interpreted in some translations of the Holy Quran as meaning 'to do justice'[2] instead of 'to deal equally' but it does not make any difference. The basic meaning of the word *'adl* (عدل) is to be equal. *'Addl al mizan* (عدل الميزان) means 'made the scales equal'. The words *wahum birabbihim y'adiloon* (وهم بربهم يعدلون) in Q. 6 : 151 mean ' and deem (others) equal with their Lord'.[3] *'Adl* (عدل) may, therefore, be a synonym of equality. The verses command equality between the wives but only to the extent it is possible. Thus equality is possible in respect of the amount of maintenance, the time of seclusion with each wife, and taking away the wife on journey on alternate occasions. If the journeys are not frequent, the decision as to which wife shall accompany the husband is arrived at by drawing a lot in the presence of the wives. But it is not possible to maintain equality in matters concerning heart. The verse, therefore, refers to an evident truth that however much you wish you will not be able to maintain equality. The equality shall therefore be maintained wherever it is possible to do; but even in matters where it is difficult to obtain one should attempt to maintain the balance

1. Q. 4 : 3.
2. *Zia ul Quran*, Vol. 1, on verse Q. 4 : 129.
3. *Lugnat ul Quran* by Parvez, Vol. 3, p. 1139 on the word عدل.

and not incline to one wife only leaving the other as in suspense.

Some persons argue in favour of monogamy on the basis of this verse. Their approach is that if this verse be read along with verse Q. 4 : 3 it would mean that Muslims may marry upto four wives subject to the condition of doing complete justice between them, but if they apprehend that this may not be possible they are bound to limit themselves to monogamy. Allah points out in verse 129 the impossibility of maintaining equality between the wives, and consequently the futility of marrying more than one wife. Plurality of wives is thus rendered unlawful. But this argument renders the injunction against leaving the wife in suspense, meaningless or a surplusage, and is not acceptable.

According to Maulana Omar Ahmad Osmani verse three of the fourth chapter applies only to orphan girls and widows and does not allow plurality of wives from amongst other women. The relevant words of the translation of the verse are: 'And if ye fear that ye will not deal fairly by the orphans, marry of the women who seem good to you, two or three or four. . .' 'The women' is the translation of *an nisaa* (النساء) while 'orphans' is the translation of the word *al yatama* (اليتٰمى). The argument is that the definite article *al* (ال) in *alnisaa* (النساء) must refer to *yatama i.e.* orphans otherwise the word (نسآء) would have been sufficient to convey the sense of generality of women.

He further says, and quotes Jassas[2] in support of it, that the word *yatama* (يتٰمٰى) does not mean orphans only but also includes widows and divorcees. Women covered by either category abounded in the then Muslim Society. The meaning of the verse is that man can marry upto four wives from among these

1. See *Zia ul Quran* on verse Q. 4 : 129.
2. *Ahkam ul Quran* by Jassas, Vol. 2, pp. 57-58.

helpless orphans and widows provided they are capable of maintaining justice and equality between them. The permission to marry more than one wife is limited to the emergency referred to above and is in no way general in nature.

Maulana Omar Ahmad Osmani holds that the general rule is monogamy while polygyny is an exception limited to the abovementioned circumstances. In order to prove the general rule he refers to the meaning of *zauj* (زوج) which means a pair or couple, husband or wife, an individual when consorting with another. The word *zauj* is used in Arabic for the husband as well as the wife but the idea is of a pair or couple[1] (one man and one wife) and not of one man and several wives. According to the Quran[2] mankind was "created from a single soul and from it (was) created its mate and from them twain hath spread abroad a multitude of men and women". Only one mate was thus created for Adam and both of them were made to dwell in the Garden (جنة Jannah).[3] Thus Adam is proved to have only one wife. While dealing with the stage through which the sperm has to pass before the human being is born it is said : "And made of him a pair, the male and female."[4] The rule of *zauj* (زوج) is thus one man and his one mate.

Maulana Osmani referred to the verses[5] in which Allah dissuades man from divorcing his wife, "For if you hate them it may happen that that you hate a thing wherein Allah hath placed much good" and then commands : "If you wish to exchange one wife for another and ye have given unto one of them a sum of money (however big) take nothing from it." The words to which he draws attention are 'if you wish to exchange one wife for another'[6] (وان اردتم استبدال زوج مكان زوج).

1. See *Taj ul Uroos, Moheet, ul Moheet, Mufradat, Lissan ul Arab.*
2. Q. 4 : 1.
3. Q. 2 : 35.
4. Q. 75 : 36-39.
5. Q. 4 : 19-20.
6. Q. 4 : 20.

The order is of bringing another wife in exchange and not more than one wife. One wife is thus the rule and plurality an exception.

Those who advocate that the permission to marry up to four women other than the orphans and the widows rely upon a tradition of Hazrat 'Aisha about the reason for revelation of Q. 4 : 3. It is said that Hazrat Aisha was asked about (the meaning of) the portion of the verse 'And if ye fear that ye cannot do justice. . .' (وان خفتم الا تعدلو) She answered that (in the verse) reference is to orphan girls whose guardians wished to marry them for their property and beauty on payment of the minimum amount of dower. This was prohibited ; the marriage was allowed only on condition of doing full justice to them; And they were directed to marry other women.[1]

After referring to this tradition Maulana Osmani took exception to its being about the reason for revelation of verse 3 of chapter 4 ; and said that there would be justification if this tradition was relatable to verse 127 of that chapter which is as follows:—

و يستفتونکَ فی النساء قل الله يفتيكم فيهن وما يتلىٰ عليكم فی
الكتاب فی يتٰمی النساء الّتی لا توتونهن ما كتب لهن و
ترغبون ان تنكحوهن والمستضعفين من الولدان وَ انَ تقوموا
للیتٰمیٰ بالقسط وما تفعلوا مّن خير فان الله كان به عليماً

Q. 4: 127.—They consult thee concerning women. Say: Allah giveth you decree concerning them, and the scripture which hath been recited unto you (decrees) concerning female orphans unto whom ye give not that which is ordained for them though ye desire to marry them, and (concerning) the weak among the children and that ye should deal justly with orphans. Whatever good ye do, Lo ! Allah is ever Aware of it.

1. *Ahkam al Quran* by Abu Bakr Jassas Razi, Vol. 2, p. 60 ; *Saheeh Bokhari.*

He refers to *Saheeh Bokhari* in which this tradition is related under the above verse also thus connoting it to be the reason for its revelation ; and to the Commentary of the Quran by Ibn Kathir in which the tradition is related in the commentary of verse 127.[1]

The purport of what Maulana Omar Ahmad Osmani said in his well reasoned thesis is not much different from the other view discussed above. The principle that monogamy is the rule is common. The only point of distinction is that while according to Maulana Osmani, the exception is the war emergency in which the plurality of only orphans and widows is permitted ; according to the other view the exception is of the requirement of justice and necessity and marriage is permitted with women other than orphans and widows also up to the limit of four.

Section 6 of the Family Laws Ordinance is, however, based upon this later view.

There is unanimity on the point that the permission to marry more than one wife is subject to the condition of treating each wife justly and equally. The Prophet pbh set the example of treating the wives equally. In a tradition Hazrat 'Aisha is reported to have said to Urwa : "O thou son of my sister ! When the Prophet pbh assigned to us our turns of his visits to us, he never showed any partiality for any one of us, since justice was at work in that assignation. No doubt, he met all of us and talked to us, but during the night slept only in those apartments where he was due according to his schedule, never changing one for the other for the night's sojourn."[2] But if any wife gifted her turn to another wife the Prophet pbh passed the nights of that turn with the other wife. Hazrat 'Aisha

1. *Fiqh-al Quran* by Maulana Omar Ahmad Osmani, Vol. 1, pp. 486-511.

2. *Bulugh al Maram ; Modesty and Chastity in Islam* by Maulana Zafeeruddin Nadvi, pp. 89-90.

said that when Hazrat Saudah grew old, she said : O Messenger of Allah, I have given my day for you to 'Aisha. Then the Prophet pbh allotted to Hazrat 'Aisha two days *i.e.* one day which was for her and the other which was for Hazrat Saudah.[1]

These turns admit of one more exception. In case of marriage with a virgin the husband can pass seven successive nights with her before fixing the turn. But when the marriage is contracted with a widow or divorcee this period is reduced to three days.[2] Whenever the Prophet pbh went on a journey he used to draw lots to determine which wife would accompany him.[3] The Prophet pbh used to maintain complete equality between his wives in this manner and then used to say : "O Allah ! this is my division on what I have control. Do not blame me about what is under your control and over which I have no control."[4] This Hadees illustrates the impossibility of control on one's affection.

The Mutazilas on the other hold that the condition of dealing with equity implies equality in love and affection which is impossible to maintain. They use this as an argument against polygyny.[5]

It is incumbent upon the husband to maintain absolute equality among his wives.[6] The equality applies among other things to the time passed in the society of each wife, and the food, clothes and lodging supplied to them.[7] The condition imposed to pass equal time with each wife is imposed so that none of them may feel lonely or neglected and not necessarily

1. *Mishkat ul Masabeeh* by Fazal Karim, Vol. 2, p. 682.
2. See *Ibid.*, p. 683
3. *Ibid.*
4. *Ibid.*, p. 684.
5. *Muhammadan Law* by Ameer Ali, Vol. 2, Appendix II.
6. *Muslim Law of Divorce* by K. N. Ahmad, p. 761 ; *Fatawa Alamgiri*, Vol. 2, p. 131.
7. *Muslim Law of Divorce*, *Ibid.*, pp. 760-761; *Al Hedaya* by Al-Marghinani, Vol. 2, p. 329.

for sexual intimacy.[1] The law is so strict in this matter that if a husband in order to induce a woman to marry him, promises to spend more time with her than with his other wife or wives, or contracts to give her more property or other compensation, these promises and conditions are legally void.[2] Similarly, if a wife induces her husband by giving him some property or making a reduction in her dower to pass more time with her then too the agreement shall be void.[3]

An exception to the rule to give time equally to each wife by fixed turns is when a husband has to attend out of turn, on a wife who is seriously ill, and if there is no one else to nurse her.[4] But subsequently he will have to make up the time of the wife who was deprived of her turn during the illness of the other.[5] There may be other such exceptions also.

The next question is: Does unequal treatment give the wife a right to seek dissolution of marriage from a Kazi ? The Hanafis and the Malikis agree that on a complaint of unequal treatment by the wife the Kazi shall admonish the husband . . If he remains persistent in his conduct he is liable to chastisement. This is the limit of the action of Kazi under the Hanafi law. No step can be taken for dissolution of marriage.[6] Under the Maliki law if the wife again complains to the Kazi against unjust treatment of the husband *viz a viz* the other wife the Kazi shall apppoint one arbitrator from each party. If the arbitrators agree on divorce their order shall have the force of a judicial decree and no order of the Kazi will be necessary.[7]

1. *Muslim Law of Divorce,* by K. N. Ahmad, p. 761 ; *Raddul Mohtar* by Ibn Abidin, vol. 2, p. 433.
2. *Muslim Law of Divorce, ibid.,* p. 761 ; *Fatawa i Hindiyya,* vol. 2, p. 41.
3. *Ibid.*
4. *Muslim Law of Divorce,* p. 762; *Raddul Mohtar, ibid.,* p. 435.
5. *Ibid.*
6. *Radd al Mohtar,* by Ibn Abidin, vol. 2, p. 434.
7. *Al Mukhtasar* by Sadi Khalil (Eng. trans. Ruxton, London), p. 120.

The provision of clause (f) section 2 under which it is a ground for dissolution of marriage, if a person having more wives than one, does not treat one wife equitably in accordance with the injunctions of the Quran, is thus based upon the Maliki law. The West Pakistan Family Courts Act provides for reconciliation proceedings at two stages firstly at pretrial stage,[1] and secondly after the close of evidence,[2] before the decree is passed.

Two other points should be taken into consideration. The first point is that a condition that the husband shall not contract another marriage during the subsistence of marriage is valid. Another proposition is that the parties' contract that if the husband contracts another marriage, the first wife will be entitled to divorce herself, is also valid. One of the conditions stipulated at the time of marriage of Hazrat Ali with Hazrat Fatima was that he would not contract another marriage in her lifetime. Ibn Qayyam reproduced a Hadith that Banu Hashim bin Mugheera sought permission of the prophet pbh that Hazrat Ali might contract another marriage with the daughter of Abu Jehl. The Prophet pbh did not give the permission and said : "Ibn Abi Talib wishes to divorce my daughter and to marry his daughter. Remember, that Fatima is my beloved daughter. Whoever tortures her, tortures me. Whoever causes her distress, inflicts distress on me. I am afraid that Fatima may not involve herself in mischief about *deen* (religion). I do not prohibit what is permitted nor permit what is prohibited but I swear by Allah that the daughter of the Messenger of Allah and the daughter of the enemy of Allah cannot live together in one place.[3] The translator of *Zaad ul Maad,* Syed Raees Ahmad Jafri points out in the footnote that this was a condition of the marriage of Hazrat Fatima that Hazrat Ali would not

1. S. 10 (3).
2. S. 12 (1).
3. *Zad al Maad,* vol. 4, p. 79.

contract another marriage during her lifelime, a fact to which reference is made by Ibn Qayyam also on the next page. He doubts the authenticity of the last words of the Hadith that the daughter of the enemy of Allah and the daughter of the Messenger of Allah cannot live together.[1]

He wrote:

1. If a person stipulates at the time of marriage that he would not contract another marriage during her life, it is incumbent upon him to fulfil the promise. If he remarries after the first marriage, the first wife shall be entitled to seek dissolution of marriage.

2. The Prophet pbh said that this would be a source of distress and annoyance to Hazrat Fatima and it will become a cause of distress and annoyance to him *i.e.* the Prophet pbh. It is definitely known that even if this condition had not been agreed upon at the time of *nikah*, the marriage of Hazrat Ali with another woman would have been a source of torture and annoyance to Hazrat Fatima as well as the Prophet.[2]

Ibn Qayyam further added the principle that non-fulfilment of the condition gives to the party entitled to its enforcement, the right to dissolution.[3] For example, if it is customary among some people that their women cannot go outside the locality and the custom is so well known that it becomes an implied condition of the contract of marriage (that their women shall not go out of the locality after marriage), it will be enforced according to the rule followed by the people of Medina that customary conditions have force like conditions specially stipulated.[4] Such customary conditions have the same force in a

1. *Zad al Maad*, vol. 4, p. 80.
2. *Ibid.*, p. 79.
3. *Ibid.*
4. *Ibid.*, p. 80.

contract as implied conditions of paying remuneration to a washerman or a bread maker who works for gain, even though there be no specific contract to that effect.[1] On the same analogy if the husband knows that to bring another wife is not possible in view of the status, nobility, eminence and dignity of the first wife, the restraint to marry another woman during the subsistence of the first marriage shall be enforceable as a condition of that marriage.[2]

If a man at the time of marriage delegates to her the power to divorce herself by repeating the formula of *amrik bi yadik* (thy business is in thy hand) and he marries again, she can exercise the power delegated to her and rid herself of the husband.[3]

It is clear from this that according to the Maliki rule the wife can seek dissolution of marriage on the ground that the husband does not treat her equitably and justly with the other wife and acts in this respect contrarily to the injunctions of Allah. She is also entitled to dissolution of marriage on his violating the conditions of marriage, whether specific or implied against re-marrying during the subsistence of marriage with her. The husband can delegate the power of divorce to the wife to be exercised by her in case of the husband marrying another wife. Such being the case the objection of some religious scholars, to the provisions of clause (iia) of the Dissolution of Muslim Marriages Act, 1939 allowing a wife to sue for dissolution of marriage in case of the husband marrying another wife in contravention of section 6 of the Family Laws Ordinance, is not understandable. The legislator has proclaimed since the enforcement of the abovementioned section 6 that a husband can remarry only with the permission of the Arbitration Council or the Collector as envisaged in section 6 and the existing wife shall

1. *Zad al Maad*, Vol. 4, p. 80.
2. *Ibid.*, p. 81.
3. *Fatawa-i-Alamgiri*, Vol. 2, p. 363.

have a right to be heard before the grant of permission, as a necessary party. This law should therefore be read as a condition implied in every marriage contract that in case of marriage of the husband with another woman in contravention of the law she will have a cause of action for dissoulation of her marriage. If mere custom can have the force of an implied contract against remarriage of the husband, *a fortiori* a legislation to the effect must also have that force. But in Pakistan the law does not go to that extent; it merely makes remarriage subject to permission on just grounds. There can be no legal or Sharia impediment to such law.

Another objection is against the provisions of section 6 of the Family Laws Ordinance, 1961 under which the permission of the Arbitration Council is necessary for contracting a marriage with another wife. The provision about the existing wife or wives being necessary party or parties to the proceedings before the Chairman is also held objectionable.

Various opinions of the commentators and jurists have been reproduced to prove that monogamy is the general rule and the permission of having more wives than one is an exception which is permitted because of certain contingencies *inter alia* like the war emergency. In fact it is not possible for the people generally to fulfil the condition of just and equitable treatment of more than one wife. Section 6 does not prohibit polygyny ; it only controls and regulates it. One of the principles of legislation is that in case of misuse of permission the State can withdraw the concession and prohibit what is permitted. But if the permission is subject to conditions, it must always be subject to the legislative power of regulation and control. The legislature has the power to intervene to prevent arbitrariness in discretionary matters in the interest of the people.

The arbitrariness in matter of plurality of wives had reached such proportions in Pakistan that regulatory legislation

had become necessary. Peer Muhammad Karam Shah, a modern commentator, who has a deep insight in social affairs, writes in the commentary of verse 3 of chapter 4 :

> "If we consider the matter objectively and realistically we shall have to admit and concede that generally we have misused the permission. Except for a few persons in our country whoever marries a second wife does it for the gratification of lust and for sexual pleasure. He is so much unbalanced in the love of his new wife that he loses all sense of proportion, and is completely unmindful or rather forgetful of the rights of the first wife. He does not even treat her nicely. Her cihldren are also deprived of the paternal affection. Let us be just and consider whether this is the command of Almighty Allah and His great Prophet.? Is this the teaching of Islam? There it is specified that if you do not have the capacity of doing justice between more than one wives, then marry only one. I wish that the Muslims abstain from sullying and defaming the name of their great religion by their wretched deeds, and by becoming the cause of making it an object of hatred for the seekers after truth and those in pursuit of guidance, by their persistent errors and evil deeds. They are expected to give prominence to the truthful teachings of Islam by making themselves models of good conduct.[1]

Marrying more than one wife is the hobby of rich men and the necessity of the men belonging to the poor peasant class or petty landowners. And both spread mischief in the society. The rich man marries for the reason elaborated in *Zia ul Quran* while the poor man belonging to the peasant class or the class of petty landowners marries to recruit cheap labour for the work in the field well as at home thus reminding one of slavery.

1. *Zia ul Quran*, Vol. I on verse Q. 4 : 3.

Mufti Muhammad Abduhu distinguished the benefits, of polygyny in the early days of Islam with the mischief of the institution as prevalent in the present age. He wrote :

> "In the early days of Islam polygyny held great advantages. The most significant benefit was that the family gained a lot in strength and influence on account of the fresh relationship with the family of the in-laws. Damage which is evidently felt these days did not accrue in those days because of the strong sense and consciousness of religious imperatives and obligations. The mischief of the co-wife remained limited to the co-wife. But these days the damage caused to one co-wife infects her children, parents and all other relatives. Malice, spite, hatred and enmity are everlastingly rampant between the co-wives. They instigate their sons and daughters to revolt against their fathers, and provoke their husbands to usurp the rights of their sons and daughters from the other wife, while the husband on account of his stupidity dances to the tunes of his beloved wife. The mischief thus spreads throughout the family. If the upbringing and training of the women is conducted on right religious lines which may entrench in them the transcendent excellence of the religion, and they bow their heads to the injunctions of Islam, it may then be said that plurality of wives cannot cause any damage to the nation. In that case it may be considered indispensable for the Ummah. But it all depends upon women. In the present circumstances it is impossible to train and educate the members of the Ummah on the right lines and to direct its evolution and development according to the correct norms of faith in connection with the institution of plurality of wives (which, as stated above, may be essential in emergency).

> "The revelation of faith is dictated by exigencies of public good and welfare. It is one of the principles of Islam that damage shall be prevented and all those things stopped which are likely to cause damage to others. There is no doubt that if in some age, something which in earlier times was not harmful, turns to be a cause of mischief, priority should be given to the acquisition of benefits by the eliminatian of that source of mischief. It is essential that the rule may be altered to suit the requirements of the age (provided it is not repugnant to what is mandatory or prohibited in Sharia). When justice between wives be not possible, or there be some such apprehension, plurality of wives is prohibited."[1]

Syed Rashid Raza said that in such circumstances marriage with more than one woman can be prohibited and the legislature can enforce legislation to that effect.[2] Dr. Tanzil ur Rahman also agreed with this principle.[3] Some other Islamic countries have passed laws either restricting or prohibiting marriage with more than one wife. It is completely prohibited in Tunis[4] where the contravention of the law is a punishable offence. In Syria,[5] Iraq[6] and Morocco[7] marriage with another wife is permitted only with the permission of the Kazi.

This is sufficient to justify the provisions of section 6, Family Laws Ordinance to the extent that it places restriction on second marriage when the earlier marriage of that person subsists. There is an objection against vesting right of opposition in the

1. *Tafsiral Manar*, Vol. 4, pp. 349-350.
2. *Majmua i Quanun i Islami*, by Dr. Tanzil ul Rahman, Vol. 1, p. 137.
3. *Ibid.*
4. *Ibid.*, p. 140 ; *Majallat al Ahwal al Shakhsia*, Tunis.
5. *Ibid.*, p. 139 : *Sharh Qanun al Ahwal al Shakhsia, Souria*, by Mustafa al Sabai.
6. *Ibid., Qanun al Ahwal al Shakhsia*, Iraq.
7. *Ibid., Mudawwanat al Ahwal al Shakhsia*, Morocco.

existing wife and the inclusion of the representative of that wife as a member of the Arbitration Council. It is said that the requirement of consent of the wife is illogical. These objections in my view, are without force. The basis of the objections appears to be that it is the right of the husband to marry another wife and this right is exerciseable without interference of the existing wife or wives. This proposition is no longer correct in countries in which the discretion of the husband is made subject to permission from an outside authority, who has to decid ethe matter objectively. If the Kazi be authorised to give permission to contract a second marriage, as suggested by Dr. Tanzil ur Rahman,[1] will he not be justified as a judicial officer, in summoning the existing wife in order to find out the justification for the application of the husband? Obviously there can be no objection to it. The consent of the existing wife who should otherwise be prone to oppose her husband's marriage with another woman, provides strong justification for such permission. It also eliminates the chances of recrimination on the part of the existing wife. The Arbitration Council is framed so as to provide opportunities to the husband and the existing wife to settle the matter amicably and no objection against amicable settlement can be logically admissible. This course may eliminate future disputes. The presence of the existing wife as a necessary party before the Arbiration Council is also required so that the Council may be able to resolve the matter as the wife is in the best position to place before it all the facts in opposition to the husband's demand. And lastly who else has the right to support or oppose the husband's application except the existing wife whose own future is at stake?

The provisions of section 6 of the Family Laws Ordinance are thus amply justified in Sharia.

1. *Majmua i Qanun i Islomi*, by Dr Tanzil-ur-Rehman, Vol. 1, p. 143.

SECTION 5

MINTENANCE (*NAFQAH* نفقه)

The meaning of *nafqah* (نفقه) which is relevant to this chapter is 'expenditure', that which one expends.[1] In the language of the Arabs *nafqah* means what a man spends on his family. In the language of the law it signifies food, clothing and lodgement. This is so mentioned by Imam Mohammad. The *nafqah* of a person becomes incumbent upon another from three causes: (*a*) from being a wife; (*b*) from being a relation and (*c*) from being a slave or a servant.[2]

The husband is legally bound to maintain his wife and her domestic servants whether she and her servants belong to the Muslim faith or not. "It is incumbent on the man to maintain his wife," says *Fatawai Kaz i Khan*, whether she be Moslemah or non-Moslemah, poor or rich, whether there has been copula or not; whether grown up (adult) or young, so that intercourse with her is possible".[3]

The wife's right to maintenance is established from the following verses of the Quran :

لينفق ذو سعة من سعته و من قدر عليه رزقه فلينفق مما اتٰه الله

لا يكلف الله نفسا الا ما اتٰها سيجعل الله بعد عسر يسرا

Q. 65 : 7.—Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allah hath given him. Allah asketh nought of any soul save that which He hath given it. Allah will vouchsafe, after hardship, ease.

1. *The Dictionary and Glossary of the Quran, Mufradat ul Quran ; Gharib al Quran* on the root word *nafaqa* (نفق)

2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 364.

3. *Ibid., Raddul Mohtar*, Vol. 2, p. 1062; *Fatawa-i-Alamgiri*, Vol. 2, p. 582.

اسكنوهن من حيث سكنتم من وجدكم

Q. 65 : 6.—Lodge them where ye dwell, according to your wealth . . .

وعلى المولود له رزقهن وكسوتهن بالمعروف لا تكلف نفس الا وسعها

Q. 2 : 233.—The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No one should be charged beyond his capacity.

These verses throw light on the manner in which the quantum of maintenance can be determined. One important principle laid down in these verses is that no one should be charged beyond his capacity. It is, however, the duty of the rich to spend of his abundance, and of the person in straitened circumstances to spend of what Allah hath given him.

Karkhi said that in fixing the amount of maintenance regard is to be paid to the condition of the husband and not to the position of the wife, and this is the *zahir ur riwayah* (ظاهر الرواية most approved doctrine) and also the doctrine of Imam Shafe'i. Ibn Khassaf said that it is stated in the *Hedaya* that when the condition of the husband and wife are not equal, in other words, when one is rich and the other poor, a proper mean should be adopted between the two; and on this is the Fatwa. And the *Hedaya* supports its view by the Hadith in the *Saheeh Bokhari* from 'Aisha that on one occasion Hind, daughter of 'Otba came and complained to the Prophet that her husband Abu Sufian was a miser, and did not support her and her child properly. The Prophet said, 'take what is necessary, but be moderate.'[1]

If the parties be both wealthy the husband must support her in an opulent manner; if they be both poor, he is required only to provide for her accordingly.[2]

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 364; *Raddul Mohtar*, Vol. 2, p. 1063.

2. Hamilton's *Hedaya*, p. 140.

The only ground on which the wife can be deprived of maintenance is her refractoriness. If the wife is living in her father's house or in her own house and she is called upon to come and live with the husband but she refuses without any valid or reasonable ground such as the non-payment of dower or illness, she is not entitled to maintenance unless she comes to the husband's house.[1] The husband's obligation is suspended only for so long as *nashuz* (نشوز refractoriness) lasts. When the *nashizah* (ناشزہ refractory) wife returns to her husband's house she shall become entitled to be maintained by her husband because the cause for the loss of the right to maintenance has been removed.[2]

Under the Shia law also the loss of the wife's right to maintenance on account of her *nashuz* or unsubmissiveness is not absolute. The maintenance becomes due to her when she gives up refraction and the husband becomes aware of it.[3]

Refusal to perform her marital obligation may be justified in some cases. If the husband does not pay her dower she has a right to refuse herself to him.[4] A woman cannot be compelled to go on a journey with her husband against her will, and the Kazi should not constrain her to accompany him. In case of her refusal to go with him, she does not lose her right of maintenance, and would be entitled to it during the husband's absence.[5] Respectable women not accustomed to household work, such as grinding corn and cooking food, should not be constrained to perform such duties, "though it was usual for our Lady Fatima't-az Zahra, who was the noblest (افضل *afzal*)

1. *See Muhammadn Law* by Ameer Ali, Vol. 2, p. 368 for case-law reproduced there.

2. *Muslim Law of Divorce* by K. N. Ahmad, p. 732. 1075.

3. *Ibid.*, p. 733; *Wasilat al Nijat*, by Sayed Abul Hasan Musawi, Vol. 2, pp. 59, 63.

4. *Fatawa-i-Alamgiri*, Vol. 2, p. 583, *Ain ul Hedaya*, Vol. 2, pp. 333-334.

5. *Radd al Mohtar*, Vol. 2, p. 1065.

of women, to do such work, for that was the custom of Arabia".[1] If a refractory wife becomes insane, she can no longer exercise her volition and her continued absence or unsubmissiveness shall not be due to her volition. She shall therefore become entitled to be maintained by her husband.[2]

The question whether a wife is bound to do household work such as cooking or washing generated considerable controversy among the jurists. This controversy is reflected in *Zad al Maad*.[3] Ibn Qayyim reproduced two traditions one from Ibn Habib and another reported in *Bokhari* and *Muslim*. In the first tradition it is stated that Hazrat Ali and Hazrat Fatima appeared before the Prophet pbh and complained about the performance of their mutual duties. The Prophet pbh ordered that Hazrat Fatima should do the domestic work while Hazrat Ali should look after other matters. Ibn Habib said that from domestic work is meant kneading of flour, cooking of food, cleaning of the house, bringing of water, that is, all the household work.

It is in *Bokhari* and *Muslim* that Hazrat Fatima came to the Probhet pbh and complained that she had to grind corn on the grindstone. She requested for a servant but did not succeed. She then related the same request to Hazrat 'Aisha. When the Prophet came she informed him about it. Hazrat Ali relates that the Praphet pbh came to us. We were lying on our beds. We attempted to rise but he stopped us and sat between us. I felt the coolness of his foot in my stomach. He said I tell you what is better than that which you demanded. When you go to bed recite *Subhan Allah* (سبحان الله) thirty-three times, *Alhamdo lillah* (الحمد لله) thirty-three times and *Allah-o-Akbar* (الله اکبر) thirty-four times. This is more approved for you than having a servant.[4]

1. *Radd al Mohtar*, Vol. 2, p. 1067.
2. *Ibid.*, p. 888.
3. Vol. 4, p. 138 (Urdu translation).
4. *Zad ul Maad*, by Ibn Qaayim, Vol. 4 (Urdu trans.), pp. 138, 139.

Ibn Qayyim also relates from Asmaa bint Hazrat Abu Bakr that she performed all the household chores and also looked after the horse whom she massaged. The details of these chores performed by her are also given.[1]

Some of the jurists consider it to be the duty of the wife to perform domestic work in the interest of the household. Abu Saur said that the wife is bound to serve the husband but jurists belonging to the other group deny this concept of service. So is held by Imam Malik, Imam Shafe'i and Imam Abu Hanifa. The Zahiris say that marriage is for enjoyment and any consideration of service or profit, is foreign to it.[2]

Fatawa-i-Alamgiri discusses this point in some detail. The principle is that if the wife refuses to cook food, she will not be compelled to cook. It will be incumbent upon the husband to bring for her cooked food or to arrange for her a maid servant who may cook for her. The jurist, Abul Lais said that on the wife's refusal to cook, the husband is bound to provide for her cooked food only when she belongs to the nobility and did not perform any domestic duty at her own house. If she does not belong to the nobility she must be suffering from some such disability which may make her incapable of cooking. In the absence of either of these contingencies it is not incumbent upon the husband to provide cooked food for her. This is written in *Zaheria*. And the Doctors said that it is the moral duty of the woman to do household work but the Kazi cannot enforce it by a decree. This is in *Bahr ul Raiq*.[3]

In Pakistan generally the women of the highest status in society with hosts of servants take pride in their cooking and pass some of their time in kitchens as a matter of hobby. It will be bad day for the husbands if their wives deprive them

1. *Zad al Maad*, Vol. 4, p. 138.
2. *Ibid.*
3. *Fatawa-i-Alamgiri*, Vol. 2, pp. 587-588.

of the taste of the dishes prepared by them and to which they are accustomed. None of these problems can arise where the husband leaves the household arrangements in the hand of the wife and shares his income with her in a manner which is satisfactory to both the spouses. It should be the option of the wife to employ servants for her help or do the household work herself.

Maintenance as already seen includes food, clothing and lodgment. There are various opinions on the measure of maintenance. Some fix the minimum in terms of quantity of flour or other articles of food which must be provided to the wife each day.[1] Others lay down the principles in general terms.[2] According to some soap and other articles necessary for cleaning the body should also be supplied.[3] Another opinion says that it is not the duty of the husband to provide medical assistance, fees of the Doctors and cost of medicines.[4]

This appears strange *inter alia* on the ground that the general principle is that maintenance shall be determined by the status and financial position of the husband and it is incumbent upon the husband to provide for the wife separate apartment and preferably a separate house and servants to boot. Medical assistance is for saving life, and for maintenance of health. On what principle can a wife be denied that which is essential for the above purpose?

It is said that articles of self-adornment and things required for make up and for improving one's appearance may be brought by the husband in his discretion but in that case it is incumbent upon the wife to use them.[5]

1. *Rawai al Ekham* by Syed Muhammad Sadiq, Vol. 2, p. 310 (Urdu translation of *Sharaya al Islam*).
2. *Fatawa-i-Alamgiri*, Vol. 2, p. 587.
3. *Ibid.*, p. 588.
4. *Ibid.*
5. *Ibid.*

The Shia Law contains similar provisions that it is incumbent upon the husband to provide, food, clothing and residence for the wife, but it is more liberal in regard to the measure of maintenance. The measure of maintenance, according to the standing rule, is regulated by the woman's requirements in the matter of food, condiments, clothing, residence, servants and articles for adornment subject to the custom of her equals among the people of her own town and even though she should be one who has not been accustomed to have a servant, yet in case of illness she must be provided with one, from a regard to what is customary.[1]

In fixing the amount of maintenance, the Kazi must have due regard to the position of the parties, the requirements of the wife and the dearness of the provisions. And he may direct the payment to be made either daily, or by the month or by the year, as may be most convenient to the man, for a labourer earns by the day, and it may be convenient to pay him daily. But in every case it must be in advance, though the husband may agree to pay, and the wife may agree to take the maintenance, in any way he chooses.[2]

Servants and their maintenance

If the husband is possessed of means, in other words, is not impecunious or poor, the wife is entitled to a servant. The number of servants is dependant on the means of the husband and the position of the parties or their requirements. And if the woman belongs to the nobility, her personal servants' maintenance is obligatory on the husband. And on this is the *Fatwa*.[3] But if the husband is poor, he is not bound to pay the expenses of maintaining the wife's servant.[4]

1. *Sharaya al Islam*, p. 305, *Muhammadan Law* by Ameer Ali, Vol. 2, p. 367.
2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 367; *Radd ul Mohtar*, Vol. 2, p. 1069.
3. *Muhammadan Law ibid.*, *Radd ul Mohtar, ibid.*, p. 1077.
4. *Ain ul Hedaya* Vol. 2, p. 336.

Residence

The Muslim Law inclines very liberally towards the woman in matter or providing for her residence. It is obligatory on the husband to provide to his wife separate residence which is not shared by his relatives or her relatives unless she consents to it.[1] The reason is that the husband cannot make a third person a partner in this facility. It is harmful to her for several reasons to associate others in the residence. It would interfere with her privacy with her husband and she would not feel free in these surroundings. If she agrees to live with her in laws, it would be permissible to share residence with them because it is her privilege to give up or reduce her rights.[2]

Similarly the husband cannot accommodate in that house his son from his earlier wife.[3]

It is not necessary that an entire house may be given to the wife for her residence. It would be sufficient if an apartment is arranged provided its door can be closed.[4]

The principle is that the maintenance of a wife includes lodging and must be provided in accordance with the social position of the parties.[5]

The wife is entitled to full maintenance including lodging during the period of *Iddat* and has also the right to claim payment for suckling the child after *talaq*.[6]

1. *Ain ul Hedaya*, Vol. 2, p. 339.
2. *Ibid.*
3. *Ibid.*, p. 339-340.
4. *Ibid.*, p. 340.
5. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 367; *Radd ul Mahtar*, Vol. 12, p. 1062.
6. See Chapter on Divorce.

SECTION 6—INHERITANCE

The question of inheritance in this book is relevant from two points of view. The first point relates to the right of a woman to inherit from her parents, sons and daughters, and brothers and sisters etc. The second point pertains to the right of grandsons and granddaughters whose parents predecease their parents, to inherit from their grandparents in the presence of the latter's sons and daughters.

The later point is relevant for two reasons. Firstly it deals with the measures to ensure *inter alia* the right of granddaughters from a predeceased son or daughter to inherit from their grandfather and grandmother, paternal as well as maternal. Secondly the object is to examine in the light of Sharia the provisions of S. 4 of the Family Laws Ordinance which provides that such grandsons or granddaughters shall have a right to inherit from the propositus the share which their father or mother, if alive, would have been entitled to receive.

It is a fallacy to build an argument on the share in inheritance of a woman that Islam treats her to be a subordinate to the male. The fact on the other hand is that in consonance with its policy of maintaining equality between man and woman and in order to alleviate her position from that of internationally recognised subordination, or rather slavery, Islam for the first time conferred upon her the right to inherit property alongwith her brothers.

Among the Israelites only the males had a right to inherit. The daughter was the only female who could inherit in the absence of the sons but this was subject to the condition of her marrying within the tribe. The eldest son was entitled to double the share. It is said in Deuteronomy[1] :

1. 21 : 15-17.

"Suppose a man has two wives and they both bear him sons, but the first son is not the child of his favourite wife. When the man decides how he is going to divide his property among his children, he is not to show partiality to the son of his favourite wife by giving him the share that belongs to the first born son. He is to give a double share of his possessions to his first son, even though he is not the son of his favourite wife. A man must acknowledge his first son and give him the share he is legally entitled to."

The injunction in Jewish Law about the right of the daughter to inherit has a history behind it. Just as in the Quran certain injunctions were revealed on the asking of certain persons so, in Torah too commands are revealed on inquiry from the Israelites. The story about the inheritance of the daughters is as follows :

Mahlah, Noah, Hoglah, Milcah and Tirzah were the daughters of Zelophehad son of Hepher, son of Gilead, son of Machir, son of Manasseh, son of Joseph. They went and stood before Moses, Eleazor the priest, the leaders, and the whole community of the entrance of the tent of the Lord's presence and said, "Our father died in the wilderness without leaving any sons. He was not among the follower of Korah who rebelled against the Lord : he died because of his own sin. Just because he had no sons, why should our father's name disappear from Israel ? Give us property among our father's relatives.

Moses presented their case to the Lord, and the Lord said to him, "What the daughters of Zelophehad request is right ; give them property among their father's relatives. Let his inheritance pass on to them. Tell the people of Israel that whenever a man dies without

leaving a son, his daughter is to inherit his property. If he has no daughter his brothers are to inherit it. If he has no brothers, his father's brothers are to inherit it. If he has no brothers or uncles then his nearest relative to inherit it and hold it as his own property. The people of Israel are to observe this as a legal requirement, just as I, the Lord have commanded you."[1]

The rule about the inheritance of daughters was made conditional on the daughters marrying in the same tribe on the request and demand of the males among Israelites, as would be evident from the following :

"The heads of the families in the clan of Gilead the son of Machir and grandson of Manasseh son of Joseph went to Moses and the other leaders. They said, "The Lord commanded you to distribute the land to the people of Israel by driving lots. He also commanded you to give the property of our relative Zelophehad to his daughters. But remember, if they marry men of another tribe their property will then belong to that tribe, and the total allotted to us will be reduced. In the year of Restoration when all property that has been sold is restored to its original owners, the property of Zelophehad's daughters will be permanently added to the tribe into which they marry and will be lost to our tribe."

So Moses gave the people of Israel the following command from the Lord. He said : "What the tribe of Manasseh says is right, and so the Lord says that the daughters of Zelophehad are free to marry any one they wish but only within their own tribe. The property of every Israelite will remain attached to the tribe. Every woman who inherits property in an Israelite tribe must marry

1. Numbers, 27 : 1-11.

> a man belonging to that tribe. In this way each Israelite will inherit the property of his ancestors, and the property will not pass from one tribe to another. Each tribe will continue to possess its own property.'"[1]

Contrary to his in Islam a number of females are entitled to inherit in the family including daughter, mother and sister, and no conditions are attached to the inheritance. The women are free to marry anywhere.

