

are placed directly on men. Quran is aware of the dangers to which witnesses are exposed and seeks to protect women from these dangers. Here again Quran's teaching is self-consistent. In the matter of khula and talaq a woman is free to make her own decision but as an added measure of protection, acts operates under protection of the Court. This is a privilege to enable her to perform her role in the society in a situation of freedom from fear for her own person or her loved ones.

In actual point of giving evidence the woman's evidence is as good as man's. If the woman giving evidence does 'need reminding', she gives evidence and 'is not reminded'. The judge is free to accept her testimony in preference to that of other witnesses.

We must note that the general rules about law of evidence are a later day growth. The proposition that women's evidence be not accepted in certain cases is itself a later day development as is clear from the reports on the theme contained in Musannaf Abdur Razzag.

The quality of evidence is not dependent on the sex of the witness but the quality of observation, retention and delivery. This differs from person to person. No superiority in this behalf can be presumed for any sex. The issue we understand is also sub-judice in the Federal Shariat Court.

In sum, a strong case exists for equality in diyat between man and woman.

duty in absence of even a clear Ijma to act in accordance with the direction given by the Quran and the Holy Prophet (P.B.U.H) himself!

Even according to the constitutional mandate given to the counsel of Islamic Ideology and to the National legislature, the binding authorities so far as the Ummah's legislative power in Pakistan is concerned is of Quran and Sunnah and not other opinion. In this behalf I would also like to refer to Al-Muntaqa a commentary on Mawta Imam Malik Vol.7 p.78, wherein it is stated that even in regard to what is reported from Ali and Umar ibn Khattab there is a contrary view also though Imam Shafai characterizes it as Zaeef (weak). In view of the material that is now available to us it can be said that in line with the principle of equality given by the Quran and the undisputed Sunnah it is certainly open to us now in 15th Century to choose which of the two opinions best suits our need.

3. The third source of the claimed superiority of men is the proposition that in the field of evidence two women substitute a man, hence men are ex-facie superior.

The proposition is too broad and therefore plainly unacceptable.

There are nine verses in the Quran appertaining evidence of which two concern us here. In lian when a man claims unchastity on part of his wife his four oaths can be rebutted by her four (24.6-10). The punishment is also avoided.

The only place wherein men preferably are asked to become witnesses is, verse 278 of Baqra wherein in regard to loan transactions instruction is given that they be written down, be they large or small; that they be written down meticulously, clearly stating the terms of liability, and witnessed preferably by men, but if men are not available then two women for a man so that one may remind the other should she stumble. The ummah is also warned that the witnesses or the scribe be not exposed to injury for performing this obligation.

It is obvious Quran does not want women dragged into bazaars to be made witnesses in big and small loan transactions. This is consistent with Quran's other teachings whereby primary economic obligations

also the different significance of the part of body in relation to the person injured. (Musannaf, Abdur-Razzaq No. 17587 Vol.9.). Secondly, if there is no final decision given by the Holy Prophet (P.B.U.H.) and if the so-called Ijma is only an Ijma by silence then it is certainly possible for the Ummah to formulate a law which can serve its contemporary needs better. In this behalf I would refer to the opinion of Abu Zahra who after citing the classical opinion about a woman receiving half the diyat of a man expresses himself very clearly that what is being compensated for is the loss of life or limb and in this behalf a man and woman are equal. Another jurist of equally high standing in this field Ali Ali Mansoor, in his work Nizam ut Tairim Wal Iqab fil Islam Vol.2 p.235 says very clearly that there is no difference in the quantity of diyat on account of the sex of the deceased or on account of the religion of deceased and then after discussing on p.236 the reported view says :

"there is much more strength in the view expressed by Ibn Ulaiya and Imam Asam that the Holy Prophet (P.B.U.H.) said :"

"that verily for the loss of a life the diyat is 100 camels."

and he then further says that this equality is supported by large number of Fuqaha and Muhaddeseen. He rejects the argument on basis of economic utility as neither just nor free from controversy.

