



## Immunity, Independence and Accountability of Judges: An Islamic Law Perspective

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### Abstract:

Judiciary is one of the fundamental pillars of the state. Immunity is indispensable for Judges to be able to judge independently. This work examines the various reasons for judicial immunity under Islamic law; what is the position of Islamic law on judicial immunity, judicial independence and accountability of judges? Whether judges would be liable for their wrong decisions if given intentionally or negligently? Who should be liable in civil and criminal cases for the wrong decisions of judges? Under what circumstances could a judge be terminated by the state? Whether immunity should also be extended to administrative, financial, executive and legislative functions of judges? Are laws enacted by a Muslim state to grant judicial immunity or immunity granted under judicial decisions in conformity with Islamic law? It is concluded that immunity for judicial as well as administrative, financial, executive and legislative functions of Judges is necessary for the smooth functioning of judicial work of judges.

### Keywords:

Immunity, Judges,  
Independence,  
Accountability,  
Judiciary, Shari'ah,  
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## 1. Introduction

Judiciary is one of the three fundamental pillars of the state. State has to appoint the best of the best qualified individuals as judges to protect the rights of its citizens and provide justice to litigants. Judges give crucial decisions and rule whether someone is guilty in criminal cases or liable in other cases. Yet, it is possible that judges might err in judging and it is in this scenario that a question is asked whether the judge is responsible or liable for his decision or not. Whereas the topic of judicial immunity in general has attracted the attention of legal scholars and researchers,<sup>2</sup> it has not got the same attention from the experts of Islamic law. It is in this background that it is very relevant to explore this topic under the thin lenses of Islamic law.<sup>3</sup> This work focuses on why it is necessary to provide immunity to judges? What are the different reasons for judicial immunity in Islam? What is the position of Islamic law on judicial immunity? Is inadvertence of *ḥākim* or head of state or a judge in civil as well as criminal cases actionable under Islamic law? Whether a judge would be liable under Islamic law if his decision based on his *ijtihād* causes the infliction of harm to someone or amounts to the loss of an organ? Can a judge be sued if his decision in a civil case caused loss to someone? Why Muslim jurists attach much importance to the independence of judiciary? These are some of the questions that are attempted in this work. The methodology in this work is doctrinal. The research uses the primary and secondary sources of Islamic law as well as the works of classical and modern authors who have discussed the topic one way or the other.

## 2. Islamic Law on Judicial Immunity

Before venturing into the above captioned topic, it is important to note that the root of the Arabic word for immunity is *ḥaṣna* literally, to be inaccessible, be well fortified. *Ḥiṣn* plural *ḥuṣun* means fortress, fort, castle, citadel, stronghold; fortification, entrenchment; protection.<sup>4</sup> *Ḥiṣn* is that fortified place which makes what is inside of it inaccessible.<sup>5</sup> The Qur'an says in the story of Prophet David, "It was We Who taught him the art of making coats of mail for your benefit so that it may protect you from each other's violence."<sup>6</sup> Similarly Allah says, in the Qur'an, "They will never fight against you as a body (in an open battlefield); and if they fight against you they will fight only in fortified townships or from behind walls."<sup>7</sup> In addition,

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<sup>2</sup> See for instance, Usman Quddus, "Judicial Immunity or Judicial Impunity: Judicial Immunity of Superior Courts' Judges in Pakistan with Special Reference to Islamic Law", *Hazara Islamicus*, 17:1 (2018), 19-49 also available at <[http://hazaraislamicus.hu.edu.pk/public/uploads/2018/Issue\\_1/16.16.pdf](http://hazaraislamicus.hu.edu.pk/public/uploads/2018/Issue_1/16.16.pdf)> (last visited 17 June 2021); Usman Quddus, Judicial Immunity of Superior Courts' Judges in Constitutional Framework: A Case Study of Pakistan, unpublished PhD dissertation submitted to the Department of Law, International Islamic University, Islamabad, 2018; and Muhammad Munir, "Judging the Judges: Judicial Immunity in Pakistan", *REVIEW OF HUMAN RIGHTS LAW*, 6:1 (Winter 2020), 114-134 also available at <<https://reviewhumanrights.com/index.php/RHR/article/view/167>> (last visited 17 June 2021).

<sup>3</sup> See, however, Salman b. Fawzān b. Ṣāliḥ, *Ḥaṣānat al-Qāḍī: Dirāsa Ta'ṣiliyyah Muqārana*, unpublished Masters of *Siyāsah al-Shar'iyyah* dissertation submitted to Higher Institute of Qāḍā, Imam Muhammad University, Riyadh, 1429/2008.