Under the Hindu Law the son has a religious importance. His presence is necessary for performing the fathers obsequies. The principle is that "if the father sees the face of the living son on birth, he transfers the debt to the son, and attains immortality. . . . . endless are the heavenly regions for those having male issue but there is no heavenly region for a sonless man." (Yashist)[2]

According to Yajur Veds, "a Brahmin on being born becomes a debtor in three obligations : to the Rishis (who are propounders of the sacred books) for studentship (to study the same) ; to the gods for sacrifices ; to the ancestor for progeny ; he is free from the debt who has performed sacrifices, and who has studied the Vedas."[3] Thus the ancestral debt is discharged by the birth of a son. A sonless man may adopt, for securing the same benefits, a son who is spoken of as a secondary, subsidiary or a substituted son.[4] The *raison d'etre* of adoption must be the desire for perpetuation of family property and name.[5]

It is not therefore surprising that in the presence of the male descendants no female can inherit.

1. Numbers, 36 : 1-9.
2. Ashtak IX, p. 127,
3. Ashtak VI, 3-10; Hang, Vol. 1, p. 179.
4. *Hindu Code*, p. 313.
5. *Ibid.*

There are two schools of law in Hindu Law—Mitakshara and Dayabhaga, but the principle is common to both that when it is a question of inheritance the three females who are recognised as heirs cannot inherit in the presence of sons, grandsons and the greatgrandsons of the propositus.[1] Another distinctive feature of the Hindu Law of inheritance is that where the property decends to a male heir it passes on his death to his heirs. But where property descends to a female heir she gets an interest in it till life and in some cases till remarriage except in the Bombay Presidency, and after her death the property reverts to the heirs of the full owner. So generally a woman does not become a fresh stock of descent.[2] Strictly speaking the right of inheritance of female is more akin to right to maintenance than succession.

Under the Mitakshara School the right of inheritance accrues in personal property only. Different rules apply to Joint Family property, which by itself is an institution and completely ousts women from the right of succession. This property is ancestral property which means property which a person inherits from his father, father's father or father's father's father or property acquired out of the income of such property.[3] This is known as coparcenary property devolution to which is regulated by the rules of survivorship which is per stirpes and not per capita. But no female can enter the coparcenary.[4] Thus self-acquired property or even separate property which once devolves upon the son, grandson or greatgrandson, becomes ancestral property and whatever concession is reserved for a woman in self-acquired property is lost to her. The quantum of property which some women in certain circumstances may inherit is thus reduced.

1. *Hindu Code*, p. 975.
2. *Ibid.*, p. 780.
3. *Ibid.*, p. 514.
4. *Ibid.*, p. 509 onwards on 'Joint Family'.

There are other disqualifications also which deprive a person of the right of inheritance. They are : (a) congenital blindness, deafness and dumbness ; (b) congenital want of any limb or organ ; (c) lunacy and idiocy though not congenital or incurable ; (d) serious or ulcerous leprosy ; (e) impotency or other incurable disease and (f) unchastity in a female heir.[1]

The reasons for such disqualifications are not far to seek. The analogy can be discovered in the Pre-Islamic Arabian society in which the stronger person could inherit to the exclusion of the weak who could not fight. The women naturally fell under that category. This logic which throws light upon the status of women in the Hindu society is very well illustrated in Ss. 27 to 30 of the General Introduction of the *Hindu Code* :[2]

> "The primitive man had not only to wage war with the forces of nature and brute creation, but also with his fellowmen whose savage instincts for spoil and strife rendered existence precarious and in the case of women and children, impossible. The gregarious instincts which man inherited from his brute progenitors first asserted themselves in the formation of alliances and aided by the self same instinct of parental protection and control, family groups were naturally formed in which the wives, sons and slaves came under the sway of the adult man of whom the eldest, usually the father became soon recognised as the headman and leader. His authority was supreme and all things came under his sway. The idea of property was then in its embryo. No distinction was made between his dependents and his belongings. All were alike his property. The virile ruled the weak.

1. *Hindu Code*, pp. 984, 985.
2. *Ibid.*, pp. xiii and xiv.

As women and sons were weak and defenceless he afforded them protection in return for their services which he commanded without any restraint of social conventions. For social conventions were of slow growth and could not influence his action till their utility was demonstrated by experience and acknowledged by traditions. But since the first requirement of the patriarchal age was the accession of adult men, they were seized, and sold, appropriated and employed at the sweet will of the patriarch.

This condition continued for long ages and when the Hindu Smiritis were written it was the prevailing practice. Wives, sons and slaves fell into the general category of this property and could own no property of their own. Accordingly Manu says : "A wife, a son and a slave are devoid of property; whatever they acquire become his whose they are. Even when some order was established their position of positive dependence continued undisturbed and the Courts were disinclined to interfere with the parental control which had led to the establishment of peace. 'So in a Smiriti cited in the Mitakshara, it is said, Even when there is a cause of dispute, between husband and wife, between father and son, between master and slave, no action is maintainable.' The infusion of religious ideas into the fabric of society merely gave to it a new reason and an added solemnity. The wife became even more dependent upon her husband who continued to be her swami or master. The father was free to sell his children and as such he sold his daughters in bondage or in marriage. The Asur form of marriage was thus the precursor of the Brahma form in which the daughter was gifted to the bridegroom. But in either case it was a transfer, whether, by sale or by gift—and

little distinguishable from the transfer of a chattel such as a goat or cow. The *patria potestas* was transferred by marriage to the husband. She still continued a chattel and as the husband was himself a dependent in the family of his father his acquisition of her was an acquisition of, and for, the family who could use her for her primary purpose of procreation. This enabled them to use her independently of her own volition which did not count; for she was foredoomed to lifelong dependence upon her husband and his relations. The younger brother of the husband, a sapinda or a sagotra, being annointed with clarified butter, and with permission of the Guru, may go to a sonless widow, when in season with the desire of raising a son.' If the wife is withdrawn after marriage the delinquent is punishable for theft, and the punishment of a thief is that his head be cut off. This was the stage of development when the earlier Smritikars ending with Yadnyavolkya described the status of women.

This property in women, sons, slaves was no peculiar feature of the Hindu system for it is equally shared by the ancient Greeks and the Romans who sold or lent their wives to their friends for pleasure or procreation. So Plutarch describing the life of Lycurgus the Spartan Lawgiver wrote : 'He laughed at those who revenge with wars and bloodshed the communications of a married woman's favours; and allowed, that if a man in years should have a young wife, he might introduce to her some handsome and honest young man, whom he approved of, and when she had a child of this generous race, bring it up as his own. On the other hand he allowed that if a man of character should entertain a passion for a married woman on account

of modesty and the beauty of her children, he might treat with her husband for admission to her company, that so planting in her beauty bearing soil, he might produce excellent children, the congenial offspring of excellent parents.' Lycurgus justifies this regulation on the ground that children were not so much the property of their parents as of the State which was interested in seeing that they were begotton by the best men in it. The regulation was held to have had the most salutary effect upon the morals of the women themselves. The privilege of leading and receiving a wife was esteemed a high privilege of the Spartan citizen and its forfeiture was considered a condign punishment reserved for serious delinquencies. The lending of wives to friends was regarded as one mark of favour in Athens and Socrates is said to have lent his wife, Xantippe to his young disciple and friend Alcibiades. That the wife was the friendship's offering is illustrated in the life of Cato the Younger. When he married his second wife Martia after divorcing Atilia, his friend Quintus Hortensius a man of great dignity and politeness,' requested Cato to lend him his married daughter Portia for the purpose of propagation. 'Cato answered that he had the greatest regard for the friendship of Hortensius, but he could not think of his application for another man's wife,' whereupon Hortensius requested him to lend him his own wife which Cato did not only lend but presented to his friend with the consent of the lady's father.

The Athenian law permitted divorce but required that the wife should appear in person to present her bill before the Archon when the husband was free to seize

her person and carry her off if he was so minded. But in the ancient Hellenic and Roman Republican days, women lived in seclusion married early and when their husbands become old young men were welcome to improve the breed. Lycurgus argued that when men took care to improve the breed of dogs and cattle why they should not take the trouble to improve theia own race. He ridiculed the vanity and absurdity of other nations where people study to have their horses and dogs of the finest breed they can procure either by interest or money; but yet keep their wives shut up that they may have children by none but themselves, though they may be doting, decrepit or infirm. This was the prevailing view of the classic age shared alike by the Egyptians, Persians, Assyrians and the Babylonians and it was the underlying current of the Indo-Aryan thought.

The second stage marks some improvement in her status but her dependence still continues. She is still a chattel in her husband's home. Her sole purpose is still to breed sons to strengthen her husband's household."

The status of women throughout the known world is described in detail in these quotations. In all societies they were treated as almost chattel or slaves. This obviously affected any claim to inherit or succeed. Islam revolutionised the status of women and brought them at par with the members of the male sex. The right of a woman to inherit or to succeed is a necessary concomitant of this revolution.

It may be clarified at this stage that succession is of two types—testate and intestate. Under some laws testate succession is the rule and a person is entitled to dispose of his property by will thus disinheriting even his legally recognized heirs. In other laws testate succession is regulated by rules which prevent

to some extent the disinheritance of heirs. In yet other laws like the law of Islam intestate succession is the rule while testate succession is allowed to a specified maximum share of the property. Disinheritance of heirs is illegal.

Adoption of a son is allowed in most of the laws primarily for reason of religious rites. Islam does not distinguish between a male and female in this respect, nor under that law the presence of children, daughter or son, is essential for performance of any religious rites on the death or during lifetime of the parents. The birth of a son is as good under that law as the birth of a daughter.

In Islam there is no concept of so moulding the law of succession that the property may remain in the family. The Jewish law of succession in the Torah, the law about Hindu joint family the laws of primogeniture, ultimogeniture, secondogeniture etc. are based upon the principle of keeping the property in the lineal family and in some cases, of keeping it intact and undivided. Such laws prefer property to human beings. Islam on the other hand prefers human beings to property, irrespective of their sex.

Among the Romans the freedom of testation was great. The first requirement of the Roman will of the historical times was the appointment of one or more heirs. An heir in the Roman sense of the term is a universal successor, that is he takes over the duties of the deceased (in so far as they are transmissible at all) as a whole. But a man was obliged after Justinian's reforms to leave a certain proportion of his property to his children and in some cases to ascendants, brother and sister.[1]

With regard to intestate succession or succession without a will those first entitled in early times were the deceased's own heirs—that is those who were in his potestas or manus when he

1. *Encyclopaedia Britannica*, Vol. 15, p. 1058.

died and became free from his power after his death. Failing these the nearest agnatic relations (relations in the male line of descent) succeeded, and if there were no agnates, the member of the gens, clans of the deceased succeeded. Later reforms placed children emancipated from potestas on an equality with those under potestas and gradually gave the surviving spouse the right of succession.[1]

In Chinese Law the father or senior male member was legally recognised as head of the family or lineage group with wide authority over its other members and with powers during his lifetime to dispose of its property. Descent was reckoned through the male line, and succession to the position of head went to the senior male in direct line in the next generation. If a man had not a son he might adopt an heir but only from among members of the next generation in collateral lines. Another method of continuing descent line was the device of recognising a male as heir to two lines of descent, in which case he could have a principal wife in each line.

Unmarried women were members of their natal families but on marriage a woman moved to the family of her husband and was afterwards subject to the authority of her husband's parents and seniors. Any property brought by the wife, apart from such ornaments as were personal was transferred to the ownership of her husband's family.[2]

An estate was divided equally among the sons, except that the eldest son might receive slightly more, partly because of his extra responsibilities in ritual duties and partly because of his usual duty to care for the aged mother. Apart from gifts of marriage, daughters did not usually inherit property.[3]

According to the law in Medieval Europe[4] the father was

1. *Encyclopedia Britannica*, Vol. 15, p. 1059.
2. *Ibid.* Vol. 4, p. 409.
3. *Ibid.*
4. *Ibid.*, Vol. 6, p. 1119.

preeminent within the family, although the classical Roman concept of paternal power had been moderated by medieval traditions. In regions where the influence of Roman law was still felt, children remained permanently under paternal control unless they had obtained emancipation. Elsewhere the Germanic Law prevailed by which children passed out of parental control on coming of age. Until they become independent the father was responsible for the children's acts and administered their property. In the countryside it was still normal in this period for family holdings to be kept undivided and farmed in common. A harsh strengthening of paternal power, particularly in the upper classes, was to come about after the end of the medieval period, in the era of absolute states. Laws relating to family property were diverse and complex. In certain regions, such as northern France, the possession of husband and wife formed a single estate. Elsewhere the property remained juridically separate, the husband contributed various possessions subject to limitations (*donatio propter nuptias, morgengable, tertia quarta*) and the wife contributed her dowry retaining her rights in it, but the administration was the husband's task.

In the Middle Ages the law of inheritance followed the Germanic tradition for a long time, heirs were drawn from the family circle according to rigorous rules of succession. None had the free disposal of his property. After his death it was destined for his legitimate offspring or other relatives and their consent was required for any alienation of his property during his lifetime. Only if there were no descendants could the estate pass to an outsider. But such a person had to be previously adopted and thus made juridically a member of the family.

A breach was opened in these principles by the practice of making the bequest to the churches and religious bodies . . Free disposal of property after death was finally admitted during or around the twelfth century with the return in many regions

of Europe (after the revival of Roman law in the eleventh century) to the Roman *testamentum* which differed from a donation in that it could be freely revoked by the author.[1]

The Christian church thus encouraged testamentary disposition for its own sake at the cost of the heirs of the deceased. Not so Islam. As would be seen later testacy was limited in Islam to one-third of the property whether the beneficiary of the will is a non-heir or charity.

The laws governing the inheritance of feudal property remained more rigid. By the twelfth century it had been established that a fief could be inherited. A little later the principle gained ground in England, Normandy and elsewhere that a fief must pass undivided to the eldest son. In England the rule of primogeniture was soon extended to commoner's property, while in other countries it was not. But it did not mean that the fief could pass on to the women. In Italy it could be divided amongst the sons on the death of the lord.[2]

In England those customs that required a minimum share in the personal property to be left to the surviving spouse and descendants disappeared in the seventeenth and the eighteenth centuries. The interest of dower when guaranteed a life-interest to the widow in the real estate of the deceased husband lost its protective effect in 1833. At the turn of the twentieth century freedom of disinheritance was complete in England as well as in the dominions but not in Scotland. There in the movable estate the *legitim* (Bairn's part) is still reserved to the children, the *ius relicti* to the widower and the *ius relictae* to the widow. Until 1964 (in immovables) the widower was entitled to courtesy (a life rent) in his wife's heritage, *i.e.* (immovable)

1. *Encyclopaedia Britannica*, Vol. 6, p. 1119.
2. *Ibid.*

property, and the widow had the right of terce, *i.e.* a lifetime out of one-third of her husband's inheritable estate.[1]

In England freedom of testation is unlimited, but by custom, among wealthy families, in each generation, the head of the family would settle the estate upon the eldest son in such a way that it would descend on him undivided but subject to a life estate for the widow and to provisions for the daughter, younger son and other needy relatives.[2]

Under the English Inheritance (Family Provision) Act of 1938, as amended by the Intestate Estates Act of 1952 and the Family Provisions Act of 1966 the Court may order that, in case of need, provisions be made out of the income and, under certain circumstances, out of other capital, for the benefit of the surviving spouse, an unmarried daughter, a minor son, or any child, male or female who is incapable of maintaining herself or himself because of physical or mental incapacity. The principle was extended to include the deceased's divorced former husband or former wife, in certain circumstances by the Matrimonial Causes (Property and Maintenance) Act of 1958 (superseded by the Matrimonial Cases Act of 1965).[3]

In the United States, the surviving spouse is now protected against complete disinheritance in every State.

The rule of intestate succession as fixed statutorily in England by the Administration of Estates Act, 1925 as amended by the Intestates Estates Act, 1952 and the Family Provisions Act, 1966 provides for the succession of females.

It is worthy of notice that Justinian's reforms of 543 and 548 A.D., established a new order of intestacy which provided for (*a*) descendants of the descendent, (*b*) ascendants, brothers and sisters of full blood and their children, (*c*) descendant's

1. *Encyclopaedia Britannica*, Vol. 9, p. 587.
2. *Ibid.*, p. 588.
3. *Ibid.*, p. 589.

brothers and sisters of half blood and their children, and (*d*) the collaterals related through nearest grade of consanguinity; and this order included females. But in England which is said to have followed Roman law in matters of succession such an order of intestate succession was established with some more elaboration and modification only by the abovementioned Act of 1925 as amended by the later Acts of 1952 and 1966. It appears that only the idea of testate succession was adopted because it helped firstly in keeping the estate undivided and in maintaining the hold of feudalism and secondly in keeping the suzerainty and hold of the father on his sons on whose heads permanently hung the sword of Damocles of disinheritance of the eldest male child and deprivation of the other sons of provision for maintenance.

In other systems the favoured son could be other than the eldest son. Under the system of ultimogeniture, which existed in parts of England as the custom of Burough English, and also under the German Nationalist Socialist Law of 1933, the person favoured was the youngest son and under systems of seniorate or juniorate it is the oldest or the youngest member of the family, under that of majorate and minorate, it is the oldest and the youngest persons standing in equal degree of consanguinity to the descendant. There have been cases where certain lands have been reserved to the second born son and his line (secundogeniture) or the third born and his line (tertiogeniture) etc.[1]

In France family relations were also deeply transformed after the Revolution according to the principles of liberty and equality.[2] The Napoleonic Code adopted many of the ideas of the Revolution towards succession. But its formulations tempered them with exceptions and combined them with ideas of *ancien* regime.[3]

1. *Encyclopaedia Britannica*, Vol. 4, p. 662.
2. *Ibid.* p. 663.
3. *Ibid.*

The revolutionary law on intestate succession relied upon two basic principles : (1) that no distinction be made within the estate of the deceased, land chattels were treated in the same way and no account was taken of origin of landed property ; and (2) that equal parts be given to all the heirs of the same degree of kindred ; the advantages accruing through some custom to the freeborn or to male children were abolished.[1] Distinction was not made between male and female.

The author of the article in the *Encyclopaedia Britannica* ascribes this change to the idea of liberty and equality, but in my view the change was also a direct consequence of the memories of the brutalities, and inhuman barbarities suffered by the French people at the hands of the Feudal Lords and the only way to end Feudalism and to prevent its revival was to put an end to the concept of undivided estates. The measures of inheritance adopted by the Napoleonic code made it impossible for feudalism to raise its head in future.

But the position of the wife still remained very weak. According to the Code, the spouse could succeed only if there were no persons who were related to the deceased up to a degree specified by law. A surviving spouse was therefore in a bad position if no gift or legacy had been made to her though under the statutory matrimonial regime she received half of the community property into which all chattels of both spouses fell. Rights of the surviving spouse have been increased at various times during the twentieth century. By mid-century the spouse was entitled to at least the usufruct (life interest) of one quarter of the property left by the deceased. The survivor also inherits half the estate if there are no children and if there are relatives on only one side of the deceased's family.[2]

The German Civil Code of 1896 was less restrictive in respect of matters of spouse than the French Code. However

1. *Encyclopaedia Britannica*, Vol. 4, p. 662.
2. *Ibid.*, p. 663.

it was only after World War II that all rules contradicting the equality between man and woman were repealed.[1]

It would be evident from this discussion that the right of inheritance of a woman whether as surviving spouse, daughter, sister or mother, whether in religious or in secular regimes, were practically nil till recently. Among the Jews a daughter could succeed her father in the absence of sons but on conditions of her marrying within the same tribe. The position of women was not different in any part of the known world. In the Arabian Peninsula it could not be different. The position in the Peninsula was that the women and minor sons had no right to inherit. It was customary that only those who were capable of riding a horse and showing their mettle in combat could inherit. This excluded the weak and the infirm among males also from inheritance.[2]

It was to refute such customs of inequality which prevailed throughout the world that the Quran declared that no one could be excluded from inheritance, whether male or female, weak or able bodied, infirm and sickly or healthy, orphan or otherwise. The legal shares in inheritance were fixed by Allah and their sanctity is perpetual. Q. 4 : 7 reads as follows :

للرجال نصيب مما ترک الوالدان والاقربون وللنساء نصيب
مما ترک الوالدان والاقربون مما قل منه اوکثر نصيباً مفروضا

> Q. 4 : 7.—Unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether, it be little, or much a legal share.[3]

The verse abrogates the principle of inheritance embodied in the Old Testament and impliedly disapproves or rather

1. *Encyclopedia Britannica*, Vol. 4, p. 664.
2. *Zia ul Quran* on verse 7, chapter 4.
3. See also Q. 4 : 33.

condemns the practice of disinheriting women and also men prevalent customarily in various parts of the world. The provision about legal shares is mandatory, but verse 8 of the same chapter persuades the Muslims to make present of part of the heritable goods or property to the kinsfolk, orphans and the needy. The verse is as follows :

و اذا حضر القسمة اولوالقربىٰ واليتمىٰ والمسٰكين فارزقوهم منه
وقولو لهم قولاً معروفا

Q. 4 : 8.—And when kinsfolk, and orphans and the needy are present at the division (of the heritage) bestow on them therefrom and speak kindly unto them.

Then follow the injunctions about the specific shares which the categories of relatives specified in the Quran are entitled to get from the heritage.

يوصيكم الله فى اولاد كم للذكر مثل حظ الانثيين فان كن
نساء فوق اثنتين فلهن ثلثا ما ترك و ان كانت واحدة فلها
النصف ـ ولابويه لكل واحد منهما السدس مما ترك ان كان له
ولد ـ فان لم يكن له ولد و ورثه ابواه فلامه الثلث ـ فان كان
له اخوة فلامه السدس من٭ بعد وصية يوصى بها او دين
اباؤكم و ابناؤ كم لا تدرون ايهم اقرب لكم نفعاً ـ فريضته
من الله ان الله كان عليماً حكيماً

Q. 4 : 11.—Allah chargeth you concerning (the provision for your children : to the male the equivalent of the portion of two females, and if there be women more than two, then theirs is two-third of the inheritance, and if there be one (only) then the half. And to his parents a sixth of the inheritance, if he have a son, and if he have no son and his parents are his heirs, then to his mother appertaineth the third and if he have brethren, then to his mother appertaineth the sixth, after any legacy he may have bequeathed or debt (hath been

paid). You know not which of your parents or children is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is Knower and Wise.

The reference to usefulness is obviously made to controvert the reason behind the rule of depriving the women and the weak of the inheritance.

ولكم نصف ما ترک ازواجكم ان لم يكن لهن ولد فان كان لهن ولد فلكم الربع مما تركن من بعد وصية يوصين بها او دين ولهن الربع مما تركتم ان لم يكن لكم ولد ـ فان كان لكم ولد فلهن الثمن مما تركتم من بعد وصية توصون بها او دين ـ و ان كان رجل يورث كلالة او امراة وله اخ او اخت فلكل واحد منهما السدس ـ فان كانو أكثر من ذالک فهم شركاء في الثلث من بعد وصية يوصى بها او دين غير مضار وصية من الله والله عليم حليم ـ

Q. 4 : 12.—And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that which they leave, after any legacy they may have bequeathed or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a child then eighth of that which ye leave after any legacy ye may have bequeathed, or debt (ye may have contracted, hath been paid). And if a man or woman have a distant relative (كالة *kalala*, having left neither parent nor child) and he (or she) has a brother or sister (only on the mother's side then to each of them twain the brother and the sister) the sixth, and if they be more than two, then they will be sharers in the third after any legacy that may have been bequeathed or debt (contracted) not injuring (the heirs by willing away more than a third

of the heritage) hath been paid. A commandment from Allah, Allah is Knower, Indulgent.

يستفتونک قل الله يفتيکم فی الکلٰلة ان امرؤ هلک ليس له ولد
وله اخت فلها نصف ما ترک و هو يرثها ان لم يکن لها ولد
فان کانتا اثنتين فلهما الثلثٰن مما ترک وان کانو اخوة رجالاً
و نساء فللذکر مثل حظ الانثيين يبين الله لکم ان تضلوا والله
بکل شئی عليم .

Q. 4 : 177.—They ask thee for a pronouncement. Say Allah hath pronounced for you concerning distant relatives (کلالہ *kalala*). If a man die childless and he have a sister, hers is half the heritage and he would have inherited from her had she died childless. And if there be two sisters, then theirs are two-thirds of the heritage, and if they be brethren, men and women unto the male is the equivalent of the share of two females. Allah commandeth unto you so that ye err not. Allah is knower of all things.

The principles emanating from these three verses (Q. 4: 11; Q. 4 : 12 ; Q. 4 : 177) are as follows:

1. *Children.*—When there are sons and daughters both, each son will get double of what the daughter gets. If there be only one daughter she will be entitled to half the heritage. If there be two or more daughters and no son, each daughter shall share equally in two-third of the property of the deceased.

2. *Parents.*—When there is a child, male or female, and both parents survive the deceased, each of the parents will get one-sixth of the property, if the deceased only leaves the parents but no children or brothers and sisters, the mother will be entitled to one-third of the

property and the balance two-third shall be inherited by the father. In case there are brothers and sisters but no child, the mother shall get one-sixth. The share of others in such contingency are not mentioned. The Hanafi jurists, however hold that the father shall exclude the brothers and sisters on account of the remoteness of the latter in degree and shall be entitled to the balance five-sixth share.

3. *Husband.*—Where the wife dies childless and is survived by the husband the latter is entitled to half her estate. If she leaves a child the husband will get only one-fourth of her heritage.

4. *Wife.*—If the husband dies childless, his surviving spouse or spouses shall be entitled to one-fourth of his estate. If he leaves a child or more, the spouse or spouses shall get only one-eighth share from his estate. If the spouses exceed one they will be jointly entitled to one-fourth or one-eighth of the estate, as the case may be.

5. *The uterine brothers and sisters.*—If there be one uterine sister or uterine brother to the deceased he will get one-sixth share in his estate. But if the uterine brothers and sisters exceed one all of them will share in one-third of his property.

6. *Brothers and sisters of full blood or consanguine.*—If the deceased is not survived by parents or child, but is survived by a sister only whether consanguine or of full blood she will be entitled to one-half of his estate. If there be two or more such sisters all of them shall share in two-third of the estate. But if there be brothers and sisters both, each brother shall get double of the share of the sister. The rule of exclusion of one by the other is not within the scope of the book.

With the exception of the son and the brother, all the other sharers in the estate, described above fall in the category of *zawil furodh* (ذوی الفروض sharers). Father and mother include true grandfather and true grandmother respectively howhighsoever and daughter includes son's daughter howlowsoever meaning the son's daughter, the son's son's daughter etc. According to the Hanafi law, therefore there are four male sharers *i.e.* father, true grandfather howhighsoever, uterine brother and husband; while there are eight categories of female sharers *i.e.* wife, mother, true grandmother howhighsoever, daughter, son's daughter howlowsoever, uterine sister, full sister and consanguine sister.

After satisfying the sharers on the principle of the nearer excluding the remoter, the residue goes to the *asbah* or residuaries of which there are four categories *i.e.* descendants, ascendants, descendants of father and descendants of true grandfather howhighsoever. In the absence of sharers and residuaries the property devolves on the distant kindred (*dhaw il arham* ذوی الارحام).

The Shia principle of succession which is also based on the same verses is different. Under the Shia law heirs by consanguinity are divided into three classes, and each class is subdivided into two sections. These classes are respectively composed as follows:—

1. (*i*) Parents ;
   (*ii*) Children and other lineal descendants howlowsoever.
2. (*i*) Grandparents howhighsoever;
   (*ii*) brothers and sisters and their descendants howlowsoever.
3. (*i*) Paternal and
   (*ii*) maternal uncles and aunts of the deceased and of his parents and grandparents howhighsoever, and their descendants howlowsoever.

Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections exclude the more remote in that section.

The Shia law is more liberal in case of *inter alia* daughter's share. If the daughter is the only issue of the deceased she gets the whole property to the exclusion of residuaries. But under the Hanafi law she gets only her Quranic share and the balance devolves upon residuaries *e.g.* brothers. Another important distinction is about the applicability of the principle of representation. It is not recognised under the Hanafi law but is partially recognised under the Shia law.

The principle of representation has more than one meaning. It may be applied for the purpose of deciding—

(*a*) what persons are entitled to inherit, or

(*b*) the quantum of the share of any given person on the footing that he is entitled to inherit.[1]

Where for purpose (*a*) the rule of exclusion applies (*i.e.* the nearer in degree excludes the more remote) it is true both of Sunnis and Shias that the principle of representation is not recognised as qualifying the rule of exclusion. Thus if A dies leaving him a surviving son and grandsons by predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father.

But if both sons predeceased the propositus who died leaving three grandsons by one son and two by the other, then all the grandsons are heirs. In that case, can the principle of representation be applied for purpose (*b*) that is for ascertaining the share of each grandson. Where the rule of representation

1. *Muhammadan Law* by Mulla, S. 93. Agha Sher Ali v. Bai Kulsum I L R 32 Bom. 540, 547, 548, 550.

applies according to the Shia law the succession among the descendants is per stirpes and not per capita.[1]

Primarily on account of the rule of the nearer excluding the more remote (hereinafter to be called the rule of exclusion), the children of a predeceased son or daughter cannot inherit the property of their grandfather who is survived by an immediate descendant, a son or sons. This rule of succession on which there is consensus among the different schools of thought was changed in Pakistan by S. 4 of the Muslim Family Laws Ordinance, 1961. It provides that in the event of the death of any son or daughter of the propositus before the opening of succession, the children of each son or daughter, if any, living at the time the succession opens, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

This section provides for succession of those who under the Fiqh of all schools of thought were treated as *mahrum ul irs* محروم الارث (deprived of the right to succeed).

It appears that the intellectuals having some knowledge of Sharia were not satisfied with the deprivation of the descendants of the descedant whose father died during the lifetime of his father because they found no justification for not applying the rule of representation pertaining to the persons entitled to succeed or inherit in view of the use of the word *'aulad'* (اولاد descendants) in Q. 4: 11, which is liable to be interpreted as including all descendants howlowsoever. The verse says that 'Allah chargeth you concerning your children (descendants howlowsoever) to the male the equivalent of the portion of two females,' and according to these thinkers there is neither any justification of confining the word *aulad* to sons only nor of denying the application of the principle of representation to the children of a predeceased son.

1. *Muhammadan Law* by Mulla, Ss. 93-94.

This matter was mooted out in the form of a bill in the Punjab Provincial Assembly in December, 1953 but it failed to muster support. The religious scholars of Pakistan opposed the measure. The Government of Pakistan formed a seven-member Commission on Marriage and Family Laws on the 4th of August, 1955 with Dr. Khalifa Shujauddin as its President to *inter alia* consider the above question. The President, however died shortly afterwards. Mr. Justice Miau Abdul Rashid, former Chief Justice of Pakistan was then appointed President of the Commission. The Commission's report on the point of inheritance of children of the deceased's predeceased son could be implemented in 1961 in the form of S. 4 of the Family Laws Ordinance, 1961. Since then there has been persistent opposition to this measure from the religious scholars, who claim that it is contrary to the Quran, the Sunnah and *Ijmaa* (consensus of the learned among the Muslims).

It may be stated that Khalifa Abdul Hakim, a well known author of several books concerning matters about Sharia was one of the members of the Commission. He championed the cause of the children of the predeceased son and daughter of the propositus. Maulana Ehtisham ul Haq an Alim member opposed it, but the Commission which consisted of three women members did not agree with the prevalent view.

This was not a new question. It had come up for consideration among the religious scholars of Egypt who favoured the device of compulsory will to compensate the children of the predeceased sons for their deprivation of the inheritance of the heritage left by their grandfather. In Sharia the right of testamentary disposition is limited to one-third of one's property and no testamentary disposition can be made in favour of an heir except with the specific permission of those who inherit the property on the death of the person making the will. It was therefore provided by S. 46 of the Law of Wills of 1946 in

Egypt that if the propositus fails to make a will of his property in favour of the children of the son who predeceased him such a will shall be presumed to have been made by him within the limits of one-third of his property and to the extent of the share that their father (the predeceased son) would have inherited if he had been alive at the time of the death of his father, provided that such children were not compensated for their deprivation from inheritance by the propositus in any other manner. In the latter contingency the compulsory will would be effective only to the extent of shortfall in compensation.[1] Such laws were also enforced in Syria, Iraq and Tunis.[2]

The question is whether Section 4 of the Ordinance of 1961 is in any way repugnant to Sharia *i.e.* the Quran and the Sunnah. The question of repugnance with Ijmaa need not deter us since according to the Constitution of the country a law can be held to be bad and can be struck off by the competent authority *i.e.* the Federal Shariat Court only if it is repugnant to the Quran and the Sunnah, secondly in my view Ijmaa has considerable persuasive value which it may not be easy to ignore but it has no binding force like the Quran and the Sunnah and is alterable with the passage of time, thirdly I do not agree with the Hanafi religious scholars that one who denies an Ijmaa is an unbeliever (كافر *kafir*). The untrammelled and unabated tendency to call a person who differs on the question of even interpretation an unbeliever has done incalculable harm to the Muslim Ummah and is primarily responsible for creating schism in it. The principle of calling the denier of Ijmaa an unbeliever has undoubtedly been evolved to create a church in Islam where there is none. The principle is also an offshoot of the doctrine of *taqleed*. The trend among the religious scholars to be treated as monopolists in all matters concerning Islam including interpretation of the Quran and the

1. *Majmua Qawaneen-i-Islami* by Dr. Tanzeel-ur-Rehman, Vol. 5, p. 1675.
2. *Ibid.*

Sunnah as well as legislation, is the creation partly of this stress on Ijmaa. In fact Ijmaa is nothing but the monopoly of the legists and jurists which virtually makes them *share* (شارع law-maker) although the law is divine and can be found only in the Quran and the Sunnah.

The emphasis on Ijmaa is also countenanced by Imam Ahmad bin Hanbal on a factual plane when he ruled that a person who claims that there is Ijmaa on any subject is a liar.

It is undeniable that there is no injunction in the Quran or the Sunnah of the Prophet pbh concerning the inheritance of the children of a predeceased son in the property of their grandparents. The question is determinable by the interpretation of the Quranic verses and the principles laid down in the traditions of the Prophet pbh. The jurists however invoke the aid of some other principles also. They have already been illustrated as for example by the applicability by the Shias of a part of the principle of representation.

The scheme of the Quranic injunctions (Q. 4: 7, Q. 4: 33; 4 : 11; Q. 4: 12; Q. 4 : 177) is that contrary to the notions then prevailing, the males and females have a right of inheriting property from their relatives and no consideration of sex, weakness or strength, or the order of birth etc. is relevant for determination of the person who can inherit. The Quran deals mainly with three groups of people who have the right to inherit. The first group consists of descendants, ascendants and spouses who may inherit simultaneously while the second group comprises of the brothers and the sisters etc. and the third one of those between whom and the propositus a female intervenes.

The members in the first group are the immediate sharers and the order in which they have been mentioned—children, parents ad spouse—is the natural order. Despite the order in which they are mentioned if all the three are living, all of them have a right in property of the descendant. The members of the

second group only inherit if all or some of the members of the group do not exist. The third group comes last.

The first two groups are capable of further extension ; as for instance grand children or still lower descendants, taking the place of children, grandparents or still higher ascendants, taking the place of parents and uncles, aunts and other distant relatives taking the place of brothers and sisters. The general principle of division on the basis of sex is that the male gets double the share of the female but there are cases in which the male and females take equal share.[1] Thus in the presence of children both the parents take one-sixth share each. Then the share of femals in some cases is fixed. If there is only one daughter and no male issue she gets half and if there be more than one daughters they are entitled jointly to two-third share. Similar principle is applicable where the sole heirs are sisters. This is, because of the responsibilities of the two sexes.

If only the children survive in the first group, they would naturally inherit the entire property on the principle of the share of the male being double that of the female. But if other members of the group whose shares are fixed (the parents or the surviving spouse) also survive they would get their shares first and the rest of the property or the residue will go to the children as residuaries.[2]

No difficulty arises if there be only grand children and no child. The principle applicable to the children shall then be extended to the grand children because the Quran says يوصيكم الله فى اولادكم (Allah chargeth you concerning your children). The word *aulad* (اولاد children) includes children howlowsoever. *Aulad* is the plural of *walad* (ولد child or offspring). As a verb *walada* means to beget. *Lam yalid* (لم يلد) in Q. 112: 3 means 'He begetteth not' and *walam yulad* (ولم يولد)

1. See Q. 4 : 11.
2. See *The Religion of Islam* by Muhammad Ali, pp. 703-7.

in the same verse means 'nor was He begotten.' The word *walad* (ولد) includes male as well as female as both are begotten. The author of *Lataif ul Lughat* says that the word *walad* does not only mean son and daughter but also includes the son's son. The religious scholars here distinguish between one who is directly begotten *i.e.* son or daughter ; and the person who is begotten through some other person *e.g.* the grandson or the granddaughter for whose birth the source is the son. According to them the children of the daughter are not included in this term, because the descent should be lineal (through male). The daughter's sons and daughters belong to the family of their father, and are distant kindred. It is only an exception that Imam Hassan and Imam Husain are called the sons of the Prophet pbh though they were his daughter's sons. The sons or daughters are *aulad* in the real sense while the son's sons or the son's daughters are *aulad* in an allegorical sense only. This is the reason why in the presence of the son the grandson or granddaughter cannot inherit. It is stated in *Ehkam al Quran* by Jassas[1] :

> "There is no difference between the scholars in the Ummah that by the divine injunction 'Allah chargeth you concerning your children' is meant the children begotten by you. There is also no difference on the point that the grandson is not included in this injunction if there be a son. Similarly is the proposition that in the absence of the children begotten the injunction is about the children of the sons and not of the daughters. This word (*aulad*) therefore connotes the begotten children and in their absence, the children of the son."

Reliance is then placed on verse 33 of Chapter 4 for the rule of exclusion. The relevant portion of the verse is as follows :

1. Vol. 2, p. 96.

ولكل جعلنا موالى مما ترک الوالدان و الاقربون .

Q. 4 : 33.—And unto each We have appointed heirs of that which parents and near kindred leave.

Verse 7 of Chapter 4 which has been reproduced above is more relevant in this connection. It lay down the rule that 'unto men belongeth a share of that which parents and near kindred leave and unto women a share of that which parents and near kindred leave.' From these verses it follows that the criterion of being an heir is the nearness of relationship. Where there are nearer relatives the remoter are excluded. This is another reason for the exclusion of the grandsons in the presence of the sons of the deceased.

A Hadith is reported in *Bokhari, Muslim, Abu Daud, Tirmizi* and *Tahawi* that it is stated by Abdullah bin Abbas that the Prophet pbh declared that whatever residue is left after payment of the Quranic shares it is for the male relative of the deceased who is nearest in degree. Ibn Hajar who wrote the commentary of *Saheeh Bokhari* writes :

> 'There is consensus of the Ummah that the residue left after payment of the share of the sharers should go to the *Asbah* (between whom and the deceased no female intervenes). Whoever is nearer in degree shall be preferred. After him will come the next who is nearer in degree. A person remoter in degree shall not inherit with one who is nearer in degree. *Asbah* is that male who is so related to the deceased that between him and the deceased no female intervenes. If he is alone he will be entitled to the whole inheritance.[1]

Imam Nawawi commentator of *Saheeh Muslim* said :

> 'All the Muslims have arrived at a consensus on the point that the residue left after satisfaction of the sharers

1. *Fath ul Bari*, Vol. 2, p. 10.

goes to the *Asbah*. Whoever among them is nearer in degree shall exclude the remoter. The remoter cannot inherit with the nearer.[1]

The opinion of Zaid bin Sabit is recorded in *Bokhari* that he said that the grandson will not inherit with the son.

These in short are the arguments of those who believe in the complete exclusion from inheritance of grandchildren in the presence of any son of the deceased. These arguments have been taken from a book entitled *Pote ki Meeras*, *Hamare 'Aaili Masail* and *Majmua Qawanin Islami*.[2] Dr. Tanzil-ur-Rehman author of the last book has dealt with the subject in a scholarly manner while the other two books are full of abuses for those who hold the other view, a pet style of at least the Ulema of the subcontinent. The emphasis in the first book is on Ijmaa and the principle that the denier of Ijmaa is an unbeliever, a principle on which there is no consensus at all.