The Shaikh-ul-Azhar, Shaikh Mohammad Shaltoot was also of the same view and his opinion is summarized in the work Makanat-ul Mirat-e-fil Ustratil Islamia, 1975 p.404.

In another modern work Al-Nizam al-Ikabi al-Islami by Abul Muaddi Hafiz Abul Fatooh, the author says on p.248 of his work, that the better view is that the diyat of a man and a woman should be equal because it is more in consonance with the thrust of the Quranic teachings: and the undisputed hadith reported from the Holy Prophet (P.B.U.H.).

It is submitted that in view of the fact that Quran commands equality and even the persons who hold the view that diyat of a woman is half that of a man concede that teaching of Quran seems to point in direction of equality, and in view of the fact that the

truly undisputed ahadith in the field speak of equality of diyat in regard to man and woman, is it not our

ity so expressly maintained in the text of the Quran (5.45; 4.92)

2. The second contention is that because man has control over marriage in regard to its continuance and its termination he is superior to woman. This again is too broad a proposition because if Talaq is the right of a man, woman also has the right to seek talaq. She can also unilaterally demand khula which demand cannot be resisted on merits either by the husband or by the kazi, should she establish before a kazi that she does not want to stay with the husband and wants a termination of the tie of marriage (PLD 1967 S.C.97).

Therefore, the argument from the presumed control of marriage itself begs the question, firstly the presumed control of marriage is not established in law; secondly in the assignment of mutual rights and liabilities during marriage, Quran is explicit ;

"they (women) have rights equal to the obligations placed on them (2.228)."

3. The fact that there does not appear widespread protest against giving half the diyat to women may well be because the existing socio-economic conditions of the society in which the rule of giving half was established was such that a woman was yet wholly subject to a man's dominion.

Women had not on the whole yet come up to the level of equality Quran and the Prophet (P.B.U.W) gave them. No one stood up on their behalf and their rights were taken without a demur from their ranks. A woman now has a more self conscious role to play in the family as well as economically which role has over the centuries been expanding. She is more educated and intellectually more alert. A large number of them work to contribute to the family kitty and in considerable number of cases they are the main supporters of the family also. On the other hand many men are finding the task of providing for all the female dependents unsupportable.

In fact it appears that in the earliest period the alleged superiority of male in regard to injuries was not universally accepted. I am here referring to the decision by the first caliph Hazrat Abu Bakr Siddique, whereby he awarded woman double the compensation that was given to a man in regard to loss of a breast, indicates that the matter was open and co-related not only to the different situations but

Thirdly, even as between the man and his wife the husband is required to give mehr to his wife. And in this behalf the conduct of the Holy Prophet (P.B.U.H.) while marrying Hazrat Fatima to Hazrat Ali is most significant.

Though Hazrat Ali was not a very rich person yet the Prophet (P.B.U.H.) asked him to sell his coat of arms and give half the price to his bride as mehr. Therefore, in view of these additional reasons drawing the conclusion that a woman is inferior to man in inheritance is not justified. Even otherwise in regard to inheritance no question personal or permanent inferiority is really involved.

Some jurists have however argued that in as much as a woman is not called upon to contribute economically, she is *ex facie* inferior. Even as a purely economic contention this argument is not correct. A woman makes a massive contribution by establishing the home and working therein every day of the year without salary which services if a man was called upon to procure or perform he would find both expensive and trying. Therefore, it is wrong to assert that no economic contribution is made by a woman.

