

Why are there no women judges in Sri Lanka's Islamic courts?

Female Quazis allowed in Islam, but not under MMDA

Wednesday 24 July 2019, by [ISMAIL Amra](#) (Date first published: 29 June 2019).

How can we put our taxes to a system that promotes inequality?

So basically Muslim women are second-class citizens

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Choose the best opinion to serve public interest

Is it Islam that changed or is it our understanding of Islam that has changed?

Kholoud al-Faqih who became one of the first female judges to be appointed to the Sharia court (Islamic court) in Palestine is considered to be the first female Sharia judge in the history of the Middle East.

Even countries such as Sudan, Egypt, Tunisia, Yemen, Malaysia, the Maldives, Pakistan and Indonesia have enabled women to serve as judges in their Sharia courts. However, in Sri Lanka, women cannot be appointed as Quazis (judges in the Quazi court). Neither can they serve as members in the Board of Quazis, adjudicators or marriage registrars. The Muslim Marriage and Divorce Act (MMDA) which is the principal law that governs marriages, divorces and related matters between Muslims, prohibits women from being appointed to such posts.

According to Section 12 of MMDA, the Judicial Service Commission may appoint any male Muslim of good character and position and of suitable attainments to be a Quazi. While the fact that the requirement to be a Quazi - that of having a "good character and position" is problematic, the fact that the office of the Quazi is reserved only for males is discriminatory. Although under the Constitution of Sri Lanka, all persons should be treated equally, due to Article 16 of the Constitution, archaic laws such as MMDA prevail despite being discriminatory towards Muslim women.

Time and again activists have urged for the reform of MMDA not just in relation to the position of the Quazi, but also in relation to issues pertaining to the minimum age of marriage, brides' consent to the marriage, maintenance, polygamy, divorce and so forth, which have resulted in discrimination against women and domestic violence.

"There is nothing in the Quran that defines any position or role which women can and cannot be. There is also evidence from centuries of human civilization that now show us any success in a professional position such as that of a judge is really about the qualification, training, character and diligence of an individual regardless of gender. The role of a judge is really a job such as that of an eye surgeon or an architect," said Hyshyama Hamin speaking to Daily Mirror. She co-authored the

publication 'Unequal Citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka' with Hasanah Cegu Isadeen.

The current MMDA enacted in 1951 is based on the Mohammedan Code which was imported from the present day Indonesia in 1770 during Dutch rule. However, in Indonesia, in as early as 1960, women served as judges in Sharia courts though few in number. In 1989, Indonesia fully accommodated female judges in their Sharia courts. Nevertheless, Sri Lanka lags behind holding onto a law imported from the very country that has shown great strides in allowing the appointment of female judges to Islamic courts. "It is fascinating to see that Indonesia, where we sourced our law, has progressed so far ahead in many forms in their marriage laws, and yet we are stuck quite far behind," said Hamin.

Enabling Reforms

Palestine follows the Hanafi Madhab (school of jurisprudence). There is an opinion under this Madhab that women can be judges. This was one of the arguments put forward to support the case for women as judges in Palestinian Sharia courts. However, there still was resistance from contemporary scholars against the appointment of female judges. Despite such resistance, Kholoud al-Faqih was appointed as one of the first two female Sharia judges in Palestine. This was a revolutionary move.

Madhabs are schools of jurisprudence and thought formed by different scholars over centuries, long after the period of the Prophet's life. There are four main Madhabs namely Hanafi, Shafi'i, Maliki and Hanbali.

In the report by the 2009 committee appointed to consider amendments to MMDA, the faction which included Faisz Musthapha PC stated Sri Lanka was governed by the Shafi'i school of jurisprudence and if a Madhab were not specified, it could lead to "a lot of confusion and misuse and people could pick and choose from different Madhabs based on their whims and fancies."

However, Hamin stressed that it was a misconception that one could not divert from one's Madhab. "The scholars who established the Madhabs did not claim they were 100% right. However, some scholars and Muslim leaders of our time treat Madhabs as if they are different religions and this is actually the most un-Islamic thing to do. By treating Madhabs as if they were separate religions, they are trying to divide the Muslim community and cause friction and tension between us," she said.

