

## The Appointment of Muslim Women as Judges in the Courts: A Textual Analysis from Islamic Perspective\*

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**Abstract:** The appointment of women as judges in Muslim countries remains a challenging and debatable issue due to a general perception that such appointment might not be in conformity with the *SharĒÑah*. Dual legal systems, i.e. civil and *SharĒÑah* courts exist in the Muslim world. The *SharĒÑah* Court has jurisdiction related to family law only for Muslims. A few Muslim women, even though their growth is continuously increasing, are contributing as judges in the Muslim world. However, it is imperatively essential to examine the textual sources in order to know the stance of Islamic *SharĒÑah*. The juristic interpretations of the texts would benefit the entire humanity in the judicial system like other sectors if the avenues of opportunities are given to them. Therefore, this article examines critically the appointment of women as judges on the basis of the textual arguments of the Qur'Ēn and the Sunnah that contribute in making a clear Islamic legal stance for a better understanding of the role of women in judicial system. In particular, it intends to focus on: a) analyzing the prohibition and permissibility of the appointment of women as judges in courts from the Islamic legal perspective, b) evaluating critically and clarifying the issue according to the classical as well as contemporary Muslim scholars, and c) providing some recommendations with the qualifications to be judges that can illuminate the existing debate about the appointment in both courts. The two key issues will be critically examined, which are; the question of the qualifications to be judges and the question of the legal stance of the *SharĒÑah* about the appointment. Discussion would include implications of the research findings, shortcomings of the current study, and directions for future research.

**Keywords:** Woman judgeship, leadership, competencies, perception, legality, and judicial leadership.

### 1. Introduction

The issue of the appointment of women as judges in both the civil and *SharĒÑah* courts is still a debatable issue. In contemporary society, a number of women are tremendously increasing all over the world, many of them are holding high government officials and many female students are pursuing higher study, but a small number of female students are studying *SharĒÑah* to be judges in the courts because of the avenues of opportunities are not available in judicial system. Therefore, this study examines critically the appointment of Muslim women as judges in courts on the basis of a textual analysis of the sacred verses of the Qur'Ēn according to the views of the classical as well contemporary scholars that determine its Islamic legal stance with recommendations that aspire to fill the gap in globalized era.

### 2. Defining *Al-QĒĒ* and Qualifications

The Arabic word, “al-QĒĒ”<sup>1</sup> derives from the word ‘qaĒĒ’, means, in Arabic English Lexicon by William Lane, “to finish a thing entirely by word or deed that is used for decreeing and deciding judicial issues,” or to Arsalan, “to give an order and judgment as a religious duty”. Sangalaji defines it as an act of deciding the disputes that disposes the differences, conflicts and passing a final order<sup>2</sup>. To Ibn xumĒm, as a

‘Īkum’ (order) that forces a transgressor from unjust action<sup>3</sup> by the religious authority<sup>4</sup>. Farhun defines it as executing the commandments of the SharĒĤah<sup>5</sup>. Disposing the suits and putting an end to controversies defined by Ibn Khaldun<sup>6</sup>. Al-QĒĤ is a judge who has vast knowledge of the SharĒĤah and gives a verdict for establishing justice<sup>7</sup>. Hafeez defines qalĒ as a judgement that is determined by the declaration of the court for recognizing the equal rights towards others<sup>8</sup>.

About the qualifications of judges, *al-NawĒwĒ* describes a *qĒĤ* must be a Muslim adult, sane, free, male, good moral, sound of hearing, stable mind, and sights, speakable, learned, and prudent about the laws of the *SharĒĤah*, not a female that prevent women’s judgeship.<sup>9</sup> In view with that, *Tyser*, in *Mijallah al-AĤĒm al-Adliyyah*,<sup>10</sup> the *ShafiĤe* and the *MalikĒte* schools of thought, *al-SarakhsĒ*, *Ibn QudĒmah*<sup>11</sup>, *ShiĤah al-Ja’fariyyah* and the *ZahirĒ* school of thought unanimously adhere that a judge must be a male, not a female<sup>12</sup> with the deepest knowledge of the *SharĒĤah* and competent to hold the office of the courts<sup>13</sup>. The candidate, to al-MarghinĒnĒ, requires to be a Mujtahid, knowledgeable, well-qualified, creative, and competent to invent new ideas because a Muqallid<sup>14</sup>, to al-ShafiĤite school and the jurists of the JaĤfari School, is not qualified to be judges. The appointment of women as judges, to al-ĪabarĒ, is permissible with the ability of making of a legal decision, or the ability of giving of a fatwĒ (decree). Furthermore, ability of Ijtihad, MuĤammad Sangalaji argues, referred to ‘Abdullah al-Shams al-DĒn ‘AmulĒ, is one of the essential criteria to be judges who can issue a fatwĒ with his analogical and innovative capabilities.<sup>15</sup> Ibn FarhĒn, a Malikite jurist, and ĤaĤyĒd argue that the qualification for being a male is preventive measure to appoint women as judges. *Ibn QudĒmah* suggests that judges must have three qualifications; KamĒl (perfection), which is two types; *KamĒl al-AĤĒm* refers to an adult male who is eligible to observe religious duties, and *KamĒl al-Khilqah* refers to a person who does not suffer from physical deficiency. *ĤAdĒlah*; a judge must be just in sayings, doings and jurisdictions, and the ability of *IjtihĒd* on the basis of the texts, that enables him to understand the different opinions and consensus of the jurists, and the *qiyyĒs* (juristic analogy)<sup>16</sup>. However, during the periods of the four Caliphs, the governors of the various provinces appointed males judges who were erudite and proficient scholars in the field of Islamic legal system but no female judge was appointed in the courts.

