

Judge And Women's Judgement In Islamic Sharia And The Laws Of Afghanistan

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Abstract

Judge and Women's Judgement is one of the utmost important and fundamental subjects that has always been discussed among Islamic jurists, both traditional and contemporary, as well as legal scholars. Although this topic is not a new or recent debate, some jurists do not permit women to hold judicial positions. Their argument is based on the narration of *عَنْ أَبِي بَكْرَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ : لَمَّا بَلَغَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنَّ أَهْلَ فَارَسَ (لَنْ يُفْلِحَ قَوْمٌ وَلَوْ أَمَرَهُمْ امْرَأَةٌ)* Abu Bakrah, may Allah be pleased with him, who said: 'When the Messenger of Allah, peace be upon him, learned that the people of Persia had appointed the daughter of Kisra as their leader, he said, 'A people will never succeed if they entrust their affairs to a woman.'

This article endeavors to discuss and explore the opinions and viewpoints of both earlier and later jurists, as well as those of legal scholars and the laws of Afghanistan.

Keywords: judge, Legitimacy of judgment, Women's judgment, condition of judgment in Afghan law

Introduction

The role of women in the legal system, particularly as judges, is a topic that has been discussed and examined in Islamic jurisprudence and various legal systems, including Afghanistan. The question of whether women can serve as judges has garnered attention from Islamic scholars, both in the past and in contemporary times, as well as legal experts in Afghanistan. While this topic may have recently come to the forefront, its significance lies in its connection to gender equality, women's rights, and the interpretation of religious texts. Islamic jurisprudence, derived from the Quran and Hadith (the teachings and practices of Prophet Muhammad, peace be upon him), serves as a primary guiding source for issues such as

governance, justice, and legal matters in Islamic societies.

The opinions of religious scholars regarding the possibility of women serving as judges differ. Some Islamic scholars object to female judges, citing narrations such as the one attributed to Abu Bakrah (may Allah be pleased with him). In this narration, it is reported that Prophet Muhammad (peace be upon him) said, "A nation that entrusts their affairs to a woman will never succeed." Some scholars interpret this narration as meaning that women should not be given judicial positions, however, it is important to note that there are multiple interpretations and viewpoints among Islamic scholars regarding this matter. Many scholars justify the eligibility of women for judging based on principles of justice, equality, and the absence of explicit prohibition in the

Quran and authentic Hadith, In Afghanistan, where Islamic law and Afghan laws coexist, the issue of female judges has also been a subject of discussion. The legal system in Afghanistan draws from Islamic principles and Afghan laws, which include the constitution, laws, and regulations established by the Afghan government.

Regarding the fact that many articles have been published in Afghanistan about the judgment of women, the following references will provide insight on this topic: Mohammad Moosa Rezaee (2016), Salman Noori (2019), Lotfoor Rahman Saeed (2019). Additionally, there are foreign research works that discuss women's judgment, including:

Abdelkader, Engy (2014), Abu Bakr, Huda (2010), Ali, Luya (2013), Amin, Tariq (2007), Al-Ghazali, Muhammad (1989), Ibn Hazm (1990), Fatemeh Birjandi (1393). These sources can provide valuable insights and analysis on the subject of women's judgment in Afghanistan.

While the judiciary existed in Afghanistan during the time of Ahmad Shah Baba Durani and subsequent rulers, during Amanullah Khan's era, the government was organized into ministries, and the Ministry of Justice took charge of judicial affairs. To facilitate judicial matters in Sharia courts, a book called "Tamsk al-Qada al-Amaniyah" was compiled, and the judiciary was divided into two branches: rights and penalties, which continued during Nader Shah's reign. During Zahir Shah's era, after the implementation of the constitution in 1964, the Supreme Court was established and began its work on Mezan 22, 1346 (January 12, 1968).

However, in the republican system, with the decree number 3 of the presidency of Afghanistan, the Supreme Court was abolished, and its jurisdiction was transferred to the Ministry of Justice. The Democratic Republic of

Afghanistan's Constitution of 1978, and later the 2007 Constitution, defined the judiciary as an independent branch of the government and prohibited judges from being members of political parties during their tenure, except for the six conditions mentioned in Article 118 for the sake of ensuring their impartiality.

In general, it can be seen that articles published about the judiciary and women's judgment in Afghanistan all revolve around the establishment of the judiciary after the enforcement of Afghanistan's constitution in the year 1343. I believe that the topic of women's judgment is still very new and fresh in Afghanistan, and the published articles have generally discussed the legitimacy of the issue, providing definitions of a judge, the elements of a judge, and the qualifications of a judge. However, none of these articles have addressed the issue of the legal legitimacy of women's judgment and the qualifications of a female judge according to Afghan laws. Therefore, with the aim of completing this gap in Afghanistan, I have delved into this discussion to complete it and present it to the community.

