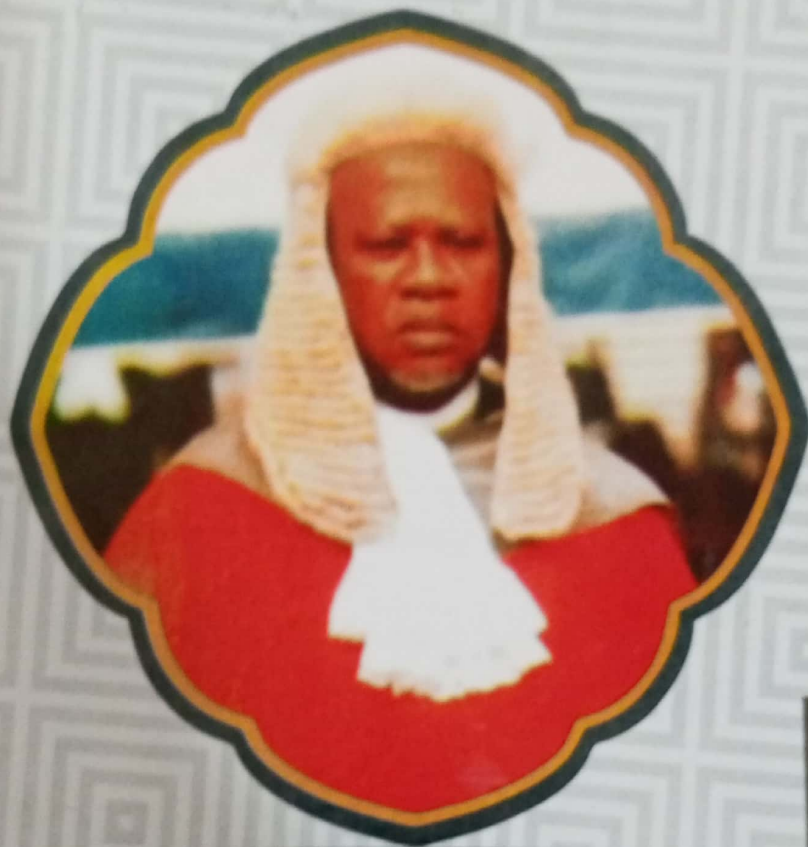


CURRENT ISSUES IN LAW, JUSTICE AND SOCIETY:

ESSAYS IN HONOUR OF
HON. JUSTICE BULYMAN D. KAWU O.F.R.;
CHIEF JUDGE OF KWARA STATE



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APPOINTMENT OF FEMALE AS A QADI (JUDGE) OF SHARIAH COURT OF APPEAL: A GENDER BATTLE OR RELIGIOUS STANCE

Abdulraheem Taofeeq Abolaji*

Abstract

Shariah Court of Appeal in Nigeria is one of the superior courts that adjudicate on Islamic matters. The appointment of the justices is well provided for under the Nigerian constitution. Appointment of a female as a judge of faith based adjudicatory process has remained a thing of divergence among scholars. A cursory look at the appointment made so far in Nigeria reveals that there is no single female ever appointed as Qadi or justice. Therefore, this research investigates the permissibility or otherwise of a female as Qadi of Shariah Court of Appeal in Nigeria. In carrying out this research a doctrinal method is employed which include analysis of primary and secondary data. This paper argues that appointment or otherwise of a female as a Qadi should not be categorised as a gender battle, rather a religious position, depending on the madhab, a given country is disposed to. It is found that a female can become a judge of the Shariah 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. The paper draws lessons from jurisdictions like Malaysia, Pakistan etc where females have been appointed as judges of the Sharia Court.

KEYWORDS: *Qadi, Appointment, Nigeria, Malaysia, Shari'ah.*

1. Introduction

The appointment of a female to a judicial position in *Shari'ah* court system is rather a sensitive issue, especially in the light of religious scholars' stance. There are divergent of opinions on whether female can be appointed as a Qadi of *Shari'ah* court. It is indisputable fact that *Shari'ah* Court of Appeal in Nigeria is an appellate court and basically dealt with issues relating to Islamic personal law. It is however imperative that there is no female Qadi among the Qadis of Shariah Court of Appeal in Nigeria because Nigeria as a country is disposed to *Madhab*

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Imam Malilik, which is well recognised under the Nigeria Constitution. The position of Malik School is clear that a female cannot be appointed a Qadi owing to the fact that it is not permitted. In the same token, the constitution allows the use of the opinions of *Madhab* Imam Malik in the adjudication of Shariah matter in Nigeria.

