



## An Investigation of Women's Judgment In Jurisprudence and Afghanistan law

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### **Abstract**

This article examines the difference between women in Imamiya jurisprudence, Sunni jurisprudence, and Afghanistan law, and in this regard, it explores the views of Imamiya jurisprudence and Sunni jurisprudence with a comparative perspective. Meanwhile, the laws of Afghanistan have also been considered. The present research has been carried out with a descriptive analytical method and it has been concluded that among the Sunni jurists and Imamiya jurists, the dominant view is that women are not qualified to be a judge. About this disqualification, jurists have referred us to verses of Quran and Ahadith and they believe that the main reason for women's disqualification is the claim of consensus. Despite this prevailing view, some Imamiya jurists doubt the existence of such a consensus and do not consider women's limited qualification in cases that can be proven by their testimony. Among the religions, the Hanafis believe that women can take the position of judge, except in cases of retribution. The absolute authority of women to hold a judgeship among the Imamis and the Sunnis also has few supporters. According to this point of view, the laws of Afghanistan have not deprived women of this right, and women can take this responsibility just like men, therefore the Afghan Courts Jurisdiction Law has not mentioned being a man as one of the conditions of being a judge in this country.

**Keywords:** *Imamiya Jurisprudence; Sunni Jurisprudence; Women's Judgment; Conditions of Judge; Judge of Consolidation; Guardianship; Civil Law; Principles of Trials*

### **Introduction**

One of the basic issues that philosophers and researchers have paid attention to in scientific and cultural societies is the issue of "women's rights and character". Women in human societies have always been far from their real position and rights, and in many cases even their human dignity has been questioned.

With the formation of feminist movements and their activities today, the position and character of women in every society shows the importance and dignity of women in that society. One of the main indicators of countries' development is the respect for human rights, especially women's.

In religious teachings, especially Islam, human beings (regardless of gender, race, color, etc.) have a very high dignity. One of the topics about women's rights is the qualification of women to be a judge. This issue has been discussed in jurisprudence for a long time and jurists have extensively discussed and investigated this issue from the past until today.

Among Imamiya jurists, the prevailing view is that women are not qualified to be a judge, as many Shia scholars have claimed consensus in this regard.

Among Sunni jurists, the prevailing view is that women are not qualified to be a judge, but some Sunni schools, including the Hanafis, believe that women can judge in various matters.

In this article, the author tries to criticize the views of Imamiya and Sunni jurists, and finally explains the position of Afghanistan laws regarding the qualification of women to be judges.

## Chapter One - Views

### 1- The View of Imamiya Jurists

#### 1-1- Disqualification of Women

Imamiya jurists often consider being a man as a condition for obtaining the position of judge and women are not allowed to get this position, and many scholars have claimed consensus on this point of view. (Al-Aamili Z., 1416, p. 327); (Tabatabaei A., 1404, p. 385); (Khoei, Bitā, p. 10)

The first martyr (may his soul rest in peace) in his book "lessons" defines judgement as: "And it is the will of the Shari'ah on the judgment about the public matters before the imam." (Al-Aamili, S.A., 1414, p. 65). He considered judging as an authority, therefore acquiring the title of a judge needs permission and installation from the Imam (guardian of Muslims). The late Khansari the author of *Jame Al-Madarak* also presented a similar definition, "It is customary to have a legal mandate to rule in public interests from the Imam, peace be upon him." (Khansari, 1355, p. 2). As jurists believe that judge is a title to be acquired, being a man is a primary condition.

After quoting the consensus of the Shia jurists, the author of *Riyad al-Masail* considered it sufficient to justify the validity of this condition and said: "Added to the original, based on the jurisdiction of the position of judge before the Imam, by agreement, a fatwa and a text"; (Tabatabaei A., 1404, p. 385) He considered judgment to be one of the affairs of the Imamate and the public administration, therefore, he mentioned being a man as one of the valid conditions for a judge. The author of *Jawahar* (may Allah be pleased with him) and other jurists, in this area have referred us to the famous hadith: "A people whose guardian is a woman will not prosper" (Najafi, 1367, p. 14); (Al-Tusi H., 1417, p. 213); (Al-Amili Z., 1416, p. 328); (Golpayaghani, Part 1, p. 48). Because the judgment is guardianship, and it is included in the general or the application of this hadith.