Study Questions

1. Is it permissible for women to assume the position of judges in Islamic jurisprudence?
2. What are the opinions of classical and contemporary jurists regarding women serving as judges?
3. Why do some jurists believe that women are not allowed to assume the position of judges?
4. Can the Hadith "A nation that appoints a woman as its leader will never succeed" be considered as the primary reason for prohibiting women from judging?

5. What is the legal status of women's participation in the judiciary system in Afghanistan's laws?

Study Objectives

1. Many issues in Islamic jurisprudence are subject to change depending on the time and place. Women's judgment is also among the mutable matters.
2. The foundation of the philosophy of *ijtihad* and analogy in Islamic jurisprudence is the same.
3. With the passage of time and the realities of society, it is assessed in what conditions women can assume the position of judges.
4. Based on the time, place, and the needs of the community, conclusions can be drawn in the jurisprudential matters.
5. Women's participation in judging is permissible if there is a societal need, appropriate environment, and preservation of the interests of the family, society, and Islam.

Research Methodology

Regarding the research method and the process of collecting the prepared and organized materials, the current research is of a descriptive research type, which utilizes library and research-based approaches to gather the required sources. In this research, reputable legal and jurisprudential books of the Sunni scholars and relevant laws related to the judiciary in Afghanistan, such as the Constitution, Law on Organization and Jurisdiction of Judiciary, the Law on the Principles of Civil Proceedings, and the Law on Judicial Code of Conduct for Judges, have been referred to.

I - General Definitions:

Before delving into the rulings of women's judgment in Islamic Sharia, it is necessary to

discuss the definition of a judge, the legitimacy of judiciary, and the qualifications of a judge in Islamic jurisprudence and the applicable laws in Afghanistan. By clarifying these aspects, the rulings of women's judgment in Islamic Sharia can be explained.

(A) Definition of a Judge

In general terms, a judge is referred to as someone who makes judgments, issues rulings, gives fatwas, arbitrates, and makes determinations. In legal terminology, a judge is a person who renders judgments. Alternatively, a judge is a person who has been appointed and designated by the ruler to resolve disputes and conflicts among people in accordance with the provisions of religious law and bring about justice. A judge is also an individual who, possessing judicial authority, handles cases and issues judgments in accordance with the provisions of the law.

(B) Legitimacy of the Judiciary

The legitimacy and permissibility of the judiciary are derived from Islamic law. The institution of judiciary not only exists in the noble religion of Islam but has also existed in previous divine religions, for which Allah, the Almighty, sent Prophets in order to establish it.

(I) The Book of Allah (Holy Quran)

The Holy Quran, as the greatest and most fundamental legislative source in Islamic law, highly regards the institution of judiciary and judgment. It explicitly establishes principles and rules for this significant duty and considers its establishment as one of the obligations of the Islamic government.

1-Allah, the Almighty, says in Surah Al-Ma'idah: {وَأَنْ أَحْكُمَ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ} "And judge between them by what Allah has revealed." This verse emphasizes the command to judge among people according to what Allah has sent down.

2-In another place, Allah, the Almighty, says to Prophet Dawood: {يَا دَاوُدُ إِنَّا جَعَلْنَاكَ خَلِيفَةً فِي الْأَرْضِ فَاحْكُم بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوَى فَيُضِلَّكَ عَنْ سَبِيلِ اللَّهِ} "O Dawood, indeed We have made you a successor upon the earth, so judge between the people in truth and do not follow [your own] desire, as it will lead you astray from the way of Allah." This verse highlights the appointment of Prophet David as a successor and emphasizes the importance of judging among people with justice, while avoiding personal desires that may deviate from the path of Allah.

3-Similarly, in another surah, Allah, the Blessed and Exalted, says: {لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ} "Certainly, We sent Our messengers with clear proofs and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice." This verse mentions that Allah sent His Messengers with clear proofs, revealed the Scripture (Quran), and provided the balance (scale of justice) to establish justice among people. These verses from the Quran highlight the elevated status of the judiciary and its importance in maintaining justice and upholding the divine law.

