

Qualifications of a *Qāḍī*: A *Sharī‘ah* Appraisal and Pakistan

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Abstract

This research explains Islamic principles of the qualifications of a *qāḍī* and the basis of such principles as quoted by different schools of thought. Further, the analysis of the qualifications of a judge under the Pakistani law is compared with Islamic law. The office of a *qāḍī* is a significant institution according to the classical Islamic era that establishes a strong and magnificent structure to protect the rights of the public under one Islamic state. In *Sharī‘ah*, a *qāḍī* holds the status of *walī* (guardian) to empower and protect the interest of vulnerable segments of the society in accordance with Islamic law. This status requires that a *qāḍī* should be qualified as per the essential conditions prescribed by the distinct schools of Islamic thought, in the light of religious teachings. It is also essential because he is entrusted with the crucial responsibility to interpret and implement the law within the bounds of *Sharī‘ah*. Pakistan being an Islamic state, as it is recognized by the Article 2A of the Constitution of the Islamic Republic of Pakistan of 1973, and Article 227(1) of the Constitution requires that all laws should be in conformity with the injunctions of Islam as laid down in the Holy Qur’ān and *Sunnah*. Moreover, the Enforcement of Shariat Act of 1991 clearly articulates that wherever more than one interpretation of the statute law of the country are possible, the interpretation contemplated under the Islamic principles and jurisprudence shall be followed. However, the statutory law related to qualifications of a judge in Pakistan and the relevant case laws do not fulfill the conditions provided by the Jurists and the requirements endorsed by the Constitution of Pakistan of 1973.

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1. Introduction

Pakistan being an Islamic state, as it is recognized by the Article 2A of the Constitution of the Islamic Republic of Pakistan of 1973, and Article 227(1) of the Constitution requires that all laws should be in conformity with the injunctions of Islam as laid down in the Holy Qur’ān and *Sunnah*. Moreover, the Enforcement of Shariat Act of 1991 clearly articulates that wherever more than one interpretation of the statute law of the country are possible, the interpretation contemplated under the Islamic principles and jurisprudence shall be followed.¹ However, the statutory law related to qualifications of a judge in Pakistan² and the relevant case laws³ do not fulfill the conditions provided by the Jurists and the requirements endorsed by the Constitution of Pakistan of 1973.⁴

The Holy Qur’ān and the traditions of the Holy Prophet Muḥammad do not specify the inclusive qualifications for the appointment of a *qāḍī*. The requisite qualifications are quoted by the jurists who mostly grounded on their inferences and deductions. Certain conditions have been laid down for the appointment of a judge by the Islamic jurists. They are agreed upon

¹The Enforcement of Shariat Act, (1991), sec. 4(a). Available at: https://na.gov.pk/uploads/documents/1335242059_665.pdf (accessed on 21 March 2022).

²See The Family Courts Act, Pub. L. No. W.P. Act XXXV (1964), sec. 4. Available at http://punjablaws.gov.pk/laws/177.html#_ftn14 (accessed on March 20, 2022).

³Ansar Burney vs. Federation of Pakistan and others, PLD 1983 FSC 73. Available at: <https://www.federalshariatcourt.gov.pk/Judgments/Sh.Pet.No.K-4%20of%201982.pdf> (accessed on March 20, 2022). See also: Hammad Murtaza vs. Federation of Pakistan and others, PLD 2011 FSC 117 (Shariat Petition No.1/L of 2010). Available at: <https://www.federalshariatcourt.gov.pk/Judgments/Shariat%20Petition%20No.%201%20-%20L%20-%20of%202010.pdf> (accessed on March 20, 2022).

⁴Justice Rustam S. Sidhwa provided verdict in the Muḥammad Latif vs. Mst. Hanifan Bibi, 1980 PCr.LJ 122. Distinct types of talaq under Ḥanafī law were discussed in this case and the petition was dismissed for having no merit.

some conditions as he must be a Muslim, sane, major and a free person while disagreed upon certain conditions. Further, these conditions are acknowledged to be fulfilled in a person for the eligibility of the office of a *qāḍī*.

2. A Muslim/ Islam

Islam considers the faith as an important element for the establishment of distinct institutions under Islamic state. A verse of *Surah al-Nisā'* defines this ruling:

وَلَنْ يَجْعَلَ اللَّهُ لِلْكَافِرِينَ عَلَى الْمُؤْمِنِينَ سَبِيلًا

And never will Allāh give the disbelievers over the believers
a way (to overcome them).⁵

A non-believer must not be appointed over a believer according to this verse. Jurists have recognized this ruling for the appointments of non-Muslims in many institutions of the government.

Qāḍī is considered as a legal guardian while a non-Muslim cannot not be accepted as a guardian of a Muslim according to the above-mentioned verse. The crucial duty of a *qāḍī* is to enforce the order of *Sharī'ah*, and a non-Muslim can be biased in implementing the rulings of *Sharī'ah* due to his prejudice or biasedness. Hence, he will go into conflict with *Sharī'ah*. So, the majority of the jurists are agreed that the judge should be a Muslim person⁶ because it is not permissible for a non-Muslim to rule among Muslims or in the lawsuit of one of the Muslims. This leads to

⁵Al-Qur'ān, 4:141.

