

## Conditions and Qualifications for Being a Judge in the Light of the Islamic Law

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### Abstract

‘Adl and Qist is indeed a manifestation of God’s mercy, rather, it may also be seen as a principal objective of Shari‘ah. The origin or sources of administration of justice in Islām are the Quran, Sunnah of the holy Prophet, consensus of opinions of the jurists of Islamic jurisprudence and Analogy (Qiyās).

Justice is a sacred obligation of supererogatory. It is obligatory upon the Muslim rulers to appoint judges for the dispensation of justice to attain equality, to protect the human rights from their violation, to safeguard the lives and properties, and to maintain law and order in society. As a judge is supposed to accomplish a very important and noble task being a regent of Allāh, hence, some vital merits and criteria regarding the conditions and qualifications for the appointment of the Qāḍī or judge in the light of the Qur’ān, Sunnah and Islamic jurisprudence and the code of conduct for the Pakistani judges must be observed at all costs. The author of this paper has discussed these conditions and qualifications in this article.

There are some unanimous conditions for the appointment of judges, while some others are not agreed upon. While presenting the difference of opinions of the Islamic jurists, the author tried to explain, reconcile the opinions and at some places presented her own view in the light of her analysis and arguments. These conditions are around thirty, but the author according to her own discretion chose some of the most important ones to discuss in this paper.

**Keywords:** Qāḍī, Qaḍā’, the Qur’ān, Sunnah, Islamic Jurisprudence, Justice, Conditions for the Appointment of Judges

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## Introduction

There are certain conditions laid down by the Islamic jurists, for the appointment of a judge. Some of them are agreed upon and others are not. According to some Islamic jurists, there are as many as thirty conditions set as the eligibility for the office of Qāḍī, whereas, some other jurists have reduced them to only three. The requisite qualification for a Qāḍī is not specified in any Qur'ānic verse or Ḥadīth. Hence, the conditions of a Qāḍī mentioned by the jurists are mostly dependent on their inferences and deductions:<sup>1</sup>

### 1. Being a Muslim

Īmān or faith is considered to be the basic foundations of every act, and Qaḍā' is deemed to be like the legal guardianship, so, an infidel or a non-Muslim cannot be a guardian of a Muslim, as it has been ordained in the Qur'ān:

﴿وَلَنْ يَجْعَلَ اللَّهُ لِلْكَافِرِينَ عَلَى الْمُؤْمِنِينَ سَبِيلًا﴾<sup>2</sup>

*And never will Allāh give the disbelievers over the believers a way [to overcome them].*

It is the duty of a Qāḍī to implement the order of Islamic Shari'ah and this is the spirit of religion (Din), thus a non-Muslim is assumed to be biased in implementing Islamic Shari'ah or through his prejudice or bias, he will go into conflict with Islamic Law. All the jurists have agreed on this point that a non-Muslim (infidel) cannot be a guardian of a Muslim.<sup>3</sup>

While decision of a non-Muslim for a non-Muslim in an Islamic state is also prohibited according to the majority of the Muslim jurists (Fuqahā') as the post of Qaḍā' is for the Muslim and for being a Qāḍī, Islām is a basic condition, whether he is dispensing justice among Muslims or non-Muslims.<sup>4</sup>

Whereas, according to Abū Ḥanīfah, the decisions of a non-Muslim Qāḍī will be correct and legal for his religion fellows

according to their customary laws. He relies upon the verse of Qur'an:

﴿بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ﴾<sup>5</sup>

*They are in fact allies to one another.*

The condition for eligibility of a Qādī is his eligibility of being a witness, and a non-Muslim is qualified to be a witness. So he can be a judge or a Qādī upon them and it will not be injurious, as a Muslim Qādī can be asked to administer justice among a special group of Muslim litigants.<sup>6</sup>

Preferred Opinion seems to be that of the majority of the jurists that dispensation of justice will be administered by Muslim Qādī only in an Islamic state, whether they decide the matters among the Muslims or non-Muslims, as it can be inferred from the text of Ḥadīth that the guardianship or supervision of a non-Muslim is forbidden, which goes as follows:

((الإِسْلَامُ يَعْلو، وَلَا يُعَلَى عَلَيْهِ))<sup>7</sup>

*Islām dominates and is not dominated.*

The administration of justice by a non-Muslim (infidel) will be given higher ranking to a non-Muslim upon a Muslim, which is prohibited in Islamic Shari'ah. Similarly, paying of tax (جزية) by non-Muslims is a symbol that the Muslims have higher placement (علو) upon the non-Muslim.