(2) Prophetic Traditions (Hadiths)

The sayings of the Prophet Muhammad (peace be upon him) hold the position of the second source of Islamic law. Due to their focus on the importance of establishing a just judiciary and ensuring justice in society, they are given great significance. For example, the Prophet of Islam (peace be upon him) stated in a hadith narrated by Amr ibn al-As (may Allah be pleased with him):

{إِذَا حَكَمَ الْحَاكِمُ فَاجْتَهَدَ ثُمَّ أَصَابَ فَلَهُ أَجْرَانِ وَإِذَا حَكَمَ فَاجْتَهَدَ - 1} "When a judge passes a judgment and strives to reach the right decision, he will be rewarded twice. And if the judge passes a judgment and strives but makes a mistake, he will still be rewarded." This hadith highlights that a

judge who makes an effort to reach a just judgment will be rewarded, regardless of whether the decision is correct or contains an error.

2-Furthermore, in another hadith narrated by Ibn Abbas (may Allah be pleased with him), it is mentioned: {إِذَا جَلَسَ الْحَاكِمُ لِلْحُكْمِ ، فَإِنْ عَدَلَ أَقَامَهُ ، وَإِنْ جَارَ عَرَجًا وَتَرَكَاهُ} "When a judge sits to give a judgment, if he acts justly, both the claimant and the defendant are rectified. But if he acts unjustly, both will be corrupted and abandon their rights." This hadith emphasizes that the justice or injustice of a judge's judgment has a significant impact on the parties involved, either leading to their rectification or corruption.

3-Similarly, in another hadith, it is reported: {وَعَنْ عَبْدِ اللَّهِ بْنِ الزُّبَيْرِ قَالَ: قَضَى رَسُولُ اللَّهِ ﷺ أَنَّ الْخَصْمَيْنِ يَتَّعِدَانِ {بَيْنَ يَدَيْ الْحَاكِمِ} "And Abdullah ibn Zubayr narrated that the Messenger of Allah (peace be upon him) decreed that the disputing parties should sit in front of the judge." This hadith indicates that both the plaintiff and the defendant should sit before the judge during the legal proceedings.

4-In another narration, it is mentioned that the Prophet Muhammad (peace be upon him) appointed Ali (may Allah be pleased with him) and Mu'adh ibn Jabal (معاذ بن جبل) as judges in Yemen, highlighting their roles as judges.

These hadiths emphasize the importance of establishing a just judiciary and the role of judges in ensuring justice in society. They serve as guidance for the principles and practices of the judiciary in Islamic law.

(3) Consensus (Ijma')

In linguistic terms, consensus (Ijma') refers to the determination and decision-making regarding a matter. In Islamic terminology, it refers to the unanimous agreement of the scholars of the Islamic Ummah (community) in a particular era regarding a legal ruling after the passing of the Prophet Muhammad (peace be upon him).

Regarding the judiciary, there is a consensus among the Islamic Ummah that the establishment of a judiciary and the act of judging among people are essential and necessary for the Muslim community. Consensus plays a significant role in determining the importance of the judiciary and the act of judgment in the Islamic community.

(C) Elements of the Judiciary

The judiciary consists of several elements, which are outlined below:

1. Haakim (Judge): Refers to the judge who has been appointed by the governing authority to resolve disputes and settle conflicts through judicial proceedings.
2. Hukm (Judgment): It is the judicial decision or ruling that is issued at the conclusion of the court proceedings.
3. Qadhi (Judge): It refers to the person who, with judicial authority, hears cases and issues judgments in accordance with the provisions of the law.
4. Mahkum bihi: Refers to the party or matter that is subject to the judgment.
5. Mahkum lahu: Refers to the plaintiff or the party in whose favor the judgment is issued.
6. Mahkum 'alayh: Refers to the defendant or the party against whom the judgment is issued.
7. Tariq al-Hukm: Refers to the method and procedure of issuing a verdict and judgment.

(D) Qualifications of a Judge

Since it is well known that judgment is a public authority, and the position of a judge is one of the most significant positions in an Islamic government, it is necessary for someone to be appointed to this position to possess complete

human qualities and moral virtues. They should be capable of fulfilling the great and solemn duty of ensuring justice in society, which has been entrusted to them as a trust. Therefore, Islamic jurists have established qualifications for the position of a judge, which are as follows:

(I) Qualifications of a Judge in Islamic Jurisprudence

(1) First condition - Maturity, Sanity, and Freedom

The duty of a judge requires maturity and the soundness of mind. Maturity is attained when a person reaches the age of adulthood, and in a state of insanity, the intellect is completely lost. Therefore, having a sound mind and maturity are necessary and obligatory conditions for a judge. However, some scholars go beyond mere intellect and maturity, stating that a judge should possess good discernment, contemplation in legal matters, and be alert in resolving conflicts. Since the judiciary is a position of public authority, freedom is also a requirement, as slavery is an impediment to its validity. Therefore, a child below the age of maturity, a mentally impaired person, a servant, a deaf or mute person who cannot hear the arguments of the parties, is not eligible for judgment.