⁶Alauddīn Abi Bakr Bin Mas'ud Al-Kasani, *Bada'i al-Sana'i fi Tartib al-Shara'i* (Kairo: Dar al-Kutub al-Ilmiya, 1986), 3:7.

disqualify him for the status of being guardian (*walī*) of a Muslim. Therefore, it is not valid to make him judge among Muslims.⁷

Further, there is disagreement of jurists on the appointment of a non-Muslim over other non-Muslims. According to the unanimous opinion of the majority of Muslim Jurists, a non-Muslim cannot be a *qāḍī* upon any matter of other non-Muslim. They have considered Islam as a basic condition in *qāḍī* without looking into the matter or the parties in dispute. In addition to this, there are numerous *āthār* which prohibit the appointment of a *dhimmī* (non-Muslim citizen) on the seat of a judge. Besides this, it is also prohibited to grant a position of a typist or a writer of the judge to a non-Muslim due to their appearance of betrayal and disloyalty in religious matters as well as their struggle to deteriorate Muslims.⁸ However, distinct opinions of the jurists are also present on a matter that allow the state to appoint a non-Muslim as a judge in all or certain matters. But his decision will not be enforced till he enters into Islam.⁹ Though, the verdicts of a non-Muslim *qāḍī* are correct and legal for his religious fellows according to the Ḥanafī Jurists.¹⁰ The condition for the eligibility of a *qāḍī* is his eligibility of being a witness according to the Ḥanafī opinion, and a non-Muslim is qualified to be a witness of his religious fellows.¹¹ So, he can be a *qāḍī* upon them and it is neither injurious nor any appearance of betrayal or disloyalty

⁷Abu al-Ḥasan Burhān al-Dīn Al-Marghīnānī, *al-Hidayah fī Sharh Bidayat al-Mubtadi* (Beirut: Dar Ahya'al-Turath al-Arabi, 1970), 3:108; Al-Kasani, *Bada'i al-Sana'i*, 7:7-17.

⁸Muḥammad bin Aḥmad Al-Sarakhsi, *Al-Mabsut* (Beirut: Dar al-Marifa, 1993), 16:110.

⁹Muḥammad Amin Ibn 'Abidin, *Radd al-Muḥtār 'ala al-Durr al-Mukhtār* (Beirut: Dar al-Fikr, 1992), 5:355; Maḥmūd Muḥammad Nasir Barkat, *al-Sultah al-Taḥdīriyya lil-Qāḍī fī al-Fiqh al-Islāmī* (Urdan: Dar al-Nafais lil-Nashar wa al-Tozee', 2008), 32-35.

¹⁰Muḥammad 'Ala ud-Dīn Ḥaskafī, *Durr al-Mukhtar Sharh Tanvir al-Absar* (Dar al-Kutub al-Ilmiyya, 2002), 463. Ibn 'Abidin, *Radd al-Muḥtār*, 5:355 & 428.

¹¹Ibn 'Abidin, *Radd al-Muḥtār*, 5:355.

can be expected by him for his religious fellows in any matter. Ḥanafī jurist have quoted the following verse of Holy Qur'ān in this perspective:¹²

"وَالَّذِينَ كَفَرُوا بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ."¹³

As for the disbelievers, they are guardians of one another.

The opinion of majority of the jurists have conditioned that the dispensation of justice must be by a Muslim judge in the Islamic state. This enlarges the scope of a Muslim judge to decide the matters among the Muslims and non-Muslims. They drive the ruling from the text of the *ḥadīth*:¹⁴

الْإِسْلَامُ يَغْلُو وَلَا يُغْلَى عَلَيْهِ.¹⁵

Islam dominates and is not dominated.

According to this *ḥadīth*, a non-Muslim cannot be a guardian or superior to Muslim in a Muslim State. Al-Mauwardī, a renowned Shāfī'ī scholar, has also explicitly prohibited the appointment of a non-Muslim on the place of *qāḍī* for the decree in matters of Muslims and non-Muslims.¹⁶

Nevertheless, it is sometimes considered that the qualifications of a judge depend upon merit and education of a person rather than religion as it is also considered in *Al-Majallah al-Ahkam al-Adaliyyah* where Islam has not been mentioned as an element of qualifications.¹⁷ In addition to it, unfortunately, Pakistani law is not in consonance with Islamic principles that are prescribed by Ḥanafī jurists in this category. The Family Courts Act, 1964 elaborates the qualifications of a Judge of a Family Court without any such condition as above mentioned.¹⁸ Professional qualification with

¹²Al-Kasani, *Bada'i al-Sana'i*, 2:239; Al-Sarakhsi, *Al-Mabsut*, 16:135.

¹³Al-Qur'ān, 8:73.

¹⁴Al-Sarakhsi, *Al-Mabsut*, 30:30.

¹⁵Al-Bukhari, *Sahih*, 2:93, Chapter: When child die whether to pray on him.

¹⁶Abu al-Hasan 'Ali bin Muḥammad bin Habib Al-Mawardi, *al-Ahkam al-Sultaniyyah wa al-Wilayat al-Diniyya* (Kuwait: Maktaba Dar ibn e Qutaiba, 1989), 89.

¹⁷*Al-Majallah al-Ahkam al-Adaliyyah* 1876, Clause 1792, 1793 & 1794.

¹⁸'The Family Courts Act', Pub. L. No. W.P. Act XXXV (1964), sec. 4.

certain experience is required in all courts irrespective of any other qualifications. As the Punjab Judicial Service Rules of 1994 elaborates that civil judge-cum-Magistrate in the province of Punjab must possess a degree in law from a recognized university as well as must have practiced for at least two years in the profession of law.¹⁹ For instance, family matters related to kinds of *ṭalāq*²⁰ and *khul'*²¹ were discussed in distinct case laws by non-Muslim judges.

3. A Sane/ Sanity and Maturity

A *qāḍī* must be an adult and prudent person to fulfill the requirement of his job as well as to practice his wisdom for deciding the lawsuits.²² He must not be stubborn and clamorous.²³ He must have ability to differentiate between right and wrong. While an insane and minor person are not able to distinguish between right and wrong. So, they do not qualify for the status of least guardianship and are not eligible to decide their own matters, how can they be appointed as guardians of others?