Contrary to the position of *Madhab* Imam Malik, Hanafi opined that a female can be appointed as Qadi of *Shariah* Court of Appeal, but such a female a Qadi cannot adjudicate on matter relating to Hudud and Qisas. This school maintained that a female can hold the position of Mufti as well as the Registrar of the court. This article examines the permissibility of female as Qadi of *Shariah* Court of Appeal in the light of *Madhab* Imam Malik and lessons from some jurisdictions.

2. Appointment and Qualifications of Qadi of Shariah Court of Appeal

Shariah Court of Appeal is the next to the Court of Appeal in the hierarchy of court in Nigeria. The appointment of the justice of the *Shari'ah* has been spelt out by the Nigeria 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 Qadi and justices of the Shariah 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.¹ As regards to the qualifications of Qadi of *Shari'ah* court of a state, it has been spelt out by the Nigerian Constitution to the effect that such 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.²

Under the *Shari'ah*, in the appointment of Qadi in *Shari'ah* Court of Appeal, there are certain qualities to be meted before the appointment can be upheld. Some of these conditions are that, the person to be so appointed, must be a devoted

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²See S.238(1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

³S.276(3) of the 1999 Constitution of the Federal Republic of Nigeria as amended

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Muslim³, adult⁴ and must have knowledge of Islamic jurisprudence, he must be sane that it is he must be mentally stable and must be on sound mind., he must be a male and this is subject to the arguments among the Islamic Jurists which shall be discussed in the later part of this article.

3. Juristic Exposition on the Appointment Female as Qadi of Shariah Court of Appeal

The majority of Islamic scholars are of the opinion that females are not fit and proper to be appointed as Qadi of *Shari'ah* Court. The proponents of this view are Maliki, Shafii and Hanbali schools. The Hanafi School argued that a female can be appointed as Qadi with exception that such female Qadi cannot adjudicate on matter involving Hudud and Qisas which are criminal matters. It is also the view of Hanafi School that a female can be appointed as Mufti and other top position in the *Shariah* Court, like Registrar, being in the helm of affairs in the adjudication by means of *Sulh* (settlement of disputes). Their views are based on the following Quran verses:

'Men are the protectors and maintainers of women, because Allah has made One of them to excel the other and because they spend (to support them) for Their mean'.⁵

It is crystal 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 appointed in charge of such responsibilities otherwise women would be the protector which is the opposite of what the verse says.

'but men have degree (of responsibility over them)⁶

³ A Qadi must be must be a Muslim and it is of the mandatory requirements this because none Muslim cannot legislate or adjudicate on Islamic personal law as he lacks vires to do so this inline with Quranic 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. Suratul Nisa V141

⁴ It is not permissible to appoint a child as Qadi and this is the consensus opinion of the Jurists because the child is not mature.

⁵Al-Nisa 4:34

⁶Al-Baaqarah 2:228

It should be noted from the above verse that, Almighty Allah has granted men a degree over women and if a woman is to be appointed as judge that would be a total contradiction to the above verse. Because for a judge to adjudicate between two disputants, he must have a degree over them and from that verse it was stated that men have been rated over women.

There are Hadiths of Prophet Muhammad (S.A.W) that support the position that women /females should not be appointed as judge of *Shari'ah* Court. One of the Hadiths was to the effect that A'ubakr (May the peace of Allah be upon him) heard that the people of Persia had appointed the daughter of Chosroes as their ruler, he said '*No people will ever prosper who appoint a woman in charge of their affairs.*'⁷

The above verses as well as the Haditha prevent woman or female to become Qadi of *Shari'ah*. Under the *Shari'ah*, it is permissible because the female lacks of prospering is akin to harm, the causes of which must be avoided. The Hadith is general in meaning and applies to all position 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, inheritance (of which they form part of affairs to be adjudicated upon at *Shari'ah* Court). There is no stern warning that women will never prosper and the most important issue is to rule according to the ruling of Allah (swt) and therefore this warning applies more emphatically to women.⁸

It needs be stressed that the messenger of Allah (SAW) did not intend to cause the people who appointed female as Qadi by the Hadith that '*No people will ever prosper who appoint a woman in charge of their affairs.*'. Rather, what the Hadith is saying is that people who appoint a woman in charge of their affairs will not prosper, because his task was to explain everything that is permissible to his Ummah in order to make them succeed and prosper. The Hadith is admonishing and demonstrating everything that is not permissible for them are made explicit, so as to safe from evil and loss. This is in pari-material with the Hadith of prophet

which says: '*There should no harm inflicted nor reciprocated*'⁹ Rather, he intended to forbid his Ummah from imitating those people (the Persians) by delegating any of their public affairs to a woman and the prophet used this incident to convey this message to the people who were keen to be prosperous so that they will comply with this advice.

