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ELIGIBILITY OF APPOINTING FEMALE QÁDÍS
BETWEEN ISLAMIC RELIGIOUS NORMS AND THE
PROVISIONS OF THE CONSTITUTION OF KENYA, 2010

BY DR. ABDULKADIR HASHIM*

1.0 INTRODUCTION

Lamya al-Faruqi has pointed out that any investigator on women’s rights in Islam is confronted by a dilemma. Researching on the appointment of female judges in the Qádis courts is a manifestation of this dilemma. Muslim female professionals have to contend with this predicament which has resulted in a dichotomy between their public lives governed by secular laws and their private lives dictated by Islamic law. The debate on the appointment of female Qádis has gained momentum in Kenya. A newspaper poll under the title “Should Muslim women be represented in Qádis courts?” demonstrates the significance of the debate on the appointment of female Qádis among Kenyans. Interestingly enough, the newspaper quoted two contrasting responses, both from non-Muslims, in which one female respondent supported the appointment of female Qádis by stating “I think everyone has a right to be given a chance so long as they have the qualities needed to perform”. Contrary to the female response, a male respondent opposed such appointment by mentioning “We should respect each other’s culture. If women are not allowed to work in the courts so be it”. Despite the different religious affiliation of the above respondents, their opinions reflect a Muslim patriarch perception of gender issues in the society.

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1 The terms Qádis and Kadhis are used interchangeably to refer to Muslim Magistrates at the Kadhish Court. L. Al-Faruqi, Women, Muslim Society and Islam (Indiana: American Trust Publications, 1994), page 23.


3 The Star 2011, 3 October, page 5.
Kamali mentions that it the patriarchal character of human society that leads to male dominance which infiltrates religion and culture of societies.\(^4\)

Appointment of female Qādīs has been a subject of debate between Muslim scholars for a very long time. This debate led to difference of opinions and the root cause for their disagreement is based on the fact that there is no qati (definitive) text from the Qur'ān and Sunna which clearly prohibits the appointment of female judges. Lack of a qati rule prohibiting the appointment of female Qādīs led classical as well as contemporary Muslim scholars to rely on the interpretation of texts which either condemn or commend the appointment of female Qādīs.

Muslim scholars have agreed on the essential requirements for the appointment of a judge which are Islām, sanity (‘aqil), and maturity (hulūgh). However, the scholars differed on the condition of masculinity (al-dukūra) as a requirement for the appointment of a judge. Based on the Hanafi School of thought, the Ottoman Majalat al ahkāmal ‘adaliyya does not include the condition of masculinity in the appointment of a judge.\(^5\)

Ibn Rushd (d.1198) has elaborated the contention among Muslim jurists on the condition of masculinity in the appointment of a judge and stated that majority of scholars (al-jumhur) are of the opinion that it is a condition of validity of the judgment (shart fi sihat al-hukm) on the basis of the Hadith reported by al-Imām Bukhārī and narrated by Aḥbāb al-Khattābī that Prophet Muhammad said: “A Nation that entrusts its affairs to a woman can never prosper”. On the contrary, Ibn Rushd mentioned that according to the Hanafi School, a woman is eligible to be appointed a judge on matters related to properties (al-amwāl) based on the approval of her testimony on matters related to properties. The other opinion mentioned by Ibn Rushd is attributed to Imām Ibn Jarīr al-Tabarī (d.923) who allows a woman to be appointed as a judge in all matters based on the maxim that the origin (al-asl) is that any judgment seeking to arbitrate between people is permissible (jālīz) except what has been confined by

\(^4\) The Star 2011, 3 October, page 5.

\(^5\) The Majallat set the following criteria for the appointment of a judge: Article 1792, the judge must be intelligent, upright, reliable and firm. Article 1793, the judge must have knowledge of Islamic Law and jurisprudence and of the rules of procedure, and must be able to decide and settle actions in accordance therewith. Article 1794, the judge must be of perfect understanding. Consequently, any judicial act performed by a minor or an imbecile or a blind man or a person so deaf that he cannot hear the statements of the parties when speaking loudly, is invalid.
consensus of scholars on the highest imamate (khasasahu al- ījmāʿī al-imāmat al-kubrā). 6

Adopting Ibn Rushd's above categorization of scholars on the appointment of female judges, I will classify the debate between the divergent schools of thought into classical controversies and contemporary experiences and highlight the Kenyan context.