(2) Second condition: Islam

The condition of being a Muslim is considered among the requirements for judges due to its fundamental importance. The judiciary is a strong and significant authority with religious responsibilities, and non-Muslim authority does not have legitimacy over Muslims. This is explicitly stated in the blessed verse: {وَلَنْ يَجْعَلَ} And Allah will never grant the disbelievers a way over the believers [of authority]".

Furthermore, it is necessary for a judge to apply the laws of Islamic Sharia. Therefore, it is

required that the judge themselves be a Muslim and have faith in the provisions of Islamic law. This ensures that the judge is capable of implementing and applying Islamic legal principles. There should be fear and vigilance within the judge to avoid any deviation from the application of Islamic law. The responsibility of the judiciary and issuing judgments among Muslims rests solely on a Muslim judge, and there is no disagreement on this matter.

(3) Third condition: Justice

Among the requirements for a judge, one essential condition is the necessity of being just. Islamic jurists state that justice for a judge means refraining from major sins and avoiding persistent minor sins. They should distance themselves from actions that tarnish the integrity and character of a person. It is because a person who lacks justice and fairness cannot be entrusted with the responsibility of the judiciary. Allah Almighty states in the blessed verse: **يَا أَيُّهَا الَّذِينَ آمَنُوا إِن جَاءَكُمْ فَاسِقٌ بِنَبَأٍ فَتَبَيَّنُوا** {O believers, if an evildoer brings you any news, verify "it".

The wisdom behind this verse is that when a disobedient person brings information, it should be examined and verified. It is not correct for a judge to be among those whose information is not acceptable. Furthermore, a disobedient person cannot serve as a witness or testify. It is also noteworthy that being a judge is not assigned to individuals who are above the position of the judiciary. However, according to the Hanafi school of thought, justice is not a requirement for the judiciary but a condition of perfection. Thus, a disobedient person can fulfill the duty of judging as long as they do not transgress the boundaries of Islamic law.

(4) Fourth condition: Ijtihad

Another condition among the requirements for a judge is being a mujtahid (one who exercises independent legal reasoning). This is the view of

Imam Malik, Imam Shafi'i, and Imam Ahmad, may Allah have mercy on them. Their reasoning is based on the fact that the judiciary requires a stronger level of certainty compared to fatwa (legal opinion). It is not permissible for the general mufti to be a mere follower (muqallid), while a judge has the capability to be independent and not a blind follower. Their evidence is derived from the statement of Allah Almighty: **وَأَن احْكُم بَيْنَهُم بِمَا أَنزَلَ اللَّهُ** and judge between them by what Allah has revealed.

According to the command of Allah Almighty, a mujtahid is knowledgeable about what Allah has revealed, not a blind follower. However, the Hanafi school of thought does not consider ijthad a requirement for judges because a non-mujtahid judge may refer to a scholar or another mufti for guidance. The purpose of the judiciary is to resolve disputes and settle conflicts, which can be achieved through taqlid (following legal opinions) and referring to the opinions of scholars.

(5) Fifth condition: Gender of the Judge (Being Male)

The gender of the judge is a requirement according to the consensus of religious scholars, and according to their perspective, the position of a judge is not permissible for women. Their evidence for this is the saying of the Prophet Muhammad (peace be upon him): **لَنْ يُفْلِحَ قَوْمٌ وَلَوْ أَتَوْا بِمَرْءٍ أَمْرَهُمْ** {A nation will not succeed if they appoint a woman as their leader.

A woman does not have the qualifications for holding the position of supreme leadership, head of state, or governing the entire country. This is the basis upon which it is not narrated from the Prophet Muhammad (peace be upon him) or his noble companions that the position of judge or any similar authority has been granted to women. However, some jurists argue that women are allowed to be judges in civil matters, excluding

criminal matters, because testimonies are required in civil cases and women are allowed to testify. They argue that a woman can still be a judge in civil affairs. However, in criminal matters, women are not allowed to give testimony, and it is evident that the eligibility for judgeship requires eligibility for giving testimony, Ibn Jarir al-Tabari (may Allah have mercy on him) says: It is permissible for a woman to be a ruler (judge) in all matters. If a woman can be a mufti (religious jurist who issues legal opinions), then it is permissible for her to be a judge as well.

(6) Six Condition: The Judge must be Sensory Capable (Hearing, Vision, Speech)

According to religious scholars, being sensory capable is a requirement for a judge because a judge must be a good listener and have clear vision. A person who is deaf, unable to speak, or cannot understand the arguments presented by the litigants (plaintiff and defendant) cannot be a judge. Similarly, a person who is visually impaired and cannot distinguish between the parties involved cannot be a judge. Therefore, a judge must be sensory capable.