It is not realised that such writings cease to be scholarly in character if they exhibit spite and vengefulness. They also confound the issue. Such language and style is most offensive for the present day readers and it can be taken for granted that such books are seldom read from cover to cover thus frustrating the object of the writing. May be the persons holding the other view have little knowledge of Sharia. May be their ideas reflects uch modernism as is repugnant to Sharia. In such a case it becomes the duty of those who know, to correct them in the most polite manner. There should be arguments and not *fatwas* of heresy or unbelief. After all who has vested any Alim with the right to denounce the modernists as unbelievers. Our attempt should be to narrow the gulf between the modern and the rigidly conservative and not to widen it. Moreover

1. *Muslim*, Vol. 2 p. 34.
2. Vol. 5, pp. 1941-1982.

such language is proof of the fact that the writer has no argument in his favour and uses recriminatory language to provide vigour to his shallow arguments. In matters of disagreement denunciation has never paid. It only creates schism which is never approved by Islam. And is this the style of the Prophet of Islam pbh whom we claim to follow? The answer is an emphatic 'No.'

No one who favours the view of allowing inheritance to grandsons whose father has died, notwithstanding the presence of other sons, says that in every case the sons and grandsons should inherit together. They argue in favour of the *mahrum ul irs* (person deprived of inheritance) on the basis of the wider connotation of the word *aulad*. The conservative view concedes the wider interpretation but distinguishes between the real and allegorical meaning of the term, and relies upon a linguistic principle that where the real meaning of a term are factually applicable, resort cannot be had to the allegorical meaning. There does not appear to be any cavil with this proposition either. The difference only arises in the application of the principles. The conservative view is that the rules of exclusion of the remoter by the nearer and of the allegorical by the real *walad* should be applied in comparison with the existing son or sons. The modernist approach appears to be that the applicability of the two rules be confined to the comparison with deceased son whose children are the grandsons. The result would by that just as in the absence of children the grandsons and granddaughters would inherit, so in the absence of the predeceased son only his sons and daughters should inherit to the extent of his share (share of the predeceased son). This concept virtually applies the principle of representation in regard to the person who should inherit which is foreign to both Fiqh, Shia as well as Sunni. This interpretation appears to be based on the principle of Istehsan.

The Muslim Family Law Commission relied upon the

principle of representation in support of the view taken by it. The Commission's report is as follows :

'It was admitted by all the members of the Commission that there is no sanction in the Holy Quran or any authoritative Hadith whereby the children of a predeceased son or daughter could be excluded from inheriting property from their grandfather. It appears that during زمانه جاهليت (period before Islam which is known as the period of ignorance) this custom prevailed among the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from inheriting property of their grandfather. It may be mentioned that if a person leaves a great deal of property and his father has predeceased him, the grandfather gets the share that the father of the deceased would have got. This means that the right of representation is recognised by Muslim law amongst the ascendants. If a person has five sons and four of his sons predeceased him, leaving several grandchildren alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by one son only and a large number of orphans left by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance cannot be irrational and inequitable. Moreover as the right of representation entitles a grandfather to inherit the property of his grandsons even though the father of the testator has predeceased him, why can the same principle be not applied to the lineal descendants, permitting the children of a predeceased son or daughter to inherit property from their grandfather. There are numerous injunctions in the Holy Quran expressing great solicitude for the protection and welfare of the orphans and their property. Any law depriv-

ing children of a predeceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy Quran. It was stated by Maulana Ehtisham ul Haq that all the four Imams are agreed that the son of a predeceased son or daughter shall be excluded from inheritance. The Maulana Sahib was not prepared to reopen this question in view of the unanimous opinions of all the Imams. The view of the Maulana Sahib would be elaborated by him in his note of dissent.

It has been suggested in some of the replies that the grandfather can by will leave one-third of his property to his grandchildren. The provision does not do full justice to the orphans as is evident from the example given above. We, therefore recommend that legislation should be undertaken to do justice to the orphans in respect of the property of their grandfathers.[1]

The main arguments are two ; that firstly the rule of exclusion of the orphan grandchildren from inheriting their father's property appears to be a remnant of the period before Islam and secondly that the rule of representation which can do justice to such grandchildren was applied to a grandfather when the parents of the propositus has died during the latter's lifetime. There is no reason not to apply that principle to this issue. The first proposition is not correct since the stronger son who could ride a horse and could weild the sword in battle had the right to inherit in Jahilya, to the exclusion of the other sons of the decedent also. The grandfather does not get the inheritance of the grandson's property on account of the principle of representation. He gets the property on the same principle on which in case of death of all children of the propositus during his lifetime, the grandson

1. *Studies in the Family Law of Islam* by Professor Khurshid Ahmad, pp. 72-73.

inherits the property. Just as the words *aulad* and *abnaa* (اولاد و ابناء) include grandsons howlowsoever similarly the word *aabaa* (آباء) does not mean only parents but also includes grandparents howhighsoever. The grandfather becomes a nearer relative on the death of the father of the propositus in the same manner that the grandsons become nearer relatives failing any son of the propositus. In either case the principle of the nearer excluding the remoter, functions and not the principle of repersentation.

It was observad in Mst. Farishta v. Federation of Pakistan.[1] by the Shariat Bench of the Peshawar High Court that, 'It is not disputed that the words *alwaladan* (الوالدان parents), *aulad* (اولاد children) *abawaihe* (ابويه his parents), *abuho* (ابوه his father) and *abnaa* (ابناء children) occurring in various forms . . . are the expressions of the widest possible amplitude. So to speak they not only include immediate parents, children, father and mother, but also parents of the parents howhighsoever and the children of the sons or issues howlowsoever. That is to say these expressions not only have restricted meaning but extended meaning as well. It can also be said that the said expressions apart from the real meaning have been used metaphorically.'

It has already been noted that a principle has been evolved from the two meanings one real and another allegorical or metaphorical—of the same word that where the real meanings are capable of being applied, it is not possible to apply the other meaning. An illustration is given of the word lion which is a beast. In the metaphorical sense it is also applied to a person who has the quality of courage and bravery of a lion. If somebody says 'the lion is coming' and the beast really comes there, the utterance would refer to the beast called by that name. But if the beast be not there it would obviously refer to some person who is metaphorically called 'lion'. But the Quranic and

1. P L D 1980 Pesh. 47.

the Sunnah rule of the nearer in degree excluding the remoter is more apt and clinches the matter. Inheritance given in violation of the rule would be repugnant to the Quran and the Sunnah. This question of nearness in degree shall have to be decided in comparison with the heirs who are alive at the time of the death of the propositus and not *viz a aiz* the predeceased son. Consequently the principle of representation as regards the heirs would be in conflict with the above rule laid down in the Quran and the Sunnah. Section 4 of the Ordinance of 1961, in my view, is repugnant to the Quran and the Sunnah.

It was so held in the above cited case of Mst. Farishta. The judgment was set aside by the Shariat Appellate Bench of the Supreme Court on the ground that the Shariat Bench of the Peshawar High Court had no jurisdiction in a matter pertaining to the personal law of the Muslims but no finding was or could be given on merits.[1] It cannot, however, be doubted that three honourable judges of the High Court also arrived at the same conclusion on merits.

The Commission did not consider the proposal of a will in favour of the excluded grand children to be a satisfactory solution of the problem. This was done without going into the question whether the will can be mandatory. This solution did nor find favour with the Shariat Bench of the Peshawar High Court in the above cited case of Mst. Farishta and the Court was only pleased to observe 'that the making of a will not being a compulsory duty of a Muslim we will be importing something in Shariat which may be equally indefensible.' The matter, therefore, requires more elaborate consideration.

In Islamic Shariah intestate succession has been the general rule since revelation of the verses pertaining to inheritance. Prior to that the divine injunction about testamentary dis-

1. Q. 4 ; 11, 12, 171.

position in favour of the parents and near kindreds formed the rule.[1]

The divine injunctions regarding will are as follows :—

كتب عليكم اذا حضر احدكم الموت ان ترک خير ان الوصية
للوالدين والاقربين بالمعروف حقا على المتقين

Q. 2 : 180.—It is prescibed for you when one of you approacheth death, if he leave wealth, that he bequeath unto parents and near relatives in kindness (This is) a duty for those who ward off (evil).

فمن بدله بعد ما سمعه فانما اثمه على الذين يبدلونه ان الله
سميع عليم

Q. 2 : 181. And whoso changeth (the will) after he hath heard it the sin thereof is only upon those who change it. Lo! Allah is Hearer, Knower.

فمن خاف من موص جنفاً او اثماً فا صلح بينهم فلا اثم عليه
ان الله غفور الرحيم

Q. 2 : 182. But he who feareth from a testator some unjust or sinful clause, and maketh peace between the parties, (it shall be) no sine for him. Lo! Allah is Forgiving, Merciful.

يا ايها الذين امنو شهادة بينكم اذا حضر احدكم الموت حين
الوصيه اثنٰن ذوا عدل منكم او آخرٰن من غيركم ان انتم ضربتم
فى الارض فاصا بتكم مصيبة الموت تحبسونهما منٌ بعد الصلٰوة
فيقسلمٰن با لله ان ارتبتم لانشترى به ثمناً ولو كان ذا قربىٰ ولا
نكتم شهادة الله انآ اذا لمن الا اثمين

Q. 5 : 106.—O ye who believe! Let there be witnesses between you when death draweth near unto one of you at the time of bequest, two witnesses, just men from among you, or two others from another tribe in

1. Q. 2 ; 180.

case you are campaigning in the land and the calamity of death befall you. Ye shall empanel them both after the prayer, and, if ye doubt, they shall be made to swear by Allah (saying) : We will not take a bribe even though it were (on behalf of) a near kinsman nor will we hide the testimony of Allah, for then indeed we should be of the sinful.

At various places in the verses relating to inheritance[1] the words 'after any legacy that he might have bequeathed, or some such words have been used which means that the inheritance shall be divided among the heirs *inter alia* after satisfying the testamentary portion of the succession.

Verse 180 of Chapter 2 comprises of an injunction in a mandatory form to make a bequest before death in favour of the parents and near relatives. It is reported by 'Abdullah bin Omar that the Prophet pbh said : A Muslim having bequeathable property has no right to pass two nights without executing a will unless the will is with him.[2]

The mandatory nature of the verse is clear from the words *kutiba alaikum* (كتب عليكم it is prescribed for you). The language is similar as used to reveal the obligatory nature of the injunction about fasting Q. 2 : 183 *kutiba alaikum alsiyam* (كتب عليكم الصيام fasting is prescribed for you or is made obligatory on you). Another important point to be considered is that the strangers are not mentioned as the subject of testamentary disposition which means that either they were to be completely excluded or they could be made the beneficiary after the interests of the parents and the near kindred were safeguarded. It is related that before the advent of Islam the Arabs preferred strangers to the relations. They treated it to be a measure of bounty and generosity. This was not due to any profusion of philanthropy. The prime

1. Q. 4 : 11 12.

2. *Sahceh al Bokhari* printed Asah al Mutabi, Vol. 1, pp. 383-384; *Sunan Abu Daud*, printed by Asah al Mutabi, Karachi, Vol. 2, p. 395.

mover of such conduct was their egotism and sense of boastfulness. Verse 180 of chapter 2 was therefore revealed to put an end to this abhorrent and condemnable practice.[1] The quantum of testmentary disposition in favour of parents and near relatives was regulated by the use of the word *bil m'aaruf* (بالمعروف) which means in kindness. If acted upon in its true spirit, this could hardly leave in the majority of cases, anything for the strangers.

The spirit of the verse is that the near relatives of the deceased should not be left destitutes. This is in line with the injunction to prefer kinsmen even in matters of charity.[2]

After the revelation of the injunctions about inheritance[3] two changes were made. The parents and the nearer relatives who were given the right of inheritance no longer remained the beneficiaries of bequests except with the permission of other heirs. The extent of the testate property was reduced to a maximum of one-third. The object of the injunctions about the law of inheritance is also the same, that is to save the descendants, ascendants, surviving spouse and near kindred from destitution. Saad bin Waqqas said that : The Prophet pbh visited me during my illness to enquire after my health. I was then in Makkah and did not like to die at a place wherefrom I had migrated. The Prophet pbh said : 'God show mercy to Ibn 'Aqraa. I said to the Prophet pbh : 'O Prophet of Allah I am wealthy and affluent and my only heir is my daughter. Please permit me that I may bequeath all my property.' He said: 'No'. I asked : 'May I bequeath two-third of my property? He said: 'No'. I asked : '(What about) one-third?' He said, (al-right) one-third, though one-third is also excessive. You should leave your property for your heirs. It is much better than

1. See *Ziaul Quran*, Vol. 1 on Q. 2 : 180.
2. Q. 30 : 38 ; Q. 2 : 177.
3. Q. 4 : 11, 12, 177.

leaving them poor and destitutes and dependent upon the bounty of others.[1]

The Hadith thus throws light not only on the verses relating to inheritance,[2] but also about the injunction to bequeath one's property.[3]

Despite the limitation on the quantum of bequest the injunction about testate succession is said in one Hadith to be a beneficence from Allah. It is stated by 'Ata on the authority of Abu Huraira that the Prophet pbh said that undoubtedly Allah conferred benevolence on you at the time of your death through one-third of your property which is a veritable additon to your virtuous actions.[4] There are other traditions which prove bequests and legacies to be one of the most approved actions.

It is related by Jabir bin 'Abdullah that the Prophet pbh observed that whoever dies after making a bequest dies after adopting the correct path and whoever dies on piety and truthfulness is entitled to remission and forgiveness.[5] Muawiya bin Qurra relates from his father that the Prophet pbh said that whoever makes a will when the time of his death approaches and the will is in accordance with (the injunctions in) the Book of Allah, the will shall be an atonement for his default in the payment of Zakat during his lifetime.[6] Naf'ae said on the authority of Abdullah bin Omar that the Prophet pbh said: "O, sons of Adam, there are two things, none of which was for you, (and which I provided for you) I fixed for you a share from your property at the time of your death so that I may purify

1. *Saheeh al Bokhari*, Vol. 1, pp. 83, 383 ; *Sunan Abu Daud*, Vol. 2, p. 395 both printed at Asah al Mutabi, Karachi.
2. Q. 4 : 11, 12, 177.
3. Q. 2 : 180.
4. *Sunan Ibn Moja*, printed Asah al Mutabi, Karachi, p. 194.
5. *Ibid.*
6. *Ibid.*

you through that property and my people may pray for you (for your remission and forgiveness)'[1]

The juristic view which is now prevalent is that though the injunction about testate succession of the parents and the near kinsmen was obligatory but it was abrogated by the revelation of the injunctions about inheritance and now it has only a persuasive value even for non-heirs. Jassas wrote in *Ehkamal Quran*[2] that the obligatory nature of the injunction in this verse[3] is patently clear because the Quranic phrase, *kutiba alaikum* (كتب عليكم it is prescribed for you) is proof of its being mandatory. The phrase means that it is made obligatory upon you) as stated by the Almighty (in respect of fasting) *kutiba alaikum al siyam* (كتب عليكم الصيام fasting is made obligatory on you). The mandatory nature of the injunction of testamentary disposition is further established by the use of the words *'bil ma'aruf haqqan alalmuttaqeen* (بالمعروف حقاً على المتقين) in kindness, a duty for all those who are pious or who ward off evil). Among the words which convey the sense of something being compulsory no words are stronger than the words, *haza haqqun alaik* (هذا حق عليك this is a right on you) meaning 'this is necessary, compulsory, obligatory and mandaory on you.' To call such persons *muttageen* (متقين pious) is to lay emphasis and stress, since it is obligatory on people to acquire piety. Allah says *ya ayyoh allazina aamanuttaqullah* (يا ايها الذين آمنو اتقو الله O people who believe fear Allah). Opinions do not differ on the point that acquisition of piety is the duty of all Muslims. If execution of a will be one of the conditions of piety, the obligatory nature of will is established.'' Jassas then relates the agreement of the jurists that the verses about inheritance abrogated this verse about bequeathing the property to the parents and near kindred.[4]

1. *Sunan Ibn Maja* printed Asah al Mutabi, Karachi, p. 194.
2. Vol. 1 p, 164.
3. Q. 2 : 180.
4. See *Majmua Qawanin i Islami*, Vol. 4, pp. 1268-1269.

Fakhruddin Razi in *Tafseer Mafatih al Ghaib* (on verse 180 of chapter 2) mentioned the following views of the jurists about *inter alia* the meaning of the word *agrabeen* (اقربين).

1. The word *agrabeen* (اقربين near kindred) means the descendants of the deceased. This opinion is attributed by Abdul Rahman bin Zaid to his father.
2. According to Ibn 'Abbas the word *agrabaa* (اقرباء near kinsmen) includes all relatives other than parents.
3. Those who treat the injunction about will mandatory but abrogated by the verses about inheritance say that the above word includes all relatives whether heirs or non-heirs.
4. Only non-heirs are meant by the word.[1]

There is a Hadith according to which the Prophet pbh said, 'Allah Almighty has given the right to each rightholder ; will is not legal in favour of an heir.'

The jurists differ on the extent of abrogation of the verses about testamentary disposition. The majority of the commentators of the Quran and the jurists treat the injunction as abrogated by the verses about inheritance or by the abovementioned Hadith. Some say that the verses of inheritance as well as the Hadith abrogate the order of execution of will. The Hadith is certainly isolated and no such Hadith can abrogate the Quran, but since the Hadith is very well known and on account of its fame and renown is considered to be *mutawatir* (متواتر continuous the criterion of which is its being related by a large number of relators in each age) after its acceptance by all the great jurists (ائمہ Imams), as such it is capable of abrogating the Quran.

Jurists who still believe in the obligatory nature of the verse regarding non-heirs argue that the verse is not abrogated.

1. See *Majmua Qawanin i Islami* by Dr. Tanzil ur-Rehman, Vol. 4, p. 1269.

The injunction in the verse is of a perpetual nature, in relation to persons who for some reason are excluded from inheritance but belong to the category of near kindred. The injunction will not be acted upon only in respect of the heirs.[1]

The four Imams from whom originate the four Sunni schools of thought treat the injunction about will as discretionary and an act of virtue, but the view of the Zahiris is different. They believe in its mandatory character for persons who do not share the inheritance of the deceased. Ibn Hazm writes in *Al Mohallah* ; that 'it is the duty of everyone who has property to execute a will.' In support of this is the Hadith of 'Abdullah bin Omar that the Prophet pbh said that it is not lawful for a Muslim owning property to pass two nights without bequeathing it by will. Ibn Omar said that since he heard this from the Prophet pbh he did not pass one night in which he did not have his will with him.' Ibn Hazm refuted the arguments of those who consider the execution of a will only a discretionary matter. Ibn Hazm is also of the view that it was enjoined upon every Muslim to make a testamentary disposition in favour of near kinsmen who are non-heirs. If he fails to execute a will it would be compulsory to pay (from the bequeathable portion) to such non-heirs after consulting the heirs and the executor, if any.[2]

The theory of total abrogation of verse 180 of chapter 2 is not understandable. As Jassas rightly pointed [3]out the injunction in this verse to bequeath one's property to the parents and near kindred was mandatory. The word *aqrabin* or *aqarib* did not mean only those near kinsmen who would later be declared heirs by the divine order. Consequently the verses about inheritance could only impliedly abrogate the injunctio aboutn legacy to the extent of heirs. The order and its mandatory

1. See *Majmua Qawanin i Islami*, Vol. 4, p. 1270.
2. See *Al Mohalla* Vol. 6, pp. 381-386.
3. P. L. D. 1981 F. S. C. 145.

nature survived the verses about inheritance in relation to non-heirs. This was duly clarified in the Hadith which lays down the principle in express terms that no will can be made in favour of heirs. The repeal is not by the Hadith but by verses 11, 12 and 177 of chapter 4. As already discussed the spirit of verse 180 of chapter 2 is that instead of giving the property to strangers it shall be disposed of testamentarily in favour of parents and near relatives since they have not to be left unprovided for. This purpose was later on achieved by the verses about inheritance in favour of the majority of the relatives and parents. It therefore followed that only those who had been provided for and were entitled to inherit the property of a propositus would cease to be beneficiaries under the will.

The view that the Quran can be repealed by *Sunnati mutawatira* has never appealed to me. This question was dealt with by me as a member of the Federal Shariat Court in Hazoor Bakhsh versus Federation of Pakistan. The discussion is as follows :

> "The problem, therefore becomes crystallised in the question whether the Holy Quran can be abrogated by the Sunnah. Those who are in favour of this rely upon the following verses :
>
> Q. 59 : 7.—And whatever the Messenger giveth you, take it and whatsoever he forbiddeth, abstain (from it).
>
> Q. 53 : 4.—Nor doth he speak (his own) desire.
>
> Q. 53 : 4.—It is naught but a revelation that is revealed.
>
> But those who are against the abrogation of the Quran by Sunah rely on the clear tradition of the Holy Prophet pbh that if there be any conflict between the Quranand the Hadith accept whatever is in accordance with the Quran and do not accept what goes against it. The Shafe'is who accord great value even to *Khabari Ahad*

(Isolated Hadith are against the proposition that Sunnah can abrogate the Quran. According to them even *Sunnah Mutawatira* (Sunnah relators of which in each successive age abound and are all truthful) cannot repeal any order of the Quran, and they rely upon the (same) Quranic verse.

In this connection reliance is also placed upon the tradition of Ma'az bin Jabal that when the Messenger of Allah sent him as a Governor of Yemen and asked him, 'How will you decide, O' Ma'az', he said 'according to the Book of Allah.' (Then the Prophet) said : 'If you do not find anything there?' He said, 'according to the Sunnah of the Messenger of Allah.' (The Prophet said) : 'If you do not find anything there also'. He said : 'I will try to decide it in accordance with my own opinion.' It is also argued that Quran is definite . . while Sunnah is *mazzuna* (surmise and presumption). There is, however, unanimity on the point that the Sunnah can fill up the vacuum or can be clarificatory in character. This is illustrated by Shafe'is, Zahiris and many others. They say that there are orders in the Quran about establishing prayer (الصلوٰة) and payment of *Zakat* (الزکوٰة). Its details and clarification would be to the effect how the prayer is to be offered and how many rakats are there to be offered in prayers of different times. And similarly on what property *Zakat* is payable and to what extent. These details are given in the Sunnah and they do not amount to abrogation of what is written in the Quran. However it would have been different if the Quran had directed the offering of prayer consisting of two rakats each day only and the Holy Prophet pbh had laid down four rakats for *Zuhr* (ظهر) and *Eisha* (عشاء) and three for *Maghreb* (مغرب). In that case there would be

abrogation which is not permissible. Thus the difference between abrogation and clarification is made out by the argument of Shafe'i and a large number of jurists."

The Government filed a review petition against the judgment of the Federal Shariat Court. At the hearing it was urged on behalf of the Ulema that the word *naskh* (نسخ repeal) was used in the sense of *takhsees* (particularisation of what was general) and in this connection reliance was placed upon the Hadith that there is no will for an heir. This argument was refuted by me as would be evident from the following paragraphs of the judgment in Review Petition.[1]

"94. The other example given in this connection is of will. Before the revelation of the verses about inheritance will was ordered to be made in favour of parents and relatives. (Q. 2 : 180). Thereafter particular shares in inheritance were fixed for certain categories of relations, descendants and ascendants, spouses, and descendants of ascendants.

95. It is established that the verses laying down the share in inheritance repealed the order in respect of making a will in favour of the heirs and the repeal is further proved by the Hadith "(لاوصية لوارث" (there is no will for an heir).[2] In these circumstances the Hadith of the Holy Prophet pbh that there can be no will in favour of an heir is merely a clarification of this principle. It can hardly be called *takhsees*.

96. The other principle laid down by the Hadith is that no more than one-third of the property can be willed away in favour of none heir. The permission to create a will in favour of strangers and the injunction fixing

1. Federation of Pakistan v. Hazoor Bakhsh P L D 1983 F. S. C. 255 (295).

2. See *Fauzul Kabir* by Shah Wali Ullah p. 42.

> the rights of heirs in inheritance can only be reconciled by fixing the quantity from the assets that can be the subject-matter of will so that the premission can be acted upon and there be no possibility of the heirs being deprived of inheritance. This is also clarificatory and cannot be held as an illustration of *takhsees*."

The opinion of Ibn Hazm about the obligatory nature of the will in favour of non-heirs who are near kindred is preferable and has been preferred by the legislators in Egypt, Tunis and Syria.

I am of the opinion that to reconcile S. 4 of the Muslim Family Laws Ordinance, 1961, with Sharia, the Government may consider the advisability of substituting it (S. 4) by the provisions of *wasiyyat i wajiba* (وصية واجبه compulsory bequest) that in the absence of a will in favour of the *mehrum ul irs* (deprived of inheritance) children of a son or daughter who predecease the propositus, or in case the will falls short of the share hereinafter mentioned, the propositus shall be presumed to have bequeathed his property to such children equivalent to the shares they would have received if the predeceased son or daughter had been alive but not exceeding one-third of the property of the propositus.

Even if it is held that the injunction regarding testamentary disposition is no longer mandatory after the revelations of injunctions about inheritance, it can be made mandatory by the exercise of the legislative power of the State which is wide enough to substitute the discretion with a mandate on the principle of *maslaha* (welfare) of the people.

Dr. Tanzil-ur-Rehman author of *Majmua Qawaneen i Islami* has discussed the point in detail in Vol. 4 of the book[1] and agreed with the view about the substitution of the section with the provisions of compulsory will.[2]

1. *Majmua i Qawaneen i Islami*, Vol. 4, pp. 1258, 1276. *Also see* the discussion in Vol. 5 of the same Book, Chapter 37.

2. *Majmua-i-Qawaneen i Islami*, Vol. 4, p. 1276.

DIVORCE

SECTION 1—NATURE AND SCOPE

Talak (divorce) is an Arabic word which means 'undoing of or release from a knot'. It is used by the Muslim jurists to denote the release of a woman from the marriage tie, and means a divorce.[1]

Lot of controversy is engendered on the basic concept of *talak*. Among some people marriage is given so much sanctity that divorce is not at all allowed. There is, in fact, no concept of divorce among them. This is the characteristic feature of a Hindu marriage. Among Christians also marriage is a sacrament. Jesus proclaimed that husband and wife are not twain but are one.[2] He prohibited separation which is a logical corollary of the theory of unity of man and wife. The Pharisees drew his attention to the Law of Moses which permits the husband to break the marriage tie at will and to send her away.[3] Jesus answered :

> 'Moses gave you permission to divorce your wives because you are so hard to teach. But it was not like that at the time of creation. I tell you, then that any man who divorces his wife, even though she has not been unfaithful commits adultery if he marries some other woman'.[4]

The rule against divorce is thus subject to the only exception of unfaithfulness of the wife.

1. *Muslim Law of Divorce* by K. N. Ahmad, p. 64, *Al Mughni* by Ibn Qudama, Vol. 7, p. 96 ; *Durrul Mukhtar* (Urdu translation), Vol. 2, p. 90.
2. Mathew, 19 : 6.
3. *See* Deuteronomy, 24 : 1.
4. Mathew, 19 : 8, 9.

The impracticability of these religious laws is proved by the liberal laws of divorce enforced in the West which is a reaction against the uncompromising nature of the law of divorce among the Christians. But this is of much later occurrence. The Christian law was abrogated by the divine law revealed through Prophet Muhammad pbh. The law might have worked satisfactorily for six centuries but on account of its rigour its utility could not be everlasting. It was meant to last till the advent of the Prophet pbh, after which was enforced a law whose benefits are acknowleged by all fair-minded persons.

The Jewish law conferred on the husband unrestricted right to divorce his wife. It is said in Deuteronomy:

> 'Suppose a man marries a woman and later decides that he does not want her, because he finds something about her that he doesn't like. So he writes out divorce papers, gives them to her, and sends her away from his home. Then suppose she marries another man and he also decides that he doesn't want her, so he also writes divorce papers, gives them to her, and sends her away from his home. Or suppose her second husband dies. In either case, her first husband is not to marry her again: he is to consider her defiled. If he married her again, it would be offensive to the Lord. You are not to commit such a terrible sin in the land that the Lord your God is giving you."[1]

There are some exceptions to the rule. A husband can never divorce his wife if he falsely charges her that she was not a virgin at the time of marriage and the charge is proved false.[2] A man committing rape with an unengaged girl has to pay bride money to her father and she becomes his wife and can never be divorced.[3]

1. Deuteronomy, 24 : 1-4.
2. Deuteronomy 22: 17-19.
3. Deuteronomy, 22 : 28-29.

The procedure of divorce is simple. The husband has simply to prepare divorce papers, give them to his wife and send her away from his home. He cannot remarry her even if the second husband divorces her or dies.

Contrary to this the procedure of *talak* in the Quran ensures that the divorce is not arbitrary since arbitrariness is remedied by making the procedure of divorce spread over almost a period of three months during which he has the right to revoke the divorce. He is not to expel the wife from his house during this period, so that he may have second thought and the door of reconciliation remains open. After the divorce given by one or two pronouncements attains finality, the divorced couple retain a right to remarry. In case the divorce is final as a result of three pronouncements, the husband can remarry his earlier wife, but only after she marries another person and he divorces her or dies.

Another important point of distinction is that a wife has no right to claim separation or divorce under any earlier law. But the Quran confers power on her to claim separation by Khula. The Sharia also allows her to seek dissolution of marriage on various grounds through a court of law. The dissolution of Muslim Marriages Act, 1939 contains all the Sharia provisions to that effect.

Whatever may be the feelings of the husband towards his wife, he is enjoined to be kind to his wife in divorce and separation too, to pay her maintenance and to be generous to her after the divorce is final. Not only this, the divorced wife is not bound to suckle the child born of her union with the husband. She must be paid for suckling the child.[1] The sum and substance of the injunctions about divorce is as follows:

1. The divorce is not immediately effective. It may either be pronounced once in the period of purity bet-

1. See Q. 2 : 229, 233, 236, 237 and Q. 65 : 1-7.

ween two periods, in which the husband had no carnal connection with her and attains finality after the wife has three menstrual periods, or it may be pronounced in three successive periods of purity in which case it attains finality and becomes irrevocable.

2. Before the finalisation of divorce as a result of one or two pronouncements, the parties can reconcile their differences, in which case the husband may revoke or retract the divorce and end the dispute. If such divorce is final, the two can still remarry.

3. After the third divorce the parties can remarry after the woman marries another husband who either dies or divorces her.

4. The divorcee cannot be expelled by the husband from her residence and is entitled to receive full maintenance from him during the period of waiting, probation or *'iddat*.

5. The husband is enjoined to treat her well and to make additional provision before separation.

6. If the husband wishes the divorcee to suckle their child for two years, he is bound to pay her maintenance.

7. The husband is restrained from placing any difficulties in the way of her remarriage with another person.

8. The husband is also bound to pay the full dower of the divorced woman.

9. It is lawful for a husband to divorce his wife before consummation of the marriage, but in that case he is liable to pay half the dower fixed and also to make fair provision for her.

There is no doubt that divorce is not desirable since it results in the disintegration of the family and creates manifold

problems for the children. But on the other hand an unhappy marriage is a curse. There may be cases in which separation may be more desirable than the continuance of such a marriage. The atmosphere of loathing, disgust and abhorrence in the house may be more disturbing and more repelling for the children and separation between the parents may even be a welcome change for them. Islam, therefore, takes a more sympathetic and realistic view of things and allows divorce, but only as a last resort.

Marriage in Islam is a mere contract; it is not a sacrament, but integration of the family is its primary aim. It ensures that integration and happiness by teaching the virtues of love and affection, the equality between the spouses, respect for one another and kindness for the weaker sex. It condemns divorce as the most abhorrent of all things made lawful by Allah and provides a procedure for it, which if followed in letter and spirit, can restore between the husband and the wife harmony, co-operation and accord. All the objections against the law of *talak* in Islam are due to the perpetuation of *talak-i-bid'at* which finds no sanction in the Quran and the Sunnah and yet was made a substitute for the Quranic and the Sunnah divorce which was completely forgotten by the people and was reserved for the syllabi taught to the students of Islamic law throughout the world.

On account of the spirit underlying the law of *talak* in the Quran it was held by some to be prohibited except for very exceptional reasons. A large and influential body of jurists regard *talak* emanating from the husband as really prohibited except for necessity such as the adultery of the wife.[1] Another section, consisting chiefly of the M'utazilas, consider *talak* as not permissible without the sanction of the judge administering the Musalman law. They consider

1. *Muhammadan Law* by Ameer Ali, Vol. II, p. 432; *cf. Raddul Mohtar*, Vol. II, p. 682.

that any such cause as may be a justification for separation and removal of *talak* from the category of being forbidden (ممنوع *mamnu*) should be tested by an unbiased judge; and, in support of their doctrine they refer to the words of the Prophet pbh already noted, and his direction that in case of dispute between the married parties, arbiters should be appointed for the settlement of their differences.

The *Raddul Mohtar*, after stating the arguments against the proposition that *talak* is unlawful, proceeds to say: "No doubt, it is forbidden, but it becomes *mubah* (مباح permitted) for certain outside reason, and this is the meaning of those jurists who hold that it is really forbidden.[1] And its being *mubah* (مباح permitted) arises from the necessity of release (from the marital tie) in certain cases. Therefore, when there is no reason whatsoever, there is no necessity for release; and if *talak* is given without any reason, that is stupidity and ingratitude to God, and the giving of unnecessary and gratuitous trouble to the woman and her family and the children.... cause for if there is no legal cause for *talak*, such as would render it *mubah*, then it must be considered unlawful; for God says (in the Quran) that if your women are obedient to you, you must not seek separation from them.[2]

The author of the *Multeka* (Ibrahim Hulbi) is more concise. He says: "The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce either in the eye of religion or the law. If he abandons his wife or puts her away from simple caprice, he draws upon himself the divine anger, 'for the curse of God',

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 433. Kamaluddin Ibn Humam is one of the jurists who holds it forbidden except in case of necessity. See for this reference *Durru' Mukhtar* (Urdu translation), Vol. II, p. 90.

2. *Ibid.*, Ameer Ali ; *ibid.*, *Raddul Mohtar*, pp. 682-683.

said the Prophet pbh, 'rests on him who repudiates his wife capriciously!"[1]

The Holy Quran declares that :

الطلاق مرتٰن فامساكٌ بمعروف او تسريحٌ باحسان

Q. 2: 229. Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. . . .

and then enjoins that :

فان طلقها فلا تحل له من بعد حتىٰ تنكح زوجاً غيره فان طلقها فلا جناح عليهما ان يتراجعا ان ظنا ان يقيما حدود الله و تلك حدود الله يبينها لقوم يعلمون .

Q. 2 : 230. And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorce her it is no sin for both of them that they come together again if they consider that they are able to observe the limits of Allah.

These are the limits of Allah. He manifested them for people who have knowledge.

From these verses three principles are deducible: (1) The husband may divorce his wife, (2) the divorce is revocable unless it becomes irrevocable and (3) the divorced wife cannot marry the divorcer without marrying another person and consummating of that marriage with him. Then the details of procedure are provided which render the divorce irrevocable. But these details are sujbect to the rule laid down in Q. 2: 228 that "Women who are divorced shall wait, keeping themselves apart, three monthly courses." The procedure of divorce or *talak* laid down by the Quran is that the husband may repudiate or may

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 433; *cf. D. Ohsson*, Vol. III, p. 79.

pronounce divorce (*talak*) in one *Qarua* (قروء) i.e. the period of purity between two menstruations, and has no sexual intercourse with her, pronounces another *talak* in the next *tuhr* (*Qarua* قروء) and again desists having sexual intercourse with her and pronounces the third divorce in the third *tuhr*. The divorce becomes irrevocable after the third pronouncement, and one of the consequences of the irrevocability of divorce is that there ensues a bar against remarriage of that couple but the same is removable by the divorcee marrying another person who after having carnal connection with her divorces her.

Here may be added an explanation that the removal of this bar cannot be manipulated by prearrangement with the second husband to divorce her after having sexual intercourse with her. The marriage with the second husband should be genuine and not contingent on his pronouncing divorce upon the wife after having carnal relations with her. Such a marriage with a previous contract or understanding of divorce is called *Halala* and is condemned as abominable. The Prophet phb said that Allah curses the person who commits *Halala* and the one upon whom it is committed.

(لعن اللہ المحلل و المحلل له).

It may be noticed that the concession of permission to marry after the intervention of another husband of the divorcee was introduced by the Quran with the object of discouraging the pronouncement of the third divorce or, to be more precise, to discourage the pronouncement of three divorces by a rash person. It is a warning to him that the pronouncement of the third divorce may slam the door of reconciliation on him so mercilessly that not only the process of reunion with the erstwhile coveted spouse will become complicated but also be fraught with uncertainty and doubt. The second husband may not divorce her. To some the idea of one's wife having carnal connection with another man may be extremely abhor-

rent and offensive. This may serve as a check on his recklessness and rashness.

The Jewish law does not allow the divorced couple to remarry,[1] whether the second husband dies or divorces her. The first husband is to treat her as defiled.[1] But Islam is more liberal in this respect. It does not make the bar against remarriage permanent. It inclines towards reconciliation, patching up of differences and restoration of harmony in the interest of the family, particularly the children who have to suffer at least psychologically by the separation of their parents. In the Quran the emphasis is on maintenance of harmonious relationship in the family. Divorce was consequently declared by the Prophet pbh as the most abhorrent in the eyes of Allah, of all matters permitted. This principle is laid down in the Old Testament also. It is stated in the *Book of Malachi*:

> 'I hate divorce', says the Lord God of Israel. 'I hate it, when one of you does such a cruel thing to his wife. Make sure that you do not break your promise to be faithful to your wife.'[2]

The irrevocability of divorce, which is the result of three pronouncements of *talak* is in the nature of punishment and retribution and is a sanction against the rashness and recklessness of a hot-tempered and excitable male, but in that case too it does not close the door of rapprochement and harmonization finally upon the husband and wife.

The general principle laid down in the Quran is الطلاق مرتٰن (Divorce must be pronounced twice) and then the woman must be retained in honour or released in kindness.[3] This stage of making up one's mind to retain the wife in honour or to release her in kindness is reached after the period of probation or

1. Deuteronomy, 24: 1-4.
2. *The Book of Malachi*, 2 : 16.
3. Q. 2 : 229.

waiting known as *'iddat* is to expire. It is provided in the Quran:[1]

والمطلقٰت يتربصن بانفسهن ثلٰثة قروء و لا يحل لهن ان
يكتمن ما خلق الله فى ارحامهن ان كن يومن بالله واليوم
الاخر و بعولتهن احق بردهن فى ذالک ان اراد وا اصلا حاً

Q. 2: 228. Women who are divorced shall wait, keeping themselves apart, three (monthly) courses.[2] And it is not lawful for them that they should conceal that which Allah hath created in their wombs if they are believers in Allah and the Last Day. And their husbands would do better to take them back in that case if they desire reconciliation...

SECTION 2—IDDAT

The *'iddat* period of three monthly courses is prescribed for those who are subject to courses (periodic bleeding). There are other rules laid down for those (1) who reach the age of menopause, (2) who, though they arrived at the age of puberty, have never menstruated and (3) those who are pregnant. These rules are:

واّلٰئى يئسن من المحيض من نسا ئكم ان ارتبتم فعدتهن ثلٰثة
اشهر و اّلٰئى لم يحضن و اولات الاحمال اجلهن ان يضعن
حملهن و من يتق الله يجعل له من امره يسرا .

Q. 65 : 4.—And for such of your women as despair of menstruation, if ye doubt their period of waiting shall be three months, alongwith those who have it not. And for those with child, their period shall be till they bring forth their burden. And whoever keedeth his duty to Allah, He maketh his course easy for him.

1. Q. 2 : 228.

2. Opinions differ on the interpretation of the word (*Qarua* قروء). Some interpret it as three courses while others hold it to mean three periods of purity that is period between monthly courses. The Hanafis hold the first view.

In other cases of revocable divorce the *'iddat* has been extended to the period of suspended menstruation. It was reported by Malik and Yahyah bin Saeed from Muhammad bin Yahyah bin Hayyan that his grandfather had two wives. One was a Hashmi and the other an Ansari. He divorced the Ansari woman who was then breastfeeding the child and her monthly courses were closed in those days. A year passed in this condition and she did not have any monthly course. Her husband Hayyan died in the meanwhile and she claimed inheritance from him since she had no monthly courses (and thus her period of *'iddat* never expired and the divorce never attained finality). The matter came up for decision before Hazrat Osman and he decided the issue in her favour. The Hashmi woman reproached Hazrat Osman (on this judgment) but he said 'your uncle 'Ali acts on the same principle of law and he told me about it.'[1]

It was related by Imam Abu Haneefa from Hammad who reported it from Ibraheem that Alqama bin Qais divorced his wife by a revocable divorce whose menstruation was stopped after one or two monthly courses. She did not menstruate for eighteen months till she died. Alqama enquired from 'Abdullah bin Mas'ud about it (the rule of her inheritance). He decreed that Allah had kept the inheritance of that woman in abeyance for him and he was entitled to it.[2]

Hazrat Omar, however, fixed the period even for this contingency. He said that in such a case where the menstruation stopped after one or two courses the woman should wait for nine months. If the pregnancy becomes manifest she would be governed as regards the period of *'iddat* by the law of *'iddat* of a pregnant woman (till delivery) otherwise she should wait for three months more.[3]

1. *Mowatta* by Imam Muhammad (Urdu translation), published by Muhammad Saeed & Sons, Karachi, p. 272.
2. *Ibid.*, p. 273.
3. *Ibid*., pp. 272-273.