## 2. Being an adult and sane:

The Qādī should be a major and a prudent person as his job requires wisdom and sagacity for deciding the litigation. As one cannot differentiate between right and wrong and truth and lie, until one enjoys wisdom and prudence. In case of one's idiocy or childhood, one can neither utilize one's wisdom, nor can differentiate between right and wrong, or profit and loss, so, an insane or a child cannot take care of their personal interests and are

under supervision of their guardians, how can they be appointed as guardians of others. According to the word of Ḥadīth:

8 ((السُّلْطَانُ وَوَلِيُّ مَنْ لَا وَوَلِيَّ لَهُ))

*"Whosoever does not have a guardian, then the ruler (the judge) is his guardian."*

It is said that a Qāḍī must be a perfect person and this perfection is of two types: perfection in decision and perfection in creation. Perfection in the decision will be attained by being a major and a prudent person. There are basic conditions for being liable in Islamic Shari‘ah. Therefore, a minor and an insane person cannot be appointed as Qāḍī, as they cannot differentiate between right and wrong, and they are not legally bound by their words or actions. Thus, their acts are not enforceable except, they cause any damage (then they will be held responsible through their guardians), as they do not fall under the legal commands, as the holy Prophet (ﷺ) has said:

(( رُفِعَ الْقَلَمُ عَنْ ثَلَاثٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنِ الصَّغِيرِ حَتَّى يَكْبُرَ، وَعَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ أَوْ يُفِيقَ ))<sup>9</sup>

*"The Pen is lifted from three (types of) persons: from a child until he grows up, from the sleeping person until he wakes up, and from the insane until he recovers,"*

Through this Ḥadīth, we can infer that their guardianship is not valid due to being imprudent and insane; so their words or actions will lead to destruction, if they are assigned the job of Qaḍā’.

Narrated by Abū Hurayrah (May Allāh be pleased with him) the Messenger of Allāh (ﷺ) said: “Seek refuge of Allāh from seventy years-old ruler and power of small boys.”<sup>10</sup>

The anarchy will appear in case the minors are made rulers; the reason is that they cannot control the situations and incidents. Consequently, their authority will be harmful for Muslims.

There is an agreement between the jurists that insane and minor persons cannot be appointed as guardian or Qāḍī for others as they are incapable of controlling their own matters.<sup>11</sup>

Some jurists have opine that whosoever is appointed as a judge, he must be a good decision maker, have great intellect, should remain away from sin, forgetfulness and negligence, be able to have clarity of mind and deep understanding about the problems and their solutions.<sup>12</sup> Prudence is a power to differentiate and intelligence, whereas perfection of creation means that a Qāḍī should not be deaf, dumb or blind, and if he is, so, he won't be able to see the litigants or hear them. While Imām Mālik has approved that a blind can be a Qāḍī as his evidence is permissible and admissible and Abū 'Abbas bin Suary allows the dumb to be a Qāḍī, if his indication can be understood.<sup>13</sup>

### 3. Being Free:

Though the slavery is not prevalent in our ages, but the jurists have discussed this topic that whether a slave can be appointed as a Qāḍī or not. The Muslim Jurists have made it a must condition that a Qāḍī should be a free person, because the slave has no discretion in his own matters and how will he be deciding the others matters? His own person is just like a commodity, which can be sold or purchased, while Qaḍā' is a very prestigious and dignified job. As a slave does not enjoy a graceful place or status in the eyes of the public, hence the people do not pay any attention towards his sayings, so, how will they respect his opinions, orders and judgments. According to the majority of jurists, the freedom is the foremost condition for the appointment of Qāḍī, and if a slave passes his order as a Qāḍī to the Muslims, they will not be enforceable. One of Mālikīte Jurist, Sahnun, opined that even if a freed slave, having a guardian, passes Judgment, they will have no sanctity in the eye of law, as his ownership is suspicious, hence his orders or decree, in people's affair shall be invalid.<sup>14</sup>

However, there is a rare opinion of a few jurists to whom the orders passed by a slave Qāḍī shall be considered as his advisory opinion and they base their argument on the saying of Ḥaḍrat ‘Umar Farooq (R.A.)