Sheikh Tusi (may Allah be pleased with him) says in the book *Mabusut*: "One of the conditions for judging is being a man, because a woman cannot be a judge under any circumstances" As for the perfection of the rulings, he must be an adult, sane, free, male, as a woman is not entitled to the judiciary under any circumstances (Al-Tusi h. , *Al-Mabsut Fi Fiqh al-Amamiyyah*, 1378, p. 101) this great jurist while pointing out the existence of the opposite point of view, considers the women's inqualification to be more correct.

Likewise, Allama Helli have explicitly stated being a man as a condition for being a judge in his book "Qavaed": "in the judgment; maturity, wisdom, being a man, faith, Justice, knowledge and legitimate birth are conditions. Therefore, a minor, insane, disbelieving, corrupt and female will not be accepted for judgment, although it has the rest of the conditions of judgment." (Helli, Allama), 1413, P. 421<sup>1</sup>. Mohaqeq Helli, the author of the book of *Sharia*, also considers one of the conditions of the judge to be a man, stating that a woman cannot be a judge even if she has other conditions of judgment. (Helli

<sup>1</sup>. The conditions for it are: puberty, wisdom, faith, justice, purity of birth, and knowledge. The judiciary of a boy cannot be carried out even if he is a teenager, nor the insane, nor the infidel, nor the immoral person, nor the woman, even if all the rest of the conditions are met.

Mohaqqeq, 1409, P. 860).<sup>2</sup> the jurists after Allama and Mohaqeq in their jurisprudential books on the subject of judgment have mentioned maleness as a condition of judgment, and the famous contemporary references have followed the same method, which can be mentioned as an example to the foundations of the “Takmila Al-Menhaj” by Ayatullah Khoi, the book of judgment. "The judge must have the following conditions: maturity, wisdom, maleness, (Khoi, B ta, P. 10) and also Tahrir al-Wasilah, by late Imam Khomeini, States: "For being a judge; puberty, wisdom, faith, justice, absolute ijtehad, legitimate birth and maleness are conditions" (Khomeini, B ta, P. 407) also, Ayatullah Montazeri in his book “Velayat Faqih” and Allama Tabataba'i in *Almizan Tafsir* have justified the prohibition of women's judgement with various arguments that we will discuss later.

As you can see, many jurists consider one of the conditions of a judge to be a man, but what is their reason? It should be said that the main reason for this view is the consensus and the narrations that have been stated in this topic. Although some other jurists have also argued about the issue of women being dominated by emotions, we will discuss this issue in detail in the evidence review section.

### 1.2- Limited Qualification

The second point of view raised among the Imamiya jurists is the point of view of those who doubted the absolute lack of qualification of women in being a judge, and implicitly accepted the qualification of women in limited cases. Among the people in this group we can mention the late Mohagheg Ardabili and Mirza Qomi. The late Moghaddis Ardabili has questioned the absolute negation of women's judgment and accepts their qualification in matters related to women and proven by their testimony if they have other conditions for judgment. At the same time, he has stated that if there is a consensus on this matter, he also submits to the consensus. (Ardabili, Beta, p. 65)

Among the contemporary jurists, Ayatollah Nouri Hamadani, in response to the question of Iranian students News Agency (ISNA) regarding the judgment of women in family courts, accepted the limited qualification. (Hamdani, 1386). Some scholars have considered Mohaghegh Ardabili's speech as the acceptance of that famous point of view, and while dividing judgment into: 1- getting the position of judge which is the guardianship or supervision over the judicial activities, and 2- the act of judging, which is merely solving the problem between two people, the doubt of Mohaghegh Ardabili is regarding solving the enmity that every scholar does between people who do not know the ruling of the issue and refer to the scholar. (Maraft, 2005), but the words of the late Mohaghegh Ardabili is inconsistent with the understanding of his words; Because he clarifies that there is no obstacle for women to judge in cases that are proven by women's testimony, and on the other hand, he states that women can judge in limited cases if they have other conditions for judgment. The settlement of disputes that a scholar makes between people does not need to have the conditions of judgment. In order to be precise in the words of the late Mohaghegh Ardabili, we quote the text of his statement: "As for the requirement of masculinity, this is apparent in what it is not permissible for a woman to do, but as for anything other than that, we do not know of clear evidence for it. Yes, that is what is well-known. If it was a consensus, then there is no discussion. Otherwise, the total prohibition is subject to discussion, as there is no caveat in its ruling on the testimony of women, along with hearing their testimony between the two women, for example, about something, while it is characterized by the conditions of the ruling. (Ardabili, Beta, p. 15).

