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 SharÊÑah. Dual legal systems, i.e. civil and SharÊÑah courts exist in the Muslim world. The SharÊÑah 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 SharÊÑah. 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'Én 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 SharÊÑah 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 SharÊÑah 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 SharÊÑah 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'Én 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-QÉÌÊ and Qualifications

The Arabic word, “al-QÉÌÊ”1 derives from the word ‘qalÉ’, 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 order2. To Ibn ×umÉm, as a
‘İukum’ (order) that forces a transgressor from unjust action by the religious authority. Farhun defines it as executing the commandments of the Sharī'āh. Disposing the suits and putting an end to controversies defined by Ibn Khaldun. Al-Qā'Eē is a judge who has vast knowledge of the Sharī'āh and gives a verdict for establishing justice. Hafeez defines qâ'ī as a judgement that is determined by the declaration of the court for recognizing the equal rights towards others.

About the qualifications of judges, al-Nawī describes a qâ'ī 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 Sharī'āh, not a female that prevent women’s judgeship. In view with that, Tyser, in Mijallal al-Alām al-Azī'llah, the Sha'īite and the Malikī schools of thought, al-Sarakhbī, Ibn Qudāmah, Shi'ī al-Jā'farīyyah and the Zahīrī school of thought unanimously adhere that a judge must be a male, not a female with the deepest knowledge of the Sharī'āh and competent to hold the office of the courts. The candidate, to al-Marghīnānī, requires to be a Mujtāhīd, knowledgeable, well-qualified, creative, and competent to invent new ideas because a Muqāllīd. To the Shāfi'ī school and the jurists of the Ja'fā'ī School, is not qualified to be judges. The appointment of women as judges, to al-Ùabarī, is permissible with the ability of making of a legal decision, or the ability of giving of a fatwā (decree). Furthermore, ability of Ijtīhad, Muhammad Sangalajī argues, referred to ‘Abdullah al-Shams al-Dīn ‘Amīlī, is one of the essential criteria to be judges who can issue a fatwā with his analogical and innovative capabilities. Ibn Farhūn, a Malikī jurist, and NA'ūnī argue that the qualification for being a male is preventive measure to appoint women as judges. Ibn Qudāmah suggests that judges must have three qualifications; Kamīl (perfection), which is two types; Kamīl al-Alām refers to an adult male who is eligible to observe religious duties, and Kamīl al-Khilliqah refers to a person who does not suffer from physical deficiency. Nādhīlah; a judge must be just in sayings, doings and jurisdictions, and the ability of Ijtīhad on the basis of the texts, that enables him to understand the different opinions and consensus of the jurists, and the qiyyās (juristic analogy).

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 arguments are applied by Muslim jurists that prevent women’s judgeship in both the Sharī'āh and civil courts. Many Muslim jurists argue that the Sharī'āh has determined and confined the roles of women such as staying at homes as wives, taking care of children as mothers and child-bearers, and intermingling between sexes is prohibited. 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. Sensitiveness and emotion are their weakness that prevents their appointment argued by the early exegetes.

The concept of female leadership is imported from the West, which had been practised by the aristocratic Greeks until the 13th century of the Christian era. 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 proscribes women’s appointment as judges in both the Sharī'āh 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-Ri'jīlu qawwāmān with al-lām means al-qawwāmān for men over women, not for women over men. From a grammatical perspective, the meaning of al-lām is “upon” that implies a preventive measure to prevent their judgeship in any court. A fatwā issued by Azhar Fatwa Ulama Council in 1992 that nullified the appointment of women judgeship as “The consensus opinion of theummah 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.” 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 ÍadÊth that man’s rows must be the front side and women’s row must be at the back or in the rear side24. Based AlÍedÊth, 25 Jamhêr UlamÉ´ (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 QudamÉh, 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 permissible26. To some ShafiNÉ jurists, no possibility for women to be judges in the courts, but for public interest it is allowed27. The appointment is permissible in general in criminal and civil courts narrated by Mélik bin Anas, quoted by ImÉm KhaÍíÉbi from Ibn Quasim who argues that there is no direct restriction of the SharÊñah28.

