

AWRĀQ

Estudios
sobre el
mundo árabe e islámico
contemporáneo



Publicado por el
INSTITUTO DE COOPERACIÓN CON EL MUNDO ÁRABE
MEDITERRÁNEO Y PAÍSES EN DESARROLLO
AGENCIA ESPAÑOLA DE COOPERACIÓN INTERNACIONAL

Vol XIX (1998)

WOMEN'S ELIGIBILITY FOR THE QADISHIP*¹

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Introduction

There is no express *Qur'anic*² text or tradition (*Sunna*)³ of Prophet Muhammad (P.B.U.H)⁴ for or against the idea of women occupying the office of judge (*qadi*)⁵ which implies that God never intended to discriminate in this area. However, scholarship has developed which deny women this right. These juristic views are often perceived as those of Islam itself. It is therefore not surprising that there are no historical data

¹This paper was read at The II Joseph Schacht Conference on Theory and Practice in Islamic Law: "The role of qādīs in Islamic law: theory and practice" hosted by the Escuela de Estudios Arabes (C.S.I.C.) Granada, Spain, 16-20 December 1997. It is dedicated in the memory of Soraya Bosch, a friend, colleague and ardent human rights activist who died in October 1997. The author would like to thank the following people and organisations for their invaluable assistance in making this contribution possible. Salbiah Ahmad and the Malaysian NGO group, "Sisters in Islam", WLUML (Grabels, France) and Professor L. M du Plessis (South Africa).

²The *Qur'an* is a religious text considered by Muslims to be the literal word of God. It is a primary source of Islam and contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. Interestingly, the *Qur'an* has more verses dealing with issues affecting women than with legal matters *per se*. Of the approximately 100 verses dealing with women's issues, only a few are consistently utilized to explain the "truly Islamic" status of women. The varying paradigms resulting from this are therefore not surprising at all (Stowasser:1987:262). See footnote 21.

³This is received custom associated with him, embodied after his death in a body of texts compiled as books called *Hadith*. Technically *Hadith* is an item of information related to him and containing either something he did or said and it is sometimes translated "tradition" as transmitted from reporter to reporter (Jaffer:1989:79). *Sunni* scholars recognize six collections of these traditions as being authoritative (Nolte:1958:301).

⁴Salutation meaning Peace Be Upon Him. This salutation will, for the sake of convenience, be implied but not repeated everytime his name is used in the text.

⁵*Qadi* (plural *qada*) means religious judge (Amin:1990:128). The term *qadi* appears 62 times in the *Qur'an* where it refers mainly to God as agent and His decision-making power (Lubbe:1989:83). Women are allowed to become *muftis* (jurisconsults) and give legal advice (Reinhart:1993:6,12). "Rather than judging, the *mufti* clarifies and guides" (*ibid.*,12).

referring to the possible appointment of women as judges (Azad:1987:13-14). Females were considered "...unfit for the difficulties of high office, and for judgements being made dependent on them" (Amedroz:1910:762). The idea that women are unfit for this task has become fossilized and therefore requires constant chiselling to reveal that it does not have any Islamic basis.

At the time of his death Prophet Muhammad left behind him a well organized judicial system. His successors or the first four *caliphs*,⁶ namely Abu Bakr, Umar, Uthman and Ali continued with this system (Guraya:1984:226). After his death, the *caliphs* Ali and Umar were responsible for setting out the "ideal" criteria (qualities/ qualifications) with which judges had to comply in order to qualify for appointment (Al Aseer:1976:16,110; Gottheil:1908:387). One of these requirements was that the *qadi* himself must be a male (Reinhart:1993:10). Other completely irrelevant criteria are used to advance the argument as to why women cannot become judges; for example, her speech and physical figure/appearance might prove to be too alluring and so forth (Azad:1987:17).

A controversial question among the different schools of Islamic (common) law⁷ (or *Shari'a*) is whether a woman is competent to be appointed as a *qadi*. The views of jurists (founders of these schools) on the matter, although based on (their) interpretations of the primary sources of Islam, namely the *Qur'an* and certain traditions (*Sunna*) of Prophet Muhammad, are nonetheless subjective and man-made. It can, for example, be argued that women can/cannot be judges or that Muslim countries can/cannot ratify human rights instruments because a basis and validation for conflicting views on particular human rights issues can be found in the same *corpus* of Islamic law which is ambiguous in many respects. The same pattern is evident with matters relating to the existence-

⁶After the death of the Prophet legal decisions were given by early *caliphs* who now led the people. The Caliphate followed the precedents set by Prophet Muhammad for a period of 30 years of Islamic history (Taji:1973:25).

⁷In the eighth century four schools (*madhhabs* or versions) of law were established and named after their founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* (Esposito:1982:2). These together comprise the *Sunni* school as opposed to the *Shi'ites* (also called *Shia*). Islamic law or *Shari'a* is the interpretation and application of the fundamental sources by these early jurists.

expansion/non-existence-constriction of women's rights. This paper asserts that in order to deal with these conflicts guidance must ultimately be sought in the spirit of equality implicit in (canonical) Islam. It is submitted that "...as women become effective participants in Muslim society, *Islam* will be better able to cope with the realities of the twent[y]-first century" (emphasis added) (Rahman:1990:498).

