

APPOINTMENT OF FEMALE AS A *QĀDĪ* (JUDGE) OF *SHARĪAH* COURT OF APPEAL IN NIGERIA: A GENDER BATTLE OR RELIGIOUS STANCE

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ABSTRACT

The appointment of the justices is well provided for under the Nigerian constitution. However, appointment of a female as a Qāḍī of the Sharīah Court of Appeal in Nigeria, faith-based adjudicatory process, has remained a thing of divergence among scholars. Therefore, this article investigates whether it is permissible for a female to be appointed as a Qāḍī of the Sharīah Court of Appeal in Nigeria. In carrying out this research, a doctrinal method is employed which includes analysis of primary and secondary data. It then argues that the appointment or otherwise of a female as a Qāḍī should not be categorized as a gender battle, but rather a religious position, depending on the madhhab (School of Law) a given country adopts. Drawing from jurisdictions like Malaysia and Pakistan, the paper finds that a female can become a Qāḍī of the Sharīah Court and hold high-ranking positions in the court as there is no explicit prohibition of such appointment in the fundamental sources of Islamic Law.

Keywords: *female, Qāḍī, appointment, Sharīah court of appeal, Nigeria, Mālik madhhab*

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INTRODUCTION

The appointment of a female to a judicial position in the *Sharī'ah* Court of Appeal is rather a sensitive issue, especially in light of religious scholars' views. There are divergent opinions on whether a female can be appointed as a *Qāḍī* of the *Sharī'ah* Court of Appeal or not.² In Nigeria, it is an indisputable fact that the *Sharī'ah* Court of Appeal is an appellate court and deals with issues relating to Islamic personal law.³ It is however imperative that there is no female *Qāḍī* among the *Qāḍīs* of the *Sharī'ah* Court of Appeal. This is connected to the fact that Nigeria as a country is disposed to the Mālikī *Madhhab*, the School of Law recognized under the Nigerian Constitution.

The position of Mālik School of Law is clear that; a female cannot be appointed as a *Qāḍī* because it is not permitted. By the same token, the constitution allows the use of the opinions of Mālikī *Madhhab* in the adjudication of *Sharī'ah* matters in Nigeria. Contrary to the position of Mālikī *Madhhab*, Ḥanafī opined that a female can be appointed as *Qāḍī* of the *Sharī'ah* Court of Appeal, but such a female *Qāḍī* cannot adjudicate on matters relating to *Hudūd* and *Qiṣāṣ*. This school maintains that a female can hold the position of *Muftī* as well as the Registrar of the court. This latter position is supported by some scholars to the effect that females can be appointed to adjudicate on any Islamic law matters. The simple reason is that a female will not be acting as overall head of Islamic institution rather she will be acting as one of the judges whose decision is subject to an appeal.⁴

² Fadilah Abd Rahman, Noorul Huda Sahari & Sharifah Zaharah Syed Mohamed, 'Appointment of Female Judges in The Syariah Courts of Malaysia: A Study of the Perception of The Society and Legal Practitioners,' (Final Report Project, Universiti Teknologi MARA, Selangor, April 2006), 56, <https://www.academia.edu/2225036/>

³ Constitution of the Federal Republic of Nigeria, 1999 (as amended) Section 273 (3).

⁴ Ismail Adua Mustapha (Associate Professor, Department of Business Law, Faculty of Law, University of Ilorin-Nigeria), in interview with the author, 26 October 2023.

GENDER BATTLE: THE APPOINTMENT OF FEMALE *QĀḌĪ* IN NIGERIAN *SHARĪAH* COURT

In the heartland of Nigeria, a historic event has unfolded, shattering long-held gender norms and challenging societal perceptions.⁵ Against a backdrop of traditional gender roles deeply ingrained in the fabric of Nigerian society, a remarkable milestone has been reached – the appointment of a female *Qāḍī* (Judge) in a *Sharīah* court.⁶ This groundbreaking development has ignited a gender battle, forcing a re-evaluation of the role of women in religious and judicial spheres.⁷

However, *Sharīah* courts hold a significant place in Nigeria's legal system; administering justice based on Islamic law or *Sharīah*, particularly in matters concerning family, inheritance, and personal status.⁸ The court is one of the superior courts in Nigeria and only two courts are above the *Sharīah* Court of Appeal in Nigeria. These are the Court of Appeal and Supreme Court. The court is a creation of Nigerian Constitution⁹ and hierarchically a superior court of record. The *Sharīah* Court of Appeal receives appeal from Upper Area Court or Area court in matters of Islamic personal law.¹⁰ This court has been an exclusively male-dominated space, with men assuming positions of authority and wielding the power to interpret Islamic law.¹¹ It is important to state at this juncture that no female has ever been appointed a *Qāḍī* of *Sharīah* Court of Appeal in

⁵ Azuh Dominic, Eghareva D. Mathew. & Azuh E. Akunna, 'Gender Discrimination and National Politics: The Nigerian Case,' *Covenant University Journal of Politics and International Affairs*, vol. 2 (2006).