The late Mirza Qomi also doubted the consensus of the condition of being a man for the position of Judge and it is clear that his doubt cannot be considered as an evidence for solving the conflicts because in such matters there is no doubt at all that it does not require special conditions (Mortazavi, 1386). Late Mirza Qomi said: “Perhaps there is a problem with the requirement of masculinity and the absolute predominance of memorization and speech because the reasons mentioned are due to the fact that women are often unable to do so due to the need to stand out and distinguish between opponents and witnesses, and that distinction and mastery do not occur with a large number of people.” Forgetting and

<sup>2</sup>. The conditions are: puberty, perfect reasoning, faith, justice, pure birth, knowledge, and masculinity... The judiciary is not held for a woman even if the conditions are fulfilled.

muteness are not constant, as there is no reason for it not being permissible at all unless there is absolute consensus, and the consensus can be based on the basis of choosing the mandate and position in general, but as for specific governments, this is not known from its transmitter, and if it is tolerated by some expressions, then the ambiguity is established in the condition absolutely.” (Mortazavi, 1386)

Contemporary jurists Ayatollah Mousavi arabili also questioned the reasons given in the book of jurisprudence of the judiciary for the lack of qualification of women to judge, despite doubting the evidence presented to the lack of qualification of women and stated the only valid reason in this regard is the requirement of the principle of non-qualification. (Mehrpur, 1386) also, Ayatollah Montazari in the book of “Velayat Faqih” doubts about the evidence presented, he also accepts the view of disqualification despite the doubt about the evidence, and cites the only reason in this regard as the same difference in the mood of men and women, claiming that women are tender and sensitive and do not have the ability to do jobs that require a lot of patience. (Montazeri, 1379, P. 106-131) we will discuss this in detail in the evidence review section.

### 1-3- Absolute Qualification

From the Imamiya jurists in contemporary times, Ayatollah Yusuf Saneyi strongly believes in the qualification of women to take over the judgment and does not stipulate gender in getting this position. In response to a question from the Iranian Students News Agency (ISNA) about the judgment of women in family courts, he states that women can absolutely take judgment as well as men. The text of their question and answer is as follows: ISNA question: "given the specific circumstances of family courts and the private and family issues of individuals in these courts, Do you think that the use of female judges in such courts is prohibited by law? If a woman can achieve ijtehad, can she also take over the judgement?"

Ayatullah Sanayi's answer: "in my point of view being a man is not a condition for being a judge however the criteria in judgment are as follows: being moderate and being in the correct path of judgment, having knowledge in the Islamic principles of judgment and laws, so we have no valid reason for the condition of being a man, and the requirement for acceptable application and abolition of character from the confirmation of the "man" in the narrative of Abi Khadijah is the lack of condition and accuracy of a female judge like a male judge. In other words, I believe all scholars, who are fair and can meet the other conditions, have the permission for judgement and there is no difference between the judgement of men and women, this means that for judgement having dominance and knowledge over laws is the main condition not being a man. If the Shariah and lawmaker wants to apply such devotion, he needs many narrations and clearer evidence and to explain it in a way that does not abolish the character, that is, just as the Shariah acted in a way to prevent the practice of analogy which is in accordance with validity. Those who know that Shi'ism should act by analogy in the parables in question should also act in the same way, and without proving that, the act is khart al-qatad. (Sanei, 1386).

Sheikh Tusi in his book “Nehaya” did not clearly mentions maleness as a condition for being a judge. Among the contemporaries of Sheikh Tusi, Abu Salah, author of Kafi Fi Fiqh and Sheikh Mufid in the book of Muqnaqah, they did not state maleness as the condition for becoming a judge, and they did not mention the inadmissibility of judging for a woman. Wise, perfect, knowledgeable in the book and tradition, ascetic in the world, avoiding forbidden things and striving for piety), Ibn Idris also listed the conditions for becoming a judge in the book of Saraer, like Sheikh Mufid and Abul Salah, and did not explicitly mention the inadmissibility of a woman's judgment.