2.0 CLASSICAL CONTROVERSIES

2.1 The Conservative View

The majority opinion (al-jumhūr) consisting of the Mālikī, Shāfiʿī, and Hanbali schools are of the view that a Muslim woman is not eligible to be appointed as a judge and subsequently her judgment is considered to be null and void. The three schools have based their arguments on textual authorities from the Holy Qur'ān, Sunnah and consensus of the Muslim scholars (ijmāʿ). The first basis of these schools is verse 34 of Chapter 4 of the Qur'ān which states “Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means”. According to the conservative view, men have been made guardians in charge of women and their guardianship covers all aspects including the household, judgeship and headship of the State. It follows that appointing a woman as a judge would put her in a position of a guardian over male litigants which will contravene the provision of verse 4:34 the Qur'ān. Furthermore, the schools have also relied on verse 228 of chapter 2 of the Qur'ān which states “but men have a degree [of responsibility] over them [women]” and argued that appointment of a woman as a judge will accord her a higher status over a man and this in turn contradicts the verse in cases where a female judge would adjudicate between male litigants.

The second basis of the majority schools is the Hadith narrated by Abī Bakr as in which Prophet Muhammad stated that “A Nation that entrusts its affairs to a woman can never prosper”. The schools argue that the words “their affairs” refers to all matters of public affairs which include judicial matters. It follows therefore, that prosperity would never occur in a Nation which appoints women judges. The schools also held that women cannot be entrusted with public affairs which include Judgeship owing to their psychological nature.

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that bar them from occupying posts which demand bold and strict qualities in decision making. Another argument advanced by the schools is that women by their nature are regarded to being soft hearted, highly emotional and could easily be moved by passion. It therefore, follows that the psychological and physiological features of women would influence their ability to make proper judgments. The schools also argued that the duty of a judge requires a female judge to intermingle with men, talk to them and even engage them in privacy. Hence, this would contradict with her religious virtues and render it difficult to be appointed as a judge. Other grounds to exclude women from public participation was based on precautionary rules such as blocking of the means (sad al-dari'a) in order to prevent sexual impropriety that could occur during the intermingling between men and women. Based on the rule of sad al-dari'a, Ibn Qudāma (d. 1223) prohibited women to attend men forums (muḥāfīl al-rijāl) particularly in cases where a female judge would be expected to attend the disputing parties in privacy (khulwa).  

The majority schools (Shāfiʿī, Mālikī and Hanbālī) also relied on consensus of Muslim scholars which prohibits a Muslim woman to be appointed as a judge. The schools argue that since the time of Prophet Muhammad, his companions and successors there has been no single appointment of a Muslim female judge. Supporting this opinion, Ibn Qudāma stated that “the Prophet and none of his companions or their successors have appointed a woman to be judge or a governor of a town as it has been narrated to us”.

Finally, the schools also used analogy (qiyyās) to prohibit a woman from being appointed as a judge and argued that the Qur’anic verse 4:34 that states “Men are the protectors and maintainers of women” gives the guardianship of the household to men. Therefore, if women cannot be in charge of the smallest responsibility of the household, then it will prove more difficult for them to be given the responsibility of judges. Another argument advanced by the scholars is the Ḥadīth of Prophet Muhammad in which he said “there is no marriage without a guardian”. The Ḥadīth prohibits unmarried Muslim woman to contract a marriage without a guardian. By applying analogy, it implies that if a woman cannot be a guardian of herself then she cannot be given the responsibility of adjudicating between other litigants.

9 Ibid.
2.2 The Progressive Approach

Scholars supporting the appointment of female judges differed on the extent of the jurisdiction of a female judge. The first group consists of the Hanafi School, Hassan al-Basri (d.728) and Ibn Qāsim (d.801), a Mālikī jurist, who are of the opinion that a Muslim woman can be appointed as a judge in areas which she is permitted to give testimony. According to this view, a woman is eligible to be appointed as a judge in all areas except in matters of ḥudūd (prescribed punishments) and qisas (retaliation) due to the fact that her evidence in these areas is not admissible. Ibn Qāsim stated that a woman is eligible to be appointed as a judge and her judgment is valid in cases which her testimony is accepted such as properties and areas which men cannot be disclosed to men such as giving birth and private matters related to women.\(^{10}\) Al-Māwardī (d.1058) referred to Abū Harīfa’s opinion which permits a woman to give a judgment on matters which she is eligible to give her testimony.\(^{11}\)

Al-Kāsānī (d.1191), a renowned Hanafi jurist, mentioned that the condition of masculinity of a judge is not among the conditions for validity in general due to the fact that a woman is eligible to give testimony in general except that she cannot adjudicate in matters of ḥudūd and qisas due to her ineligibility to give testimony in these cases. Al-Kāsānī based his argument on the rule that the eligibility of judgeship revolves around the capability of giving testimony (ahlīyat al qadā tadāru ma ‘a ahlīyat al-shādī).\(^{12}\)

The second group is led by Ibn Jarīr al-Tabarī (d.923), a Shafi’i jurist, who held that women are eligible to be appointed as judges absolutely. Al-Tabarī maintained that the principal task of a judge is to implement the Sharī’ah and men and women stand on the same footing in this regard.\(^{13}\) Al-Tabarī further mentioned that the most significant qualification for a judge is the knowledge of Islamic law and the ability to conduct ījtihād.\(^{14}\)

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\(^{13}\) Kamali, Supra at page 270.