The principle as quoted in Muhammadan Law by Ameer Ali[1] is that "When a divorced woman has kept her *'iddat* for one or two terms and they then cease, the *'iddat* is not completed until she despair of their return, whereupon she must commence anew by months.

There are other contingencies also in which the period of *'iddat* has been extended but they relate to death and inheritance of one or the other spouse, but it is not necessary to mention them as the only object of this discussion is to establish that a *talak* pronounced in the manner according to the Quran remains revocable for at least three courses and much more time in certain contingencies, and the chances of revocation of therepudiation or divorce by giving more time to the spouses to reconcile their difference are thus maximised.

One of the principles is that divorce should not be pronounced during the period of menstruation. (Q. 65 : 1) The Hadith is reported in all books, that Ibn Omar divorced his wife during menstruation but the Prophet pbh commanded him to revoke it and divorce her if he so liked during the period of her purity. The obvious object underlying the principle is that a woman should not be divorced during the period when the husband and wife have to remain apart. The test of its genuineness and sincerity is that divorce is pronounced when there is possibility of rousing the husband's love of and inclination towards the wife.

Other opportunities or facilities for rapprochement are provided by the injunction that the wife shall remain in the same apartment in the house of the husband during the period of *'iddat*. It is provided :

لاتخرجوهن من بيوتهن ولا يخرجن الا ان يأتين بفاحشة مبينة

1. Vol. 2, p. 460, Published by P L D Publications.

Q. 65 : 1. Expel them not from their houses nor let them go forth unless they commit open immorality.

The injunction in the above verse is very clear that neither the wife should be expelled during the period of *'iddat* from the place where she is residing nor should she herself leave that residence during that period. The Quranic exception is that they can be expelled only if they commit open immorality. To this some other reasonable exceptions have been added. One is that the place of residence is so desolate that she is frightened there and another is that she is bad tempered enough to make the life miserable for the husband. This will also apply if the woman wants to give up the residence on the ground that the husband is so bad tempered that her life is made miserable by him.

There is a tradition that Fatima bint Qais left the house of her husband during the period of *'iddat* and she was directed by the Prophet pbh to reside in the house of Ibn Umme Maktum, one of his old and blind companions. In another case in which the woman had left the house of her husband Hazrat 'Aisha pointed out that this was not approved. When the case of Fatima bin Qais was cited before her she distinguished it on the ground that she was residing at a desolate place where she felt frightened.[1] According to Sulciman bin Yasaar she was extremely bad tempered.[2] This is accepted by the learned as a valid reason.[3]

This injunction has a definite purpose underlying it. The object is that by dwelling in the same house, and it being open to the husband to revoke the divorce, they must live under conditions that may facilitate reconciliation between them or the revocation (رجعت) by the husband of the divorce pronounced by him. It may also be strong proof of the difference between

1. See *Bokhari*, Kitab ul Talaq, Ch. 196, Hadith 300.
2. *Abu Daud*, Kitab ul Talaq, Ch. 168. Hadith 534.
3. See *Tirmizi*, Hadith 1083.

the two being irreconcilable or the detestation of the husband for the wife having firm roots.

Peace and cordiality of relationship between the husband and the wife is necessary for peace and tranquillity in the family. The Quran puts a premium on peace in the relationship between the husband and the wife. It provides :

وان امراة خافت من بعلها نشوزا او اعراضا فلا جناح عليهما
ان يصلحا بينهما صلحا والصلح خير

Q. 4 : 128. If a woman feareth ill-treatment from her husband or desertion, it is no sin for them twain if they make terms of peace between themselves. Peace is better . . .

The procedure of arbitration is also provided to avoid separation.

وان خفتم شقاق بينهما فابعثوا حكما من اهله وحكما من اهلها
ان يريدا اصلاحا يوفق الله بينهما ان الله كان عليما خبيرا

Q. 4 : 35. And if ye fear a breach between them twain (the man and the wife) appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware.

The intervention of the relatives and friends, in order to bring about rapprochement between man and wife in case of apprehension *inter alia* of divorce is also provided for. From this is evolved the principle that if the matter goes to the court of law the judge should not make haste in dissolving the marriage but should attempt to reconcile the differences between the two and an arbiter each from among the folk of the two parties be appointed to bring about compromise between them.

SECTION 3—RAJ'AT

During the period of *'iddat* the husband can revoke his divorce at any time and thus annul the consequence of his pronouncement of formula of repudiation or *talak*. This is

called *rajat* (رجعة). *Rajat* is defined to be maintaining of marriage in its former condition while the wife is in *'iddat*.[1] *Rajat*, or retention is of two kinds *i.e. sunnee* (سنی or according to the traditions); and *badaee* (بدعی or irregular). The *sunnee* form is when a man retains his wife by speech, calls on witnesses to attest the fact, and intimates it to her; if, then, he should retain her by speech, as, for instance by saying, 'I have retained thee' or 'have retained my wife' without calling upon witnesses to attest what he has done, or though he should call upon them to do so, yet if he fails to give his wife intimation, the *rajat* is *badaee*, or irregular and contrary to the Sunnah, or traditions but still valid.[2] As *rajat* is established by speech, it may be likewise by deed; as by matrimonial intercourse, or touching with desire ; so also by kissing on the mouth with desire by general agreement. There is a difference of opinion as to kissing on the cheek, the chin, the forehead, or the head; but the most probable and correct opinion is that any kind of kiss that would induce the prohibition of affinity would be sufficient for the purpose. Looking at nakedness with desire is also a retention . . . . and whatever would induce the prohibition of affinity would suffice, also for *rajat*. Kissing or touching without desire would not suffice, by general agreement; but it makes no difference whether the kissing, looking or touching be on her part or on his, provided that when on her part it is with his knowledge and without his prohibition.[3]

Another classification of *rajat* is express or implied. It is express where the husband expresses his decision to take her back. It is implied where he has carnal connection, or takes conjugal liberties with her such as viewing those parts of her which are usually concealed and so forth.[4] According to Imam Shafe'i,

1. *The Digest of Muhammadan Law* by Baillie, p. 287.

2. *Fatawa-i-Alamgiri*, Vol. 2, p. 478 ; *The Digest of Muhammadan Law* by Baillie, p. 287.

3. *Ibid., Baillie*, p. 288.

4. *Ain ul Hedaya*, Vol. 2, p. 247 ; *Hedaya* by Hamilton, p. 103.

however, 'a return to conjugal union cannot be effected tacitly, *e.g.* by coition ; but one must declare that one takes one's wife back.'[1]

Rajat is valid even if it is made unwillingly or in jest (هزل) or playfully (لعب) or by mistake (خطاء).[2]

Thus kissing of the husband by the wife whether with his consent or without or her cohabiting with him would amount to *rajat*.[3] There is difference of opinion whether it would amount to *rajat* if the husband takes the wife with him on a journey. One dominant view is that it is *rajat* if the husband does not announce before departure his intention to the contrary.[4] An interesting illustration is given in *Fatawa-i-Alamgiri* that if someone declares that his touch to his wife would amount to divorce, his first touch amounts to divorce but if he touches her again it would amount to *rajat*.[5]

The Shia law also recognises the implied form of *rajat*. According to it even though the husband should only touch or kiss his repudiated wife with desire, that would be revocation. Another form of implied *rajat* is illustrated by the example that even a mere denial of repudiation would amount to revocation or *rajat*.[6]

The principle of *rajat* is thus quite liberal and provides opportunities to the spouses to restore harmony among themselves, so that the order may be complied with فامساک بمعروف و تسریح باحسن (and then the woman must by retained in honour or released in kindness.[7]

1. *Minhaj ut Talibin*, English Translation by E. C. Howard, p. 344.
2. *Raddul Mohtar* (Urdu translation), Vol. 2, p. 161 ; *Fatawa-i-Alamgiri*, Vol. 2, p. 480 ; *Durrul Mukhtar* (with English translation), p. 216.
3. *Fatawa-i-Alamgiri*, Vol. 2, pp. 479-480; *Raddul Mohtar*, Vol. 2, p. 161; *Ain ul Hedaya*, Vol. 2, p. 161.
4. *Radd ul Mohtar*, Vol. 2, p. 166.
5. *Fatawa-i-Alamgiri*, Vol. 2, p. 480
6. *A Digest of Muhammadan* Law by Baillie, part second, p. 127.
7. Q. 2 : 229.

Even after the revocable divorce attains finality it is open to the parties to remarry and there is an injunction against interference with the remarriage. The injunction is in mandatory terms and is to the following effect :

واذا طلقتم النساء فبلغن اجلهن فلا تعضلوهن ان ينكحن
ازواجهن اذا تراضو بينهم با لمعروف ذالک يوعظ بهم
من كان منكم يؤمن بالله واليوم الاٰخر ذالكم ازكٰى لكم واطهر
والله يعلم و انتم لا تعلمون

Q. 2 : 232.—And when ye have divorced women and they reach their term place not difficulties in their way against marrying their husbands if it is agreed between them in kindness. This is an admonition for him among you who believeth in Allah and the last day. That is more virtuous for you and cleaner. Allah knoweth : ye know not.

It is reported from Hassam that the sister of Maaqil bin Yasaar was married. Her husband divorced her and remained seprarted from her till the period of *'iddat* expired. He requested for remarriage with her. Maaqil resented the request and said that when he was capable (of maintaining the wedlock) he continued to remain estranged from her and now he made a request for marriage. Thus he interfered in the remarriage of her sister (with her former husband). The above verse was then revealed, that when you have divorced women and they have reached their term, place not difficulties in the way of their marrying their husbands if it is agreed between them in kindness. The Prophet pbh then summoned Maaqil and recited the verse before him. On this he refrained from interfering in obedience to the injunction of Allah.[1]

Thus while the right of the husband to take back his wife during the period of *'iddat* is emphasised in verse Q. 2 : 228

1. *Bukhari*, Kitab ul Talak, Hadith 304.

'And their husbands would do better to take them back in that case if they desire a reconcilation', the right of the divorced couple to reunite withot interference from any quarter is stressed in verse Q. 2 : 232.

In verse Q. 2 : 228 is recognised the mutuality of rights of the husband and wife over one another ولهن مثل الذى عليهن بالمعروف (And they have rights similar to those (of men) over them in kindness).

SECTION 4—RIGHTS AND DIVORCE

It is noticeable that in all procedural matters concerning divorce men are commanded to show to the wife kindness and generosity. They are enjoined to restrain themselves from being vengeful or spiteful, and from displaying harshness to them or maltreating them. The direct command in this respect couched in most admonitory language is in verse Q. 2 : 231 which reads :

واذا طلقتم النساء فبلغن اجلهن فامسكوهن بمعروف او
سرحوهن بمعروف ولا تمسكوهن ضرارا لتعتدو و من يفعل
ذالک فقد ظلم نفسه ولا تتخذو ايٰت الله هزوا واذكرو نعمت
الله عليكم وما انزل عليكم من الكتب والحكمة يعظكم به
واتقو الله واعلموا ان الله بكل شئ عليم

Q. 2 : 231.—When ye have divorced women, and they have reached their term, then retain them in kindness or release them in kindness. Retain them not to their hurt so that ye transgress (the limits). He who hath done that hath wronged his soul. Make not the revelation of Allah a laughing stock (by your behaviour) but remember Allah's grace upon you and that which He hath revealed unto you of the scripture and of wisdom, whereby He doth exhort you. Observe your duty to Allah and know that Allah is aware of all things.

Thus according to the verse, to hurt women amounts to transgression, wronging of one's soul, making the revelations of Allah a laughing stock against which there is exhortation. It appears clear that kindness to women is a duty which must be observed in retaining them and also in releasing them.[1] Generosity is to be preceded by final accounting of dower and its payment and payment of half the dower even to the woman who has not been touched by him.[2] Such women are not subject to rule about *'iddat*.[3] They should be released in kindness after payment of something to them with which they may feel contented.[4] This provision should be made to them by the rich according to his means and the straitened according to his provision, but in either case it should be a fair provision.[5] The other divorcees should be paid their maintenance (during the period of *'iddat*), and they cannot be ejected from their former lodgings during that period. The *'iddat* of a woman divorced during pregnancy lasts till she is delivered of the child. Thereafter her duty towards the child delivered by her ceases and the child's father is solely responsible for arranging for the suckling of the child. If the mother has to suckle she must be remunerated for it. These commands are as follows :

اسكنوهن من حيث سكنتم من وجدكم ولا تضاروهن
لتضيقو عليهن وان كن اولات حمل فانفقو عليهن حتى
يضعن حملهن فان ارضعن لكم فاتوهن اجورهن واتمرو بينكم
بمعروف وان تعاسرتم فسترضع له اخرى

Q. 65 : 6. Lodge them where you dwell, according to your wealth, and harass them not so as to straiten life for them. And if they are with child then spend for

1. Q. 2 : 229, 231.
2. Q. 2 : 237.
3. Q. 3 : 49.
4. *Ibid.*
5. Q. 2 : 236.

them till they bring forth their burden. Then if they give suck for you, give them their due payment and consult together in kindness ; but if you make difficulties for one another, then let some other woman give suck for him (the father of the child).

لينفق ذوسعة من سعته و من قدر عليه رزقه فلينفق مما اٰتٰه

الله لا يكلف الله نفسا الا ما اٰتٰها سيجعل الله بعد عسر يسرا

Q. 65 : 7.—Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which Allah hath given him. Allah asketh naught of any soul save that which He hath given it. Allah will vouchsafe, after hardship ease.

The remuneration for suckling the child is a matter which is negotiable between the parents of the child with the condition that neither the father should be stingy and niggardly nor the woman too harsh and demanding. The means of the husband provide the criterion for fixation of the remuneration. One who has abundance should spend abundantly and one who is in straitened circumstances shall pay according to his means. Here an important principle is laid down that Allah does not impose any burden on anyone which may exceed the means granted by Him.

Such is the law of divorce in the Quran. Eventually divorce is a matter of last recourse for the release of the husband from the liabilities of a wife whose association has become intolerable for him. In the words of Sir Syed Ahmad Khan, it is only the remedy of an incurable disease.[1] If the Quranic injunctions in regard to divorce are obeyed and implemented in letter and spirit it will be difficult for a husband to resist the closeness of his wife and not to revoke the divorce during the period of *'iddat* and thus not to develop harmonious relationship with her. But

1. *Al Khutbat ul Ahmadiyya* by Sir Syed Ahmad Khan, p. 206.

the form of divorce which is practised by most of the Muslims has practically no nexus with the Quranic divorce. The form which is generally practised among Muslims following the Sunni schools of thought is known as *talak i bid'at* or irregular divorce which is neither in the Quran nor in the Sunnah. This leads to the consideration of three forms of divorce which is juristically recognised.

SECTION 5—KINDS OF DIVORCE

Divorce or *talak* is either *Talak us Sunnat* or *Talak ul Bid'at* which is also called *Talak ul Badai*. *Talak us Sunnat* is either *ahsan* or *hasan*. In the *Ahsan* form the husband is required to submit to the following conditions *viz.* : (a) he must pronounce the formula of divorce once, in a single sentence ; (b) he must do so when the woman is in a state of purity (*tuhr*) and there is no bar to connubial intercourse, nor has there been any during that state and (c) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three *tuhrs*. This latter class is intended to demonstrate that the resolve, on the husband's part, to separate from the wife is not a passing whim, but is the result of a settled determination. On the lapse of the term of three *tuhrs*, the separation takes effect as irrevocable divorce:[1]

> "It is proper and right to observe this form," says the *Radd ul Mohtar*,[2] "for human nature (*nafs*) apt to be misled and to lead astray the mind and to perceive faults which may not exist, and to commit mistakes of which one is certain to feel ashamed afterwards."[3]

In the *Hasan* form, the husband is required to pronounce the formula three times during three successive *tuhrs* namely three periods of purity. When the last formula is pronounced, the *talak* or divorce becomes irrevocable.[3]

1. *Muhammedan Law* by Ameer Ali, Vol. 2, pp. 435-436.
2. *Ibid.*, p. 435 on the authority of *Raddul Mohtar*, Vol. 2, pp. 683-684.
3. *Ibid.*, Ameer Ali, *Fatawa-i-Alamgiri*, Vol. 2, p. 278.

These two forms alone are recognised by the Shias.[1] The second form *viz. Hasan* form is the same as described in the Quran.

The reason for calling the first form as *Ahsan* or most proper and the second form as *Hasan* or proper is established from the opinion of Ibn Omar. Allais said to Nafaee that when Ibn Omar was asked about a person who pronounced triple *talaks*, he replied that he wished that only one *talak* was pronounced since the Prophet pbh ordered that in case of three pronouncements the wife is divorced (irrevocably) and becomes unlawful till she marries another husband.[2]

Sautarya and Sedillot[3] agree with the Muslim jurists in thinking that this rule (about the consequence of three divorces that the parties separated by *talak* cannot re-marry without the formality of the woman marrying another man and being divorced from him) was framed with the object of restraining the frequency of divorce in Arabia. Sedillot speaks of the condition as 'a very wise one,' as it rendered separation more rare, by imposing a check on its frequent practice among the Hebrews and the heathen Arabs of the Peninsula. Sautarya says that the check was intended to control a jealous, sensitive but half-cultured race by appealing to their sense of honour.[4]

The *Talak ul Bid'at* practically abolished all the checks that were placed on the frequency of divorce by the two forms of divorces discussed above.

The *Talak i Bid'at* or irregular divorce, is where a husband repudiates his wife by three divorces at once (that is, included in one sentence) or he repeats the sentence separately, thrice, within one *tuhr* and if a husband gives three divorces in either of

1. *Mohammadan Law* by Ameer Ali, Vol. 2, p. 436.
2. *Bokhari*, Kitab ul Talak, heading of Chapter 162.
3. Ameer Ali *ibid.*, *cf. History des Arabs*, p. 85, comp. Syed Ahmad Khan's Ess. IV. p. 14.
4. *Ibid.*

these ways, the three hold good, but yet the divorcer is an offender against the law. The pronouncing of the divorces[1] comes under the description of *bid'at* or irregular. A question arose among the learned, whether the pronouncing of a single divorce irreversible within one *tuhr* be of the description of *bid'at* or not. Muhammad in the *Mabsoot* said : 'Whoever gives an irreversible divorce, although it be within the *tuhr*, forsakes the Sunnah as there is no urgent necessity of such a formula to effect release from the wife, since by the lapse of the *iddat* that end is obtained ; but again, in the *Ziadat*, he said that the method is not to be reprobated, on account of the occasional urgency of immediate release, which by an irreversible divorce is obtained, it not then being suspended upon the lapse of the *'iddat*.[2]

The essential feature of *talak ul bid'at* is its irrevocability. One of the tests of irrevocability is the repetition three times of the formula of divorce within one *tuhr*. But the triple repetition is not a necessary condition for *talak* in the *bid'at* form, and the intention to render a *talak* irrevocable may be expressed even by a single declaration. Thus if a man says: I have divorced you by a *talak-i-bain* (irrevocable divorce), the *talak* is *talak-i-bid'at* and will take effect immediately it is pronounced.

The pronouncement of *talak-i-bidat* is effective even if made during menstruation. If the husband says addressing the wife: You are divorced thrice, according to the Sunnah and the intention is that the three divorces should take place collectively upon the instant, the divorce is effective in such instance according to his intention, immediately, whether she be in her courses or in *tuhr*.[3]

Opinions differ as to the origin of *bid'at* form of *talak*. The view which is generally held is that it was made effective by

1. *Hedaya* by Hamilton, p. 73.
2. *Ibid.*, p. 75.
3. *Ibid.*

Hazrat Omar, two or three years after he undertook the responsibilities of Caliphate. Another view which is voiced by Ameer Ali in the *Muhammedan Law*[1] is that it was introduced in the second century Hijra. It was then that the Omayyad monarchs finding that the check imposed by the Prophet pbh on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose. A third view which is aired by many religious scholars to give it more sanctity, is that it is traceable to the period of the Prophet pbh and even in the Quran.

SECTION 6—FAMILY LAWS ORDINANCE

In Pakistan *Talak i Bid'at* was abolished by S. 7 of the Family Laws Ordinance, 1961 which is as follows:—

> S. 7.—(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talak* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.
>
> (2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.
>
> (3) Save as provided in subsection (5), a *talak* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.
>
> (4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a concili-

1. Vol. 2, p. 435.

ation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *talak* is pronounced *talak* shall not be effective until the period mentioned, in subsection (3) or the pregnancy, whichever be latter, ends.

(6) Nothing shall debar a wife whose marriage has been terminated under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

The expressions 'Chairman' and 'Arbitration Council' are defined in S. 2 of the Ordinance. It is not necessary to reproduce these definitions. It would suffice to note that in accordance with the Quranic text it consists of a representative of each of the parties. The Chairman is its ex-officio member. There is a proviso added to the definition that where any party fails to nominate his representative within the prescribed time, the body formed without such representative shall be the Arbitration Council.

The procedure of *talak* provided in the section abolishes *talak-i-bid'at* and introduces *talak* which is characteristically in *Ahsan* form though it leaves scope for the third divorce after a person has exercised the right of divorce twice and remarried the divorced wife. Thereafter remarriage is not possible without an intervening marriage with a third person. This discourages the Quranic *talak* or the *talak* in *Hasan* form in which each divorce is pronounced once in a *tuhr* (period of purity) and three pronouncements are repeated in three successive *tuhrs*. On the other hand it enforces the principle of each person being owner of three *talaks*; if a person divorces his wife in one *tuhr* in which he did not cohabit with her and after the *'iddat* re-

marries her, divorces her again in the same manner and remarries her and divorces her a third time according to the same procedure, he cannot remarry her without her intervening marriage with a third person. Under S. 7 each such *talak* should have been finalised according to the provisions of that section.

Other objections to this section shall be taken into consideration later but the objection of the Ulema to the abolition of *talak-i-bid'at* may be considered at this stage.

There is unanimity since the time of the Prophet pbh, on the legality of the *Ahsan* and *Hasan* forms of *talak*. The *Ahsan* form of *talak* is but a commentary by the Prophet pbh, of the verses of the Quran regarding the manner concerning time when and number in which *talak* can be given.

SECTION 7—TALAK-I-BIDD'AT WHETHER LEGITIMATE

The difference of view about the legitimacy of *talak* in a *bid'at* form is not new. It exists since earliest times. It was held legal by some for all times to come and illegal by others. Among this later category are those who treat it to be completely ineffective and there are others who treat three divorces pronounced at the same time as one divorce. Again there are those for whom the intention of the pronouncer of three simultaneous divorces is the determining factor whether the number of divorces to be pronounced were intended to be three or only one. However many of those who legalise it treat it to be sinful, offensive and most abominable among things permitted in Sharia. Only Imam Shafe'i referring to the three forms of divorce said that they are unexceptionable and legal because divorce is in itself a lawful act, whence it is that certain laws have been instituted respecting it ; and this legality prevents any idea of danger being annexed to it. But on the other hand, Imam Abu Hanifa and his disciples say that divorce is in itself a dangerous and disapproved procedure, as it dissolves marriage, an institution which involves many circumstances both of spiritual as well as of a temporal nature.

Nor is its propriety at all admitted, but on the ground of release from an unsuitable wife. The legality of divorce does not prevent its being considered dangerous because it involves matters of both spiritual and temporal character.[1]

Another important consideration is that those who hold it to be legal insist on calling it by the name of *talak-i-bid'at*, which is translated in English as irregular *talak* although *bid'at* means an innovation or something new, a novelty or something unprecedented. Imam Raghib Isfahani said in *Mufradat ul Quran*[2] that *albidaa* means to admit an innovation in the religion which may not be traceable to any utterance or action of the Prophet pbh nor is proved from the earlier Muslims or from the (established) principles of Sharia. It is related that all innovations are *bid'at* and each *bid'at* or new thing is a deviation from truth and each deviation is in fire. (كل محدثة بدعة و كل بدعة ضلالة و كل ضلالة في النار).

The nomenclature *talak-i-bid'at* cannot thus be applied to something which has the sanction of the Prophet pbh or which was made effective by him. Either say what Shafe'i said that all the three forms of *talak* are legal or *mashroo* (مشروع) but if it is called *ghair-mashroo* (غير مشروع) it cannot be said to have been enforced by the Prophet pbh because it would then become *talak-i-sunnah*. It would not then be idle *talak* to conclude that all attempts to prove this form of *talak* as emanating from the Quran or as having been made effective during the time of the Prophet pbh are much later in time and have been made to furnish answer to the obvious question about the rights of Hazrat Omar to substitute a Quranic or Sunnah injunction by a different rule. In answer it is said that *talak-i-bid'at* is enforceable but it is a sin which is punishable by the State also. But this Fiqh view is most unconvinc-

1. See *Hedaya* by Hamilton, p. 73; *Dictionary of Islam* by Hughes, p. 87.
2. *Mufradat ul Quran* by Raghib Isfahani, (Urdu translation), p. 89.

ing. The *talak* in the Quran or the Sunnah is as much subject to the rule that of the permitted things *talak* is the most detested thing in the divine scheme of things and its propriety is not admitted by Imam Abu Hanifa and others save on the ground of release from an unsuitable wife. This being the object of *talak* which otherwise is disapproved, the whole scheme of the Quranic and the *Sunnah talak* is frustrated by *talak-i-bid'at* which takes away the authority to revoke the *talak* from the husband and makes the divorce immediately effective. It may be stated that in the Indian sub-continent pronouncement of three *talaks* at the same time has been a universal rule. The divorce in these countries has always been treated as irrevocable. In fact few people have any knowledge of reversible or revocable *talak*. The divorce deeds prepared by lawyers and petition writers invariably contain the formula of irrevocable divorce which makes remarriage of the divorced couple impossible without the woman's intervening marriage with another person.

Attempts have been made to justify the effectiveness of this form of *talak* on the basis of a fiqh principle. It is to the effect that prohibition (نهی) presupposes the existence of what is prohibited (منهی عنه). There can be no prohibition unless what is prohibited is identified and exists. *Nahi* (نهی prohibition) pertains to restraint from that which is prohibited, and which the person who is prohibited, is empowered to do. If he stops doing it he is entitled to its reward but if he advances towards it he would be liable to be punished for it. If what is prohibited is done its effectiveness, is not prohibited in Sharia if the object of prohibition is not inherent in what is prohibited. One of the examples given in support of the prohibition is that after its commission theft does take effect ; its effectiveness cannot be denied though the offence so committed is punishable in law. The divorce pronounced in the *bida'at* form is therefore effective, though it is punishable.

Other instances are of slightly different nature. Offering of prayer is prohibited on land encroached upon or trespassed over but if it is offered on such land, the liability is discharged. Similarly buying and selling after the call to Friday prayer is prohibited but such sale is legally effective between the seller and the purchaser. In *talak* the prohibition is on account of something not inherent in divorce but it is on account of extension or protraction of *'iddat* or creation of doubt about the period of *'iddat* or the closure of the door of making reparation or amends in case of regret for the thing done. Its enforcement is not therefore prohibited.[1] Those who are opposed to the legality of *talak-i-bid'at* like Ibn Qayyim compare the function of giving divorce to the function of a *vakil* (وكيل). In reply it is stated that this analogy cannot hold good in the husband who as a consequence of *nikah* or marriage becomes owner of three *talaks* and ownership envisages authority to dispose of the thing owned.[2]

This amounts to nothing but arguing in a circle. The view which is generally held is that, as will be discussed later, that the words (الطلاق مرتٰن divorce must be pronounced twice) do not mean that the *talak* can be given by repeating its formula twice at the same time. It can be pronounced twice in two different succeeding periods of purity. These words of the Quran are not in the nature of information (خبر) but are injunctive. If the verses regarding the injunction of *talak* had not been there in the Quran, the law of *talak* would have been non-existent.[3] Now the principle is that as stated by the Prophet pbh. من ادخل فی امرنا ما لیس منه و فهو رد (whoever enters in our order what is not there, should be refuted).[4] *Talak* is therefore,

1. *Al Mabsoot* by Sarakhsi, printed Egypt, 1324 *Hijra*, Vol. 6, pp. 57-58.
2. *Ibid.*
3. *Ehkam ul Quran*, by Abu Bakr Jassas on Q. 2 : 229.
4. *Ibid.*

lawful when it is subject to the attributes and conditions which are laid down by the Prophet pbh. One of the objections of Ibn Qayyim to the lawfulness of *talak-i-bid'at* is that admittedly *nikah* or marriage by the person who is prohibited, is ineffective because of its illegality. Tahawi concedes this proposition on the principle that people enter into the contract of *nikah*—rather all contracts and dealings—on account of their attributes ; they cannot enter them only as (or in the manner) commanded. He supplements it with an exception which is not as definite as the above principle and is rather based on conjectures, that it is possible that in some cases they may get out of those contracts and dealings in a manner contrary to injunctions and yet their action may be legal. However the principle is established that if an injunction includes provisions about the manner of performance this provision is also obligatory though it may admit of exceptions.[1]

The abovementioned principle is the same which is pursued in modern law that if something is required to be done in a particular manner it must be done in that manner or not at all. The modern rule is also subject to exceptions but those exceptions are of matters which are simply discretionary. But can this be said of *talak* for which two pronouncements, in two different *tuhrs*, as explained by the Prophet pbh, are provided so as to invest the husband with the right to revoke it and the option to retain or release with kindness is co-terminus with the expiry of the *'iddat* period? Those who rely upon theft as illustration of performance or bringing into existence that which is prohibited probably take into consideration cases in which the thief is not in a position to restore the loss caused by him to the complainant by his illegal action. But there may be cases in which it may be possible to restore *status quo ante*, for example in a case in which the entire stolen property is recovered. Similarly the

1. *Ma'ani ul Asaar* by Tahawi (Urdu translation), Vol. 3, p. 79.

two illustrations given by Sarakhsi have no applicability to matters which are mandatory. Moreover there is no unanimity on the points whether the transaction of sale entered after the call to Friday prayer is effective and legal or the duty to offer prayer is discharged by knowingly offering prayer on land encroached upon for the purpose. According to Ibn Qayyim such sale is void.[1] On the question of validity of prayer performed knowingly on the land encroached upon the opinions are divided.

These juristic principles are not considered or applied in isolation. They are intended to sustain and support the results deduced by those who believe in *talak-i-bid'at*, from the study of the Quran and Hadith. In order to appreciate and understand the point of view of different jurists on the subject of validity or invalidity of such *talak*, it is necessary to refer to various interpretations of the Quran and various traditions of the Prophet pbh and his Companions which have gained currency.

It should be noticed that the verse about the pronouncement of divorce twice[2] (الطلاق مرتٰن) does not prove that the second divorce should be pronounced in the next *tuhr* or that separation after the first pronouncement is envisaged. This finds support from the opinions of Imam Ibn Jareer Tabari, Hafiz Ibn-e-Kathir and Imam Razi. According to the latter the above words only prove the number of revocable divorces. The verse enjoining فطلقوهن لعدتهن واحصوا العدة (put them away by divorce for their period and reckon the period)[3] also does not clarify that the second divorce is to be given at some other time, and not in the same sitting or meeting. Such conclusion has been drawn from the other verses by the commentators in the light of the traditions of the Prophet pbh which are explanatory and clarificatory.

1. *Zad ul Ma'ad* by Ibn Qayyim (Urdu translation), Vol. 4, p. 176.
2. Q. 2:229.
3. Q. 65 : 1.

There are commentators and jurists who trace the legality of three divorces pronounced successively in one sitting, to verses Q. 2: 228 and 229. According to them the word *marraataan* (مرتان) in Q. 2: 229 means twice, or one after the other and though it may not apply to such a formula as 'I divorce you twice' its condition would be fulfilled if the husband says at the same time 'I divorce you ; I divorce you'. The third divorce, of course, can likewise follow. Those who oppose *talak-i-bid'at*, whether on the ground that it is *ghair-mashroo* (غیر مشروع) and void, or on the ground which has the support of Hadith that three divorces pronounced at the same time will have the effect of one revocable divorce, argue that the word *marraataan* (مرتان) means *marratan baada marra* (مرة بعد مرة one after the other or once and then a second time) and not repeatedly. Quran has used the word *marra* (مرة once), *marra-tain* (مرتين twice) and *talasa marraat* (ثلاث مرات thrice) in this sense in the following verses :

اولا یرون انهم یفتنون فی کل عام مرة او مرتین

Q. 9 : 126.—See they not that are tested once or twice in every year.

یا ایها الذین امنوا لیستا ذنکم الذین ملکت ایمانکم والذین
لم یبلغوا الحلم منکم ثلث مرات من قبل صلوة الفجر و حین
تضعون ثیابکم من الظهیرة و من بعد صلوة العشاء ثلث
عورٰت لکم .

Q. 24 : 58.— O ye who believe ! Let your slaves and those of you who have not come to puberty, ask leave of you at three times (before they come into your presence). Before the prayer of dawn, and when ye lay aside your raiment for the heat of noon, and after the prayer of night. Three times of privacy for you.

These two verses are indicative of the meanings in which the word *marraataan* (مرتان twice) is used. It neither includes

the utterance of the figure two once, nor the repetition of the formula twice in the same sitting or meeting. Several instances have been given to refute the use of figure 'two'. Four oaths are provided in the Quran for *Li'an* (لعان false accusation of women). The condition cannot be fulfilled by using the figure four with oath and saying 'I swear four times'. Each oath shall have to be taken separately. Imam Razi therefore wrote طلقوامرتين يعنى دفعين (divorce twice *i.e.* two times) and deduced:

ان الطلاق المشروع متفرق لان المرات لا تكون لان بعد تفرق بالاجماع .

The legal divorce is to pronounce each *talak* separately because there is consensus that for pronouncing it many times dispersal or separation is necessary.[1]

Abu Bakr Jassas wrote:

ان الاية الطلاق مرتٰن تضمنت الامر با يقاع الاثنتين فى مرتين فمن اوقع الاثنتين فى مرة فهو مخالف لحكمها .

The verse (الطلاق مرتٰن) (divorce must be pronounced twice) means that the two divorces must be pronounced separately. Whoever pronounces them once (in the same *tuhr*) opposes the injunction of Allah.[2]

At another place Jassas deduced from verses 229 and 230 of chapter 2 the justification for three divorces pronounced simultaneously. The last words of the relevant passage make interesting reading:

فحكم بتحريمها عليه با لثالثه بعد الاثنتين و لم يفرق بين ايقا عهما فى طهر واحد او في اطهار فوجب الحكم بايقاع الجميع على الى وجه اوقعه من مسنون او غير مسنون و مباح و محظور .

1. *Al Tafseer ul Kabeer*, Vol. 2, p. 260.
2. *Ehkam ul Quran* on verse Q. 2 : 229.

> In this sentence Allah ordered the irrevocable separation of woman and did not distinguish between pronouncement of two *talaks* in the same *tuhr* or in different *tuhrs*. It transpires from the verse that all (types of) *talak* can be ordered in whatever manner they may be pronounced, *i.e.* according to the manner regulated by *Sunnah* or not so regulated, or a manner lawful or prohibited.

It is strange that the manner of pronouncement of three simultaneous *talaks* is being deduced from the Quran and yet it is being labelled as prohibited or unlawful. Jassas is conscious of the contradiction between his two interpretations and adds in order to resolve them:

> If it is said that you had interpreted this verse so as to clarify its intent about the purposeful manner which is fixed by Sharia, which is to the effect that to pronounce three *talaks* simultaneously is against Sunnah; why then do you argue about a manner which according to you is unlawful although it is not included in the meanings of the verse. The reply to this is that the verse indicates also the manner of pronouncement of two or three *talaks* at the same time though this manner of *talak* is not according to Sunnah and denotes that the required and approved manner of *talak* is to pronounce divorce separately in different *tuhrs*. It does not prohibit this other interpretation also. Do you not see that if Allah had said: 'pronounce divorce three times in different *tuhrs*, but if you pronounce them at one time they shall take effect', it would have been correct (there would have been no contradiction in it). If the two meanings are not contradictory and the verse is capable of being interpreted in both ways, both the meanings should be assigned to it.[1]

1. *Ehkam ul Quran* on verse 2 : 229.

It is clear from this passage that Jassas attached the other meaning to the verses on account of the traditions. He has not been able to trace out *talak-i-bid'at* in the verses. All the arguments in this behalf are only conjectural. And then if the verse is capable of being interpreted in that farfetched and remote manner, such divorce should be called Quranic divorce and not the prohibited one. Moreover once the word *marraa-taan* (مرتٰن twice) is interpreted to mean twice in different *tuhrs*, no justification would be left for giving this word the meaning of 'twice in the same *tuhr*'. The attempt to trace such *talak* in the language of the Quran has not met with success.

It is not necessary to pursue this method of approach in view of what has been stated above. It would be sufficient to reiterate that the generally held view is that the Quran makes no reference to what is known as *talak-i-bid'at*. The next point is more significant : how far the Sunnah supports one point or the other.

The Hadith which lays down the Sunnah method of *talak* is the famous Hadith of Ibn Omar from whom it is related that during the period of the Prophet pbh he divorced his wife during menstruation. Hazrat Omar enquired from the Prophet pbh about it, he said order him to revoke the divorce and retain her during the period of purification, she may then have her courses and then again have the period of purity; he may then retain her if he so wishes or divorce her again before having carnal relations with her. This is the *'iddat* about which Allah directed that the divorce should be pronounced at the time.[1]

The Hadith is similarly reported in *Saheeh Muslim*[2] in the chapter *'Tahreem u Talak il Haiz'* (تحريم طلاق الحائض prohibition of divorcing when wife is menstruating), and not in the

1. *Saheeh Bokhari*, Kitab ul talak.
2. *Saheeh Muslim*, Kitab ul talak.

chapter concerning three divorces (ثلاثہ طلاق). The number of divorces is not mentioned in these versions and it appears that Ibn Omar had pronounced one revocable divorce.

In some of the narrations the reply of Ibn Omar is reproduced in answer to a question: "If you have pronounced three divorces you have disobeyed the injunction of Allah regarding *talak* and she is separated from you." But this is not a part of the Hadith of the Prophet pbh and is at most his own verdict.

In the Hadith of Ibn Omar as related in *Musannaf Ibn Shaiba*, or in the compilation of Darqutni and Tabarani, there is an addition that "(it is related by Ibn Omar) I asked! O Prophet pbh if I had pronounced *talak* thrice, would it have been lawful for me to revoke them? He said, No! She would have separated from you and you would have sinned." This addition is *Zaeef* (weak). This addition which is the sheet anchor of those who treat *talak-i-bid'at* as fully effective is not there in all narrations of this Hadith. Baihaqi and Imam Ibn Qayyim said about this addition that its relator is Shuaib about whom the experts in Hadith literature entertain doubt.[1] Besides Ruzaiq bin Shuaib or Shuaib bin Ruzaiq, there is among its relators Ata Khurasani who has been treated by Imam Bokhari, Shaaba and Ibn Hayyan as weak and by Saeed Ibn Musayyib as a liar.[2] In *Tafseer-i-Qurtubi*,[3] on the other hand it is stated that Abdullah bin Omar pronounced three *talaks* on his wife but the Prophet directed him to revoke. Another important consideration cannot be ignored. This addition does not mean that Ibn Omar had inquired about the effect of three *talaks* pronounced at the same time. The question appears to have been put in connection with the right to revoke and can at most be read in that context. The reference to the commission of sin

1. *Ighasat al Sahfan*, by Ibn Qayyim.
2. *Ek Majlas Ki Teen Talaq*, Art. by Maulana Hamid Ali, p. 194.
3. *Tafseer Qurtubi*, Vol. 3, p. 179.

is on account of the pronouncement of *talak* during menstruation. The Hadith of Ibn Omar is only an authoritative construction of the verses regulating the manner of *talak*.

