



WOMEN AND THE JUDICIARY IN SOMALILAND

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1. Introduction

This paper follows on from research and training carried out by Horizon Institute (Horizon) in Somaliland as part of its Somaliland Justice Sector Project (SJSP). Over the duration of the project, Horizon conducted training with members of the judiciary, as well as prosecutors and Deputy Attorney Generals (DAGs) that revealed the several challenges facing the judiciary in Somaliland. One of the challenges is the lack of gender equality within the justice system, particularly with regard to the judiciary.

While there are female prosecutors, DAGs, lawyers and court registrars, there are no female judges in Somaliland. The general perception throughout the justice sector is that women are not suitable candidates as judges despite being as professionally qualified as men for the job. This is largely the result of social prejudice and serious objection from religious leaders to women judges. Both traditional customs and Islamic (*Sharia*) law are extremely influential in Somaliland and conservative interpretations of *Sharia* have so far prevented women from being appointed as judges.

This paper focuses on the obstacles to achieving female representation in the judiciary and in particular, how such challenges have been overcome in other jurisdictions that also rely heavily on *Sharia* and traditional laws. It is hoped that it can be used as a starting point for discussion and debate within Somaliland, and to raise awareness of approaches to *Sharia* law that permit women to be appointed as judges.

2. Somaliland's Constitution

Somaliland's Constitution, which came into force in 2001, does not prohibit the appointment of female judges but supports the appointment of women to the bench. Under the Constitution, *Sharia* is mandated as the supreme law of Somaliland but the type of *Sharia* is not specified. Article 5 designates Islam as the religion of the State and provides that the "laws of the nation shall be grounded on and shall not be contrary to Islamic *Sharia*," but the Constitution is silent on which school of *Sharia* applies in Somaliland. The State is only required to promote general *Sharia* principles and not necessarily the doctrines of the *Shaffi* school of thought which are interpreted as prohibiting female judges.

The Constitution's equal protection clauses, when read in light of the general provision of *Sharia* in Article 5, support the appointment of women judges. Article 8 (1) provides that "all citizens of Somaliland shall enjoy equal rights and obligations before the law, and shall not be accorded precedence on grounds of colour, clan, birth, language, gender, property, status, opinion etc." This general equality clause is bolstered by Article 36 (1), which relates specifically to the rights of women and provides that "the rights, freedoms and duties laid down in the Constitution are to be enjoyed equally by men and women save for matters which are specifically ordained in Islamic *Sharia*." Moreover, both Article 8 (1) and 36 (1) must be interpreted to reflect international standards because Article 21 (1) provides that the articles relating to fundamental rights and freedoms shall be interpreted in a manner consistent with international conventions on human rights and international laws referred to in the Constitution. Accordingly, when interpreting fundamental rights in the Constitution, consideration must be had for international conventions such as the International Covenant on

Civil and Political Rights (ICCPR), as well as regional and thematic conventions, as stipulated in the explanatory notes that accompany the Constitution.¹

There is nothing in the Constitution prohibiting the appointment of women as judges. Rather, it should be seen as an important basis for supporting female representation in the judiciary.

3. Challenges Facing Women in Somaliland

The main obstacles to appointing women judges are Somaliland's traditional patriarchal society and the wide acceptance of the *Shafii* school of thought. Old customs and traditions are reinforced by the traditional law system of *Xeer*, which is dominated by male clan elders who regulate inter-clan relations and disputes, and restrict the involvement of women in the public sphere. The *Shafii* school of thought is the most conservative form of *Sharia* and is often interpreted as prohibiting female judges.

Traditional culture is strongly entrenched in the attitudes of Somali society. One defence lawyer Horizon interviewed in Borama stated that Somali culture would never allow women to participate in adjudicating a dispute under the customary law system and that this mind set is reflected in the formal justice system. He added that women themselves do not believe that they can be judges because this is what they have been told by their communities while growing up and they have internalised this believe. Further highlighting the cultural barriers, Gabiley's Presiding Judge said that the practice of excluding females from decision making roles is deeply ingrained in Somali culture. Even though he was aware of female judges in other Muslim countries, he nonetheless considered that the same could never happen in Somaliland due to Somali culture and the type of *Sharia* followed.

