

A Woman as a Judge in a Muslim State

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Assignment question:

Please write about a woman as a judge in a Muslim state.

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Abstract

This research paper examines question whether women can be appointed as a judge in a Muslim state. This question has been raised especially during the last decades even though the early scholars have discussed this issue and have come up with different opinions. There are three different opinions whether it is permissible and, if so, in which cases a woman can be appointed as a judge.

During the last decades, more and more women have complained about some discriminative treatment towards them in the courts which has led to many problems, especially in lawsuits regarding family law. A great need and demand for female judges has arisen therefrom which is why some Muslim countries such as Egypt, Jordan, Malaysia, Palestine, Sudan, Tunisia, United Arab Emirates and other Muslim countries have started appointing female judges.

This research paper will first examine the opinions held by the different scholars and the difference of opinion within the madhhab of Ḥanafīyah. Then, the evidence from the sources of Islamic law will be discussed with a critical analysis of the accuracy of the evidence used by the scholars. Lastly, suggestions will be made for a way forward in the issue of female judges in Muslim States.

Keywords: Fiqh, Islamic law, female judges, Qadiyyah, woman as judge, conditions of a judge

Introduction

The question if women can be appointed as judges in a Muslim state was discussed by early scholars (muta'akhhirīn). However, it was raised during the last decades due to the emergence of situations where women felt discriminated and deprived of their rights by the male judges in sharī'ah courts. This is especially the case in lawsuits regarding family law.

Therefore, some Muslim states such as Egypt, Jordan, Malaysia, Palestine, Sudan, Tunisia, United Arab Emirates and other Muslim countries have started appointing female judges. Other countries such as Pakistan have started educating women to become Muftīyah, who are qualified to be appointed as a judge.

The difference of opinion has led to two opposing positions, one position not accepting the other position. The lack of respect for this ikhtilāf has led some people to not accept the court decisions made by female judges who are appointed as judges based on the opinion of the Ḥanafīyah and other scholars of the past (muta'akhhirīn).

Generally, the conditions of a judge are that he must be a Muslim, sane, adult, and free person, pious, a Mujtahid, and physically fit. If the condition that the judge must be male is applicable will be discussed in this research paper.

This research paper is divided into three different sections.

Section 1: The different opinions of the scholars will be discussed as well as the ikhtilāf within the madhhab of the Ḥanafīyah.

Section 2: The evidence used by the scholars will be critically analysed.

Section 3: Suggestions about how to go forward with the issue of women as judges will be formulated, in shā Allāh.

The Ikhtilāf regarding Women as Judges in a Muslim States

There are three different opinions known from the early scholars (muta'akhhirīn) regarding the issue of women as judges.

1. Women are not allowed to be judges and their judgement is invalid. This is the opinion of the madhhab of the Shāfi'īyah, Ḥanābilah, and the majority of Mālikīyah.
2. Women are only allowed to be judges in matters other than ḥudūd and qaṣāṣ. This is the opinion of the scholars of Ḥanafīyah.
3. Women are allowed to be judges in all matters including ḥudūd and qaṣāṣ. This is the opinion of ibn Ḥazm and ibn Jarīr al-Ṭabarānī.

As for the first opinion that women are not allowed to be judges and their judgement is invalid, it is the opinion of the majority of the scholars (jamhūr al-'ulamā').

Al-Qarāfī stated in his al-Dhakhīrah: “[...] what is required for the validity of the inauguration (tawliyah) [...] is that he is male because females are prevented from rebuking the oppressors and establishing the right.” (al-Qarāfī, 1994)

Ibn Qudāmah mentioned in al-Mughnī: “In summary, three conditions must be fulfilled by the judge. One of them, perfection, which is of two types; The perfection of judgments and the perfection of creation, while the perfection of judgments is considered in four things; To be an adult, sane, free, male.” (ibn Qudāmah, 1997)

Abū al-Ḥasan al-Māwardī mentioned in al-Dāwī al-Kabīr: “And the second condition is being male, so he must be a man. And as for the woman, it is not allowed to follow her (taqlīd).” (al-Māwardī, 1994)

As for the second opinion that women are only allowed to be judges in matters other than ḥudūd and qaṣāṣ, this is the opinion of Imām Abū Ḥanīfah. However, this is not the only opinion in the madhhab of AḤnāf as many of his rulings were overturned by his students and the latter-day scholars (mutaqaddimīn).

Imām al-Qudūrī has mentioned in his Mukhtaṣar: “And legal [court] judgement is allowed for the woman in each matter except in ḥudūd and qaṣāṣ.”

Imām Ḥaskafī mention in his Durr al-Mukhtār: “And when she (meaning a woman) gives judgement regarding ḥadd and even ratiliation, then it is referred to another judge who checks its permissibility. If he confirms it, it is not [allowed] for anyone to revoke it.” (ibn 'Ābidīn, 2003)

As for the third opinion that women are allowed to be judges in all matters including ḥudūd and qaṣāṣ, ibn Qudāmah mentioned “it was narrated on the authority of Ibn Jarir [al-Ṭabarānī] that masculinity is not a condition because a woman may be a mufti, so she may be a judge.” (ibn Qudāmah, 1997)

And al-Māwardī mentioned: “And its permissibility of ibn Jarīr al- Ṭabarānī is similar [for] the man.”