<sup>4</sup> Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan (Beirut: Librairie Du Liban, 1974, rep. 1980), 183.

<sup>5</sup> See, Muḥammad ibn Mukkaram Ibn Manẓūr, *Lisān al-'Arab* (Beirut: Dār Ṣādir, n.d.), vol. 13.

<sup>6</sup> Qur'an, 21:80. The translation of the Qur'an in this work is taken from Sayyid Abūl A'lā Mawdūdī, *Towards Understanding the Qur'an: English Version of Tafhim al-Qur'an*, trans. and ed. Zafar Ishaq Ansari (Leicester: Islamic Foundation, 2016), also available at <<http://www.islamicstudies.info/tafheem.php>> (last accessed 13 April 2021).

<sup>7</sup> Qur'an, 59:14.

Allah mentions in the Qur'an: "And also forbidden to you are all married women (*muḥṣanāt*)...."<sup>8</sup> Thus, the Arabic term *muḥṣana* (singular of *muḥṣanāt*) means sheltered, well-protected, chaste. In Islamic law it means woman of unblemished reputation.<sup>9</sup> As a matter of fact the term *ḥaṣana* has not been defined by Muslim jurists of classical times in their treatises. However, classical works on judiciary in Islamic law discuss judicial immunity under other related issues such as, independence of judiciary, the duties of judges, judicial guarantees and the rights of judge etc. There are numerous books in Arabic language regarding *qaḍā* (judgeship). These books are mostly known as *Adab al-Qāḍī*, literally, "the etiquette of the judge," deals with *qaḍā* and procedural laws. The genre of *Adab al-Qāḍī* literature is similar in certain respects to the Pakistani "Etiquette of Bar and Profession."<sup>10</sup> Authors of modern works on the subject have attempted to give the technical meaning of the word *Ḥiṣn* and *Ḥaṣāna* though. Salman b. Fawzān has defined it as, "the protection of the judge and his functions and providing him a suitable environment so that he could perform his functions freely and without any hindrance."<sup>11</sup> This is a broader definition of the term as it goes beyond the termination of a judge.

Judicial immunity is one of the hallmarks of judiciary in Islamic legal system. The fundamental basis of judicial immunity in Islamic law are some tenets of the administration of justice according to Sharī'ah and few legal precepts of Islamic law. These are: First, *al-maṣāliḥ al-mursala* (unrestricted interests), as judicial immunity is based on *maṣāliḥ al-mursala*, the interests and benefits that are never specifically prohibited nor fixed by the Sharī'ah. These are not thoroughly explained by the Sharī'ah but these are not violative of the fundamentals and the higher objectives of Sharī'ah. *Maṣāliḥ* is the plural of *maṣlaḥa*<sup>12</sup> which literally means benefit or utility and is divided into three: *ḍarūrāt* (necessary interests), *ḥājāt* (supporting interests), and *taḥṣīnāt* (complimentary interests). The *ḍarūrāt* include, the preservation and protection of faith, life, progeny, intellect, and wealth. These are those without which there will be anarchy and chaos in society. The absence of protection for these interests would mean the loss of everything that we hold dear. *Hājāt* (supporting needs/interests) are required for the smooth operation/implementation of the *ḍarūrāt*. If *ḥājāt* are not protected there would be hardship and loss in the performance of social functions. *Taḥṣīnāt* (complementary interests) provide additional rules that lead to the moral and spiritual progress of the individual and society. All ethical and moral rules come under *taḥṣīnāt*. Thus, an overarching principle of all policy making (political, legal, economic, social, environmental etc.) that emerges from these objectives is *maṣlaḥa* (public interest). Public interest can be defined in simple words as promoting and preserving the things that are beneficial to society and preventing the things that are harmful to it. Thus, judicial immunity is one of the *maṣāliḥ al-mursala* that is not specifically mentioned but it is 'the seeking of benefit and the repelling of harm' and it is not harmful to others because it is to allow the judge to work with the peace of mind and to have

<sup>8</sup> Qur'an, 4:24.

<sup>9</sup> Wehr, *A Dictionary of Modern Written Arabic*, 183.

<sup>10</sup> See, Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 445-482, at 466, f.n. 1 also available at <<https://www.jstor.org/stable/20839140?seq=1>> (last accessed 17 April 2021).

<sup>11</sup> Salman, *Ḥaṣānat al-Qāḍī*, p. 17.