⁶ Jam Ejukonemu, 'Gender Role in Contemporary Nigeria Society,' *International of Social Science and Economic*, vol. 1/1 (2018): 22-28.

⁷ Danjuma Safiya, Muhammad Yusuf & Alkhali Larai F, 'Factors Militating Against Women and Economic Empowerment and Poverty Reduction in Africa Countries,' *Journal of Business and Management*, vol. 13/6 (2013).

⁸ Okon Donatus, 'Gender Mainstreaming as Index of Sustainable Development in Nigeria: Problems and Prospects,' *International Journal Scientific Research in Education*, vol. 9/4 (2016).

⁹ Constitution of the Federal Republic of Nigeria, 1999 (as amended) Section 273.

¹⁰ Asein John, *Introduction to Nigerian Legal System* (Lagos: Ababa Press Ltd., 2005), 199.

¹¹ Okorie Mercy., 'An Assessment of Factors Militating Against Girl Child Education in Nigeria,' *International Journal of Advanced and Multidisciplinary Social Science*, vol. 3/2 (2017): 49-54.

Nigeria. This is based on the fact that the Nigeria government, as earlier pointed out, adopts Mālik School of Law in adjudicating matters relating to Islamic Personal law. The position of Mālik School of Law is that a woman should not be appointed as a judge.¹² It has been argued that that the issue of equality cannot be applied in this regard as championed in feminism struggle. Islam has basic responsibilities for each gender and does not averse to appointment of women to the positions of public authority including serving as *Qāḍī*.¹³ Oniye argued that although there is no any stipulation in the Nigerian statutes, especially the grundnorm-the constitution, barring the appointment of female as *Qāḍī* of *Sharī'ah* court of Appeal in Nigeria, the disqualification of female from holding appointment as *Qāḍī* in Nigeria is definitely predicated on the religious stance. The views of Islamic scholars preponderate to its impermissibility based on the facts inter alia that there was no such precedence among those appointed as *Qāḍī* during the time of the noble Prophet Muḥammad S.A.W, neither was there any of such during the time of the Calips after him. This stance can be further buttressed by the legal position by the treatise (book) *Tuḥfah al-Ḥukkām* which provides:

وَأَنْ يَكُونَ ذَكَرًا حُرًّا سَلِمًا. مَنْ فَقَدَ رُؤْيَا وَسَمْعًا وَكَلِمًا

“A person to be appointed as *Qāḍī* (Judge of any court) must be male freeborn and free from sight, hearing and speaking disabilities.”¹⁴

However, some minority views, such as those from scholars like Imām Abū Ḥanīfah, are of the view that a female may be permitted to hold office of Judge in all matters where she is a competent witness, such as in respect of property but not in *Qiṣāṣ* and *Ḥudūd*.¹⁵

¹² Abdulkadir Imam (A Judge of Area Court, Ilorin, Kwara State), in interview with the author, 27 October 2023.

¹³ Lukman M. Shafii (Director Civil Right and Development Resource Center, 12b, Western Reservoir Road, Olorunshogo Area, Ilorin, Kwara State), in interview with the author, 26 October 2023.

¹⁴ Ibn ‘Āṣim al-Andalusiy, *Tuḥfah al-Ḥukkām fī Nakti al-‘Uqūd wa al-Aḥkām* (Qāhirah.: Dār al-Afāq, 2011), 18.

¹⁵ Mas’ud Adebayo Oniye (Qāḍī Sharī‘ah Court of Appeal, Kwara State), in interview with the author, 2 October 2023.

CONTROVERSY SURROUNDING THE APPOINTMENT OF FEMALE AS A *QĀḌĪ* IN NIGERIA

Appointment of a female *Qāḍī* (Judge) in a *Sharī'ah* court in Nigeria carries immense significance and has sparked a wave of controversy.¹⁶ Such appointment challenges deeply-entrenched gender barriers within the judicial and religious spheres.¹⁷ *Sharī'ah* courts in Nigeria have been male-dominated, with women limited to peripheral roles.¹⁸ Appointment of a female *Qāḍī* will disrupt this norm, signalling a departure from conventional gender roles and offering a powerful symbol of inclusivity and equal opportunity.¹⁹ It will also serve as a beacon of empowerment for women, affirming their right to hold positions of authority and influence.²⁰

According to the advocates of the appointment of a female as a *Qāḍī*, the female *Qāḍī* becomes a role model, inspiring other women to pursue careers in the legal and religious fields, thereby dismantling the notion that their contributions are confined to the private realm.²¹ It confronts conservative interpretations of Islamic law that have perpetuated gender inequality.²² It opens up conversations about the role of women in

¹⁶ Abdulmumini Adebayo Oba, 'The *Shari'ah* Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction,' *American Journal of Comparative Law*, vol. 52/4 (2004): 859-900.

