

WOMEN AS JUDGES

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Introduction

The appointment of women judges in Muslim countries remains a controversial issue, due to a general perception that such appointments might not be in conformity with the shari'ah. There is no clear *nass* or authority in the textual sources – i.e. the Qur'an and the authentic Sunnah of the Prophet (s.a.w.) – that allows or disallows women to be appointed as judges. Several juristic interpretations of these sources, however, discriminate against women, going against the spirit of gender equality that is clearly woven into the fabric of Islam.

In Malaysia's dual legal system, divided into the general civil courts and the Shari'ah Courts, Malaysian women have been appointed to serve as judges in the civil courts – in the High Courts since the 1980s and in the lower courts since the 1960s.

The Shari'ah Courts only have jurisdiction over Muslims and its main area of jurisdiction is family law. In January 2003, the Malaysian Government made a decision to appoint women Shari'ah Court judges. In April 2006, the National Fatwa Council of Malaysia made a ruling that qualified women may be appointed as Shari'ah Court judges. In November 2007, the Perlis state government announced that it was ready to appoint its first woman Shari'ah Court judge. However, these policies have yet to be implemented and no women currently serve as judges in Malaysia's Shari'ah Courts.

Sisters in Islam (SIS) and other women's groups have pushed for the appointment of women as judges in the Shari'ah

Courts since the 1990s. To counter objections alleging that such appointments would be contrary to the shari'ah, SIS has embarked on a research project to put forward the following arguments in support of the appointment of woman as Shari'ah Court judges.ⁱ

SIS research has shown that interpretations that discriminate against women were influenced mostly by cultural practices and values which regarded women as inferior and subordinate to men. This Q & A booklet is written to illustrate the fact that in Islam, men and women are created equal, and that qualified women should be just as eligible as qualified men to be appointed to positions of leadership, including the office of judgeship.

ⁱ This paper is also partly based on *The Judiciary and the Appointment of Women Judges in the Syariah Courts of Malaysia* by Salbiah Ahmad, presented for Unit Pengajian Wanita dan Sumber Manusia, Pusat Pengajian Sains Kemasyarakatan, Universiti Sains Malaysia, Penang, 1 October 1991

1

JURISTIC VIEWS ON THE APPOINTMENT OF JUDGES

In Muslim history, there have been three juristic interpretations of textual sources regarding the appointment of judges:

1. The majority Sunni view (*jumhur*), among the founding jurists (*mujtahid mutlaq*) of Imam Shafii, Malik and Ibn Hanbal, was that women were disqualified as judges. This was because of an interpretation of Surah an Nisa' 4:34, that men are *qawwamuna*, or protectors of women. However, there was also a minority view among the Malikis, led by Ibn al-Qasim al-Maliki, that women could be appointed as judges. The Shafiis also allowed the concept of women as judges if their services are needed. Only the Hanbali school was unanimous in the view that women should not be appointed as judges.ⁱⁱ
2. The minority Sunni view of Imam Abu Hanifah was that the authority of a judge is not valid unless the judge possesses the qualifications necessary for a witness. This opinion allows women to be judges in all except *hudud* and *qisas* cases.ⁱⁱⁱ This flows from Imam Abu Hanifah's interpretation of Surah al-Baqarah 2:228, on women's eligibility to be witnesses in commercial transactions.
3. The individual views of jurists such as al-Tabari and Ibn Hazm stated that a woman can be a judge in all cases

ⁱⁱ Faisal Othman, *Kedudukan dan Peranan Wanita Dalam Islam* (1993), Utusan Publications and Distributors Sdn Bhd, Kuala Lumpur, at p. 31. Also see Abu Haniffa Mohamed Abdullah & Mohd Yazid bin Zul Kepli, "Women Judges in Shariah Court: Why Not?", in [2008] *Shariah Law Reports*.

ⁱⁱⁱ The original research for this booklet was funded by The Ford Foundation.

without exception as long as she fulfils the requirements for the position. This would appear to flow from a reading of Surah al-Taubah 9:71, that believing men and women are each other's *awliyya*, or protecting friends and guardians.

2

TEXTUAL SOURCES CITED IN FAVOUR OF MALE DOMINANCE

Certain Qur'anic verses and hadith have been interpreted and cited to allege men's inherent superiority and women's incapacity to lead or be judges.

Qur'anic verses

1. What does the Qur'an say about the status of women in relation to men?

The Qur'an establishes that men are *qawwamuna*, or have responsibility over women. This, however, does not mean that women are incapable of handling their own affairs or of assuming leadership roles. This is a misinterpretation of a verse that is the parent source of all juristic opinion on the status and position of women, Surah an-Nisa' 4:34. It states:

Men are *qawwamuna* over women, (on the basis) of Allah has (*faddala*) preferred some of them over others and (on the basis) of what they spend of their property (for the support of women) ...

This verse has been misinterpreted to mean that men have authority over women and that all men are superior to women. Instead, it is intended to establish mutual responsibility in society, within a specific social context. Biologically, only women can bear the future generations of Muslims. The Qur'an creates a harmonious balance in society by establishing, for men,

the material responsibility to support and ease this biological function of women.