The jurists have unanimous opinion regarding the disqualification of an insane or a minor person for guardianship or *qāḍā* due to their incompetency in controlling their own matters and non-realization of one's interest correspondingly. They are not legally bound by their words and actions and further these words and actions are not enforceable except their

¹⁹The Punjab Judicial Service Rules (1994), rule 7. Available at: https://regulationswing.punjab.gov.pk/system/files/PbJudicial_SR_1994_19940331.pdf (accessed on 24 March 2022).

²⁰ Justice Rustam S. Sidhwa provided verdict in the Muḥammad Latif vs. Mst. Hanifan Bibi, 1980 P Cr. L J 122. Distinct types of *Talaq* under Ḥanafī law were discussed in this case and the petition was dismissed for having no merit.

²¹Justice Dorab Patel and Justice Ghulam Safdar Shah provided verdict in the Muḥammad Sadiq Hussain vs. Khurshid Fatima, 1978 SCMR 130. Petition was dismissed for having no merit.

²²Al-Kasani, *Bada'i al-Sana'i*, 3:7; Ibn 'Abidin, *Radd al-Muḥtār*, 5:354.

²³Al-Sarakhsi, *Al-Mabsut*, 16:109.

guardian will be liable for any destruction occurred due to their actions. The *ḥadīth* of Prophet Muḥammad elaborates that:

رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنِ الصَّغِيرِ حَتَّى يَكْبُرَ، وَعَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ، أَوْ يُفِيقَ.²⁴

The Pen has been lifted up from three: from the sleeper until he wakes up, from the child until he reaches puberty and from the insane until he regains his sanity.

However, there is one contradictory opinion of Abdul Waḥid Al-Shayrāzī, a Ḥanbalī jurist, who has not mentioned maturity as a condition in his book for *qāḍī*.²⁵ But it is not preferred opinion according to the consensus of all schools of thought. Some jurists have added supplementary requisites to enhance the criteria of the eligibility of a *qāḍī*. These requisites include a good decision maker, a great intellect, a person who remains away from sin/*maḥārim* as well as from negligence and forgetfulness, and he should have clarity of mind and deep understanding regarding the problems and their solutions.²⁶

4. Perfection of Senses

A *qāḍī* must be perfect in creation because he is responsible for accurate dispensing of rights between parties. Perfection in creation includes sanity as well as perfection of hearing, seeing, and speaking.²⁷ A renowned Ḥanafī Jurist, Imām al-Kāsānī stated that all the three senses must be present in

²⁴Abu Abdullah Muhammad bin Yazid bin Maja, *Sunan* (Dar al-Risalah al-‘almiyah, 2009), 3:198, Ḥadīth no 2041; Ahmad bin Muhammad bin Hanbal, *Musnad* (Cairo: Dar al- Ḥadīth, 1995), 2:11, Ḥadīth no 940; Abu Daud Suleman bin al-Ash’ath, *Sunan* (Dar al-Risalah al- ‘ilmiyah, 2009), 6:452, Ḥadīth no 4398. Ḥadīth is Ṣaḥīḥ because of corroborating evidence.

²⁵Alauddīn Abu Al-Ḥassan Al-Mardavi al-Hanbali, *Al-Inṣāf Fī Ma’rifat al-Rājiḥ Min al-Khilāf* (Dar al-Ahya’ al-Turath al-Arabi), 11:176.

²⁶ Ibn ‘Abidin, *Radd al-Muḥtār*, 5:364.

²⁷Abdullah bin Aḥmad ibn Qudamah, *Al-Mughni* (Egypt: Maktabah al-Qaherah, 1968), 10:36.

qāḍī.²⁸ A deaf, dumb, or blind person should not be appointed as a *qāḍī*, and if he is so, he would not be able to hear the litigants or see them. Imām al-Kāsānī also stated in his book *Bada'i Al-Sanai* that Imām Abū Ḥanīfah and Imam Muḥammad have made a condition of perfect seeing and hearing for a witness.²⁹ So, a *qāḍī* must not be a blind person or having a problem in seeing according to the rulings³⁰ as defined and cited by them as the qualifications of a witness and afterwards applied for the *qāḍī*. However, Imām Sarakhsī has also conditioned and highlighted this point that a *qāḍī* should not be a blind person.³¹ If he becomes deaf, dumb, or blind as well as insane, he will cease to have an office of *qāḍī* till he gains his senses back.³² While, a blind person can be qualified to be a *qāḍī* according to some Shāfi'ī jurists.³³

5. Free/ Not Slave

An important condition for the appointment of *qāḍī* is a freedom. Nowadays, the world has agreed to eliminate all forms of slavery and it is significant that the term "freedom" is itself prevalent. But the jurists have also discussed the topic related to the appointment of a slave as a *qāḍī* to unveil the ambiguity. The majority of the Jurists have determined freedom as an essential condition for a *qāḍī*³⁴ because a slave does not possess discretion in his own matters. His profits, wages and gains are in the ownership of his master. He himself is just like a commodity which can be purchased or sold. Therefore, it is not possible for him to decide the disputes

²⁸ Al-Kasani, *Bada'i al-Sana'i*, 3:7.

²⁹ Al-Kasani, *Bada'i al-Sana'i*, 6:268.

³⁰ Quality of being a witness of the parties as defined previously under Islam.

³¹ Al-Sarakhsi, *Al-Mabsut*, 16:109.

³² Ibn 'Abidin, *Radd al-Muhtār*, 5: 354 & 364.

³³ Ibn Qudamah, *Al-Mughni*, 10:37.