¹⁷ Brescoll Victoria & LaFrance Mariane, 'The Correlates and Consequences of Newspaper Reports of Research on Sex Differences,' *Psychological Science*, vol. 15 (2004): 515-520.

¹⁸ Abdulmumini Adebayo Oba, 'The *Shari'ah* Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction,' 859-900.

¹⁹ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islam Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia' Egypt and Iran),' *Fordham International Law Journal*, vol. 37/2 (2014): 307-372, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2329&context=ilj>, accessed on 18 August 2023.

²⁰ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islam Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia' Egypt and Iran),' 307-372.

²¹ Miriam Cooke, *Women Claim Islam: Creating Islamic Feminism Through Literature* (New York: Routledge, 2001), 434.

²² Nikki Keddie, 'The Study of Muslim Women in the Middle East: Achievements and Remaining Problems', *Harvard Middle Eastern and Islamic Review*, vol. 6 (2000): 26-52; Nikki Keddie, 'Women in the Limelight: Some

interpreting *Sharī'ah*, challenging the narrow definition that has historically limited their involvement.²³ This signifies an evolution in understanding and applying Islamic principles within a contemporary context. In addition, there has been an argument that the appointment of female *Qāḍī* would be a significant step towards achieving gender equality within the judicial system as it will highlight the need to consider merit and qualifications over gender when selecting judges.²⁴ It is, therefore, argued that by diversifying judicial appointments, the legal system becomes more responsive to the needs and experiences of women, fostering a fairer and more inclusive justice system.

Furthermore, the presence of a female *Qāḍī* can help address gender bias in legal proceedings, particularly those related to family matters.²⁵ Women litigants may feel more comfortable presenting their cases before a female judge, who can offer nuanced insights into their experiences and challenges.²⁶ This has the potential to enhance the fairness and equity of outcomes in *Sharī'ah* courts.²⁷ In this perspective, if it could not be established that the primary sources of *Sharī'ah* have categorically excluded women from adjudicating process, it could be conveniently concluded that women with fast knowledge of *Sharī'ah* be considered for appointment as *Qāḍī* to adjudicate on matters concerning women. Where

Recent Books on Middle Eastern Women's History', *International Journal of Middle East Studies*, vol. 34/3 (2002): 553-573.

²³ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992).

²⁴ Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002), 203.

²⁵ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islam Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia' Egypt and Iran),' 307-372.

²⁶ Nik Noriani Nik Badlishah & Yasmin Masidi, *Women as Judges* (Malaysia: Sisters in Islam, 2002), <https://sistersinislam.org/wp-content/uploads/2021/10/booklet-women-as-judges.pdf>, accessed on 18 August 2023.

²⁷ Fariba Zarinebaf-Shahr, 'Women, Law and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century', in *Women, the Family and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (n.p: Syracuse University Press, 1996), 81.

this is taken into cognizance, the agitation for inclusion of women will definitely vanish.²⁸

However, the appointment of a female *Qāḍī* has not been without controversy. Traditionalist viewpoints rooted in conservative interpretations of Islamic law have raised objections, arguing that women are unfit to hold positions of authority within religious institutions.²⁹ Opponents may question the qualifications and legitimacy of the female *Qāḍī*, citing concerns about the potential deviation from traditional practices.³⁰

The controversy surrounding the appointment reflects broader debates about the interpretation and application of Islamic law in modern societies.³¹ It highlights the clash between conservative and progressive perspectives on gender roles, women's rights, and the dynamics of religious leadership. Therefore, the appointment of a female *Qāḍī* in a Nigerian *Sharīah* court signals a progressive shift towards gender equality and women's empowerment.³² It challenges traditional gender norms, promotes inclusivity, and demands a re-evaluation of the role of women in religious and judicial institutions. The controversy it has generated underscores the ongoing battle for gender equity, calling for dialogue and understanding as society grapples with evolving notions of justice and equality within the framework of *Sharīah*.

²⁸ Abdulrazaaq Owolabi Abdulkadir (Associate Professor, Department of Private and Property Law, Faculty of Law, University of Ilorin-Nigeria), in interview with the author, 30 October 2023.