2. Doesn't this material responsibility mean that men have a higher status than women?

Responsibility is not and cannot be interpreted as superiority. It should be noted that the word *qawwama* also means "to provide with the means of subsistence". Therefore, a man who does not maintain his wife and breaks this relationship of mutual responsibility should not be *qawwama*.^{iv}

3. What about the fact that men receive a double share of inheritance?

Men's double share of inheritance under the *faraid* should be seen in the context of the material responsibility mentioned in the Qur'an: they are invested with the responsibility of spending for women's support. It must also be remembered that the deceased estate's distribution under the *faraid* should only take place after the payment of any debts, and of any bequests or legacies under a will, or *wasiyya*.

4. Is it true the Qur'an says that Allah (s.w.t.) prefers men over women?

The Qur'an does not say that "all men are superior to or are better than all women", or that all men are preferred by Allah (s.w.t.) over all women. When it says that "some (unspecified gender) are preferred by Allah (s.w.t.) over others", it uses general language that reflects an observable reality: some creatures have some advantages over others, and even some humans over others. It does not mean that all men always have an advantage over all women, or all women over all men.

iv Aftab Hussein, *Status of Women in Islam*, Law Publishing Company, Lahore, 1991, at p. 205.

Even if (some) men are physically "stronger" than (some) women, the view that this makes men superior is not supported by the Qur'an and authentic Sunnah. The divine sources mention "care" and "responsibility" within the family, but not superiority. Muslim men and women are equal in their individual and social responsibilities, being in charge (protectors) of one another and of society as a whole (*awliyya*), as stated in Surah al-Taubah 9:71.^v

5. But what about the verse that says two female witnesses are equivalent to one man?

Surah al-Baqarah 2:282 is often quoted to suggest that the evidence of two women equals the evidence of one male, and that women are intellectually and morally less capable. The verse states:

Whenever you take credit for a stated term, set it down in writing. And let a scribe write it down equitably between you ... And call upon two men of your men to act as witnesses; and if the two men are not available to you as witnesses, then a man and two women from among you, so that if one of them should make a mistake, the other could remind her ...

It must be stressed that this verse relates to a written loan agreement and is rooted in the socio-historical context of the time. That two women may be substituted for one male witness was due to the fact that, at the time of revelation, women were less familiar with business procedures than men. Therefore, they were more liable to commit mistakes.^{vi} The presence of a

v Fathi Osman: *Muslim Women in the Family and the Society*, Reprint 1996, SIS Forum (Malaysia) Behad), at p.48.
vi Muhammad Asad : *The Message of the Qur'an*, commentary on Surah 2:282, also with a reference to Abduh in *Manar III*.

second woman was so that if the woman witness erred or forgot, the other was needed to remind her.

Hadith

1. There is a hadith that says, “When the news reached the Prophet (s.a.w.) that the Persians had made the daughter of Chosroe their ruler he observed: “That a nation can never prosper which has assigned its reign to a woman.” Doesn’t this mean a woman cannot become the leader of a nation (*khalifah*)?

That is the traditional interpretation by a majority of jurists, which also largely precludes women from becoming judges (part of the function of a *khalifah*). However, it must be noted that this hadith, said to be related by Abu Bakra, is classified as an *ahad*, or isolated hadith. This means that the narrators of this hadith do not exceed two persons in each generation. A *mutawatir* hadith, on the other hand, means a hadith that is reported by an indefinite number of people in such a way that precludes the possibility of it being false.

It is a principle of Islamic jurisprudence that an *ahad* hadith is not a basis for binding rules, nor is it necessary to act upon it. Hence, it is strange and illogical that this isolated tradition should have been made the basis for the ruling that a woman cannot become a head of state or be appointed as a judge. This ruling has had serious implications on society in general as well as on women, resulting in the regression of their status and position.

2. What is the evidence that this hadith is unreliable?

The above hadith was narrated for the first time during the Battle of the Camel in which Aishah (r.a.) led her forces into Basrah. Her army included many Companions of the Prophet, none of whom objected to her being in command or deserted her. Her forces, which eventually lost, reportedly also included Abu Bakra. If the hadith had been genuine, Abu Bakra would have obeyed the injunction by not going out to battle under Aishah’s banner. Another possible explanation may be that the report was in the nature of a *khabar* (information).^{vii}

Many modern-day commentators view this hadith as a false one. How could it be said that a woman cannot become the leader of a government when Aishah’s leadership was accepted by eminent Companions of the Prophet?^{viii}

3. What are the criteria used to determine whether a hadith is reliable?

A hadith cannot be accepted as authentic if:

- i. it describes what is impossible or unacceptable to human reason,
- ii. it is contrary to the Qur’an,
- iii. it is contrary to historical facts.

The former Chief Justice of the Federal Shariat Court of Pakistan, Justice Aftab Hussein, referred to the view of Dr Abdul Hamid Mutawalli, who said this tradition is clearly one of the thousands which were forged and ascribed to the Prophet (s.a.w.) falsely, as it contains all the three defects.^{ix}

vii Justice Aftab Hussein: *Status of Women in Islam*, Law Publishing Company, Lahore, 1991, at p. 220.

viii Asghar Ali Engineer *The Rights of Women in Islam*, 1992, IBS Buku Sdn Bhd., at p. 77.

ix Aftab Hussein, at p.221.

4. However, didn't Aishah (r.a.) say, "It would be more to my liking had I remained in my house and not gone to the expedition to Basrah"?

If Aishah (r.a.) had, in fact, made this statement, it could have been because she regretted the loss of so many lives, including some of her nearest and dearest, and of her own prestige – she did not necessarily mean she was not supposed to lead.^x

^x Nabia Abbott: *Aishah – The Beloved of Muhammad*. First published in 1942 by the University of Chicago Press, Al Saqi 1985, at p.173.