A female prosecutor in Gabiley summed up the challenges faced by women legal professionals in Somaliland.

The main obstacle preventing women from being judges in Somaliland is our culture...People even discriminate against us as lawyers and prosecutors. When [] men come to my office and see that I am a DAG, they ask me why I am a prosecutor since I'm a woman.²

She explained that the cultural restrictions women experience and the conservative interpretation of *Sharia* that is widespread in Somaliland impact decision-making on the appointment of female judges.

I was one of the eight females that took the UNDP judge training in 2015. We prepared and trained to be judges, but those in the justice sector who appoint judges think that society will have a problem with women being judges, and so they do not appoint us [], and we can only be prosecutors and lawyers. The[y] refuse to appoint women judges because they think this will anger religious leaders and that in turn religious leaders will incite the public. And I think they are right about how religious leaders would react because when I was completing research for my LLB, I had to speak to religious leaders about *Sharia* and they were very surprised that I was

¹ Somaliland Constitution, note 44, referring not just to the ICCPR but also the Convention on the Elimination of all Forms of Discrimination (CERD) and regional conventions.

² Interviewed in Gabiley on 10 September 2016.

studying law. So the leaders in the justice sector are scared of the reaction from religious leaders and don't appoint female judges. To change this, I think the first thing we need to do is an awareness campaign that women are capable of being judges. The justice sector could also appoint women to limited cases at first, for example women judges could decide juvenile cases or they could sit as one judge on a panel of male judges. Maybe this way they wouldn't seem like such a threat.

A female legal aid lawyer discussed how attitudes towards women make it hard for them to be in positions of power within the formal justice system, but ended on a positive note that attitudes are changing.

There are still people in Somaliland that think women should be nothing more than court registrars. People who think we shouldn't even be lawyers. I have even had men tell me that they did not want me to represent them. This happened to me in 2015, when a client came from outside Hargeisa and once he learned that I was assigned to represent him, he told me he would not accept having a woman lawyer.[] This prejudice comes from the culture of Somaliland. But I can say that society's view of female lawyers is changing. The clients that female lawyers represent end up being happier with us than with a male lawyer because we do not chew *qat* and we are always available when they need us. So more and more of the population are starting to accept female lawyers, and I think the same can happen with female judges.³

One prosecutor brought out the argument put forward by some Islamic scholars that women are physiologically different to men and, therefore, can become more emotional.

A judge gives the final decision on a case and their mood needs to be stable to do this. They cannot have changes in their emotions that could affect their decisions. Also, Somali men want their women at home to take care of the house and raise their children.⁴

While negative attitudes towards female judges was pervasive, two members of the public who were interviewed felt that women would make good judges and would be viewed as more trustworthy than their male counterparts. One farmer from Agamsa said he had "heard that female lawyers and prosecutors are better because they are more serious" and did not see "any cultural barrier to women being judges."⁵ He said he would have no objection to his case being heard by a female judge. Similarly, a businessman from Gabiley said that "people now prefer female lawyers because they are more active than male lawyers." He was of the view that "the community would react the same to female judges."⁶

The positive public attitudes on female judges is further supported by the current Chief Justice (CJ). The CJ has indicated to Horizon his support for women judges, saying he believes that in order for Somaliland to achieve sustainable justice reform, it is necessary to employ both male and female university graduates. He believes that a gradual introduction of women in the role of assistant judge might meet less resistance from religious leaders and members of the public opposed to female judges, and provide inroads into appointing women

³ Interviewed in Hargeisa on 8 September 2016.

⁴ Interviewed in Hargeisa on 7 September 2016.

⁵ Interviewed in Gabiley on 10 September 2016.

⁶ Interviewed in Gabiley on 10 September 2016.

as judges in Somaliland. As a first step, the CJ considered it necessary to engage Islamic scholars in Somaliland to convince them that women can be judges and indeed, that the country can benefit from female judges. As will be seen from the comparative examples below, the support of senior figures such as the CJ, is essential to the possibility of women entering the judiciary.