³⁴ Ahmad Bin Muḥammad bin Ali Bin Hajar al-Haitami al-Shafi'i, *Tohfa ul-Mohtaj fi Sharh al-Minhaj* (Beirut: Dar al-Ahya' al-Turath al-Arabi, 1983), 10:106; Ibn Farḥūn al-Mālikī, *Tabsarah al-Hukkam fi Usool al-Aqdiya wa Minhaj al-Ahkam* (Maktabah al-Kuliyat al-Azhariyya, 1986), 1:26; Al-Kasani, *Bada'i al-Sana'i*, 3:7.

of others with freedom and without coercion. While making a condition of free person, Imām Sarakhsī stated that he is not accepted as a witness in matters and *qāḍī* is more dignified and prestigious than *shahādah* (*shahādah*).³⁵ According to the majority of jurists, if a slave passes his orders or gives verdict as a *qāḍī* to the Muslims, these orders or verdict are not enforceable because the freedom is the foremost condition for his appointment. Nevertheless, A Zāhirī jurist, Ibn Ḥazm has not defined any such condition. He mentioned that the *qāḍī* has to render services for the promotion of virtue and the prevention of wrong deeds, hence it does not conflict with the status of a slave.³⁶ He quotes the tradition of Holy Prophet, narrated by one of the companions, Abū Zar, that:

أَنْ أَسْمَعَ وَأَطِيعَ وَإِنْ كَانَ عَبْدًا مُجَدَّعَ الْأَطْرَافِ.³⁷

Listen and follow the master even he is a slave, and his limbs are severed.³⁸

Another tradition that is narrated by Anas bin Mālik that Prophet Muḥammad said:

اسْمَعُوا وَأَطِيعُوا، وَإِنْ اسْتُعْمِلَ عَلَيْكُمْ عَبْدٌ حَبَشِيٌّ، كَانَ رَأْسُهُ زَبِيئَةً.³⁹

You should listen to and obey your ruler even if he was a black slave (Ethiopian) whose head looks like a raisin.

Some jurists have accepted the authority of a slave and alleged that he is qualified to be a *qāḍī* with the permission of his master.⁴⁰ But many jurists

³⁵ Al-Sarakhsi, *Al-Mabsut*, 16:110; Al-Kasani, *Bada'i al-Sana'i*, 7:3; Al-Mardavi, *Al-Inṣāf Fī Ma'rīfat al-Rājiḥ Min al-Khilāf*, 11:176.

³⁶ Abu Muḥammad Ali Bin Aḥmad bin Saeed Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār* (Beirut: Dar al-Fikr), 8:528.

³⁷ Abu al-Hussain Muslim bin Hajjaj al-Qushairi, *Ṣaḥīḥ* (Cairo: Matba'at al- 'Isa al-Babi al-Halbi, 1955), 3:1467, Ḥadīth number 1837.

³⁸ Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār*, 8:528.

³⁹ Muḥammad Bin Isma'eel Abu Abdullah Al-Bukhari, *Al-Jama' al- Ṣaḥīḥ* (Jaddah: Dar Tauq al-Naja, 2000), 9:62, Ḥadīth no: 7142.

⁴⁰ Al-Mardavi, *Al-Inṣāf Fī Ma'rīfat al-Rājiḥ Min al-Khilāf*, 11:176.

have negated his appointment and considered this argument on the level of an analogy with dissimilarity while elaborating that *qāḍā'* has a binding force, while Fatwa does not have a binding power.

Further, some Ḥanafī scholars have elaborated a different opinion regarding the appointment of a slave on the seat of the *qāḍī*. According to them, if his judgement is in consonance with the judgement of another *qāḍī*, it will be enforced because he is accepted as a witness by Imām Mālik and *Qāḍī al-Shurayḥ*.⁴¹

6. Righteousness and Knowledge about Aḥkām al-Sharī'ah

Generally, righteousness includes justice, trustworthiness, nobility, honesty, and patience during anger and in the difficulties, abstinence from major sins and infrequency upon minor sins. According to Imām Abū Yūsuf, righteousness in evidence (*al- 'adl fī shahādah*) means being away from major sins and being infrequent upon minor sins, and the honesty of a person should be more than of his corruption, and his accurateness should be more than of his errors.⁴² There are distinct opinions regarding the appointment of a *fāsiq* judge and the status of his decision. However, a strong opinion of Ḥanafī scholar, Imām al-Kāsānī, enumerates that the righteous person is not a primary condition for the validity of the decision of a *qāḍī* but it is a condition that leads to perfection. So, it is allowed to appoint a *fāsiq* judge and his decision is considered a legitimate one as long as it does not conflict with the religious rulings.⁴³ While, it is explained in *al-'Inayah* that a *fāsiq* is among the people of disrepute but he is still considered from the group of people who have authority (*wilāyah*) upon

⁴¹ Shaykh Nizām al-Dīn al-Balkhi, *al-Fatawa al-Hindiyyah* (Dar al-fikr, 1320H), 3:361.

⁴² Ibid, 3:450.

⁴³ Al-Kasani, *Bada'i al-Sana'i*, 7:3.

themselves and others.⁴⁴ Further, some Ḥanafī jurists have mentioned a situation that if a *fāsiq* has given a verdict, which then has been referred or appealed to another *qāḍī* and he had annulled it, hence the third *qāḍī* cannot make this verdict enforceable.⁴⁵

Apart from this, majority of the jurists from distinct schools of thought except a group of Mālikī, do not validate the decision of a *fāsiq* judge because they do not accept him as a witness. Imām Shāfi‘ī has stated that *qāḍa’* is a great fidelity, while *fāsiq* is not accepted as a witness.⁴⁶ They derive the ruling from the verse of Holy Qur’ān that a wicked person must be ascertained to discover the truth.