In this paper I will ascertain whether those views of Muslim jurists which deny women access to the office of *qadi* accord with the *Qur'anic* norm of equality between the sexes and the *Sunna* of Muhammad. I will take on the issue as a matter of Islamic law by dealing with what the schools said and why.

Primary sources of Islam are often used in justification for the view that women are not eligible to be judges. Some traditions in fact go so far as to treat the office of *qadi* as such "...with suspicion, ambivalence, and at times disdain..." (Reinhart:1993:6). It is true that some *Qur'anic* references can in fact be interpreted to allude to an inequality of sexes. However, in this paper it is argued that although the effects of conservative interpretations of for example, verses dealing with socio-economic matters, provide for unequal treatment between the sexes, verses relating to ethico-religious concerns highlight that a more dominant spirit of equality pervades Islam (Esposito:1982:107). The traditions cited denying women access to the *qadiship* are also to be treated with caution.

Muslim countries profess to treat women equally in the public sphere. As far as employment in the public domain is concerned, the constitutions of most countries guarantee equality in access to state employment for all citizens, regardless of gender. However, in many of these countries women are not allowed to become judges or magistrates or even to practise law at all. The position in several Muslim countries will be looked at and will conclude with a brief look at the position in South Africa.

Schools of Islamic Law and women's eligibility for the *qadiship*

In terms of the *Hanafi* school of law, because a woman qualifies as a witness, she may execute this essentially male task in family law matters

but not in cases concerning punishment and retaliation as her evidence in these matters is not admissible. According to the *Shafi'i*, *Maliki* and *Hanbali* school of law she may not hold the office of *qadi* at all. According to a third view, namely that of Al Tabari, a woman could be a judge in all matters, a view that accords more with the *Qur'anic* norm of equality between the sexes (Al Aseer:1976:106; Qadri:1973:483; Farani:1980:9; Azad:1987:10-11). The basis for their views will be elaborated in the next paragraph.

Primary sources of Islam and women's (in)capacity to adjudicate

Qur'an

Although the *Qur'an* puts great emphasis on the equality of the sexes⁸, saying that they only differ in the extent of their piety/righteousness, it qualifies this equality on the basis of biological differences giving the "edge" to men (Q.49:13; Honarvar:1988:384).

The *Qur'anic* passages on this question, namely Q.2:228 and Q.4:34, are very controversial and have been subject to many interpretations. In the area of the general rights of spouses, the *Qur'an* states that spouses have reciprocal rights and duties but adds that "men are but one degree superior to women" (Q.2:228). This qualifying clause read with Q.4:34, which contains the rationale for it, namely that "men are the maintainers of women...with what they spend out of their wealth", explains the economic superiority of men over their wives. In this regard the conservatives and modernists hold opposite views.⁹ These two passages are usually interpreted to justify Muslim men's superiority over Muslim women and usually signifies the end of any attempt to discuss the issue of women's equality with men in Islam. However, in the final analysis it does not mean that women cannot or should not provide for themselves or that they lack legal capacity and leadership skills but that, in view of the fact that it is women who bear children and mostly shoulder the responsibility of rearing them, they should not have the added burden of *simultaneously* providing for a family as well. This does not mean that

⁸See footnotes 35-36.

⁹For more detail see Moosa, N:1991:135-149.

all women can or should bear children or that a woman's sole function is to bear children. While there are common and varying characteristics of both sexes, there is no rule which has no exception. This is also recognised in Islam, for example, the *Qur'an* [3:36] says: the male is not as the female. Real differences between the sexes, like the ability to fall pregnant, for example, should not be seen as an obstacle in achieving (intellectual) equality. It is also on the basis of their interpretation of verse Q.4:34 that the majority view of Imam Shafi, Malik and Hanbal deny women access to the *qadiship* (Ahmad:1993:46).

The testimony of Muslim women, in the case of certain business transactions, is equated to half that of a man and the rider relating to "forgetfulness" added to the *Qur'anic* verse in this regard (Q.2:282)¹⁰ is often used to substantiate the argument as to why women are not eligible to become judges (Muslehuddin:1988:30). This verse has been interpreted to mean that women are of inferior intelligence and have inferior powers of judgement (Thijssen (ed):1994:27,46-47;Ahmad:1993:47). The fact that a man's testimony is equated with that of two women together with the rider relating to "forgetfulness" leaves the question as to whether a strong memory instead of, for example, practical experience is the determining factor (Azad:1987:15). So too, for example, the evidence of an expert female witness is less credible than that of an illiterate male. Asad (1980:63 fn 273) explains that "[t]he stipulation that two women may be substituted for one male witness does not imply any reflection on women's moral or intellectual capabilities: it is obviously due to the fact that, as a rule, women are less familiar with business procedures than men and, therefore, more liable to commit mistakes in this respect..." This verse must of course be read in the context and time of its revelation. The fact that Khadija, the first wife of the Prophet, had in pre-Islamic Arabia already conducted business in her own right was seen as an exception. Even though Muhammad was in her employ she left him in charge of her business affairs (Moosa:1996:21-23). Asad's view also accords with Imam Abu Hanifa's interpretation of verse Q.2:282, namely that "...the authority of a judge is not valid unless he possesses the qualifications necessary for

¹⁰Chapter 2 verse 282: "...Whenever you give or 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 of your men to act as witnesses; and if two men are not available, then a man and two women from among...you...so that if one of them should make a mistake, the other could remind her..." (Asad:1980:62-63).

a witness...this opinion allows...women to be judges in all cases except *hudud* and *qisas* cases"¹¹ (Ahmad:1993:46).