3

TEXTUAL SOURCES ON EQUALITY OF MEN AND WOMEN

There are also Qur'anic verses and hadith which emphasise the equality of men and women before God, but these are often overlooked by those in favour of male dominance. The question of women's ability to lead and hold important positions, including the office of a judge, is related to this larger question of equality between men and women.

Qur'anic verses and hadith

1. Are there any verses that support equality between men and women?

Surah Ahzab 33:35 explicitly addresses men and women without discrimination when it states:

Verily, for men and women who have surrendered themselves unto God, and believing men and believing women, and truly devout men and truly devout women, and men and women who are true to their word, and men and women who are patient in adversity, and men and women who humble themselves (before God), and men and women who give in charity, and self-denying men and self-denying women, and men and women who are mindful of their chastity, and men and women who remember God unceasingly: for them has God readied forgiveness of sins and a mighty reward.

Surah al-Taubah 9:71 states:

The Believers, men and women, are protectors of one another, they enjoin what is just and forbid what is evil ... On them will God pour His mercy.

This is the final verse to be revealed on the relationship between men and women. In it, men and women are said to be each other's *awliyya* – protectors or protecting friends and guardians. It also talks about the obligations of both men and women in Islam, including enforcing what is just and forbidding what is evil.

These are primarily the duties of the State, as it is in the best position to fulfill them. In ordering women to discharge the duty of enjoining good and forbidding wrong, the verse paves the way for women to take on the authority of the State, including the authority of the Head of the State.^{xi}

2. How do you read these verses in the context of earlier verses?

While Surah an-Nisa' 4:32 mentions "men (*rijal*)" as being *qawwamuna* over "women (*nisa'*)", Surah al-Taubah 9:71 mentions "believing men (*mu'minun*)" and "believing women (*mu'minat*)" as being *awliyya* over each other. Revealed in 8 Hijrah towards the end of the Prophet's life, it can be said that Surah al-Taubah 9:71 sums up the spirit of equality and mutuality the Qur'an preaches in the relationship between men and women.

^{xi} Ibid., p.228.

3. What does the hadith have to say about equality?

A hadith narrated by Sayyidina Ali (r.a.) and reported by Ibn 'Asakir states that, "One who honours women is himself honourable, and one who insults women is himself lowly."

4. What about the allegation that women are defective in reasoning and religion?

The hadith related by Abu Bakra is part of the tradition that declares women as "*naqis al-'aql wa al-din*" (defective or imperfect in reasoning and religion). This is neither acceptable to reason nor in conformity with the Qur'an or to present-day society. This tradition has all the three elements of forgery.^{xii} If this tradition is assumed to be true, it would conflict with various injunctions in the Qur'an itself and also in other traditions. It would also conflict with several historical facts in the Prophet's time and that of the rightly-guided Caliphs.

5. What is the conflict between this tradition and the Qur'an?

It is in conflict with the verses about Balqis, Queen of Sheba (Surah Naml 27:29-35), as well as with the verses which demonstrate equality (e.g. Surah Ahzab 33:35 and Surah al-Taubah 9:71 cited above). Determining what is right and wrong is one of the basic duties of the leaders of a state, and here both women and men have been enjoined to perform this task. How can women then be excluded from being leaders of the state, especially in a democratic government?

Furthermore, if women are defective in reason and religion it would be necessary to restrict their power to dispose of their

^{xii} Ibid., pp.221, 222.

properties, or at least make it necessary for them to obtain the approval and permission of their husbands or guardians. But Islam has acknowledged the absolute competence of women in this respect and has allowed them full rights of disposition over their properties.

6. How does this tradition relate to other hadith?

It would also appear to conflict with another tradition of the Prophet (s,a,w,) narrated by Sayyidinna Ali (r.a.), as quoted in the previous section.

7. How does this tradition contradict historical facts?

The Caliphs sought counsel from women and gave importance to their opinions. Earlier in Islamic history, the first person to believe in the Prophet (s.a.w.) was a woman, Khadija (r.a.) (the Prophet's first and only wife until her death 25 years after their marriage). The first martyr, or *syahidah*, to die in the cause of Islam was also a woman, Ummu Amir, the wife of Yasir. These women disprove the notion that women are defective in reasoning and religion, respectively.

8. Hasn't the hadith reported by Abu Bakra been verified by al-Bukhari?

Since its inclusion in *Sahih Bukhari*, this hadith is often considered indisputable. However, the study of hadith is complex and veracity is not impossible to dispute based on available information. Al-'Asqalani's 17-volume *Fath al-bari* contains line-by-line commentaries on al-Bukhari. For each hadith of the *Sahih*, al-'Asqalani gives historical clarification: the political events that served as a background, a description

of the related battles, the identity of the conflicting parties, the identity of the transmitters and their opinions, and finally the debates concerning their reliability.^{xiii}

9. Isn't questioning any hadith an attack against one of the tenets of Islam?

Imam Malik in fact recognised that the transmission of hadith is only as reliable as its narrator. He said, "This religion is a science, so pay attention to those from whom you learn it. I had the good fortune to be born [in Medina] at a time when 70 persons [Companions] who could recite hadith were still alive. They used to go to the mosque and start speaking: The Prophet said so and so. I did not collect any of the hadith that they recounted, not because these people were not trustworthy, but because I saw that they were dealing in matters for which they were not qualified."