### 3. Causes of the Prohibition of the Appointment of Women as Judges in Courts: A Textual Analysis

In contemporary context, many women are participating actively in almost all aspects of life in Muslim countries such as Sudan, Egypt, Tunisia, Yemen, Bangladesh, Pakistan, Indonesia, Malaysia, and Maldives, but women’s appointment as judges in the courts is still a few. This part examines how the textual argumentations are applied by Muslim jurists that prevent women’s judgeship in both the SharĒĤah and civil courts. Many Muslim jurists argue that the *SharĒĤah* has determined and confined the roles of women such as staying at homes as wives, taking care of children as mothers and child-bearers<sup>17</sup>, and intermingling between sexes is prohibited<sup>18</sup>. The appointment as judges is against their inborn natural quality gifted by God must be preserved, otherwise, it may cause social distortion, mutilating and devastating the Islamic society.<sup>19</sup> Sensitiveness and emotion are their weakness that prevents their appointment argued by the early exegetes<sup>20</sup>. The concept of female leadership is imported from the West, which had been practised by the aristocratic Greeks until the 13<sup>th</sup> century of the Christian era<sup>21</sup>. Some Muslim scholars examined critically some contentious verses applying the methods of literal and contextual readings of verses 4:34, 2:228, 33:35, 66:12, 27:32, 9:71, 5:42, which proscribe women’s appointment as judges in both the SharĒĤah and civil courts. From the literal sense, the exegetes limit the meaning of verse 4:34 for men’s guardianship over women, not women over men because *al-RijĒlu qawwĒmĒn* with *alif ĪĒm* means *al-qawwama* for men over women, not for women over men. From a grammatical perspective, the meaning of *aĤĒĒ* is “upon” that implies a preventive measure to prevent their judgeship in any court<sup>22</sup>. A fatwĒ issued by Azhar Fatwa Ulama Council in 1992 that nullified the appointment of women judgeship as “The consensus opinion of the ummah is that the appointment of a woman as a judge is unlawful that cannot be considered as lawful and the doers of such acts would be sinner”<sup>23</sup>. Furthermore, displaying the face, not controlling the tone of the voice, and showing attractive parts of the body in trading places, in open space, and in courts may provoke people into committing adultery or unethical acts. Her attraction is her face and a soft voice is the sweetness

of her words that may cause temptations for the opposite sexes. Free mixing prevents women to hold not only the position of judgeship in courts but any high government position on the basis of a *Ād* that man's rows must be the front side and women's row must be at the back or in the rear side<sup>24</sup>. Based on *Ād*,<sup>25</sup> Jamhūr Ulamā' (majority Muslim scholars) disagree to appoint women as judges in civil or criminal courts whether there is a financial crisis or the absence of a qualified man to be a judge. Her short-sightedness and less intelligence also prevent them to be judges because to Ibn Qudāmāh, a judge must have sharp intelligence, wisdom and adroitness. To the *anbalite*, masculinity is as one of the requirements to be a judge, but the appointment for cases relating to family matters is permissible<sup>26</sup>. To some Shafi'i jurists, no possibility for women to be judges in the courts, but for public interest it is allowed<sup>27</sup>. The appointment is permissible in general in criminal and civil courts narrated by Mĕlik bin Anas, quoted by Imĕm Khaĭĭĕbi from Ibn Quasim who argues that there is no direct restriction of the *Sharĕh*<sup>28</sup>.