Sunna

Muslim women's inequality in the public sphere is largely the result of a *hadith* (Prophetic *dictum*)¹² attributed to the Prophet Muhammad to the effect that those who entrust their affairs to a woman will never know prosperity. The tragic consequences of the event (Battle of the Camel referred to in footnote 14 below) capitulating the remembrance of this tradition is also used as additional fuel in support of women's inequality in this sphere. According to al-Bukhari¹³ this *hadith* was related by Abu Bakra, a companion of the Prophet. The Prophet, according to him, uttered these words upon learning that the Persians had named a woman (a princess) as their ruler. Interestingly, and perhaps politically conveniently, he recalled this tradition only 25 years after the Prophet's death and at the time that the *caliph* Ali retook Basra after having defeated Aisha (wife of the Prophet then aged 42) and her forces at the Battle of the Camel.¹⁴ Abu Bakra, although he refused to participate in the war, did not support Ali and was aware of Aisha's intentions as he had been duly informed thereof. When confronted by Aisha, he is supposed to (claims to) have justified his decision (neutrality) on the basis of the fact that one of the parties was a woman "...according to the way he told it *after the battle*"

¹¹*Hadd* (plural *hudud*) crimes are those crimes for which there is a fixed Islamic penalty and include fornication, adultery, false allegation of adultery, drinking wine, theft, apostasy, rebellion (against Allah). *Qisas* crimes, for which there is punishment by retribution, are murder (intentional or otherwise) and injuries to the person.

¹²See footnote 3.

¹³Al-Bukhari was born in the ninth century of the Christian era and his "...work has been one of the most highly respected references for 12 centuries" (Mernissi:1991:43,3-4).

¹⁴The Prophet Muhammad delegated to his wife, Aisha, authority on religious affairs. She was often called upon by the Companions of Muhammad after his demise to give legal opinions on his tradition which was mentioned earlier as a major source of Islamic law (Ahmed:1992:60;73;Armstrong:1995:240). This is a good reflection of the intellectual nature of their relationship. Aisha was also opposed to Ali (cousin and son-in-law of Muhammad) becoming a *caliph* - a controversy which would eventually result in the split between *Sunni* and *Shi'ite* Muslims. She participated in the ensuing Battle of the Camel. This battle was so named because she rode a camel in the battle. In this way, although it was not directly named after her, her participation was emphasized (Ahmed:1992:61).

(Mernissi:1991:56-57). It was on her (political) defeat (and therefore after the battle) that he recalled this tradition. Why did he not obey and recall the Prophetic injunction at the onset of the battle already when it could have been used in an attempt to avert the battle? Even though this tradition is classified as an isolated one or "singleton" meaning that its narrators do not exceed two persons in each generation, its inclusion in al-Bukhari's *Sahih* means that it was classified as authentic and therefore unassailable (Mernissi:1991:3,5,49-50,53-54;Abbott:1985:172-176;Ahmad:1993:48). However, Mernissi (*ibid.*,1-11,49-61), after making a detailed historical and methodological investigation of this *hadith* and its author, refutes this claim. She writes that "[t]his Hadith is the sledgehammer argument used by those who want to exclude women from politics" (*op.cit.*,4). This "tradition...came in time to be used as the basis of all major political discrimination against the Moslem woman" (Abbott:1985:176). This is in spite of the fact that "...we find...no specific [*Qur'anic*] pronouncement, pro or con, concerning the eligibility of women for political service" (*ibid.*,120). It has also been interpreted "...to mean by a majority opinion that as a woman cannot lead a nation (khalifah), all the more so she should not be allowed to be judge (which is part of the function of a khalifah). The other opinion which also stems from this hadith allows women to be judges but not leaders or heads of government" (Ahmad:1993:48). The ideas on women as judges can therefore be extrapolated from some of the arguments for and against women as leaders. In support of their argument that women should not hold positions of leadership, some capitalise on the following type of statements attributed to Aisha while grieving the loss of believers, loved ones and her prestige in the battle: 'It would be more to my liking had I remained in my house¹⁵ and not gone on my expedition to Basrah...' (Abbott:1985:173). In spite of its authenticity, this misogynistic *hadith* was "...hotly contested and debated by...*fuqaha* [jurists of the first centuries who] did not agree on the weight to give that Hadith on women and politics...Al -Tabari was one of those religious authorities who took a position against it" (Mernissi:1991:61). Concerning this tradition, Mernissi (*ibid*) advises "...redoubled vigilance when, taking the sacred as an argument, someone hurls at the believer as basic truth a political axiom so terrible and with such grave historical consequences". Abbott (1942:120-124) concludes that it was unlikely that this tradition could be

¹⁵In accordance with the *Qur'anic* injunction Q.33:32-33 ordering the wives of the Prophet to remain in their homes.

attributed to Muhammad, who accepted the advice of his wives Khadija¹⁶ and Salma¹⁷ and who referred in the *Qur'an*¹⁸ to the good governance of Bilqis, the Queen of Sheba.

