

WOMEN AS JUDGES

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Empowering Voices For Change

WOMEN AS JUDGES

PUSTAKA PERDANA



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Introduction

The appointment of women judges in Muslim countries remains a controversial issue, due to a general perception that such appointments might not be in conformity with the shari'ah. There is no clear *nass* or authority in the textual sources – i.e. the Qur'an and the authentic Sunnah of the Prophet (s.a.w.) – that allows or disallows women to be appointed as judges. Several juristic interpretations of these sources, however, discriminate against women, going against the spirit of gender equality that is clearly woven into the fabric of Islam.

In Malaysia's dual legal system, divided into the general civil courts and the Shari'ah Courts, Malaysian women have been appointed to serve as judges in the civil courts – in the High Courts since the 1980s and in the lower courts since the 1960s.

The Shari'ah Courts only have jurisdiction over Muslims and its main area of jurisdiction is family law. In January 2003, the Malaysian Government made a decision to appoint women Shari'ah Court judges. In April 2006, the National Fatwa Council of Malaysia made a ruling that qualified women may be appointed as Shari'ah Court judges. In November 2007, the Perlis state government announced that it was ready to appoint its first woman Shari'ah Court judge. However, these policies have yet to be implemented and no women currently serve as judges in Malaysia's Shari'ah Courts.

Sisters in Islam (SIS) and other women's groups have pushed for the appointment of women as judges in the Shari'ah

Courts since the 1990s. To counter objections alleging that such appointments would be contrary to the shari'ah, SIS has embarked on a research project to put forward the following arguments in support of the appointment of woman as Shari'ah Court judges.ⁱ

SIS research has shown that interpretations that discriminate against women were influenced mostly by cultural practices and values which regarded women as inferior and subordinate to men. This Q & A booklet is written to illustrate the fact that in Islam, men and women are created equal, and that qualified women should be just as eligible as qualified men to be appointed to positions of leadership, including the office of judgeship.

ⁱThis paper is also partly based on *The Judiciary and the Appointment of Women Judges in the Syariah Courts of Malaysia* by Salbiah Ahmad, presented for Unit Pengajian Wanita dan Sumber Manusia, Pusat Pengajian Sains Kemasyarakatan, Universiti Sains Malaysia, Penang, 1 October 1991.

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JURISTIC VIEWS ON THE APPOINTMENT OF JUDGES

In Muslim history, there have been three juristic interpretations of textual sources regarding the appointment of judges:

1. The majority Sunni view (*jumhur*), among the founding jurists (*mujtahid mutlaq*) of Imam Shafii, Malik and Ibn Hanbal, was that women were disqualified as judges. This was because of an interpretation of Surah an Nisa' 4:34, that men are *qawwamuna*, or protectors of women. However, there was also a minority view among the Malikis, led by Ibn al-Qasim al-Maliki, that women could be appointed as judges. The Shafiis also allowed the concept of women as judges if their services are needed. Only the Hanbali school was unanimous in the view that women should not be appointed as judges.ⁱⁱ
2. The minority Sunni view of Imam Abu Hanifah was that the authority of a judge is not valid unless the judge possesses the qualifications necessary for a witness. This opinion allows women to be judges in all except *hudud* and *qisas* cases.ⁱⁱⁱ This flows from Imam Abu Hanifah's interpretation of Surah al-Baqarah 2:228, on women's eligibility to be witnesses in commercial transactions.
3. The individual views of jurists such as al-Tabari and Ibn Hazm stated that a woman can be a judge in all cases

ii Faisal Othman, *Kedudukan dan Peranan Wanita Dalam Islam* (1993), Utusan Publications and Distributors Sdn Bhd, Kuala Lumpur, at p. 31. Also see Abu Haniffa Mohamed Abdullah & Mohd Yazid bin Zul Kepli, "Women Judges in Shariah Court: Why Not?", in [2008] *Shariah Law Reports*.

iii The original research for this booklet was funded by The Ford Foundation.