The fact is that the type of duties which a woman performs as a member of the family unit, cannot be substituted and to that extent on the parity of reasoning she would appear to be, to that extent, superior to them man. But this line of reasoning I am afraid does not take the matter very far because what a woman has to do she has to do, and a man has to do he has to do. Their roles are to an extent distinct but on the whole complementary to each other. Nothing in this behalf in the matter of division of labour or duties, makes one the superior of another. And when the relevant Quranic verse gives in relation to marriage a certain amount of superiority to the male it states very clearly the reason for that superiority which is limited and for specified reasons. There is no nexus between assignment of a role for specific purposes and the claimed absolute superiority of men and the inferiority of a woman, requiring her or her heirs in case of death to be paid half the damages. It is often forgotten that diyat is substitute of equal punishment for a death or injury caused. If in the original loss man and woman are equal and entitled to equal qisas, we cannot on plain of logic reduce the diyat, because that would immediately violate the principle of equal-

take the view that diyat for women should be equal to that of a man.

It is also submitted that the two main traditions on which reliance is based by the Hanafis and the Shafais in part contradict each other and again contradict two other ahadith reported from the Prophet (ﷺ). The so-called Ijma then is really based not on superior authority but on certain economic propositions, each one whereof is subject to grave doubts and disputes.

It is submitted that in a situation where the alleged Ijma has disappeared it becomes the obligation of the Ummah to accept the rule which is nearer to the plain text of the Quran just as the Ulema in the past ages have on such principle given the muhid's diyat equal to that of a man.

Q.3. The question No.3 is, what is the value of the sociological reasons given in support of this proposition, My first submission in this behalf is that it is claimed that a woman's inferiority is established because she receives half the share of male in inheritance. Reliance is placed on verse :

"Allah commands you concerning your children :
a male shall have as much as the share of two
females

And his parents shall have each one of them a
sixth of the inheritance. " (4.11)

It will be notice that this very verse where it gives a boy share equal to of two girls, in regard to the father and mother of the person whose estate is to be inherited the share of the mother is prescribed to be equal to that of the father. Consequently it is obvious that the very verse on which reliance is placed is not supporting any intrinsic superiority or inferiority of a man or a woman. In some cases closer female relations receive more than the remoter men. The quantum of inheritance it would thus appear is governed entirely by the relational situation.

Secondly, the reason for a woman receiving half the share of a man is that the economic burden of looking after the family, the Quran places on the husband. The man is placed under a continuing burden to contribute economically when a woman is not placed under an obligation to do so.

history of muslim jurisprudence that diyat of woman be equal to that of a man appears stronger, more consistent with the Quran and Sunnah, and the general values of equality and justice as reflected in the Quran.

In his Tafseer Fakhruddin Razi (d.606 A.H.) points out that fairly early in the history of Muslim Jurisprudence contrary view had appeared. The contrary opinion is cited of Imam al-Asam and Ibn Atiya or Ibn Ulayya who were both jurists of eminence and were of the opinion that diyat of a female is equal to that of a male. They based their opinion on the text of the Quran.

Says Fakhruddin Razi in Vol.X of his Tafseer at p.237 :

" The opinion of the majority of the jurists is that diyat of woman is half that of a man but Al-Asam and Ibn Atiya says that it is equally to that of a man. The reasoning of the jurists is that Ali, Umar and Ibn Masood had decided, since in inheritance and in evidence her value was half that of a man so should it be in Diyat. But the reasoning of Al-Asam was based on Quran. (Refer to Ayat 92 of Sura Nisa) and particularly when all are agreed with in regard to causing of death, man and woman are equal. But conclusion is irresistible that this equality be maintained in the consequences and Allah knows best."

Commenting on verse 178 Al-Baqra Tabri cites in support of equality the hadith for muslims "the blood of one is equal to that of the other", he points out that it was the habit of Arabs that while taking revenge they used to kill a free man for a slave, but Allah turned them away from this bad tradition and commanded equality in revenge.