“Would Sālm, slave of Abī Ḥudhayfah be alive; no doubt, it would have not made me hesitate to follow him.” But the jurists have negated this opinion by taking this argument as an analogy with dissimilarity, because Qaḍā’ has a force of binding, while the Fatwa does not have the binding power.

#### 4. Being a Male:

About this condition, (Can a female be appointed as a judge)? The jurists have disagreement on this condition:

According to the majority of the jurists, it is a must condition that a Qāḍī should be a male, as said by Imām Mālik, Imām Shāfi‘ī etc. According to this opinion, a woman has nothing to do with the assignment of Qaḍā’ and it is not a matter of interest for her to be in a supervisory position for passing orders or executing the decrees. As the Holy Prophet (ﷺ) has said:

15 (( مَا أَفْلَحَ قَوْمٌ يَلِي أَمْرَهُمْ امْرَأَةٌ ))

*“A nation which entrusted their affairs to a woman will never prosper.”*

Qaḍā’ requires perfect opinion, full wisdom, intelligence and experience of practical life, whereas, a woman is imperfect or short of wisdom in opinion making as her experience of outdoor affairs is very less, and her information is very limited in practical spheres of life.

Imām al-Māwardī has said: No doubt, Allāh Almighty has preferred men upon women in wisdom and opinion making, and men have been granted the status to dominate the women, due to their prudence, wisdom and opinion making, hence how a woman

can be a judge (Qāḍī) upon them? <sup>16</sup> Further, they take an argument from this Qur'ānic verse:

﴿الرِّجَالُ قَوُّمُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا  
 أَنْفَقُوا مِنْ أَمْوَالِهِمْ﴾<sup>17</sup>

*Men are responsible for women by [right of] what Allāh has given one over the other and what they spend [for maintenance] from their wealth.*

Therefore, men have the preference over women due to their wisdom and opinion, while upon reaching the just decision in *Qaḍā'*, refined approach, sagacity and prudence. To be able to make solid opinion is a must condition to be a Qaḍī. Furthermore, men's superiority over women has been established directly due to the reason that they spend their money upon them. For these reasons, the jurists have inferred that the important government functionaries should be men and not women, as according to the Ḥadīth, regarding the nation that entrusts his affairs to a woman will be unsuccessful. The Holy Prophet (ﷺ) has asked Muslims to deal their lives in such a way to be successful in this life and life after death, and this Ḥadīth directly prohibits to hand over power or judicial job to women. Similarly, a woman cannot lead a prayer, neither can she be appointed a ruler nor a Qāḍī, as she lacks wisdom, and capacity to form focused and well oriented opinion, whereas, the jurists have allowed the sinful/impious man to be an Imām.<sup>18</sup> Furthermore the jurists have narrated that there is no such evidence that proves that a woman was given the responsibility of justice in the life time of the holy Prophet (ﷺ) or during the reign of al-Khulafā' Al-Rāshidīn (The Reign of Righteous Caliphs) and even after that period. On the contrary, only those persons were elected or selected for the post of Qāḍī who were erudite and proficient scholars (this is because the function of Qāḍī is to assist the ruler to carry out his responsibilities). Whereas the assignment of Qāḍī requires mingling up with men (coming to jurors, witnesses and litigants), while the

woman had been prohibited to mix up with men, as it will lead to destruction, and it is not desired (in an Islamic society).<sup>19</sup>

Allāh (S.W.T) has warned us about woman's forgetfulness.

﴿ أَنْ تَضِلَّ إِحْدَهُمَا فَتُذَكِّرَ إِحْدَهُمَا الْأُخْرَى ﴾<sup>20</sup>

*“So that if one of the women errs, then the other can remind her”.*

#### 4.1. Can a Female be appointed as a judge?

According to the Hanafite point of view, a woman is eligible for holding the office of Qāḍī for the administration of justice in case her evidence is acceptable or her evidence along with men. As her evidence is acceptable for others, her orders for others shall also be acceptable, because evidence also means guardianship.

This implies that a woman can be a Qāḍī only in civil matters or matters related to the property, etc., Because, her evidence is acceptable in such type of matters. However, her evidence is not acceptable in criminal cases and it is a settled principle, that the persons whose evidence is acceptable, their Qḍā' is also acceptable.<sup>21</sup>

Some of Hanafite jurists like Ibn Jarīr have allowed women to be Qāḍī like men in each and every matter, because, she can issue a fatwa and can administer justice, as well, but<sup>22</sup>, this is a rare opinion and has characteristics of analogy with dissimilarity, because, Qaḍā' is not similar to Iftā', as both are entirely different in nature. This is a fact that many companions of the holy Prophet (ﷺ) used to seek advice from Ḥazrat 'Ā'ishah (the beloved wife<sup>23</sup> of the Holy Prophet (ﷺ), we should remember that she was not assigned the duty of the administration of justice).