He also warned, "...And finally one should not receive knowledge from a *shaykh*, even a respected and very pious one, if he has not mastered the learning that he is supposed to transmit", and that "There are some people whom I rejected as narrators of hadith, not because they lied in their role as men of science by recounting false hadith that the Prophet did not say, but just simply because I saw them lying in their relations with people, in their daily relationships that had nothing to do with religion".^{xiv}

10. What evidence is there to question Abu Bakra's reliability as a narrator of hadith?

Abu Bakra recalled the hadith a quarter of a century after the

^{xiii} Ibid., p.50

^{xiv} Ibid., pp.59, 60.

death of the Prophet (s.a.w.), at a time when the Caliph Ali retook Basrah after defeating Aishah in the Battle of the Camel. Aishah was in a difficult and vulnerable position, as many of her supporters died in battle. It seems too convenient a coincidence that Abu Bakra then remembered having heard a hadith that suggested one should not participate in a war if the army was headed by a woman.

There are other instances where Abu Bakra's timing could be considered suspicious. After the assassination of Ali, Mu'awiya could only legitimately claim the caliphate if Hasan, Ali's son, declared in writing that he renounced his rights. Hasan did so under pressure. It was at this moment that Abu Bakra recalled having heard the Prophet say that "Hasan will be the man of reconciliation". Hasan, however, would have been only a baby when the Prophet was supposed to have said it. Abu Bakra had a truly astonishing memory for politically expedient hadith which curiously and effectively fitted into the stream of history.^{xv}

Furthermore, if one follows the principles of Imam Malik for fiqh, Abu Bakra must be rejected as a source of hadith. This is because one of the biographies of him tells us that he was convicted of the offence of *qadhif* (slander for giving false testimony by making an unproven accusation of *zina*) by the Caliph Umar al-Khattab, and flogged.^{xvi}

11. But what if the hadith in question is authentic?

Even if the isolated tradition reported by Abu Bakra is to be taken seriously, there is no need to infer from it a blanket rule

that prohibits women from holding leadership positions in any form of government.

12. Is it possible to accept that hadith narrated by Abu Bakra as authentic, and yet support the interpretation that women can hold leadership positions?

An eminent theologian from India, Maulana Ashraf Ali Thanavi, expressed a fatwa (religious opinion) regarding Abu Bakra's hadith that said:

Governments are of three types. The first type is one which is both personalised (*tam*) and based on popular sanction (*'am*). The *tam* type of government is one in which the ruler rules personally and is not dependent on any other superior's sanction. The second type is one which is absolute and has no popular sanction. The third type of government is one which has popular sanction but is not absolutist. As an example the first type of government may have a woman as head of state who has personal authority. A woman who heads a small group and wields absolute authority without sharing it with anyone else can exemplify the second category. The example of the third category, is one in which the head of state has no authority by herself but is part of a consultative body, the real authority being wielded by the consultative body. If we contemplate on the hadith it becomes obvious that what is implied by it is the first category (i.e., personalised rule of a woman). The reason for pronouncement of this tradition is that the people of Iran had made the daughter of Chosroe their ruler.

xv Ibid., pp.53, 58.

xvi Ibid., pp.60,61.

The Maulana refers to the story of the Queen of Sheba in the Qur'an and about whose rule it raised no objections. From the words of the Qur'an, "I never decide an affair until you are in my presence" (Surah al-Naml 27:32), the Maulana concludes that her rule belonged to the third category of government (democratic) and what the Prophet objected to was the rule of the first category.^{xvii}

The view expressed by Dr Yusof al-Qaradawi on this matter is also convincing. He explained that a fatwa previously issued by Al-Azhar in the middle of the 20th century - that major public posts were the preserve of men - was made for that time. According to him, if the sheikhs who made the fatwa were alive today and observed the social changes and circumstances that have taken place since then, and the need for new *ijtihad* (independent reasoning), they might change their view.

Yusof Qaradawi also referred to the story of the Queen of Sheba in refuting the view that women should not be given power or be allowed to decide. He is also of the view that the hadith that says a nation will not succeed if it is ruled by a woman is in the nature of khabar, or information, and is therefore not binding legal doctrine.^{xviii} The Queen's wisdom was demonstrated by her recognition of the nobility of the message of the Prophet Sulaiman (Solomon) (a.s) and her submission in Islam with Sulaiman (a.s.) (Surah Naml 27:30 & 44).

Moreover, even during medieval times, it was considered by al-Tabari that since a judge does not have to lead the army in

war, a woman is equally qualified for appointment to judicial office.^{xix} Ibn Hazm has held that except for the caliphate itself, women are eligible for all offices of government. It may be noted in passing that a group of the Kharijites, namely the Shuhaybiyyah, have held that women are eligible for the office of the head of state.^{xx}

xvii Referred to in Asghar Ali, at pp. 77-79.

xviii Abu Haniffa Mohamed Abdullah & Mohd Yazid bin Zul Kepli, "Women Judges in Shariah Court: Why Not?", in [2008] *Shariah Law Reports*, at p.10.

xix Referred to in Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam* (1999), at p.146

xx Ibid, pp. 97, 99.

4 Muslim Women in History

There are various examples of the participation of women throughout Muslim history that support the view that women are capable of becoming leaders.

