



Women's Advocacy for Appointing Women *Qāḍī* in Sri Lanka: A Juristic Analysis

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Abstract

The women's organisations in Sri Lanka have been advocating for three decades for appointing women *Qāḍī*. However, the association of predominant religious leaders, namely All Ceylon Jam-e-athul Ulama (ACJU), opposes women's demands. Consequently, there has been a deadlock between the ACJU and its reform proponents. This deadlock has created chaos and public debate among not only Muslims but among the other religious groups in Sri Lanka. Therefore, to fulfil this timely need, this study analysed the possibilities of the appointment of women *Qāḍī* (judges) in Sri Lanka from a juristic perspective. Because it is a juristic analysis, this study mainly focuses on secondary data drawn from the Quran and the Hadith and the opinions of classical and modern jurists. However, the interviews were conducted to find the insights of the experts in the Muslim Marriage and Divorce Act (MMDA) of Sri Lanka as primary data, which greatly supported the secondary data. This study deeply delves into the justifications of reform proponents and the counterarguments of religious leaders from a juristic perspective. Finally, this study found that even though the reform proponents propose alternative views to achieve their demand, the ACJU vehemently denies it, criticising that their demand is impracticable, according to the text and the context, since the Shafie Madhhab governs the Muslim Family Law in Sri Lanka. However, this study provides some suggestions and recommendations to curb the malpractices women face in the system.

Keywords: Advocacy, MMDA, Sri Lanka, Women *Qāḍī*

Introduction

Women have been criticising the *Qāḍī* court system for its ironical stipulation requiring a *Qāḍī* to be a male. They argue that because of the male *Qāḍī*, the female clients face numerous unfairness and hardships in their societal and family life,¹ such as embarrassment in expressing marital disputes in front of the male *Qāḍī* and judgements of *Qāḍī* favouring the males (husbands). Hence, they persuaded the Sri Lankan government to amend sections 12(1) and 14(1) relating to the appointment of *Qāḍī*, including special *Qāḍī* and section 15(1) relating to the board of *Qāḍī*, justifying as follows:

¹ Nasrin Muhammadu Ibrahim et al., "The Challenges Faced By Muslim Women in Pursuing Postgraduate Studies," *Islamiyyat* 44, no. 2 (2022): 149-57, <https://doi.org/10.17576/islamiyyat-2022-4402-11>.

We maintain that women and men should have equal rights to be appointed as Qāḍī and Registrars of Muslim marriages. There is no explicit ban in the Qur'an or the Ḥadīths against women holding the position of Qāḍī. Indonesia, which is predominantly a Shāfi'ī practising country, had made provisions for the appointment of women Qāḍī in terms of the marriage law of 1974. According to that, more than 100 women have been appointed to the office of Qāḍī in Indonesia.²

The reform proponents claim to implement equality, particularly gender equality, emphasised in the Qur'anic verses, "For men, there is reward for what they have earned, and likewise) for women, there is reward for what they have earned" (al-Nisā':32)³, and "Allah has promised the believers - men and women - Gardens under which rivers flow to dwell therein forever, and beautiful mansions in Gardens of 'Adn (Eden Paradise). But the greatest bliss is the Good Pleasure of Allah. That is the supreme success" (al-Tawbah:72). Therefore, the proponents express that refusing the appointment of women Qāḍī is discriminatory against Islam's principle of equality.

Moreover, they refute the ACJU's argument for the Ḥadīth narrated by Abū Bakrah "never succeed such a community that nominate a woman as its ruler" (al-Bukhārī, Ḥadīth No:4425), which is contradicted by the Qur'anic verses in Sūrah al-Naml:23-44. Relating to the queen of Saba, who is praised for his wise leadership. Accordingly, they reject the Ḥadīth of Abū Bakrah for two reasons. First, if the Ḥadīth is contrary to the Qur'an, the Ḥadīth should be rejected by the veterans of the Ḥadīth. Second, the authenticity of the Ḥadīth is considered isolated (*āḥād*) Ḥadīth.⁴

In addition, the proponents highlight the historical records of Muslim women's active engagements in state matters, community affairs, and spiritual awareness.⁵ Shifā 'Abdullah was an exemplary female companion of Prophet Muḥammad (PBUH) when she was appointed to monitor and supervise commercial transactions in the entire marketplace of Madinah. She ensured consistency of business transactions with Islamic law. 'Umar (R.A.) recognised Shifā's knowledge and advised traders to consult her on commercial matters.⁶

In addition, the women's organisations emphasised female leadership, citing the battle of the camel 'Ā'ishah (R.A.) was the chief commander of the army, which included popular companions of the Prophet Muḥammad (PBUH), especially Abū Bakrah, who narrated the Ḥadīth regarding the Persian queen. However, none of them rejected 'Ā'ishah (R.A.) for command.⁷

The proponents intensely advocate for appointing the female Qāḍī, citing traditional and modern jurists' views. Al-Ṭabarī and Ibn Ḥazm state that a woman can

² Zackariya Faizun and Kodikara Chulani, *Women Claiming Rights and Spaces: Activism to Reform Muslim Personal Law in Sri Lanka* (Colombo: Muslim Women's Research and Action Forum, 2014).