<sup>12</sup> *Maṣlaḥa* is defined as the seeking of benefit and the repelling of harm ((*jalb'l-manf'ah wa daf' al-maḍarrah*)).

guarantee in his or her work. It seems that judicial immunity comes under *hājāt* or supporting interest which is necessary for the smooth functioning of judiciary.

Secondly, judicial immunity is based on juristic preference (*al-Istihsān*) which in its literal sense means to consider something good. When a *mujtahid* finds a general rule that could be applied to the legal issue before him but he also finds a specific rule or an exceptional situation that leads him to rule differently, then he is using *istihsān* or juristic preference. There are different types of *istihsān*, such as *istihsān* through text (*naṣṣ*), *istihsān* on the basis of consensus (*ijmā'*), *istihsān* on the basis of what is good, *istihsān* on the basis of necessity and so on. Under the last type a *mujtahid* may prefer the use of particular judgments over other possibilities because of necessity and because applying the general rule would be impossible in such a situation. Judicial immunity comes under this last type of *istihsān*. The reason why judicial immunity comes under this type is that Islamic law stands for absolute equality between men, between the ruler and the ruled, between the rich and the poor and so on without any exception and that judicial immunity is the only exception because it is indispensable to protect Judges in their work and because a Judge would not be able to carry out his work if he has no immunity from the executive branch of the state or other authorities. The Qur'an says, "Human beings, We created you all from a male and a female, and made you into nations and tribes so that you may know one another. Verily the noblest of you in the sight of Allah is the most God-fearing of you. Surely Allah is All-Knowing, All-Aware."<sup>13</sup> The Prophet has announced this supreme equality in his famous sermon on Mount Arafāt on the day of *hajj* in more detail.<sup>14</sup> Therefore, judicial immunity is a deviation from the principle of equality before the law. This is necessitated to provide justice to the people and to repel harm to Judges.

Thirdly, it is absolutely an essential obligation of the state that justice be provided to litigants and justice could only be provided by Judges if they have judicial immunity, judicial guarantees and independence in their work, therefore, it becomes indispensable to provide immunity to judges; *مالا يتم الواجب إلا به فهو واجب* (that without which an obligatory act could not be achieved is itself an obligation). Thus, it is the duty of the state to provide justice to people and condemn the wrongdoers. This is based on the Qur'an and the Sunnah of the Prophet Muḥammad (peace be upon him). Justice cannot be provided by Judges if they do not have judicial immunity to work independently with a peace of mind. Therefore, if justice cannot be provided to people if Judges do not have immunity, then it becomes indispensable to provide them the same.

Judicial immunity also comes under the maxim *تصرف الإمام على الرعية منوط بالمصلحة* (Ruler's decision must be in favour of the people). Imām Shāfi'ī argues about this maxim that relation between the Imām and his community is like relation between a guardian and the ward. It is reported that 'Umar (may Allah be pleased with him) said about himself that "I treat myself regarding the state's money like the guardian of the property of the orphan; I take from it when I need it but I return it as soon as I get money; and when I get rich, I do not take from it (state's money)."<sup>15</sup> The granting of judicial immunity by the Imām or his deputy has a much greater

<sup>13</sup> Qur'an, 49:13.

<sup>14</sup> Aḥmad b. Ḥanbal, *Musnad*, *ḥadīth* no. 23489; Aḥmad b. al-Ḥusayn al-Bayhaqī, *Shu'ub al-Imān*, 4:489, *ḥadīth* no. 5137.

<sup>15</sup> Aḥmad b. al-Ḥusayn Bayhaqī, *al-Sunan al-Kubrā*, 6:7, *ḥadīth* no. 11001.

public interest for the community and that it is not harmful to any member of the community and thereby it is a decision of the Ruler in favour of the people. Finally, another maxim is very relevant here, that is, <sup>16</sup> خطأ القاضي في بيت المال (the *baytulmāl* or treasury is to pay compensation for the mistake of the judge (in his judgements)). The mistake here is unintentional but in case of an intentional mistake he is liable. In other words, the state is liable in case a judge makes a mistake in his judgment without any intention and such ruling harms someone financially or otherwise. This maxim is explained in detail below.

The *ration legis* of judicial immunity in Islamic legal system is that judicial independence is guaranteed. Thus, judges are free to apply and interpret the law without any external pressure from the executive branch of government. Secondly, a judge works without any worries as the immunity he enjoys makes sure that he can fully focus on his work. Thirdly, immunity shields judges from prosecution from litigants as anyone who is unhappy with the decision in his case would always sue the judge first which must be stopped.