Some scholars of the Shafi'i school of thought argue that blindness does not invalidate a judge's eligibility, and a blind person can be a judge. However, for those who are mute and do not understand gestures, the Shafi'i scholars have two opinions: one allowing them to be judges and the other disallowing it. Maliki scholars state that if a person is blind or deaf and issues a ruling while holding the position of a judge, their ruling is enforceable unless removing them from the position and rectifying the situation becomes necessary.

Other Conditions

Jurists state that a judge should be strong and powerful, but not excessively harsh. They should

have a gentle disposition, but not be weak or feeble, so that no one can surpass them through unjust means. The judge should not become hopeless due to their weakness and incapacity. The judge should be vigilant and alert, not falling for deception and trickery. They should possess qualities such as self-restraint, piety, and a strong memory. They should not have excessive greed or expectations.

2. Conditions for Judges in the Law

Islamic jurisprudence has determined certain conditions for judges, and the law also specifies conditions for judges, which include the conditions set by Islamic jurisprudence. Article 81 of the Law on the Formation and Jurisdiction of the Judicial Power specifies the following conditions for judges:

- Having a minimum of ten years of citizenship of the Islamic Republic of Afghanistan at the time of judicial appointment. The requirement of a minimum of ten years of Afghan citizenship applies to those who are not Afghan nationals but acquire Afghan citizenship later on. Such individuals cannot serve as judges in Afghan courts until ten years have passed since acquiring citizenship.
- Not being convicted of a crime or deliberate offense by a competent court.
- Having an academic degree in Islamic studies or law, or a higher degree in these fields, or having an educational certificate from official religious schools and institutions, or its equivalent. Therefore, someone who has graduated from another field cannot fulfill the duties of a judge. Additionally, according to Article 498 of the Code of Civil Procedure, it is stated that: "A judge must have a complete understanding of the prevailing laws of the country, the provisions of Islamic

law, and have sufficient knowledge of the customs and general practices of society."

- Not suffering from severe illnesses or disabilities that would hinder the performance of their duties.
- Reaching the minimum age of twenty-three years at the time of entering the judicial profession. Islamic jurisprudence mentions the age of maturity (baligh) for judges at the time of judicial appointment, while the law states the age of 23. The law takes precaution in this matter, considering that a person should reach the age of adulthood and complete their legal education to have a better understanding and ability to resolve disputes.
- Completion of the successful period of judicial internship. The requirement of completing a judicial internship is considered essential and of utmost importance for judges because during this period, judges can learn practical aspects of legal and jurisprudential matters, as well as the conduct of judges in courts. Afterwards, they can serve as judges or presiding judges in one of the courts.

These are some of the conditions specified for judges in both Islamic jurisprudence and the law.

2- The Judgment of Women by Jurists

According to the majority of religious scholars, the requirement for a judge is masculinity, and they believe that the position of a judge is not permissible for women. Their justification for this is a saying of the Prophet Muhammad (peace be upon him): { لَنْ يُفْلِحَ قَوْمٌ وَلَوْ أَمَرَهُمْ امْرَأَةٌ } A nation will not succeed if they appoint a woman as their leader."

They have used this statement as evidence to support their opinion, along with references to verses of the Quran, narrations, and other

arguments. However, there are a number of scholars who agree that women can be judges, either absolutely or under certain conditions, and they consider it permissible and enforceable.

First Theory - Women judging is Not Permissible Absolutely

The majority of religious scholars, including Imam Malik, Imam Shafi'i, and Imam Ahmad, hold the opinion that women judging is not permissible absolutely. They believe that a woman cannot be a judge in matters related to property, boundaries, retribution, and others. Because a woman lacks the qualification of supreme leadership, which refers to being the head of state (president, prime minister, etc.), and since she lacks the qualification for supreme leadership, she also lacks the qualification to be a judge.

Neither the Prophet Muhammad (peace be upon him) nor any of the rightly guided caliphs have reported appointing a woman as a judge or governor. Additionally, the role of a judge requires interaction with knowledgeable men, jurists, witnesses, and the parties involved in the case, who are mostly men. However, mingling and interacting with men is generally not permissible for women due to the fear of temptation and corruption. Therefore, the appointment of women as judges is not permissible based on their argument. The following are their reasons:

A. Holly Quran

[الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ - 1
 وَمِنَ امْرِئَاتٍ أَنْفَقُوا مِنْ أَمْوَالِهِمْ} 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.