³ Muḥammad Taqiyyuddīn Al-Hilālī and Muḥammad Muḥsin Khān, *Translation of the Meanings of the Noble Quran* (Madinah: King Fahd Complex for the printing of the Holy Quran, 1983). p. 34.

⁴ Masidi Nik Noriani, Nik Badlishah and Yasmin, *Women as Judges* (Kuala Lumpur: Sisters in Islam, 2009). p. 45.

⁵ Iqbal Saujan et al., "Misconceptions of Women's Rights in Islam and Its Refutations: A Conceptual Study Based on Sources of Islamic Law," *International Journal of Research and Analytical Reviews* 6, no. 2 (2019): 849-56, <https://doi.org/10.6084/m9.doi.one.IJRAR19K6827>.

⁶ 'Alī ibn Aḥmad Ibn Ḥazm al-Zāhirī, *Al-Maḥallī* (Beirut: Dār al-Fikr, n.d.). 34.

⁷ Nik Noriani, Nik Badlishah and Yasmin, *Women as Judges*. p. 87.

be a judge in all cases without exception as long as she fulfils the requirements for the position, while Abū Ḥanīfah allows women to be judges in all matters except ḥudūd and qīṣāṣ cases. Likewise, modern jurists such as Yūsuf al-Qarḍāwī and Muḥammad al-Ghazzālī argue that there is no clear evidence in *Sharī'ah* to prohibit women from serving in the post of judge.⁸

Hence, the proponents insist that the Sri Lankan government amend the law considering the opinions mentioned above and the contemporary context of Muslim countries such as Pakistan, Sudan, Egypt, Yemen, Indonesia, and Malaysia⁹. Moreover, they express that "it is very regretful to omit women from being as Qāḍī and registrars of marriage in Sri Lanka while the women are appointed as Qāḍī and judges in those Muslim countries."¹⁰ Therefore, it is timely to analyse the feasibility of the appointment of women Qāḍī (judges) in Sri Lanka to bridge the gap between the conservative and reformist approaches.

Research Methodology

Since it is a juristic analysis, this study mainly focuses on the secondary data drawn from the Quran and the Hadith and the opinions of classical and modern jurists. However, even though it is mostly based on qualitative research, the interviews were conducted to find the insights of the experts on the Muslim Marriage and Divorce Act of Sri Lanka as primary data, which greatly supported the secondary data.

Ban on Appointing the Woman Qāḍī

The Jurists of Mālikī, Shāfi'ī, Ḥanbalī and some of the Ḥanafī jurists stipulate masculinity for the post of Qāḍī and vehemently refute the appointment of women Qāḍīs. Desawqī of Mālikī School refutes the appointment of women Qāḍīs and nullifies their decisions even though they were appointed quoting the *Ḥadīth* "never will succeed such a nation as makes a woman their ruler" (al-Bukhārī, *Ḥadīth* No:7099). Likewise, al-Ghazzālī of Shāfi'ī school says: "The Qāḍī should be an independent, a male, a jurist and a wise"¹¹. Similarly, al-Haytamī suggests that "a woman should not be appointed as Qāḍī, even in the cases where her testimony is accepted"¹².

A-Ansārī questions that "if a woman is not assigned to the small leadership for men (in the prayer), how could she be assigned to the communal leadership that requires an outing and insecurity"¹³. Similarly, al-Nawawī elaborates that 'woman should not be appointed as Qāḍīs' according to the *Ḥadīth*: 'A community who appoint

⁸ Saleem Marsoof, "Report of the Committee Appointed to Consider Amendments to the Muslim Marriage and Divorce Act" (Colombo, 2017). p. 54.

⁹ Mohammad Ismath Ramzy and Ghavifekr Simin, "Women Quazi in a Minority Context: An Overview of Sri Lankan Experience," *Societies* 9, no. 13 (2019): 1-15, <https://doi.org/10.3390/soc9010013>.

¹⁰ M.A. Nuhman, "Proposals Submitted to the Committee Appointed to Consider Amendments to the MMDA" (Kandy, 2017). P. 34.

¹¹ Muḥammad bin Muḥammad Gazzālī, *Al-Wasīṭ Fi al-Madhhab* (Cairo: Dār al-Salām, 1997). 98.

¹² Ibn Ḥajar Al-Haytamī, *Tuḥfat Al-Muḥtāj Bi Sharāḥi al-Minhāj* (Beirut: Dār al-Kutub al-'ilmiyyah, 2001). P. 78.

¹³ Abu Yahya Zakariyyā Al-Anṣārī, *Asnal Maṭālib Sharahu Rawḍi Al-Ṭālib* (Beirut: Dār al-Kutub al-'ilmiyyah, 2001). p. 32.

a woman as their ruler never succeed' because they are deficient in reason and religion'¹⁴.

Ibn Qudāmah of Ḥanbalī School details the reasons for excluding women from the post of Qāḍī as follows¹⁵:

1. The Prophet (PBUH) says: "A community who appoints a woman as their ruler never exceed" because a Qāḍī needs to attend a forum or gathering of litigants, mostly men.
2. Women's testimony is never accepted without a woman, despite being a thousand women with her, according to the Qur'anic verse, "so that if one of them (two women) errs, the other can remind her" (al-Baqarah:282).
3. A woman is not appropriate for leadership and administrative positions. Therefore, the Prophet (PBUH), the successive caliphs and their descendants never appointed any woman as administrator or judge.