4. Overcoming Challenges: Comparative Examples

4.1. Introduction

The 2005 Human Development Report on Arab States, published by the UN Development Programme (UNDP), observed that “the business of writing the law, applying the law and interpreting the law in the Arab world is governed above all by a male-oriented culture.” Nevertheless, there have been significant advancements in the gender equality within the judiciaries in other Muslim majority countries. For example, in 2006 the first woman was appointed to the Yemeni Supreme Court, in 2007 Jordan appointed the first female court chief, and in 2008 the first female judge was appointed in the United Arab Emirates (2008). Women account for 10 percent of judges in the West Bank and Gaza, 18 percent of judges in Morocco, and 37 percent of judges in Lebanon.⁷ Other countries with a history of appointing female judges include Afghanistan, Egypt, Indonesia, Malaysia, Pakistan, Sudan, and Tunisia. While these are all countries with majority Muslim populations, not all are Islamic states and the type of Islam followed varies from jurisdiction to jurisdiction.

This paper focuses on female representation in the judiciaries of countries that follow the same school of thought within Sunni Islam as Somaliland, the *Shafii* school of Islamic thought, which is prevalent in several Muslim populated countries and is followed by approximately 15 percent of Muslims worldwide.⁸

This section first considers the debate on appointing female judges, in particular, the interpretations of Islam, as well as conservative and traditional attitudes that impede their appointment. Then four countries that follow the *Shafii* school of Islam—Egypt, Indonesia, Yemen and Malaysia—and have female judges are considered. Notably, in these countries, support from senior political and judicial figures has been critical to the appointment of female judges.

4.2. The Debate

The type of arguments debated amongst Islamic scholars and gender rights advocates regarding women judges have depended on the school of thought followed within Islam. For example, Islamic scholars from the *Shafii* school of thought argue that only where there is a pressing need, may women serve in judicial capacity.⁹

⁷ Palestinian Central Bureau of Statistics (March 2008); Government of Morocco, Ministry of Justice Website; Embassy of Lebanon, Washington DC, correspondence 1, 2007, cited in “The Status & Progress of Women in the Middle East & North Africa”, World Bank Middle East and North Africa Social and Economic Development Group p. 16.

⁸ <http://islamawareness.net/Madhab/Shafi/shafi.html>.

⁹ Badawi, Gender Equality in Islam, Basic Principles 2 (1995) cited in To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt and Iran), Fordham International Law Journal [Vol. 37: 1] (“To Judge or Not to Judge”), p. 8.

Another argument, based on a very conservative interpretation of *Sharia*, is that women are strictly prohibited from being in positions of authority. However, there are other interpretations of the sources of *Sharia* law which can be considered as evidence that women were permitted to be in positions of power during the early days of Islam. For example, there is historical evidence of women issuing legal opinions, in a capacity similar to that of Muftis—experts in Islamic teachings and law who hold the right to issue legal rulings or opinion.¹⁰

One argument that has continuously been advanced by opponents of female judges is that women and men are physiologically different and these differences render women unqualified for judicial posts. The argument is that women are more emotional and would also require time off work if pregnant. These views, however, can and have been countered by the argument that male judges may also be rendered emotional for various different reasons, and other physical conditions can result in absence from the office, as well as impact their ability to carry out their duties. Moreover, judges are bound by the rule of law and where this is flouted, are to be held accountable. They are required to meet high educational and professional standards and all decisions must be made in accordance with the law, regardless of emotions. Accordingly, the physiological differences argument is not a sufficient basis for excluding women from the judiciary.¹¹

An argument invoked by gender rights advocates is that of necessity and that economic, political, legal, and cultural necessity dictate female participation in the public sphere. Women in the workforce, including in the judiciary, alleviates economic hardship confronting many struggling families.¹²

Lastly, in most modern constitutions, even in countries where Islam is the religion of the State or the faith of the majority, the principle of equality is enshrined. Based on the fundamental right to equality, the only requirement for the position of judgeship should be that the individual meets the necessarily high academic and professional standards required of a judge and the candidate's gender should not be a factor to be taken into consideration.

The following are examples of jurisdictions that, like Somaliland, follow the *Shafii* school of Islamic thought but nonetheless have a history of appointing female judges.