#### 4.2. Women's Equality in Judgeship and Leadership.

According to Islām, women enjoy all rights, equal to those of men, hence, the reasoning behind the ban on female judges is proven to be groundless. Ijtihād (contemporary interpretation of allegorical

verses of the Qur'an by qualified scholars) requires that every decree or Judgment be evaluated according to four criteria:

1. The Qur'ān
2. The Traditions (the methods, sayings and writings) of the holy Prophet
3. The consensus of 'Ulamā' (religious scholars)
4. Common sense.

1. According to the Qur'an: There are no statements in the Qur'ān, depriving women from acting as judges. It addresses both men and women:

﴿ إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ ﴾<sup>24</sup>

*"God doth command you to render back your trusts to those to whom they are due; And when yea judge between peoples, that yea judge with justice.*

2. According to the tradition of the holy Prophet: None of the expressed citations from the traditions (Sunnah) imply that the holy Prophet forbade women from becoming judges or political leaders. Besides, it is in the common knowledge that after the holy Prophet's death, women's citations of the holy Prophet's sayings were considered credible and many have been incorporated into the main body of the Ḥadīth literature. The citations used by those who try to prove that Islām restrains women from becoming judges are baseless. They argue, for example, that if a woman was to become a judge, men would hear her voice when she speaks, it will promote corruption, whereas, the assignment of Qāḍī requires mingling up with men (coming to jurors, witnesses and litigants), while the woman had been prohibited to mix up with men, as it will lead to destruction, and it is not desired (in an Islamic society).<sup>25</sup> Therefore, women are not permitted to sit on the bench. Such

reasoning is without credence. For instance, women, such as Ayesha, the young lady, whom the Holy Prophet married after Khadija's death, was high spirited, extremely intelligent and outspoken, and he loved her dearly. She actively supported him in the founding of the new community of Medina and always asked probing questions about his actions and policies. It is to this lady that Muslims owe one third of the Ḥadīth (reports of the holy Prophet's actions and sayings) and she is one of the foremost authorities on Islām. Later in her life, she even led an army into a battle that she initiated. Umm-e-Salamah, whom the holy Prophet married after she became a war widow, she used to advise him on the political matters, and was also central to the narration of Ḥadīth. The holy Prophet's heroic granddaughter, Zaynab, defied the tyrant Yazīd, who usurped power in 682 A.H. So fearful was Yazīd of her powerful oratory that he had her murdered. During the holy Prophet's life, women were not passive, either, knowing that he stood with them. He even appointed a woman, Umm Waraqah, as prayer leader of her household. It is also a fact that Ḥazrat Umar had appointed Shifā' bint 'Abdullah as the inspector of markets.<sup>26</sup> There are countless such examples of outstanding women from Islām's earliest days, who were our role models. There are also a number of historical instances about the exercise of jurisdiction of Qāḍī or head of state by women without any objection by the 'Ulamā' of that age. The oldest examples are of the mother of Muqtadir bi'llāh, who presided over the high court of appeal. It appears that she decided criminal cases. Raziyah Sultānah, as the head of state, also decided cases, the name of Shajaru'l-Darr is frequently mentioned in this connection by the jurists.<sup>27</sup>

1. There are many cases in which the holy Prophet (ﷺ) acted on the evidence of women. There is consensus on the point that if a woman Qāḍī gives a Judgment and order in the matter of Ḥadd and the case goes to another Qāḍī, the latter is bound to execute the order.<sup>28</sup>

2. According to the religious scholars, contrary to the notion that all religious jurists concur on such prohibition of woman to become a Qāḍī, some of the most renowned Sunni jurists think otherwise. Imām Abū Ḥanīfah does not believe any such prohibitions existed. One can conclude, therefore, that the serious disagreements among the religious scholars make it clear that there are no citations in the holy Prophet's tradition or in the Ḥadīth, which prohibits women from becoming a judge.