Al-Māwardī elucidates that "men are substratum in reason and conception. Women are not permitted to outshine the men"¹⁶. If female Qāḍī appointment is permitted, men would be outweighed by women, contrary to the Quranic verse.

In demonstrating the opinion of Ibn Mas'ūd (R.A.): "put the woman back as Allah has put them back"¹⁷, the supporters of this argument explain that 'if anyone permits the woman for the post of Qāḍī, definitely he moves woman forward and put men back (against the command of Almighty Allah)¹⁸.

Permission for Appointing Woman Qāḍī

The proponents of the appointment of woman Qāḍī argue that this Qur'anic verse: "Men are the protectors and maintainers of women" (al-Nisā':34) is out of dispute. This is because the verse does not have any connection with political matters. However, exclusively, this verse links with family affairs or the husband's control of his wife, as the background incident illustrates this verse's linkage with family affairs:

"Sa'ad (R.A.) disputed with his wife and slapped her face. His wife then complained to the Prophet (PBUH), and the Prophet (PBUH) said, 'There will be retaliation between you'. However, almighty Allah instructed him to "do not hasten with the Qur'an before the revelation is accomplished", and the verse "the men are protectors of women" was revealed. The Prophet said, 'I intended a matter; however, Allah had intended another matter'¹⁹.

Ibn Ḥazm argues that the Ḥadīth, "A community never prosper if they appoint a woman as their ruler" is not evidence for refuting the appointment of Qāḍī because

¹⁴ Muhyiddīn Al-Nawawī, *Rawḍat Al-Ṭālibīn Wa Umdat al-Muftīn* (Beirut: al-Maktab al-Islāmī, 1991). p. 73.

¹⁵ 'Abdullah bin Aḥmad Ibn Qudāmah, *Al-Mughnī* (Cairo: Hajar, 1992); 'Alī bin Muḥammad Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah* (Kuwait: Dār ibn Qutaybah, 1989). p. 99.

¹⁶ Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*. 22.

¹⁷ Ibn Hammām al-Ṣan'ānī 'Abdul Razzāk, *Muṣannaf 'Abdul Razzāk* (Cairo: Dār al-Ta'ṣīl, 2015). p. 86.

¹⁸ Muḥammad Shalash, "Ḥukmu Tawliyatī Al-Mar'ah al-Qaḍā'," *Majallat Dirāsāt University of Jordan*, 2007. p.78.

¹⁹ Ismā'īl ibn 'Umar Ibn Kathīr, *Tafsīr Al-Quran al-'Azīm* (Riyadh: Dār Ṭaybah, 1999). P.88.

the *Ḥadīth* only denotes the leadership of a nation. However, this does not imply a judicial appointment²⁰.

Ibn Ḥazm al-Zāhirī and Ibn Jarīr al-Ṭabarī suggest the full recognition for the appointment of woman judges, providing the following justifications:

“Umar ibn al-Khaṭṭāb (R.A.) appointed a woman called 'Ummu al-Shifa bint 'Abdullah as superintendent (controller) of the market. Accordingly, the appointment of *Qāḍī* is permitted since both are public appointments. If this is not permitted in Islam, 'Umar (R.A.) would not have appointed a female controller/overseer”²¹.

Moreover, the jurists state that 'the Prophet (PBUH) confirmed women's accountability in household management, saying, "a woman is a shepherdess in charge of her husband's house and children, and she is responsible for them" (Mishkāṭ, *Ḥadīth* No:3685). Hence, the *Ḥadīth* reveals the eligibility of women to be appointed in every sphere of life²².

Al-Qurṭubī elaborates 'Surely, Allah instructs to render trusteeship by the Qur'anic verse "Verily! Allah commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice" (al-Nisā':58). The most significant step in the trusteeship is the escrow of judgement (al-qadā). Hence, the word "order" and law imply gender balance²³.

Moreover, the proponents of this opinion cite the story of Balqīs, queen of Saba, to prove the eligibility and ability of women to be appointed as *Qāḍīs*,²⁴ depicting her wisdom, diplomacy, and ability in administrating the affairs of her kingdom. Remarkably, she protected her dominion, tackling a significant challenge with diplomatic moves when she received a war warning from the Prophet Sulaymān (A.S.)²⁵.

In addition, they mention the *Ḥadīth*: "During the *Ḥudaybiyah* incident, the Prophet (PBUH) consulted Ummu Salamah (R.A.) when his companions denied obeying him. Thus, she advised the Prophet to remove the *iḥrām* and slaughter the animal before him. Consequently, the companions also responded" (al-Bukhārī, *Ḥadīth* No: 2731) and argued that the wisdom of Ummu Salamah (R.A.) and the Prophet's recognition of her opinion attests to the wisdom of women assisting the appointment of women *Qāḍīs*²⁶.

²⁰ 'Abdul Ḥalīm Abū Shuqqah, *Taḥrīr Al-Mar'ah Fī 'Aṣr al-Risālah* (Kuwait: Dār al-Qalam, 1990). p.44.

²¹ Ibn Ḥazm al-Zāhirī, *Al-Maḥallī*. p.81.