²⁹ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islam Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia' Egypt and Iran),' 307-372.

³⁰ Organization of Economic Cooperation Development, *Women in Public Life: Gender, Law and Policy in the Middle East and North Africa* (OECD Publishing, 2014), 142, <https://www.oecd.org/mena/governance/women-in-public-life-mena-brochure.pdf>, accessed on 12 August 2023.

³¹ Engy Abdelkader, 'To Judge or Not to Judge: A Comparative Analysis of Islam Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia' Egypt and Iran),' 307.

³² Abdulmumini Adebayo Oba, 'The *Shari'ah* Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction,' 859-900.

NIGERIAN CONSTITUTION AND APPOINTMENT OF *QĀDĪ*

In recognition of the rights of the Muslims in Nigeria and support of the fundamental human right of freedom of religion, the Constitution provided that there shall be established for any state that requires the *Sharī'ah* Court of Appeal and that the *Sharī'ah* Court of Appeal of Federal Capital Territory (FCT). There are 19 states³³ and Federal Capital Territory that have the *Sharī'ah* Court of Appeal in Nigeria. Appeals from the *Sharī'ah* Court of Appeal lie to the Court of Appeal and the appeal further moves to the Supreme Court. The constitution further provides for the procedure for the appointment of *Qāḍī* to the *Sharī'ah* Court of Appeals and other courts of record.

APPOINTMENT AND QUALIFICATIONS OF *QĀDĪ* OF *SHARĪ'AH* COURT OF APPEAL IN NIGERIA

Sharī'ah Court of Appeal is the next to the Court of Appeal in the hierarchy of courts in Nigeria. The appointment of the justice (*Qāḍī*) of the *Sharī'ah* Court of Appeal has been spelled out by the Nigerian Constitution. Therefore, it is considered as one of the superior courts of which its decision is binding on the subordinate courts. The appointment of the Grand *Qāḍī* and justices of the *Sharī'ah* Court of Appeal shall be made by the president on the recommendation of the National Judicial Council, subject to the confirmation of such appointment by the Senate.³⁴ As regards the qualifications of *Qāḍī* of the *Sharī'ah* court of a state, it has been spelled out by the Nigerian Constitution to the effect that such a person must be a legal practitioner in Nigeria and must have been called to the Nigeria Bar not less than 10 years. A person who is vast in the field of Islamic jurisprudence with experience can also be appointed.³⁵

On the appointment of *Qāḍī* in the *Sharī'ah* Court of Appeal, certain qualities must be met before the appointment can be upheld. Some of these conditions are that the person to be so appointed must be a devoted

³³ These states constitute Northern states in Nigeria with the inclusion of the Federal Capital Territory (FCT) they are 19 states.

³⁴ Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 238 (1) & (2).

³⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 276 (3).

Muslim,³⁶ adult³⁷ and must know Islamic jurisprudence. He must be sane. That is, he must be mentally stable and must be of sound mind. He must be a male, though this remains a disputed issue among the Islamic Jurists which shall be discussed in the later part of this article.

JURISTIC EXPOSITION ON THE APPOINTMENT OF FEMALE AS *QĀḌĪ*

The majority of Islamic scholars believe that females are not fit and proper to be appointed as *Qāḍī* of the *Sharīah* Court. The proponents of this view are Mālikī, *Shāfi'ī*, and Ḥanbalī scholars. The Ḥanafī School argued that a female can be appointed as *Qāḍī* with the exception that such female *Qāḍī* cannot adjudicate on matters involving *Hudūd* and *Qisās* which are criminal matters. It is also the view of the Ḥanafī School that a female can be appointed as *Muḥtāb* and other top positions in the *Sharīah* Court, like Registrar, being at the helm of affairs in the adjudication using *Ṣulḥ* (settlement of disputes). Their views are based on the following verse of the Glorious Qur'an:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ
أَمْوَالِهِمْ ... ﴿٣٤﴾

“Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property...”

(Surah al-Nisā', 4: 34)

It is crystal clear from the above verse that men are the protectors and maintainers of women, in the sense that they are in charge of them. Therefore, the verse may be understood to mean that women cannot be

³⁶ A *Qāḍī* must be a Muslim and it is of the mandatory requirement. This because none Muslim cannot legislate or adjudicate on Islamic personal law as he lacks vires to do so. This is in line with Qur'anic verse “Those who wait for (some misfortune to befall you then if you have a victory from Allah they say: were we not with you? And if there is a chance for the unbelievers, they say: Did we not acquire the mastery over you and defend you from the believers? So Allah shall judge between you on the day resurrection, and Allah will by no means give the unbelievers a way against the believers. Surah al-Nisā' 4:141.