### 4.3 According to Analogy:

A simple question can be enlightening regarding this matter. How is it possible that women and men bear an equal responsibility, both in terms of their religion and society, to propagate the faith; and bear an equal responsibility, stated in the Qur'ān, to promote justice and Tawḥīd (oneness); but when it comes to the most crucial means of advancing these objectives, judgeship, women are excluded? If women are permitted to master Ijtihād, then how can they be deprived, at par with lunatics and criminals, of the right to do justice, even when more qualified? Why should the public be deprived of a woman's superior insight or more comprehensive understanding of the faith?

We are free to debate, at whatever length, the qualifications required for a jurist/ judge, until we arrive at a definite conclusion. It is very difficult, however, to deprive women of the chance to acquire the necessary qualifications and religious knowledge. According to the criteria of jurisprudence, being a man is not a prerequisite to becoming a judge. Contrary to what the fundamentalists attribute to Islām, the logic of the Qur'ān clearly articulates that women can become judges.

### 5. Being Righteous:

This means the judge should be '*Ādil* i.e. a person who judges selflessly, and is not inclined towards his personal whims and wishes.<sup>29</sup> According to the jurists '*adl*' is to forbid, refraining from big sins and not insisting and continuing the small sins and

refraining from all actions that may disgrace dignity. He should be truthful, trustworthy, keeps away from prohibited acts, sins and far from the doubt, having a balanced attitude in happiness and anger.<sup>30</sup>

To be just and fair is not required only in Qaḍā', but, it is a must condition for other matters, related to the guardianship, as well. A sinful is not trustworthy, his sayings or words cannot be taken into account and Allāh Almighty has ordained to restrain and verify, whenever he says as it is a Qur'ānic injunction:

﴿يَا أَيُّهَا الَّذِينَ آمَنُوا إِنْ جَاءَكُمْ فَاسِقٌ بِنَبَأٍ فَتَبَيَّنُوا﴾<sup>31</sup>

*O you! Who have believed, if there comes to you a disobedient one with information, investigate.*

So, if his news or saying is not accepted until it is verified, how his orders as being Qāḍī will be complied with? A sinner's evidence is also not admissible, so, how his Qaḍā' shall be accepted? As Guardianship in case of Qāḍā' is having much worth and prestige than the *Shahādah* to be a witness.<sup>32</sup>

According to the Hanafite Jurists, '*Adālah* (to be just) is not a condition for the validity of the administration of justice; it is only the condition of perfection. They have allowed to follow a sinful, if his order are not in transgression with the injunctions of Sharī'ah, just like his evidence, is admissible.<sup>33</sup> However, a few Hanafite jurists are of the opinion that he will not be followed. It is obligatory upon the Muslims' ruler to appoint persons to be Qāḍī, who are just and fair.<sup>34</sup> If Imām (Ruler) appoints a sinful as a Qāḍī and people follow or comply with his orders, then his orders will be executed by taking them as a necessity, like the orders of rebellion, and the Imām will be sinful to do so.<sup>35</sup>

Therefore, it is necessary that the assignment of the administration of justice must be in the hands of just and fair person, who strictly observes the commands of Sharī'ah. As it is the basic philosophy of dispensation of justice and equality that the down-trodden be protected and their rights be safeguarded and if this noble

profession is not properly assigned to a proper person, the purpose of dispensation of justice will not be fulfilled, which forbids sinning from doing any injustice to the poor and needy, as Imām ‘Izz bin ‘Abd al-Salām said: “Similarly, being righteous is conditional in judges, caliphs and governors etc., but if it is absent among all the people, then supervision of above-mentioned persons is permissible. In this case, the best and the most suitable among them shall be appointed on the basis of doing what is possible and not being responsible for what is out of reach. There is no doubt that preserving some is better than losing all.”<sup>36</sup> As said by the holy Prophet Shu‘ayb:

﴿ إِن أُرِيدُ إِلَّا الْإِصْلَاحَ مَا اسْتَطَعْتُ ﴾<sup>37</sup>

*I only intend to reform as much as I am able.*

﴿ فَاتَّقُوا اللَّهَ مَا اسْتَطَعْتُمْ وَأَسْمِعُوا وَأَطِيعُوا وَأَنْفِقُوا خَيْرًا لِّأَنْفُسِكُمْ ﴾<sup>38</sup>

*So fear Allāh as much as you are able and listen and obey and spend [in the way of Allāh]; it is better for yourselves.*

So attaining the requirements of piety is related to ability and capacity.