²² Jamāl Šādiq Al-Miršafāwī, *Niẓām Al-Qaḍā' Fī al-Islām* (Riyadh: Idārat al-Thaqāfah wa al-Nashr, 1991). p.80

²³ Muḥammad bin Aḥmad Al-Qurṭubī, *Al-Jāmi'u Li Aḥkām al-Quran* (Beirut: al-Risālah Publishers, 2006). P.143.

²⁴ Iqbal Saujan, "Female Quazi Appointed in the Judicial Position : Islamic Law and Public Opinion in Sri Lankan Context .," *IOSR Journal of Humanities and Social Science* 24, no. October (2021): 57-64, <https://doi.org/10.9790/0837-2410075764>.

²⁵ M.A.M Mansoor, *Some Key Aspects of Muslim Personal Law* (Colombo: Mishkat, 2017). p.45.

²⁶ Aḥmad bin 'Alī Ibn Ḥajar al-'Asqalānī, *Fatḥ Al-Bārī Bi Sharāḥi Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Fikr, 1995). p.11.

Permission with Stipulations

Abū Ḥanīfah allows the appointment of women Qāḍīs in all cases except criminal (*ḥudūd*) and retaliation (*qīṣāṣ*) cases²⁷. The proponents of this opinion emphasise that whoever is eligible for testimony is eligible to be appointed as a Qāḍī. Accordingly, the stipulations for the testimony are similar to the appointment of Qāḍī. Nonetheless, since women are ineligible for testimony in the criminal and retaliation cases, they are amiss for Qāḍī's post²⁸.

Citing the opinions of Abū Ḥanīfah, Ṭabarī and the feminist views, the woman activists advocate accommodating the appointment of women Qāḍīs in MMDA. Nonetheless, according to the *Sharī'ah*, their arguments are anomalous, misinterpreted, and contrary to the consensus of the majority opinions.

Justifications for Appointing the Women Qāḍī

The women activists in Sri Lanka advocate for women Qāḍīs' appointment, justifying their arguments that: 1. *qiwamah* of men should be restricted to familial administration; 2. The contradiction of Ḥadīth with the Qur'anic verse that felicitates female leadership, 3. Refutation of the veracity of the Ḥadīth, 4. Appointment of al-Shifā' (R.A.) by 'Umar (R.A.), 5. Headship of 'Ā'ishah in the Jamal incident, 6. Prioritisation of Ḥanafī opinion on the appointment of women, 7. Differentiation between the majority and minority context.

Restriction of Qiwamah to Familial Administration

The MWRAF argues that the *qiwamah* in the Qur'anic verse, "al-rijāl qawwāmūn alā al-nisā" denotes only family life and not public administration. They explain that: "this verse and its revelatory circumstance focus on men's stewardship of women within the family structure" (the President of the MWRAF). Nonetheless, ACJU refutes the following: "if a woman is not allowed to be a qawwamah in a house, she is not allowed to be a qawwamah for a community" (the president of the ACJU). To further illuminate this point, they cite Mawdūdī's as he responds:

The Qur'an does not restrict the guardianship only to 'the woman in homes' and does not mention the word 'in homes'. Thus, the ruling cannot be restricted to family life. Moreover, Allah does not make women responsible for house chores. Nevertheless, they put her in the position of obedience. So, do you like to push her from obedience to guardianship over the entire home or the country? Do you think that Allah makes a woman a steward on a group of millions of homes while He did not make her a steward within her home? Is there any suspicion that a state's stewardship is more dangerous and more accountable than its own stewardship of a house?²⁹.

²⁷ Ibn Qudāmah, *Al-Mughnī*, p. 86.

²⁸ Abū Bakr ibn Mas'ūd Al-Kāsānī, *Badā'i' u al-ṣanā'i'* (Beirut: Dār al-Kutub al-ʿilmiyyah, 2003).

²⁹ Abū al-A'ālā Al-Mawdūdī, *Tadwīn Al-Dustūr al-Islāmī* (Beirut: Mu'assasat al-Risālah, 1981).

Furthermore, Abū Fāris argues that: "if the verse is connected with the family responsibility, it is also evidence to prove that if a woman is unable to maintain a family which consists of some members, she will be more incapable in the administration of public affairs, reconciliation and problem-solving"³⁰. Hence, it is assumed that since a woman is incapable of being a qawwamah in a family, she would be incompetent to be a qawwamah in a community.

Moreover, al-Māwardī argues that: "there is no value on the word that contradicts the Qur'anic verse "al-rijāl qawwāmūn alā al-nisā" (the men are protectors of women) (al-Nisā':34). Thus, women cannot have superiority over man. If so, there is no value in denying the community's consensus against the appointment of woman Qāḍī"³¹.

Contradiction of the Ḥadīth with the Qur'anic verse

The MWRAF argues that the Ḥadīth "No people will ever prosper who entrust their leadership to a woman" (al-Bukhārī, Ḥadīth No:7099) contradicts the Qur'anic verses, which felicitate the queen of Saba in the surah al-Naml (al-Naml:23-44).

In contrast, ACJU argued that the administration of Saba's queen was during her disbelief epoch. Therefore, the action of non-believers is not a lesson or evident as Alūsī elaborates that: "in this verse, there is no indication for allowing a woman to be a queen (ruler), and the action of non-believers is not evidence"³².