Other prophetic *dicta* on the *qadiship*

The moral nature of the office¹⁹ of *qadi* is evident from statements like the following which appear in almost every source in this regard: "It [office of *qadi*] is considered to be one of the most noble acts of devotion, and is the most important duty, next only to belief in God" (Qadri:1973:481-482). However, while the *hadith* related by Abu Bakra is used to justify the denial of women to the *qadiship*, other traditions which specifically relate the Prophet's negative opinion of the *qadiship* as a whole are not even alluded to. "It is interesting to observe...that while the office of jurist was universally respected, that of *qadi* or judge was frequently deprecated" (Anderson:1957:20). Suitable candidates began to refuse office in the early centuries of Islam already (Juynboll:1927:606; Amedroz:1910:774). The reasons for this were attributed partly to fear that independence would not be guaranteed and partly by conservative *Ulama* (religious authorities) interpretations attached to *Hadith* of the Prophet Muhammad in this regard (Kumo:1978:102-106). There is a Prophetic tradition stating that judges "...are of three types: two of whom will go to hell and the other to paradise" (Kumo:1978:106). "The two are the ignorant who accept the office and the learned who deviate from the Sharia. The third is the learned who follows the Sharia" (*ibid.*, 106 fn 22). There is another tradition to the effect that being appointed a *qadi* is like being "slaughtered without a knife" (Doi:1981:15). The Prophet is also reported to have said that "...a camel could pass through the eye of a needle more easily than a *qadi* could enter heaven" (Christelow:1985:262). "Traditions were put into currency in which the Prophet was made

¹⁶Khadija advised Muhammad through his first traumatic experience of revelation and was also the first person to embrace Islam (Armstrong:1995:84-85;102).

¹⁷The Prophet consulted and acted upon the advice of Salma on the occasion of the treaty of Hudaibiya (Armstrong:1995:222;Abbott:1942:124).

¹⁸Q.27:23. See also Wadud-Muhsin:1994:107-108 for a list of women mentioned in the *Qur'an* "...who perform[ed] unique functions from the perspective of the book itself and from the perspective of humanity" (*ibid.*, 107).

¹⁹Here reference is made to appointment to or the establishment of the office of *qadi* rather than to the actual constitution of a court.

to utter grave warnings against accepting the position of kadi...[Even] Abu Hanifa...declined to fill the office of judge" (Juynboll:1927:607). According to *Shafi'i* jurists the importance of this office is reflected in the recommendation that "a Muslim who feels himself specially capable of exercising the functions of a judge should solicit those functions..." (Qadri:1973: 82). So, in spite of the negative picture painted above, the *Shafi'i* school of law actually encouraged people who felt themselves capable of exercising the functions of a judge to do so (Qadri:1980:3). According to the *Hanafi* jurists, however, an ignorant person can (contrary to the Prophetic tradition referred to above) be appointed a judge because he merely has to base his decision on the opinion of others (Qadri: 1973:482; Al Aseer:1976:106; Amedroz:1910:765; Gottheil:1908:393).

Thus "[f]rom the outset of Islam and for some two centuries the office of Kadi was accepted with fear and reluctance. The Prophet's utterances on the matter were ominous" (Amedroz:1910:773). So why, it might be asked, are women "clamouring" for admission to this office? The fact of the matter is that in reality "Muslim women do participate in the administration of justice, as claimants or defendants and as lawyers and judges. National laws have enabled women, in many cases, to be on an equal footing with men in court" (Thijssen (ed):1994:47).

Women's ability to adjudicate: constitutional²⁰ (including human rights) implications

While a *qadi's* jurisdiction is basically limited to matters of family law or Muslim Personal Law (MPL),²¹ historically, however, *Shari'a* (religious) courts and their Muslim judges are supposed to decide all cases irrespective of whether they involve issues of civil (family) or criminal

²⁰Constitutional law falls within the ambit of public law as opposed to private or personal law. Most Muslim countries follow Western constitutional models because of a lack of a comparable Islamic model (Moosa,N:1996:75-82,176).

²¹The term "Muslim Personal Law" has been coined by various Muslim countries and jurists because it pertains to, among other things, marriage, divorce, inheritance, polygyny, custody and guardianship which fall under the category of family law. Moreover, it is interesting to note that *all* laws affecting the status of Muslim women have historically been relegated to Muslim Personal Law (private sphere of family). Henceforth the abbreviation MPL will be used. Because of its divine origin (see footnote 2), MPL has remained relatively unchanged.

law. The secularization of commercial and criminal law by Muslim countries under the influence of, for example, colonialism and European codes meant that new courts had to be created as *Shari'a* courts, as the then main and standard judicial organs were unable to meet the needs and demands of the time. Instead of uniformity in the judicial systems of most Muslim countries this has resulted in a dichotomy or twofold (parallel) administration of justice because jurisdiction is either in the secular or *Shari'a* court.²² It is interesting to note that in Muslim countries where women practice as lawyers, they are usually (see also footnote 21) treated as being suitable for matters relating to family law as opposed to commercial or criminal law.