The basis of this argument is the blessed verse that states men are the protectors and maintainers of women. Allah has given some men superiority

over others, and they spend from their wealth. Therefore, according to this verse, the leadership and guardianship of women have been entrusted to men. It is not permissible for women to have authority over men. Men possess qualities such as knowledge, intellect, and skill in managing affairs, which are prerequisites for leadership and judging. If women were to be given the responsibility of leadership and judging, it would contradict the apparent meaning of this verse.

2- [أَنْ تُضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَى] that if one of them should err, the other may remind her.

The argument here is that Allah has made women aware of their potential for forgetfulness and errors. Judging requires sound judgment, complete intellect, and discernment.

3- [وَ قَرْنَ فِي بُيُوتِكُنَّ] And remain in your houses.

The argument is that women's judging necessitates their departure from their homes, interaction with men, raising their voices, and engaging in arguments with men. All of these actions contradict the explicit text of the verse and the sacred Islamic law.

B. Hadiths

(عَنْ أَبِي بَكْرَةَ رَضِيَ اللَّهُ عَنْهُ، قَالَ: أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: «لَنْ يُفْلِحَ قَوْمٌ وَلَوْ أَمَرَهُمْ امْرَأَةٌ» Narrated by Abu Bakrah (may Allah be pleased with him): The Messenger of Allah (peace be upon him) said, A people that appoint a woman as their leader will never succeed.

This hadith clearly indicates a prohibition, as the term "amrahum" encompasses all the affairs of the Muslims, including judging. Therefore, according to this hadith, women are prohibited from any form of leadership, such as governance and judging. Imam Shawkani states that women do not possess the qualification and competence for leadership, and it is incumbent upon the people not to entrust them with positions of

authority such as governance and judging, as they must refrain from anything that leads to failure and ruin.

(عَنْ أَبِي سَعِيدٍ الْخُدْرِيِّ رَضِيَ اللَّهُ عَنْهُ قَالَ: خَرَجَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي أَضْحَى أَوْ فِطْرٍ إِلَى الْمُصَلَّى، فَمَرَّ عَلَى النِّسَاءِ، فَقَالَ: «يَا مَعْشَرَ النِّسَاءِ تَصَدَّقْنَ، فَإِنِّي أُرِيدُكُمْ أَكْثَرَ أَهْلِ النَّارِ». فَقُلْنَ: وَيَمَّ يَا رَسُولَ اللَّهِ؟ قَالَ: «تُكْفِرْنَ اللَّعْنَ، وَتَكْفُرْنَ الْعَشِيرَ، مَا رَأَيْتُ مِنْ نَاقِصَاتِ عَقْلِ وَدِينٍ أَذْهَبَ لِلْبَّ الرَّجُلِ الْحَازِمِ مِنْ إِحْدَاكُنَّ». قُلْنَ: وَمَا نُفْصَانُ دِينِنَا وَعَقْلُنَا يَا رَسُولَ اللَّهِ؟ قَالَ: «أَلَيْسَ شَهَادَةُ الْمَرْأَةِ مِثْلُ نِصْفِ شَهَادَةِ الرَّجُلِ؟» قُلْنَ: بَلَى، قَالَ: «فَذَلِكَ مِنْ نُفْصَانِ عَقْلِهَا، أَلَيْسَ إِذَا حَاصَتْ لَمْ تُصَلِّ وَلَمْ تُصُمْ؟» Narrated by Abu Sa'id Al-Khudri (may Allah be pleased with him):

The Prophet (peace be upon him) went out on the day of Eid al-Adha or Eid al-Fitr to the prayer area. He passed by the women and said, "O group of women, give charity, for I have seen you as the majority of the inhabitants of Hell." They asked, "Why, O Messenger of Allah?" He replied, "You curse frequently and are ungrateful to your husbands. I have not seen anyone more deficient in intelligence and religion than you. A cautious, sensible man could be led astray by some of you." They asked, "O Messenger of Allah, what is deficient in our intelligence and religion?" He said, "Is not the testimony of a woman equal to half of that of a man?" They replied in the affirmative. He said, "This is because of the deficiency in your intelligence. Isn't it true that a woman can neither pray nor fast during her menstruation?" They replied in the affirmative. He said, "This is because of the deficiency in your religion."

The argument here is that the Prophet (peace be upon him) described women as deficient in intelligence and religion. Judging requires complete intellectual capacity, and women do not possess this quality. Therefore, anyone in such a condition is not fit to judge among the servants of Allah and resolve their disputes. There is no deficiency greater than a lack of intelligence and religion.