Al-Tabari regarded the analogy drawn from the Hadith of prohibiting a woman from being the head of state to be a discrepant analogy (qiṣāṣ māʾ al-fāriq). Supporting Al-Tabari’s view, Ibn Hazm (d. 1064) argued that the Prophet mentioned the Hadith on the general command (al-amr al-ʿām) which is the vicegerency (al-khilāfat) and therefore, the Hadith does not prohibit a woman from assuming the position of a judge. Ibn Hazm quoted another Hadith of the Prophet which stated “a woman is a guardian of the property of her husband and she is responsible to take care of it” and argued that if a woman has been made a guardian of her husband’s property then, by extension, she should be equally qualified to be appointed to be a judge. Ibn Hazm concluded that a woman is eligible to be appointed as a judge and her judgment is valid absolutely in all cases including matters of hudud and qisās.

Proponents of appointing female judges base their arguments on verse 71 of chapter 9 of the Qur’an which states “The believers, men and women, are Auṭiyā (supporters/friends) of one another they enjoin al-Ma’rūf (good) and forbid al-Munkar (evil).” The jurists argued that Almighty Allah has given the responsibility of enjoining the good and prohibiting the evil to both male and female. It follows that administration of justice is part of the process of enjoining the good and prohibiting the evil and therefore Muslim women are equally eligible to be appointed as judges. Ibn Hazm argued that the command to uphold justice in verse 58 of chapter 4 which states “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” is directed to both men and women and does not specify men alone to be appointed as judges. The progressive scholars have also relied on analogy and argued that the fact that a Muslim woman is allowed to give a verdict (jatuwa), she should, by extension, be permitted to serve as a judge. However, the conservative scholars who oppose the appointment of female judges counter this argument by stating that a jatuwa is not binding legally whereas a judgment (itnun) of a judge has a legal force. Hence the fact that a Muslim woman is entitled to be a Mufti does not necessarily qualify her to be a judge.

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16 Ibid.
17 Ibid.
18 Progressive scholars have also referred to the incident which it is reported that Khalifah Umar Ibn al-Khattab appointed a woman by the name al-Shifa bint ʿAbdullahi in charge Hisba (inspection of grievances) of the market in Madina. However, scholars opposing the appointment of female judges refuted the occurrence of this appointment. In supporting the appointment of women in holding public office, progressive scholars have argued that while Prophet Muhammad lived in Mecca,
3.0 CONTEMPORARY EXPERIENCES

Cardinal’s research on the appointment of female judges in Syria found that women make up 14 per cent of the Judiciary charged with various judicial responsibilities in both civil and criminal jurisdictions. Although female judges were appointed in the Syrian Judiciary since 1975, nonetheless, they do not hold office in the personal status courts which include the Shari’a courts. A striking feature is that the article 6 of the Faculty of Law of the Syrian University no. 182/29 May 1954 stated that its graduates could work as judges in the Shari’a courts. Cardinal noted that among the arguments prohibiting women to be appointed as judges is based on the maxim al-qâdi wâll ‘man la wâliyya la-hu “the judge is the guardian of whosoever has no guardian” and since a woman is not eligible to serve as the guardian of a minor or as marriage guardian, she cannot be appointed as judge.

Appointment of female judges has been a subject of debate which has also engaged contemporary Muslim scholars. Scholars who support the appointment of female judges have adopted a progressive approach in interpreting the divine texts. For instance, Fazlur Rahman and Ismail Fatiq argue that men’s superiority over women mentioned in Qur’an chapter 4 verse 34 is not inherent but rather functional. In interpreting verse 9 of chapter 71 that stated “The believers, men and women, are Awdiyâ (supporters/friends) of one another they enjoin al-Ma‘ruf (good) and forbid al-Munkar (evil)”, Rashid Ridâ (d.1935) stated “God has proved for the believing women the absolute guardianship with men believers which include the guardianship of brotherhood, friendship and financial and social cooperation and military and political victory, but the law has exempted women from actual fighting”. In emphasizing gender equality as reflected by the above verse, Kamali noted that the word awdiyya used in the verse is a derivative of urîlîyah (to have authority, to protect) in reference to both sexes, which does not entail inequality between male and female on account of urîlîyah. Kamali argues that equality of sexes should be maintained.

Samâ‘ bint Nahayk al-Asadiyya served as the market inspector (muhtasib).