“When forbidden things spread everywhere and legitimate things are missing altogether, people should not remain patient to attain the necessity which will lead to general harm”.<sup>39</sup>

## 6. Knowledgeable and ability of interpretation (Ijtihād)

One of the conditions upon which the Muslim jurists have disagreed among themselves is being knowledgeable and capable of interpretation. According to the Mālikite, Shafite, Hanbalite and a few Hanfite jurists, like Imām al-Qadūrī<sup>40</sup>, opine that to be able to exercise Ijtihād (ability to interpret) is a must condition for being a Qāḍī<sup>41</sup> and an ignorant person cannot supervise or legally enforce the injunctions of the Islamic Sharī‘ah. Therefore, to be knowledgeable is a must thing for being a Qāḍī, hence, a jurist must be well equipped with the tools of personal reasoning, individual Judgment, and must not be a mere conformist. The argument here is

that delivering Fatwa (Legal opinion) without knowledge or *Ijtihād* shall be incorrect, invalid and void ab initio, then, how the Qaḍā' will be valid by such a person? As Qaḍā' is having a ranking higher than that of fatwā. Allāh Almighty has ordained:

﴿ إِنَّا أَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ لِتَحْكُمَ بَيْنَ النَّاسِ بِمَا أَرَاكَ اللَّهُ وَلَا تَكُنْ لِلْخَائِنِينَ خَصِيمًا ﴾<sup>42</sup>

*Indeed, we have revealed to you, [O Muḥammad], the Book in truth so you may judge between the people by that which Allāh has shown you. And do not be for the deceitful, an advocate.*

﴿ إِنَّا أَنْزَلْنَا التَّوْرَةَ فِيهَا هُدًى وَنُورٌ يَحْكُمُ بِهَا النَّبِيُّونَ الَّذِينَ أَسْلَمُوا لِلَّذِينَ هَادُوا وَالرَّبِّيُّونَ وَالْأَحْبَارُ بِمَا اسْتُحْفِظُوا مِنْ كِتَابِ اللَّهِ وَكَانُوا عَلَيْهِ شُهَدَاءَ فَلَا تَخْشَوُا النَّاسَ وَاحْشَوْنِ وَلَا تَشْتَرُوا بِإِيتِي تَمَنَّا قَلِيلًا وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ ﴾<sup>43</sup>

*Indeed, we sent down the Torah, in which was guidance and light. The Holy Prophets who submitted [to Allāh] judged by it for the Jews, as did the rabbis and scholars by that with which they were entrusted of the Scripture of Allāh, and they were witnesses thereto. So do not fear the people, but for me, and do not exchange my verses for a small price. And whoever does not judge by what Allāh has revealed - then it is those who are the disbelievers.*

(( عَنْ بُرَيْدَةَ، عَنْ رَسُولِ اللَّهِ، قَالَ: الْقُضَاةُ ثَلَاثَةٌ، اثْنَانِ فِي النَّارِ، وَوَاحِدٌ فِي الْجَنَّةِ، رَجُلٌ عَلِمَ الْحَقَّ فَقَضَى بِهِ فَهُوَ فِي الْجَنَّةِ، وَرَجُلٌ قَضَى لِلنَّاسِ عَلَى جَهْلٍ فَهُوَ فِي النَّارِ، وَرَجُلٌ جَارَ فِي الْحُكْمِ فَهُوَ فِي النَّارِ، لَقَلْنَا: إِنَّ الْقَاضِيَ إِذَا اجْتَهَدَ فَهُوَ فِي الْجَنَّةِ ))<sup>44</sup>

*It was narrated by Buraydah that the holy Prophet (ﷺ): said: there are three classes of judges, one in Paradise and two in the fire, one who recognizes the right and*

*decides accordingly, this man goes to paradise. The other recognizes the right but goes against it; this man will go to hell. The third one is he who decides the cases of men in ignorance. He also goes to hell. "*

The conformist is surely, if given the task of Qaḍā', will decide being ignorant and this is disliked in Islamic *Sharī'ah* as the philosophy of Islamic Law is to implement the commands of Allāh Almighty and that of His holy Prophet (ﷺ): in letter and spirit, in all fields of life. Administration of justice without enforcing the orders of Allāh, leads towards transgression. The person who is not well versed in the Qur'ān and Sunnah, cannot be expected that his orders/Judgments will take place in accordance with the Qur'ān and Sunnah of the holy Prophet (ﷺ).<sup>45</sup> Thus, it can be said that a person having full command of the Qur'ānic sciences and Sunnah can be a Mujtahid (for doing justice) not a conformist.<sup>46</sup>