(عن بُرَيْدَةَ رَضِيَ اللهُ عَنْهُ، عَنِ النَّبِيِّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ: 3 «الْقُضَاةُ ثَلَاثَةٌ: وَاحِدٌ فِي الْجَنَّةِ، وَاثْنَانِ فِي النَّارِ، فَأَمَّا الَّذِي فِي الْجَنَّةِ فَرَجُلٌ عَرَفَ الْحَقَّ فَقَضَى بِهِ، وَرَجُلٌ عَرَفَ الْحَقَّ فَجَارَ فِي الْحُكْمِ، فَهُوَ فِي النَّارِ، وَرَجُلٌ قَضَى لِلنَّاسِ عَلَى جَهْلٍ فَهُوَ فِي النَّارِ) Narrated by Buraydah (may Allah be pleased with him): The Prophet (peace be upon him) said, "Judges are of three types: one will be in Paradise, and two will be in the Hellfire. As for the one in Paradise, he is the one who knows the truth and judges accordingly. As for the one in the Hellfire, he is the one who knows the truth but acts unjustly in his judgments. And the one who judges' people based on ignorance will also be in the Hellfire."

The argument is that the Prophet (peace be upon him) mentioned "rajul" (man) when referring to judges. Therefore, he indicated that a judge must be a man, and women are excluded from this role.

Second Theory: Women's Judging is Permissible Except for Hudud and Qisas

Hanafi scholars state that women's judging is permissible except for cases of hudud (prescribed punishments) and qisas (retaliation). This means that a woman can serve as a judge in civil matters, excluding criminal cases, as testimonies are involved in civil matters and women's testimonies are permissible. They can continue to be judges, but in cases of hudud and qisas, women do not provide testimony, and this is a known matter that the qualification for judging necessitates the qualification for giving testimony.

1- Marghinani, a Hanafi jurist, writes, ويجوز قضاء المرأة في كل شيء إلا في الحدود والقصاص، اعتباراً وشهادته and it is permissible for a woman to judge in everything except for hudud and qisas, based on her testimony." Women's judging is permissible in all matters except for hudud and qisas.

2- and وشهادتها جائزة في غير الحدود والقصاص 2- testimonies are permissible except for hudud and

qisas. Women's judging is permissible in everything except for hudud and qisas.

[اما الذكورة فليست من شرط جواز التقليد في الجملة، لان 3- المرأة من اهل الشهادات في الجملة؛ الا انها لا تقضى با الحدود والقصاص؛ لانه لا شهادة لها في ذلك و اهلية القضاء تدور مع قياسا على الشهادة؛ فالمرأة من اهل الشهادات في الجملة إلا أنها لا تقضي في الحدود والقصاص؛ لانه لا شهادة لها في ذلك، و أهلية القضاء تدور مع أهلية الشهادة Being male is not a prerequisite for taking on the responsibility of judging as women have the qualification for giving testimony in some cases (testimony outside of hudud and qisas), but they cannot issue judgments in cases of hudud and qisas because their testimony is not permissible in those cases, and the qualification for judging is aligned with the qualification for giving testimony.

Furthermore, they deduced from the hadith the validity of judgments issued by women in matters other than hudud and qisas. Their deduction is based on analogy, as they stated that judging in matters related to governance involves participation in testimony, and women are permitted to give testimony. Therefore, their judging is valid in matters other than hudud and qisas, even if they have committed sins.

Third Theory: Women's Judging is Permissible without Any Restrictions

According to a third group of jurists. This group includes Imam Hasan Basri, Imam Ibn Jarir Tabari, and Imam Ibn Hazm. According to their view, when a woman is capable of being a mufti, she can also be a judge. This is because a mufti derives rulings based on knowledge,

consideration, insight, and responsibility, while a judge expresses rulings based on the authority of the state.

Imam Ibn Jarir Tabari, may Allah have mercy on him, states: "Being male or masculinity is not a condition for assuming the responsibility of judging because judging is similar to issuing fatwas. And in issuing fatwas, being male or masculinity is not a condition. Therefore, it is likewise in judging. Based on this, it is permissible for a woman to be a judge in all matters, including property and other cases, without exception. Just as a woman can be a mufti in all matters."

1- {رُوي أَنَّ عُمَرَ رضي الله عنه وألى الثيفاء -امرأة من قومه- -narrated from Umar ibn Khattab, may Allah be pleased with him, that he appointed a woman named Al-Shifa'a as the overseer of the marketplace.

2- {قياسا على الإفتاء؛ فالمرأة يجوز أن تكون مفتية، فيجوز أن تكون قاضية.} By analogy with issuing fatwas, if a woman can be a mufti, then she can also be a judge.

3- {لأنه لم يأت نص في منع المرأة أن تلي بعض الأمور} Because there is no explicit prohibition in regards to women assuming certain matters.