20 Ibid, page 186.
21 Ibid, page 189.
24 Kamali, supra at page 71.
at all levels with the exception of cases where equality may not be advisable on grounds of judicious policy (siyāsah shar'iyya) such as police and military duties in a male-dominated environment.  

Focus of contemporary Muslim scholars is geared towards the interpretation of the Hadith “A nation that entrusts its affairs to a woman can never prosper”. Mustafa Al-Sibā’ī (d.1964) has interpreted the Hadith to refer to the highest public guardianship (al-ulūūyat al-‘ulūūa) based on the fact that the Prophet was informed that the Persians have appointed the Caesar’s daughter to be their king after the death of the Caesar. Al-Sibā’ī is of the opinion that that guardianship in general is not forbidden for a woman by consensus (ijmā’i) based on the global approval of Muslim jurists (ittifāq al-fuqahā‘ qāthibatān) for a woman to be a guardian of the minor and those who lack mental capacity and to be an agent of any group of people in the disposal of their properties and management of their agricultural lands. Al-Sibā’ī adds that “a woman is eligible to give testimony and testimony is guardianship”.  

Fadel cited contemporary Muslim scholar Yusuf Al-Qaradāwī who dismisses rules restricting females participation in public sphere as lacking sufficiently clear textual authority. Al-Qaradāwī claims that many historical rules regulating women’s roles in society were based on incorrect assumptions and therefore need to be revisited within our contemporary context. For instance, in response to the interpretation of the Hadith “A nation that entrusts its affairs to a woman can never prosper”, Al-Qaradāwī maintains that “the Hadith does not apply to the judge, because when we appoint a woman as a judge, we do not entrust her with our affairs”. Al-Qaradāwī further noted that “it does not mean that a woman lacks intelligence ... and therefore the argument that a woman is of an inferior opinion is rejected”. Al-Qaradāwī attributes the view of scholars opposing the appointment of women judges to be “based on opinion and that there is no definitive text ... I do not see in my view any

25 On the issue of headship of the state, Kamali notes that “the only exception of note in Islamic law with regard to women’s participation in government concerns the position of the head of state which is reserved for men; this seems to be based on a presumptive consensus (IJMĀ’I), Kamali, supra at page 269.


27 Fadel, supra at page 22.

28 Ibid., 19.


30 Ibid.
legal text which prohibits a woman from being appointed as a judge". Al-
Qaradāwī's opinion reflects a modern approach which challenges the notion that "women are unfit for the task of a judge which has become fossilized and therefore requires constant chiselling to reveal the true position in Islam".

The matter of appointing women judges was raised in Pakistan in the case of Mian Hammad Murtaza v Federation of Pakistan and others in which the petitioner challenged sections 2, 3 and 4 of the Family Courts Acts, 1964 on the ground that the sections were repugnant to the injunctions of Qur'ān and Sunnah. The main contention of the petitioner was that a woman cannot act as a judge and is therefore not competent to decide between litigants in family matters. The Federal Sharī'at Court dismissed the case and held that the petitioner did not refer to any injunction of Islām under which a female is barred from holding the office of a judge. In a similar case of Ansar Burney v Federation of Pakistan, the petitioner filed a suit to challenge the Federal Sharī'at Court of Pakistan and argued that Islām required the seclusion of women (purdah) and their appointment as judges was therefore repugnant to the injunctions of Islām, and was in violation of article (203D) of the Constitution of Pakistan. After examining texts from the Qur'ān and Hadīth, the Federal Sharī'at Court held that there is no express restriction on the appointment of a female judge in the Qur'ān or Sunnah and the matter therefore fell within the ambit of permissibility (ibāhah).

Female judges have been appointed in the Sharī'ah courts in the West Bank of Palestine in January 2009 by a Presidential Decree that appointed two women judges to the Sharī'ah courts of Rāmallah and al-Khalil. Shaykh Taysīr Rajab al-
Tamīm, Head of the High Islamic Judicial Council (al-majlis al-a'īl līl-qadā al-
shar'ī) supported the appointment of Asmahān al-Wāhidī and Khulād al-Faqīh. He argued that the majority of contemporary Muslim jurists (ālim al-fuqahā al-
mu' assīrīn) support the appointment of female judges in the Sharī'ah courts.

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31 Ibid.
32 Moosa, supra at pp. 2.
34 Reported in Pakistan Law Digest, Federal Sharī'at Court, pp.73.
35 Cardinal, supra at page 210.
36 Ibid.
4.0 The Kenyan Context

The discourse on Qādis courts in Kenya has taken different dimensions which have engaged the State and Muslims since independence. Two incidents will suffice to demonstrate this religion-state contestation. The first event occurred between 1967 and 1990. Shortly after independence, the Kenyan Government established the Commission on the Law of Succession in 1967 in order to come up with a unified Law of Succession to all Kenyans irrespective of their religious or cultural affiliations. The Commission drafted a Bill of the Law of Succession which was passed in 1972. The government advocated for a unified family law but due to political pressures the Law of Succession Act remained inoperative until 1 July 1981 when it was gazetted. Muslims campaigned against the Act and were exempted from the application of the uniform Law of Succession in 1990.