1. What are examples of women's participation during the time of the Prophet (s.a.w.) and the rightly-guided Caliphs?

Women Companions of the Prophet (s.a.w.) were not confined to their homes. They took part in activities ranging from politics to religion and participated in all professions. Some were very accomplished and sought after for consultation, and lived independently. It was only much later that women came to be confined to the home and people generally began to believe that their main role in life was to bear children and to do housework. For instance:

1. It is a well-established historical fact that the Prophet consulted Salma (r.a.) on the occasion of the Treaty of Hdaybiya.
2. Women participated freely in the affairs of war. Muslim women, including the Prophet's wives themselves, actively helped the wounded in the battle of Uhud. Some even participated in actual combat.
3. In *Sunan Abu Dawud*, it is reported that the Prophet (s.a.w.) appointed Umm Waraqah to be the imam to lead the prayers of her household, while the *muezzin* was an

elderly man. This hadith is said to have a stronger *isnad* (chain of transmission) than another contradictory hadith, reported in *Sunan ibn Majah*, that a woman cannot be the imam when there are men in the congregation.^{xxi}

4. Umar, one of the rightly-guided Caliphs, was corrected by a woman on the value of the *mahr* (dower) when he wanted to fix the mahr lower. Umar had to acknowledge that her opinion was correct.
5. Aishah (r.a.) has been known to have corrected Abu Hurairah with regard to traditions that were in conflict with the Qur'an. She was consulted on her knowledge of the Sunnah by the believers. Imam Zarkashi (born in 745 Hijrah) devoted a book dedicated to Aishah's particular contribution in this field, entitled *Collection of Aishah's Corrections to the Statements of the Companions (Al-'irada fi ma istadrakathu 'A'isha 'ala al-sahaba)*.^{xxii}
6. When the Qur'an was first compiled, it was entrusted to the custody of Hafsa (r.a.), daughter of Umar al-Khattab and wife of the Prophet. She remained the trustee from the time of Abu Bakar's caliphate until the reign of Uthman.
7. Umar had appointed Shifa binti Abdullah as an inspector of markets.
8. During the election of Uthman as the third Caliph, Abdul Rahman ibn Auf, who was put in charge of the election,

^{xxi} Discussed in KH. Hussein Muhammad, *Fiqh Perempuan*, at pp.29-38..

^{xxii} Referred to in Fatima Mernissi, at p. 77.

ensured that both women and men participated in the election.^{xxiii}

9. Khansa', Safiyah, 'Atikah, Hind bint Harith, Kabshah bint Rafi and several others were known for their excellence in the sphere of poetry. Khansa even published a collection of poetry.
10. Apart from Aishah, Umm Salma, Umm 'Atiyyah, Asma' bint Abu Bakr, Umm Hani and Fatima bint Qays also narrated a number of hadith.
11. Rafidah Asiamiyah, Umm Muta, 'Umm Kabsha and several others were experts in medicine and surgery. Rafidah had her nursing home next to the mosque of the Prophet (s.a.w.).

2. What about women's participation in certain later periods in Muslim history, such as during the Abbasid period, the Fatimid period and the period of Muslim rule in India?

1. During the Abbasid period, many women wielded great influence in state affairs. Zubaydah, wife of Caliph Harun al-Rashid, was a woman of intelligence who advised her husband on political and administrative matters.
2. Other women in the high circles of that Abbasid period also achieved distinction and exercised influence in state

affairs. These women include al-Khayzuran, al-Mahdi's wife and al-Rashid's mother, 'Ulayyah, daughter of al-Mahdi, Zubaydah, al-Rashid's wife and al-Amin's mother, and Buran, al-Ma'mun's wife.

3. Hurrah Malikah Arwa' bint Ahmad headed the administration of the province of Yemen on behalf of the Fatimid Caliphs of Egypt. Three of the Fatimid Caliphs, Mustansir, Must'ali and Amir, reposed faith in her and gave her a free hand to govern Yemen. She was held in high esteem by all three. The last of the three Caliphs, Amir, even appointed her *hujjah* (the highest religious office under the Fatimid hierarchy).
4. In India, stories of such outstanding Muslim women as Raziyah Sultana, Chand Bibi and Nurjahan, among others, are well known. Their ability to govern and administer has been recognised by all historians. The courage of these extraordinarily talented women who came to the fore despite severe restrictions and strong prejudices in society, won them many plaudits.^{xxiv}

3. What about the references in the Qur'an to accomplished women during the periods of the earlier Prophets?

The Qur'an itself has a special category of women who performed unique functions from the perspectives of the Qur'an and humanity. They are:

1. Hawa (Eve), wife of Prophet Adam (a.s.) (in Surah al-Baqarah 2:35, Surah an-Nisa' 4:1, Surah al-A'raf 7:19-23).

^{xxiii} Ibn Kathir, *al Bidaya wa an Nihaya*, referred to in Muhammad Hamidullah, *The Prophet Establishing a State and His Succession*, Pakistan Hijra Council, Islamabad, 1988, at p.124.

^{xxiv} Asghar Ali, at pp.81, 82.