When deeply delved, there is no connection or contradiction between the Ḥadīth and those Quranic verses. No explicit verse felicitates the kingdom of Balqīs's kingdom, but it narrates the end of her rule. On the contrary, her history reveals that she finally surrendered to the Prophet Sulaymān (A.S.).

Refutation of the Veracity of the Ḥadīth

The MWRAF argues that Abū Bakrah, the narrator of the Ḥadīth "No people will ever prosper who entrust their leadership to a woman" (al-Bukhārī, Ḥadīth No:7099), was punished for slandering by 'Umar (R.A.). Therefore, the Ḥadīth narrated by him cannot be accepted. Nevertheless, ACJU refuted the criticism of the MWRAF by citing the opinion of Abd al-Āl, stating as follows:

Some ignorant people have challenged the veracity of the Ḥadīth, accusing that Abū Bakrah (R.A.) was slapped by 'Umar (R.A.) for slandering al-Mughira ibn Shu'bah (R.A.). However, this is not correct. The ḥadd punishment was enforced on Abū Bakrah (R.A.) because four witnesses were incompleting in their testimonies of adultery accusation on al-Mughīrah (R.A.). Hence, the scholars unanimously agreed to accept the narration of the person who was punished for slandering if he repented, and therefore al-Bukhārī prescribed the Ḥadīth narrated by him³³.

³⁰ Muḥammad Abd al-Qādir Abū Fāris, *Al-Qaḍā Fī al-Islām* (Amman: Dār al-Furqān, 1995).

³¹ Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*. p.34.

³² Shihāb al-Dīn al-Sayyid Maḥmūd Al-Alūsī, *Rūḥ Al-Ma'ānī* (Beirut: Dār iḥyā al-turāth al-Arabi, 2008). P.54.

³³ Aḥmad 'Aṭwah Abd al-Āl, *Muḥāḍarāt Fī 'Ilm Al-Qaḍā* (Cairo: Alukah Net, 2012). P.33.

Besides, 'Alā' al-Dīn Maghlatāy cites the statement of Abū Bakr al-Ismā'īlī in his book 'al-Madkhal' regarding Abū Bakrah (R.A.) as follows:

None of the Tābi'īn and those after them refrained from narrating the Ḥadīth of Abū Bakrah (R.A.) and invoking it, and none of the narrators criticised his narration in terms of his testimony on al-Mughīrah (R.A.). This is despite their unanimous agreement that there is no evidence for those who were punished for slandering if they did not repent. Accepting his narrations became the course of consensus³⁴.

Appointment of al-Shifā' (R.A.) by 'Umar (R.A.)

MWRAF emphasised that Ibn Ḥazm al-ẓāhirī and Ibn Jarīr al-Ṭabarī in favour of the opinion that women should be appointed as judges, citing the following:

'Umar Ibn al-Khaṭṭāb (R.A.) appointed a woman called 'Ummu al-Shifā' bint 'Abdullah as market inspector. Accordingly, the appointment of Qāḍī is permitted since both are public appointments. If this is not permitted in Islam, 'Umar (R.A.) would not have appointed a female inspector³⁵.

Nevertheless, ACJU elucidates that Shifā' was appointed to inspect the women merchants only as Abū Fāris articulates that.

Because of the deficiency and illegibility of the evidence, the action of 'Umar (R.A.) cannot be evidence for the appointment of woman Qāḍī. Although the evidence is correct, it can not be assumed that 'Umar (R.A.) appointed al-Shifā' as Qāḍī. However, it should be acquired that he selected her only to prevent the evil deeds of women in the market³⁶.

Moreover, Ibn Sa'd emphasised that "it is said that 'Umar bin al-Khaṭṭāb appointed her for the market. Nonetheless, her children refuted it and became angry about it"³⁷. Ibn al-'Arabī mentions that "it is narrated that 'Umar appointed a woman for inspecting the Madīnah market. Nevertheless, it is not veracious. Hence, it is ignored. It is an intrigue of the innovators in the Ḥadīth"³⁸. Abd al-'Āl argues that: "the appointment of 'Umar (R.A.) contradicts with the proven Ḥadīth "No people will ever prosper who entrust their leadership to a woman" (al-Bukhārī, Ḥadīth No:7099). Therefore, it is unacceptable that 'Umar (R.A.) might have acted against this Ḥadīth"³⁹. However, Ibn 'Abd al-Barr prescribes that: "'Umar (R.A.) appointed Sulaymān bin Ḥathmah for inspecting the Madinah market"⁴⁰.

Al-Qafāsh elaborates that it is evident that "'Umar (R.A.) appointed al-Shifā' and her son to inspect the Madinah market. Therefore, she inspected female merchants, and her son inspected the male merchants". Furthermore, he adds that

³⁴ Qalīj al-Hanafī 'Alā' al-Dīn Maghlatāy, *Ikmāl Tahdhīb Al-Kamāl Fī Asmā' al-Rijāl* (Cairo: al-Fārūq al-Ḥadīthah, 2001). P.222

³⁵ Ibn Ḥazm al-ẓāhirī, *Al-Maḥallī*. p.42.

³⁶ Abū Fāris, *Al-Qaḍā Fī al-Islām*. P.81.