The second incident was the Referendum on the Constitution of Kenya that took place in August 2005. Between 1997 and 2005, Kenya embarked on a process of reviewing the Constitution and the debate on Qādis courts dominated the process. Muslims asserted their historical right to retain Qādis courts in the Constitution whereas Christians from the mainstream churches opposed the entrenchment of Qādis courts in the Constitution. The debate was halted by the promulgation of the Kenya Constitution 2010 which incorporated the Qādis courts in the judicial system.

Prior to the Referendum, the Constitution of Kenya Review Commission was established in November 2000 with the mandate of collecting views of Kenyans on the constitutional review process that was geared towards protection of human rights and ensuring people's participation with transparency and accountability. Civic groups that included religious organizations supported by opposition political parties pressured the government for a comprehensive review of the Constitution. As a response to the public pressure, former President Moi announced the government's plan to invite foreign experts to draft a constitution but the idea never materialised. Due to lack of government's commitment to the review process, political parties established the Inter-Party Parliamentary Group (IIPG) in August 1997. The government responded by enacting the Constitution of Kenya Review Act in 1997 to provide the legal framework for the constitutional review. The Review Act 1997 was rejected due to lack of due consultation with the stakeholders. The stalemate resulted in two parallel review initiatives. The first was the Parliamentary initiative supported by the then ruling party KANU among others. The other was the Ufunganano
initiative, backed by national religious organisations, opposition parties and the civil society.

After the failure of the government and civil society to agree on a common process of review, the Ufungamano initiative set up the People’s Commission of Kenya to review the Constitution in June 2000. The Constitution of Kenya Review Commission was finally established in November 2000. In an effort to bring about the merger of the two processes, the Constitution of Kenya Review Commission mandated its chairperson, Prof. Yash Ghai to facilitate negotiations between the Ufungamano initiative and the Parliamentary Select Committee that led to a merger in December 2000. On 22nd September 2002, the Commission came up with a report entitled “The People’s Choice”. Among the key constitutional reforms undertaken by the CKRC was gender equity and fair representation in the State institutions. The Report pointed out thirteen main points from the people which included “we want women to have equal rights and gender equality”.

While the above two events demonstrate engagement of Muslims with the State on the status of Qādis courts and the Muslim personal law, the debate on female Qādis has taken a new dimension. Since the implementation of the new Kenya Constitution in 2010, the Government has upheld the notion of separation of powers by shunning away from interference in judicial matters. Hence, the debate on female Qādis has taken a new shape of engagement between Muslim organizations and the Judicial Service Commission.

On Friday 27 August 2010, Kenya witnessed an historic ceremony of the promulgation of a new constitution which was considered to be the birth of the second Kenyan Republic. Among the salient features of the Constitution of Kenya 2010 is the bold step to affirm gender balance in all public appointments.

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40 There are a number of events in which the Executive has refrained from interfering with matters handled by the Judiciary such the trial of the Deputy Chief Justice on the allegation of insulting a security guard. President Mwai Kibaki suspended the Deputy Chief Justice pending her appearance before a Tribunal.

Article 27(3) of the Constitution provides that “Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”. Subsection (6) of the Article further states “To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination”. In order to ensure gender representation in public appointments, the Constitution demands affirmative action to ensure that at least one-third of appointive state bodies are women. Article 27(8) provides that “In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender”.

Thrust of transforming State organs of the ‘New Republic’ focused on reforming the Judiciary. First on the list was the establishment of the Judicial Service Commission which was done under the auspices of article 171. Gender representation was clearly echoed in subsection (d) of article 171(2) which provided that the “The Commission shall consist of one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates; (f) two advocates, one a woman and one a man, each of whom has at least fifteen years’ experience, elected by the members of the statutory body responsible for the professional regulation of advocates; (h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly”. Subsection (2) of article 172 guides the functioning of the Judicial Service Commission by stating “In the performance of its functions, the Commission shall be guided by the following — (a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and (b) the promotion of gender equality”. Further provisions to guarantee gender equality are provided in article 59(2)(b) that provides the establishment of the Human Rights and Equality Commission with specific mandates which includes “to promote gender equality and equity generally and co-ordinate and facilitate gender mainstreaming in national development.”