Historically, women definitely had a low status as far as constitutional matters were concerned. They were "...specifically and authoritatively disqualified from holding high executive and judicial office on the ground of religion and sex, respectively" (An-Na'im: 1985:335-6). A woman could not be a governor (*Khalifah*) nor head any government department or become a member of *shura* (council of elders or "senate"), which was a distinctively male body. She could, however, be appointed as an arbitrator and, as we have seen, according to the *Hanafi* school of thought even a judge (she was limited to dealing with civil matters only as opposed to criminal matters) although there were no female judges during the Arab Caliphate (Husaini:1980:7,123). Until last year (November 1996), for example, Benazir Bhutto was a female head of an Islamic state, namely Pakistan. She has thus proved critics like Maudoodi from her own country, who regard the appointment of a woman as a head of state or leader as unIslamic, wrong (Maudoodi:1986:243;262-3). These critics can nevertheless still argue that the fact that she held office does not make it "Islamic". However, even though she was "First Lady" she was a "second-class" citizen, thus reflecting the paradoxical position of Pakistani women. In *A model of an Islamic Constitution* (1983:6) written on Pakistan, in a chapter that can be likened to a bill of rights, it was stated in Article 9 that "[a]ll persons of equal merit are entitled to equal opportunity, and to equal wages for equal work. No person shall be discriminated against or denied the opportunity to work by reason of religious belief, colour, race, origin

²²For example, in Saudi Arabia *Shari'a* courts are still the only official courts whereas in Turkey, Egypt and India these courts have been abolished and replaced by Western counterparts. See Moosa, N:1996:96-101,172, 179-251). See footnote 32.

or language" (emphasis added). Sex, however, is clearly left out as a ground of exclusion and this appears to be standard practice in Islamic constitutions.²³

Notwithstanding the fact that all women face status problems, Muslim women also have to contend with an additional inequality attributed on religious grounds. This has resulted in a dichotomy between their public lives governed by secular laws and constitutions, and their private lives governed by religion. To date this conflict remains unresolved in various Muslim and non-Muslim countries.²⁴ These countries are unable, because of a refusal to be guided by the spirit of equality in Islam, to resolve the conflicts faced by Muslim citizens in the public and private spheres of their lives. Such countries often acknowledge and deny equality between the sexes in one and the same document (constitution) by placing reservations and limitations on this human right in so far as it conflicts with religious rights. The same pattern of conflict is evident in the human rights instruments²⁵ which these countries have either become signatories to or ratified with reservations in so far as the provisions of equality in these instruments might conflict with MPL. Yet in spite of this conflict Muslim countries were instrumental in the formulation of some of these instruments.²⁶ Women's rights are thus marginalized in some countries regardless of constitutional provisions that profer to protect these rights. Furthermore, not only are international instruments in general themselves also fraught with inconsistencies, but women's rights are marginalized in all international instruments. Muslim women therefore have all the odds against them. For example, while both the UN Charter and the UDHR provide for both religious and women's rights, neither foresees a conflict between these two kinds of rights.

Countries which recognize MPL and implement Western

²³See, for example, the position in Egypt, India and Pakistan.

²⁴This pattern is evident in Egypt, Algeria, Nigeria, India, Pakistan and Malaysia, although countries like Indonesia and Tunisia do depart from it.

²⁵For example, the United Nations (UN) Charter of 1945, the Universal Declaration of Human Rights (UDHR) (1948), the UN Women's Convention CEDAW (1979) and others. By 1988 several Muslim countries had either become signatories to or ratified CEDAW, albeit with reservations (Moosa, N:1996:120 *et al*,170-171). See footnote 27.

²⁶While Islam and human rights are not necessarily incompatible, the same is not true for Islamic law and human rights. See Moosa, N (1996:104-110) for a discussion.

constitutional models and human rights instruments have been unable to make significant progress in improving the status of women because of inevitable constitutional and judicial conflict (Moosa, N:1996:7-9,11-14,75-82,100,120 *et al*,169-173,246).

The constitutions of most countries guarantee equality in access to state employment for all citizens, regardless of gender. Article 7 of CEDAW,²⁷ for example, also states that "States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right...(b)...to hold public office and perform all public functions at all levels of government..." (United Nations:1988:116). However, Muslim women are generally disqualified from holding public office under the pretext of Islamic law if this means that they would be exercising some form of authority over Muslim men.