The next Hadith is of Rukana. "It is related on the authority of Ibn Abbas that Rukana pronounced three *talaks* in the same sitting for his wife. He then regretted this and was immensely grieved over it. The Prophet pbh asked him: 'how did you divorce her.' He said: 'I divorced her thrice.' He (the Prophet pbh) enquired : In one sitting'? 'He said: 'Yes'. He said: 'It is one (divorce) if you like you may revoke it.' He said, 'I revoke it.'

There is another version of this Hadith. It is to the following effect:

> "It is reported from Rukana : 'I appeared before the Prophet and said that I have pronounced *talak-il-batta* for my wife. He asked: 'What was your intent?' I said: 'I intended to divorce her once.' He asked : 'Do you swear by Allah?' I said : 'I swear by Allah.' He said: 'Its verdict is in accordance with your intention'.

Batta (بت) means to cut off, to settle, to decide. *Batta* or *Albatta* (البته - بته) means, *Qat'an* قطعاً definitely) *talak ul batta*, therefore is definite, decisive or catergorical divorce. The point for which this second version has been relied upon by the protagonists of *talak-i-bid'at* is that according to the Prophet pbh the intention of the husband is decisive and the divorce cannot be equalised to one divorce as a mathematical formula.

But opinions vary on its meaning and effect. Some held it to be equal to three divorces but this did not find favour with Hafiz Ibn Hajar. During the time of the Prophet pbh it meant one in Medina but later it came to be known as amounting to three *talaks* during the reign of Omar.[1]

1. *Fath ul Bari*, Vol. 9, p. 365.

In *Mishkat* it is explained that "*talak ul batta* is revocable according to Imam Shafe'i in view of this Hadith (Rukana) and if the intention is to give two or three *talaks*, the matter shall be decided according to intention. In the opinion of Imam Malik it is tantamount to three *talaks*. In the view of Imam Abu Haneefa *talak ul batta* is irrevocable. He interprets the order (to Rukana for restoration of his wife) as remarriage."

The following details are given in *Tirmizi* :

"The opinions of the Companions of the Prophet pbh and the other learned differ in respect of *talak ul batta*. It is related that Hazrat Omar treated it to be equivalent of one *talak*. In respect of Hazrat Ali it is said that he held it as equal to three. Some of the learned are of the view that the determinant factor is the intention. If the intention is to give one *talak* it will be likewise affected. If three are intended, three *talaks* shall take effect. But if the intention is to pronounce two *talaks* only one shall take effect. This is the view of Sauri and the Kufaites. Malik bin Anas said about *talak ul batta* that three *talaks* will be enforced if the carnal relationship between the husband and the wife has been established, Imam Shafe'i was of the view that if the intention was of one *talak* only one would take effect ; if two were intended two would become effective and if three were intended three would be enforced.[1]

Imam Tirmizi who has reported this second version writes about it that he did not know any other version of the Hadith which proves his preference for it.[2] Allama Ibn Hajar also showed his inclination towards the same narration.[3] But about one of the relators of this version, namely Zubair bin Saeed he

1. *Tirmizi* (Urdu translation), Vol. I, p. 232.
2. *Ibid.*
3. *Bulugh al Maram* by Ibn Hajar Asqalani (Urdu translation), p. 222.

wrote in *Taqreeb ul Tahzeeb* that he is *layyan ul hadith* (flexible, pliable in transmission of Hadith). Same opinion is stated about another transmitter namely Abdullah. Allama Ibn Qayyim says that Ibn Jauzi wrote that this Hadith is not correct. Imam Ahmad says that the Hadith of Rukana is worthless. Imam Bokhari called it weak. The learned who are experts in the sources and origin of Hadith say that the transmitters or relators of the Hadith are little known (مجہول).[1] Jassas said some call it Munkar. As regards the first version it is said that among the relators of the Hadith is Yaadu bin Abi Rafae who is little known.

The second version in which the expression *talak ul batta* is used is also criticised because of variation in relevant particulars in its various versions. In some versions the words طلاق واحدہ (pronounced one divorce) while in others طلاق البتہ (pronounced definite or categorical divorce) have been reported. According to Imam Muhammad bin Hazm all the versions of this Hadith are weak in authenticity. According to Ibn Qayyim one of the relators of the version consisting of the reference to *talak i batta* is Nafae bin Ajeer who is unknown, while the first version according to which three *talaks* were treated by the Prophet pbh as amounting to one *talak* is reported by Ibne Juraij from Baad bin Rafae who though unknown is a *tabiee* and since Ibn Juraij and such other relators of Hadith have reported from him, that version is acceptable.[2]

There are however others who have accepted or rather preferred the second version because Nafie bin Ajeer was related to Rukana.[2]

In view of this difference of opinion about the authenticity of Hadith of Rukana and its being muztarab it appears strange

1. *Ighasat ul Lahfan*, Vol 1, p. 316 ; *Ek Majlis Ki Teen Talak*, p. 63. Article by Shams Peerzada.

2. See the discussion in *Majmua-i-Qawaneen-i-Islam* by Dr. Tanzeel-ur-Rehman, Vol. 2, pp. 521-526.

that it should be cited in support of what admittedly is not an approved manner of *talak* and according to its protagonists it only tolerated.

The controversy about the authenticity of traditions attributed to the Prophet pbh as in the present case can be logically resolved by preferring traditions which accord with the injunctions of the Quran as interpreted by the Prophet pbh. The logical solution as regards the Hadith of Rukana is either not to rely upon it at all or to accept that version as genuine which is in agreement with the Quranic injunctions which do not recognise, directly or indirectly, *talak i bid'at*, and the unanimously acknowledged Sunnah of the Prophet pbh which acknowledges only two forms of *talak*—Ahsan and Hassan. Another Hadith is of Mahmud bin Labeid :

> "It is reported from Mahmud bin Labeid that the Prophet pbh was informed that a person had divorced his wife by pronouning three *taleks* at the same time. The Prophet pbh stood up enraged and said: "Is the Book of Allah made a plaything while I am present amongst you." Finding him in a state of such indignation a man stood up and asked : "O Prophet! May I kill him."

Ibn Kathir called it *mungataa* (منقطع).

According to Ibn Qayyim its chain of authorities is according to the standard of Muslim. Ibn Wahab reported it from Makhrama bin Bukair bin Ashjaa who reported it from Ashjaa. Objection is raised about Makhrama but Ibn Qayyim explained that he is reliable. Muslim in his *Saheeh* accepted his report from his father. Imam Ahmad bin Hanbal considered him trustworthy. Imam Malik in his *Muwatta* said that he was pious. Malik bin Anas also treated him to be reliable. Some say that Makhrama did not hear Hadith from his father, but reported from the book maintained by his father. Makhrama swore that he heard Hadith from his father. Ibn Qayyim concluded from this evidence that if Makhrama who was reliable

transmitter of Hadith, reported from what was written in the compilation of his father, his account was more reliable and in any case he swore that he heard it from his father and this is sufficient to make his testimony reliable.[1]

As a last resort it is said that the Prophet pbh did not hold the *talak* pronounced by that man to be ineffective in law. This argument is of no worth for distinguishing the Hadith, since the words playing with the book of Allah" uttered in a state of rage point out to the illegality of the act. The Prophet was a man of mild disposition and if he lost temper on any report it must follow that it was not a case of mere disapproval but it was treated intolerable. It also provides guidance to those who try to trace *talak-i-bid'at* in the Holy Book.

Another Hadith is that "Hafs bin Mugheera divorced his wife Fatima bint Qais during the lifetime of the Prophet pbh thrice in one sentence. The Prophet pbh treated it as irrevocable. Nothing has reached us indicating that the Prophet pbh held it to be disapproved.[2] This Hadith it also reproduced in *Saheeh Muslim* but in a different manner. It is as follows :

> "It is reported from Fatima bint Qais that Abu Umar bin Hafs gave *talak ul batta* (definite divorce) to her. Since he himself was not present he sent his agent (*wakeel*) to her with barley. Fatima expressed her resentment and anger over it (paltry quantity of barley). He said swearing by Allah that she had no right over them. She approached the Prophet pbh and petitioned before him but he said: 'your maintenance is not on him.' (meaning that he was not liable to pay maintenance to her).

In another version in *Saheeh Muslim* it is said that "out of the three divorces he gave her the last divorce." In yet another report it is said : "He sent (the agent) to his wife

1. *Zad ul Maad* by Ibn Qayyim (Urdu translation), Vol. 4, pp. 182 to 184.
2. *Darqutni*, Vol. 2, p. 429.

Fatima bint Qais after pronouncing the third *talak* which remained out of the *taleks* for her."

In view of these two last mentioned reports in *Saheeh Muslim* the theory or deduction of pronouncements of three *talaks* at the same time fails. Ibn Qayyim said that the chain of authorities of the last version that it was the last *talak*, is *Saheeh Muttasil*.[1]

There is a Hadith in *Saheeh Bokhari* from Hazrat 'Aisha:—

"The wife of Rifaa Qurzi appeared before the Prophet pbh and said: 'O Prophet of Allah Rifaa divorced me by *talakul batta* and I then married Abdul Rahman bin Zubair Qurzi, but he is not fit for performance of marital obligations. The Prophet asked her : 'you want to go back to Rifaa.' 'No, not till he (the second husband) enjoys you and you enjoy him.''

This Hadith only mentions *talak ul batta*. There is no clarification whether the three *talaks* were given simultaneously or as provided in the Quran. This is, however, differently reproduced in *Saheeh Muslim*. In one report it is said that "he gave her three *talaks*,"[2] while in the other report only the word *talakani* (طلقنی) is used which means 'he divorced me'. Thus, it would not be correct to argue in favour of three simultaneous *talaks* on the basis of this Hadith.[3]

Another important tradition is reported from Ibn Abbas that "during the period of the Prophet pbh Hazrat Abu Bakr and the first two years of the reign of Hazrat Umar three *talaks* were treated as one but Hazrat Umar observed that people had begun to make haste in a matter in which they were given time for consideration. Why should we not then enforce it. He consequently enforced it."

1. *Zad ul Maad* (Urdu translation), Vol. 4, p. 193.
2. *Saheeh Muslim*, Kitab ul Nikah, Hadith 1611.
3. *Ibid.*, Hadith 1610.

The tradition is reported from Ibn Taoos from his father who reported it from Ibn 'Abbas. Another version of this tradition deals with questions on the subject put to Ibn 'Abbas by Abul Sahba and his answers. The transmitter of the tradition is the same that is Ibn Taoos reporting from his father. The tradition is as follows :

> "Abus Sahba enquired from Ibn 'Abbas : 'Do you know that in the period of the Prophet pbh, the regime of Hazrat Abu Bakr and for three years during Hazrat Omar's reign three *talaks* were treated as one.' Ibn 'Abbas said : 'Yes'."

These traditions which prove the state of law during the period of the Prophet pbh and Hazrat Abu Bakr and for the first two or three years during the reign of Hazrat Omar have been the subject-matter of comments from a large number of the learned in Hadith and the jurists. Jassas called the tradition Munkar, (related by a pious reliable man contrary to other version), because Saeed bin Jaibar, Malik, Ibn Haaris, Muhammad bin Ayas and Numan bin Abi Ayyash related from Ibn Abbas the verdict of three simultaneous *talaks* being a legally effective manner of *talak*. Jassas[1] interpreted the tradition as meaning that during the reign of Hazrat Omar people had started pronouncing three *talaks* at the same time and Hazrat Omar gave effect to it. Qurtubi referred to the opinion of 'Abdul Barr that the tradition of Taoos was whimsical and untrue, and that the jurists of Hejaz, Syria, Iraq, and East and West did not assign any importance to it. Qurtubi said that it is also not well known that Abus Sahba was a mawali (manumitted slave) of Ibn 'Abbas. He criticised the tradition on the same ground as Jassas. Alternatively he wrote that if the tradition be capable of being interpreted in the sense that all the *talaks* given at one time were treated as one *talak*, it would follow that Ibn Abbas later reviewed

1. *Ehkam ul Quran* by Jassas, Vol. 1, p. 388.

his opinion and adopted what was stated by other companions. This would become a consensus of the companions on the subject. Qurtubi referred to the opinions that during those days people customarily pronounced one *talak*. During the reign of Hazrat Omar they adopted the habit of pronouncing three *talaks*. Ibn Hazm said that this tradition could not have the effect of a Hadith emanating from the Prophet pbh since it does not deal with what he said or how he acted or reacted towards the pronouncements of three *talaks* at the same time. Ibn Qudama has referred to the opinions of the learned that the tradition of Ibn 'Abbas only refers to the manner of divorce as current during the period of the Prophet pbh or Hazrat Abu Bakr. In those days only one divorce was customary. If the tradition is not interpreted in that manner then the insoluble question would be under what authority Hazrat Omar could make a rule which was different from the rule which had been in force during the reign of the Prophet pbh and Hazrat Abu Bakr. Baihaqi conjectured in *Al Sunan ul Kubra* that Ibn 'Abbas held in favour of three *talaks* being effective because he might have come to know about the abrogation of the rule of three *talaks* being accounted as one.[1]

It is clear that the question which arises in the mind of a layman these days, was present in the minds of the learned during the period of development of Fiqh. The question was about the authority of anyone except Allah and His Prophet to act as *shari*, (شارع law-giver) and yet practically despite their constant efforts to trace the origin of *talak-i-bid'at* to the Quran and the Prophet pbh they have assigned that role to him and perpetuated *talak-i-bid'at inter alia* on the ground that it is sufficient for its efficacy that Hazrat Omar acted upon it.[2]

1. See *Majmua-i-Qawaneen Islami* Vol. 2, by Dr. Tanzil-ur-Rehman, pp. 530 to 535.

2. *Ibid.*

Not much comment is required upon this interpretation of the traditions of Taoos by such great commentators of the Quran and jurists who from the words "three *talaks* amounted to one" or "three *talaks* were treated as one", have concluded that probably during the period of the Prophet pbh only one *talak* was given, venturing thereby to mean, that the question of three *talaks* being treated as one, never arose. And yet from the same quarter attempts are made to prove that in a number of cases three *talaks* pronounced at the same time were given effect to by the Holy Prophet. Yet another view was advanced that Ibn 'Abbas reviewed his view as stated in the tradition of Taoos when he received information about the abrogation of the rule of three *talaks* being treated as one. This is an indirect concession about the existence of such a rule. If there was such a rule the question will arise, by which Hadith it was abrogated ? If the rule was never there, then where arises the question of abrogation? It therefore appears that there can be no doubt about the authenticity of these two traditions from Taoos which go to prove the practice of the Prophet, Hazrat Abu Bakr and for the first two or three years, of Hazrat Omar and the ground for change of the practice or rule by Hazrat Omar. All the arguments reproduced above are conjectural.

Another tradition is from Ubada bin Samit, related in *Darqutni*[1] :

> "It is related from Ubada bin Samit that some of his ascendants divorced his wife a thousand times. It was mentioned before the Prophet pbh. He observed: 'that the woman became unlawful to him from three *talaks* on account of the action being sinful and the nine hundred ninety-seven *talaks* are sins on his neck (for which he shall remain liable)."

Yet another tradition is reported in *Darqutni* from Maaz bin Jabal:[1]

1. *Dar Qutai*, Vol. 2, p. 433.

"It is related from Maaz bin Jabal that he said: 'I have heard the Prophet pbh saying: Whoever gives *talak-i-bid'at*—one, or two or three—we shall enforce that *bid'at* for him."[1]

The Hadith of Ubada bin Samit is also reproduced in *Musannaf Abdul Razzak*. There it is said that the grandfather of Ubada bin Samit had divorced his wife in this manner. Ibn Qayyim says that this Hadith is absolutely unreliable. Yahya bin Ala is one of the chain of narrators who related it from Obaidullah bin Waleed Wasafi who narrated from Ibrahim bin Obaidullah, all of whom are deficient and unknown. Moreover only father of Ubada bin Samit was converted to Islam. It was not possible for the Prophet pbh to judge the *talaks* of a non-Muslim.

Yahyah bin el Ala is not strong but weak according to Ibn Hatim, *matruk* (abandoned *i.e.* unreliable) according to *Dar Qutni*, and a liar who fabricated Hadith according to Imam Ahmad.[3]

Ibn Qayyim says in respect of the Hadith related from Maaz bin Jabal that Ismail bin Umayya is one of the narrators of the Hadith who is a liar. Another narrator is Abdul Baqi bin Qani but Dar Qutni himself said that he commits too many errors.[4]

Obaidullah bin ul Waleed al Wasafi was held as non-entity (unreliable) by Nassai.[5]

Ibrahim bin Obaidullah is *majhul* or unknown.

The next Hadith is also reported in *Dar Qutni*:

1. *Dar Qutni*, Vol. 2, p. 444.
2. *Zad al Maad* by Ibn Qayyim, (Urdu translation), Vol. 4, p. 144.
3. *Meezan ul 'Itidal* by Zahabi.
4. *Zad al Maad Ibid.*, p. 180.
5. *Ibid.*

"It is reported from Hazrat 'Ali that the Prophet pbh heard that some person had pronounced *talak-al-batta* on his wife. He was enraged and stood up and said: 'you jest and play with the commands of Allah, whoever gives *talak-batta*, we shall enforce three *talaks* against him and his wife will not be lawful for him without her marrying another husband'."

One of the narrators in the chain of narrators of this Hadith is Ismail bin Umayya Qarshi about whom Imam Ibn Qayyim's opinion that he is a liar, has already been noticed. Dar Qutni himself called him *zaeef* (deficient) and *matruk* (abandoned as unreliable). He also said about him that he fabricated Ahadith. Another narrator is Usman bin Qatar about whom Ibn Moeen said that his Hadith is not recorded and Ibn Hayyan said that he narrates incorrect traditions from (in the name of) pious people. Allama Muhammad Tahir said about another narrator of this Hadith namely Abdul Ghafoor that 'he fabricates Ahadith.'

Imam Ibn Taimiya said about this tradition that the narrators described therein include unreliable and unknown persons (*Zoafa wa majaheel* ضعفاء و مجاهيل).[1]

A Hadith from Imam Hassan may also be reproduced:

" 'Aisha al Khath'amya was married to Hassan bin Ali. After the martyrdom of Hazrat 'Ali[1] 'Aisha said to Hassan : 'congratulations for the Caliphate'. Hazrat Hassan said: انت طالق يعنى ثلاثه (you are divorced i.e. thrice). The narrator said that she collected her clothes and remained in *'iddat* till it expired...Imam Hassan sent to her the balance of her dower and ten items of property as gift. When the Messenger reached her she said that those things from the separated beloved were insignificant. Hearing this Imam Hassan

1. *Ek Majlis ki Teen Talak*, p. 155, Article by Maulana Hamid Ali.

> cried and said: 'If I had not heard it from my maternal grandfather (or said from my father) that whoever pronounces three *talaks* on his wife or divorces her during her periods, she ceases to be lawful to him until her marriage with (and divorce by) another husband, I would have revoked (my *talak*)."[1]

This Hadith is reproduced by Baihaqi from two chains of narrators. In one chain there are two relators worth mentioning. They are Muhammad bin Humaid ul Razi and Salma bin ul Fazl. In the other chain there is Imran bin Muslim. According to Bokhari he is doubtful. Abu Zaraa falsified him, others held him to be a liar.[2] Abu Hatim said about Salman bin ul Fazl that he was *munkar ul hadith* (منكر الحديث). Abu Zaraa said that he did not know him. The narrator in the other chain, Imran bin Muslim is said by Abu Ahmad al Zubairi to be *Jarwi kalb* (جرو كلب puppy).[3] For criticism of the narrators see also *Al Tabq ul Mughni alad Dar ul Qutni*.[4] Ibn Qayyim also held the Hadith to be unreliable.[5]

Imam Ibn Taimya concluded about the unreliability of such Ahadith :

> "I do not know of any one who, during the period of the Prophet pbh, divoced his wife thrice by one sentence and he enforced the same as amounting to three *talaks*. It has not been narrated in any Hadith, Sahee or Hassan, nor any self-assertive writer reproduced anything respecting this. On the other hand there is unanimity among the learned in Hadith literature that the traditions of this category are not only weak but fabricated.."[6]

1. *Al Suman al Kubra*, by Baihaqi, Vol. 7, p. 336.
2. *Meezan ul 'Itidal* by Zahabi.
3. *Ibid*.
4. Vol. 4, pp. 30-31.
5. *Ighasat ul Lahfan*, Vol. 1, pp. 317-9, by Ibn Qayyim.
6. *Fatawa Ibn Taimiyya*, Vol. 33, pp. 12-13.

At another place he wrote:

"No one reproduced authoritatively from the Prophet pbh any such incident that a person pronounced three *talaks* in one sentence and he enforced them as three. Whatever traditions are narrated in this regard are unanimouly held by the learned to be false (fabricated). Wherever in the correct traditions it is mentioned that such and such person pronounced three *taakls* on his wife, it only means that he pronounced three *talaks* separately (in different *tuhrs*)".[1]

Same is the view of Imam Ibn Qayyim who considered each Hadith in detail and commented upon its reliability or unreliability.[2]

Reference may now be made to the Hadith of Uwaimar 'Ajlani which is treated as Hadith in Taqriri[3] form which according to the protagonists of *talak-i-bid'at*, impliedly sanctions the enforcement of three *talaks* pronounced at the same time: Aweemar Ajlani accused his wife of *zina*. The proceedings of Lian were taken by the Prophet pbh. At the conclusion of the proceedings Aweemar said: "O Prophet of Allah pbh if I retain her with me I will be labelled as a liar". Before the Prophet pbh could answer he pronounced three *talaks* upon her and the Prophet of Allah pbh did not refute him or prohibit him.[4]

This Hadith cannot support one point of view or the other. The effect of Lian as stated by most schools of thought is that the husband and wife are separated for good and can in no circumstances remarry. The separation is automatic. The difference of view is on the question whether Lian itself results

1. *Fatawa Ibn Taimya*, Vol. 33, p. 73.
2. *Zad ul Maad*, by Ibn Qayyim, Vol. 14, p. 180.
3. Sunnah Taqriri is that something was done before the Prophet pbh which he did not forbid.
4. *Al Sunan al Kubra* by Baihaqi, Vol. 7, p. 328.

in separation or is separation effected by the decree of the Kazi. But this difference of opinion is not relevant in the circumstances when the parties are present before the Kazi and the proceedings of Lian are concluded before him. The order of perpetual separation may be passed by the Kazi but it has to follow as a matter of course after the Lian. This position obtained in the case of Uwaomar Ajlani. The proceedings of Lian had been concluded before the greatest ever Kazi who had laid down the divine law of automatic perpetual separation.

It is said in *Hedaya* :[1]

"And on both making imprecation in this manner, a separation takes place between them ; but not until the Kazee pronounces a decree to that effect. . Ziffer says that separation takes place upon the imprecation, independent of any judicial decree, because a perpetual prohibition is established by it, the Prophet pbh having said, the two who make imprecation can never come together,"—which proves their separation as the Prophet's forbidding their ever coming together after imprecation, expressly declares this. The comment of our doctors is that as, in consequence of the establishment of a prohibition between them, the retaining of the woman with humanity is impossible, it is incumbent upon the husband to divorce her on the principle of benevolence, but if he declines so doing, it then behoves the Kazee to issue a decree of divorce, as the Kazee is the substitute of the husband in this matter for the purpose of removing injustice: and a proof of this is that Aweemar divorced his wife after imprecation, in the presence of the Prophet pbh which shows that the marriage still continued, and was not virtually dissolved by the imprecation, otherwise the Prophet pbh would have prevented him from pronouncing divorce."

1. P. 124.

The conclusions drawn from the Hadith of Uwaimar obviously cannot be drawn from it. It is possible that the Prophet pbh did not speak because the separation had already taken place; the *talaks* would have hardly made any difference. Merely from his silence for which other reasons—*i.e.* conclusions can be advanced such a conclusion cannot be drawn. Sarakhsi advanced two reasons for the silence of the Prophet pbh in *Mabsoot*:

> "The Prophet of Allah pbh did not prevent Uwaimar at that time. This might be due to kindness and clemency because on account of extreme indignation and rage he might not have been in a condition to accept the advice of the Prophet pbh and might have become a heretic. He therefore put off what he wanted to say to some later time and only said: 'you have no right over her', or the possibility is that to pronounce three *talaks* simultaneously is disapproved because it closes the door of revocation without any reason. But this was not present in the case of 'Ajlani because if the imprecators insist on imprecations such door is closed and 'Ajlani was insistent on Lian."

Another explanation is given in *Al Mughni* by Ibn Qudama :[1]

> "As far as the Hadith of Li'an is concerned this deduction is not certain from it because the separation was not effected by *talak* but had been effected exclusively from Lian."

Some verdicts or decisions of the Companions of the Prophet pbh are also reported. They are as follows :

1. "It is related from Hazrat Omar that a person who had pronounced one thousand *talaks* on his wife, was brought to him. He told him: 'You have jested', and

1. Vol. 7, p. 103.

hit him with stripes. He then added : 'only three *talaks* were sufficient for you.[1]

2. A man went to Hazrat 'Ali. He said that he had pronounced one thousand *talaks* on his wife. He (Hazrat 'Ali) said: 'You made her unlawful for you by three *talaks* and now divide the balance of *talaks* on your other wives.'[1]

3. It is relatad from Ibn Abbas that he was questioned about a person who had pronounced one hundred *talaks* on his wife. He said: You disobyed your Lord and Master and your wife is separated from you. You did not fear Allah Who would have found some way for you.' He then recited (Q. 65 : 1) "O Prophet! When ye (men) put away women, put them away for their legal period."[2]

4. It is related from Ibn 'Abbas that he said that a man from amongst you makes a fool of himself by pronouncing one thousand *talaks* on his wife and then come (here) calling O Ibn 'Abbas! O Ibn 'Abbas! although Allah says that if you fear Him he finds out a way for you, but since you did not fear Allah, I do not find a way for you. Your wife is irrevocably separated from you and you are liable for commission of sin.[3]

5. A man said to Ibn 'Abbas: "I have pronounced one hundred *talaks* on my wife." He said : 'Take three (they have become effective) and take away ninety-seven of them' (they are surplusage).[4]

6. A person approached 'Abdullah bin Masood and said: 'I have *talaked* my wife with eight divorces.' Ibn

1. *Al Sunnan al Kubra* by Baihaqi, p. 334.
2. *Ibid.*, p. 321.
3. *Ibid.*, p. 331.
4. *Ibid.*, p. 337.

Masood asked him: 'What has been said about you?' He said: 'It is said that she is irrevocably separated from me.' Ibn Masood said : 'What is stated about you is correct. Whoever divorces in the manner laid down by Allah, His order is enforced for him. But whoever involves his idiosyncracies and desires in the bargain, we would make them stick to him. Do not observe matters for your desires or (momentary) pleasure or we shall burden you with what you say.'[1]

7. It is reported from 'Ata bin Yaasar that a man came to 'Abdullah bin 'Amar bin al 'Aas to enquire from him, the order in Sharia because he had divorced his wife thrice before validly retiring with her. 'Ata says that he observed that only one *talak* is sufficient for divorcing a married virgin, on this 'Abdullah bin 'Amar remarked : 'you are only a story teller. One *talak* separates her and three make her unlawful till she marries another person.'[2]
8. It is reported that a person divorced his wife thrice before valid retirement. He came to Ibn 'Abbas and Abu Huraira to inquire about the law. They informed him that he could not remarry until she married another husband. He said that in fact it was one *talak*, but Ibn 'Abbas said : 'Whatever right you had you lost it.'[3]
9. Anas, when asked about three divorces said she is not lawful unless she marries another person.[4]
10. Wakie relates from Maawiya bin Abi Yahya that a man came to Hazrat Osman, and said that he had pronounced one thousand *talaks* on his wife. He said that she was separated irrevocably by three *taleks*.

1. *Mowatta Imam Malik.*
2. *Ibid.*
3. *Ibid.*
4. *Ma'ani al Asaar,* by Tahawi (Urdu translation), Vol. 3, p. 81.

These and other such verdicts from the Companions of the Prophet pbh are relied upon by the advocates of *talak-i-bid'at* as furnishing proof of Ijma'. Generally they first challenge the authenticity of the Hadith of Ibn Abbas through Abus Sahba in which is related the practice of treating three *taleks* as one prevalent during the times of the Prophet pbh and Hazrat Abu Bakr and during the first two or three years of the reign of Hazrat Omar, on the ground that the verdicts or decisions of Ibn 'Abbas on the subject are to the contrary as seen above, and alternatively say that the verdicts of the Companions of the Prophet pbh in support of the action taken by Hazrat Omar against those who pronounced simultaneously or in one sentence three or more *taleks* on their wives make out a case of Ijma' which is unalterable.

The first point has already been discussed in detail. The question of authenticity of these traditions about the Companions of the Prophet pbh need not detain us since it will be evident from the discussion of Ijma' that contradictory views have been ascribed to most companions. But once the Hadith of Abus Sahba and Ibn 'Abbas is proved to be genuine and authentic, the above-mentioned verdicts will stand explained. Hazrat Omar had not given a *fatwa* in Sharia; in fact he was introducing a law which was contrary to the practice not only of his predecessor but also of the Prophet pbh. He was undoubtedly enforcing this law, as will be discussed later, in exercise of the authority conferred upon him by Sharia, as *ulil Amr* and it was binding upon all. It must be assumed that he enforced the law after consulting the Companions of the Prophet pbh, who formed his Shoora. It cannot be expected under these circumstances that anyone would give a verdict which was contrary to the law of the land. Nothing turns on these traditions of the Companions unless it is proved that they pertained to the period before the enforcement of the above law by Hazrat Omar. No such proof is forthcoming.

The question of Ijma' is raised by the scholars on a particular matter to establish the infallibility of the rule and its decisive nature which is good for and binding on all the generatoins to come and yet there is no Ijma' *inter alia* on the definition, scope and alterability of the rule having the authority of Ijma'. Generally the word ijma' is loosely used by the scholars in order to stress a point of view. It is in this sense that the word ijma' is used in respect of the enforceability of *talak-i-bid'at* which has throughout been a contentious issue—at least as contentious as the issue of genuineness or authenticity of various traditions, whether of the Prophet pbh or of the Companions. Allama Alusi writes in *Rooh ul Ma'ani*[1] وهذه مسألة اجتهادية كانت على عهد رسول الله صلى الله تعالىٰ عليه وسم ولم يرو في الصحيح انها رفعت اليه فقال فيها شيأ (This is a problem involving decision by use of Ijtihad. No case appears to have reached the Prophet pbh or he said anything about it). Tahawi[2] said: قال ابو جعفرقذهب قوم الى ان الرجل اذا طلق امرأتة ثلاثا معافقد وقعت عليها واحده (Many of the learned held the opinion that if three divorces are pronounced by a person at the same time, only one will be effective).

Allama 'Aini wrote in *Amdat ul Qari*, Sharah Bokhari[3] that "Taoos, Ibn Ishaq, Hajjaj bin Irtat, Nakhai, Ibn Maqatil and Zahiris hold that only one will be effective, if three *talaks* are pronounced together. These are great names indeed. Taoos is acknowledged as a great jurist, Hajjaj bin Irtat was the well known jurist of Kufa, Ibrahim Nakhai was the teacher of Imam Abu Hanifa and Muhammad bin Maqatil Razi was a pupil of Imam Abu Hanifa and Imam Muhammad.

Allama Shaukani writes in *Neil ul Autar*,[4] "one group of the learned has adopted the view that the repetition of *talak* is effective as one *talak* only and *Sahib i Bahr* attributes this rule to Abu

1. Vol. 2, p. 136.
2. *Ma'ani al Asaar*, Vol. 3, p. 75.
3. Vol. 9, p. 537.
4. *Neil a. Autar*, Vol. 2, p. 245.

Moosa Ash'ari, Hazrat 'Ali (one tradition), Ibn 'Abbas, Taoos, 'Ata, Jabir bin Yazeed, Hadi, Qasim, Nasir, Ahmad bin Eisa, Abdullah bin Eisa bin Abdullah and according to one tradition, Zaid bin 'Ali. Similarly a group of the learned in the later centuries like Ibn Taimiyya, Ibn Qayyim and others held the same view. Ibnul Munzar reported it from the followers of Ibn 'Abbas, Amar bin Deenar etc. Ibn Mughees ascribes it to Abdullah bin Masood, 'Abdul Rahman bin Auf and Zubair bin ul 'Awam. In his book namely *Alwasaiq*, Ibn Munzar related it from Muhammad bin Wazzah. He also relates verdicts to the same effect from the learned of Cordova, namely Muhammad bin Tabi, Muhammad bin ul Salam etc.

Maazri reproduces in his book *Moallam* the following opinion of Imam Abu Hanifa on the authority of Muhammad bin Maqatil Hanafi :

> "Three *talaks* pronounced at the same time are in the nature of revocable *talak*. This is one of the opinions of Imam Abu Haneefa and Imam Ahmad bin Hanbal".[1]

One of the two opinions of Imam Malik and the views of some of the pupils of Imam Ahmad and of Dawood Zahiri are the same. Hafiz Ibn Hajar writes in *Fath ul Bari*:[2]

> "The fourth point which is stressed is that the followers of the view of three *talaks* of the same sitting being equivalent to one *talak* is held only by a few. Consequently it cannot be acted upon. In reply it is said that this is said to be stated, by Hazrat 'Ali, Ibn Masood, 'Abdul Rahman bin Auf, and Zubair Ibn Moghees wrote this in *Kitab al Wasaiq* and attributed it to Mahammad bin Wazzah and Ghunwai ascribed it to a group of the learned of Cordova for example

1. *Ighosat al Lahfan* by Ibn Qayyim, p. 456.
2. Vol. 9, p. 363.

Muhammad bin Taqi bin Mukhallad and Muhammad bin 'Abdul Salam al Khishti and Ibn ul Munzar ascribes it to the followers of Ibn 'Abbas for example 'Ata, Taoos and Amar bin Deenar. In view of this it is strange that Ibn ul Teen expresses his certainty on their being no difference of opinion on this point and the difference being only in its being prohibited. As you see the difference is fully established."

Imam Razi wrote in *Tafseer i Kabeer* :[1]

"Difference then arose between those who voiced these opinions. Two opinions are attributed to them. One view which is adopted by many of the learned in religion is about the enforceability of one *talak* only where three are pronounced simultaneously and this view is closer to reason, because prohibition denotes that what is prohibited includes some preponderating invalidity and the opinion about the enforceability of three *talaks* pronounced as above would be an attempt to validate it which is not lawful. It is essential that the order should be of unenforceability."

Clearly according to this writing of Imam Razi, this view is not reasonable and there are many of the learned who do not hold it. Ibn Qayyim discusses this question succinctly and in detail. He refers to various traditions including that of Abus Sahba and remarks that if there was any Ijma' it was on the point of treating *talaks* as one which remained in force up to the first three years of the reign of Hazrat Omar. The number of the Companions, many of whom were learned in law and had the understanding to solve Sharia problems, must have exceeded one thousand, all of whom either decided according to this rule or maintained silence. In the battle of Yamama about twelve hundred Companions were martyred which proves the big num-

1. *Tafseer ul Kabeer*, Vol. 2, p. 248 ; also see p. 260 for the same principle.

ber of the Companions during the period of Hazrat Abu Bakr. There could be no better proof of Ijma' than the consensus either express or through silence of such a large number of companions. Ibn 'Abass expressly treated three *talaks* as one, though a different verdict is also ascribed to him. Zubair bin 'Awam and 'Abdul Rahman bin 'Auf held likewise. The same verdict is attributed to Hazrat Ali and Ibn Masood though verdict in favour of enforceability of three *talaks* is also ascribed to them.[1]

Among the Tabieen (generation after the Companions) Ikrima and Taoos held the same. Among Tabe-Tabieen (generation after the generation following the Companions) this view was held by Muhammad bin Ishaq, Khallas bin Amar, and Haris 'Akli. Thereafter, most of his companions, some Malikis, Hanafis and Hanblis adopted the same view. Abu Bakr Razi related it from Muhammad bin Maqatil; Imam Ibn Taimiyya said that his grandfather also gave the same verdict.[2]

During the present age Ahle Hadith and many Shafeis, Hanafis and others have adopted the same opinion. Allama Sheikh Muhammad Shaltoot held accordingly. Allama Rashid Raza writes in *Tafseer al Manar* that some Sharia jurists and intellectuals proposed to the Government of Egypt that in matter of three *talaks* it should revert to the Quran and the Sunnah, the arguments favouring which were given first in detail by Imam Ibn Taimiyya and then his pupil Ibn Qayyim in his books, *Eilam ul Muwaqqieen, Ighasat ul Lahfan,* and *Zad ul Ma'ad.* They received support from Imam Shaukani, Siddiq Hassan Khan and other Ulema (learned in Sharia) from India. In November, 1973 a Seminar of Ulema of Ahl Hadith and Hanafi Ulema was held in Ahmadabad in India. Important articles which were contributed in the Seminar were compiled in the form of a book named *Ek Majlis ki Teen Talak.*

1. *Elamul Muwaqqieen* (Urdu translation), Vol. 5, p. 802.
2. *Ibid.*, p. 803.

The articles justify the reversion to the Quranic and the Sunnah *talak*. The contributories are Ulema of such status as Allama Saeed Ahmad Akbar Abadi. There is an article to the same effect published in the same book (printed in Lahore), by Maulana Peer Muhammad Karam Shah now Judge of the Shariat Appellate Bench of the Supreme Court of Pakistan, Allama Waheed ul Zaman who translated Abu Daud in Urdu added a note supporting this view below the Hadith of Abus Sahba that the order of Hazrat Omar (enforcing *talak-i-bid'at*) cannot be acted upon since it is proved from the Hadith of the Prophet pbh that three *talaks* are to be treated as one *talak*.[1]

Strong arguments in favour of this view are given by Maulana Omar Ahmad Osmani, a pioneer among the Ulema of the age who interpret Sharia rationally.[2]

It may be noted that the Shias never agreed with the enforceability of *talak-i-bid'at*. They consider such *talak* absolutely void. This view was also shared by Ibn Ulya and Hisham bin al Hakam.[3]

It is not therefore correct to say that there has ever been an Ijma' on the enforceability of *talak-i-bid'at*. To give it the name of infallible, decisive and unalterable Ijma' is not only to ignore the rule of Ijma' but also the difference of opinion on the point which has persisted throughout, for almost the last about fourteen centuries. Scholars of repute who favour *talak-i-bid'at* did not agree with the applicability of the principle of Ijma' to this question.

There is nothing in the Quran which may justify *talak-i-bid'at*. The Sunnah of the Prophet pbh does not justify it, as is clear from the above discussion. The Hadith of Abus Sahba

1. *Abu Daud* (Urdu translation), Vol. 2, p. 178.

2. *Fiqh ul Quran* by Maulana Omar Ahmad Osmani, Vol. 2, pp. 205-284.

3. *Al Mughni*, Vol. 7, p. 94.

is challenged by those who advocate *talak-i-bid'at*. If the two traditions of Taoos reporting from Ibn 'Abbas that Hazrat Omar made *talak-i-bid'at* enforceable, are excluded from consideration there is nothing left to justify *talak-i-bid'at*. In such case the historical origin as stated by Ameer Ali would stand proved that the Omayyads introduced this form of *talak*. But there appears no reason to disregard the origin of the rule as stated by Ibn 'Abbas. Those who challenge its authenticity, had to proceed on its basis to lend it the legal cover of Ijma'. There are some who relied upon it specifically. Tahtavi[1] wrote: انه كان فى الصدر الاول اذا ارسل الثلاث جملة لم يحكم الا بوقوع واحده الى زمن عمر رضى الله عنه ثم حكم بوقوع الثلاث سياسة لكثرة بين الناس. (During the early years if three *talaks* were pronounced in one sitting they were treated as single *talak*). This remained the rule) till the reign of Hazrat Omar when he passed order of enforcement of three (as three) as a matter of siyasah on account of their excessive exercise among the people). Qahastani said the same thing.[2]

It appears clear that Hazrat Omar introduced this rule in order to curb the mischief. It was a lesson to those who made haste and then regretted their action. To enforce the three *talaks* as irrevocable was to punish them for their recklessness which amounted to playing with the injunctions of Allah and teasing their wives as was the custom during Jahiliyya (period of ignorance before Islam). Notwithstanding the injunctions that three *talaks* pronounced in a particular manner would make remarriage with the divorced wife illegal and prohibited, and the direction to be kind to women who are divorced, and in spite of the injunction not to tease them people pronounced, as before Islam, one hundred *talaks*, one thousand *talaks* or *talak* numbering as the stars in heavens. The rule was introduced to curb these un-Islamic tendencies. Dr. Muhammad Husain Haikal the

1. Tahtawi on the marginal notes on *Durre Mukhtar*, Vol. 2, p. 105.
2. *Jame ul Rumuz*, by Qahastani, p. 321.

well known Egyptian writer writes in his book *Omar ul Farooq*[1] on this point :

> "It appears most probable that during the period of the reign of Hazrat Omar those who divorced their wives did not treat them with kindness and benignity. The reason was that large number of captive women had come from Syria and Iraq. The people of the Arabian Peninsula were enchanted by them. They began divorcing their wives hastily and indiscriminately by the formula of pronouncing three *talaks* at one time, in order to please those on whom they doted, so that they might feel gratified, that they exclusively possessed their hearts. Besides there were other causes too, on account of which the people of the early period of Islam had made divorce a jest or plaything with a view to cause distress. One of the reasons was that when somebody wished to marry a free Arab or non-Arab woman, she would stipulate that he should *talak* his wife irrevocably so that she might not remain lawful to him without Halala (marrying another husband). If the husband remarried his former wife after Halala there was so much unpleasantness in the house that life became unendurable."