It is pertinent to mention that judiciary has some special privileges than other employees of the state because the duties it performs are very fundamental in the running of the business of the state. Judges of higher judiciary are appointed by the head of state whereas powers are delegated for the appointment of judges to the lower judiciary and that person who fulfil a certain specified criterion of education and qualification are appointed. Thus, the people of a certain area cannot appoint a judge over themselves under Islamic law. The idea behind it is that judges are not answerable in their work to anyone no matter how high a position he enjoys in the state.

### 3. Accountability of Judges in Islamic Law

We have discussed above that a judge enjoys judicial immunity under Islamic law. This section focuses whether a judge could be held responsible for wrongdoing or could be made accountable for wrong committed by him under Islamic law. In addition, Muslim jurists have paid more attention to the termination of a judge without any reason. One of the foremost consequences of judicial immunity is the fact that a judge shall not be removed from his job if he has not violated his oath of office and has no strong case against him to answer. But in case the judge is accused of wrongdoing such as corruption or violation of the oath of his office or some other misconduct then it may become necessary to remove him from judiciary because he would not be suitable for this noble profession. Muslim jurists have split on the issue of termination of a judge who is doing his job properly and is not accused of any wrongdoing. As a matter of fact, under Islamic law it is not a condition that either the ruler or the judges appointed by him shall be spiritual persons. As I have noted elsewhere, “According to *Hanafīs*, ‘*al-‘adālat*’ (probity) is not a condition for judgeship; it is only preferred. Ibn ‘Abidin does not agree with those who argue that a ‘*fāsiq*’ (sinful) cannot be a *qādī* and says that ‘[I]f this was applied in our times, no one will be eligible to be a *qādī*’. He argues that the judgment of any person appointed by the *Sultān* [head of State] is binding even if he be ignorant and ‘*fāsiq*’. What about the decision of a *qādī* who himself is not only un-educated about the rules

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<sup>16</sup> Aḥmad b. Shaykh Muḥammad Al-Zarqā, *Sharḥ Al-Qawā'id al-Fiqhiyah* (Dimishq: Dār al-Qalam, 1996), 309.

of Islamic law, but is also a bad Muslim (*fāsiq*)? According to the Hanafi school, decisions of such a *qāḍī* are binding and must be implemented.”<sup>17</sup>

According to the Ḥanafī and Shāfi‘ī schools, some Mālikī jurists and one opinion within the Hanbali school, the Head of State or his representative for judiciary can terminate a judge with or without any reason.<sup>18</sup> Under Islamic law a judge could be terminated for many reasons, especially, first, if he confesses to wrongdoing or the same was proven against him. In such a situation he can be terminated and punished. Moreover, Ibn Farhūn argues that “he shall be terminated which shall be publicized; he shall be humiliated and he shall neither be appointed again nor shall his testimony be accepted ever even if he has repented and has mended his ways because of his breaching of the decree of Allah the Exalted.”<sup>19</sup> Secondly, if he committed a sinful act such as drinking alcohol or committed a major sin then, the majority of jurists are of the opinion that he should be terminated and his decisions thereafter shall not be binding. According to Ibn Qudāma, “if the conduct of a judge changed because of a sinful act or loss of mental capacity or sickness that prevents him from judgeship or because of the absence of conditions to be a judge, so he shall be removed as a result and the *Imām* (head of state) is obliged to terminate him straight away.”<sup>20</sup> However, the Aḥnāf do not agree with the rest of the Muslim jurists and opine that committing a sinful act does not make a judge liable to removal because the Ḥanafī school allows the appointment of sinful judges and they can continue. It is mentioned above that probity is not a condition for the appointment of a judge for the Hanafi jurists. But the majority of the rest of Muslim jurists makes probity a condition for judgeship as they do not allow the appointment of a sinful person as a judge in the first place. They, therefore, argue that when a pious man is appointed as a judge, the time he commits a sin, he should resign as a judge as his decisions thereafter shall be considered a nullity.