4.3. Egypt

Similar to Somaliland, Islam is the state religion in Egypt. Article 2 of the Egyptian Constitution states that “Islam is the Religion of the State [] and the principle source of legislation is Islamic Jurisprudence (*Sharia*).” Also like Somaliland, it has a large following of the *Shafii* school of Islamic thought.¹³

¹⁰ In particular, the Prophet's (PBUH) wife, Aisha. For a more detailed discussion of a rights-empowering argument, see To Judge or Not to Judge, pp. 22-29. See, e.g., MAULANA ABDUS-SALAM NADVI ET AL., BIOGRAPHIES OF THE WOMEN COMPANIONS OF THE HOLY PROPHET AND THE WAYS OF THEIR SACRED LIVES 42 (2000) (“[Aisha] used to issue ‘FATWA’ (legal decision under Islamic jurisprudence) during the Caliphats of Hazrat Abu Bakr, Hazrat Umar and Hazrat Uthman.”).

¹¹ For an in-depth discussion of this argument, see To Judge or Not to Judge, pp. 18-19, 22.

¹² To Judge or Not to Judge, p. 30.

¹³ <http://www.islamic-laws.com/articles/sunnischools.htm>

Although Egypt now has several female judges, for generations women have faced strong opposition to being able to pursue judicial careers. In 1949, a female law graduate challenged the denial of her judicial application on account of gender. However, the denial of her judicial application was upheld by the courts on social and political grounds.¹⁴ In 1952, the Fatwa Council of Egypt's Al-Azhar University expressly issued a ruling excluding women from the judiciary based on traditions and customs and this was upheld the following year by the administrative courts. Women continued to be excluded from the judiciary for decades to follow.¹⁵ In 1973, the administrative courts issued another ruling referencing Islamic law as the principal source of law (pursuant to the 1971 Constitution) and reasoned that while no law explicitly prohibited female judges, no provision explicitly provided that right either. In 1988, a female law graduate attempted again to apply for judgeship, but her application to the administrative courts was again denied on the basis of her gender. She appealed the decision but it was upheld in a 1990 ruling finding the appointment of female judges religiously impermissible.¹⁶

Finally, in 2000, President Hosni Mubarak appointed the first female justice, to the Supreme Constitutional Court.¹⁷ At the time, women comprised approximately 20 percent of the legal profession. The achievement appears to have been due to a secular feminist movement, as well as interpretations of Islamic law to justify the practice. Proponents of female judges argued that the Egyptian Constitution guarantees gender equality while highlighting women's service in the Egyptian Cabinet and Parliament as evidence of women's ability to achieve. Notably, the support of a prominent and well-respected Constitutional Supreme Court Justice was also critical.¹⁸

In 2007, President Mubarak appointed 31 women, who previously served as state prosecutors, to judge in the family courts. The efforts and backing of several prominent political figures, including the head of the Supreme Judicial Council and the Minister of Justice, were crucial.¹⁹ The support of senior religious figures was also critical. Mohamed Hamed al-Gemel, the former president of the Fatwa Council of Egypt stated that "there is no specific provision in the Qur'an or Sunnah proscribing the appointment of female judges, so the interpretation depends on the rulings of contemporary jurists."²⁰

Egypt's Grand Mufti Sheikh Ali Gomaa also held that the appointment of women to judicial positions does not contradict Islamic precepts because "the job of a judge is merely to know the law well and to implement it fairly. The inclusion of women is a right owed to society as a whole."²¹

Egyptian women were able to attain judicial positions with the backing of religious leaders, gender rights activists and male members of the judiciary. Prominent religious authorities provided moral and religious legitimacy for female judges. Furthermore, gender rights advocates countered arguments that limited women's rights, with "rights-empowering"

¹⁴ To Judge or Not to Judge, p. 48.

¹⁵ Id citing Al Bayoumi Abdou Bayoumi, Islamic Law and Permissibility of Women Being Judges, in Women Judges in the Arab Region: Point, Counterpoint.

¹⁶ To Judge or Not to Judge, pp. 49-50.