إِنْ جَاءَكُمْ فَاسِقٌ بِنَبَأٍ فَتَبَيَّنُوا.⁴⁷

If a wicked person came to you, he must be ascertained.

Ibn Qudāmah al-Maqdisī has also elaborated the opinion of Ḥanbalī School of Thought in his book.⁴⁸ In this era of globalization, a fair and truthful person, as required by the Islamic law, may not be available. In this case, a person most worthy among those who are less worthy, shall be appointed as a judge, considering all other necessary requirements, to maintain a balanced society.

Moreover, Imām Shāfi‘ī, Imām Mālik, Imām Aḥmad bin Ḥanbal and some of the Ḥanafī jurists have also extended the qualifications of a judge and obligated that the judge should be a skilled and knowledgeable in the field of Islamic law. Moreover, he must be a *mujtahid*.⁴⁹ Therefore, it is not legitimate to appoint judges from ignorant people. However, if a *muqallad*, *mujtahid fil madhhab* or *mujtahid fil fatwā*, is appointed by the authority of the state due to any necessity, his decisions are enforceable

⁴⁴ Muḥammad bin Mahammad bin Mahmood al-Roomi, *al-Inayah Sharh al-Hidayah* (Dar al-fikr), 3:201.

⁴⁵ Shaykh Nizām al-Dīn al-Balkhi, *al-Fatawa al-Hindiyyah*, 3:361.

⁴⁶ Ibn Qudamah, *Al-Mughni*, 10:37; Al-Kasani, *Bada'i al-Sana'i*, 7:3.

⁴⁷ Al-Qur’ān, 49:6.

⁴⁸ Ibn Qudamah, *Al-Mughni*, 10:37.

⁴⁹ Ibn Qudamah, *Al-Mughni*, 10:37.

according to all jurists. The preferred opinion of Ḥanafī School of Thought permits the appointment of a judge who may be a follower of one of the schools of thought.⁵⁰ In this case, the judge will take *fatwā* from the *mufti* or *faqih* to conclude the verdict. According to Mālikī jurist, Muḥammad bin Aḥmad ad-Dusūqī, it is legitimate to appoint a *muqallad* judge as he explained that the condition of being mujtahid is considered under the category of recommended qualities according to Ibn Rushd.⁵¹ Today, a qualified persons to the level of absolute mujtahid is not available. Further, it is very hard to find out a person who has some knowledge to the level of *mujtahid muqayyad*.

7. Other Qualities

Jurists have recommended certain supplementary conditions with the above-mentioned principal conditions. While some of the statements consider them as obligatory. These may be divided into two categories such as positive and negative aspects of abilities and qualities. Such as negative aspects of qualities like he must not be a person who is generally slandered in lineage⁵² or is vulnerable or poor⁵³, impolite or offensive, arrogant, rigid or stubborn even to understand the truth.⁵⁴ While, positive aspects of qualities are being sagacious, honest, God-fearing, pious, honorable, respected, lenient,⁵⁵ who take opinions and suggestions and having good inside.⁵⁶

⁵⁰ Al-Kasani, *Bada'i al-Sana'i*, 3:7.

⁵¹ Muḥammad bin Aḥmad bin Urfah Ad-Dasuki Al-Mālikī, *Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir* (Dar al-Fikr), 4:129.

⁵² Al-Kasani, *Bada'i al-Sana'i*, 7:3.

⁵³ Shaykh Nizām al-Dīn al-Balkhi, *al-Fatawa al-Hindiyyah*, 3:308.

⁵⁴ Al-Sarakhsi, *Al-Mabsut*, 16:108.

⁵⁵ Al-Sarakhsi, *Al-Mabsut*, 16:108.

⁵⁶ Al-Kasani, *Bada'i al-Sana'i*, 7:3&5.

8. Male and Female

All the jurists are agreed on the issue that a male, having all other requisites, is qualified to be appointed on the post of a judge. But they disagreed and differentiated upon the ruling of an appointment of a female judge even if she possesses all the requisites of the qualification of a judge. This disagreement can be divided and elaborated into three perspectives.

A first group, majority of the jurists (*jamhūr*) have inflicted a principal condition of being a male person to fulfill the qualification of a judge and if the woman is appointed as a judge, her appointment and decisions will be considered void ab initio in all of the matters and, her judgements will never be enforced. This is the *maḏhhab* of Mālikī⁵⁷, Shāfi'ī⁵⁸ and Ḥanbalī⁵⁹ School of thought.⁶⁰ Imām Zufar has also agreed with *jamhūr* in this ruling.

However, the second group, Imām Abū Ḥanīfah and Ḥanafī jurists have elaborated a distinct opinion and permitted the appointment of a female judge.⁶¹ Muḥammad Amīn Ibn 'Abidīn has stated that the woman is qualified to be a judge in all matters except *ḥudūd* and *qīṣāṣ* according to Imām Abū Ḥanīfah.⁶² He derived this qualification from the rule of *shahādah* (being a witness) and quoted that the woman can be a judge in all matters except the matters linked with *ḥudūd* or *qīṣāṣ* issues as she can become a witness in all these matters according to Islamic rulings.

⁵⁷ Abū al-Walīd Muḥammad bin 'Aḥmad bin Muḥammad Ibn Rushd, *Bidayatul Mujtahid wa Nihayatul Muqtashid* (Kairo: Dar al-Kutub al-Ilmiya, 2004), 4:243.

⁵⁸ Abū Zakariyyā Mohiyuddin Yahyā Bin Sharaf Al-Nawawī, *Al-Majmoo' Sharh al-Muhadhib* (Beirut: Daar al-Fikr, 1997), 20:127.