2. Maryam (Mary), mother of Prophet Isa (Jesus) (a.s.) (in Surah al-Imran 3:6 & 37, Surah Maryam 19:16-34, Surah al-Tahrim 66:12). She was classified as “one of the *qanitin*” (Surah 66:12) a word that uses the masculine plural form to indicate one devout to Allah. There is no reason not to use the feminine plural form (*qanitat*), except to emphasise that the significance of Maryam’s example is for all who believe, regardless of gender.^{xxv}
3. Hannah, woman of the family of Imran and mother of Maryam (in Surah al-Imran 3:35).
4. Asiyah, adopted mother of Prophet Musa (Moses) (a.s.) and wife of the Pharaoh (in Surah al-Qasas 28:9, Surah al-Tahrim 66:11).
5. Umm Musa, the birth mother of Prophet Musa (a.s.) (in Surah Ta Ha 20:38-40, Surah al-Qasas 28:7 & 10-13). She received *wahy*, divine communication from Allah (Surah 28:7), demonstrating explicitly that women too have been recipients of *wahy*.^{xxvi}
6. Balqis, Queen of Sheba (in Surah Naml 27:23-44). The Qur’anic story of Balqis celebrates both her political and religious wisdom.^{xxvii} The Queen’s wisdom in politics is demonstrated by her recognition that the letter from Prophet Sulaiman (Solomon) (a.s.) was “worthy of respect” (Surah Naml 27:30) and her religious wisdom is demonstrated in her submission in Islam with Sulaiman (a.s.) (Surah Naml 27:44).

xxv Amina Wadud . *Qur’an and Woman*, at p.40.

xxvi Ibid.

xxvii Ibid.

5

Socio-historical circumstances and female participation

A clearer perspective on the historical position of women in Muslim civilisation may be obtained through comparisons with the historical position of women in Western civilisation. Socio-historical circumstances in the past tended to limit women’s role in almost all societies, both in the West as well as in the East.

1. Aren’t women’s rights a Western concept?

Muslim advocates of women’s rights are often accused of being westernised or influenced by the West. Yet it is the original Islamic teachings which upgraded the status of women and rescued them from the oppression and injustice suffered in pre-Islamic Arabia and various other historical civilisations.

2. What was the historical background of women’s rights in the Western world?

On family law

Unlike the position under Islamic law, which has always acknowledged women’s property rights, the property rights of women were limited in most Western legal systems. Reforms in favour of women only began to take place in the latter half of the 19th century. Under English common law, a wife had no capacity to hold property in her own name and everything she possessed became her husband’s after marriage. The Act of Parliament which began altering the common law position to allow married woman to own property was only enacted in 1882 (the Married Women’s Property Act 1882).

On civil law

A married woman was also denied direct access to the courts as she was incapable of suing or being sued in her own name. She could only sue or be sued through her husband. Law reforms in the 20th century brought about statutes such as the Married Women and Tortfeasers Act 1935, declaring that a married woman was capable of suing or being sued.

On political participation

In Great Britain, the idea of women's suffrage (the right to vote in parliamentary elections) was not taken seriously until the early years of the 20th century. In 1903, the Women's Social and Political Union was formed, and women activists (known as suffragettes) held public demonstrations and fought hard for voting rights. The government attempted to suppress the movement by arresting and imprisoning the suffragettes on charges of disturbing the peace. However, at the outbreak of the First World War in 1914, these women leaders called off the suffrage campaign and offered their services to the government in the war effort. The government then released all suffragette prisoners and the women activists devoted their efforts to aiding the national cause, especially by working in military hospitals, ammunition factories and farms. Towards the end of the war, in 1918, the Representation of the People Act gave the vote to a limited number of women. The age of women voters in the 1918 Act was 30 and above. Only 10 years later, in 1928, was the age of women voters lowered to 21 to place them on an equal footing with male voters.

3. What was the extent of women's intellectual involvement in early Muslim history?

Among the first generation of Muslims, women were involved in the transmission of Prophetic reports as well as the development of legal doctrine. The most prominent of these women was Aishah (r.a.). Her marriage to the Prophet (s.a.w.) gave her privileged status as a transmitter of religious doctrine. However, it was her own qualities as an individual that gave her the authority to interpret law.

Women's participation in the production and reproduction of the religious sciences did not cease there. Evidence of female participation in the public transmission of the hadith can be found in many diplomas (*ijazas*) containing women's names and in the manuscripts that mention women as teachers and students. There is some evidence that women also participated in the more speculative branches of the religious sciences, such as positive law and speculative legal philosophy.^{xxviii}

4. Where did Muslim jurists stand on the issue of women's judicial capacity?

There were arguments in medieval Islamic legal discourse that sought to locate the source of gender-based distinction against women not within the biological nature of women, but in specific social circumstances. These include women's marginalisation in political contexts and the role that women played within those social circumstances.^{xxix}

A witness's testimony and a judge's verdict are both political because the consequences of each are immediate, tangible

xxviii Mohammad Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought" *Int. J. Middle East Studies* 29 (1997), at p.191.

xxix Ibid.

and binding.^{xxx} However, as noted by al-Qarafi, courts faced difficulties in enforcing the law. More generally, men (including al-Qarafi) in 13th century Egyptian society viewed women as being inferior to men. Subsequently, there is a greater likelihood that the losing party will not respect a court decision involving a woman judge or witness.

In a society where men would respect the decisions of the court and comply with court verdicts regardless of the gender of the witnesses or the judges, there is no reason to exclude qualified women from being appointed as judges.

5. Didn't al-Qarafi also argue that women are inherently deficient in reason and religion?

This argument was described as weak by Ibn al-Shatt (d.1323). The reason is that if one accepts this argument, this deficiency must also be present when a woman acts as a narrator of hadith.^{xxxi} However, women are recognised as narrators of hadith, and also as muftis (legal experts).