³⁷ Ibn Manī' al-Zuhrī Ibn Sa'd, *Al-Ṭabaqāt al-Kubrā* (Taif: Maktabat al-Ṣiddīq, 1992). P.12.

³⁸ Abū Bakr Muḥammad bin 'Abdullah Ibn al-'Arabī, *Aḥkām Al-Qur'ān* (Beirut: Dār al-Kutub al-'ilmiyyah, 2003). P.87.

³⁹ Muḥammad Abd al-Ra'ūf Al-Qafāsh, "Athar Tawliyat 'Umar Al-Khaṭṭāb Raḍiya Allah 'Anhu al-Shifā' Raḍiya Allah 'Anha al-Sūq," *Alukah.net*, 2003.p. 23.

⁴⁰ Abū 'Umar Ibn 'Abd al-Barr, *Al-Istī'āb Fī Ma'rifat al-Aṣḥāb* (Beirut: Dār al-Jayl, 1992).p.42

"the deduction of Ibn Ḥazm is not acceptable. Because 'Umar (R.A.) appointed al-Shifā' for a part of inspection (for women), not for judgements"⁴¹.

Headship of 'Ā'ishah in the Jamal Incident

The MWRAF contends that the leadership of 'Ā'ishah in the Jamal incident is evidence of women's leadership. However, the ACJU refutes this argument and quotes the opinion of Mawdūdī as he stresses: "How can we deduce from this incident when the companions of the Prophet (PBUH) accused it as well as 'Ā'ishah also expressed her contrition for innovating a wrong model"⁴².

Besides, al-Dhahabī mentions that "undoubtedly 'Ā'ishah completely regretted her march to Basra and her presence on the day of the Jamal incident. Moreover, if she recited the Qur'anic verse "And stay in your houses", she cried until her veil dipped"⁴³.

Therefore, Abū Bakrah described the Jamal incident as a calamity and praised Allah for rescuing him from participation in it:

During the days (of the battle) of al-Jamal, Allah benefited me with a word I had heard from Allah's Messenger (PBUH) after I had been about to join the Companions of al-Jamal (i.e. the camel) and fight along with them. When Allah's Messenger (PBUH) was informed that the Persians had crowned the daughter of Khusraw as their ruler, he said, "Such people as ruled by a lady will never be successful (al-Bukhārī, Ḥadīth No:4425).

In another narration, Abū Bakrah said the following:

Allah restrained me with something that I heard from the Messenger of Allah (PBUH). When Kisra died, he said: 'Who did they have to succeed him?' They said: 'His daughter'. Therefore, the Prophet (PBUH) said: "A people will never succeed who give their leadership to a woman". He said: "So when 'Ā'ishah arrived - in Al-Basrah - I remembered the saying of Messenger of Allah (PBUH), so Allah restrained me by it (al-Tirmidhī, Ḥadīth No:2262).

Moreover, Ibn Ḥajar accentuates that: "no anyone revealed that 'Ā'ishah or the people who were with her claimed to unseat 'Alī (R.A.) from the caliphate nor they lobbied for handing over the caliphate to anyone"⁴⁴. Though 'Ā'ishah played a significant role in the delegate, he was chaired by Ṭalḥah and Zubayr⁴⁵. Hence, it is evident that 'Ā'ishah did not chair the battalion in the Jamal incident. Although she was the leader as the women activists assumed, her team was defeated, and the Ḥadīth of the Prophet (PBUH), "Never will succeed such a nation which makes a woman their ruler" (al-Bukhārī, Ḥadīth No:7099) materialised in this incident.

⁴¹ Al-Qafāsh, "Athar Tawliyat 'Umar Al-Khaṭṭāb Raḍiya Allah 'Anhu al-Shifā' Raḍiya Allah 'Anha al-Sūq." P.63

⁴² Al-Mawdūdī, *Tadwīn Al-Dustūr al-Islāmī*. P.15.

⁴³ Muḥammad bin Aḥmad Al-Dhahabī, *Siyaru A'lām Al-Nubalā'* (Beirut: Bayt al-Afkār al-Duwalīyyah, 2004).p.32.

⁴⁴ Ibn Ḥajar al-'Asqalānī, *Fath Al-Bārī Bi Sharahī Ṣaḥīḥ al-Bukhārī*. P.144

⁴⁵ Abd al-Āl, *Muḥāḍarāt Fī 'Ilm Al-Qaḍā'*. P.167

Prioritisation of Ḥanafī Opinion on the Appointment of a Woman as a Qāḍī

The MWRAF is in favour of the Ḥanafī opinion on the appointment of women Qāḍī, which is prescribed by Ibn Qudāmah prescribes as follows: "Abū Hanīfah allows the woman to be a Qāḍī except in criminal matters"⁴⁶. Likewise, Ibn Rushd mentions that "Abū Hanīfah permits women to be a Qāḍī in financial matters"⁴⁷. Therefore, the MWRAF determines that Abū Hanīfah allows women to assume judicial positions.