The majority of Muslim jurists argue that a judge could be removed by the head of state. However, other jurists are of the opinion that a judge cannot be removed. While justifying the position that a judge could be removed by the *Imām*, the Hanafi jurists argue that the appointment of the judge by the head of state is on behalf of the people and the removal of the judge by him is also on behalf of the community in public interest. Similarly, the appointment of another judge is done by the head of state in the interest of the community. Thus, in reality the removal of the judge is done by the head of state on behalf of the community. Kāsānī gives the example of the relationship between the principal and his agent to explain the relationship between a judge and the head of state and argues that a judge could be removed similar to an agent with the difference that when the principal dies or withdraws his authority, the agent is

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<sup>17</sup> See, Muhammad Munir, “Challenging State Authority or Running a Parallel Judicial System?: ‘Ulama versus the Judiciary in Pakistan”, *LUMS Law Journal* 2017:4(1), pp. 11, also available at <https://sahsol.lums.edu.pk/law-journal/challenging-state-authority-or-running-parallel-judicial-system-%E2%80%98ulama-versus-judiciary> (last accessed 9 April 2021).

<sup>18</sup> See, Abū Bakr b. Mas‘ūd al-Kāsānī, *Badā’i‘ al-Ṣanā’i‘ fī tartīb al-Sharā’i‘*, ed. ‘Muḥammad ‘Adnān Darweesh (Beirut: Iḥyā’ al-Turāth al-‘Arabī, 2000), 6:439; Al-Dusūqī Muḥammad ‘Arafāh, *Hāshiyah al-Dusūqī ‘alā Sharḥ al-Kabīr*, ed. Muhammad ‘Alīsh (Cairo: Dār Iḥyā’ al-Kutub al-‘Arabī, n.d.), 4:130-131; & Al-Khatīb Al-Sharbīnī, *Mughnī al-Muhtāj* (Beirut: Dār al-Kutub al-‘Ilmiyah, 1994), 6:171.

<sup>19</sup> Burhān al-Dīn Ibrāhīm Ibn Farhūn, *Tabṣīrat al-Hukkām fī Uṣūl al-Aqḍiyat wa Manāhij al-Aḥkām*, ed. Shaykh Jamāl Mar‘ashly (Riyadh: Dār al-Kutub, 2003), 2:231.

<sup>20</sup> Muwaffaq al-Dīn Ibn Qudāma, *Al-Mughnī ‘Alā Mukhtaṣar al-Khiraqī* (Cairo: Maktabat al-Qāhira, 1968), 10:91.

removed but if the head of state dies or is removed his judges and governors are not removed.<sup>21</sup> Secondly, the Prophet peace be upon him had appointed ‘Ali ibn Abi Tālib as a judge to Yemen but had recalled him for the last *hajj* and he did not go back to take his post in Yemen again.<sup>22</sup> Thirdly, according to the Maliki reasoning a judge is considered as the deputy of the *Imām*. They also consider the relationship between the two as the relationship between the principal and the agent. As the principal is allowed to remove his agent when he so wishes, the *Caliph* or the *Imām* can also remove the judge when he wants to.<sup>23</sup> This is the preferred opinion of the Shāfi‘ī school.<sup>24</sup> Finally, the rightly guided Caliphs have removed judges. It is reported that ‘Umar removed his judge of Basra (Iraq) and appointed Ka‘b b. Sawār as his replacement; that ‘Alī b. Abī Tālib removed Abū al-Aswad as a judge; that the rightly guided Caliphs used to give judicial charge to their administrators and would subsequently take it back. ‘Abdul Karīm Zaydān argues that there is no harm to the community in termination of a judge because when a head of state removes one judge, he appoints another one as a replacement.<sup>25</sup> This is also the position of the Ḥanbali school.<sup>26</sup>

The jurists who assert that a judge cannot be removed by the *Imām* argue that a judge was appointed by the *Imām* for the interest of the general public and that his appointment cannot be cancelled as long as a judge is doing his job properly. They also point out that a judge’s acceptance of the post of a judge means that he becomes a judge from Allah the Exalted, therefore, he cannot be removed by the *Imām*. This is the view of Qafāl of the Shāfi‘ī school of thought.<sup>27</sup> Zaydān has a unique interpretation of this assertion. He opines that when Muslim jurists mentions this, they mean that the judge works as a judge on behalf of the community and for their general welfare.<sup>28</sup> To sum up this discussion a judge may be removed by the state and that if he could be appointed by the *Imām*, he should also have the authority to remove him but only for a genuine reason and larger public interest because the actions of the *Imām* are always for the benefit of the community. According to Ibn ‘Arafah of the Māliki school, the termination of judge is disrespectful to the judiciary,<sup>29</sup> therefore, a judge may only be terminated in the larger interest of the people. An indication that the removal of the judge is in the best interest of the people is to appoint a better judge. However, if the replacement is less capable and less qualified, the termination of the previous judge and the appointment of the new one will be implemented but the *Imām* will be considered to have committed a sin.<sup>30</sup>

#### 4. Inadvertence of the Judge in Islamic Law

In case of a mistake by the judge in his judgments he shall not be liable and any harm or loss shall be borne by the state. There are many incidents in the early Islamic legal history that

<sup>21</sup> Kāsāni, *Badā’i*, 6:460.