As a result of the ‘wave of reform’ initiated by the Constitution, the Judiciary of Kenya witnessed two significant developments which took place in June 2010. The first was the nomination of five Supreme judges; three from the
Judiciary, one male law lecturer and one female lawyer and former nominated Member of the Parliament of Kenya. The second event was the nomination of a former law lecturer and human right activist Dr. Willy Mutunga as the Chief Justice of Kenya and a lady lawyer Ms. Nancy Baraza as the Deputy Chief Justice. The Standard newspaper captured this monumental occasion by stating that “The face of a reformed Judiciary began to take shape after Parliament endorsed the nominees for Chief Justice, Deputy Chief Justice and Director of Public Prosecutions hours after the nominees for the Supreme Court were released”.

As a sign of reforming the Judiciary and breaking away from the ‘old tradition’, the Judicial Service Commission appointed fourteen women judges out of the twenty eight judges in the High Court. The appointment of female judges in the High Court exceeded the minimum threshold as provided in the Constitution. The Chief Justice provided the raison d’être of the appointments by stating “We have picked candidates from rich diversities decreed by the Constitution and law, including gender, ethnicity, county, minorities and other forms of marginalization”.

The ‘wind of change’ initiated by the Judiciary has triggered an intra-religious discourse on Qâdis courts among Muslim circles in Kenya. The main contention is whether Muslim women are allowed in Islam to be appointed as Qâdis. Muslim for Human Rights (MUHURI) based in Mombasa pioneered supported the appointment of women magistrates in the Qâdis courts and noted that “there are Muslim women who have extensive knowledge of Islam and Shar’iato interpret the Qur’an and Sunnah to fellow women” and that “Many arguments that women cannot serve as Qâdis because they cannot commission marriages or lead prayers do not hold water”. Khâlid’s call on appointing women Qâdis attracted critics such as Shaykh Juma Ngao, the Executive Director of the Kenya Muslim National Advisory Council, who reacted by stating that “women are free to interpret the secular law, but for Shar’i’ah law, they must meet the qualifications of a Qâdi, one of which is being a man”.

42 The three Judges are Justice Ibrahim Mohamed, Justice Philip Tunoi and Justice Jackton Oywango. The male law lecturer is Justice Dr. Smokin Wanjala and the female lawyer and former nominated Member of the Parliament is Justice Ms. Njoki Ndung'u.
44 The Standard, Tuesday, 23 August 2011, page 5.
45 The Star 2011, 22 June, page 12.
Shaykh Ngao’s response is a reflection of the normal religious rhetoric arguing for restrictions on women’s roles in the public sphere.

The Chief Justice of Kenya took a bold step to announce that the Judicial Service of Kenya has embarked on the process of hiring women magistrates in the Qadis courts. The Chief Justice noted that “I am happy about the ongoing debate over women in Qadis courts and there is no reason as to why they should not be represented”.47 Dr. Mutunga supported the appointment of women magistrates in the Qadis courts by stating that “The on-going debate over the posts is healthy though it has split members of the Muslim community but I fully support the idea”.48 Mutunga’s sentiments were supported by the Chief Qadi of Kenya, Shaykh Ahmad Muhdar who asserted that “There is no law in Islam that prevents a woman from becoming a Qadhi. The law is silent on this question”. Muhdar elaborated further that “the work of a Qadhi concerns matters of personal status like marriage, divorce and inheritance which a woman can handle”.49

However, some Muslim leaders cautioned the Chief Justice against making statements on matters concerning Islam without consulting Muslim scholars. Shaykh ‘Abdillahi ‘Abdi, the Chairperson of the National Leaders forum (NAMLEF) cautioned Mutunga to desist treating the Qadis courts like secular courts by introducing women Qadis. Shaykh Muhammad Dor, the Secretary General of the Council of Imams and Preachers of Kenya (CIPK), asked leaders to respect the Islamic rule and accept that women will never be allowed to work as magistrates or Qadis.50 A similar note of caution was reported in the “feedback” column of a local daily newspaper which stated “We appreciate the CJ’s effort to reform the Judiciary, but the issues of Qadis courts is very sensitive and should be approached with lots of caution. The fact that Muslim women organisations and scholars never raised this as an issue is a pointer the faithful are at home with the idea. Let’s respect all religions and their rules”.51

A striking feature of the Constitution of Kenya 2010 regarding appointment of Qadis is the fact that it does not mention gender as a requirement for the appointment of Qadis. Article 170(2) of the Constitution states “A person shall

47 The Standard 2011, 30 September, page 12.
50 Saturday Nation 2011, 1 October, page 6.
51 The Standard 2011, 3 October, page 16.
not be qualified to be appointed to hold or act in the office of Kadhi unless the person:

(a) Professes the Muslim religion; and

(b) Possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi’s court”.