4- {لأن الأصل أن كل من يتأتى منه الفصل بين الناس فحكمه جائز إلا ما خصصه الإجماع من الإمامة الكبرى والمرأة كالرجل صالحة في الأصل لتولي الأحكام والفصل بين الناس، وهذا حكم عام لا يخصصه إلا نص، والنص لم يستثن إلا الإمامة الكبرى.} The principle is that anyone who is capable of resolving disputes among people, their judgment is permissible, except for what has been specifically assigned by consensus to the position of supreme leadership. Women, like men, are fit by default to exercise authority and pass judgments among people. This is a general ruling that can only be specified by textual evidence, and the text only exempts the supreme leadership, so the default principle remains, which is permissibility.

5- Firstly, it should be explicitly stated that there is no clear and definitive textual evidence in the Quran and the Prophet's traditions that prohibits women from assuming positions in the judiciary or any other governmental or non-governmental position. Therefore, we return to the principle of permissibility. In this matter, the opinions of Muslim jurists have been diverse and varied, to the extent that it has become a subject of debate. Given this situation, principles of fairness, justice, and benefit dictate that women should not be deprived of any position.

Forth: Judgment of Women in the Laws of Afghanistan

If we know that the judicial system of Afghanistan is a mixed system, Article 130 explicitly states the following: "The courts shall apply the provisions of this Constitution and other laws. In cases where there is no provision in the Constitution or other laws, the courts shall decide the matter in accordance with the Hanafi jurisprudence and within the limits prescribed by this Constitution, in a manner that ensures justice to the best extent."

According to the Constitution, the Supreme Court is the highest judicial authority and is located at the top of the judicial branch of the Islamic Republic of Afghanistan. According to the Constitution, the Supreme Court consists of nine members who are appointed by the President with the approval of the Wolesi Jirga/National Assembly. Gender is not a consideration for membership in the Supreme Court, and being male has never been a condition for membership in the Supreme Court.

If a person, whether male or female, meets the requirements stipulated in the Constitution, they can be appointed as a member of the Supreme Court. Similarly, Article 4 of the Judicial Organization and Jurisdiction Law states: "A judge is a person who, possessing judicial

qualification, adjudicates cases and issues judgments in accordance with the provisions of the law." In this text, the term "person" is used, which includes both men and women. It is evident that all members of the Supreme Court are referred to as "judges."

Based on the conditions specified by the law for judges, we mention the following:

- Having a minimum of ten years of citizenship of the Islamic Republic of Afghanistan at the time of judicial appointment.
- Not being convicted of a crime or intentional offense by a competent court.
- Possessing an educational degree in Islamic law, or law, or higher, or having an educational degree from official Islamic seminaries and religious schools of the state or its equivalent.
- Not suffering from diseases or disabilities that hinder the performance of duties.
- Attaining the minimum age of twenty-three at the time of appointment in the judiciary.
- Successfully completing the judicial internship program.

Conclusion

Overall, we come to the conclusion that many jurisprudential issues are subject to change based on the changing circumstances of time and place. The foundation of *ijtihad* (independent legal reasoning) and *qiyas* (analogical reasoning) in Islamic jurisprudence is based on this principle. The matter of women's judgment is also among the issues that are subject to change and evaluation based on the past and present realities of society. According to Dr. Yusuf al-Qaradawi,

scholars hold different opinions regarding women's judgment, but considering the time, place, and necessities of the society, one can derive conclusions about under what conditions women can take on judicial responsibilities.

Furthermore, if there were a prohibition on women's judgment and it was explicitly established as a definitive ruling, then none of the jurists could have exerted *ijtihad* or made interpretations contrary to the explicitly prohibited texts. However, Islamic jurisprudence is divided into three categories regarding this matter: those who do not permit women's judgment at all, those who allow it in certain cases, and those who believe that women can absolutely hold the position of judges, and their rulings are valid and enforceable. Taking into account the changing circumstances and situations, as well as the departure of jurists from their previous principles regarding certain conditions of judgment (such as knowledge, expertise, and justice), the latest opinions of the jurists have been carefully considered and evaluated. Given the current changes in society and the presence of women in various social domains, this issue should be regarded as a "time-variable jurisprudential issue," and scholars should address it by providing new definitions and solutions.

In the contemporary world, the judicial system consists of primary, appellate, and high courts, and many judgments issued by judges are subject to review or appeal. In this sense, the verdict should be referred to the higher court, and women can be involved alongside men in judicial matters concerning personal and civil affairs and can be envisioned to carry out judicial actions.

Therefore, the matter of women's judgment is permissible in certain specific and defined circumstances when it is necessary for society, provided that the environment is proper and

healthy, and it serves the interests of the family, society, and Islam.

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