<sup>22</sup> ‘Alī b. Aḥmad Ibn Ḥazm al-Zāhirī, *Kitāb Al-Muḥallā*, ed. Aḥmad Muḥammad Shāhkir (Maktaba al-Jamhūriyah al-‘Arabiyyah, 1967), 9:435-436.

<sup>23</sup> ‘Abdul Karīm Zaydān, *Niẓām al-Qaḍā fī al-Sharī‘ah Al-Islāmiyyah* (Beirut: Mu’assasat al-Risālah, 2<sup>nd</sup> edn., 1989), 90.

<sup>24</sup> *Ibid.*

<sup>25</sup> Zaydān, *Niẓām al-Qaḍā*, 90.

<sup>26</sup> Ibn Qudāma, *Al-Mughnī*, 9:103-104.

<sup>27</sup> See, Shahāb al-Dīn Abī Ishāq Ibn Abī al-Dum, *Al-Durar al-Manzūmāt fī al-Aqḍiyat wa al-Ḥukūmāt*, ed. Muḥammad Muṣṭafā al-Zuhayli (Damascus: Maṭba‘at Zayd b. Thābit, 1975), 48.

<sup>28</sup> Zaydān, *Niẓām al-Qaḍā*, 91.

<sup>29</sup> Muḥammad Al-Ṭāhir b. ‘Āshūr, *Maqāṣid al-Sharī‘ah al-Islāmiyyah* (Cairo: Dār al-Kutub al-Miṣrī, 2011), 346.

<sup>30</sup> Zaydān, *Niẓām al-Qaḍā*, 91.

indicate that a judge or a state official shall not be personally liable and that, instead his loss, if any, will be borne by the state. It is reported that the Prophet Muḥammad peace be upon him had sent Abū Jahum b. Ḥuzayfah for collection of charity. Unfortunately, he hit a man and severely injured him. The heirs of the injured man came to the Prophet (PBUH) and asked for retribution. The Prophet (PBUH) offered them blood money or compensation but they refused initially. The Prophet convinced them at the end to accept blood money and they agreed.<sup>31</sup> The point is that Abū Jahum was not liable to pay the blood money himself, rather it was the state that had to pay the same. Consequently, if the state is liable for the mistake of its agent working in charity, it must be liable for the mistake of its judge. Thus, if a *Qāḍī* makes a mistake in his decision leading to loss or harm by someone, then the State will be responsible in making it good. Similarly, when Caliph ‘Umar sent someone to order a woman to appear before him, she was so scared that she gave birth to a child prematurely. She brought the dead body to ‘Umar Farooq, the second Caliph, and told him about her ordeal. ‘Umar consulted the *Muhājirūn* (those who had migrated from Makka to Madīna) who advised him that he is not liable for anything because he is an educator and can discipline anyone. However, among the companions was ‘Ali ibn Tālib but he kept quiet. ‘Umar asked the opinion of ‘Ali who told ‘Umar that he should pay blood money. On this ‘Umar told ‘Ali to divide the blood-money on his, i.e., ‘Umar’s community (*‘āqila*) before leaving.<sup>32</sup> In this episode the person who was sent by ‘Umar was not liable but rather he himself was liable. Thus, a *qāḍī* who decides cases based on his *ijtihād* between Muslims will not be liable personally as long as he has no intention of any wrong doing. The first episode indicates that the state is responsible for the consequences of the acts of its representative or agent or judge and that the state had to pay blood money in case of *diyat* or compensation in case of injuries. The second incident shows that ‘Umar (may Allah be please with him) is personally liable and the *diyat* had to be divided on the *‘āqila*. The decision of the judge might be based on his *ijtihād* and he may err in his *ijtihād* and it may have some consequences; that this is done for the interest of the general public.