⁵⁹ Ibn Qudamah, *Al-Mughni*, 10:36.

⁶⁰ Ibn Rushd, *Bidayatul Mujtahid*, 4:243.

⁶¹ Abdullah Bin Maḥmood Bin Modood al-Mosalī, *Al-Ikhtiyār li Tāleel Al-Mukhtar* (Kairo: Matba'a al-Ḥalbī, 1951), 2:84.

⁶² Ibn 'Abidin, *Radd al-Muḥtār*, 5:353.

Furthermore, the third group, Imām Ibn Ḥazm has not inflicted any condition for a *qāḍī* to be a male person and exclusively permitted a woman to be qualified as a *qāḍī* in all matters.⁶³ He has referenced his opinion while quoting the opinion of Imām Abū Ḥanīfah and the narration of ‘Umar ibn al-Khaṭṭāb regarding placement of *al-Shafā*’ from his tribe to control the marketplace. He elaborated that the tradition of Prophet which prohibits the entrustment of affairs to a woman is specifically applicable in one matter and that is the caliphate. He further grounded his opinion on another tradition of Prophet Muḥammad which states that:

وَالْمَرْأَةُ رَاعِيَةٌ عَلَى بَيْتِ زَوْجِهَا وَوَلَدِهِ.⁶⁴

a woman is the shepherd of her husband’s wealth, and she is responsible for her flock.

He argued that the textual sources do not prevent woman from being appointed in different authoritative areas including judiciary.⁶⁵ Ibn Ḥazm has also cited the appointment of woman, named Thumal al-Qahramana, in the office of *maẓālim* court in the year 306 A.H. She was appointed by the mother of the caliph al-Muqtadir.⁶⁶ He said that she sat as a judge between people as well as judges and, the jurist have also attended her sessions.⁶⁷ Al-Dhahabī⁶⁸ and Ibn al-Jawzī⁶⁹ have also quoted this historical account. Al-Dhahabī further had added that she put the rescripts on the petitions. Ibn

⁶³ Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār*, 8:527.

⁶⁴ Al-Bukhari, *Saḥīḥ* (Damascus: Dar Ibn e Kathir, 1993), 5:1996, Ḥadīth no: 4904.

⁶⁵ Ibn e Ḥazm al-Zahiri, *Al-Mohalli bi-al-Athār*, 8:527-528.

⁶⁶ Jamal al-Din Abū al-Maḥāsīn Yūsuf ibn Taghrī-Birdī, *al-Nujūm al-Zāhira* (Beirut: Dar al-Kutub al-Ilmiya, 1992), 216-217.

⁶⁷ Abu Muḥammad Ali Bin Aḥmad bin Saeed Ibn e Ḥazm al-Zahiri, *Rasā’il Ibn Ḥazm al-Andalusī* (Beirut: Arab Institute for Research & Publishing, 1987), 2:98.

⁶⁸ Shams ad-Dīn adh-Dhahabī, *Siyar a’lam al-Nubalā’* (Moasas al- Rasalah, 1985), 15:49.

⁶⁹ Jamal ud Din ‘Abd al-Raḥmān bin ‘Alī bin Muḥammad al-Hanbali Ibn al-Jawzī, *Al-Muntaẓam fī Tārīkh al-Umam wa al-Mulūk* (Beirut: Dar al-Kutub al-Ilmiya, 1992), 13:181.

Taghrī-Birdī holds that she issued the rescripts and upon these rescripts was her writing.⁷⁰ Ibn e Jarīr al-Ṭabarī has also narrated the similar opinion to the opinion of Ibn e Ḥazm.⁷¹ But some of the jurists have rejected the authenticity of the opinion of Imām al-Ṭabarī. Imam Qurṭabī has quoted the dialogue between *qāḍī* Abū Bakr bin al-Ṭayyab al-Mālikī al-Ash‘arī known as Ibn al-Baqilāni and Abū al-Faraj, a renowned Sheikh of Shāfi‘ī *madhhab*. He has written the statement of Imām Abū al-Faraj that the woman is qualified to decide any matter and the basis of this rule is the enforcement of *aḥkām* by the *qāḍī* through listening the witnesses and deciding the issues and disputes between the parties and, this can be done by a woman in the same sense as by a man. *qāḍī* Abū Bakr has criticized this point of view and highlighted the problem while associating it with the greatest imamate which regulates the protection and defense on borders, manages the international policies, accumulates the *kharāj* and delivers it to the needy. These obligations can be fulfilled more accurately by a man than a woman.⁷²

Moreover, majority of jurists (*jamhūr*) have derived their ruling to elaborate the disqualification of woman in this matter from the verse of the Holy Qur’ān and the tradition of the Holy Prophet Muḥammad and disagreed with Ḥanafī scholars. The verse elaborates that:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ.⁷³

Men are responsible for women due to the right which Allāh

Almighty has given them over the women.

Moreover, Imām Bukhārī narrates the tradition of the Prophet Muḥammad:

⁷⁰ Ibn Taghrī-Birdī, *al-Nujūm al-Zāhira*, 217.

⁷¹ Ibn Qudamah, *Al-Mughni*, 10:36.

⁷² Abu Abdullah Muḥammad bin Aḥmad bin Abu Bakr Al-Qurṭubī, *al-Jama’ li-Ahkām al-Qur’ān* (Kairo: Dar al-Kutub al-Misariya, 1964), 13:183.

⁷³ Al-Qur’ān, 4:34.