Furthermore, the Hadith referred to in the preceding paragraph has been categorised to form part of an isolated Hadith of which the narrators are not more than two persons. Assuming the Hadith has numerous narrators, which is known as Mutawatir in Arabic parlance. Assuming the Hadith is Mutawatir, there will no room for different argument or discussion as far as the appointment of female judge or Qadi is concerned.¹⁰ It is one of the principles of Islamic law as far as the exegesis of the Hadith of Prophet Muhammad Ahad (the chain of narrators of this Hadith are not more than two people) is concerned that binding rules can be formulated from such as Hadith and it is not necessary to act on it.¹¹ Therefore, the appointment of female as Qadi of *Shari'ah* Court is allowed based on the interpretation of one of the Quranic verse which says:

"..... and call in to witness from among your men two witnesses but if there not two women, then one men and two women from among those you choose to be witnesses....."¹²

It can be pointed out from the above verse that the testimony of women in any matter is strong and recognised as credible evidence as same will be admitted in evidence. Therefore, for a woman to be appointed a judge, should be permitted by away of analogy. On the other hand, if we are entertaining fear about the credibility and sense of reasoning of a female, 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.

⁷ Muhammad bn Ismail Abu Abdullahi al-bykhari al-Jafi Al-Bukhaari (4425)
⁸ Al-Shawkaani. Al-Sayl al-jaraar 4/273.

⁹ Ibn Majah, Abu Abdullah Muhammad bn Yasid al-Qasiwayni; 'Sunann Ibn Majah vol. 2, page 784.
¹⁰ Hanafi A.H. (2022) 'Islamic Law of Evidence and Administration of justice in Nigeria. P.104
¹¹ Hanafi A. Hammed (2022) 'Islamic Law of Evidence and Administration of Justice in Nigeria.p106
¹² Al-Baqarah 2 v282s

4. Lesson from Malaysia

Malaysia is a country in Southeast Asia with a sizeable Muslim population. Malaysia has experienced appointment of female as judge of Shariah Court with no jurisdiction to hear and determine Hudud and Qisas of course this is not without the usual argument on the propriety of such appointment. For example in 2003, the Malaysian government decided to appoint female Qadi to the Shari'ah Courts, although women had been appointed as judges in civil courts since the 1960s (the Malaysian judicial system consists of Civil and Shariah courts). Afterward, a controversy arose regarding the authority of female Qadis on certain issues, even though in 2006 the national Fatwa Council of Malaysia ruled that qualified women could serve as religious judges. In the end, it was decided that the authority of female Qadis would be identical to that of male Qadi.¹³

Despite the publication in 2006 by the National Fatwa Committee, the debate (discussion) surrounding the appointment of females judges continues and the available literature by both academic scholars and the legal professionals on the feasibility and the appointment of female judges to serve in the *Shari'ah* court reflects both positive and negative responses. Since the Fatwa does not have a binding effect until after it has been passed by different states, it creates uncertainty and confusion among the public as to the correct position as regard to having women as judges of *Shari'ah* court.¹⁴ This aggravated further when the dispute plays out among those who have authority on the issue. For example, in his 2007 article, the then Chief Shariah Judge of the Malaysian Shariah Court disapproved of female judgeship and relied on several authorities from classical Islamic law, especially the books of the Shafi'i school of jurisprudence. In his writing, this judge argued that women were not competent to be judge due to the complexity of the service and need to adhere strictly Shafii view. The Shafii

¹³ N.Norani, N. Badishah & Masidi (2002) 'Women as judges : Malaysian sisters in Islam' available at <http://www.state.gov/documents/organization/220614.pdf>
¹⁴ R. W. Muhammed & A.M. Rozian (2018) 'Women as Shariah Court Judges with Reference to Judicial Creativity : A comparative study of Malaysia and Indonesia. <https://www.researchgate.net/publication/327973807>

Madhab is the official school adopted in Malaysia and this school disapproves of women serving as judges. In the stead, Chief Shariah Judge concurred that women can be appointed to serve in the Shariah court as Registrars, research officers to Higher Court *Shari'ah* judges, *Sulh* (mediation) officers and other functions within the judiciary.