## 2- The Point of View of Sunni Jurists

### 2-1- Inability of Women to be Judges

Among Sunni jurists, the prevailing view is that women are not qualified to be a judge. Muhyiddin Nawi, one of Shafi'i jurists, says in al-Majmo book: There is a difference between the scholars regarding the condition of a judge being male, and the majority of jurists consider being a male as a

condition for a judge, but Abu Hanifah believes that women can be judges in financial matters and Tabari has accepted the absolute qualification of women. "There is a difference in the requirement of masculinity. The public said it is a condition. Abu Hanifa said it is permissible for a woman to be a judge in property. Al-Tabari said: It is permissible for a woman to be a ruler over everything." (Al-Navi, Al-Majmoh fi Sharh Al-Muhdez, B. Ta., p. 150) He also emphasizes the condition of the judge being a man in his book "Rawza Talibeen". (Al-Navi, Roza Talibin, Bita, p. 82) Shams al-Din al-Dusoqi Maliki in his book Hashiya al-Dusoqi has also stated the absolute lack of qualification of women to be a judge. His saying: (Neither female nor hermaphrodite) means that it is not valid for them to be appointed judges and their rulings will not be implemented. (Al-Dusoqi, Bayta, p. 129) Abi al-Barakat of Maliki's jurisprudence has also mentioned this condition in the book of Sharh al-Kabeer. (Abi al-Barakat, Beita, p. 129)

## 2-2 Women's Qualification in Limited Cases

Among the Sunni schools, the Hanafi jurists believe in the limited qualification of women to be a judge. Abu Hanifa's followers believe that women have the authority to judge those matters that can be proven by the testimony of women. Sheikh Tusi (may Allah be pleased with him) who wrote the book of Khilaf to introduce conflicting issues between Imami jurisprudence and public jurisprudence, specified that Hanafi jurists accept the limited jurisdiction of women and only excluded Hudud and Qisas from it. (Al-Tusi H., 1417, p. 213) from the Hanafi jurisprudence of Ibn Najim Masri, in the book Bahr al-Ra'iq, it is specified that it is not necessary to be a man to hold the position of judge. "And al-Hakim: wisdom, maturity, Islam, freedom, hearing, sight, speech, and safety from the limit of Qazf, and to be the owner of the law without hearing the case, only as in the treasury, without masculinity and ijtihad." (Masri, 1997, p. 432) As can be seen, he does not consider being a man and ijtihad as a condition for holding a judgeship.

## 2-3- Absolute Jurisdiction

Among Sunni writers, only Ibn Jarir al-Tabari accepted the absolute authority of women to hold the position of judge. Sheikh Tusi has reflected his point of view in his book. (Al-Tusi H., 1417, p. 213) The author of the Fiqh Al-Sunnah book also quoted Ibn Jarir al-Tabari's point of view. "The judgment of the imitator, the infidel, the minor, the insane, the immoral person, or the woman is not valid." (Al-Saqab, Bita, p. 396) In footnote number 2 of the same page, he expresses the views of Abu Hanifah and Ibn Jarir. "(2) Abu Hanifa permitted a woman to be a judge in financial matters. Al-Tabari said: It is permissible for a woman to be a judge in everything. He said in Nail Al-Awtar - He said in Al-Fath: "They agreed on the stipulation of maleness in the most stubborn Hanafi judge. They made an exception for the punishments. Ibn Jarir was states: He supports what the majority said that the judiciary needs perfect opinion and saw women as deficient, especially in men's circles." (Previous, B. Ta, p. 396)

Therefore, there is no significant difference between Imamiya and common jurisprudence regarding the condition of being a man to be a judge. Absence of absolute qualification, acceptance of limited qualification and absolute qualification have their supporters both among Imamiya and among Sunnis.

## 3-Judging Women in Afghanistan Law

In Afghanistan, there is no legal restriction on women's judgment. In the laws, there is no prohibition on women to be a judge, and in practice, women used to serve in the judiciary of the country before the Islamic Emirate. In the last judicial apprenticeship held in the country, women had a huge contribution.

The new constitution of the country devotes Chapter VII to the judiciary and in Article 118 states how and the conditions of the Supreme Court members (the Supreme Court), in which he did not mention being a man. Article 118 the member of the court shall be eligible for the following:

- 1-the age of the president and members shall not be less than forty years when being appointed.
2. be an Afghan citizen<sup>4</sup>
3. have sufficient expertise and experience in legal or jurisprudential Sciences and in the Afghan system<sup>4</sup>
- 4 - have good character and good reputation<sup>4</sup>
- 5-has not been convicted by the court of crimes against humanity, crime or violation of civil rights<sup>4</sup>
- 6-Not a member of any political party while on duty.

As you can see, this article of the Constitution of the country, which is dedicated to the conditions of the highest judges of the country, does not mention being a man, so women, like men, have the right to be a member of the Supreme Court of the country.