¹⁷ Id citing Salah Nasrawi, Egypt Names First Female Judges, Association Press, Mar. 15, 2007.

¹⁸ To Judge or Not to Judge, pp. 50-52.

¹⁹ Id, pp. 52-53.

²⁰ Morrow, A., et. Al., (2007), Egypt: Female Judge Appointments Stir Controversy.

²¹ Published in Cairo by AL-AHRAM, 13 June 2007, Issue No. 848, Egypt Current Law Journal of 2010.

interpretations of sources of *Sharia* law—a movement referred to as “Islamic feminism.” Finally, and critical to the movement, was the support of prominent male members of the judiciary.²²

4.4. Indonesia

As with Somaliland, *Shafii* is the prominent school of Islamic law in Indonesia.²³ Also like Somaliland, it has a pluralistic legal system, based on statutory law, customary law (*Adat* law includes not only decisions made by judges, village leaders, and religious leaders but also decisions made by the village assembly),²⁴ and *Sharia* law. Unlike Somaliland, however, its interpretation of the *Shafii* school of thought has permitted female judges for decades.

While the Indonesian Constitution, like Somaliland’s, protects gender equality, it took more than constitutional protection to lead to the appointment of female judges. Support from the government and senior religious and public figures was critical, as was a political will to adopt gender mainstreaming legislation to promote inclusive development.²⁵ The government pursued a policy that women should fill at least 30 percent of vacancies in several sectors, including politics and the judiciary. Now women contribute to about a third of the personnel in Indonesia’s Islamic judiciary.²⁶

Such support, as well as the legislative framework, allowed women to become judges despite discrimination based on local customs and traditional laws. Initially women faced opposition from conservative Muslim groups who considered that women sitting in Islamic courts was a violation of Islamic legal tradition, especially the *Shafii* school of thought. In response, the Directorate of Religious Justice of the Ministry of Religious Affairs issued a clarification, stating that the appointment of women judges to Islamic courts has a strong basis in Islamic legal theory. The Directorate justified the recruitment of women to serve as judges in Islamic courts on the basis of necessity or legal emergency because Indonesia lacked qualified Islamic judges.²⁷

The recruitment of female judges first started at a local level with a small number and then spread to other regions.²⁸ Legislation facilitated this process by allowing for female judgeships from as early as 1964, when women started to sit in Indonesia’s family courts. The practice of appointing female judges was further recognised in the Religious Judiciary

²² To Judge or Not to Judge, p. 66.

²³ See M.B. Hooker, The State and Shari’a in Indonesia, in SHARI’A AND POLITICS IN MODERN INDONESIA 33, 36 & 47 n.7 (Arskal Salim & Azyumardi Azra eds., 2003); see also Amina Elbendary, Women on the Bench, AL-AHRAM WEEKLY ONLINE, Jan. 9–15, 2003, <http://weekly.ahram.org.eg/2003/620/fr2.htm>

²⁴ Asean Law Association at <http://www.aseanlawassociation.org/legal-indonesia.html>. Indonesian Legal System, p. 35. *Adat* Law not expressly referred to in the Constitution but Article I of the Transitional Provisions of the Constitution, stipulates that all regulations in existence are to remain in force for so long as there are no new laws or regulations established pursuant to the provisions of the Constitution. *Adat* Law mainly regulates the areas of marriage, inheritance, land law and law of delict. See pp. 36-37.

²⁵ For example, Presidential Instruction No. 9/2000 on Gender Mainstreaming in National Development and No. 3/2010 on Justice for All/Gender Empowerment. See also Indonesia - Gender Equality, Policy Brief, World Bank, 2013/01/01. <http://documents.worldbank.org/curated/en/746211468051553636/Indonesia-Gender-equality>.

²⁶ Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia, Euis Nurlaelawati and Arskal Salim (“Gendering the Islamic Judiciary”), pp. 262-263.

²⁷ *Id.*, p. 256.

²⁸ *Id.*, p. 257.