Nevertheless, al-Shimrānī asserts that this conception is wrong. Ḥanafī jurists agree with the majority opinion as deduced from the text, refuting women Qāḍī's appointment as they state that the evidence indicates the impermissibility for a woman to be appointed in the judiciary⁴⁸. Similarly, Ibn al-Hammām elaborates that "the purpose of his opinion is to prevent women's appointment as a Qāḍī. Hence, if anyone appoints her, he will be a sinner. However, the argument focuses on the acceptance of her judgement if she was appointed for the judicial positions⁴⁹ (in other than the criminal and retaliation cases). Thus, this denotes that the Ḥanafī jurists also do not allow the appointment of women Qāḍīs⁵⁰. Besides, al-ʿĀnī stresses that: "most jurists deduced from the text, while others deduced by analogy and reasoning. Nevertheless, the fundamental principle of Usūl al-fiqh states that there is no *ijtihād* in the explicit text (*naṣṣ*), so there is no need to call for leaving the text and acting against it⁵¹. Moreover, the Ḥanafī madhhab had been practised throughout the Ottoman Empire and the subsequent caliphates. Nonetheless, there is no narration or evidence to prove the appointment of a woman to the judiciary⁵².

Differentiating between Majority and Minority Context

The MWRAF seeks to differentiate between the classical Arab context and the contemporary Sri Lankan context to neglect the Islamic ruling on women Qāḍī's appointment, as Ramzy and Simin argue:

The judicial responsibility of a Qāḍī in Sri Lanka is restricted only to the Muslim Marriage and Divorce Act; it is a very narrow and minor area compared to the judicial domain of the pre-modern Arabic world. Likewise, the contemporary Sri Lankan Muslims' socio-political and cultural context is different from the scholars who prioritise masculinity for their position in the judiciary. Therefore, the opinions of the scholars who stipulate masculinity for the appointment of a Qāḍī are irrelevant to the Sri Lankan context⁵³.

However, the ACJU refutes the following:

⁴⁶ Ibn Qudāmah, *Al-Mughnī*. P.167

⁴⁷ Al-Qurṭubī, *Al-Jāmi' u Li Ahkām al-Quran*. P.145

⁴⁸ Ṣāliḥ bin 'Alī Al-Shimrānī, "Al-Shudhūd Fī al-Qawl Bi Jawāz Tawallī al-Mar'ah Maṣīb al-Imāmah Wa al-Qaḍā", Dorar.net, 2019, <https://dorar.net/article/399/> الشذوذ في القول بجواز تولي المرأة منصب الإمامة والقضاء.

⁴⁹ Kamāluddīn al-Ḥanafī Ibn al-Hummām, *Fath al-Qadīr* (Beirut: Dār al-Fikr, 1977). P.44

⁵⁰ 'Abd al-Wahhāb Khayrī 'Alī Al-ʿĀnī, *Nizām Al-Murāfa'āt Dirāsah Fiqhiyyah Baina al-Shara'iyyah Wa al-Qānūn al-Madānī al-Urdunī* (Cairo: al-Markaz al-Qawmī, 2014). P.38

⁵¹ Al-ʿĀnī.

⁵² Al-ʿĀnī.

⁵³ Ghavifekr Ramzy, Muḥammad Ismath and Simin, "Women Quazi in a Minority Context; An Overview of Sri Lankan Experience," *Societies* 9, no. 13 (2019).

This argument is baseless. If MWRAF applies this argument in all matters, then most Islamic rulings in the Sri Lankan Muslim minority context will be irrelevant. Then, the women activists in Sri Lanka would then be able to escape from the rules and regulations of the *Sharī'ah* and enact what they needed in the law (the president of the ACJU)

Moreover, the MWRAF criticises that the male *Qāḍīs* discriminate against women and do not understand the female grievances of female clients'. Therefore, to mitigate this gender bias, the MWRAF calls for the appointment of women *Qāḍīs* (the President of the MWRAF). Nonetheless, the ACJU argues that the demands of the MWRAF are found illogical and unreasonable. There are 65 *Qāḍīs* in Sri Lanka. According to the generalised critiques of the MWRAF, all *Qāḍīs* should be replaced by female *Qāḍīs*. But it is practically impossible (the president of the ACJU)

Besides, a prominent woman activist criticises the *Qāḍīs*' ignorance regarding the Muslim Family Law for which they are assigned; the female clients face difficulties and receive unfair judgements. Conceivably, they are humiliated by the unethical *Qāḍīs* (a female lawyer and prominent women activist). Furthermore, the women activists cite the opinion of al-Qarḍāwī as he believes that: "there is no definitive provision regarding the appointment of woman *Qāḍī*, and no full consensus. Thus, this matter became an open area that governs according to the circumstances of every society and every time"⁵⁴.

However, they neglected the three conditions given by al-Qarḍāwī to appoint the women for the judicial positions, which are:

1. The woman should not assume the judiciary until after she is mature and has reached menopause to avoid the psychological disorders and physical troubles that lead to menstruation and pregnancy.
2. The existence of a matured and socially improved society until accepting the appointment of women *Qāḍīs*.
3. The necessity of appointing women *Qāḍīs*

When the stipulations of al-Qarḍāwī are compared with Sri Lankan Muslims' context, the appointment of women *Qāḍīs* would be impossible. An empirical survey of 2014 reveals that most Sri Lankan Muslims do not accept women *Qāḍīs* appointment⁵⁵. Hence, it indicates that the Muslim community is not mature enough to accept the woman *Qāḍī*.