³⁷ It is not permissible to appoint a child as *Qāḍī* and this is the consensus opinion of the Jurists because the child is not mature.

appointed in charge of such responsibilities as that would make women the protectors which is the opposite of what the verse says:

...وَلِلرِّجَالِ عَلَيْهِنَّ دَرَجَةٌ... ﴿٢٢٨﴾

“...and the men are a degree above them...”

(Surah al-Baqarah, 2: 228)

There are *Aḥādīth* of Prophet Muḥammad (SAW) that support the position that women/females should not be appointed as judges of *Sharī'ah* Court.

وَعَنْ أَبِي بَكْرَةَ قَالَ: لَمَّا بَلَغَ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنَّ أَهْلَ فَارِسَ
قَدْ مَلَكَوا عَلَيْهِمْ بِنْتُ كِسْرَى قَالَ: «لَنْ يُفْلِحَ قَوْمٌ وَلَوْ أَمَرَهُمْ امْرَأَةٌ». رَوَاهُ
الْبُخَارِيُّ

“Abū Bakra told that when God’s Messenger heard the people of Persia had made Kistrā’s daughter their queen he said, “People who make a woman their ruler will never prosper.”³⁸

(Collected by al-Bukhārī)

The above verses as well as the *Ḥadīth* prevent women or females from becoming *Qāḍī*. The *Ḥadīth* is general in meaning and applies to all positions of public authority. Therefore, it is not permissible to appoint a woman/female because the word ‘affair’ is general in meaning and it includes all public affairs of the Muslims including Islamic personal affairs such as divorce and inheritance (parts of the affairs to be adjudicated upon at the *Sharī'ah* Court). There is a stern warning that any society that makes women its leaders will never prosper.³⁹

It is important to stress that the messenger of Allah (SAW) did not intend to curse the people who appoint(ed) a female as *Qāḍī* or in charge of their affairs by that *Ḥadīth*. Rather, the Prophet of Allah was warning the people against it because his task was to explain everything permissible to his *Ummah* (Nation/Community) to make them succeed and prosper. The

³⁸ Muḥammad bin Ismā‘īl Abū ‘Abd Allāh al-Bukhārī, *Al-Jāmi‘ Ṣaḥīḥ al-Bukhārī*, vol. 6 (n.p.: Dār Ṭawq al-Najāh, 2001), 8, Bāb Kitāb al-Nabiyy Ilā Kistrā wa-Qayṣar, *ḥadīth* no. 4425.

³⁹ Muḥammad bin ‘Alī al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq ‘alā Ḥadā’iq al-Azhār*, vol. 4 (Al-Qāhirah: Dār Ibn Ḥazm, 1970), 273.

Ḥadīth, thus, admonishes and demonstrates everything that is not permissible for them and which is made explicit. This, according to scholars, is to save women from evil and loss. This is in *pari-materia* with the *Ḥadīth* of the prophet which says: ‘No harm inflicted nor reciprocated.’⁴⁰ The Prophet of Allah therefore, intended to forbid his *Ummah* from imitating those people (the Persians) by delegating any of their public affairs to a woman. The prophet used the above scenario to convey this message to the people who were/are keen to be prosperous so that they would/will comply with this advice.

The *Ḥadīth* referred to in the preceding paragraph has been categorized to form part of an isolated *Ḥadīth* (*Ḥadīth al-Aḥād*) of which the narrators are not more than two persons. Assuming that the *Ḥadīth* has numerous narrators, which is known as *Mutawātir* in Arabic parlance, there will be no room for different arguments or discussions as far as the appointment of a female judge or *Qāḍī* is concerned.⁴¹ It is one of the principles in the study of the *Ḥadīth* of Prophet Muḥammad. *Aḥād* (the chain of narrators of this *Ḥadīth* are not more than two people) dictates that binding rules can be formulated from such as *Ḥadīth* and it is not necessary to act on it.⁴²

Therefore, the appointment of a female as *Qāḍī* of the *Sharīah* Court of Appeal is allowed based on the interpretation of one of the verses of the Qur’an which says:

... وَأَسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ ۖ فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ
مَنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ... ﴿٢٨٢﴾

“...and call in to witness from among your men get two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses...”

(Surah al-Baqarah, 2: 282)

⁴⁰ Abū ‘Abd Allāh Muḥammad bin Yazīd al-Qazīwaynī Ibn Mājāh, *Sunan Ibn Mājāh*, vol. 2 (Riyāḍ: Maktabah al-Ma‘ārif li al-Nashr wa al-Tawzī’, n.d.), 784, *Kitāb al-Aḥkām, ḥadīth* no. 2341.