Act of 1989, by which time women were fully accommodated in Indonesia's religious courts.²⁹ Women now even occupy positions in the Supreme Court of Indonesia.³⁰

However, one point that should be borne in mind is that Indonesia has a tradition of women working in the public sphere and the majority of the population support women holding positions of authority.³¹ This, along with the government's support, has been critical to overcoming interpretations of Islam and cultural norms that would otherwise prohibit women entering the judiciary.

4.5. Yemen and Malaysia

Two other examples of countries where the *Shafii* school of thought is followed, but nevertheless permits women judges, are Yemen and Malaysia. Since 2007, women have been allowed to enroll in the High Judicial Institute in Yemen, which allows them to pursue a career as a judge.³² This is notable, in an otherwise conservative Islamic society.

Malaysia, which is a dualist system with separate civil and *Sharia* law courts, has also had a history of women serving as judges in its civil courts. In 2010, the first appointments of female judges to its *Sharia* courts were made. Sisters in Islam, a women's rights group, had campaigned for female judges since the 1990s and finally, support came from the government allowing for female judicial appointments. The Prime Minister justified such appointments saying that they "were made to enhance justice in cases involving families and women's rights and to meet current needs."³³

5. Conclusion

Somaliland's Constitution is a progressive piece of law which protects equality with reference to international human rights standards. While *Sharia* and customary law play a significant role in Somali society, as seen from examples such as Indonesia and Egypt, religion, tradition and custom have not prevented the appointment of female judges. Although such appointments have faced opposition and stirred heated debates amongst Islamic scholars, ultimately, arguments based on conservative interpretations of Islam have been countered, and support for the appointment of women judges has come from senior government, judicial and religious figures. Such support has been crucial to the movement of gender equality in the judiciary.

While Somaliland is a country where religion and custom still dominates the private and public sphere, including the legal system, it is encouraging that women are represented as prosecutors, DAGs, registrars and defence lawyers. It is also positive that during Horizon's research, members of the public, and those working within the justice system, have spoken

²⁹ To Judge or Not to Judge, p. 39.

³⁰ Gendering the Islamic Judiciary, pp. 249, 255 (citing Christina Fattore, Thomas J Scotto, and Arnita Sitasari, "Support for Women Officeholders in a Non-Arab Islamic Democracy: The Case of Indonesia," Australian Journal of Political Science vol. 45, no. 2, June 2010, pp. 261-275).

³¹ Gendering the Islamic Judiciary, pp. 249, 255 (citing Christina Fattore, Thomas J Scotto, and Arnita Sitasari, "Support for Women Officeholders in a Non-Arab Islamic Democracy: The Case of Indonesia," Australian Journal of Political Science vol. 45, no. 2, June 2010, pp. 261-275).

³² Yemen, MENA Gender Equality Profile, Status of Girls and Women in the Middle East and North Africa, UNICEF, October 2011.

³³ Malaysian Groups Welcome First Islamic Women Judges, 9 July 2010, <http://www.bbc.com/news/10567857>.

positively of the possibility of women becoming judges. It is, arguably, only a matter of time before they can also sit as judges. It may be that they first start by sitting in specialised courts, such as juvenile courts and/or deal with specialised cases, such as those involving gender-based violence where a more victim-centred and gender sensitive approach is required. Indeed, studies carried out in Indonesia confirmed that female judges took a more gender sensitive approach to family law cases.³⁴

Female appointments to the judiciary, however, cannot occur without the support of senior judicial and government officials in Somaliland. The CJ's support for the initiative is positive and can be taken further through initiating a debate amongst Islamic scholars within Somaliland—perhaps through also inviting scholars (or at least putting forward arguments from such scholars) from countries such as Egypt and Indonesia with the aim of raising awareness on the issue. Assistance can also be sought from external organisations that have experience of working to promote female representation in the judiciary, such as the International Association of Women Judges (IAWJ).

Ultimately, the positive effects of including women in the judiciary cannot be stressed enough and the necessity argument to counter conservative interpretations of Islam can be invoked in Somaliland. Not only is the aim to take an inclusive approach and achieve gender equality, but to improve access to justice not just for disadvantaged female litigants—especially in family law matters and cases of gender-based violence—but for all, by increasing the number of qualified, competent and committed judges.

³⁴ Gendering the Islamic Judiciary, pp. 268-269.