6. Are only men allowed to interpret textual sources of Islam?

Interpretation of revelation was free of gender restrictions. A woman's legal opinion (fatwa) was just as valid and morally binding as the legal opinion of a man. Thus a woman could legitimately be a mufti, a legal expert, whose task it was to communicate legal rules to non-specialists, including at times judges and other holders of political power.

^{xxx} Mohammad Fadel, at p. 188.

^{xxxi} Mohammad Fadel, at p. 192.

7. What was the position of jurists and ulama' on women as muftis? Were there no objections?

There was complete agreement among medieval Sunni jurists that women could be muftis. Moreover, it was the law's acceptance of women as muftis that led al-Tabari to argue that a woman could be a judge in all areas of the law.^{xxxii}

There are also a number of historical instances about the exercise of jurisdiction of *qadhi* by women without any objection by the ulama' of that age. The oldest example is of the mother of the Caliph Muqtadar Billah who presided at the High Court of Appeal.^{xxxiii}

^{xxxii} Mohammad Fadel, at pp. 189, 190, 200.

^{xxxiii} *Tarikh al Khulafa* by Sayuti, cited in Aftab Hussein, at p. 229.

6

Appointment of Women Judges in Modern Times

Circumstances have changed in modern times, and more societies have become receptive to accepting women in leadership positions. The Pakistan Federal Shariat Court has upheld the appointment of women judges based on Islamic arguments, and Morocco, Sudan, Egypt, Tunisia and Indonesia already have women as Shari'ah Court judges.

1. What about the appointment of women judges in modern times, in a country like Pakistan, for instance?

In *Ansar Burney v. Federation of Pakistan*^{xxxiv}, a case decided by the Federal Shariat Court of Pakistan, a petition was filed to challenge the appointment of women as magistrates. The petitioners opposed the appointments on the grounds that, among others:

1. During the period of the Holy Prophet and Companions, judicial duties were not entrusted to women as it appeared to be a violation of the injunctions in Islam.
2. According to Muslim law, the evidence of a woman is half that of a man and her share in inheritance is equal to half of that of her brother. The judgment of two women can only be equivalent to that of a man.
3. Women do not fulfill the qualification of a judge according to established principles of Muslim jurisprudence.

The Court dismissed the petition on the following grounds, among others:

1. It is not possible to accept the argument that since the evidence of a woman is half that of a man and her share in inheritance is half of that of her brother, there should be at least two female judges to decide a case. According to fiqh, at least two male witnesses must prove disputes of property or criminal cases in *hudud* and *qisas*. If the petitioner's argument is taken to its logical conclusion, it should follow that no male judge sitting alone can decide a civil or criminal case, as the number of judges must then correspond to the number of witnesses.
2. The shares in inheritance to a male are in proportion to his responsibilities and not due to any superiority over the female.
3. That the Holy Prophet or his four successive Caliphs did not appoint any women as judges is not grounds for excluding women from the judiciary. The rule is that what is not specifically prohibited in the Qur'an and Sunnah is permitted. The burden of proof on any alleged prohibition is on the person who claims it to be so.
4. There is no specific and direct injunction in the Qur'an and Sunnah of the Holy Prophet concerning women as shari'ah judges, only the conflicting opinions of the jurists.

xxxiv PLD (1983) FSC 73.

5. There are certain injunctions in the Qur'an that are common to both men and women, regarding the duty of all Muslims to be just and do justice. (Surah an-Nisa' 4:58, Surah al-Ma'idah 5:42, Surah al-Hadid 57:25)
6. The words "*adl*" and "*qist*" in these surahs are used in a much wider sense and each Muslim, whether male or female, is bound to be just and equitable in his dealings with his spouse, parents, children, neighbours, relatives, friends, fellow Muslims and all others. The concept of justice in deciding disputes between the parties or in dealing criminal cases is only a part of *adl* or *qist*. The verses Surah 4:58 and 5:42 clearly envisage determination of disputes or litigation. There is no distinction in this connection between man and woman.

2. What about the appointment of women judges in neighbouring Indonesia, which is also the world's most populous Muslim country?

Indonesia in the 1990s had approximately 100 women judges in the Shari'ah Court or *Peradilan Agama*. Their appointment came with the enforcement of the Marriage Law of 1974 (no. 1 of 1974).

Under the existing majority juristic interpretation, the qualifications of a judge are as follows: Muslim, major, a free person, mature, just, with integrity, able to use his sense of hearing and sight, a *mujtahid*, and male. The appointments of women as judges in Indonesia were therefore reasoned and justified as follows:

1. The hadith related by Abu Bakra is stated in the negative - "that a nation can never prosper ..." is not a direct prohibition. This hadith is interpreted as not prohibiting the appointment of women as leaders or as judges.
2. By adopting the Hanafi approach that women can be judges on matters other than *hudud* and *qisas*.
3. Both men and women are enjoined to do good and prevent evil in Surah al-Imran 3:104:

and that there might grow out of you a community (of people) who invite unto all that is good, and enjoin the doing of what is right and forbid the doing of what is wrong ...
4. That it is inconceivable that all women are incapacitated morally and intellectually. The Prophet (s.a.w.) himself acknowledged the intelligence of Aishah (r.a.), his wife. Surah al-Imran 3:190 & 191 states that "those who reflect" are those who "remember Allah when they (men and women) stand, and when they (men and women) sit, and when they (men and women) lie down to sleep". The Qur'an does not discriminate between men and women in "those who reflect (or think)".
5. The interaction of women and men in public does not necessarily bring about a corruption of morality (*fitnah*). One of the necessary qualifications of a judge is integrity. If the appearance of a woman litigant does not bring

about a corruption of morals of a male judge, it would follow that the appearance of male litigants will not bring about the corruption of a female judge. Surah an-Nahl 16:97 states:

As for anyone – be it man or woman – who does righteous deeds, and is a believer withal ... We shall grant unto these their reward in accordance with the best that they ever did.