Also, in Article 132 of the Constitution, regarding the selection of judges, judges are appointed based on the proposal of the Supreme Court and the approval of the President.<sup>3</sup> It is not stated in the conditions of the judges that they should be male, and in the Law on Organization and Jurisdiction of the Courts, approved in 1370, which is a special law regarding the jurisdiction of the courts and judges, the fifth chapter is dedicated to the affairs of judges and in Article 58 under the title of "conditions for dissolution of the judiciary" He has explained the qualification of this position in detail, such as the level of education, age and in this article, he has not stated being male as the conditions for qualification of this position. The text of Article 58 of the Law on Organizations and Jurisdiction of Courts is as follows: "Article 58: (1) A person with the following qualifications shall be appointed as a judge upon the proposal of the President of the Supreme Court and the approval of the President.

- 1- Having at least ten years of citizenship of the Islamic Republic of Afghanistan, at the time of enrollment.
- 2- He has not been convicted of a crime or not be an intentional misdemeanor by the final decision of the competent court.
- 3- He has a bachelor's degree from a law or Shariah school or higher, or an official state religious school certificate or equivalent.
- 4- He should not suffer from contagious diseases or disabilities that prevent him from performing his duties.
- 5- He has completed the age of twenty-five during his enlistment in the judicial staff.
- 6- Successfully completed the judicial internship.

(1) A person who has an educational certificate from the official religious schools of the government or its equivalent can be appointed as a member of the elementary court for the first three years by observing the conditions listed in the components (1, 2, 4, 5 and 6) of paragraph (1) of this article.

(2) When the number of qualified candidates is more than necessary, the Supreme Court can impose additional conditions for the recruitment and inclusion of candidates. On the other hand, considering Afghanistan's accession to the International Convention on the Elimination of Any Discrimination Against Women, this convention is a domestic and binding law, and the Afghan

<sup>3</sup>. New Constitution, Article 132: Judges are appointed by the Supreme Court's proposal and the President's approval. Appointing, transferring, promoting, dismissing and proposing the retirement of judges is the jurisdiction of the Supreme Court in accordance with the provisions of the law. In order to better regulate executive and judicial affairs and ensure the necessary reforms, the Supreme Court establishes the General Administrative Directorate of the Judiciary.

government is obliged to provide conditions for women and men to have equal rights in all fields. , especially in the field of employment and exploitation of political-civil rights; Because Article 2 of the convention emphasizes: member states must provide women with human rights and basic freedoms on the basis of equality with men in all political, social, economic and cultural fields. Also, Article 7 of the Convention obliges the member states to eliminate discrimination against women in political and social fields and holding public positions. Article 11 of this convention in the field of employment, while considering employment as an inalienable right of human beings, requires the member states to provide equal rights to men in the field of employment for women.

#### 4. Judgment of Women after the Fall of the Republic

After the fall of the Republic period and the rule of the Islamic Emirate over Afghanistan, women were temporarily prohibited from studying and working or in other words until further notice, and the reason for this prohibition was the lack of infrastructure in accordance with Islamic Sharia. The ban on employment in the judiciary sector is more severe than in other sectors, and so far no ruling has been issued regarding the return of women to their studies and jobs, and it has not been explained what positions the ban will include in the future.

What actually exists is that women in Afghanistan are currently not in charge of judging and it is prohibited. What is the basis of this prohibition? And how long it will last is in an aura of uncertainty. It is not clear which jurisprudential point of view the Islamic Emirate will follow in the future.

#### Chapter Two - Examining the Evidence

Those who believe that women are not qualified to hold the position of judge have cited many verses and narrations as well as consensus in this field, which we will criticize while examining these evidences.

##### 1. Verses

1-1- Verse 34 of Surah Al-Nisaa " Men are Guardians of Women Because God Has Favored some of You Over Others and What They Spend of Their Wealth for Charity";

According to the verse, men have guardianship over women due to their superiority in some physical and sensual aspects and the payment of alimony. Those who refer to this verse consider this verse to be beyond the relationship of couples and include both men and women. The late Allameh Tabatabai said in the interpretation of this verse, " God has favored some of you over others, it is the excess that God Almighty has given to men according to their capacity for difficult actions and because the life of women is an emotional life. whose foundation and capital is compassion and tenderness." (M. Tabatabai, 1366, p. 532) He goes on to say that since the reason for a man's guardianship over a woman is general, therefore the rule of guardianship is also general and is not exclusive to married couples, especially in general areas such as governance and judgment which It is related to the life of all human beings. Because the consistency of these two responsibilities is the emergence of reasoning and this force is more and stronger in men than in women; Therefore, women are not qualified to hold these positions. (M. Tabatabai, 1366, p. 532)

1-2- Verse 18 of Surah Zukhruf: "Or Someone Who Gets Carried away in Adversity While He Is in Conflict without Being Clear. »

Some of those who believe that women are not qualified to be judges have cited this verse. This verse mentions two characteristics for women, First, they always see their personality and perfection in their adornment. This feature is mentioned as a defect in this verse, because the personality of a human is in the same human perfection.