Imām Mālik’s student ibn Qāsim was of the view that women can be judges. (al-Ḥaṭṭāb, 1995)

Ibn Ḥazm gave a very detailed explanation concerning why women are allowed to be judges in all matters: “Women are allowed to assume the role of a judge.” (ibn Ḥazm, 2016)

Some of his arguments will be discussed in the following section, in shā Allāh.

The Evidence used by the Scholars

First of all, it should be mentioned that judgement is a matter of worldly affairs (mu'āmalāt). Thus, the legal maxim which applies this case is that all matters are permissible unless proven otherwise. Therefore, the permissibility is not to be proven but the prohibition.

One of the reasons why some scholars said that it is not allowed to appoint a woman as a judge is that Prophet Muhammad ﷺ never appointed a woman as a judge, nor did the Rightly Guided Caliphs appoint a woman as a judge. Furthermore, women were not appointed as judges in history. However, regarding this as evidence is problematic as a prohibition was never clearly mentioned by anyone of them.

The second reason is that Abū Bakrah narrated: During the battle of Al-Jamal, Allāh benefited me with a word (I heard from the Prophet). When the Prophet heard the news that the people of Persia had made the daughter of Khosrau their Queen (ruler), he said, "Never will succeed such a nation as makes a woman their ruler."¹

Some scholars have understood this ḥadīth to be regarding all positions of authority. However, ibn Ḥazm explained that 'Umar ibn al-Khaṭṭāb entrusted al-Shifā' bint Abdillāh with the position of authority over the market of Madinah. Thus, the ḥadīth regarding making a woman their ruler is to be seen in its context which is the actual position of a Sultan, Queen and the like, i.e. the highest position in a country.

Judges, however, are not in the highest position in a country but only represent the Sultan and are under his authority. Therefore, a woman who is appointed as a judge would not rule the people but only represent the ruler.

¹ Sahīh al-Bukhārī, Ḥadīth No. 7099

Another reason why some scholars said that women cannot fulfil the role of a judge is that the requirement of the judge is not in agreement with the code of conduct of women because she will have to argue with men when men are involved in the lawsuit. They further say that it would be inappropriate to talk to a female judge about some private and personal matters. However, the same counts for the case that men are appointed as judges and women may have to talk to him. The inappropriateness regarding talking about personal and private issues applies also to the women who have to talk to a male judge – which is the reason for the emergence of problems where women will be discriminated and deprived of their rights by male judges. The discrimination and deprivation of their rights may not be intentionally done by the men, but it is a natural consequence of the fact that women may not be comfortable explaining their case and their position to the male judge. A female judge would help in this situation.

Finally, some scholars including Shaykh al-Munajjid said that the role of a judge requires a high level of understanding, insight and intelligence which is supposedly less found in women than in men. It may be true that fewer women fulfil the requirements of a judge than men, but some women may fulfil these requirements. They are educated and thoroughly examined by their teachers to be granted permission to be the judge. Thus, this statement may be true in general, but not individually.

Thus, it becomes clear that there is not enough evidence to make it completely impermissible and invalid for a woman to be a judge based on clear (zāhir) textual evidence (naṣṣ). It is merely the ijtihād of the aforementioned scholars and qiyās (legal analogy) which may or may not be valid in this case.

The difference of opinion is a very valid ikhtilāf and must be respected.

Suggestions on how to go forward with Women as Judges

As mentioned in the introduction to this research paper, there are cases where women feel discriminated and deprived of their rights by male judges. It was mentioned already that it may not be intentional but rather due to the fact that women may not be confident and comfortable enough to explain their point and their position to a male judge which makes it difficult for the judge to judge correctly.² It may also be the case that the women's perception is purely subjective and not accurate.

Therefore, there is a need (ḥājah) for female judges in modern times.

The benefit of having female judges in certain cases are numerous, some of which I am going to mention here:

1. Female claimants, defendants, and witnesses would feel more confident and comfortable explaining their cases to a female judge.
2. If a female judge makes a judgement against another woman, she is less likely to be labeled misogynist than a male judge which increases the chance that women accept the judgement which was given.
3. Female judges may have a better understanding of certain issues with regard to family law than male judges.

Therefore, my suggestions on how to go forward with women as judges are as follows:

1. Women can be appointed as judges under the supervision of male grand judges.
2. Women can be entrusted with lawsuits where one mostly has to talk to women and not to men.

² This also applies in the case the help of an attorney is sought: Either the female client feels uncomfortable with the male attorney or the female attorney feels uncomfortable with a male judge.

3. Women can be entrusted as judge assistants for male judges so they can ensure that the female claimants, defendants and witnesses can speak freely, confidently and comfortably to her while the male judge listens or gets a report of what had been said.

Conclusion

It can be concluded that one cannot rule out the permissibility of female judges completely and that there is a great need (ḥājah) for appointing female judges.

And Allāh knows best.

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