6. The fact that the Caliphs did not have women appointees as judges does not mean that it is prohibited. There is no clear *nass* (authority) in the Qur'an and Sunnah to prohibit such appointments. The duty of arbitration and settling disputes is a matter enjoined by the Qur'an and Sunnah. The decision of appointing the arbiters or judges is left to humans who can fulfil the requirement of the task of judging.^{xxxv}

3. What comparisons can be made between Pakistan and Indonesia?

It might appear that while the Pakistan decision allows women judges to hear all cases under the shari'ah, the Indonesian argument suggests a limitation to family cases. It should however be observed that the Indonesian appointees (male and female) in the Shari'ah Court in Indonesia are only for family cases under the Marriage Law of 1974. Neither male nor female shari'ah judges in Indonesia are empowered to decide on *hudud* and *qisas* cases.

It is interesting to note that both the Pakistani decision and the Indonesian argument cite Surah al-Taubah 9:71:

The Believers, men and women, are protectors of one another

Revealed in 8 Hijrah towards the end of the Prophet's life, this verse sums up the Islamic way of life within a relationship of women and men as each other's protectors and friends. It sums up the spirit of equality and mutuality of men and women.

4. What is the legal position in Malaysia regarding the appointment of women shari'ah judges?

If seen from a legal angle in Malaysia, there is no specific prohibition on the appointment of women as shari'ah judges. According to the Islamic Administration (Federal Territories) Enactment 1993, the qualifications of a candidate to be appointed as a judge are as follows:

- (a) Must be a Malaysian citizen and;
- (b) Have experience as a Qadi in a subordinate court or Shariah High Court or as a public prosecutor or even a court registrar or a person who is knowledgeable in hukum Shara'.

The provisions in the Administration of Islam (Selangor) Enactment 2003, in sections 58 and 59, also provide the same criteria for candidates to be appointed as judges in the High

xxxv Ibu Hakim Dra. Faizah Manshur: *Kedudukan Hakim Wanita dan Peranannya di Lingkungan Peradilan Agama*, Yogyakarta 1987, paper prepared for discussion at a special meeting of Surakarta Women Judges in Yogyakarta 1987.

Court and subordinate courts. It states that those who are qualified to be appointed as judges are:

- (1) A citizen;
- (2) For a period of not less than 10 years before appointment have practised as a syarie lawyer in any Subordinate Courts or a member of a Shari'ah Court or possesses expertise in Islamic law.

Article 8 of the Federal Constitution of Malaysia now provides that there shall be no discrimination on the grounds of gender. Thus, it would be against the Constitution if a woman who is qualified is not appointed as a judge solely on the grounds of her gender. Similarly, any provision of the law which is based on gender discrimination is void and unconstitutional. Therefore, it becomes clear that all the existing laws in Malaysia can be considered as not preventing women from being appointed as judges. It thus becomes permissible for qualified Muslim women to hold the position of Shari'ah Court judges.^{xxxvi}

Conclusion

There is no prohibition in the Qur'an against the appointment of women to the office of judgeship. There are a number of verses in which Allah commands us to uphold justice without referring to Muslim men or women, such as Surah an-Nisa 4:58, which states: "Allah doth command you to render back your trust to those to whom they are due, and when you judge between people that you judge with justice."

However, certain socio-historical circumstances in the past, particularly during feudal and medieval times, tended to diminish women's status and limit their roles in almost all societies, whether Muslim or not.

With regard to the appointment of women judges in the Shari'ah Court, the following approaches may be taken:

1. Adopting the Hanafi opinion that women can be appointed as judges of family law. In any case, in Malaysia, as in Indonesia, the shari'ah courts deal mainly with family law cases.
2. Adopting the opinion of al-Tabari and Ibn Hazm that women can be appointed as judges in all cases as long as the woman appointed fulfils the requirements for the position. This was a very radical view in medieval times but should be acceptable and logical by modern standards.

^{xxxvi} Dr Ramizah Wan Muhammad, "Women Judges in Islam and the Application in the Malaysian Shariah Court" [2008] *Shariah Law Reports*.

3. Rethinking the paradigm, involving a transformation or reconstruction of the position of men and women in society generally; their participation in public life, as well as the qualifications for appointment to judicial office in the shari'ah courts, and to leadership positions in general.

Given the research results and the contemporary precedents set by other Muslim-majority countries, Sisters in Islam believes that women clearly have a place as judges in the Shari'ah Court. The issue has even been settled from a policy standpoint, as demonstrated by the decisions of the Malaysian Government, the National Fatwa Council and the Perlis state government. The women of Malaysia, however, are still waiting for these policies – and for Islam's spirit of gender inclusiveness – to become reality.

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