Secondly: He is constantly in the grip of emotions, and in the whirlwind of unfortunate events and incidents, instead of using reason and appropriate planning, he is overcome by emotions, loses his

composure and patience, which is necessary to deal with misfortunes, and finds himself helpless and weak." (Marefat, 1385).

The late Allameh Tabatabaei also considers this verse as a proof of the weakness of women's reasoning power and the intensity of their emotions and feelings, and he considers their strong interest in ornaments to be one of the clear manifestations of their emotions. (M. Tabatabai, 1366, p. 132) The author of the Tafsir Nemone also cited this verse for women as a trait, which is a strong interest in ornaments and adornment and not having enough strength to prove themselves during arguments due to modesty. and shame (Makaram Shirazi, 1353, p. 28)

1-3, Verse 228 of Surah Al-Baqarah: "And for Them is the Same as That of Them, with Goodness, and for Men a Degree Over Them, and God is Mighty, Wise."

This verse, which is about the duties and rights of couples after divorce and separation, while pointing out that women have rights in addition to their duties, it says that men are of a higher rank than women, that is, they have more superiority and experience. Some have got this meaning from this verse that a woman cannot hold the office of judge.

While commenting on this verse, Ayatollah Makarem Shirazi claims that there is a wide difference between the abilities of men and women, women have more emotions because they are responsible for the sensitive task of motherhood and raising the future generations of the society, and this superiority in emotions is the reason for the implementation of justice. So the tasks that require more reasoning and is far from feelings should not be left to women, such as judging and governing. (Makaram Shirazi, 1353, p. 28)

The quoted verses especially verse 34 of Surah An-Nisa and 228 of Surah Al-Baqarah are about private life relationships and it is not possible to argue about social life and social relationships from them. In this regard, psychologists confirm the issue that the power of thinking and reasoning is strong among women, so the validity of this argument is not certain, and jurisprudence should take this validity as a subjective principle of psychological science. In this regard, we will explain more in the review section of hadiths.

## 2- Narrations

The mentioned narrations can be presented under two general types, the first category of narrations that prohibit women from judging and ruling, the second category of narrations that consider women's reasoning and thinking powers to be less than men's, or introduce them as having strong emotions.

The first category: Narrations that directly or indirectly prohibit women from judging and ruling:

- 1- Saduq narrated a narration in the book of Khasal from Imam Baqir (a.s.) that the Holy Prophet (PBUH) said that following things are not for women: the call to prayer and Iqama, attendance at Friday and congregational prayers, visiting the sick, funerals, and saying the zikr of lips in a loud voice (in Hajj). Running between Safa and Marwah, touching the Black Stone, entering the Kaaba, etc., and taking charge of judgment and government. (Ibn al-Hussein Ibn Babouyeh, Beita, p. 585)<sup>4</sup>

<sup>4</sup>. Jaber bin Yazid al-Jaafi said: I heard Abu Jaafar Muhammad bin Ali al-Baqir, peace be upon them, saying: Women are not required to call to prayer, nor to the iqama, nor to the Friday prayer, nor to pray in congregation, nor to visit the sick, nor to follow funerals, nor to pronounce the Talbiyah loudly, nor to jog between Safa and Marwah, nor to touch the black stone. entering the Kaaba, and shaving are only shortened with their hair. A woman should not be appointed as a judge, should not be appointed to rule, should not be consulted, should not be slaughtered unless absolutely necessary, and begin ablution with the inside of the arm and the outside of the leg. She should not wipe as men wipe, but rather she should throw away the veil. From the place where she wipes her head during the morning and sunset prayers, and she wipes over it and during the rest of the prayers, she inserts her finger and wipes her head without removing her veil...