لَمَّا بَلَغَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَنَّ أَهْلَ فَارِسَ قَدْ مَلَكَوا عَلَيْهِمْ بِنْتَ
كِسْرَى، قَالَ: لَنْ يُفْلِحَ قَوْمٌ وَلَوْ أَمَرَهُمْ امْرَأَةٌ.⁷⁴

When it was informed to the Prophet that the people of Persia had crowned the daughter of Khosrau as it is their ruler. The Prophet said: Such people as ruled by a lady will never be successful.

Imām Ibn Qudāmah, an eminent Ḥanbalī Jurist, further elaborates that a male *qāḍī* attends meetings of disputes as well as assemblies of men, and the profession of *qāḍī* requires expert opinion, excellence in intelligence and intellect. While the woman lacks the intellect and expert opinion because she does not attend assemblies of male and she alone as a witness is never acceptable in any matter even if she has thousands of females as witnesses with her, except they have a man with them in witnesses. He has also quoted the verse 282 of *surah al-Baqarah* while stating that Allāh Almighty has warned about their misguidance and forgetfulness. She is not suitable for the greatest Imamate nor for the supreme authority upon any country as the Prophet, his caliphs and their successors have not allocated any woman to the seat of a judge nor for the headship of countries. And, if it was permissible then all the history must not be silent of it.⁷⁵

However, A Mālikī jurist, Ibn Rushd (595 A.H) has further disclosed the roots of discrepancies between the opinions and stated that the first group, which exclusively disqualifies a woman from being a judge, ambiguated and confused the status of a woman judge with the status of greatest Imāmate, and they have also made an analogy of a woman upon a slave due to the reason of less expert opinion and intellect.⁷⁶ In addition to it, Imām Nawawī has elaborated that it is mandatory for a *qāḍī* to sit in the

⁷⁴Al-Bukhari, *Saḥīḥ al-Bukhari*, 6:8, Ḥadīth no: 4425.

⁷⁵ Ibn Qudamah, *Al-Mughni*, 10:36.

⁷⁶ Ibn Rushd, *Bidayatul Mujaḥid*, 4:243.

sittings of jurists, witnesses and disputes of men while, a woman cannot sit in the gatherings of men as it is prohibited due to the fear of infatuation with her.⁷⁷ Further, Imām Ibn Rushd has disclosed the second group that permits, accepts and qualifies a woman to be a judge in financial matters, has rooted their opinion in the ruling of acceptance of a woman as a half-witness in financial matters. The third group which exclusively qualifies a woman to be a judge in all matters, has based its opinion upon the ruling that every person who can make judgement in disputes is eligible to be a judge and it is a general rule according to this group. This group has further elaborated that this rule is a general and a greatest imamate is excluded and particularized from it through the consensus of all jurists. So, woman cannot be a supreme authority of any state according to the consensus.⁷⁸

However, the opinion of Ḥanafī Jurists which qualifies a woman to be a judge is quoted by many jurists like Muḥammad Amīn Ibn 'Abidīn,⁷⁹ Abū Bakar Al-Kāsānī,⁸⁰ Abdullāh bin Maḥmūd⁸¹, Ibn Qudāmāh⁸² and Kamāluddīn Ibn al-Hammām.⁸³ But many of the jurists considered it to be a wrong perception of the opinion. As according to them, Muḥammad Amīn Ibn 'Abidīn has cited the text of al-Ḥaskafī which acknowledges that the appointing authority is a sinner in this matter due to the existence of *khābr* (*ḥadīth*) of unsuccessful people ruled by a lady in *Ṣaḥīḥ* al-Bukhari.⁸⁴ In addition to it, some critics of Ḥanafī view have also pointed out the non-existence of a female on the status of *qāḍī* in the history of Islamic era, even

⁷⁷ Al-Nawawī, *Al-Majmoo' Sharh al-Muhadhib*, 20:127.

⁷⁸ Ibn Rushd, *Bidayatul Mujtahid*, 4:243.

⁷⁹ Ibn 'Abidin, *Radd al-Muḥtār*, 5:353.

⁸⁰ Al-Kasani, *Bada'i al-Sana'i*, 7:3.

⁸¹ Al-Mosali, *Al-Ikhtiyār li Tāleel Al-Mukhtar*, 2:84.

⁸² Ibn Qudamah, *Al-Mughni*, 10:36.

⁸³ Kamāluddīn Muḥammad bin Abd al-Wahid al-Sivasi - Ibn al-Hammām al-Ḥanafī, *Fath al-Qadīr* (Beirut: Dar al-Fikr), 7:253.

⁸⁴ Ḥaskafī, *Durr al Mukhtar*, 476; Ibn 'Abidin, *Radd al-Muḥtār*, 5:440.

it spread over with the majority of Ḥanafī Chief Justices.⁸⁵ Dāmād Afandī has also agreed with the al-Ḥaskafī while elaborating it in his *Majma'al-Anhur*.⁸⁶

Nevertheless, Ḥanafī jurists have elaborated certain origins of their ruling regarding permissibility of appointment of woman as a judge in matters except *qīṣāṣ* and *ḥudūd*. They said that everything which is not forbidden through argument (*dalīl*) is allowed. Any person who is eligible to understand the dispute, his decision is legitimate and his appointment in the judiciary is lawful.⁸⁷ Hence, a righteous and a qualified woman, who can understand the affairs of dispute, can be appointed in matters other than *qīṣāṣ* and *ḥudūd* without any objection.