#### 4. Causes of the Permissibility and Validity of Women's Appointment as Judges in Courts: A Textual Analysis

In contemporary Muslim countries, women are playing an active role in almost all aspects of life in general and in judicial system in particular. Women have been appointed to serve as judges in the civil courts, but not to cases, involved capital punishment. Some are allowed to issue *fatwas* and to be witnesses in cases because there is no absolute restriction about women's appointment as judges. Even though, they are exempted from performing some religious duties such as the exemption of prayer and fasting during the period of menstruation and post-delivery bleeding (*nifas*) that do affect the performance of her judicial duties in the courts. In inevitable situations, the appointment of a learned and prudent woman is allowed if a qualified man is not available. As for the appointment of women as judges, Mawardĕ views that the appointment in the *Sharĕh* court is permissible in line with the view of al-Ūabĕri who commented on verse 4:34 on the appointment of woman judges as part of the Islamic law system<sup>29</sup>. Ibn *azm* contextualizes verse 4:58 with a linguistic analysis and in his notion of interpretation, he reluctantly stipulates that the verse "when you judge between mankind, judge with justice" permits an appointment of a woman as a judge in all cases that address both man and woman to participate actively in the judicial system in order to establish justice. He further argues that there is no reason to discriminate between man and woman who have been given equal rights in various aspects of life and there is no barrier for a woman to be a judge if she is qualified<sup>30</sup>. In line with the above, Ibn *azm* argues that the appointment of a woman as a judge is permissible in both the *Sharĕh* and the civil courts including for *udĕd* and *Qiĕĕ* cases because they are allowed to be witnesses in those cases. So no one should deprive them from exercising their rights<sup>31</sup>. Al-Tabarĕ likewise opines that the appointment of a woman as a judge is permissible in all cases<sup>32</sup>. Establishing justice, the verses 4:58, 7:29, 57:25, 16:90 and 2:282 instruct, is equal responsibility for both a male and a female as a judge in the courts and must give judgement rightly even though against their own, parents, children and family members. The verses of 3:104, 114, 9:67-71, and 20:132 have authorized the power of discharging of the duty of *al-amar bi al-marĕf wa al-nahy al-munkar* for women and men equally<sup>33</sup>. Ibn Jarĕr al-Ūabarĕ supports the legitimacy of the appointment of women as judges as they should be given the chance to establish justice efficiently and professionally by giving verdicts in the courts as agreed by some Malikĕ jurists<sup>34</sup>. To Ashraf Ali Thanvi, making of maleness as a condition is precedent for the legitimacy of the headship of the state, but not applicable for judgeship<sup>35</sup>. Marginĕnĕ Kamĕl, Ibn Humĕm<sup>36</sup> and al-Ghazĕĕ agree that for *udĕd* and *Qiĕĕ* (death punishment) cases, it is prohibited<sup>37</sup>. To Abĕ Hanĕfa and Ibn Jarĕr, if woman judges maintain the authority and dignity of the courts on account of their awe-inspiring magnificence without objection while they give their verdict, their appointment as judges is permissible<sup>38</sup>. Their appointment as some Shafi'i jurists argue is permissible in the *Sharĕh* court during the emergency period as quoted from the book of Zakaria Ansari who explains, "a *qĕĕ* should be a person who is Muslim, independent and a male. If a male is not available, a female can be appointed as *qĕĕ* in this special situation."<sup>39</sup> From the legal perspective, some Muslim jurists argue that this *Ād* is considered as fabricated because it has been classified as an *ālad*, which was not in the form of a directive, but descriptive with a single statement, narrated only by Abu Bakrah<sup>40</sup>. According to the principle of Islamic jurisprudence, *ālad* is not a basis for formulating binding rules and practices for Muslims. The question arises as to how some Muslim scholars by referring to an isolated *Ād* narrated by a companion prevented the appointment of a