According to a rare Mālikite jurists' opinion, administration of justice by a conformist is valid in case there is no *Mujtahid*<sup>47</sup>. Hence, Qāḍī is allowed to derive the injunction/argument from the mother book of the religion for fair and smooth administration of justice. However, to be a *Mujtahid* is a difficult task,<sup>48</sup> hence, it can be inferred that according to Mālikite opinion the conformist can administer justice if a Mujtahid is present (along with him, so that he may take his legal /advisory opinion).<sup>49</sup>

Hanafite opinion: A person without having the ability of interpretation can be appointed judge, as he may refer/get advice from the learned religious scholars. He should be strict, firm, and clear cut (in his behavior). He should be trustworthy in his piety, have the ability of understanding, knowledge of Sunnah, sayings of the companions of the Holy Prophet and Islamic Law.<sup>50</sup>

The philosophy of administration of justice is to resolve the people's matters amicably to complete litigation, and it is possible to refer and to consult the legal opinion or advisory opinion of the jurists.<sup>51</sup> This may be referred to the Hanifite's majority jurists that to

become a Qāḍī, to be a *Mujtahid* is a condition of perfection and it is recommended and favorable. Imām al-Ghazālī commenting upon this issue has said: “That in the present age, all these conditions like Ijtihād and being righteous are impossible to be in one person related to the administration of justice, as the judges are appointed through powerful and mighty rulers, who can be ignorant and even sinful.”<sup>52</sup>

The Preferred Opinion is the opinion of majority of Hanafite jurists, which seems more appropriate and reasonable.

Ibn Farhūn, a Mālikite jurist’s opinion seems sound and attractive that in case of need, the conformist can be appointed as a Qāḍī, who will refer or consult the famous legal opinions of his school of thought, but, when a *Mujtahid* will be found, the opinion of conformist shall not be taken up, as this will be an overlapping/conflict of legal opinions, then a *Mujtahid* will be assigned the task of Qaḍā’:<sup>53</sup>

If we see the case of the present age, the condition of every Qāḍī to be a *Mujtahid* seems almost impossible, as the jurists have counted twenty (conditions) for being a *Mujtahid*, like deep knowledge of the Qur’an and Sunnah of the holy Prophet (ﷺ), knowledge of Juristic opinions (Fiqh): consensus (Ijmā‘) and Analogy (Qiyās), and Arabic language etc.<sup>54</sup>

### 6.1. Comparison with the Modern Law

The purport of suggesting or asserting the condition of *Ijtihād* for a Qāḍī is to confer on him a right to make and pronounce his own opinion, as what ought to be and is, the law concerning the dispute to be adjudged by him. This concept is quite different from the modern concept of judge, who interprets the law and makes it. In Pakistan, the Supreme Court of Pakistan is the apex court, whereas, the result of the former concept is to allow early Qāḍī to make law according to his capacity of knowledge and learning and this will bring us into a troublesome quandary. In this situation, the law will

differ from province to province and from town to town, rather, from court to court. What is admissible and lawful with one court can be prohibited and invalid with the other. We, therefore, seek guidance from the ruling of ‘Umar bin ‘Abdul ‘Azīz, who suggests that a Qāḍī should be a Faqīh and fully conversant with the Islamic jurisprudence, and as far as Ijtihād is concerned, it should be left for the legislature.<sup>55</sup>

**7. The Code Of Conduct for the Judges in Pakistan:** It lays down that a judge should be God-fearing, law abiding, abstemious, truthful about the tongue, wise in the opinion, cautious and forbearing, blameless, and untouched by greed while dispensing justice, should be strong without being warned and faithful to his words, always presenting calmness, balance and complete detachment for the formation of correct conclusions in all matters coming before him. In the matters of taking his and serving from the seat as a judge, he should be punctilious in point of time. His behavior, while in his seat, he should be mindful of the formal courtesies, careful to preserve the dignity of the court maintaining an equal respect towards all litigants, as well as, lawyers appearing before him. He must determine to decide a case involving his own interest or his close relatives on just ground. He should refrain from entering into a business dealing with any party to a case before him. He should ensure that justice is not only seems to be done but is done. That the gifts to be received are only from near relatives and close friends and only such as customary.<sup>56</sup>

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