Muhammad Husain Haikal writes further :

> "This was *ijtihad* of Hazrat Omar which was opposed after him by many jurists. In the present age too a group of jurists is opposed to it. But it neither brings blame on Hazrat Omar nor on those who oppose him (oppose this ijtihad). The decisions of Hazrat Omar and other Companions given on the basis of their personal opinions were not of binding nature, nor was it claimed that only they were right. They were

1. Urdu translation, p. 683.

treatted as opinions only, which if correct, were from Allah and if incorrect were of the persons from whom they emanated. He (Hazrat Omar) repented before Allah on such occasions."

He further writes that Hazrat Omar used to say :

السنة ما سنة لله و رسوله لا تجعلوا خطاء لرائى سنة للامة

(Sunnah is that which is established from Allah and His Prophet as Sunnah. Dot't make an erroneous opinion as Sunnah for the Muslim community).

Al Jaziri wrote in *Kitab ul Fiqh 'alal Mazahib al Arbaa* :

"But it is a fact that Ijma' is not proved on this matter. Many of the Muslims opposed it. Ibn Abbas was definitely one of the Mujtahids who can be relied upon in matters concerning religion. As already stated it is permissible to follow him. It is not however obligatory to follow Hazrat Omar in a matter decided on the basis of his opinion merely because he also happened to be a Mujtahid. The agreement with him of the majority does not make it incumbent that he should be followed. It is possible that he enforced it for the sake of retribution when people were divorcing in a manner contrary to that provided by Sunnah, because the requirement of Sunnah is that the *talaks* may be pronounced on different occasions as stated above. Whoever dares to divorce by pronouncing *talaks* at the same time contravenes the Sunnah, which demands that he should be visited with retribution.

Briefly speaking those who say that three divorces uttered in one sentence only amount to one *talak* and not three, act reasonably because during the regime of the Prophet, pbh the great Caliph Abu Bakr and the first

two years of the reign of Hazrat Omar, they were treated as one *talak* only. The Ijtihad of Hazrat Omar made after that time was opposed by others. To follow the opponents should be as essential as to follow Hazrat Omar. Allah did not make us responsible for discovery of what is certain in non-essential matters because it is practically impossible."[1]

To remedy the evils which become rampant the rule of *bid'at* form of *talak* was enforced. The ground given by Hazrat Omar for enforcement of the rule proves that it could only be a temporary measure for reform of the society and in public interest. It was not meant to last and remain in force in perpetuity, so as to make people forget and completely disregard the Quranic and the Sunnah divorce and to make the women folk absolutely subservient to the whims of the male. The intention of the injunctions of *talak* is to provide safeguards for keeping the family an integrated whole. Now the opportunities provided to the spouses for reconciliation and arbitration are rendered of no practical value. This is proved from the fact that nearly the entire fiqh on the subject of *talak* is based on *talak i bid'at* and there is very little concerning the Quranic and the Sunnah form of *talak*. It would not be surprising that further research in the matter may establish a connection between the Omayyad monarchs, chiefs, courtiers and wealthy persons of the realm and the perpetuation of a transient and temporary law which is held to be prohibited by all except a few *e.g.* Imam Shafe'i. It is called *talak i Moharram* (prohibited *talak*) and yet the anomaly is that what was lawful in Sharia and approved by the Quran or the Sunnah has not been practised and what is prohibited is the rule of conduct almost throughout the history of Islam.

It is said that Hazrat Omar himself regretted the enforcement of this rule :

1. *Kitab al Fiqh alal Mazahib al Arba'a*, Vol. 4, pp. 343-344.

"Hafiz Abu Bakar Ismaili has reproduced in *Musnad i Omar* the report from Abu Ya'ala who heard it from Saleh ibn Malik who related from Khalid ibn Yazeed ibn Abi Malik who related from his father that Omar bin ul Khattab used to say that : 'I have never regretted so much as three of my measures—(I wish) I had not declared *talak* as *haram* (prohibited, *i.e.* had not issued the rule for making the woman unlawful), I had not caused the manumitted slaves to marry and I had not issued the order to kill women who lamented and mourned over their dead."

After reproducing this tradition Ibn Qayyim explained the first regret:

"It is well known that Hazrat Omar did not mean by it that he had prohibited the revocable *talak* which is made lawful by Allah and whose lawfulness is established beyond doubt and expressly by the Sunnah of the Prophet pbh. Similarly it cannot mean that illegal divorce over the illegality of which there is Ijma' of the entire Muslim Community, *i.e.* to divorce a woman during menstruation or in a *tuhr* in which the husband had carnal relation with her, nor can it mean the divorce pronounced prior to valid retirement with the wife about which is the divine injunction that : 'It is no sin for you if ye divorce women before ye have touched them and ye appointed unto them a portion.'[1] It is not probable that Hazrat Omar means any of these matters. It is, therefore, established conclusively that he meant the making of woman unlawful by the pronouncement of three *talaks*."[2]

1. Q. 2. : 236.

2. *Fiqh ul Quran*, Vol. 2, p. 244, *cf. Ighasat ul Lahfan* by Ibn Qayyim, Vol. I, p. 351.

The order of Hazrat Omar was not a Sharia order. It was only in the nature of an administrative law which was promulgated to bring home to men of the Arabian Peninsula that if they divorce their wives by three *talaks* the separation will be irrevocable and they will not be able to remarry their wives unless some other men marry them and enjoy intimacy with them. The women, who according to their sense of honour should remain inviolable except by them were put to risk of shame by their own conduct. Hazrat Omar also punished them with stripes for having committed an unlawful act which was a sin. This was for the God-fearing people of that age a double retribution so that they could desist from that act. The result may be judged from the fact that cases are available in the reign of Hazrat Omar when revocable *talak* was given by husband to the wife and he or the wife having expired during *'iddat* the question of inheritance was decided in favour of the living spouse.

The *ratio decidendi* of the order of Hazrat Omar proves that the order could last till the society was reformed. This is also the settled principle in Fiqh. The rule is : ما ثبت با لضرورة فهو يتقدر بقدر الضرورة (Whatever is made lawful for necessity shall be in force till the necessity ceases). But that ratio is not applicable to he Indian subcontinent where the generality of people do not know anything about the Quranic *talak* or *talak-i-Ahsan*. They do not even know that less than three *talaks* is also allowed in Islam. Even educated people think that *talak* should be *ba'in* (irrevocable) and this purpose can be achieved through three pronouncements only. Can the ratio of Hazrat Omar's order apply to such society. The poor people! they do not even know that the *talak* which they are pronouncing is *haram* (prohibited) and by resorting to this manner of *talak* they are committing sin.

Once it is held that the *talak* in this form is prohibited and is a sin, does it not follow that the people should be saved or

rather prevented from committing a sin and doing an act which is prohibited? If Hazrat Omar could, in the large interest of the people, on the principle of Sadde Zarai change the rule of the Quran and the Sunnah on what logic is the Legislature debarred from preventing what is *haram* and from comitting sin? The answer to the question must be that there can be no bar to the prevention of what is prohibited and is unjust and unlawful.

Egypt took the lead in 1929 and passed a law that a divorce accompanied by a number expressly or impliedly shall count only a single divorce and such a divorce shall be revocable except when three *talaks* are given one in each *tuhr*.[1] Such law was passed in Sudan in 1935,[2] in Syria in 1953,[3] in Iraq in 1959,[4] and in Pakistan in 1961.[5] Similar laws were passed in Morocco,[6] Jordan,[7] and Singapur.[8] In Tunis the enforcement of *talak* is subject to the decree of the Kazi.

There are certain principles of legislation which must be kept in view as they justify the order of Hazrat Omar in the circumstances of the social norms of those times many of which were the remnants of pre-Islamic usage (*urf* and *a'adah*).

The main principle is that of *Zarai* ذرائع which has two aspects : *Fathe Zarai* and *Sadde Zarai* (سد ذرائع و فتح ذرائع). The first is positive and the other negative in character. Usually the word '*Zarai*' means medium, instrument, means or device. Some jurists for example the Maliki jurist Qarafi uses the term

1. *Qanun ul Asri*, No. 25 of 1929.
2. *Aaili Qanun*, Sudan No. 41 of 1935 (Family Law of Sudan).
3. *Qanun ul Ahwal ul Shakhsia*, Syria of 1953 (Personal Law).
4. *Qanun ul Ahwal ul Shakhsia*, of Iraq, No. 188 of 1959.
5. See *Majmua i Qawaneen i Islami* by Dr. Tanzeel ul Rahman, Vol. 2, p. 563.
6. *Mudassinat ul Ahawal ul Shakhsia*, Morocco.
7. *Qunun i Huquq ul Ahwal ul Alla*, Jordan.
8. See *Majmua-i- Qawaneen-i-Islami* by Dr. Tanzil-ur-Rehman, Vol. 2, p. 563.

wasilah (وسيلة). *Zarai* or *wasila* mean anything ro action which becomes a means or serves as an instrument for the existence of another thing or the occurrence or the commission of an act. If it becomes a means or serves as an instrument for the occurrence or the commission of something evil or unlawful, it will also be considered unlawful; if it is the only means or instrument for an obligatory thing or act it will be considered obligatory. Imam Qarafi[1] says : (ما لا يتم الواجب الابه فهو واجب الوسيله الى افضل المقاصد افضل الوسائل والى اقبح المقاصد اقبح الوسائل والى ما هو متوسط متوسطة (An act which is the means to the (realisation of the) best objective is the best of means; an act which is the objective is the best of means; an act which is the means to (the realisation of) the worst objectives is the worst of means; and an act which is a means to (the realisation of) a medium type of objective is the middle of means.

This is briefly the meaning of the principle of *Zariah*.

Applying this principle, the legislature can issue a law either prohibiting something lawful which has become a means to the commission of an unlawful act, or the occurrence of an unlawful thing, or requiring the citizen to do something which though not compulsory or obligatory has become the only available means to the realisation of an objective of Shariah or to the compliance of an orders/commandment of the Shariah. There are a number of examples of the application of the principle both in the Quran and the Sunnah. In his masterpiece *E'ilam ul Muwaqqieen*, Ibn Qayyim has given ninety-nine examples of the application of the principle of *Zariah* of which the negative aspect *i.e. Sadde Zariah* is more frequently used. The legislation has to ensure on this principle:

(1) *Daf' al-Haraj* (removal of unnecessory tightness).
(2) *Raf' al-Mashaqqah* (lifting of difficulty and hardship).
(3) *Yusr* (convenience) and

1. *Al Furuq*, Vol. 2, p. 32.

(4) *Qilat-i-taklif* (reduction of legal responsibilities . .[1]

These principles have been discovered by the jurists who are experts in Usul ul Fiqh, from the Quran and the Sunnah. Shatibi has discussed this principle in detail. Examples are given where the lawgiver prohibits the commission of a lawful act in order to avert mischief. One or two examples will suffice :

1. The Prophet pbh refused to kill the hypocrites on the ground that he will be blamed for killing his companions. To kill them for the mischief they created in the Ummah (community) would have been a lawful act. But this would have become the source of blame which would have caused more damage to Islam.[2]

2. The Prophet pbh prohibited the cutting of hands of thieves during war because of the apprehension that the convict may associate with the non-Muslims. The principle is extended to all *hudood*. Hazrat Omar similarly suspended the punishment of cutting of hands during famine because people are obliged to satisfy their hunger and save them from starvation, from the food belonging to others.[3]

3. It is permitted to sell or store articles of food in the hope of higher profits. But if hoarding is apprehended which may cause the essential commodities to disappear from the market, with the intention that the public may be forced to purchase those commodities at a very high rate it is permitted to fix rates and prevent hoarding which is a source of exploitation of the people.[4]

1. Judgment of Federal Shariat Court on 'The Press and Publications Ordinance.'

2. *Nazaryat al Maslaha fi Fiqh il Islami* by Dr. Husain Hamid Hassan, p. 220.

3. *Ibid.*, p. 222.

4. *Idib.*, pp. 228-229.

4. The payment of bribe is prohibited but according to Shatibi it is permitted to pay it for removal of *zulm* (ظلم oppression and iniquity) if it is irremovable otherwise.[1]

There are a number of maxims for the applicability of this rule which is based upon *maslaha* (مصلحه the principle of advancing the general interest) *e.g.* الضرر يدفع بقدر الامكان (*Zarar* or harm or injury should be avoided as far as possible) and درء المفاسد اولى من جلب المنافع (to avoid the *mafasid* or mischief is better than to acquire *manafa* (*i.e.* profit or advantage). During the reign of Hazrat Omar, the *nikah* between a Muslim male and a female from among the peoples of the Books was legal. Hazrat Omar prevented some of the companions of the Prophet pbh from marrying Jewish girls.[2] The order of Hazrat Omar respecting the three *talaks* is based upon the principle of *Zarai*. It is unnecessary to reproduce the opinion of Dr. Husain Hamid Hassan from his book *Nazaryat ul Maslaha fil Fiqh il Islami* because it would amount to repetition of what has already been stated. Suffice it to say that he held it to be an instance of acting upon the principle of *Sadde Zarai* in the field of legislation, by that great genius of early Islam.[3]

It is very strange that all actions of Hazrat Omar are treated as Shariah for the posterity, though many of them were in the legislative field and could be taken as model for the legislators in Islam.

It is evident that if what is prohibited is made effective for reasons of public interest and for elimination of a particular mischief, such a law cannot be permanent in character. Its effect can last as long as the mischief likely to be removed, endures. The law must therefore change with the change

1. *Nazaryat ul Maslaha fi Fiqh il Islami* by Dr. Husain Hamid Hasan, p. 204 *cf. Almowafiqat*, Vol. 2, p. 3526.
2. *Ibid.*, Maslaha, p. 229.
3. *Ibid.*, p. 232.

in circumstances on another principle that يتغير الحكم بتغير الزمان (the law changes with the change in time which means change in circumstances). The principle is disscused by Allama Shami[1] as follows :

> 'It is clear that there are certain matters proved by express *nass* (Quran or Hadith) which have been described by us in the first chapter. Other matters are proved by Ijtihad and use of Ra'y (reasoning). Some of such matters are decided by the mujtahid in the light of custom and usage of his time, though if those Mujtahids had been in the present age their decisions (on the subject) would have been different and contrary to their own former opinions. For this reason one of the important conditions of Ijtihad is that the Mujtahid should be well conversant with the custom and usage of the time and should be an expert in determining *maslaha* (what is in public interest) of the age,' because many orders change with the change in time.'

Comparing the circumstance in which Hazrat Omar passed the order it would be clear that the same order is not justified in the present age. The provision in section 7 of the Muslim Family Law Ordinance, 1961 is therefore amply justified in Sharia.

The section provides for the machinery of arbitration for reconciliation of the differences between the spouses which is a commendable step.

An objection is raised that the section does not deal with a case where a person pronounces three *talaks* in three different *tuhrs* in which case the woman cannot remarry the same husband without undergoing the ceremony of a genuine marriage with another husband. *Ex facie* the objection appears to have

1. *Naasshar al Harf fi Binal, baad al Ahkam alal Urf*, p. 18.

merit. But the clear answer is that the section enforces *talak i Ahsan* and discourages even that form of *talak* in which more than one divorce may be pronounced. This is in accordance with the view of Imam Malik who was not in favour of pronouncing more than one divorce because it is sufficient to serve the purpose.

Another objection is that according to the section it is not possible for the male to revoke the *talak* without the consent of the wife. This objection is based on clear misreading of the section which does not make such a provision nor does it prevent the husband from revoking the *talak*.

A third ojection is that if the period of ninety days starts from the date of information to the chairman, from which point of time will the *'iddat* be calculated? And if the period of ninety days expires from the date of *talak* and ninety days have not passed from the date the matter was referred to the Chairman, the right of revocation shall remain vested in the husband, despite the finality of the divorce according to the injunctions of the Quran.

There is no provision justifying the second inference about subsistence of the right of revocation beyond ninety days. The difficulty, if any, is however, removed from the judgment of the Supreme Court of Pakistan in Ali Nawaz Gardezi *v.* Muhammad Yousaf.[1] It was held that the failure to give notice of *talak* to the Chairman, would amount to revocation of *talak*. This would mean that *talak* shall be deemed to be pronounced on the day information about it is furnished to the Chairman. It has already been noticed that there are various ways of revocation of *talak*—some are express while others are implied. In view of the state of law as declared by the Supreme Court of Pakistan, which the husband is presumed to know, his inaction will amount to revocation. Moreover revocation can also be by force (*ikrah*). The authority of the

1. P L D 1963, S C 57.

legislator and the Supreme Court is legally sufficient for the legality of this new form of revocation.

Another objection is about the *'iddat* period of ninety days which is made obligatory for all *i.e.* (*a*) those for whom there is no period of *'iddat* (those with whom the marriage was never consummated); (*b*) pregnant women who deliver the child before the expiry of ninety days and (*c*) women who menstruate and whose *'iddat* is three menstruations which is less than ninety days.

According to the Quran the period of ninety days forms the period of *'iddat* for women whose periods cease on account of age and those who did not have menstruation on account of youth. For those who have menstrual periods the *talak* should be pronounced during a *tuhr* when the husband did not have carnal connection with the wife and the period of *'iddat* is three menstrual periods. Despite this the popular notion is that the *'iddat of* divorce by which is meant *talak-i-bid'at*, is ninety days while the *'iddat* for death is four months ten days and this has never been corrected by the Ulema. The question, therefore, is whether there is any justification in fixing the time of ninety days for such a contingency. It may be stated that various jurists have tried to fix the maximum time of three menstruations but the fixation of sixty days or more or less as attempted by the jurists is arbitrary. If a person divorces his wife in the beginning of the *tuhr* the period of three menstrations may be equal to near about ninety days. The best calculation is the one made by divine ordinance in the chapter of Divorce in the Quran : "As for such of your women as despair of menstruation, if ye doubt, their period (of waiting) shall be three months, alongwith those who have it not."[1] This was explained by the jurists as being the substitute of three menstruations. While dealing with the difference of views among the Shafe'is and the Hanafies whether the *'iddat* lasts

1. Q. 65 : 4.

the three periods of purity or three menstrual periods it is said in *'Ain ul Hedaya* that the objection that menstruation is at most for ten days in each month is easily refutable because three menstruations take three months to occur...It therefore appears that months (in the above verse) are substitutes for menstruations.

The correct calculation, therefore, is that three periods would mean three months which is a matter which can be calculated easily without any proof. But if the matter is to be determined on the basis of the menstrual periods, it would require proof. The jurists have given finality in this respect to the woman's word. But this has ceased to be practicable in this age when few witnesses tell the truth. This may require recording of evidence in every case. The fixation of time is, therefore, a measure for avoidance of complication in each case and to regulate the matter by a formula which has divine sanction. This does not appear to be objectionable.

The objection about the *'iddat* of a pregnant woman and one with whom marriage is not consummated stands on a different footing. The *'iddat* of a pregnant woman is till she bring forth her burden'[1] whether it be before ninety days or after ninety days. The period of three months can in no circumstances be a substitute for this period and the finality of *talak* depends upon the bringing forth of burden. This period can neither be prolonged nor shortened. Section 7 of the Family Laws Ordinance provides that the *'iddat* of a pregnant woman delivering before the expiry of ninety days' period shall be ninety days. This is obviously repugnant to Quran which fixes the time of delivery as the time of termination of *'iddat*.

Women with whom the marriage is never consummated stand finally divorced by the pronouncement of one *talak*. There is no period of *'iddat*, waiting or probation for them.

1. Q. 65 : 4

The finality of their divorce cannot be postponed on any principle, whatsoever. The Government's attention has been drawn by the Federal Shariat Court to this repugnance of the provision of section 7 of the Family Laws Ordinance, with the Quran.

It is said that the provision of arbitration should be precedent to *talak*, but in section 7 it follows *talak*. There is no bar in the Ordinance to arbitration prior to *talak*. Hence the objection loses force. It cannot, however, be denied that the provision is very sound and is in compliance with the spirit of the Quran that the spouses should have opportunities to reconcile.

As already noticed the public is generally ignorant about the letter and spirit of *talak* in the Quran. It is time that they are informed about it through the information media to enable them to regulate *talak* in the manner provided by the Quran and the Sunnah. They should also be informed that *talak-i-bid'at* is *talak-i-moharram* and that divorce is a matter of last resort and not a tool of oppression in the hand of the male partner.

CHAPTER 9

RIGHT OF WOMEN TO SEPARATE

SECTION 1—NATURE AND SCOPE

Islam was a pioneer in introducing the right of women to seek dissolution of marriage on various grounds including incompatibility of temprament which renders it impossible for the parties to live within the limits ordained by Allah. As a general rule neither the Habrews nor the Pre-Islamic Arabs recognised the right of divorce for women.[1] The Quran says, "And they have rights similar to those of man in kindness"[2] and then adds, "And men are a degree over them."[3] In the context of *talak* this dictum may apply to the distinction that while man can initiate the procedure of *talok* by his simple volition, though there is at least one school of thought which now is practically extinct, which held that the reason for divorce by him should be tested by an unbiased judge, the women's right to dissolve marriage either accrues as a result of a pre-nuptial contract, or is secured by a compromise with the husband, or can be exercised by filing proceedings of dissolution of marriage in Court. If the principle which can be evolved from the Quranic and Sunnah *talak* be kept in view that *talak* is a matter of last resort and is the ultimate remedy for an irremediable malady, and then are considered the grounds on which a woman can claim dissolution of marriage, the conclusion would be unavoidable that women are in a stronger position than men ; they enjoy more favourable treatment. Perhaps if the Mutazilas had held the field and the divorce by a male had been subject to the decree of the Court, the point of favourable distinction would have been soon realised. The reason evidently is, that while man is a degree over woman

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 446.
2. Q. 2 : 228.
3. *Ibid.*

he also incurs many liabilities, and failure to discharge those liabilities gives her a cause of action for dissolution of marriage. The male belongs to the physically stronger sex and is in a position to tease her, assault her, and use physical violence on her. This obviously gives her a cause of action.

On the other hand, if *talak* is *abghadul halal* (ابغض الحلال most detested of all lawful matters) which means that *talak*, unless it be unavoidable, is disapproved, the initiation by a woman of *khula* and obviously dissolution—except for a strong reason is not approved. The Prophet pbh said that a woman who seeks *khula* without strong reason will not be entitled to the fragrance of paradise. The exact words of the Hadith are (فحرام عليها رائحة الجنة the fragrance of paradise is unlawful for her).[1] To the male, however, the Quran says:

وعاشروهن بالمعروف فان كرهتموهن فعسى ان تكر هو شيئا و يجعل الله فيه خيرا كثيرا .

Q. 4 : 19... And consort with them in kindness, for if you hate them it may happen that you hate a thing, wherein Allah hath placed much good.

As seen in the chapter of divorce, the injunction of kindness towards women is the main theme in matters of *talak*.

There are various ways in which women can claim separation from the husband. It may be clarified that tais separation is very much unlike the separation of the laws in the West in which it is distinguished from divorce. In the context of Islamic Law separation means absolute separation which permits the woman to remarry. Separation can therefore be claimed by a woman if—

(1) the power to divorce is delegated to her by the husband,

1. *Tirmizi*; *Ahmad*; *Mishkat ul Masabih*, translation by Fazal Karim, Vol. 2, p. 702.

(2) the husband is prepared to release her as a result of compromise, conditional or unconditional,

(3) she is in a position to prove before a court of law the impossibility of her living with the husband within the limits of Allah,

(4) she is able to prove before a Court of law any of the grounds on which dissolution of marriage is premitted, and

(5) the husband falsely accuses her of adultery.

In the first case she can exercise the delegated authority herself and pronounce divorce. This is known as *talak-i-Tafwizi.* Separation obtained in the second manner is known as *mobarat* (مباراة). The third method of obtaining separation is called *khula,* (خلع) the fourth as dissolution of marriage and the fifth as *lian* (لعان).

SECTION 2—TALAK-I-TAFWIZ

The Muslim Law allows the husband to delegate his power of repudiation to the wife. If the delegation be accepted by the wife and the right exercised, it would take effect as an irrevocable divorce under the Hanafi Law.[1] Although under the Shiah doctrines, an option given to the wife has no effect, nor is a conditional *talak* valid, express authority may be reserved to the wife to dissolve the contract on breach of any of its stipulation.[2]

The right may be delegated in a prenuptial agreement, contract entered at the time of marriage or after marriage.[3] The right is recognised by section 8 of the Muslim Family Laws Ordinance, 1961 which reads :

S. 8. *Dissolution of marriage otherwise than by talak.*—

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 455 *cf. Fatawa-i-Alamgiri,* Vol. 1, p. 543, Muhammad Amin v. Amina Bibi, A I R 1931 Lah. 134.

2. Ameer Ali, *ibid.*, p. 457.

3. *Muslim Law of Divorce* by K. N. Ahmad, p. 207 ; *Ibn Abidin,* Vol. 2, p. 497.

Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of section 7, shall, *mutatis mutandis* and so far as applicable, apply.

Section 7 as already discussed provides for arbitration through an Arbitration Council prior to the *talak* obtaining finality. By section 8, cases of dissolution of marriage by *khula*, *mubarat*, other cases in which dissolution is obtained by a decree of the court as well as cases in which *talak* is pronounced by the wife in exercise of the power delegated to the husband, have also been made subject to the same procedure as cases of unilateral *talak* by the husband.

The origin of delegation of the authority to divorce is traceable to Q. 33 : 28 which reads :

يا ايها النبى قل لازواجک ان كنتن تردن الحيوة الدنيا و
زينتها فتعالين امتعكن و اسرحكن سراحا جيلا .

Q. 33: 28.—O Prophet! Say unto thy wives ! if ye desire the world's life and its adornment, come ! I will content you and will release you with a fair release.

The delegation may be conditional or unconditional. There are a large number of authorities of the Superior Courts of the Indian sub-continent about the validity or invalidity of conditions. Similarly the subject of kinds and forms of delegation and matters allied to them is discussed in great detail in the books of Fiqh but the scope of this book does not extend to the consideration of those matters. Mr. N. K. Ahmad has elaborated various details in his book, *Muslim Law of Divorce*, which can be consulted by those who may be interested.

SECTION 3—MUTUAL CONSENT TO SEPARATE

Mobarat—The only difference between *Mobarat* and *Khula* is that in the former the termination of marriage is affected

by mutual wish to separate while in the latter the offer accrues from the wife. According to Ameer Ali in *Mobarat* the aversion is mutual while in *khula* it is unilateral and is on the part of the wife.[1] The distinction as given in the *Hedaya* is more helpful :—

> A *mobarat*, on mutul discharge (signified by a man saying to his wife, 'I am discharged from the marriage between you and me,' and her consenting to it), is the same as *khula* that is to say in consequence of the declaration of both, every claim which each had upon the other drops, so far as those claims are connected with their marriage. This is the doctrine of Haneefa. Muhammad says that nothing is done away by either except what is particularly mentioned by both the wife and the husband. Abu Yousuf unites with Muhammad as to the *khula*, but with Haneefa as to the mutual discharge. The argument of Muhammad is that mutual discharge and *khula* are contracts of exchange, in which the circumstances expressly stipulated are also regarded and not those which are not stipulated. The argument of Abu Yousuf is that word *mobarat*, from its grammatical form bears a reciprocal sense, and therefore requires that the discharge be equally established on both sides; and this is general, yet the discharge in this case is restricted to those rights connected with marriage, as the design proves it to be so ; but *khula* only requires that the woman be freed from the restraint of her husband ; and as that is obtained by the dissolution of the marriage, it does not require that all its effects be terminated. The argument of Haneefa is that *khula* bears the sense of separation, and that is general, the same as a mutual discharge and conse-

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 467.

quently marriage is thereby terminated, together with all its rights and effects, the same as by a mutual discharge.[1]

The distinction between *Khula* and *Mobarat* is rather fine. In a way *Mobarat* falls within the category of *Khula*, the only distinction being, that one rests upon mutuality and it is not required to seek the assistance of the Court for its fulfilment; while in the other the wife, in case of refusal of the husband to release her can file proceedings (for *Khula*) in court. The main distinction between the views of Imam Abu Hanifa and Imam Abu Yousuf on the one hand and of Imam Muhammad on the other is on the question of discharge of mutual marital liabilities of both. According to the view of Imam Muhammad this requires to be expressly stipulated. But the view of the other two Imams is that the discharge is automatic and is a consequence of mutuality in release from the marriage tie and restraints.

The injunction regarding dissolution of marriage in these manners is in verse 229 of Chapter 2, the relevant portion of which reads :

ولا يحل لكم ان تاخذو مما اتيتموهن شيئا الا ان يخافا الا
يقيما حدود الله فان خفتم الا يقيما حدود الله فلا جناح عليهما
فيما افتدت به تلك حدود الله فلا تعتدوها ومن يتعد حدود الله
فاولئك هم الظلمون ـ

Q. 2 : 229.—And it is not lawful for you that ye take from women, taught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by): Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the

1. Hamilton's *Hedaya*, p. 116.

limits (imposed) by Allah. Transgress them not. For whoso transgresseth Allah's limit, such are wrongdoers.

There are traditions which throw light on and explain the occasion and scope of *Khula*. It is related from Ikrima who related from Ibn 'Abbas that the wife of Sabit bin Qais came to the Messenger of Allah and said, "O Messenger of Allah, I do not reproach Subit in respect of character or religion but I do not want to be guilty of infidelity in Islam". So the Messenger of Allah said to her, "Would you give him back his garden?" She said: "Yes". The Messenger of Allah said: "Accept the garden and give her one *talak*."

In another version of *Bokhari* the words are:

فتر دين عليه حديقته فقالت نعم فردت عليه و امره فقا رقها

"Will you give back his garden to him?" She said: 'Yes.' So he returned it to him and he (the Prophet) ordered him and he separated her.)[1]

In another Hadith reported in *Ibn Moja*[2] it is related that Habiba daughter of Sohl, was the wife of Sabit bin Qais bin Shamas and he was a short statured and ugly man. She said: "O Messenger of Allah, by Allah, if I did not fear Allah, I would spit on his face when he comes to me." The Messenger of Allah said, "Will you return his garden to him?" She said, "Yes." So she returned his garden to him and the Prophet of Allah separated them.

As already seen, in case of *mubarat* no reference to the Qazi is necessary.[3] The Courts are not likely to get an opportunity to go into the question whether the mutual release was due to mutual aversion or any other reason. In *Al-Musawwa min Ahadith ul Mowatta*[4] Shah Wali Ullah said that 'even if she

1. *Bokhari*, Vol. 2 printed in Nur Muhammadi Press, p. 794.
2. *Ibn Moja*, Vol. I, p. 263.
3. Khurshid Bibi *v.* Muhammad Amin, P L D 1967 S. C 97 (117).
4. Vol. 2, p. 160.

obtains *Khulaw* ithout any reason (apart from personal dislike) it is lawful but not approved. The reason is that the Prophet pbh and the Companions never inquired from her (wife of Sabit) the reason for seeking *Khula*. In a case where *Khula* is the result of mutual arrangement, this matter has been placed at the moral plane rather than legal.

Among the Christians who are opposed to *talak* there is marked inclination towards liberalising the law of divorce. As pointed out in the *Muslim Law of Divorce*[1] Section 2 (d) of the *English* "*Divorce Reforms Act*, 1969," incorporated the principle of *Mubarat*. According to the Act the ground for divorce is that the marriage has broken down irretrievably. Section 2 provides the circumstances in which the marriage can be treated as broken down irretrievably. Sub-section (d) thereof provides one ground : "that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent *consents* to a decree being granted."

The Muslim Law allows the matter of incompatibility of temperament or aversion of the wife to be proved even by the evidence of the wife herself as is evident from the other above-mentioned two traditions. The English Law on the hand laid down certain condition which is in the nature of extraneous proof of the issue of breaking down of marriage irretrievably, and it is living apart for a continuous period of two years. But the provision of consent of the respondent to the passing of the decree undoubtedly proves that the Legislators had to accept the Islamic concept of *mubarat*.

I would add that even the principle of breaking down of marriage is the same principle on which *talak* is allowed as a last resort and *khula* is permitted, because it would then be no longer possible for the husband or the wife to remain within the limits imposed by Allah.

1. *Muslim Law of Divorce* by K. N. Ahmad, p. 1094.

SECTION 4—KHULA

According to *Hedaya* :[1]

> "*Khula*, in its primitive sense, means to draw off or dig up. In law it signifies an agreement entered into for the purpose of dissolving a connubial connexion, in lieu of compensation paid by the wife to her husband out of her property. This is the definition of it in *Jama Ramooz*.
>
> Whenever enmity takes place between husband and wife and they both see reason to apprehend that the ends of marriage are not likely to be answered by a continuance of their union, the woman need not scruple to release herself from the power of her husband, by offering such a compensation as may induce him to liberate her, because the word of God says, "No crime is imputed to the wife or her husband respecting the matter in lieu of which she hath released herself;" that is to say, there is no crime in the husband's accepting such compensation, nor in the wife giving it."

The definition and its elaboration envisage agreement of the husband to release the wife, which question has already been considered in the treatment of '*Mubarat*'. What is required to be considered now is the remedy of the wife in a case in which the husband's consent is not possible to obtain. The answer to this question is furnished by a Full Bench of the High Court of West Pakistan (Lahore Bench) in the case of Bilqis Fatima *v.* Najmul Ikram[2] and by the Supreme Court of Pakistan in Khurshid Bibi *v.* Muhammad Amin,[3] that the judge or the Kazi has the necessary jurisdiction to grant *Khula* to the wife despite opposition from the husband. It was further

1. Hamilton's *Hedaya*, p. 112.
2. P. L. D. 1959 (WP) Lahore 566.
3. P. L. D, 1967 S. C. 97.

held in those cases that the wife is entitled to *Khula*, as of right, if she satisfies the conscience of the court that it will otherwise mean forcing her into a hateful marriage.

The real but frail opposition to *Khula* emanates from those who interpret the Hadith about the wife of Qais bin Sabit as meaning that the Prophet only advised or persuaded Qais to divorce his wife and did not pass an order. But there are *asaar* (آثار traditions of the Companions) to the contrary. A man and a woman, who were husband and wife, appeared before Hazrat Omar because the woman wanted separation. Hazrat Omar advised her to live with the husband but she refused. On this, Hazrat Omar shut her up in a dungeon containing refuse, and kept her there for three days. He then asked her how she fared. She replied 'I swear by God, I never passed more peaceful nights'. Hazrat Omar asked the husband to give her *Khula* even if it be in lieu of her ear-rings.[1]

Rabi, daughter of Mao'oz, appeared before Hazrat Osman for a *Khula* in lieu of all that she owned. Hazrat Osman ordered her husband to take all that she had and divorce her.[2]

These traditions imply nothing but orders for *Khula*. The Prophet pbh never enforced his advice. There is a well known tradition. Barairah a slave girl was married to Mughees who was also a slave. She was freed and as a result of manumission was given the option to leave the slave husband. She exercised the option in favour of her release from him. Mughees whose love for her was well known, followed her weeping and broken-hearted. The Prophet advised Barairah to go back to her husband. She asked: 'Is this an order' ? The Prophet replied that it was a mere recommendation. She declined to go to him and said, 'I have no need of him'.[3]

1. *Kashful Ghumma*, reproduced in Lahore case, P L D 1959 (WP) Lah. 566.

2. See the Lahore case, *ibid.*

3. *Abu Daud* (printed Muhammad Saeed and Sons), Vol. 2, p. 190, Chapter, 147.

The tradition proves that people could distinguish between an order or command of the Prophet pbh and an advice. They knew that the advice of the Prophet pbh was in the last analysis, unenforceable.

Ibn Qayyim, after considering the different versions called it an order or decision,[1] from which he drew several conclusions. Hakim in *Almustadrak* (المستدرک), Ibn Abdul Barr in *Al Isti'ab* (الاستیعاب) Shaukani in *Neil ul Autar* (نیل الاوتار) (the last named (relying on Dar Qutani's version) are categorical in saying that it was the Prophet pbh who ordered the separation. Ibn Hajar Asqalani shares this opinion and doubts the authenticity of the Hadith which specifies that this was a case of *talak*. The fact that, as will be noticed, in case of disagreement between the husband and wife the Qazi can decree *Khula* or separation established it to be an order.[2]

The jurisdiction of the judge or the Qazi emanates from two verses of the Quran, *i.e.* Q. 2 : 229 and Q. 4 : 35. Verse 229 of Chapter 2 has been reproduced in this chapter. It includes the injunction about justification of *Khula* : "And if ye fear (وان خفتم) that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. The words 'if ye fear' (وان خفتم) are addressed to the community or اولی الامر منکم (those in authority from among you) and include the Qazi, who represents the community for adjudication of disputes.[3] The verse in chapter 4 is about the procedure to be adopted when breach between the husband and the wife is apprehended. It is as follows :

و ان خفتم شقاق بینهما فابعثو حکما من اهلهٖ و حکما من
اهلها ان یریدا اصلاحا یوفق الله بینهما ان الله کان علیما خبیرا

1. *Zad ul Ma'ad* (Urdu translation), Vol. 4, p. 147.
2. Khurshid Bibi V. Muhammad Amin, P L D 1967 S C 97.
3. *Ibid.*, See p. 115.

Q. 4: 35.—And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower and Aware.

Zamakhshari said, while commenting upon verse 229 of chapter 2 that : "And if you say that Imams and rulers neither take anything from nor give anything to the woman, I will say that both things are permissible in this way that in the first part of the verse the spouses are addressed and in the second part, the Imam and Rulers are addressed."[1]

Nasafi wrote : "And it is permissible to say that the spouses are first addressed and then the rulers."[2]

Baizawi said: "These words are addressed to the rulers as they are authorised to give orders regarding the giving and taking of compensation when the matter is taken to them."[3]

According to Qurtubi : "These words are addressed to the persons in authority and those exercising similar powers though not in authority (as officials)."[4]

Alama Alusi wrote: "The addressees are the persons in authority and not others."[5]

Maulana Mahmud ul Hassan translated the words as: "And if you people fear." In the margin the words "O Muslims" are recorded.[6]

1. *Al Kashshaf*, printed Matba Mustafa Muhammad, Egypt, 1354 A.H., p. 139.
2. *Madarik ul Tanzil wa Haqaiqal Tawil*, printed Cairo, 1936 A. D., p. 148.
3. *Tafsir al Baizawi*, Matba Mujtabai, Delhi, 1326 A. H., p. 150.
4. *Al Jami al Ehkam al Quran*, on verse Q. 2 : 229.
5. *Rooh al Maani*, Vol. 2, p. 140.
6. *Al Quran al Karim*, commentary by Allama Shabbir Ahmad Usmani, p. 45.

Peer Muhammad Karam Shah said nothing on this point while translating the verse but in his commentary wrote : "that in case of such development the women can approach the person in authority and demand *Khula*."[1]

There are some translations in which these words are translated as relating to the husband and wife but the language of the verse does not justify this translation.