Lack of mentioning of gender-distinction in the appointment of Qâdîs in the 2010 Constitution is a departure from the Kenya Constitution of 1963 which clearly provided for make gender in section 179(1) that stated “A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless:

(a) He professes the Muslim religion; and

(b) He possesses such knowledge of the Muslim law applicable to any sects of Muslim law as qualifies him, in the opinion of the Judicial Service Commission, to hold a court of a Kadhi”.

On 14 December 2011, the Judicial Service Commission advertised for vacancies in the Qâdîs courts without mentioning a gender requirement. Applicants were invited to apply for twenty posts for the positions of Kadhi II and required to fulfil the following requirements:

“A candidate must:

• Have a degree in Islamic law or its equivalent from a recognized University Institution

• Profess the Islamic faith

• Be able to effectively communicate in English Kiswahili, and Arabic

• Be of good conduct in accordance with Islamic faith

• Be proficient in computer applications; and

• Possess the qualifications set out in Chapter Six (6) of the Constitution of Kenya.

The Judicial Service Commission is an equal opportunity employer and selects candidates on merit through fair and open competition from the widest range of eligible candidates.”

Lack of mentioning gender in the requirements for the appointment of Qâdîs triggered further debate among Muslims circles on whether Muslim female qualified applicants would be eligible to apply for the position of Qâdîs. Umbrella Muslim organizations in Nairobi led by the Supreme Council of

52 The Standard 2011, 14 December, page 47.
Kenya Muslims (SUPKEM) and Jamia Mosque held consultative meetings to respond to the challenge. The debate on female Qādis has brought SUPKEM and Jamia Mosque together on a common stand to oppose the appointment of women Qādis. In addition to the textual basis opposing the appointment of female judges mentioned above, Muslim organizations have tied the debate on female Qādis with the general elections which are set for March 2013. Interviews conducted with officials of SUPKEM (Murabwa, 2012) and Jamia Mosque (Abdulbari, 2012) indicated that the two organizations were of the opinion that the debate on female Qādis should be postponed until the general elections are conducted in 2013. The main concern of both Muslim organizations was that appointing female Qādis may cause division among the Muslim community which in turn could interrupt with the ‘election mood’ of the country. Based on these arguments, both organizations have requested the Judicial Service Commission to postpone the appointment of female Qādis until the matter is resolved by the Muslim community. The Judicial Service Commission responded by stating that the matter of halting the process of appointing Qādis will be placed before members of the Commission for consideration.

5.0 CONTEXTUALIZING THE APPOINTMENT OF FEMALE QĀDIS IN KENYA

With regard to the appointment of female Qādis, the situation in Kenya varies to a larger extent from other countries having majority Muslim population. It is worth mentioning that the jurisdiction of the Qādis courts in Kenya is confined to matters of Muslim personal law. Section 5 of the Kadhīs Courts Act provides that “A Qādis Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or any subordinate court in any proceeding which comes before it.” The fact that the jurisdiction of Qādis in Kenya is limited to matters of Muslim personal law is in line with the progressive view of the Hanafi

53 SUPKEM was established in 1973 by Muslim organizations in Kenya and is regarded to be the national umbrella body representing Muslim organizations in the country. It also serves as a liaison between Muslims and the government. Jamia Mosque is located at Nairobi city centre and it is involved in various Islamic activities.

54 Murabwa, V (the Executive Officer) SUPKEM 2012, 14 March, and Abdulbari, A (the Secretary General of Jamia Mosque) 2012, 13 March.
School which permits female Qādis to adjudicate in matters excluding the prescribed punishments (ḥudūd) and qisas.

Appointment of women judges in Kenya does not imply that judgments of female Qādis would be final since they would be subjected to the appeal system whereby judgments of the Qādis normally go for appeal to High Court judges and thereafter to judges of the Court of Appeal.

With regard to women participation in public sphere, there is an exaggeration between two extremes; on the one hand, conservatives who confine women in their houses and prohibit them from any engagement in public affairs and on the other hand, liberals who solicit for equality of women without recourse to religious rites. A middle ground between the two extremes would pave the way to overcome the challenges facing Muslim female professionals in seeking public engagements. A similar approach has been adopted by modern Muslim feminists who perceive an evolution of feminism within an Islamic framework that incorporate aspects of Islamic doctrine in order to improve the status of women.55 Kamali suggests a gradual approach towards ensuring gender equality within the Islamic context by stating that "we should seek solutions that strike balance between traditional and modern social values and that exigencies of our time may dictate to us to design a two or even three-phased approach to equality issues, beginning with the least challenging and proceed towards the more sensitive areas of reform".56