woman as a judge in the courts that implies serious implications in contemporary Muslim society<sup>41</sup>. To al-Samnani, the hadith does only prevent the headship of state made consensus by Muslim scholars based on authentic *al-ĀdĒth*.<sup>42</sup> An *ĀdĒth* narrated by Buraidah from the Prophet (peace be upon him) implies that among three types of judges, two of them will be in hell and only one will be in paradise. Judge who will be in paradise is the one who decides disputes on the basis of truth, the second who realizes the truth but passes an order contrary, will be in hell, and the third who decides disputes without knowing the truth, will also be in hell. It is also argued that if in certain situations such as appearing in the court as a witness, buying and selling in the markets with veiling their faces and lowering their gaze, then the appointment is allowed<sup>43</sup>. The appointment, as a *qĒdĒ*, without hesitation and confusion is allowed, if they are allowed to hold high government positions. As MustafĒ al-ZarqĒ agrees that women can work in various sectors if they avoid free mixing<sup>44</sup>. An *ĀdĒth*,<sup>45</sup> “You may take half of the spirit of Islam from women” allows her appointment if she is knowledgeable like men. The Grand Sheikh of al-Azhar, Mohamed Sayed TantĒwĒ after a contentious three-hour debate about woman judgeship in the weekly meeting of the Islamic Research Council (IRC) ruled that there is no restriction in the Qur’Ēn and Sunna that ban a woman from holding the office of the courts. *Ānafī* jurists approve women to be judges in civil and financial courts, but not in criminal courts.<sup>46</sup> Ali Gomaa states that the job of a judge is merely to know the law well and to implement it fairly, therefore, no absolute restriction to appoint women as judges in the courts.

## 5. Conclusion

The appointment of women’s judgeship as a contentious and debatable issue might not be inconformity with the *SharĒĤah*. However, the above analytical discussions tell us that according to Muslim jurists, exegetes, and feminists, the appointment in the *SharĒĤah* and civil courts for yielding more their participation is allowed. The study suggests three different juristic views; the appointment of women’s judgeship is prohibited in any court, it is only permissible in the civil court, not in the criminal court, and it is allowed in both the *SharĒĤah* and civil courts. The textual analysis shows that the physical presence of a woman as a judge without a *Muhrim* or a proper dress is a *fiĤnah*, which may provoke people of the evil eyes and diseased hearts to commit adultery or unethical acts. Defectiveness and imperfectness in reasoning and religion are also considered as the lack of competence and depth knowledge of women. About the validity of the appointment, a group of the *Ānafī* jurists are flexible in cases in which women are allowed to be witnesses as al-MĒwardĒ,<sup>47</sup> al-Āfīz Ibn Hajr al-ĤAsqĒlĒnĒ,<sup>48</sup> Ibn Rushd<sup>49</sup>, Ibn *Āzīm*<sup>50</sup>, and al-ĀnĤĒnĒ<sup>51</sup> stated in their books of *fiqh*. AbĒ *ĀnĒfah* and some of his followers such as al-KasĒnĒ, al-MurgĒnĒ, and Ibn HumĒm<sup>52</sup> opined their appointment in civil courts, not in the criminal courts, even a decision made by a female judge in criminal cases will be invalid although it is right<sup>53</sup>. Ibn JarĒr al-ĀabarĒ<sup>54</sup>, Ibn Hazm<sup>55</sup>, al-*Āsan* al-BasrĒ<sup>56</sup>, Ibn al-QĒsim al-MĒlikīyah<sup>57</sup> and al-KhawĒrij<sup>58</sup> agreed to appoint female judge in both civil and *SharĒĤah* courts without the condition of being a man and her given verdict would be valid in any case in both courts. MuĀaddith who support women’s appointment as judges include Muhammad SaĤĒd RamadĒn al-BĒĒĒ, YĒsuf al-QaraĒĒwĒ<sup>59</sup>, ĤAbbdul KarĒm ZaidĒn<sup>60</sup>, al-QĒĒĒ Sumair ĤĒliyah, Abdul Halim AbĒ Shuqa<sup>61</sup>, Muhammad Rafat Osman<sup>62</sup>, Abdur Rahman Ibrahim Abdul Aziz al-HamĒĒ and so on. From contextual and historical perspectives, Muslim feminists such as Fatima Marnisi, and Amina Wadud are in favour of the appointment even though their critiques objected and raised some questions because their interpretations of verses lead to the openness and limitless of texts, to what extent does the notion of permissibility of female judgeship toward reform come from within the text and to what extent is it imposed from outside response to modern pressures? However, the appointment of women as judges requires our due consideration within the *SharĒĤah* paradigm that may qualify women to be judges in courts such as safeguarding their private parts from illegal sexual acts and restraining the eyes from evil desires in the public (verse 24:31), abstaining from displaying women’s fineries and decorations before all other men, (verse 33:33), covering the entire body by outer dress like veil, gloves, head-cover, apron, etc. (verses 24:31, 33:59), lowering their gaze for both men and women from looking at the opposite sex with sexual desire, avoiding from free-mixing, maintaining motherhood and fulfilling the mutual rights of husband and wife in order to have a happy marital life. Furthermore, this paper recommends forming, “a world council of Muslim

‘UlamÉ’’, in the Muslim world to eliminate the confusions and doubts about women’s judgeship in Muslim world.

## 6. References

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