In contrast, it is the contention of one of the Islamic jurists that lack of consistency among Muslim jurists in their arguments in term of legality has contributed to the confusion on the appointment of female as *Shari'ah* judge. For example the arguments that women lack intellectual capacity and weak in making judgment are presumptions that based on the position that women are not actively exposed to social activities.¹⁵ On the other hand, women in contemporary society are in parallel position to men in term of the opportunity to acquire knowledge through education and freedom to express their thought. History has shown that there are women who are endowed with intellect and intelligence like Hafsa who was adjudged as one of the intellectual and intelligent persons.¹⁶ It is opined that even though women were not known in Islamic history to hold any judicial post except the position of Mufiti, 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 Maqsid Shariah.

The above discussion on the appointment of female as a judge of *Shari'ah* court led to the appointment of more women to the *Shari'ah* court. In some states, women had previously served as *Sulh* officers, in other states they came from the ranks of research officers or lawyers. For example, despite the fact that state of Kelantan officially declared it would not issue out fatwa on the appointment of female as a Qadi, it was one the early state to officially appoint female *Sulh* officers. *Sulh* officers conduct mediation proceedings with the authority t

¹⁵ The Opponent of this view based their opinion on one of the hadith of Prophet Muhammad S.A.W, "O woman give charity for you are the majority of the people of the fire" A woman among them said : And why is that 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 woman among them said ' And what is deficiency of her intellect and religion ? He said: 'The testimony of women among you is like the testimony of a man and the deficiency in your religion is menstruation, because of you will go three or four days without performing Salat. (Jami al-Tirmidhi 5:38:2613).

¹⁶ Hanafi A. Hammed (2022) 'Islamic Law of Evidence and Administration of Justice in Nigeria.p106

perform limited judicial functions (extrajudicial), such as to confirm a divorce settled outside the court. These appointments were not announced publically, as the *Sulh* officers is not a judicial post, 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 *Shari'ah* judges in the Federal Territories of Malaysia; They were Suraya Ramli and Rafidah Abdulrazaq. Both women had served as senior assistant directors of training division of the Malaysian Islamic Judicial Department.

5. Lesson from Malaysia On The Appointment Of Qadi

It is clear from the above discussion regarding the appointment of female as Qadi of Shariah Court in Malaysia, notwithstanding the argument against the appointment, the proponents of the inclusion of female as a Qadi of *Shari'ah* Court were able to find their way through a thin line from Hanafi School. They added the justification in term of human rights, although this leg of argument lacks statutory in Shariah as every gender have been assigned responsibilities by Allah not in terms of the supposed human rights.

Nigeria government needs to borrow from this position, notwithstanding the Maliki School of thought adopted in Nigerian 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 examples, the Area Courts need more judges because of the bundles of cases place before the judges. The female judges would be relevant, especially having regard to the retinue of divorce cases being experienced in the court on daily basis. Women in certain situation are the best in addressing issues relating to women. Therefore, the inclusion of females judges will fast track proper and dispensation of cases and reduce the congestion. The females can also be appointed as mufti as well as the registrar of *Shari'ah* Court. Though in Kwara state, a female has been appointed the Registrar of *Shari'ah* Court of Appeal, but not to the rank of Qadi. Where it is established that a female is competent, she should be appointed, this may not be unconnected to the fact that Maliki school does not permit such appointment as elicited above.

6. CONCLUSION

The appointment of female as Qadi of *Shari'ah* court is not totally prohibited under the Shariah, especially having to the position of the schools identified above. There is evidence from the Islamic jurists who have critically and painstakingly examined the need for the inclusion of the female judges among the judges of *Shari'ah* court in Nigeria. This will surely enhance females in our society. The important thing is that, they must satisfy the requirements. There are females who are well versed in Islamic law. This proposition will create no room for human right on the side of women in Nigeria. The involvement of Aisha (R.T.A) in answering some questions relating to Islamic jurisprudence during the life time of Prophet Muhammd (S.AW) when some women were referred to her. Her response and disposition paved way for their stance and inclusion. It is also apposite to mention that aside from being a Qadi of *Shari'ah* court, they can also hold high position such as Mediators in the establishment of *Sulh*, Registrars of the *Shari'ah* Court of Appeal as practised in Malaysia. It is instructive to note that all the qualities of Judges as mentioned above should be adhered to in the appointment of female as a Qadi of *Shari'ah* in Nigeria.