Women in the classical times were less privileged and not exposed to challenges which face Muslim women in modern time. Modern women have proved to be professionals in various areas which they did not engage in the past. Circumstances of our contemporary time are quite distinct from the earlier times and pose challenges to the participation of women in public life. What is needed is to reconcile between the normative and contextual religious texts with a view of providing solutions to challenges facing Muslim women in their societies. In this regard, Rahmān noted that "as women become effective participants in Muslim society, Islam will be better able to cope with the realities of the twenty-first century".57

Efforts to ensure justice is served in gender discourse must involve the process of revisiting the classical appreciation of religious doctrine and untangling the

55 Moosa, supra at page 102.
56 Kamali, supra at page 269.
juristic interpretations regarding the position of women so as to conform to the modern challenges. It is therefore imperative for Muslim scholars and lawyers in Kenya to cater for these new developments and provide solutions through the spirit of Islâm.

One of the basic characteristics of Islâm is its flexibility and adaptability in order to respond to the needs of times and places. Ibn Qayyim has placed a distinct chapter in his celebrated treatise on change of fatwâ according to the change of time and place (taghâyûr al-fatwâ bi taghâyûr al-zamân wa al-makâm). In adopting this principle, al-Qaradawi opposes the restriction of women’s participation in public sphere as unjustifiable examples of harshness (tashâddud) that contradicted the true spirit of Islâm.

Contemporary Muslim scholars who support the appointment of women judges argue that the State should ensure that a proper and conducive Islamic environment is availed to such women so as to avoid putting them in a difficult choice between their religion and profession. For instance, al-Qaradawi qualifies Muslim women participation in the political sphere by her marital and family duties children. Similarly, Zaydân in his encyclopaedia on rules pertaining to a Muslim woman mentioned that a Muslim woman is eligible to assume a public profession such as judicial function subject to the following two conditions; (1) the profession should not interfere with her obligation; (2) She should be in a need to earn in order to sustain herself.

6.0 CONCLUSION

The article has demonstrated views of both proponents and opponents of appointing Muslim female Qâdis. Opponents of female Qâdis base their arguments on cultural norms rather than religious traditions to restrict women participation in the public space. Proponents of appointing women Qâdis have interpreted religious texts with a view of achieving gender equality within the parameters of Islamic religious teachings.

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58 M.A. Ibn Qayyim al-Jawziyyah, ‘jâmi‘ al muqâ‘e‘an rabbi al-‘âlamîn, (Cairo: Maktabat al-Kulliyat al-‘Azharîyya, 1968), page 139. This maxim has also been adopted by the Ottoman Majallat al akhâm al ‘adiliyyah in article 39 which states “It is an accepted fact that the terms of law vary with the change in the times”.

59 Fadel, supra at page 26.

60 Ibid, page 38.

The debate on women’s eligibility to become Qādis demonstrates vibrancy of the Qādis courts discourse in Kenya. Qādis courts have assumed the role of a religious symbol which has since independence engaged Muslims in Kenya with the State on the one hand, and Muslims and Christians from the mainstream churches on the other hand. In the former, Muslims struggled to retain the Qādis courts in the Constitution whereas in the latter some Christian churches opposed the entrenchment of Qādis courts in the new Kenyan Constitution. This time round the debate has shifted from being an inter-religious between Kenyan Muslims and their Christian counterparts to an intra-religious discourse between Muslims themselves. A heated debated among Muslims has emerged as to the eligibility of women to be appointed as Qādis.

An interesting aspect of the Qādis discourse in Kenya is that the debate has taken a new dimension of engagement between Muslims and the Judiciary. The Chief Justice’s remarks on the issue in September 2011 have triggered a sequence of reactions captured by the media. The debate on the appointment of female Qādis is a kick-starter for a series of overdue reforms expected in the religious courts. Beside gender issues, much is anticipated to streamline the functioning of the Qādis courts such as improving terms of the Qādis, laying down procedural laws and codification of Muslim laws of personal status.  

Success of these reforms will depend on the efforts of stakeholders represented by Muslim religious and human rights forums and the Qādis themselves who should take the lead to initiate such changes.

Appointing female Qādis will continue to generate contentious debates between religious circles and policy makers. It remains to be seen whether the two sides will be flexible and be able to accommodate each other’s divergent views. All in all, two things are evident; first is that the Constitution of Kenya has laid a framework for affirmative action paving the way for gender representation in public appointments, including the appointment of Qādis. Secondly, a wind of change is blowing towards reforming the Judiciary and Qādis courts will not be spared from the on-going reform process targeting the Judiciary.

The Judicial Service Commission will need to be firm in upholdiing the equal opportunity policy in interviewing and appointing qualified candidates who will include women. With regard to the appointment of female Qādis, the

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Judicial Service Commission will be put to task take a firm decision of tilting the balance between the politics of accommodating Muslim grievances within the State policy and pursuing reforms initiated by the Judiciary.