Until 1997, women in Iran, for example, were not allowed to become judges or magistrates (Mayer:1991:131; Ahmed:1992:232; Sciolino:1997:47). On 1997, the first four women were appointed to the judiciary (Iwraw: 1998:3) "In some Muslim countries [for example, Egypt], women have been active as lawyers since the 1930s" (Thijssen (ed):1994:48). Even though in Egypt there are no explicit provisions preventing women from occupying such posts, to date no female judge has been appointed. The presence of a woman expert is, however, required in a juvenile trial court (Rateb:1988:99;Ahmed:1992:208). In Algeria, while women may become judges, they cannot deal with personal law (Shirkat Gah:1994:10). While women in Morocco can serve as magistrates, they cannot preside over penal sessions. Moreover, women judges cannot hear cases of personal status, nor head a tribunal and women lawyers cannot be judicial prosecutors (Shirkat Gah:1994:10). In Nigeria women judges are found in magistrates and high courts but not in the Supreme Court. There are no women *qadis* not because the Nigerian Constitution excludes them, but because the Constitution places stringent requirements to be fulfilled before anyone can occupy the office of a *qadi*. For example, in terms of

²⁷CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) is a UN instrument adopted in 1979 and came into force in 1981. As of March 1996 it has been signed by 97 countries and ratified by 152 countries representing peoples from all cultural and religious backgrounds in the world. See footnote 25.

S 241 (3) of the 1979 Constitution, one must have studied Islamic law, be called to the bar and must have served in any sector of the country for ten years. Women were only allowed to study Islamic law in the 1980s (Shirkat Gah:1994:10). "In the former People's Democratic Republic of Yemen there were several women judges, and women legal experts were appointed as intermediaries in cases concerning marriage and divorce" (Thijssen (ed):1994:48). All courts in Yemen operate as Islamic courts and although women serve as judges in the southern part of the country, they experience intimidation in executing their judicial duties (Shirkat Gah:1994:10). In 1987 there were four female judges in courts in Sudan. In India, the High Court has a woman among its members. In Indonesia women are allowed to be judges. They have been accepted as judges in Indonesian Islamic or *Shari'a* courts since the 1970s and today total approximately one hundred. Apparently their decisions must be approved by the *Shari'a* court headed by a man (Thijssen (ed):1994:48; Ahmad:1993:50;Shirkat Gah:1994:10). As far as Pakistan is concerned it was social taboos rather than regulations which prevented women from entering the judiciary (Shaheed: 1986:41). In Pakistan, therefore, women had to fight for this right and only gained it after a lengthy legal battle (Azad:1987:17-19). The relevant case was that of Ansar Burney v Federation of Pakistan²⁸ (Mayer:1991:105-106,230). This decision "...allows women judges to hear all cases (civil and criminal)... [while] the Indonesian experience suggests a limitation to civil-family cases" (Ahmad:1993:52). While women serve as magistrates in Family and High Courts in Pakistan, to date no woman has been appointed to the highest appellate courts (Supreme and Federal Shariat Court) (Shirkat Gah:1994:10).

It is clear from the above that irrespective of whether a country has parallel legal systems or one uniform legal system and whether or not women are formally or informally denied access to the judiciary, they inevitably have limited participation in the legal system, especially in so far as MPL is concerned.

²⁸PLD FSC 1983, 73. For a detailed discussion of this Federal Shariat Court decision and the arguments raised in court see Patel:1986:120-125.

The position in the South African judiciary

Statistics from countries like the United States of America and Australia, for example, highlight that gender related judicial imbalances are not only restricted to Muslim countries. The position in South Africa is no different.

With a new constitutional order in South Africa, attempts are also being made to transform the judiciary into a truly non-racial, non-sexist and independent institution. Judges in the new South Africa are the guardians of the Constitution and the Bill of Rights but, as in the past, South African judges today are mostly men professedly "[d]rawn from the cream of South Africa's legal men..." (Department of Foreign Affairs:1968:20).

Imbalances are only now beginning to be redressed to accommodate the political, cultural and religious mosaic of traditions in South Africa. This is evident from the recent appointments of, for example, Muslim judges²⁹ (incidentally all males) to the Supreme Court (some as acting judges) and Constitutional Court (Van Zyl:1995:134). South Africa's new chief justice is also a Muslim. The first female Muslim judge has now been appointed to the Land Claims Court and there are at least four Muslim women magistrates apparently all located in the province of Kwazulu Natal.³⁰ However, while new appointments are welcomed and long overdue, it is not enough to prepare or educate court personnel for the challenges facing them. There should also be more significant changes in the judicial personnel and gender imbalances in the composition of the bench should be rectified. As recently as 1993 South Africa had only two female judges. The second one was appointed late in 1993 (Friedman:1993:15). Women have now also been appointed to the newly established Constitutional Court (Van Zyl:1995:134). There is of course no guarantee that female judges will, as a matter of course, be more gender sensitive than men. Women lawyers must therefore also become more

²⁹This does not imply that these judges possess any legal qualifications in Islamic law.

³⁰Exact figures can be gleaned from a database of magistrates which is in the process of being compiled by the Law, Race and Gender Research Unit, University of Cape Town, South Africa.

involved in gender issues. It is interesting to note the explicit references to women in certain sections of the final South African Constitution³¹ dealing with the eligibility to hold office. For example, in terms of S 174 (1) "[a]ny appropriately qualified *woman* or man who is a fit and proper person may be appointed as a judicial officer" (emphasis added). In terms of S 174 (2) "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are being appointed." In terms of S 175 (1) "[t]he President may appoint a *woman* or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent..." (emphasis added).