- 2- Mufid narrated from Ibn Abbas and he narrated from the Prophet (PBUH) that the Prophet said: "Hawa was created from Adam, and if Adam was created from Eve, divorce would be in the hands of women and... and if Eve was from the whole If Adam was created, surely women would be able to judge like men." (Nouri, 1987, p. 285)<sup>5</sup>

Considering the doubts that exist in issuing these hadiths, it cannot be cited, although some elders have argued against them by claiming to compensate for their weakness by the actions of the Companions. (Marefat, 1385).

- 3- Narrated by Abi Khadijah that Imam Sadiq (a.s.) said: "Be careful not to judge one another against unjust people, but look at a man among you who knows something of our issues, and take it among yourselves, for I have made him a judge, so refer to him..." (Al-Tusi, M. 1365, p. 219)

In this hadith, Imam Sadiq (a.s.) forbade the Shiites from referring to the rulers and said to choose a man from among yourselves and I appointed him as a judge for you...

It is clear that in this narration, Imam (a.s.) does not state the condition of judgment in terms of being a man or a woman, and the mention of the word "male" is about dominance, not in the sense of masculinity, and its main purpose is not to bring a complaint before the rulers. (Mehrpur, 1386) On the other hand, it can be said that the word "man" here removes the characteristic and the hadith means to choose someone from among yourself.

- 4- A narration from the Prophet (PBUH): "A congregation ruled by a woman or headed by a woman will not be saved." This hadith assigned to the Prophet was issued when he was informed that the Iranians had chosen their king's daughter as his successor. There are other hadiths in this context, for the sake of brevity, we refrain from mentioning them.

Second category: Narratives that indicate the lack of intellectual and mental power of women or prohibit men from advising and following women.

- 1- Imam Ali (a.s.) in a letter addressed to Imam Hassan (a.s.) says: Avoid voting and consulting with women who are weak women and unable to make decisions, and keep them in a veil so that their eyes do not see the uncharitable. Being in the veil keeps them better, and if you can, treat women so that they don't know anyone but you, and leave the work that is beyond a woman's ability to her, because a woman is as delicate and vulnerable as a spring flower, not a hero. (Razi, 1414, p. 405)<sup>6</sup>
- 2- In the narration books of the Sunnis, there is a narration from the Holy Prophet (PBUH) that he said to the women: "Women, give charity, even if it is from your adornments, for you will be among the majority of the people of Hell." (Abi Umar al-Adni, Bit, p. 101), the narrator of the hadith of Ibn Masoud. In the following, he analyzes that women are deficient in intellect and deficient in faith, and the reason for their deficient intellect is that the value of the testimony of

<sup>5</sup> . Al-Mufid in Specialization: On the authority of Ibn Abbas, in a long hadith in which Abdullah bin Salam issues questions on the authority of the Messenger of God (may God's prayers and peace be upon him and his family), until he said: So tell me about Adam being created from Eve or Eve being created from Adam? He said: "Rather, Eve was created from Adam, and if Adam had been created from Eve, divorce would have been in the hands of women, and not in the hands of men." He said: From all of it or from some of it? He said: "Rather, from some of it. If Eve had been created from all of it, it would be permissible for women to make up for it just as it is permissible for men." He said: From its apparent meaning or from its inner meaning? He said: Rather, from its interior, and if you were created from its exterior, women would be exposed just as men are exposed. Therefore, women are hidden. He said: From its right or from its left? He said: Rather, from his left, and if it had been created from his right, it would have been the share of the male and the female as one, so therefore the male has two shares and the female has one share, and the witness of two women bears one man.

<sup>6</sup> And you and the women, if he sees them to the arrival and their determination to them, and I will stop them from their eyes with your headscarf. Herself, for a woman is a blessing and not an oppressor.

two women is equivalent to that of a man, and the lack of religion is that they do not pray and fast during menstruation. (Abi Omar al-Adni, Beita, p. 101)<sup>7</sup>

- 3- And also in a narration from Imam Sadiq (a.s.) and he narrates from the Messenger of God (s.a.w.) that he said: Disagree with the opinion of women, even if they give an opinion on a good deed, do not follow them, so as not to be greedy for following in the deed of evil and conflict. don't say (Alkalini, 1388, p. 517)<sup>8</sup>

It is a difficult task to use the ban on women's judging from such narrations, whose authenticity is not certain, and secondly, the transmission of some of them from the Prophet (PBUH) and Imam (PBUH) is highly doubtful. Especially since the appearance of many of these narrations is in conflict with the axioms of the society.