⁴¹ Hanafi A. Hammed, *Islamic Law of Evidence and Administration of Justice in Nigeria* (Lagos: Princeton and Ass. Pub. Co., 2022), 104.

⁴² Hanafi A. Hammed, *Islamic Law of Evidence and Administration of Justice in Nigeria*, 106.

It can be pointed out from the above verse that the testimony of women in any matter is strong and recognized as credible evidence, and as such will be admitted in evidence. Therefore, from analogy and based on the above position, a woman is permitted to be a *Qāḍī*. It is clearer from the above verse that women tend to entertain fear, especially when appearing before a male judge. This can be allayed when appearing before a female *Qāḍī*. This will also give some security and assurances a female who wishes to testify for or against a matter where witnesses are allowed. Two females may be appointed to sit together, having regard to the admissibility of testimony of two women in place of evidence of a man as contained in the above verse.

Ibn Ḥazm al-Ẓāhirī and Ibn Jarīr al-Ṭabarī argued for the absolute permissibility of women holding positions in the judiciary (based on analogy and reason). It has been narrated that ‘Umar Ibn al-Khaṭṭāb (may Allah be pleased with him) appointed a woman named Umm al-Shifā’ bint ‘Abd Allāh al-Ḥasbah as the overseer of the market. Based on this, it is permissible for women to hold positions in the judiciary because both roles fall under general authority, and if it were not permissible, ‘Umar (may Allah be pleased with him) would not have allowed a woman to oversee the market.⁴³ Besides, In Islam, a woman is permitted to serve as a witness in cases where the person does not behave properly, just as she is allowed to act as an agent for others. No text prohibits her from handling certain matters. Therefore, it is necessary to establish the right of women to participate in the judiciary based on this perspective. The judiciary draws upon the testimony, and women are eligible to testify in matters other than prescribed limits and retribution, as established in the text. Therefore, it is permissible for a woman to preside over cases in which it is permissible for her to testify, as the judiciary is a form of guardianship similar to testimony. Hence, she becomes eligible for guardianship. As for prescribed limits and retribution, they do not fall within the domain of testimony, so they are not considered part of guardianship either. Secondly, a woman is allowed to oversee endowments (*waqf*) and act as a guardian for orphans. Therefore, it is also permissible for her to be a judge in cases that do not involve prescribed limits and retribution, within the scope of guardianship at a mosque or any other place.⁴⁴

⁴³ Ramadan Ali Al-Sharnoubi, *Consumer Protection in Islamic Jurisprudence*, 1st ed. (Egypt: Al-Amana Library, n.d.), 87-89.

⁴⁴ Al-Zayla‘ī Fakhr al-Dīn ‘Uthmān, *Tabyīn al-Ḥaqāiq Sharḥ Kanzu al-Daqāiq*, vol. 4 (Cairo: Dār al-Kitāb al-Islāmī, 1895), 184. See Al-Kāsānī Abū Bakr

LESSON FROM MALAYSIA

Malaysia is a country in Southeast Asia with a sizeable Muslim population. Malaysia has experienced an appointment of a female as *Qāḍī* of the *Sharī'ah* Court with no jurisdiction to hear and determine *Hudūd* and *Qisāṣ*. For example, in 2003, the Malaysian government decided to appoint female *Qāḍī* to the *Sharī'ah* Courts, although women had been appointed as judges in civil courts since the 1960s (the Malaysian judicial system consists of Civil and *Sharī'ah* courts). Afterward, a controversy arose regarding the authority of female *Qudāt* (Female Judges) on certain issues. However, in 2006, the National Fatwa Council of Malaysia ruled that qualified women could serve as religious judges and that the authority of female *Qudāt* would be identical to that of male *Qudāt*.⁴⁵

Despite the publication in 2006 by the National Fatwa Committee, the debate (discussion) surrounding the appointment of female *Qāḍī* continues and the available literature by both academic scholars and legal professionals on the feasibility of the appointment of female *Qāḍī* to serve in the *Sharī'ah* court reflect both arguments. Since the Fatwa does not have a binding effect until such fatwa has been passed by different states, it creates uncertainty and confusion among the public as to the correct position as regards the appointment of women as *Qāḍī* of the *Sharī'ah* court.⁴⁶ This is aggravated further when the dispute plays out among those who have authority on the issue. For example, in his 2007 article, the then-judge of the Malaysian *Sharī'ah* Court disapproved of female judgeship and relied on several authorities from classical Islamic law, especially the books of the Shāfi'ī school of jurisprudence. In the writing, the judge argued that women are not competent to be *Qudāt* due to the complexity of the service. According to him, adherence to the strict view of Shāfi'ī is

'Alā' al-Dīn, *Badā'i al-Ṣanā'i fī Tartīb al-Sharā'i* (Bayrūt: Dār al-Kutub al-Ilmiyyah, 1976), 230.