Ijma by definition is the conscious consensus of the learned of an age about a principle of law which must in term not conflict with the Quran or the proved Sunnah of the Prophet (P.B.U.H) . It is of course open to the Ummah to adopt a course or all courses possible for which Sunnah, not in conflict with Quran, is available. In the present case we shall presently show that there has never been a conscious Ijma after full consideration of all the relevant material on this point, and that today atleast on re-assessment of the Quranic teachings, the reported traditions of the Prophet (P.B.U.H), the learned of the Ummah are inclined to

About the second foundations of Kasani's view Abu Zahra criticizes the claim of consensus (Ijma) on the ground that the consensus that Kasani alleges is only consensus by silence. Many learned jurists do not accept this consensus as Ijma. (Al-Akuba p.646).

Personally he supports equal diyat for man and woman.

Maulana Zafar Ahmed Usmani in his work Ail-al-Sun-an feels considerable difficulty in reconciling to the idea of diyat of a non-muslim living in lands of Islam (Muahid) being equal to that of a muslim and of a muslim woman being half. He then resolves the issue by saying :

"We accept the traditions giving non-muslims muahids (i.e. those living in muslim lands with consent of the Ummah) diyat equal to that of the muslims by accepting those traditions which accord with the apparent meaning of the verse (Q.4.92) which (appears to) prescribe equal diyat for murder of a muslim and a non-muslim muahid but if you say that women also appear to be included in the general words of the ayat then just as their diyat is not equal to that of a muslim male, the diyat of a non-muslim can also be so. In reply we would say, the shortfall of the diyat in case of a woman is on account of Ijma and reports about it, without reports to the contrary. If reports about the non-muslims were similar, same would have been the rule about them, but you have seen that about them (non-muslim) reports in accord with the plain meaning of the ayat and contrary thereto are available, so decision is in accordance with the plain meaning of the text (of Quran) is preferable.

In sum, the plain text of the verse prescribes equality between diyat of a woman and that of a man as in case of non-muslims muahids but we turn it away from its apparent meaning on account of the reported decisions and Ijma. This is not the situation in case of a muahid non-muslim in whose case the reports conflict."

Today the position is that on re-examination of the entire material on which the so-called Ijma is based there has been a shift towards granting woman diyat equal to man. The reasoning offered by Imam al-Asam and Ibn Attiyah who insisted fairly early in the

nnaf Abdur Razzaq and Musannaf Ibn Abi Shaiba would not have appeared because the companions of the Prophet (P.B.U.H.) would have known and acted upon a decision of the Prophet (P.B.U.H.) without demur. It is possible to recount this difference of opinion in greater detail but if the authorities which have already been referred are seen in depth the proposition would be more than established.

2. So far as the opinion of the alleged Ijma is concerned the position is as under :

According to Kasani (Al-Badae-Was-Sanae) the foundation of this Ijma is decisions by Hazrat Umar bin Khattab, Hazrat Ali, Hazrat Ibn Masood and Hazrat Zaid of the view that diyat of woman is half that of a man and nothing is reported which contradicts this statement. (Vol.7. p.254). Firstly, the statement of Kasani is not accurate because both Musannaf Abdur Razzaq and Musannaf Ibn Abi Shaiba contain reports to the contrary. Abdur Razzaq reports "17979, Abdur Razzaq from As-Suary from Hammad from Ibrahim from Ali who said, whenever there be (dispute) between a man and a woman there would be Qisas in injuries or taking of life or in other matters, if it is intentional." Item No.17980, 17981 support this view.

In item No. 17973 Abdur Razzaq reports from Ibn Juraih from Atta who said, "woman will be killed for (killing) a man, there is no superiority between them." Similar is the report from Amar.

In item No.17975 Abdur Razzaq reports from Mamer from Katada that Umar bin al-Khattab sentenced a man to death for killing a woman. Abdur Razzaq cites contrary view also in item No.17977 & 17982 to the extent that except for killing there is no qisas between men and women. In Musannaf fil ahadith wal Asaar of Ibn Abi Shaiba there is a chapter No.1348 beginning with the hadith "the muslims-their blood is equal to each other". In this chapter it is reported that a free man, woman and slaves appeared to have different diyats though in the matter of murder they were treated as equal.