Muslim jurists have different opinions about the personal liability of a judge. Is a judge responsible for the mistakes he makes in his judgments or not? It is because of the nature and amount of work he has to perform. According to Abū Bakr Kāsāni of the Ḥanafī school, “if a judge made a mistake in his ruling, such as if it appeared that the witnesses were slaves or were given a *ḥadd* punishment in *qazf*, then the judge is not liable because his decision was not for himself but for someone else, so in that case he shall be considered as an agent [of the state] and he shall not be held liable. Then the case should be looked into whether it [the case] comes under the rights of human beings or purely the rights of Allah the Exalted such as the cutting of hand in theft and *rajm* in case of adultery.”<sup>33</sup> If the case comes under *ḥaqq al-‘Abd* (the right of man), such as claim of one party against another, then if the decision is wrong the money or property as the case may be shall be returned to the rightful party if possible. However, if the property or money is consumed, then the one who consumed or spent it shall bear the loss. But

<sup>31</sup> Abū Dāwūd, *al-Sunnan*, kitāb al-diyāt, ed., Muḥammad Muḥyī al-Dīn (Beirut: Al-Maktaba al-‘Aṣariya, n.d.), 4:181, ḥadīth no. 4534.

<sup>32</sup> Aḥmad ibn al-Ḥusayn al-Baihaqī, *Al-Sunnan al-Kubrā* ed., Muḥammad ‘Abdul Qādir ‘Aṭā (Beirut: Dār al-Kutub al-‘Ilmiyah, 2003), 2:204. *‘āqila* is a clan committed to pay the bloodwite for each of its members.

<sup>33</sup> Kāsāni, *Badā’i*, 6:459-460.

if the case is not about property or money but some other right is involved, such a decision shall be annulled and reversed unlike *ḥudud* (fixed penalty offences) or consumed property.<sup>34</sup>

However, if the case involves the right of Allah, such as “if he decided the *ḥadd* of *zinā* (adultery or fornication) or the *ḥadd* of theft or the *ḥadd* of drinking alcohol and the punishments of cutting of hands and *rajm* and *ḥadd* were implemented, then it was revealed that the witnesses were slaves or infidels and were given *ḥadd* punishments in *qazf* so the loss of these is on the *bayt al-Māl* (the treasury).<sup>35</sup> According to the Māliki school, if the judge decided on the basis of the testimony of two persons but later on it was known that the two witnesses had committed *fiṣq* (sinful act). The decision of the judge shall stand in such a case but the two witnesses shall be held liable for any loss or harm they had caused due to their wrong testimony. Thus, they will be liable if the loss inflicted is to property but if their testimony caused the loss of an organ or the infliction of injuries on someone, they shall be liable to pay *diyat* if they confessed. However, according to the opinion of Ibn Al-Qāsim there shall be no retribution against them.<sup>36</sup>

According to the Ḥanbali school, if a judge ruled regarding money on the basis of the testimony of two witnesses, then it was revealed that they are either *fāsiq* (sinful) or infidels, the *Imām* (head of state) may order the money to be returned if available but shall compensate him if it is consumed. If it cannot be done because the decree-holder is very poor or due to some other reason, so the state shall be liable and then recover it from the decree-holder.<sup>37</sup> In another opinion from Imām Aḥmad b. Ḥanbal the decision will be binding in case the two witnesses are sinful and they will be liable. But if the error of the judge is about the right of Allah or *qiṣāṣ* (retribution) such as if he ordered the cutting of hand of thief on the testimony of two witnesses then it was known that either both were sinners or infidels or slaves or one of them was, then the witnesses are not liable because they are trustworthy for what they have witnessed and the judge or the *Imām* (head of state) is liable in this case. The reason is that the judge or the *Imām* who appointed him ruled on the basis of testimony of those whose testimony shall not be accepted in such a case. But there shall be no retribution because the judge made a mistake, rather he should pay blood money. On the question of who should pay the blood money there are two narrations within the Ḥanbalī school: first, it shall be paid from the *Bayt al-Māl* because the judge is working for the welfare of the community and is thereby their agent. This is similar to the *‘āqila* which pays for the blood money for one member of the clan. In the second opinion it should be paid by the *‘āqila* of the judge just like the *diyat* for the death of the prematurely born baby when the woman was informed to appear before ‘Umar (may Allah be pleased with him) as discussed above. Because if the *diyat* would be borne by the *bayt*

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<sup>34</sup> Ibid; Muhammad Amīn Ibn ‘Ābidīn, *Radd al-Muḥtār ‘alā al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār with Takmilah* (Cairo: Maṭba‘at al-Bābī al-Ḥalabī, 1966), 5:418; ‘Alī b. Muḥammad al-Samnānī, *Rawḍat al-Qaḍā*, ed. Salāḥ al-Dīn Al-Nāhī (Baghdad: Maṭba‘at Asa‘ad, 1970), 1:154, 157.

<sup>35</sup> Kāsānī, *Badā‘i*, 6:459-460.