In the explanation of consensus, it should be said that the consensus that is valid in Imamiyah jurisprudence is the consensus that is cited from the words of the Infallible (AS). But the aforementioned consensus cannot be cited as a proof because the claimed consensus is based on the same hadiths that were narrated. Secondly, the claimed consensus is not established because this consensus was raised after Allameh Helli and such a claim is not seen among the jurists before him. Because regarding the condition of being a male judge, it can be said that there are three categories of jurists. Some people have not discussed the issue of the judge's conditions in the book of Qadha, such as "Sheikh Sadouq (died 381 AH) in Muqaneh and also in "Al-Hidayah Balkhair", Sheikh Mufid (died 413 AH) in Muqaneh, Seyed Morteza (died 436 AH) In Intisar, as well as in the book of Nasiryat, Selar (died 463 AH) in al-Marasim al-Alawiya, Qazi Ibn Baraj (died 481 AH) in Jawahar al-Fiqh, and Qutb Rawandi (d. 573 AH) in al-Qur'an jurisprudence. (Mortazavi, 1386) and some others who were subjected to circumstances did not mention being a man, such as al-Kafi by Abi al-Salah Halabi (died 447 AH), Zahir Nahayeh al-Ahakam by Sheikh Tusi (died 460 AH), Ghaniyeh al-Nuzou by Sayyid Ibn Zohra (died 585 AH). A.H.), the device of Ibn Hamzah (died 560 AH) and the appearance of Saraer by Ibn Idris (died 598 AH) (Mortazavi, 1386) and only after Allameh, the issue of being a man is widely seen in the words of jurists, which in this Between Mohaghegh Ardabili and Mirzai Qomi, he doubted it.

Among the contemporary jurists, as mentioned before, Ayatollah Sanei accepts absolute jurisdiction and does not recognize any difference between men and women in terms of governance and judgment. Therefore, the consensus claim that many elders put forward as the main reason cannot prove this condition.

## **Conclusion**

Women's judgment has been discussed for a long time among Imamiya and popular jurists, and the dominant view among both religions is that women are not qualified, although limited jurisdiction and absolute jurisdiction also have few supporters. Among Sunni Hanafis, they accept limited jurisdiction, and the laws of Afghanistan, which are derived from Hanafi jurisprudence, accept absolute jurisdiction in

<sup>7</sup>. Humiliation, on the authority of Ibn Masoud, who said: The Messenger of God, may God's prayers and peace be upon him, said, "O women, give charity, even if it is from your adornments, for you are among the people of Hellfire." A woman who was not among the elite of women stood up and said, "Why, O Messenger of God." He said, "You curse a lot and deny that it is a blessing, and you deny your partner." Abdullah said, "We did not find any Deficient in reason and religion prevail over the minds of men who have an opinion over their affairs than women. So it was said to him, O Abu Abd al-Rahman, what is the deficiency in her intellect and religion? He said, As for the deficiency in her intellect, the testimony of two women is equal to the testimony of one man, and as for the deficiency in her religion, she stays in such and such and does not prostrate to God.

<sup>8</sup>. On the authority of Abi Abdullah (peace be upon him), he said: The Messenger of God (peace be upon him and his family) mentioned women, and he said: Disobey them in the good before he commands you to do evil, and seek refuge in God from their wickedness, and beware of their choice.

the conditions of a judge, so they did not mention being a man in the conditions of a judge, and in practice, there are still many women in the country acting as judges. has done

The most important arguments in Imamiya and popular jurisprudence are consensus and arguments such as the difference in the mental state of women. Many jurists have cited consensus for women's incompetence in judging, and some have put forward women's mental state and emotionality, their inability to reason and think as the most important reasons. As it was checked, first of all, this consensus claimed by the researcher is not true. A large number of jurists were either not exposed to the conditions of the judge at all, or if they were, they did not mention being a man. Thirdly, this consensus was obtained by referring to the hadiths that were reviewed earlier and the consensus is a proof, it cannot prove a verdict as a proof.

Being sensitive and weak in the power of reasoning and thinking in women is an issue that is the subject of another science and jurisprudence cannot comment on it, but jurisprudence must examine its verdict after proving it in psychology.

After the fall of the republic and the rule of the Islamic Emirate, women have been prohibited from attending duties until further notice, and this issue is not clear in the judicial department, whether the ban will be permanent or temporary. It is not clear from which jurisprudential point of view the Islamic Emirate will act regarding the judgment of women. What is true is that women are currently deprived of employment in all fields, including the judiciary.

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