As there are no ecclesiastical courts in South Africa, religious denominations arrange their own religious affairs (Department of Foreign Affairs:1968:19). Muslims, within a broader South African society are therefore exposed to a plurality of legal systems. Alongside South African civil law there are informal religious tribunals. Male religious authorities dominating these bodies are, however, now seeking formal state recognition of MPL to be implemented in newly created *Shari'a* or Islamic courts. Without elaborating on the viability or not of these courts³² it suffices to say that while Muslim women in South Africa are free to follow any profession and accessibility to the justice system being easier with the demise of Apartheid, the question remains whether their position is going to be any different with the establishment of *Shari'a* courts in South Africa³³ now that the final South African Constitution makes provision for the possible recognition (S 15 (3)) and implementation of MPL and thus the establishment of such types of courts? The South African Constitution, unlike the case in various Muslim countries, clearly states that MPL, once

³¹Act 108 of 1996.

³²For more detail on this see Moosa, N:1996:420-432. Historically the recognition of MPL, exempt from constitutional provisions and human rights instruments, has necessitated the creation of separate *Shari'a* (religious) courts. The fact that some countries have separate *Shari'a* courts for the enforcement of MPL, but others do not, is further proof that there is no Islamic justification for its existence (Moosa, N:1996:441). See also footnote 22.

³³It is now a constitutionally guaranteed right and choice to access (gender) justice in terms of S 34 of the final Constitution which reads as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum." S 166 (e) of the final Constitution makes "[a]ny other court established or recognised by an Act of Parliament..." a court of the Republic.

recognised, must be subject to the Bill of Rights. The South African government has thus chosen to deal with the conflict between the two fundamental rights of equality and religious freedom by resolving it to the advantage of all Muslims at final constitutional level. This reinforces its commitment to ensure the birth of a transparent and equitable MPL and implies that it is not going to be an agent in women's subjugation as is the case in various Muslim and non-Muslim countries where the problem and conflict between women's rights and religious rights has to date not been resolved in their constitutions nor by international human rights instruments. Local Muslim women ought therefore not to face status problems between private and public law encountered by Muslim women worldwide as individual interests have trumped state and group interests. This, however, might not necessarily be the case, because many issues remain which need to be addressed and resolved (Moosa, N:1996:438).

In an attempt to address the problems which accompany recognition, various organizations have made interim recommendations regarding MPL and its judicial operation. For example, proposals have been made to the Minister of Justice to the effect that a register of duly qualified Muslim *Shari'a* jurists stating their sphere of operation be compiled. These jurists have to comply with strict Islamic law academic qualifications before they can be considered eligible for these posts. This implies the exclusion of women. Other proposals, however, recommended that current deficiencies in *process* evident in a variety of informal Muslim judiciaries need to be addressed, for example, the correction of gender imbalances and biases. The composition of these courts should therefore include women who need to contribute to decisions affecting themselves and their communities (Moosa, N:1996:424;428).

Conclusion

While there is no real *Qur'anic* impediment against Muslim women becoming judges, for Islam to have survived the hostile milieu in which it was born, it had to be flexible and adaptable. The *Qur'an*³⁴ advocates

³⁴Chapter 3 verse 159: "It is part of the Mercy Of God that thou [Prophet Muhammad] dost deal Gently with them. Wert thou severe Or harsh-hearted, They would have broken away From about thee: so pass over (Their faults), and ask For (God's)

that change had to be gradual especially with regard to "replacing" the pre-Islamic paternal and tribal bond with a religious bond of brotherhood and equality. The laws of the *Qur'an* were conditioned by the socio-historical context in which they were enacted (Rahman:1982:301). It is important to distinguish, as the modernist Muslim scholars do, the normative verses of the *Qur'an* (which has a continual relevance and was meant for all times to come) from its contextual verses. The latter were revealed as solutions to the problems of individuals or the fledgling community as they arose during Muhammad's reign of 23 years in the seventh century. Thus it is postulated that the moral or ethical norms set out in the *Qur'an* concerning the status of women are of equal, if not greater, importance than its specific legal rules (Coulson & Hinchcliffe:1978:37). "The moral and religious equality of the sexes before God represents the highest expression of the value of equality" (Esposito:1982:108). The "ethico-religious equality of women" remains uninfluenced by a change of social situation as would be the case with socio-economic matters (*ibid*). The *Qur'an*³⁵ emphatically states that God not only created the sexes of like nature, manner and substance but that they are also equal in the sight of God.³⁶ "...[T]he Qur'an does not make a distinction between men and women in...[the process of] creation, in the purpose of the Book, or in the reward it promises" (Wadud-Muhsin:1994:15). While "...[t]he Koran nowhere prohibits women from becoming judges...their presence on the bench is frequently contested by referring to various Koranic verses and Traditions..." (Thijssen (ed):1994:47 fn 85). It would be ambitious to expect a radical reformulation of the *Qur'anic* law which deny women this right. There are, however, a number of ways in which the law can be reformed "...from inside', neither rejecting *Shari'a* outright nor maintaining it in fact...[and in doing so, beginning] the process of formulating a modern *Shari'a* of human rights from a number of sources..." (Arzt:1990:228). Hassan (1990:305) quotes a well-known Muslim scholar as saying: "...The creative process in each generation is not to remake the [Divine] Law but to reform men and human society to

forgiveness For them; and consult Them in affairs (of moment). Then, when thou hast Taken a decision, Put thy trust in God. For God loves those Who put their trust (in Him)" (Ali:1946:164-165).