⁴⁵ Nik Noriani Nik Badlishah & Yasmin Masidi, *Women as Judges* (Malaysia: Sisters in Islam, 2002), <https://sistersinislam.org/wp-content/uploads/2021/10/booklet-women-as-judges.pdf>, accessed on 18 August 2023.

⁴⁶ Ramizah Wan Muhammad & Ahmad Muslim Rozlan 'Women as Shari'ah Court Judges with Reference to Judicial Creativity: A Comparative Study of Malaysia and Indonesia', *US-China Law Review*, vol. 15/1 (2018): 18-28, https://www.researchgate.net/publication/327973807_Women_as_Shari'ah_Court_Judges_With_Reference_to_Judicial_Creativity_A_Comparative_Study_of_Malaysia_and_Indonesia, accessed on 18 August 2023.

non-negotiable in this regard. The Shāfi‘ī *Madhhab* is the official *Madhhab* adopted in Malaysia, and the *Madhhab* disapproves of women serving as judges. In the stead, Chief *Sharī‘ah* Judge concurred that women can be appointed to serve in the *Sharī‘ah* court as Registrars, research officers to Higher Court *Sharī‘ah* judges, *Ṣulḥ* (mediation) officers, and other functions within the judiciary.

In contrast, it is the contention of one of the Islamic jurists that the lack of consistency among Muslim jurists in their arguments in terms of legality has contributed to the confusion on the appointment of females as *Sharī‘ah* judges. For example, the arguments that women lack intellectual capacity; and are weak in making judgments, are presumptions based on the position that women are not actively exposed to social activities.⁴⁷ On the other hand, women in contemporary society are in a parallel position to men in terms of the opportunity to acquire knowledge through education and the freedom to express their thoughts. History has shown that there are women who are endowed with intellect and intelligence like Hafṣa who was adjudged as one of the intellectual and intelligent persons.⁴⁸ It is opined that even though women were not known in Islamic history to hold any judicial post except the position of *Muḥtāb*, there is no comparison between the needs of the past and the present. They are completely different and the law must accommodate such changes through the understanding of *Maqāṣid Sharī‘ah*.

The above discussion on the appointment of females as *Qudāt* of the *Sharī‘ah* court led to the appointment of more women to the *Sharī‘ah* court. In some states, women had previously served as experts in *Ṣulḥ*. In

⁴⁷ The Opponent of this view based their opinion on one of the Ḥadīth of Prophet Muḥammad (SAW), “O women give charity for you are the majority of the people of the fire”. A woman among them said; And why is that O Messenger of Allah? He said; because of your cursing so much”- meaning your ungratefulness towards your husbands. He said; and i have not seen any among those lacking i intellect and religion and insight than you.” A woman among them said ‘And what is deficiency of her intellect and religion? He said: ‘The testimony of two women among you is like the testimony of a man and the deficiency in your religion is menstruation, because one of you will go three or four days without performing Salat. Imām Ḥāfiẓ Abū ‘Īsā Moḥammad Ibn ‘Īsā al-Tirmidhī, *Al-Jāmi‘ al-Tirmidhī*, vol. 5 (Riyād: Maktabah Dār al-Salām, 2007), 38, ‘Bāb Abwāb al-Īmān,’ *ḥadīth* no. 2613.

⁴⁸ Hanafi A. Hammed, *Islamic Law of Evidence and Administration of Justice in Nigeria*, 106.

other states, they came from the ranks of research officers or lawyers. For example, even though the state of Kelantan officially declared it would not issue out fatwa on the appointment of a female as a *Qāḍī*, it was one of the early states to officially appoint female *Ṣulḥ* officers. *Ṣulḥ* officers conduct mediation proceedings with the authority to perform limited judicial functions (extrajudicial), such as to confirm a divorce settled outside the court. These appointments were not announced publically, as the *Ṣulḥ* officers are not judicial posts, even though these posts could enjoy the same salary as a lower court judge.