Besides, it is evident that Islam does not encourage women due to their incompleteness (weakness), not based on their gender. Therefore, the Prophet (PBUH) refused to appoint Abū Dharr as he illustrates the scene: "he asked Allah's Messenger to make him a governor, but he struck him on his shoulder with his hand and said, "You are weak, Abū Dharr, and it is a trust which will be a cause of shame and regret on the day of resurrection except for him who undertakes it as it ought to be undertaken by the one who fulfils his duty in it" (Mishkāṭ al-Maṣābīḥ, Ḥadīth No:3682).

⁵⁴ Shalash, "Ḥukmu Tawliyatī Al-Mar'ah al-Qaḍā'."

⁵⁵ Muḥammad Buhary Fowzul, "The Operation of the Quazi Court System in Sri Lanka: A Study with Special Reference to Quazi Judges" (University of Peradeniya, 2014).

Overall, it is pertinent that all the justifications of the women activists are based on their logic and modern reinterpretation but not on the explicit text. Significantly, the Sri Lankan context is very different from other Muslim countries such as Malaysia and Indonesia. The *Qāḍī* court system in Sri Lanka is not systemised or not like other conventional courts. Most of the courts are conducted in houses. Sometimes, the *Qāḍīs* need to work during the late nights and meet aggressive clients who sometimes use abusive words. Since there is no security and organised structure, the (male) *Qāḍīs* face various difficulties and unwanted experiences⁵⁶. Hence, the contemporary Sri Lankan context is inappropriate for women *Qāḍīs*' appointment despite the jurists' divergent standpoints.

Moreover, according to the *Sharī'ah* and the MMDA, when a woman is appointed as a *Qāḍī* she would face religious blocks in performing her judicial positions completely in the Sri Lankan context, such as acting as a wali for those who do not have a wali and attending the marital and religious ceremonies in the mosques during her menstruation.

Conclusion

The MWRAF diligently advocates for the appointment of woman *Qāḍī*, justifying the following arguments:

1. *Qiwamah* in the Quranic verse "al-rijal qawwamun" is restricted only to the familial administration.
2. The Ḥadīths which are shown for refusing the appointment of *Qāḍī* are contradictory to the Quranic verse that felicitates woman leadership.
3. The appointment of al-Shifā' (R.A.) as a market controller by 'Umar (R.A.) is evidence for the appointment of women *Qāḍīs*.
4. The headship of 'Ā'ishah in the Jamal incident is evidence for the women leadership.
5. The opinion of Ḥanafī madhhab supports the appointment of woman *Qāḍī*.
6. The Islamic rulings should be understood according to the minority context.
7. A Feminine-Friendly Environment should be established in the MMDA.

However, when deeply delved, it was found that if the *qiwamah* is restricted to family life, it is impossible to have the *qiwamah* in a more prominent public life than the family. Moreover, there is no explicit Quranic verse that felicitates women's leadership. Significantly, the scholars elaborate that the surah al-Naml narrates regarding the sovereignty of Balqis during her atheism. Therefore, it cannot be considered a role model for women's leadership. Besides, Shifa (R.A) was appointed just for the women as a market controller, not as a judge. Likewise, Scholars confirm that Aishah was worried about her involvement in the Jamal incident. Furthermore, the party which Aishah supported was defeated. Hence, Aishah's leadership cannot be taken as a model for women's leadership. Likewise, the MWRAF demands to prioritise the opinions of Hanafi jurists for the reform of MMDA. In contrast, the ACJU argues that the MMDA is based on the Shāfi'ī Madhhab, and most of the Sri Lankan Muslims adhere to its rulings. Moreover, though there is a favourable Hanafi opinion regarding

⁵⁶ Fowzul.

the appointment of women Qāḍī, most of the Hanafi jurists refute it. Therefore, the Hanafi opinions will not be considered for the reform in the Sri Lankan context. Furthermore, the women activists differentiate the Islamic rulings between majority and minority contexts. The contemporary Sri Lankan Muslims' socio-political and cultural context is different from those who prioritised masculinity for the judiciary. Therefore, the opinion of the scholars who stipulate the masculinity for the appointment of a Qāḍī is irrelevant to the Sri Lankan context. Nonetheless, this argument is baseless. If the women activists apply this argument in all matters, most Islamic rulings will be irrelevant in the Sri Lankan Muslim minority context. Then, they would be able to escape from the rules and regulations of Islamic *Sharī'ah* and to enact what they need in the law. Moreover, the MWRAF criticise that the male Qāḍīs discriminate against women and do not understand female clients' grievances. Therefore, to mitigate this gender bias, the MWRAF demand the appointment of women Qāḍīs. In contrast, their demands are found illogical and unreasonable. There are 65 Qāḍīs in Sri Lanka. According to the generalised critiques of the MWRAF, all Qāḍīs should be replaced by female Qāḍīs. However, it is practically impossible.

Recommendations

- The competent women can be appointed as assistants to the Qāḍī. Then, the women litigants can reveal their sexual or secret family problems to those assistants.
- The women can express their grievances in written form if they feel embarrassed or hesitant. Then, it would be solid evidence to take legal action against the husbands if they were found guilty.
- The religious leaders in Sri Lanka should analyse the demands of women's organisations fairly and favourably, especially from the maqaasid al-Shariah perspective, to mitigate malpractices and discrimination against women.

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