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, MawardÊ views that the appointment in the SharÊñah court is permissible in line with the view of al-ÙabÉri who commented on verse 4:34 on the appointment of woman judges as part of the Islamic law system29. Ibn ëazm 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 qualified30. In line with the above, Ibn ëazm argues that the appointment of a woman as a judge is permissible in both the SharÊñah and the civil courts including for ñudÊd and QiÎÉÎ cases because they are allowed to be witnesses in those cases. So no one should deprive them from exercising their rights31. Al-TabarÊ likewise opines that the appointment of a woman as a judge is permissible in all cases 32. 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-marÊf wa al-nahy al-munkar for women and men equally33. Ibn JarÊr al-ÚabarÊ 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 MalikÊ jurists34. 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 judgeship35. MarginÊn KamÊl, Ibn HumÊm 36 and al-GhazÉlÊ agree that for ñudÊd and QiÎÉÎ (death punishment) cases, it is prohibited37. To AbÊ HanÊfa and Ibn JarÊr, 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 permissible38. Their appointment as some ShafiNÉ jurists argue is permissible in the SharÊñah court during the emergency period as quoted from the book of Zakaria Ansari who explains, “a qÉÌÊ should be a person who is Muslim, independent and a male. If a male is not available, a female can be appointed as qÉÌÊ in this special situation.39 From the legal perspective, some Muslim jurists argue that this ÍadÊth is considered as fabricated because it has been classified as an Íad, which was not in the form of a directive, but descriptive with a single statement, narrated only by Abu Bakrah40. According to the principle of Islamic jurisprudence, alád 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 ÍadÊth narrated by a companion prevented the appointment of a
woman as a judge in the courts that implies serious implications in contemporary Muslim society. To al-Samnani, the hadith does only prevent the headship of state made consensus by Muslim scholars based on authentic hadith. An hadith narrated by Buraiddah 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. The appointment, as a qadi, without hesitation and confusion is allowed, if they are allowed to hold high government positions. As MustaqF al-Zarqawi agrees that women can work in various sectors if they avoid free mixing. An hadith, “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 Tantawi 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‘an and Sunna that ban a woman from holding the office of the courts. Anfani jurists approve women to be judges in civil and financial courts, but not in criminal courts. 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 Sharī‘ah. However, the above analytical discussions tell us that according to Muslim jurists, exegetes, and feminists, the appointment in the Sharī‘ah 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 Sharī‘ah and civil courts. The textual analysis shows that the physical presence of a woman as a judge without a Muhirim or a proper dress is a fitnah, 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 anfani jurists are flexible in cases in which women are allowed to be witnesses as al-Mawardi, al-‘Effiz Ibn Hajr al-‘Askari al-Hasqu, Ibn Rushd, Ibn azzm, and al-OamNen stated in their books of fiqh. AbE anEh af and some of his followers such as al-Kasen, al-Murgan, and Ibn Humen 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. Ibn Jarir al-‘Abbar, Ibn Hazm, al-‘asan al-Basrei, Ibn al-Qasim al-MElukyyah and al-Khawarij agreed to appoint female judge in both civil and Sharī‘ah courts without the condition of being a man and her given verdict would be valid in any case in both courts. Muladdith who support women’s appointment as judges include Muhammad SaNed RamadEn al-BEI, YEsuf al-QaraIw, ‘Abdul KarEm ZaidEn, al-QEI Sumair NolIyah, Abdul Halim AbE Shuqa, Muhammad Rafat Osman, Abdur Rahman Ibrahim Abdul Aziz al-HamI 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 Sharī‘ah 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
Ulam" in the Muslim world to eliminate the confusions and doubts about women’s judgeship in Muslim world.

6. References

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[2] The word Qādī in English means a judge in contemporary time.


[24] Isma`īl al-Bīhīm, Nīṣāʾ al-Qādī al-Īslāmī, 211


[27] Abī Yaḥyā, Al-Ālīkh al-Ṣullānīyāh, p.66


[35] \textit{Fatî al-Bîrî}, (vol. 7), printed in Beirut, chapter regarding 'letter of the holy prophet to Qisra), p.128

[36] \textit{Ibn ûazm, Al-Ma'allih, \textbf{-M}u'álah bi \textbf{-A}thîr}, vol. 5, P.p. 91-93

[37] The interpretation of Ibn Añâbedin, vol 5, p.44

[38] Al- Margûnî, \textit{Al-Hidîyah, Sharî' al-\textbf{-B}i\textbf{-D}ayat al-Mu\textbf{-B}utadîh}, (vol.3), p.107

[39] See the provisions of the contempt of court act and section 228, Pakistan Penal Court.


[43] \textit{Shaîlî Muslim, Bëb al- \textbf{-F}adhiatah \textbf{-M}îm al-\textbf{-A}dîl, ûadîth no-20.}


[48] Al-Méwardî, \textit{al-\textbf{-A}kêm al-Sulînîyyah, p. 72.}

[49] Al-\textbf{-X}ûfiz Ibn ûajr, \textit{Fatî al-Bîrî}, vol. 13, p. 143. All Muslim jurists agreed except ûanafî school of thought to appoint a woman as a judge.

[50] Ibn Rushd, \textit{Bidîyatul \textbf{-M}ujtahid}, vol. 2, p. 564:


[56] Ibn ûazm, \textit{al-MalâlîlÎ}, vol. 9, 363