The commentary of Ibn Kathir[2] contains in detail the different opinions about the scope of authority of the arbiters to be appointed under verse 35 of Chapter 4. It is stated that Hassan Basri was of the view that the arbiters have the right to bring accord among the spouses but cannot pass order of separation. This is the view of Qatada and Zaid bin Aslam. It is also so held by Imam Ahmad, Abu Saur and Daud. They argue that there is nothing in the verse to justify separation. But the other view is that they are Hakams (arbiters) and have the right to finally decide one way or the other. According to the learned the person in authority should appoint arbiters, one from each side and they have the power and authority to achieve by their efforts, whatever be possible. The first attempt should no doubt, be to reconcile the differences. If, the husband is to blame they can prevent the wife from going to him to oblige him to reform himself. He will be made liable to pay full maintenance to the wife. But if the fault lies with the wife, she shall not be awarded the maintenance and shall thus be forced to live with the husband amicably. Similarly they may also decide to arrange divorce or *khula* and order accordingly. In one such dispute Hazrat Osman appointed Ibn 'Abbas and Moawiya as arbiters with the specific instruction that they could bring about reconciliation between them as well as order separation. It is in *Musannaf Abdul Razzaq* that during the Caliphate of Hazrat Ali, a

1. *Zia ul Quran*, Vol. 1, p. 158.
2. *Tafsir Ibn Kathir*, on verse Q. 4: 35.

couple approached him for settelment of their differences. The relatives of both parties also accompanied them. Hazrat Ali appointed one arbiter from each party and said : 'Do you know what are your functions. The demand of your office is that if you wish you may remove the discord between the parties or you may separate them.' The woman said that she would agree to the decision of (according to the injunctions of) God whether it be reconciliation or separation. The man said that he hid not agree to separation. Hazrat Ali said, "By God you will have to accept (abide by) both the alternatives."

There is thus consensus of the learned on the point that the arbiters enjoy both the authorities. Ibrahim Nakha'i said that they can pronounce (on behalf of the husband) two or even three divorces. To the same effect is related from Imam Malik. This view is also ascribed to Imam Shafe'i. The view is favoured by Imam Abu Hanifa and his followers.[1]

Badruddin 'Ayini wrote in *Umdat ul Qari* : "One of the arbiters should be from the side of the man and the other from the side of the woman, but if such people who cannot bring about settlement are not available from the friends of the parties, it is permissible to appoint strangers. Verily if they differ, their order will not be promulgated but if they agree it will be enforced in its entirety without any delegation."

"But there is difference of opinion as to what is to happen if the arbiters agree on separating the parties. It is the opinion of Malik, Auza'i and Ishaq that it will be enforced independently of any it authority and without the permission of the spouses. But the Kufites, Shafe'i and Ahmad ibn Hanif are of apinion that they need permission because the right to divorce is with the husband ; if he agrees, well and good, but if he does not then the judge will enforce a divorce. Ibne Abi She'ba narrates of Hazrat Ali that he said that

1. See *Tafsir Ibn Kathir*, on Q. 4 : 35.

Allah has permitted the arbiters to join the spouses and to separate them. Sha'abi is of tht opinion that whatever is decided by the arbiters becomes enforceable. Abu Salma is of the view that if the arbiters wish they may bring the spouses together and if they wish they may separate (them). Mujahid is of the same opinion."[1]

Ibn Rushd writes that, "Imam Malik says that the Qazi will grant divorce, in place of the husband and the Ahli Zahir (followers of Daud Zahiri) say that the husband will be kept in prison till he himself grants divorce...Those who regard the well known foundation of divorce, say that divorce can proceed from the husband alone and those who consider the injury that results to the women in this respect, say that the Sultan will grant divorce on his behalf and they thus pay regard to the public welfare. This is known as Qiyas Mursal. Imam Malik is said to have acted on it but many legists deny this."[2]

Imam Ibn Qayyim while discussing the matter of dissension between the spouses first reproduced the Hadith about *Khula* and then relied upon verse Q. 4 : 35 about the appointment of arbiters. He referred to the difference of opinion between the learned on the question whether the arbiters were vested with the power of decision or they were mere agents. The opinion about agency is attributed to Abu Hanifa, Shafe'i and according to one of his utterance, to Imam Ahmad. It is also said that according to another of his utterance or saying, they are entitled to decide between the spouses. This is the view of Imam Malik and the Medinites. According to another pronouncement of Imam Ahmad as well as Imam Shafe'i they are Hakams (who can decide). Imam Ibn Qayyim says that this view is correct.[3]

1. *Umdat al Qari* by Badruddin 'Ayini, Vol. 9, p. 573.
2. *Bidayat al Mujtahid* by Ibn Rushd, Vol. 2, p. 101.
3. *Zad al Ma'ad*, Vol. 4 (Urdu translation), pp. 142-143.

Some jurists are very firm on the point that only the Sultan (person in authority) can give a decision on the question of *Khula*. Muhammad bin Sirin used to say that it was said by them (others whose names appeared in the context) that *Khula* is not possible, except before the Sultan.

Khula will take place only when the husband first tries to advise the woman against it. If she accepts the advice, well and good, otherwise, he might beat her. If she accepts, well and good otherwise, both will go to the Sultan. The Sultan will then appoint a Hakam from her family and a Hakam from his family. Each of the Hakams will convey what he heard from his client to the Sultan. Then if the Sultan comes to the conclusion that they should separate, he will separate them and if he forms the opinion that they should live together, he will order accordingly.[1]

Al Qastalani said that *Khula* is not valid in the absence of the Sultan. In the words of Ibn Abi Sheba, it must be in the presence of the Sultan.

Al Qastalani, then quotes the opinion of Abu Ubayd from which it appears that the principle that a judge (Sultan) has exclusive jurisdiction to decide disputes about *Khula*, is discovered from the words فان خفتم (if you fear) in verse Q. 2 : 229. He said: 'Abu Obeid argues on the basis of the Quranic verse, meaning "if you fear that they will not abide by the limits of God" and by the words of Allah, meaning "If you fear disagreement between them." He says that the fear is ascribed to others than the spouses and it is not stated that they both fear. So here the verse implies the public authorities.'[2]

Ali Khafif, however justified the authority of the judge on the basis of the Hadith of Sabit. Reference may be made to his detailed opinion.

1. *Al Mohalla* by Ibn Hazam, Vol. 10, p. 237.
2. *Irshad al Sari* by Al Qastalani, Vol. 3, p. 149.

He writes : "Does it not follow from this Hadith *Saheeh* (about Qais bin Sabit) that the Qazi has the right of ordering separation by *Khula* among the spouses when the wife takes her dispute with the husband to him and she is unable to tolerate his enmity and in such conditions that their mutual relations cannot endure in their present state and she is unable to maintain the limits ordained by Allah, with him? Then he (the Qazi) shall order their separation by *Khula* on return of the Mehr given to the wife by the husband. If they both agree well and good, otherwise the Qazi will decide between them and will impose his decision on them, when the wife is agreeable to it but the husband is refusing to accept it.

I consider this Hadith to lead to the conclusion that the direction of the Prophet pbh in the matter of *Khula* (separation) between Sabit and his wife, does not amount to a mere piece of advice or something praiseworthy obedience to which is not obligatory, as some legists have opined. It is clear that when the spouses presented their dispute before the Prophet pbh and the state of affairs had come to such a pass that despite faith and morality, there was no possibility of reconiliation, then the Prophet pbh could not have left the matter suspended without an immediate and absolute decision. Since contrary to this, there is no positive opinion of any legist, this conclusion is without any fault in view of the *Saheeh* Hadith."[1]

It would thus appear that practically all the jurists are agreed on the question of the judge's authority to decide the dispute when *Khula* is demanded by the wife and refused by the husband. The difference is either on the origin of the

1. *Faruq al Zauj fil Mazahib al Islamia,* by Ali Khafi—Egypt, p. 135.

authority or on the question whether the arbiters appointed in pursuance of the divine direction in verse 35 of chapter 4 are also vested with the authority to decide the dispute between the spouses. Most of the jurists conform to the view about the authority of the arbiters to decide. Ibn Qudama sums up that : "It is not required that *Khula* must be before a person in authority. So is said by Ahmad. He said *Khula* is permissible without the presence of Sultan. This is related by Bokhari from Hazrat Omar and Hazrat Osman (Allah be willing with them). Same was also said by Shuraih, Malik, Shafe'i, Ishaq and *ahlurrai* (rationalists). But it is related from Ibn Sirin and Hassan that it is not valid except before the Sultan (person in authority)."[1] Clearly, therefore, the authority of the judge to decree *Khula* is not disputed.

The Supreme Court of Pakistan[2] also relied upon the principle on which dissolution of marriage is allowed at the instance of the wife in case *inter alia* of impotency, mutilation or *Eila* (ایلا). Such decree can be passed on the basis of the divine injunction that the wife be either retained in kindness (امساک بالمعروف) or released with grace (تسریح باحسان) and the command to the husband not to cling to the woman, in order to cause her injury (ولاتمسکو هن ضرارا لتعتدو). "The Court also applied the principle of the Hadith *La darara wala daraara fil Islam* (لاضرر ولا ضرار فی الاسلام) Let no harm be done, nor harm be suffered in Islam). In this connection reference was made to the opinions of the jurists. The opinion of Jassas is to the following effect:

> "(Commenting on this statement Saeed b. Jabeer)—Abu Bakr says, the position is the same as in the case of *inin* (impotent), *majbub* (the mutilated) and *eila* (oath of abstinence) in which the Hakim (ruler) has the authority to adjudicate.[3]

1. *Al Mughni*, Vol. 7, p. 52.
2. Khurshid Bibi's case, P L D 1967 S C p. 97.
3. *Ehkam ul Quran*, Vol. 2, p. 231.

Sarakhsi said in *Al Mabsut* : "Here the husband is wrong doer in keeping her without needing her (due to impotency) and the judge has the authority to remove harm through divorce."[1]

Kasani said : "And the Prophet pbh said, 'let no harm be done nor harm suffered in Islam.' If it was not so, it would lead to a contradiction and that is impossible because Allah has made it obligatory for the husband to keep her in a becoming manner or part her with kindness' as Allah says, 'so keep them in becoming manner or part them with kindness.'[2] It is definitely known that to keep her in marriage while depriving her of husband's company is not *imsak bil Maaruf*. So it becomes obligatory on him to part her with kindness (*Tasrih bi ihsan*). If he leaves her himself (well and good) or the judge will act on his behalf in separating her."[3] This opinion pertains to impotents.

It is stated in *Hedaya* about the above disability that "When the period allowed by the judge passes, and the impotent husband does not cohabit with her, it is evident that the disability is natural. So the 'retaining with equity' is invalidated and separation with grace becomes incumbent upon him. If he persists, the Judge will act on his behalf, and he will separate them."[3]

There are three questions which have been given prominence by the jurists. The first question is about the grounds on which *Khul'a* can be granted by the Courts. Suffice it to say that the only ground as laid down by the Courts and as held by the jurists, according to the letter of the injunction in the Quran,[4] is that the wife may not be able to live within the limits ordained by Allah. The second question

1. Vol. 5, p. 97.
2. *Al Badai wal Sanai*, Vol. 2, p. 343.
3. In chapter, *Innin*. (عنين)
4. Q. 2 : 229.

is whether *Khul'a* amounts to divorce, separation or dissolution of marriage. Once it is held that *Khul'a* ends in separation which permits the wife to marry, it is not necessary to go into other problems which are purely legal in character. The third question pertains to the terms on which *Khul'a* may be granted. It is also a matter of legal details which is beyond the scope of this book. It will be sufficient to state that where the judge finds that husband is to blame for the aversion of the wife he may pass an unconditional order. It may, however, be clarified that the condition of restitution of husband's property is not without reason. The nature of the law of *Khul'a* can be better understood by a quotation from *Law in the Middle East*[1] :—

> "It is decreed that the fundamental principle of the marriage contract is that it is permanent and is to endure as long as the spouses live. But in order for it to continue it is not alone for the Shari'a to lay down the law that it is permanent ; the love which binds the two spouses together must continue also, for it is the tie on which the continuation of the true married life depends. But the spouses might develop a strong aversion to each other, thus making love difficult. In such a case one of three choices must be made : (1) To continue the marriage despite this strong aversion, thus giving rise to ill-will and rancour. The continuation of this situation would not be in the interest of the family; (2) Physical separation while preserving the married state. This would be an offence against morality and might drive the two parties to vice; (3) Divorce, which breaks the marriage bond and makes an act of ill-will out of what had originally been an act of blessing. This is the soundest

1. Pages 146-147 : Bilqis Fatima's case, P L D 1959 (W. P.) Lah. 566.

way, even though it means the destruction of the family.

"If then there must be divorce when aversion is strong, in whose hands shall the decision regarding divorce lie? Shall both parties decide it jointly, shall the law decide it, or shall one of the two parties decide it ?

"There is no doubt but that if the two parties agree on divorce it must be carried out. It is only necessary to see that this agreement has not taken place in a momentary fit of anger which might quickly pass away; Islam has made provision for such an eventuality as we shall make clear.

"There remain the other two cases, namely whether the judge is to determine when divorce can take place or whether this can be done by either of the two parties.

"If the woman wants a divorce it can take place only by decision of the Kazi because the husband has undertaken financial responsibilities with regard to this marriage, made an advance payment of the bride price and is to pay the balance upon divorce; he has furnished the house and borne many expenses. If the wife could divorce him on her own responsibility he would lose all that he had spent on her, it is therefore necessary for the Kazi to intervene in order to ascertain that she has requested a divorce because she has been wronged. If such is the case, then the husband bears the consequences and loses the money which he has spent on her. If it is established that the aversion is on her part and that it is the cause of her seeking the divorce, then the Kazi divorce them on condition that she reimburse the husband for all that he has spent on his marriage. This is the procedure of the school

of Malik which was the practice also of some of the companions of the Prophet pbh and their successors. The intervention of the Kazi was for the purpose of preventing the husband from being wronged if it were she who bore the aversion to him, so that the husband would not lose the money which he had spent on her.''

The language of the rule as formulated in this opinion is rather widely worded and does not take into consideration the tradition of the Prophet pbh[1] that the woman having mentioned her hatred for her husband, he advised to give up her dower, as a compensation, to which she replied, 'I will give that and more' but the Prophet pbh answered, 'No more'. According to another view the payment of more is legal, but when the matter comes to the Kazi he has to administer justice after taking into consideration various factors, even though the husband be absolutely free of accusation. The circumstances of the parties, the contribution made by the wife to the prosperity of the family, the dowry brought by the wife and enjoyed by the husband, though legally he had no right to its enjoyment, any gift of property or money made by the wife to the husband etc. It is not that he may act on any cut and dried formula ; he will have to take a balanced view of the things. Generally the wife is deprived by the highhandedness of the husband or her family, of her dower and ornaments when the spouses part company. The Kazi should be authorised to decide in the proceedings of *Khul'a* the question of return to the wife of the dower received by her from her parents or guardian as also the restoration of undue benefits received by the husband from the wife's property including the property gifted by her to him. In fact where the husband divorces the wife he should be made to restore the property of the wife received by him even by way of gift as well as her dowry.

1. See Hamilton's *Hedaya*, p. 113.

According to the Hanafi law the gift made by a husband to the wife and a wife to the husband is irrevocable. If this doctrine is liable to be shattered in respect of husband's property in matter of *Khul'a*, there is no reason why it should be maintained in respect of the wife's property gifted by her to the husband, in the same proceedings or when the husband divorces the wife. Such law cannot violate the letter and spirit of the Quran and the Sunnah.

In Pakistan the husband's self-assumed predominant position gives him such swaying authority over what belongs to the wife that generally the gift of the property by the wife to the husband, among the illiterates, is the result of pressures and threats which she is not in a position to resist. There is all the more reason for restoration of *status quo ante* in case of her separation from the husband, whether as a result of *Khul'a*, dissolution of marriage or divorce. Keeping this in view the Courts are and should be more liberal to the women.

SECTION 5—DISSOLUTION OF MARRIAGE BY RENUNCIATION OF ISLAM

On the 17th March, 1939 was enforced the *Dissolution of Muslim Marriages Act*, 1939 to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubt as to the renunciation of Islam by a married Muslim woman, on her marriage tie. The last mentioned point was clarified by Section 4 of the Act which is as follows :—

> S. 4. The renunciation of Islam by a married Muslim woman on her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:
>
> Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of marriage on any of the grounds mentioned in Section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

Before the enforcement of the Act of 1939 apostasy was considered as the surest way for a woman to get rid of an unwanted husband, since under the Hanafi doctrines which were accepted by the Muslims of the Indian Sub-continent as the only Personal law did not favour dissolution of marriage at the instance of women except on the grounds of impotency or extreme cruelty of the husband which endangered her life etc. The main reason which induced Mr. Muhammad Ahmad Kazmi, a member of the Jamiat Ulema-i-Hind to move the bill of Dissolution of Muslim Marriages in the Central Assembly was that Muslim women found themselves sometimes compelled to forsake their religion to seek liberation from the husbands whose conduct was intolerable for them and with whom they could not live within the limits imposed by divine injunctions. It would not have been sufficient to thwart their design to seek emancipation from their husbands, by making a law in terms of section 4 of the Act unless alternative methods of rescue were provided for. The law of Islam was not deficient in this and the Maliki and Shafe'i doctrines were quite liberal for the achievement of this end. The grounds of dissolution of marriage were therefore drawn from fiqh of other schools of thought, which is permissible in the fiqh (jurisprudence فقہ) of those who follow only the Hanafi doctrines. It may be stated that the extremism in the doctrine of *Taqlid* is undergoing a process of reevaluation and reorientation in the modern age and the Supreme Court of Pakistan disapproved it in the case of Khurshid Bibi and said :

"The four orthodox schools of Sunni Fiqh were headed by Imam Abu Hanifa, Imam Malik, Imam Shafe'i and Imam Ahmad bin Hanbal. The learned Imams never claimed finality for their opinions, but due to various

historical causes, their followers in subsequent ages, invented the doctrine of *Taqlid*, under which a Sunni Muslim must follow the opinions of only one of their Imams, exclusively irrespective of whether reason be in favour of another opinion. There is no warrant for this doctrinaire fossilisation, in the Quran or the authentic Hadith. In the *Al Milal Wal Nihal* (page 39), it is stated that the great Abu Hanifa used to say "This is my opinion and I consider it to be the best. If someone regards another person's opinion to be better, he is welcome to it ('for him is his opinion and for us ours')."[1]

The Federal Shariat Court of Pakistan while examining the laws refused, in matters of Public Law to be governed by the opinion of either of the Schools of thought unless it be based on sound reason to suit the modern age.[2] Abdul Rahim wrote; while tracing the history of *Taqlid*:

"No doubt the four teachers had each his own followers and these men, as time progressed, devoted themselves more and more to the task of developing the particular doctrines of their respective masters until we arrive at the age of the writers on *Usul*, when the labours of these jurists who devoted themselves to the separate systemisation of the principles laid down by the early teachers must have accelerated the tendency to form different schools. But even in their time the question of a difference of opinion among the masters was regarded as a matter for discussion and controversy, and it was not supposed that, because a certain view had found vogue among the principal exponents of a particular school, it was on that account binding on the conscience of a Sunni Muhammadan or on the Courts of justice in preference to any other view which had the support

1. P L D 1967 S C 97.
2. Muhammad Riaz *v.* Federal Government, P L D 1980 F S C 1.

of some other Sunni School. It was not until very modern times that attempt was made by means of the doctrine of *Taqlid* to confine the Courts and the jurists to one of the four Schools of law as distinguished from the others."[1]

Despite this inflexibility among the followers of different schools and insistence of orthodoxy in following any one Imam there are examples of a Hanafi *Kazi* acting on the verdicts or decisions of the teachers of different schools of thought, or of referring the matter to a *Kazi* who followed a different Imam. Abdul Rahim discussed this point as follows :

"When a question depends upon juristic deduction a *Kazi* belonging to one School of Sunni law such as the Hanafi may decide it according to the Shafe'i law, if he prefers that view, or he may make over the case, to a Shafe'i *Kazi* for decision, if there is one available.

In support of this a number of cases are mentioned. For instance a Hanafi Qazi following the view of other Sunni Schools in preference of his own School to the contrary, may declare that divorce by a drunken person is not valid, uphold a marriage contracted without two witnesses being present as valid, set aside the marriage of a minor contracted by his father in the presence of profligate witnesses, uphold the sale of a *muddabar* and perhaps of an *umme wald*, and so on. That this is the correct view of the law cannot be doubted not only upon principle but having regard to the array of authorities cited in its support such as As-Siyaru'-l-Kabir, Jami'tul Futawa, Khazanutul' Muftin, Majma'u'n Nawazil, Al-Zakhira, Futawa Rashidu'din, Shaikh'ul Islam Abdul Wahabu'sh Shaibani, Shaikhu'l Islam Ata Ibn Hamza, and others."[2]

1. *Muhammadan Jurisprudence*, p. 178.
2. *Ibid.*, pp. 180-181.

It is therefore, no wonder that the law of Dissolution of Marriage was drafted on the doctrines of Maliki School in a country in which among Muslims the followers of the Hanafi School dominated. The law was considered necessary to rid the Muslim women of preferring the expediency of conversion to other religions rather than live a life of continuous and unending torture and misery.

SECTION 6—DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

Section 2 of the Dissolution of Muslim Marriages Act, 1939 provides for the following grounds on which a woman is entitled to obtain a decree for dissolution of marriage—

(*i*) that the whereabouts of the husband have not been known for a period of four years ;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(*iia*) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(*iv*) that the husband has failed to perform, without reasonable cause his marital obligation for a period of three years;

(*v*) that the husband was impotent at the time of the marriage and continues to be so ;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(*vii*) that she having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of sixteen years provided that the marriage has not been consummated ;

(viii) that the husband treats her with cruelty that is to say—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of ill-repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice,

(f) if he has more wives than one does not treat her equitably in accordance with the injunctions of the Quran ;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law. Provided that—

(a) no decree shall be passed on ground (ii) until the sentence has become final ;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside that decree; and

(c) before passing a decree on ground (v) the Court shall on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

CLAUSE (i)—MAFQUD UL KHABAR

The first ground endorses the principle of *Mafqud ul Khabar* according to the Maliki law. "The *Mafqud* is a person regarding whom it is not known whether he is dead or alive. In the *Muhit* it is stated that if a Muslim be captured by an enemy, and it be not known whether he is dead or alive though it be known that he is a captive in the Dar-ul-Harb, he should be designated as *Mafqud*. But in the *Multeka* and other authorities it is clearly laid down, that in order to be designated a *Mafqud* the place where he is abiding should also be unknown. The author of the *Radd ul Muhtar* observes that a knowledge of the place of abode involves a knowledge of the missing person being alive for if it be not known whether he is living, it follows that the other fact would also be unknown.[1]"

The Muslim law about a missing person is based on a tradition in which the Holy Prophet pbh is reported to have said with respect to the wife of a missing person that she is his wife until such time as his death or divorce shall appear.[2] Ali, the fourth Caliph, has followed the tradition and has stated that a wife, in such circumstances, shall wait till she receives news of her husband's death or divorce. Umar, the second Caliph, is said to have subsequently adopted the view of Ali.[3]

The principle of *Istishab-al-hal* (استصحاب الحال) *i.e.* things continue in the condition in which they are, until a change in them or in their condition is established), requires that the marriage should subsist until and unless the husband's death or divorce is proved.[4] It has already been discussed that one of the principles of justification of *Khul'a* is that damage should neither be caused nor suffered (لا ضرر ولا ضرارا) and the principle

1. *Muhammadan Law* by Amir Ali, p. 86.
2. *Muslim Law of Divorce* by K. N. Ahmad, p. 500.
3. *Ibid., cf. Majma al Anhur*, by Sheikh Zada, Vol. 1, p. 721.
4. *Muslim Law of Divorce, ibid.*, p. 501.

that wife can claim dissolution of marriage on the ground *inter alia* of impotency of the husband is based on that principle.[1] The principle of Qiyas (analogy) demands that the marriage should be dissolved as done in the case of impotency and *Eila* because the absence of the husband involves hardship to the wife. Hence the wife has the right to separate from the husband.[2] This is known as Qiyas Mursal which was adopted by Imam Malik. The Hanafis however followed the principle of *Istishab al hal* (استصحاب الحال). This is the reason for the difference of opinion among the Malikis and the Hanafis regarding the period which would be sufficient for raising a presumption regarding the death of a missing person, in the matter of dissolution of his wife's marriage.

According to Imam Malik the wife of a missing person is entitled to observe the *'iddat* of death on the expiry of four years from the date of his disappearance. In other words, his death would be presumed on the lapse of four years, and after observing the usual period of probation of four months and ten days prescribed as the period of *'iddat* in case of husband's death, she would be entitled to remarry. Imam Shafe'i held the same opinion originally. As regards the partition of the missing man's property they agree with the Hanafis that it can only be done under she decree of a judge (which means that it is his option to raise the presumption of death of the missing person at any time after four years of his disappearance), otherwise distribution is possible only after ninety years.

Imam Ahmad says that when there is a strong presumption of death, the property should be divided among the heirs, just as the widow should be allowed to observe the *'iddat* of death after four years. For example, if a man is missing from the

1. *Ehkam ul Quran* by Jassas, Vol. 2, p. 231 : *Al Mabsut* by Sarakhsi, Vol. 5, p. 97; *Al Hedaya*, Vol. 2, p. 381 ; *Al Badai wal Sanai*, Vol. II, p. 323 by Kasani.

2. *Bidayet al Mujtahid* by Ibn Rushd, Cairo, Vol. 2, p. 45.

3. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 87.

ranks of two fighting bodies or from a ship which is wrecked, the presumption is that he is killed or drowned. In such cases, the property should be divided after four years from the date of the accident, and the wife should observe her *'iddat*. But when no such presumption arises *e.g.* when a man has gone travelling on trade and has not been heard of, Imam Ahmad says, recourse must be had to the Hakim (judge) to pronounce his judgment.[1]

Among the Hanafi jurists the opinion differed as is related in the *Hedaya* :

> "When one hundred and twenty years shall have elapsed, from the day of the missing person's birth, he is to be declared defunct. The compiler of *Hedaya* remarks that Hassan has declared this as the opinion of Haneefa. According to the Zahir rawayat, this point is to be determined by the decease of the co-evals of the missing person, or of his equals—that is those who are known to resemble him in health and habits of body. It is recorded from Abu Yousef that the term is one hundred years—Some of the learned again, fix it at ninety years. Analogy requires that the term should not be fixed at any particular period, such as one hundred years, or ninety years, since to fix time merely from judgment or opinion is illegal; but yet it is requisite that it be fixed by some specific standard such as the demise of the missing person's co-evals, because if no criterion, whatever were established, his decease could never be declared.
>
> "The benevolence of the law, however, suggests that the term be fixed at ninety years, as the shortest fixed term mentioned and it is difficult to ascertain anything respecting circumstances of the missing person's co-evals or equals."[2]

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 87.
2. *Hedaya* (translation by Hamilton), pp. 215-216.

The impracticable period of ninety years is thus fixed by way of benevolence. How many persons live up to the age of ninety, one hundred or one hundred twenty years. The life span of the generality of the people may be gathered from the fact that the Prophet pbh expired at the age of sixty-three years. The first Caliph died at the same age. For this reason the jurists of later period fixed the natural age of man at sixty years. Thus it is stated in *Fath al Qadir* that the "moderns" have adopted the age of sixty years on the ground that it is the probable limit of age.[1]

In the Bazazia it is stated that "in our times", the Fatwa is according to the rule of Imam Malik. And the author of *Radd al Muhtar*, following Mufti Abu Sa'ud, adds "where there is no Maliki Kazi, the Hanafi Kazi is authorised to pronounce the Fatwa according to the exigencies of the times in conformity with the rule of Imam Malik."[2] Imam Malik fixed the period of four years on the basis of an order passed by the second Caliph who fixed the period of four years.[3] The tradition of Hazrat Omar is reported in *Muwatta* from Saeed bin al Mussayyab that Omar bin al Khattab said that if the husband of a woman disappears and his whereabouts are not known, she should wait for four years from the day that it ceases to be known where he actually is, then she should undergo the *'iddat* of four months and ten days. Thereafter she may, if she likes, remarry.[4]

According to the note of Allama Waheeduzzaman similar views are related from Hazrat Osman and Hazrat Ali.[4]

It is said that Malik held that the period of four years shall

1. *Muslim Law of Divorce* by K. N. Ahmad, p. 503.
2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 87.
3. *Al Hedaya* by Al Marghinani, Vol. 2, p. 602 ; *Muslim Law of Divorce* op. cit., p. 505, *Muhammadan Law*, op. cit., p. 87.
4. *Muwatta* by Imam Malik (Urdu translation) by Allama Waheed uz Zaman), p. 476.

commence from the time when the Kazi passes the decree.[1] According to *Bidayat al Mujtahid* four years will be counted from the time the suit was filed.[2] Dr. Tanzeel ur Rahman in his book *Majmua-i-Qawaneen-i-Islam*[3] discussed the various views of the Maliki jurists in order to establish that according to them the period of four years did not include any period which elapsed before the woman approaches the Kazi. In this connection he reproduced from *Al Mohalla*[4] three versions of the tradition. In two of the versions related from Ibn Abi Laila it is said that a woman who had been missing for about four years approached Hazrat Omar but he directed her to wait for four years more before observing the *'iddat*. In the third version, however, reference is to the above facts and to the order of waiting for four years. On this score it is said that there is no such opinion of Imam Malik that the wife is entitled after the period of four years of the disappearance of the husband to pass the prescribed period of *'iddat*. It is strange that so many books are consulted on the subject but the most important book which has the stamp of Imam Malik himself *i.e. Mowatta* is ignored. This view is clearly attributed, there to Hazrat Omar and Imam Malik held accordingly Ameer Ali correctly reproduced the view of Imam Malik, and the tradition of Hazrat Omar on which he based this opinion is not the one cited in *Al Mohalla* but is the tradition cited by Imam Malik in his book *Mowatta*.[5] It appears that Hazrat Omar might not have felt convinced about the date of disappearance of the husband and in such contingency might have fixed four more years for waiting for the husband. This is the only way to reconcile these different traditions, if the one in *Al Mohalla* is at all

1. *Muslim Law of Divorce* by K. N. Ahmad, p. 504, *Ibn Abidin*, Vol. 4, p. 340.
2. *Bidayat al Mujtahid* by Ibd Rushd, Vol. 2, pp. 43-44.
3. Vol. 2, pp. 676-699.
4. *Ibid.*, pp. 695-697.
5. *Mowatta* by Imam Malik (Urdu translation) by Allama Waheed uz Zaman, p. 476.

authentic. The four years' rule is not inflexible. If someone is missing since the battle between the Muslims and non-Muslims the wife is required to wait for one year only. According to another view she can observe *iddat* soon after the battle.[1] The period of four years can be reduced to one year when the wife has already waited for a considerable time for her husband or when it is feared that she may be led astray on account of the absence of her husband and may commit that which is not lawful.[2] It would thus appear that under the Maliki law the period of four years can be reduced on the principle of necessity or the exigency of the situation. In these circumstances no fault can be found with the provisions of clause (1) of S. 2.

There are certain traditions relating the opinions of Hazrat Ali and Hazrat Omar that the wife can be restored to the missing husband on return after the remarriage of his wife or that he will be put to option of claiming restoration of wife or of being content with receiving her dower debt from the second husband.[3] The view about option is attributed to Hazrat Omar. Imam Malik held this tradition about Hazrat Omar to be unauthentic. According to him Hazrat Omar only held in favour of restoration in a case where the marriage with the second husband had not been consummated.[4] Imam Malik was against restoration of the woman to the first husband.[5] However, when the decree of dissolution of marriage is passed by the court no right of restoration accrues.[6] From this point of view

1. *Bidayat al Mujtahid* by Ibn Rushd, Egypt, Vol. 2, p. 44.

2. *Heelat al Najiza* by Maulana Ashraf Ali, p. 110; *Muslim Law of Divorce* by K. N. Ahmad, p. 504.

3. See *Majmua-i-Qawanin-i-Islami* by Dr. Tanzeel ur Rehman, Vol. 2, p. 682.

4. See *Mowatta* by Imam Malik (Urdu translation,) p. 477; *Mudawwinat al Kubra* by Imam Sahnun, Egypt, 1323 A. H., Vol. 5, p. 133, *Majmua Qawnin i-Islami, ibid.*

5. *Ibid.*

6. *Majmua-i-Qawanin-i-Islami, ibid.*, p. 683.

also the provision about the missing person in the Act of 1939 is unexceptionable.

The position under the English Law is interesting. Under that law a person was at one time presumed to be dead at such time when he would have attained the age of one hundred years.[1] But considering the hardship that was caused in some cases the seven years rule, which was incorported in section 108, Evidence Act, 1872, was evolved that if a person had not been heard of for seven years, he would be presumed to have died.[2] Ameer Ali says that seven years rule is also attributed to Imam Shafe'i,[3] although it is also said that he approved the Hanafi view.[4] Under the English Civil Law, under certain circumstances a shorter period could be deemed sufficient for the presumption of death. Thus when a person had sailed in a ship two or three years before and the ship had not been heard of since then his death was presumed.[5]

CLAUSE (II)—NEGLECT

The second ground of dissolution of marriage is neglect in or failure to provide for the maintenance of the wife for a period of two years. Failure to maintain wife is not a ground for dissolution of marriage in Hanafi Law. The Kazi shall authorise the woman to raise loan on the credit of the husband. But according to Imam Shafe'i separation will be effected between them, because the husband is unable to retain her according to usage. It becomes obligatory on him to release her with kindness. According to him it resembles the case of an impotent or mutilated man. In fact the failure to maintain the wife stands on a stronger footing, since maintenance is indis-

1. *Treatise on the Law of Evidence* by Taylor, London, Vol. 1, p. 1931 ; *Muslim Law of Divorce* by K. N. Ahmad, p. 505.
2. Watson *v.* King, 1 Stark, 101: *Muslim Law of Divorce, ibid.*, p. 506.
3. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 88.
4. *Muslim Law of Divorce* by K. N. Ahmad, p. 505.
5. As in note 2.

pensable. The reasoning of the Hanafi doctors is that separation abrogates the right of the husband which causes more damage. The right of the wife (to maintenance) can be kept in abeyance. The fixation of the amount of maintenance by the Kazi turns the unpaid arrears into a debt on the basis of which loan can be obtained on the credit of the husband. The main object of marriage is procreation while the payment of maintenance is not its object. It is subsidiary to marriage.[1] According to Imam Abu Hanifa and Imam Abu Yousuf maintenance is only a gift or grant like the salary of a Kazi or Mujtahid.[2] According to the Hanafi School the Kazi can also send the husband to prison if he defaults in payment of Nafqa krowingly. But he shall not imprison him if he is not in a position to pay.[3]

Under the Shafe'i Law, as already stated the inability of the husband to provide maintenance, wilful or otherwise, is a cause for dissolution of marriage by the Kazi. And, therefore, in order to avoid injustice, when a complaint was preferred by a Hanafi woman before a Hanafi judge seeking separation on the ground of the husband's inability to maintain her, he referred the case to a Shafei Kazi whose pronouncement became binding on the parties.[4]

The view of Imam Shafe'i is also shared by the Hanblis.[5] On the other hand Zaidis and Jaafris hold the same view as the Hanafis.

The Zahiris are of the view that if the woman is solvent enough to bear her expenses, she will not be entitled to dissolution of marriage during the penury or insolvency of the husbund.[6]

1. *Ain ul Hedaya*, Vol. 2, p. 333.
2. *Ibid.*, p. 334.
3. *Radd ul Muhtar* by Ibn Abidin, Vol. 2, pp. 903-904.
4. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 479.
5. See *Al Mughni* by Ibn Qudama, Vol. 7, p. 577.
6. *Al Mohalla* by Ibn Hazm, Egypt, Vol. 10, p. 92.

Imam Malik held that in case of default in the payment of maintenance the Kazi should give the husband one month's time, after which he shall pass decree of divorce which shall be effective as revocable divorce and the husband would have the authority to exercise the right of return of the wife, if his financial position improves during the period of *'iddat*.[1]

This raises the question whether the separation is a *talak* or dissolution of marriage because in the second case there is no right of return of the wife (رجعہ).

Ibn Qayyim refers a Hadith reported in *Dar Qutni* and related from Saeed bin al Musayyib, about a person who was unable to pay maintenance to his wife. It was ordered that separation shall be ordered between them. Similar Hadith is also related from Abu Huraira. Same tradition from Saeed bin al Musayyib is reported in the Sunnan of Saeed bin Mansur.[2] But these traditions are held by some as unreliable. Ibn Qayyim lays down the following rules :

(*a*) If the husband marries the woman on false pretence of his richness which is believed by her, and it later transpires that he is poor, the wife shall be entitled to dissolution of marriage.

(*b*) If the husband makes default in the payment of maintenance, despite his richness or ability to pay, the woman has a right to separation.[3]

There are two views on the question whether the separation amounts to *talak* in which case it would be revocable, or dissolution (فسخ) of marriage which is irrevocable.[4] The Act of 1939 is obviously based on the point of neglect or failure to pay maintenance on Shafe'i law and holds the separation to be

1. *Zaad al Maad* (Urdu translation) by Ibn Qayyim, Vol. 4, p. 307.
2. *Ibid.*, p. 306.
3. *Ibid.*, p. 312.
4. *Ibid.*, p. 307.

dissolution of marriage. In view of what has been stated it is not objectionable in Sharia.

The Hanafi reasoning is difficult to sustain. Nafqa is not an *atiyya* (عطیہ grant) ; it is the right of the wife. If the wife is dependent upon the husband for her living, the damage to her will be greater than the damage to the husband if the marriage tie is not dissolved. It is also not correct that procreation is the primary object of marriage. The main object is to save humanity from the sin of sexual perversion or waywardness; procreation is the secondary object. This point is discussed in the chapter of Family Planning.

CLAUSE (III)—CONTRAVENTION OF THE LAW AGAINST POLYGAMY

The third ground which is added by the Muslim Family Laws Ordinance, 1961, has been added because of the provisions in that Ordinance, against a second marriage except with the per mission of the Chairman of the Union Council or Committee concerned. The justification of the law has already been discussed in the Chapter about Marriage. In view of this the provision in clause (iia) is not open to any exception.

CLAUSE (IV)—HUSBAND'S IMPRISONMENT

Clause (iii) of S. 2 provides that the wife is entitled to dissolution of marriage if the husband has been sentenced to seven years' imprisonment or more provided the sentence has become final.

The basis of the rule is the priniciple of disappearance of the husband or his remaining missing otherwise than on the principle of *Mafqud ul Khabar*. According to the Shafe'is, Hanafis, and the Zahiris this is not a ground for dissolution of marriage.[1] But according to Imam Ahmad bin Hanbal dis-

1. *Kitab al Umm* by Imam Shafe'i (printed Egypt, 1961), Vol. 5, p. 339. *Majmua Qawanin-l-Islami* by Dr. Tanzil ur Rehman, Vol. 2 p. 701.

appearance for six months without an excuse is sufficient for dissolution of marriage. There are two views among the Malikis. According to one view three years' disappearance confers such right upon women but as per another view, one year is sufficient.[1]

Ali Yazid al Kazwini and 'Ali Abul Hasan, two Shafe'i jurists are of opinion that when the imprisonment lasts over five years, the wife has the right of demanding a dissolution of her marriage and, after the necessary *'iddat*, of contracting a fresh union.[2]

In Egypt,[3] Jordan[4] and Syria[5] three years' imprisonment, and in Iraq[6] five years' imprisonment of the husband entitles the wife to seek dissolution of marriage. Dr. Tanzil ur Rahman fixes a period of three years and recommends accordingly.[7]

The clause is not repugnant to Sharia.