<sup>36</sup> Muḥammad b. Aḥmad b. Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Cairo: Maktabat al-Kulliyāt al-Azhariyah, 1960), 2:468;

<sup>37</sup> See, Ibn Qudāma, *Al-Mughnī*, 10:227-228; ‘Alā’ al-Dīn al-Mardāwī, *Al-Inṣāf fī Ma‘rifat al-Rājiḥ min al-Khilāf ‘alā Mazdhab al-Imām al-Mubajjal Aḥmad b. Ḥanbal* (Maṭba‘at Al-Sunnah al-Muḥammadiyah, 1955), 11:318; Ibn Muflīḥ, *Al-Furū‘ alongside Taṣḥīḥ al-Furū‘ of ‘Alā’ al-Dīn al-Mardāwī* (Cairo: Dar Miṣr li al-Ṭibā‘ah’, 1960), 6:494-496.

*al-Māl* it would have not been divided on the clan of ‘Umar. Imām Shāfi‘ī’ also argues that in such a case the ‘*āqila* shall bear the amount of *diyat* because it is a mistake in the decision.<sup>38</sup>

Before concluding this article let us examine one of the questions posed in the beginning, that is, whether immunity granted to judges of a Muslim state through the constitution or statutes or bylaws or judicial interpretations not only for their judicial works but also for their administrative, executive, financial and legislative works would be considered in conformity with Islamic law or not. As discussed above judges have immunity in Islamic law for their judicial work. Since the Chief Justice of a constitutional court or the head of the district judiciary has to perform many administrative, financial, executive and legislative functions which if not performed would bring the many functions of the Chief Justice, the administrative committee or the office of the head of the district judiciary to a standstill. In other words, it is indispensable for the smooth functioning of the judiciary that judges should have immunity not only for judicial works but also for administrative, legislative, consultative, executive and financial works. This is the application of the Islamic juridical maxim, “*mā lā yatimu ‘l wājib illā bihī, fa hu wa wājib* (that without which an obligatory act could not be achieved is itself an obligation)” discussed above.

## 5. Conclusion

The main points of the above discussion may be summed up here. Under Islamic law Judges have immunity for their judicial work because of *maṣalaḥa* (public welfare), *istiḥsān* (judicial preference), the legal maxims that without which an obligatory act could not be achieved is itself an obligation, Ruler’s decision must be in favour of the people, and the *bayt al-Māl* or treasury is to pay compensation for the mistake of the judge in his judgement. That since judges are appointed by the head of state or by those to whom powers are delegated for this purpose, therefore, they are not answerable to other persons in the government no matter how higher their position may be. ‘*Al-‘adālat*’ (probity) is not a condition for judgeship according to the Ḥanafī school of thought but is only preferred. Ibn ‘Abidin argues that the judgment of any person appointed by the Sultān [head of State] is binding even if he be ignorant and ‘*fāsiq*. According to the majority of Muslim jurists, a judge can be terminated by the appointing authority for genuine reasons; that he may even be punished if found guilty of corruption and committed other major sins. In case of a mistake by the judge in his judgment he shall not be liable and any harm or loss shall be borne by the state because he is considered as an agent of the state. Muslim jurists are divided on the issue of a judge giving *ḥadd* punishment to someone on the basis of the testimony of slaves or those who have committed sinful acts. Some argue that the state shall be liable in such a case as the judge had acted on behalf of the state and that if the case involved the right of man, the one who benefited from the decision shall bear the burden of returning the money or property to the rightful owner. In case the judge has given a wrong decision intentionally, then he is personally liable to pay the *diyat* amount or pay compensation, be removed from judgeship, will become unfit for job in the future and his testimony shall not be accepted thereafter. Other jurists point out that the witnesses shall be responsible for bearing the cost or the payment of *diyat*. Judges must have immunity for their administrative, executive, consultative and legislative works for the smooth functioning of the

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<sup>38</sup> Muḥammad ibn Idrees Al-Shāfi‘ī’, *Kitāb al-Umm along with Mukhtaṣar by Ismā‘īl al-Muzani al-Shāfi‘ī* (Cairo: Dār al-Sha‘b, 1955), 6:76.

judiciary. The arguments used above about judicial immunity can also be used to prove immunity for non-judicial works. Immunity in these areas is necessary for the smooth functioning of the judiciary and smooth performance of judicial works. Thus, immunity for administrative, executive, financial and legislative works is based on *maşlahā*, *istiḥsān* and the legal maxims.