It is, however, noteworthy that in report No. 17586 Vol.9 in Musannaf Abdur Razzaq there is a decision reported from Abu Bakr the first caliph wherein he ordered 100 dinar as diyat for loss of a breast by a woman and in case of man losing a breast he fixed 50 dinar as diyat.

also her suffering, to which Saeed said are you an Iraqi (the question that are you Iraqi, means are you given to opinions based on logical reasoning for which people of Iraq were characterized as Ahl-al-Rai) I said not but a person seeking to know; whereupon he said this is Sunnah Oh my counsins."

(iii) Zailai in his work Nasbur Raya Vol. IV p. 364 characterizes this report as not being Sunnah and explains that Ibn al-Musaiyab in this report by Sunnah meant the practice in Medina (not of the Prophet (ﷺ)).

(iv) Sarakhsi is unwilling to accept this report because it is very rare and is contrary to intelligence. (Al-Mabsut Vol.26 p.79). It obviously contradicts the hadith reported by Maiz, on which the hanafis rely at least upto 1/3rd.

(v) In modern times Maulana Zafar Ahmed Usmani in his celebrated work has characterized this report as zaeef (weak) because one of the relators of this hadith is Ibn Juraih Hijazi and the person relating from him is Ibn Ayiyash whose reports from people of Hijaz are not considered reliable. (Ailao Sunan Vol.18 p. 166-170).

(vi) In his celebrated work Nail al Autar, Shaukani, points out the internal contradiction of these reports with telling effect Vol.7 p.70.

(vii) The above two views stand further contradicted by the following ahadith :

(1) In his instructions to Amr bin Hazm the prophet (ﷺ) said, "the diyat of a believing soul is one hundred camels."

(2) The Prophet (ﷺ) said, "the muslims - their blood is equal to that of each other."

(viii) In addition we have several reports in Musannaf of Abdur Razzaq (d.A.H.211) and the Musannaf of Ibn Abi Shaiba (d.A.H.235), both being oldest available detailed works in the field, which indicate that the subject was subject to a variety of opinion. This would not be if there was any decision by the Prophet (ﷺ) occupying the field. Therefore the claim about the matter being finally decided on authority from the Prophet (ﷺ) is not acceptable. If there had been a clear decision from the Holy Prophet (ﷺ) this difference of opinion which is reflected most concretely in the earliest works namely : Musa-

NOTE

ON PROPOSED LAW OF

QISAS AND DIYAT

BY

KHALID M. ISHAQUE

The case of those who insist on the diyat of a woman being half that of a man according to their own sources rests on :

1. Two reports from the Holy Prophet (P.B.U.H.)
2. On the Ijma of the learned of the Ummah barring two early authorities namely, Imam al-Asam and Ibn Atiyah or Ibn Uliyah.
3. The alleged inferiority of woman in comparison to man.

1. According to Ahnaf there is a report by Ma'az bin Jabal that " the Prophet (P.B.U.H.) said, the diyat of woman is half that of a man."

(i) This tradition is reported through two chains of relators from the Prophet (P.B.U.H.) which according to Baihaqi Sunan al-Kubra Vol.8 p. 95, are weak. Other reports wherein according to Zaid bin Thabith the diyat is equal in injuries upto 1/3rd and there after that of women is half is also munkate i.e. not established upto the Prophet (P.B.U.H.).

(ii) The Shafais seek support from the report related in a conversation by Rabiya bin Abi Abdur Rahman with Saeed bin al-Musaiyyab which goes as under :-

" What is compensation for a single finger of a woman, he said 10 camels, then I asked him how much for two fingers, he said 20 camels then I asked him how much for three fingers and he said 30 camels then I asked him how much for four fingers, he said 20 camels, I said how is the compensation reduced when her injuries are greater and