9. Female Judges in Pakistan

After analyzing the opinions of the jurists of distinct schools of thought, it is easy to further analyze the case study of Pakistani law and build a principle regarding entrusting the duties of the *qāḍī* to a woman. Although in Pakistan, the first appointment of a woman judge dates back to 1974. A first woman judge, Khalida Rashid Khan, was appointed as a civil judge in the history of Pakistan and eventually she was elevated to the High Court as a judge in 1994.⁸⁸ However, women representation was increased to more than one third of family courts through appointment of female judges in 2009.⁸⁹ Moreover, Ashraf Jehan was first female judge to be appointed to

⁸⁵Hafiz Muḥammad Anwar, *Wilayat ul Mar'a fi al-Fiqh al-Islami* (Riyadh: Dar Balensiyah Publications and Distributors, 1999), 227.

⁸⁶Damad Afandi, *Majma'al-Anhur fi Sharh Multaqat al-Abhur* (Bairut: Dār Ahya al-Thurāth al-arabī), 2:168.

⁸⁷Ibn Rushd, *Bidayatul Mujtahid*, 4:243.

⁸⁸Rubya Mehdi, "Lady Judges of Pakistan: Embodying the Changing Living Tradition of Islam," in *Women Judges in the Muslim World: A Comparative Study of Discourse and Practice* (Leiden: Brill, 2017), 206. DOI: https://doi.org/10.1163/9789004342200_009.

⁸⁹Livia Holden, "Women judges in Pakistan," *International Journal of the Legal Profession* 26, no. 1 (2018): 89. Available at: <https://doi.org/10.1080/09695958.2018.1490296>.

the Federal Shari‘at Court in the history of Pakistan. Prominent empowerment of women in the male-dominated judiciary has been shown in the current year when Honorable Mrs. Ayesha A. Malik was appointed as a judge of the Supreme Court of Pakistan on January 24th of 2022. In addition to it, many female judges are currently working in civil and criminal courts. The appointment of women judges was a challenging task in Pakistan. Many public debates, petitions and criticisms were made.⁹⁰ As mentioned previously, the opinions of all jurists elaborate prohibition for the woman judge in *hudūd* cases but today women judges are deciding cases under the *hudūd* laws.⁹¹ The qualification and admissibility of women to the judiciary had been challenged twice in Federal Shari‘at Court correspondingly in 1982 and 2010. One of the significant petitions filed in Federal Shari‘at Court is Ansar Burney versus Federation of Pakistan and others. This petition challenged the qualification of women on certain grounds such as discharge of functions as *qāḍī* without observing the veil, obligation of *qāḍī* were never entrusted to women during the period of the Holy Prophet as well as after him in the history of Muslim era, and the testimony of a woman is worth half that of a man, and likewise her share in inheritance with her brother.⁹² The first and third argument were rejected by the court while stating that the court did not contemplate the seclusion of women to be an injunction of Islam and the rules of evidence and inheritance do not have any connection with the question of the qualification of a woman. On the other hand, it was also held that an argument of no woman has ever served as a judge during the times of the Holy Prophet could not serve as a proof for the disqualification of a woman. Further, the

⁹⁰Mehdi, “Lady Judges of Pakistan: Embodying the Changing Living Tradition of Islam,” 207.

⁹¹Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Rawalpindi: Federal Law House, 2013), 139.

⁹²PLD 1983 Federal Shari‘at Court 73, Ansar Burney vs. Federation of Pakistan and others, 73-93.

court has also discoursed the philosophical and historical survey to overcome and evaluate certain other objections regarding sovereignty of men over women. In addition to it, the verse of *surah Al-Baqarah* was quoted by the court while eliminating discrimination between a man and a woman on the basis of sex. The court also incorporated it under the violation of Article 25 of the Constitution of Islamic Republic of Pakistan of 1973 and cited the text of the article that special provision may be made for the protection of children and women.⁹³ The court affirmed that the petitioner has failed to refer any injunction of Islam under which a woman could be barred from holding the office of a judge.⁹⁴ A new petition, *Murtaza versus Federation of Pakistan and others*, was filed in Federal Shari‘at Court in 2010. But this petition was dismissed while stating that the arguments are almost identical to the arguments of *Ansar Burney versus Federation of Pakistan*.⁹⁵

10. Conclusion

It is to be concluded from the above-mentioned explanation that all the schools of thought have determined different conditions for the qualification of a judge, and they are agreed in most of the requirements like, Islam, sanity, perfection of senses, freedom, righteousness, and knowledge about *aḥkām al-sharī‘ah*. On the other hand, they disagree on certain requirements like a female, blind and non-Muslim. Further, a bit comparison has been established regarding the qualifications of a judge within Islamic law and Pakistani legal system where any qualification is disregarded or conflicted in Pakistani law. According to the majority of

⁹³Hammad Murtaza vs. Federation of Pakistan and others, PLD 2011 FSC 117 (Shariat Petition No.1/L of 2010), 3; Ansar Burney vs. Federation of Pakistan and others, PLD 1983 FSC 73.

⁹⁴Ansar Burney vs. Federation of Pakistan and others, PLD 1983 FSC 73.

⁹⁵Hammad Murtaza vs. Federation of Pakistan and others, PLD 2011 FSC 117 (Shariat Petition No.1/L of 2010).

Ḥanafī jurists, the general doctrine for appointment of a judge includes conditions such as Islam, being sound mind and mature, free, righteous, knowledgeable about *aḥkām al-sharī‘ah* and a male in *qiṣās* and *ḥudūd* cases. While, they have agreed on the appointment of a female in financial and family matter (cases in which she can be witness). A non-Muslim can also be appointed as a judge for his religious fellows as per their opinion. Although, other three school of thoughts disagreed with this doctrine. Jurists have also recommended certain supplementary conditions such as sagacious, honest, God-fearing, pious, honorable, respected, lenient and many others. On the other hand, sometimes, importance had been given to merit and education of a person rather than religion in the history as *Al-Majallah al-Aḥkām al-‘Adalīyyah* did not mention Islam as an element of qualifications of a judge.