³⁵See *Qur'an* 4:1; 7:189; 16:72; 42:11. See also footnote 8.

³⁶See *Qur'an* 3:190-191,195; 4:32; 4:124; 16:97(8); 9:71-2. For further and general detail see Ali:1978. See also footnote 8.

conform to the Law." What is therefore needed, besides reform, is a more fundamental evolution of Muslim society.³⁷

As explained above, jurists from the *Sunni* schools of Islamic law justify their views on women as leaders/*qada* on the basis of certain *Qur'anic* verses. The classical formulation and codification of Islamic law into the various schools of law by early Muslim jurists like Abu Hanifa, Imam³⁸ Shafi, Imam Malik and Ibn Hanbal are not canonical but "man-made". There is a gap of about two centuries between the time of revelation of the *Qur'an* and this formulation. It was during these two centuries that the *Qur'anic* norms were diluted often to the disadvantage of women (Coulson & Hinchcliffe:1978:38). Although these juristic formulations were merely interpretations of the two primary sources of Islam, namely the *Qur'an* and *Sunna* of Prophet Muhammad, they are often mistaken for Islam itself (An-Na'im:1988:2-3). However, the learned Muslim jurists referred to above have warned that Muslims must guard against upholding their interpretations, which should be considered wrong if the primary sources indicate otherwise. They did not want their views to be followed blindly the way certain religious authorities (*Ulama*) seem to advocate. This is evident from the following quote: "Malik, also a practising judge, said, 'I am but a human being, I may be wrong and I may be right. So first examine what I say, if it complies with the Book [*Qur'an*] and Sunnah, then you may accept it...if...not...then you should reject it'" (Razak:1985:72). The same logic was followed by Abu Hanifa (who was not a practising judge but rather a philosopher), Shafi and Ibn Hanbal (Razak:1985:72-73; Al Aseer:1976:95-96). These jurists "...viewed their opinions as contextual, the best they could achieve for their own time and circumstances" (Davies:1988:62). Yet today these opinions are given more weight than the original sources of Islam itself!³⁹ Notwithstanding the

³⁷See for example, the following verses in the *Qur'an* namely, Q.13:11 and Q.8:53 wherein God reminds us that He will never change the condition of a people until they change it themselves.

³⁸Literally leader, normally of congregational prayers.

³⁹After he had been elected the first *caliph* Abu Bakr addressed the community with the following words which should be seen in the context to apply to all four *caliphs* and which reminds one of the warnings uttered by the jurists: "I have been given authority over you but I am not the best of you. If I do well, help me, and if I do ill, then put me right...Obey me as long as I obey God and His apostle, and if I disobey them you owe me no obedience..." (Armstrong:1995:258).

problems of translating the *Qur'an* from Arabic into other languages, as far as interpreting the *Qur'anic* text or exegesis of the *Qur'an* is concerned, it is said that: "The best *tafsir* [exegesis] is the explanation of the Qur'ān by the Qur'ān...[N]othing can match the explanation of the Qur'ān by the Qur'ān and the explanation of the Qur'ān by the Prophet [Muhammad]" (Von Denffer:1983:125,145).

In light of there being no clear *Qur'anic* directive to the contrary, the fact that neither the Prophet Muhammad or his four successive *caliphs* appointed any woman as such to this office does not constitute sufficient grounds for denying women access to this office. What remains are the conflicting opinions of jurists. The majority opinion deny women access while the minority view of Abu Hanifa restricts their appointment to matters of family or personal law. These jurists nevertheless caution against their man-made views being blindly followed.

Having examined the primary sources of Islam and the relevant law and legal scholarship from both an Islamic point of view as well as from modern constitutional law and human rights perspectives, I conclude that there is support for my theoretical contention that women not be denied the right to adjudicate at both a religious and secular level in *Shari'a* as well as secular courts respectively. The position in theocratic Pakistan, for example, serves to illustrate that this is possible. It must also not be forgotten that early *Shari'a* courts in any event were unified courts which dealt with both civil (family) and criminal matters.⁴⁰ While "[w]omen lawyers and judges...were considered better suited to dealing with family law...they never reached these positions in sufficient numbers to pose a threat to their male colleagues. However, their case serves to demonstrate here the room for manoeuvre which is potentially open to women. The number of well-to-do women who manage to break into the legal profession is admittedly small, but they are important as role models" (Thijssen (ed):1994:48).

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⁴⁰See footnote 32.

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