CLAUSE (v)—FAILURE OF THE HUSBAND TO PERFORM MARITAL OBLIGATION

Clause (iv) of S. 2 of the Dissolution of Muslim Marriages Act, 1939 permits the wife to file a suit for dissolution of marriage on the ground that the husband has failed to perform his marital obligations, without reasonable cause for a period of three years. This is a kind of desertion of the wife by the husband and is not different in category from the case of his disappearance which, as seen above, allows after three years according to one Maliki view, the wife the option to claim dissolution of

1. *Al Rauzat un Nadbah*, by Siddiq Hassan Khan, Vol. 2, p. 56; *Al Fawol Al Sharai ala Mazahib il Ummiah* by Jawwad Mughannia, Printed Beirut, 1370 A.H., p. 80; *Majmua Qawanin-i-Islami, Ibid.*, p. 702.
2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 482.
3. *Majmua Qawanin-i-Islami, ibid.*, Qanun ul Misri, No. 25 of 1929.
4. *Ibid.*, p. 703 ; *Qanun i Huquq ul Aila*, Jordan, S. 93.
5. *Ibid.*, p. 703 ; *Qanun al Ahwal al Shakhsia*, Syria.
6. *Ibid.*, p. 702 ; *Qanun al Ahwal al Shaksia*, Iraq.
7. *Ibid.*, pp. 703-704.

marriage. It also contravenes the Quranic principle of *fa imsakun bil ma'aruf* (فامساک بالمعروف must be retained in honour) *au tasrihun bi ehsan*[2] (او تسریح باحسان or released in kindness). It would not be lawful for the husband to torture the wife by keeping her in suspense by desertion and by failing to perform his marital obligation. It is also a breach of the implied contract for marriage. The only remedy for her would be to seek dissolution of marriage, for reduction of the harm.

CLAUSE (VI)—IMPOTENCY OF THE HUSBAND

Clause (v) of section 2 of the above Act allows the woman to file a suit of dissolution of marriage on the ground that the husband was impotent at the time of marriage and continues to be so. The third proviso to the section provides that before passing a decree on this ground the Court shall on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on this ground.

The right of a woman, under the Mussalman Law, to cancellation of marriage on the ground of her husband's impotency is similar in all respects to her right under the English Law. The analogy, specially between the Shia law and the English Common Law, is close enough to deserve the attention of the students of comparative jurisprudence.[3]

Under the Shia Law the wife is entitled to claim a divorce on the ground of her husband's impotency, if she was aware of the infirmity prior to the marriage. If she accepted the husband with a knowledge of the fact that he was impotent and physically incompetent to consummate the marriage, she has

1. *Muhammadan Law* by Ameer Ali, Vol. 2, pp. 703-704.
2. Q. 2 : 229.
3. *Ibid.*, p. 488.

no right to divorce. Similarly, if the infirmity supervened after the consummation, the wife would have no right to ask for a divorce.[1]

Under the Sunni Law, the wife is entitled to a dissolution of the marriage for what is called in English Law impotency *versus hanc*. It makes no difference in her right to obtain annulment of the marriage, whether the incapacity of the husband is only special in her case, and whether he is able to have sexual intercourse with other women or not.[2]

There is considerable difference of opinion on this point among the Shia jurists. One section agrees with the Sunni lawyers, while another holds that if the man be able to have intercourse with another woman, but not with the wife in question, she has no right.[3]

There is a separate chapter in almost each book of Fiqh about *Innin* (impotent) and *majbub* (person with organ cut off or mutilated). Particulars and details apart, there is unanimity on the point that marriage with such persons can be dissolved at the instance of the wife since Allah commands the retention of women with kindness, while in the case of such persons there is no retention becausethey do not require women. The grounds on which marriage with impotents ought to be dissolved have already been considered in the discussion on the subject of *Khul'a*.

The object of marriage is primarily the enjoyment of sexual passions which may keep away the spouses from commission of sin. The secondary object is the procreation of children. These bring about a happy companionship of the members of the opposite sexes. Obviously none of these objects can be fulfilled by a marriage in which the husband is unable to consummate the marriage.

1. *Muhammadan Law* by Ameer Ali, Vol. 2, pp. 488-489; *Raddul Mahtar*, Vol. 2, p. 977.
2. *Ibid.*
3. *Ibid.*, p. 489.

But sometimes the impotency may be curable and the husband may request for time for cure. Hazrat Omar fixed one year for this purpose and wrote to Qazi Shuraih to fix as much time for the impotents.[1] According to section 2, clause (v) such time can be fixed on application by the husband. This is because the term 'impotent' includes those persons also whose impotency is incurable, like the eunuch or a person with a mutilated organ. In case of incurability it is not required to give time.

The clause is therefore, in accordance, with Sharia.

CLAUSE (VII)—INSANITY, LEPROSY OR VIRULENT VENEREAL DISEASE

Section 2, clause (vi) provides that the wife can file suit for dissolution of marriage if the husband has been insane for a period of two years or is suffering from leprosy or a virulent disease.

The Hanafi jurists only consider those defects as ground for dissolution of marriage which make consummation impossible. Such defects are impotency, mutilation of the male organ and being an eunuch. Imam Muhammad al Shaibani adds to this category of defects, insanity, leprosy.[2] Imam Abu Hanifa and Imam Abu Yousuf do not agree with this view.[3] Another statement attributed to Imam Muhammad alone is that the woman is entitled to option (of dissolution of marriage) not only on grounds of the husband being insane or a leper, but on any defect whatsoever, which makes it impossible for her to live with him without suffering harm or damage[4] و كل عيب لا يمكنها المقام معه الا بضرر

1. *Durr ul Mukhtar* (Urdu translation), Vol. 2, p. 211.

2. *Bahar ul Raiq* by Ibn Nujaim, *Badal al Sanai* by Kasani, Egypt, 1328 A.H., Vol. 2, p. 327; *Majmua Qawanin-i-Islami*, Vol. 2, p. 613.

3. *Majma al Anhar Sharah Multaq al Abhar* by Damad Effendi, Egypt, 1369 A.H. Vol. 1, p. 463; *Majmua Qawanin-i-Islami, Ibid.*, p. 614.

4. *Moheet min Nafaais il Makhtutat al Arabia fi Maktabatul Azhar* No. 3488 ; *Majmua Qawanin-i-Islami, Ibid.*

The Malikis, Shafe'is, Hanblis, Zaidis and Ja'afris show tha tinsanity and leprosy are such defects which entitle the woman to claim dissolution of marriage.[1] The reasoning of the Shafe'is is relevant and important. Leprosy according to them is included in such defect because of being infectious which is transmitted to the children too, and no woman would like to have intimate relations with a husband suffering from such disease.[2]

Imam Ibn Taimiya[3] and Ibn Qayyim[4] say that all those defects in the husband which make him hateful may be the cause of separation. Ibn Qayyim is of the view that the number of such defects cannot be fixed. In this category of defects may also be included such defects as blindness, deafness, or lameness. It may also include those whose both hands or one foot or both feet are amputated.

The law in Pakistan (Clause (vi) of S. 2) is based partly on the views of Imam Muhammad, Imam Ibn Taimiya and Imam Ibn Qayyim and partly on the reasoning of the Shafei's in favour of leprosy being a ground for dissolution of marriage. The reason was that leprosy is an infectious disease which may be transmitted to the children.

There are laws in Lebanon, Jordan, Iraq, Syria, Morocco and Egypt concerning the woman's right to claim dissolution of marriage on ground of the husband suffering from diseases. In Lebanon leprosy and syphilis are mentioned. In Iraq the law is similar as in Lebanon. In Morocco leprosy and consumption are mentioned. In Iraq leprosy, syphilis and consumption are recorded. In Egypt the language is general as including all incurable diseases.[5]

1. *Majmua Qawanin-i-Islami*, Vol. 2, p. 616 ; *Al Durral Mutaqa Sharh al Multaqa on Hashia Majma al Anhar*, Vol. 1, p. 427.

2. *Majmua, Ibid.*, pp. 618-619 ; See *Mughni al Muhtaj*, Vol. 3, p. 203.

3. *Majmua, Ibid.*, p. 620 ; *Al Ikhtiarat al Ilmia*, by Ibn Taimya, p. 131.

4. *Majmua, Ibid., Zad al Maad*, Vol. 4, p. 43—Matba Muhammad Ali Sabih, Cairo.

5. *Majmua, Ibid.*, pp. 624-629.

The provisions of clause (vi) of Section 2 are based on Sharia. This is also the view of Dr. Tanzil ur Rahman.[1]

CLAUSE (VIII)—OPTION OF PUBERTY

Clause (vii) of section 2 of the Dissolution of Muslim Marriages Act, 1939 provides another ground for dissolution of marriage that the wife, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated.

The Child Marriage Restraint Act (XIX of 1929) made the solemnisation and promotion of child marriage a criminal offence and thus prohibited such marriages.

The matters relating to child marriage and option of puberty as well as the question of repugnancy or otherwise of these laws with Quran and Sunnah have already been considered in the chapter on Marriage. The relevant provisions in both the laws were held to be in accordance with Sharia.

CLAUSE (IX)—CRUELTY

Clause (viii) of section 2 of the Dissolution of Muslim Marriages Act, 1939 provides that the wife can claim dissolution of marriage in a Court of law on the ground that the husband treats her with cruelty that is to say—

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*b*) associates with women of ill-repute or leads an infamous life, or

(*c*) attempts to force her to lead an immoral life, or

1. See *Majmua-i-Qawanin-i-Islami*, Vol. 2, pp. 622-624.

(*d*) disposes of her property or prevents her from exercising her legal rights over it, or

(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

Unequal treatment with the wives has already been discussed and commented upon. It has been proved that this ground is sufficient in Sharia for dissolution of marriage. The right to dissolution of marriage on ground of cruelty accrues from the contravention of the well known and oft-repeated injunction of the Quran فامساک بمعروف اوتسریح باحسان (a woman must be retained in honour or released in kindness).[1] Marriage is designed to serve as a check on immorality. If a man himself leads an immoral or infamous life or forces his wife to lead an immoral life his actions are absolutely incompatible with the object of marriage. Association of husband with women of ill-repute is always a source of recurring torture for the woman, but the torment and agony becomes excruciating if the wife is forced to lead an immoral life. Habitually assaulting or abusing the wife is likely to make her life miserable. Nothing is more painful for a wife of a religious bent of mind, which women generally are, if the husband obstrucrs her in the observance of her religious profession and practice. Such cruel conduct on the part of the husband must create in the woman hatred and disgust for the husband which would destroy the feeling of love and even of tolerance and harmony in the woman. Islam does not allow the spouses to live a life of perpetual agony. It favours the severance of a detestable and intolerable relationship.

In Islam property rights of each individual are sacrosanct.

1. Q. 2 : 228.

A wife has as much right over her property as a husband over his. The husband's property may be subject to payment of her dower and also to the payment of her maintenance but her own property is not subject to any claim of the husband. She enjoys unrestricted rights over it. In these circumstances disposal of her property by the husband or prevention by him of the exercise of her legal rights over it is cruel conduct which will disrupt the marriage.

Cruelty contravenes another Sharia principle: "neither cause nor suffer damage". But the views differ on the method of rectification. The Hanafi jurists never considered dissolution of marriage as the proper method though as already seen in connection with the discussion on neglect, the Kazi can admonish and then chastise the husband. The jurists, however, facilitated remedial measures by permitting, despite the doctrine of *taklid*, resort to such measures, if allowed in any other school of thought.

Under the Shafe'i law if a wife complains to the Kazi that her husband treats her with cruelty, the Kazi shall admonish him. If the admonition proves ineffective the Kazi may take such measures against the husband as he may deem proper and necessary to make the husband give up his undesirable conduct, and unlawful behaviour. If the discord between the husband and the wife be of a grave nature, the Kazi shall appoint two arbitrators, one to represent each party as enjoined in verse Q. 4 : 35. (And if ye fear a breach between them twain, appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind). They will proceed in the matter as if they were agents of the parties. According to another view they shall be considered to have been appointed agents by the Kazi. The agents, according to the former view can separate the husband and the wife,

if they are so authorised, on payment of compensation or without payment.[1]

The Maliki law also authorises the Kazi first to admonish and then to chastise the husband. On further complaint from the wife he shall appoint the arbiters, one from each party to look into and decide the case. If they deem it proper to separate the parties they may make a declaration to that effect, which will amount to a decree for dissolution of marriage.

The appointment of arbiters would be necessary if the wife has no proof in support of her allegations. But if she satisfies the Kazi, by adducing proof thereof, about the genuineness of her claim he can dissolve the marriage even in cases where the husband's misconduct is not of long standing. This divorce shall be an irrevocable divorce.[2]

Under the Hanbli law if the wife complains to the Kazi against her husband's ill-treatment and the Kazi is satisfied about the genuineness of her charge, he will appoint two arbitrators with the consent of the parties. The arbitrators shall be free men and Muslims of integrity. The arbitrators shall investigate the case and try to bring about reconciliation between the parties. If they find that no compromise is possible they can dissolve their marriage and their decision shall be binding upon the parties.[3]

The difference between the Shafe'i law and other laws is on account of the scope of authority of Hakams. The Shafe'is

1. *Nihayat al Muhtaj ila sharh al Minhaj* by Al Ramli, (Cairo, 1938), Vol. 6, pp. 384-385 ; *The Muslim Law of Divorce* by K. N. Ahmad, pp. 772-773.

2. *Zarqani's Commentary on Mowatta* by Imam Malik (Cairo 1954), Vol. 3. pp. 213-214 ; *Al Madawwanaat al Kubra*, by Sahnun Cairo, 1323 A. H.) Vol. 5, pp. 50, 51 ; *Al Mohalla* by Ibn Hazm, Vol. 10, pp. 87-88 ; *Muslim Law of Divorce* by K. N. Ahmad, p. 772.

3. *Al 'Uddah*, by Abd al Rahman al Maqdisi, (Cairo, 1382 A. H.), pp. 405-406. *Muslim Law of Divorce, Ibid.*, p. 773.

invest a Hakam with the authority of an agent only while the other view is that the right of decision vests in him. This question has already been thoroughly discussed under "*Khul'a*".

Cruelty is a ground of divorce in the laws of Egypt,[1] Tunis[2] Jordan,[3] Syria'[4] Morroco,[5] and Iraq.[6] This is discussed in *Majmua-i-Qawanin-i-Islami* by Dr. Tanzil ur Rahman.[7]

The law in Pakistan was deficient in so far as it did not provide for attempts at reconciliation. This deficiency is now made up by providing for reconciliation at two stages in the Family Courts Act, 1964.[8]

Clause (viii) of section 2 of the Dissolution of Muslim Marriages Act is not repugnant to Sharia.

CLAUSE (X)—OTHER GROUNDS OF DISSOLUTION OF MARRIAGE

Clause (ix) of section 2 of the Dissolution of Muslim Marriages Act is residuary in character and authorises the Court to dissolve marriage on any other ground recognised as valid for dissolution of marriage under Muslim law. The breach of valid stipulation in the marriage contract may be a ground for separation.

The valid stipulations are *inter alia*, the following:

(1) That the husband shall not cantract a second marriage during the existence or continuance of the first.

1. *Qanunal Ahwal al Shakhsia*, No. 25 of 1929.
2. *Majallat al Ahwal al Shakhsia*, Tunis.
3. *Qanunal Huquq al Aila*, Jordan.
4. *Qanun al Ahwal al Shakhsia*, Syria.
5. *Mudawwanat al Ahwal al Shakhsia*, Morocco.
6. *Qanun al Ahwal al Shakhsia*, Iraq.
7. Vol. 2, pp. 667-673.
8. Ss. 10 and 12.

(2) That the husband shall not remove the wife from the conjugal domicile without her consent.

(3) That the husband shall not absent himself from the conjugal domicile beyond a certain specified time.

(4) That the husband and the wife shall live in a specified place.

(5) That the husband shall pay the wife a fixed maintenance.

(6) That the husband shall maintain the children of the wife from a former husband.

(7) That he shall not prevent her from receiving the visits of her relations whenever she likes.[1]

Ibn Qayyim says that it is incumbent upon the husband to fulfil all conditions settled at the time of marriage except conditions which are repugnant to the injunctions of Allah and his Prophet pbh.[2]

Such conditions which stipulate giving up of valid retirement, of maintenance and of dower etc. are not liable to be fulfilled.[3]

There is difference of opinion on the validity of such conditions that the husband shall live in the city or in the residence of the wife, or that the husband will not have coitus with the wife or that he will not remarry during the subsistence of the marriage. Imam Ahmad said that the husband is bound to comply with all these conditions. In case of default in the fulfilment of any condtion, the wife will be entitled to the dissolution of marriage.[4]

1. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 288.
2. *Zad al Maad* by Ibn Qayyim (Urdu translation), Vol. 4, p. 65.
3. *Ibid.*
4. *Ibid.*

Ibn Qayyim says at another place that custom and usage have also the force of an implied contract which are binding and their breach affords a right of cancelling the contract. Thus if the women of any locality do not go out of that locality as a matter of usage and custom it will be treated to be a condition of *nikah* that the wife from that locality shall not be taken outside that locality and non-fulfilment of the condition will give the wife the right to claim cancellation of the contract of marriage.[1]

SECTION 7—L'AAN OR IMPRECATION

L'aan is a procedure for falsifying the slander against the woman spread by her husband and for dissolving the marriage between the two. The Quranic injunctions about the procedure are Q. 24 : 6-9 but the injunction can be better appreciated if the order laying down the punishment of qazf is reproduced first.

Injunctions about qazf.

والذين يرمون المحصنٰت ثم لم يا تو اربعة شهدآء فا جلدوهم
ثمنين جلدة ولا تقبلوا لهم شهاده ابدا و اولٰئک هم الفاسقون ۔

Q. 24 : 4. And those who accuse honourable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterwards) accept their testimony—they indeed are evil-doers.

والذين يرمون ازواجهم ولم يكن لهم شهداء الا انفسهم
فشهاده احدهم اربع شهدٰت بالله انه لمن الصٰدقين ۔

Q. 24 : 6. As for those who accuse their wives but have no witnesses except themselves ; let the testimony of one of them be the four testimonies, (swearing) by Allah that he is of those who speak the truth.

1. *Zad al Maad* by Ibn Qayyim (Urdu translation, Vol. 4, pp. 80-81.

والخامسة ان لعنت الله عليه ان من كان الكاذبين -

Q. 24 : 7. And yet a fifth invoking the curse of Allah on him if he is of those who lie.

ويدرؤ عنها العذاب ان تشهد اربع شهٰدٰت باالله انه لمن الكاذبين

Q. 24 : 8. And it shall avert the punishment from her if she bear witness before Allah four times that the thing he saith is indeed false.

والخامسة ان غضب الله عليها ان كان من الصدقين -

Q. 24 : 9. And fifth (time) that the wrath of Allah be upon her if he speaketh truth.

Verse 4 provides for the punishment of a person who accuses a woman who is not his wife, of adultery to prove which is required the testimony of four witnesses, but who does not have four witnesses to prove the charge. The punishment is eighty stripes. This is obviously to discourage the Muslims from slandering women as is their wont in every society. A man cannot accuse a woman of having adulterous connection unless he is able to produce four witnesses to support the charge.

Similarly husbands are discouraged from falsely accusing their wives of such a heinous offence. Verses 6 to 9 provide the procedure for dealing with such a case. There is a tradition reported in *Saheeh Bokhari* and *Saheeh Muslim* both that Aweemer al 'Ajlani said to Aasim bin 'Adi that "if a person finds his wife involved with another man in a criminal liasion should he kill him? But then he himself will be killed (by way of punishment) Ask the Prophet pbh about this matter on my behalf." He asked the Prophet pbh about it. The Prophet pbh felt some disgust, and did not like it. Aweemer then enquired from the Prophet pbh himself. He said : "The injunction of Allah has already been revealed about you and your wife. Go and bring her with you." Both of them threw imprecations on one

another, in the presence of the Prophet pbh. Thereafter Aweemer said : 'O Prophet of Allah if I keep her with me I will prove myself a liar ! Before the Prophet pbh could utter anything he pronounced three *talaks* upon his wife.[1]

In another version it is related that Aweemer and his wife cursed each other in the mosque. Then they were separated in the presence of the Prophet pbh.[1]

The principle laid down in Sunnah is that after the procedure referred to above, the husband and wife are separated. There is a difference of opinion on the point whether they can remarry. Except the Hanafis others are of the view that they are separated for good and cannot remarry. The other point of difference which has already been considered on the subject of three *talaks* pronounced simultaneously, is whether the hadith proved the validity of three simultaneous *talaks*.

Bokhari reports that Hilal bin Umayya accused his wife before the Prophet pbh of having (illicit) relations with Sharik bin Sahmaa. The Prophet said: "either proof or *hadd* punishment (on you for false accusation)." Hilal said: "O Prophet! By Allah should a person who sees his wife involved with another man go to bring witnesses to see the occurrence?" But the Prophet pbh continued repeating : 'either bring evidence or *Hadd* will be imposed on you.' Hilal said, By One Who sent you as His Prophet pbh, if I am truthful, He shall spare my back of the pangs of punishment.' At that moment came Gabriel and the verse Q. 24 : 6 was revealed.[2]

Another Hadith is reported both in *Saheeh Bokhari* and *Saheeh Muslim* that Sa'ad bin Obada enquired from the Prophet pbh that if some one finds his wife and another man involved illegally with one another, can he murder him? He said : 'No'. Sa'ad said, 'By Him who sent you as His Prophet

1. *Zad al Maad* (Urdu translation), Vol. 4, p. 250.
2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 484.

pbh, it is necessary. The Prophet pbh said : looking towards those who were present : 'Look what does your chief say?'

There is another version that Sa'ad said: O Prophet of Allah, should I give her time till I bring four witnesses if I see my wife involved with another man?' The Prophet said: 'Yes'. Sa'ad said, 'Never. I swear by Him Who sent you as His Prophet pbh, I shall decide with my sword.'

The Prophet pbh turned towards those present and said: "Listen to what your chief says. Certainly he has sense of honour. But I am more envious of honour. And Allah is more emulous of honour than me."[1]

The traditions referred to above demonstrate that the object is to prevent scandal mongering against women. Whoever scandalised them ran the risk of being punished with eighty stripes and of practically being declared *persona non grata* for the courts. The husband also could not level such a charge against the wife. He could insist on the charge if he was prepared to undergo the procedure of Li'an. In the words of Ameer Ali :[2]

> "A person who slanders another is liable to Hadd-ul-kazf, "the specific punishment for slander" under the Mussalman Law. But when a man maligns his wife and accuses her of adultery in the majority of cases he escapes the punishment usually inflicted for slander. In order, therefore, to subject the slanderer to some definite penalty for an unjustifiable accusation, as well as to enable the wife to clear her character by a public and solemn denial of the charge *daf'a ul 'aar*), it was provided that when a charge of adultery was made against a woman, the accuser and the accused were bound to proceed to the Kaz i,and mutually take the sacramental oath prescribed by the law.

1. *Zad ul M'aad*, Vol. 4 (Urdu translation), pp. 252-253.
2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 484.

"The disapprobation with which the proceeding of L'aan is regarded by Moslem jurists, is shown by the direction contained in the *Shara'ya* and the *Fatawai 'Alamgiri*. The *Sahara'ya* says : It is not lawful for a husband to accuse his wife on a mere supposition of guilt; and the Fatawa directs that when the accuser and the accused appear before the Kazi he should admonish them to abandon the proceedings. Should they persist, one in making the accusation and the other in insisting upon the charge being proved, then alone should the judge administer to them the sacramental oath prescribed, 'invoking the curse of God' upon each other."[1]

The Shafe'is, Malikis and the Shias agree among themselves that the dissolution of marriage decreed as the result of L'aan operates perpetually and the parties are debarred from ever remarrying. But the Hanafis allow remarriage, if, *inter alia*, the husband retracts the accusation.[2]

The provision of L'aan is now incorporated in the Offence of Qazf (Enforcement of Hudood) Ordinance (VIII of 1979), S. 14 of which reads :

S. 14. *L'aan*—(*i*) When a husband accuses before a Court his wife who is Muhsan within the meaning of S. 5, of *zina* and the wife does not accept the accusation as true, the following procedure of L'aan shall apply, namely :

(*a*) The husband shall say upon oath before the Court: "I swear by Allah the Almighty and say I am surely truthful in my accusation of *zina* against my wife (name of the wife) and, after he has said four

1. See *Fatawa-i-Alamgiri*, Vol. 2, pp. 543-544 ; *Fatawa-i-Kazi Khan*, Vol. 2, p. 153 ; *Durrul Mukhtar* ; *Shara'ya*, pp. 348-349.

2. *Muhammadan Law* by Ameer Ali, Vol. 2, p. 487.

times, he shall say: "Allah's curse be upon me if I am a liar in my accusation of *zina* against my wife (name of the wife)"; and

(*b*) the wife shall, in reply to the husband's statement made in accordance with clause (*a*), say upon oath befort the Court : "I swear by Allah the Almighty that my husband is surely a liar in the accusation of *zina* against me"; and, after she has said so four times, she shall say : "Allah's wrath be upon me if he is truthful in his accusation of *zina* against me."

(2) When the procedure specified in subsection (1) has been completed, the Court shall pass an order dissolving the marriage between the husband and wife, which shall operate as a decree for dissolution of marriage and no appeal shall lie against it.

(3) Where the husband or the wife refuses to go through the procedure specified in subsection (1) he, or as the case may be, she shall be imprisoned until—

(*a*) in the case of the husband, he has agreed to go through the aforesaid procedure ; or

(*b*) in the case of the wife, she has either agreed to go through the aforesaid procedure or accepted the husband's accusation as true.

(4) A wife who has accepted the husband's accusation as true shall be awarded the punishment of the offence of *zina* liable to Hadd under the Imposition of Hudood for the offence of Zina Ordinance, 1979.

The provisions of section 14 are thus in accordance with the Quran and the Sunnah.

One important point which should be noticed is that according to the Quran four oaths represent four witnesses whether the oath be of the husband or of the wife, which points out the equality of man and woman in matter of evidence.

L'AAN IN THE OLD TESTAMENT

The Quran provides a procedure for L'aan in which the burden of proof is on the accuser husband and he has to take the oaths first and finish his statement with imprecation. The wife is required to take similar number of oaths and hurl similar imprecation in defence. But the Old Testament throws the entire burden on the woman to disprove the accusation. It is provided in Numbers :[1]

> The Lord commanded Moses to give the Israelites the following instructions. It may happen that a man becomes suspicious that his wife is unfaithful to him and has defiled herself by having intercourse with another man. But the husband may not be certain, for his wife may have kept it secret there was no witness, and she was not caught in the act. Or it may happen that a husband becomes suspicious of his wife even though she has not been unfaithful. In either case the man shall take the wife to the priest. He shall also take the required offering of two pounds of barley flour, but he shall not pour any olive oil on it or put any incense on it, because it is an offering from a suspicious husband, made to bring the truth to light.
>
> The priest shall bring the woman forward and have her stand in front of the altar. He shall pour some holy water into a clay bowl and take some other earth that

1. Numbers 5 : 11 to 31.

is on the floor of the Tent of the Lord's presence and put it in the water. Then he shall loosen the women's hair and put the offering of the flour in her hands. In his hands the priest shall hold the bowl containing the bitter water that brings the curse. Then the priest shall make the woman agree to this oath spoken by the priest: "If you have not committed adultery, you will not be harmed by the curse that this water brings. But if you have committed adultery, may the Lord make your name a curse among your people. May he cause your genital organs to shrink and your stomach to swell up. May the water enter your stomach and cause it to swell up and your genital organs to shrink."

The woman shall respond, "I agree may the Lord do so."

Then the priest shall write this curse down and wash the writing off into the bowl of bitter water. Before he makes woman drink the water, which may then cause her bitter pain, the priest shall take the offering of flour out of the woman's hands, hold it out in dedication to the Lord, and present it on the altar.

Then he shall take a handful of it as a token offering and burn it on the altar. Finally he shall make the woman drink the water. If she has committed the adultery, the water will cause bitter pain, her stomach will swell up and her genital organs will shrink. Her name will become a curse among her people. But if she is innocent, she will not be harmed and will be able to bear children.

This is the law in cases where a man is jealous and becomes suspicious that his wife has committed adultery. The woman shall be made to stand in front of the altar, and the priest shall perform the ritual. The husband shall be free of guilt, but the woman, if guilty, must suffer the consequences.

In Islam no proceeding can be taken merely on ground of suspicion and conjecture of the husband. The proceedings of L'aan are taken when there are definite charges about the commission of offence but the legal evidence is not forthcoming. Under the Jewish Law action can be taken against the wife to satisfy the whim and suspicion of the husband. Under the Islamic Law the husband is punished by the judge passing a decree of permanent dissolution of marriage. Under the Jewish Law the husband remains guiltless and despite proof of her innocence the wife must live with him. Under the Islamic Law the proceedings of L'aan are judicial and all the proceedings are conducted by the Judge ; under the Jewish Law the unilateral proceeding against the wife are conducted by the priest. The Jewish procedure of curse and imprecation might have been successful in the age of miracles but it is no more practical now. The Islamic Procedure is good for all times to come. It is sufficient proof of Islam being the final and the ultimate religion which shall remain effective till the Day of Judgement.

SECTION 9—EILA

Eila in its primitive senses signifies a vow,—in law, it implies a husband swearing to abstain from carnal knowledge of the wife for any time above four months.[1] In the pre-Islamic period it was customary to take such a vow on pain of undergoing some specified hardship by way of penalty if he was intimate with the wife during the period specified. By this device the husband succeeded in keeping the wife in a state of suspense, neither divorcing her nor having conjugal relations with her. Islam put an end to this nefarious practice. The Quran provided :—

للذين يؤلون من نسايهم تربص اربعة اشهر فان فاؤ فان الله غفور الرحيم ۔

Q. 2 : 226.—Those who forswear their wives must wait

1. *Hedaya* by Hamilton, p. 109.

four months; then, if they change their mind. Lo ! Allah is Forgiving, Merciful.

وان عزمو الطلاق فان الله سميع عليم -

Q. 2 : 227.—And if they decide upon divorce (let them remember that) Allah is Hearer, Knower.

If the vow is broken by the husband, by resuming intimacy with the wife, the husband is required only to make expiation for the infringement of the vow.[1]

Quran limited the period to four months after which the husband should either resume conjugal relationship with the wife or separate.

The jurists differ whether on the expiration of the vow the divorce is automatic or is subject to the will of the husband or the order of the judge (Kazi). The Hanafis hold that the divorce is automatic.[2] The Kazi's decree is not necessary to complete separation.[3] Under the Maliki law the judge shall ask the husband to resume conjugal relation with the wife or to divorce her. If the husband refuses or fails to comply with the order, the judge shall dissolve the marriage.[4] Shafe'i and Ahmad bin Hanbal expressed the same view as Imam Malik.[5]

According to the Hanafis, the husband manifests his intention to divorce by his conduct of sticking to his vow. But according to the verse[6] the intention and decision should be formed after the expiry of the period of four months. The hus-

1. *Al Hedaya* by Al Marghinani, Vol. 2, pp. 381-382.

2. *Raddul Mohtar*, by Ibn Abidin, Vol. 2, p. 563 ; *Bidayat ul Mujtahid* (Cairo, 1329 A.H.), Vol. 2, p. 83; *The Muslim Law of Divorce* by K. N. Ahmad, p. 112.

3. *Raddul Mohtar, Ibid., Muslim Law of Divorce, Ibid.*

4. *Bidayat ul Mujtahid ibid., Al Mughni* by Ibn Qudamah, Vol. VII, pp 318-9; *Muslim Law of Divorce, Ibid.*, p. 112.

5. *Al Mughni, ibid., Muslim Law of Divorce, Ibid.*, p. 113.

6. Q. 2 : 227.

band can no doubt divorce the wife after the expiry of the period of the vow but for divorce he shall have to undergo the Quaranic procedure. The concept of automatic divorce appears to be an outcome of the emphasis on the validity of three divorces pronounced simultaneously and on the same being effective as irrevocable divorce. It can be divorce either according to the procedure provided in the Quran or it can be dissolution of marriage through Court. Eila is a wrong caused to the wife by the husband who denies her the right of marital life and as such he is punished by dissolution of marriage at her instance.[1]

SECTION 10—ZIHAR

The word Zihar is derived from Zahr, the back. In the language of the law it signifies a man comparing his wife to any of his female relations within such prescribed degree of kindred, whether by blood, fosterage or marriage, as renders marriage with them invariably unlawful, as if he were to say to her (by a peculiarity in the Arab idiom) "You are to me like the back (Zahr) of my mother.[2]

This was another method in Jahilya of keeping the wife under suspense. The husband would say to the wife, in case of discord ; *anti 'allaya ka zahri ummi* (انت علی کظہر امی). (You are to me as the back of my mother). The consequence was a divorce in which the wife could not leave her husband's house and remained for her whole life a deserted wife.

Islam did not recognise it as divorce, as would be apparent from the Hadith of *Khaul'a* and the Quranic verse.[3] *Khaul'a* was the wife of Aus bin Samit who pronounced Zihar on her. She came to the Prophet pbh who showed his inability to interfere. She went back disappointed. Then the verse was revealed :

1. *Bidayat ul Mujtahid, Ibid*, p. 84; *Al Mughni*, p. 331 ; *Muslim Law of Divorce*, by K. N. Ahmad, p. 113.
2. *Hedaya* by Hamilton, p. 117.
3. *Ibid.*, p. 118, 1st column.

قد سمع الله قول التى تجادلک فى زوجها وتشتکى الى الله
والله يسمع تحاور کما ان الله سميع البصير ـ

Q. 58 : 1—Allah hath heard the saying of her that disputeth with thee (Muhammad) concerning her husband, and complaineth unto Allah. And also heareth your colloquy. Lo! Allah is Hearer, Knower.

الذين يظهرون منكم من نسائهم ما هن امهتهم ان امهتهم الا
الّٰى ولدنهم وانهم ليقولون منكرا من القول وزورا وان الله
لعفو غفورا ـ

Q. 58 : 2.—Such of you as put away your wives (by saying they are as the back of their mothers). They are not their mothers ; none are their mothers except those who gave them birth—they indeed utter an ill-word and a lie. And Lo! Allah is Forgiving, Merciful.

The first verse deals with the complaint of *Khaul'a* and the second with the refutation of the age old pre-Islamic custom by which the life of woman was made miserable. Islam declared that Zihar could not constitute divorce. And yet the jurists held that if in some cases it is proved that the intention was to divorce the woman, it would amount to irreversible divorce.[1] The evolution of this last principle also has roots in the doctrine of three simultaneous *talaks* being effective as irrevocable divorce after which the woman cannot remarry the same husband without effectively marrying anothre husband. In view of what has been said in regard to this method of *talak* I do not agree with the above interpretation of the jurists regarding Zihar. Intention or no intention, Zihar cannot in any form, amount to *talak*.

The other two verses concern expiation for Zihar. The woman can compel the husband through the Kazi to expiate.

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1. *Hedaya* by Hamilton, p. 118, 1st column.

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156. The tradition from Ibn Abbas that during the period of the Prophet (p. b. u. h.) *inter alia* three talaks were treated as one and Hazrat Omar enforced the principle of three talaks as being irrevocable, 605.

157. Another tradition from Abus Sahba to the same effect, 606.

158. The tradition from Ubada bin Samit that it was mentioned before the Prophet (p. b. u. h.) that some person had divorced his wife 'a thousand times' and he was pleased to observe that the woman had become unlawful as a result of three talaks, and nine hundred ninety seven talaks amounted to a sin for which he would be held liable, 608.

159. The tradition from Hazrat Ali that the Prophet (p. b. u. h.) was enraged on hearing that some person had pronounced *talak-al-barra* on his wife and held it to be a jest or playfulness with the divine commands and three Talaks would be enforced against him so as to make his wife unlawful to him, 610.

160. The tradition that Imam Hassan pronounced three divorces on his wife and later said that he would have revoked the talak if he had not heard it from his grandfather or father that on pronouncement of three Talaks the wife ceases to be lawful to the husband, 610, 611.

161. The tradition of Uwaimar that after conclusion of the proceedings of li'an between him and his wife, he pronounced three talaks on her and the Prophet of Allah (p. b. u. h.) did not refute or prohibit him, 612

162. The tradition concerning the decree of Khula' passed by the Prophet (p. b. u. h.) on the petition of the wife of Sabit bin Qais, 644.

163. Other versions of the same tradition, 644

164. The tradition which gave option to a freed woman to seek release from her slave husband, 647.

165. The tradition that 'let no harm be done nor harm suffered in Islam', 657, 683.

166. The tradition about the revelation of the verse about Li'an in respect of Aweemar and his wife, 688

167. The tradition about Hilal bin Ummayya in respect of the revelation of Q. 24 : 6, 689.

168. The tradition in respect of Sa'ad bin Obaida who inquired from the Prophet (p. b. u. h.) whether he could kill a man if he saw him in compromising position with his wife and the reply of the Prophet (p. b. u. h.) in the negative. On his insistence the Prophet (p. b. u. h.) observed that he was more envious of honour than him, 690.

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CORRIGENDA

Page 15 in line 10 read "grund" for "ground".
Page 21 in lines 18 & 23 read "consensus" for "concensus".
Page 42 in line 15 read "indubitable" for "indubtable".
Page 94 in last line read "blind" for "behind".
Page 106 in line 11 give bracket after 'her'.
Page 131 in line 5 read "unto" for "into".
Page 152 in line 25 add "Pbh that" after "prophet".
Page 152 in line 27 the words "Pbh that" be omitted.
Page 158 in line 18 read 'into' for 'no'.
Page 189 in line 14 read "Billah" for "billah".
Page 190 in line 19 add ',' after Muslim and in line 21 read "their" for "Their".
Page 233 in line 11 read "He" for "he".
Page 233 in last but one line read "off" for "of".
Page 240 in line 8 read "men" for "women".
Page 269 in last line read "He Pbh" for "she".
Page 287 in line 23 read "him" for "her".
Page 283 in line 26 read "of the victim" for "th evictim".
Page 297 in line 4 read "Saheeh" for "Shaheeh".
Page 302 in line 19 read "as" between "her" and "to".
Page 304 in line 2 read "phrase" for "phase".
Page 304 in line 22 read "Pbh" after "Messanger of Allah".
Page 330 in line 6 read "undeniable" for "undernable".
Page 331 in line last but one ',' may be added after 'man'.
Page 348 in line 4 read "الوصية" for "وصية".
Page 362 in line 23 read "expenses" for "express".
Page 364 in line 9 read "where" for "when".
Page 373 in line 6 read حرصتم for حريتم .
Page 382 in line 2 read "contentment" for "cententment".
Page 422 in line 29 read "others" for "other".
Page 429 read ',' at the end of line 9.
Page 439 in line 27 read "first" for "firs".
Page 441 in line 22 read "insertion".
Page 443 in line 14 read "Ja'alna" for "Ja'al".
Page 443 in line 16 read "We" for 'he'.
Page 468 in line 3 read "hands" for "hand".
Page 470 in line 7 read "Ashraf" for "Ahraf".
Page 497 in line 18 read "Shia" for "Shaia".
Page 479 in line 21 read ',' after 'into'.
Page 486 in line 29 read "تعدلوا" for "تعولوا" and "ta'adilu" for "taoolu".

Page 492 in line 4 read "for" after "and".
Page 504 in the last line read 'as' after "field".
Page 518 in line 16 read "drawing" for "driving".
Page 519 in line 5 read "this" for 'his'.
Page 524 in line 11 read "lending" for "leading".
Page 528 in line 7 read "became" for "become".
Page 532 in line 3 read "and" after "land".
Page 546 in line 5 read "lays" for "lay".
Page 547 in line 25 read "reflect such" for "reflects uch".
Page 562 in the last but one line read "non" for "none".
Page 573 in the last but on line read "keepeth" for "peedeth".
Page 575 in line 12 read 'or' for 'of'.
Page 575 in line 13 read "of" for 'or'.
Page 581 in line 8 (Section 4) read "Rights of Divorce" for "Rights and Divorce".
Page 586 in line 5 read "is" for "be".
Page 589 in line 14 (Section 7) read "Bid'at," for "Bidd'at".
Page 603 in line 2 read "is" after "it".
Page 626 in line 8 read "became" fot "become".
Page 641 in line 12 read "by" for "to".
Page 642 in line 6 read "or" for "on".
Page 643 in line 26 read "aught" for "taught".
Page 644 in line 15 read "she" for "he".
Page 645 in line 1 read "khula without" for "khulawithout".
Page 645 in line 21 omit word "other".
Page 645 in line 22 add word "other" at the end.
Page 651 in line 9 read "did" for "hid".
Page 651 in line 27 omit word "it".
Page 664 in last but one line read "eighteen" for "sixteen"
Page 666 in line 19 (cl. IX (*a*)) read (*iii*) for (*ii*).
Page 666 in line 23 second bracket be omitted.
Page 667 in line 23 read "the" for "she".
Page 677 in line 26 read word "not" between "is" and "entitled".
Page 680 in line one and two read words "that insanity" for "thu tinsanity".

Letters "P. B. H.", "Pbh" or "Pbuh" or "P. B. U. H." wherever used in this book mean peace be on him or peace be upon him.