In furtherance to this and specifically in 2010, two females were officially appointed *Sharī'ah* judges in the Federal Territories of Malaysia. The appointed *Quḍāt* were Suraya Ramli and Rafidah Abdulrazaq. Both women had served as senior assistant directors of the training division of the Malaysian Islamic Judicial Department.⁴⁹

It is clear from the above discussion regarding the appointment of females as *Qāḍī* of *Sharī'ah* Court in Malaysia that notwithstanding the argument against the appointment, the proponents of the inclusion of females as *Qāḍī* of *Sharī'ah* Court were able to find their way through a thin line from Ḥanafī School. They added the justification in terms of human rights, although this leg of the argument lacks statutory footing in *Sharī'ah*. This is because every gender has been assigned responsibilities by Allah and this is premised on the supposed human rights.

Nigeria's government needs to borrow a leaf from this position, regardless of *Madhhab* being adopted as the official School of Thought in Nigeria as provided in the 1999 Constitution of Nigeria. Where this appears impossible, females who are knowledgeable and satisfy the requirements and or conditions for the appointment should be appointed as a judge. This could start at the Area Court level. In Kwara State, for example, the Area Court needs more *Quḍāt* owing to the volume of cases placed before the court. The female *Quḍāt* would be relevant, especially having regard to the retinue of divorce cases being experienced in the court daily. Therefore, the inclusion of female judges will fast-track the proper dispensation of cases and will reduce congestion. Females can also be appointed as *mufīṭ* as well as the registrar of the *Sharī'ah* Court. In Kwara

⁴⁹ Ramizah Wan Muhammad & Ahmad Muslim Rozlan 'Women as Shari'ah Court Judges with Reference to Judicial Creativity: A Comparative Study of Malaysia and Indonesia.'

State, for example, the current Chief Registrar of the court is a female. This can also be replicated in other jurisdictions in Nigeria.

LESSONS FROM PAKISTAN

Pakistan is considered an extremely conservative country. It subscribes to the Ḥanafī School of Islam strictly. Therefore, the role of *Quḍāt* has been predominantly held by men. However, in recent years, there have been efforts to promote gender equality and inclusivity within the judicial system. For instance, at the end of 2013, it decided to appoint the first woman to the position of *Qāḍī* to the state's High *Sharī'ah* Court.⁵⁰

Also in 2020, Pakistan made headlines when it appointed four women as *Quḍāt* in the province of Punjab.⁵¹ This was a significant step towards empowering women and ensuring their representation in decision-making roles.⁵² The appointment of female *Quḍāt* aimed to provide women with a platform to seek justice and address their legal concerns more inclusively.⁵³ While this development is laudable, it is important to note that there are differing opinions on the matter. Some view it as a progressive step towards gender equality while others may have reservations based on traditional interpretations of Islamic law.⁵⁴

CONCLUSION

The appointment of a female as *Qāḍī* of the *Sharī'ah* court is not prohibited under the *Sharī'ah*, especially having regard to the position of the schools identified above. There is evidence from the Islamic jurists who

⁵⁰ United States Department of State, *Country Reports on Human Rights Practices for 2013: Pakistan 2013 Human Rights Report*, <https://www.state.gov/documents/organization/220614.pdf>, URL not found, please give latest URL, accessed on 13 August 2023.

⁵¹ Kirmani Nida & Khan Ayesha, 'Moving Beyond the Binary: Gender-based Activism in Pakistan', *Feminist Dissent*, vol. 3 (2018): 151-191.

⁵² Anjum Gulnaz, 'Women's Activism in Pakistan: Role of Religious Nationalism and Feminist Ideology Among Self-Identified Conservatives and Liberals', *Open Cultural Studies*, vol. 4/1 (2020): 36-49, doi:10.1515/culture-2020-0004.

⁵³ Shaheed Farida, 'Maintaining Momentum in Changing Circumstances', *Journal of International Affairs*, vol. 72/2 (2019): 159-172.

⁵⁴ Anjum Gulnaz, 'Women's Activism in Pakistan: Role of Religious Nationalism and Feminist Ideology Among Self-Identified Conservatives and Liberals'.

have critically and painstakingly examined the need for the inclusion of female *Qudāt* among the judges of *Sharīʿah* courts in Nigeria. This will surely enhance females in our society. The important thing is that they must satisfy the requirements. Some females are well-versed in Islamic law. This proposition will create no room for human rights on the side of women in Nigeria. The involvement of ‘Āishah (R.T.A) in answering some questions relating to Islamic jurisprudence during the lifetime of Prophet Muḥammad (S.AW) when some women were referred to her is a clear example. It is also apposite to mention that aside from being a *Qāḍī* of the *Sharīʿah* court, they can also hold high positions such as Mediators in the establishment of *Ṣulḥ*, Registrars of the *Sharīʿah* Court of Appeal as practiced in Malaysia. It is instructive to note that all the qualities of Judges as mentioned above should be adhered to in the appointment of a female as a *Qāḍī* of *Sharīʿah* in Nigeria.

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