"The Madhabs are merely human understanding and interpretation of Sharia and there is so much difference of opinion among scholars within specific Madhabs and among different Madhabs which show Islamic legal tradition is really rich and vibrant in terms of debates, discussions and disagreements. Diversity of opinion and efforts to find guidelines and pathways that best resolve human issues are very much part of Islamic tradition. This diversity is really something to be proud of," added Hamin.

Speaking at a recent panel discussion, Activist Zainah Anwar said among the four schools of jurisprudence, the opinion that best served society should be adopted. After all, the four schools of jurisprudence are all Islamic. "Nowadays, nobody sticks strictly to one Madhab. If you want to push for reform, you have to look at the best from all the Madhabs which are Islamic. You have to choose the best opinion to serve public interest and find the right solution for the problem you're encountering," she said. However, this is contrary to views expressed by conservative Islamic scholars who believe a deviation from the Shafi'i Madhab is not permissible.

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Meanwhile, Hamin pointed out that Imam Shafi'i and all the other scholars from different Madhabs not only acknowledged different viewpoints and positions of other scholars but also respected each other's opinions and were humble about their approach. In fact, Imam Shafi'i famously said: "I am convinced about the veracity of my opinions, but I do consider that it is likely they may turn out to be incorrect. Likewise, I am convinced about the incorrectness of views different to mine, but I do consider the possibility that they may turn out to be correct."

Hamin said many countries used one or more of the Madhabs to frame their family laws. According to research carried out by Musawah, a global movement for equality and justice in the Muslim family, there are more than 45 countries that have some form of Muslim family law and no two laws are exactly the same as a result of this diversity.

Hamin further pointed out that there was a rich diversity of Muslim communities in Sri Lanka and most did not know what Madhab they were supposed to belong to as they identify primarily as Muslims. "The MMDA is based on Shafi'i Madhab mainly because the source of the code of laws prior to MMDA was from Batavia, present day Indonesia, which also follows the Shafi'i Madhab," she said.

Experience of Malaysia

In the 1990s when there were no female judges in Sharia courts in Malaysia, Sisters-In-Islam, an organisation Anwar co-founded, wrote a letter to the Sharia Department proposing the appointment of women as Quazi judges. Malaysia predominantly followed the Shafi'i Madhab. "Of course in the civil courts the chief judge of Malaya was a woman. We had female judges in the Supreme Court and the Civil Court including Muslim women judges, but none in the Sharia court. In fact, there were more female students in the Law Faculty than men, more female students in the Islamic Faculty," recalled Anwar.

"We got a letter in response saying women could not be judges in Islam and the Hadeeth that 'a community will never prosper with a woman as its leader' was quoted. That was the end of the discussion. But we didn't give up," she said. Malaysia appointed its first two female Sharia judges in 2010. "So is it Islam that changed or is it our understanding of Islam that changed?" she asked.

"With pressure and societal change with so many qualified women today, in the end they decided to appoint women as judges. They did not follow the Shafi'i opinion, but followed the Hanafi opinion. This is common practice - to choose the best opinion from the different Madhabs to do what is right and fair for your society," she added.

'No' to Female Quazis

Various reasons have been put forth justifying the opposition to females holding the position of Quazis. The publication 'Unequal Citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka' notes the following as reasons given by religious leaders and conservatives:

- Lack of evidence of women leaders in Islamic history
- Practice of segregation which prevents women from interacting with men who are not closely related
- Interpretation that a woman's testimony is half of that of a man's

- That women are unable to make credible judgment during their menstruation period because it renders them “emotional and irrational”

In the report by the 2009 MMDA Reform Committee, the faction that dissented with the report by Justice Saleem Marsoof upholds that it was not permissible for a woman to be appointed as a judge. They state that the one who appoints her is sinning and that her judgment carries no weight.

A position paper by the Muslim Personal Law Action Group (MPLRAG) on women as Quazis notes that the fallacy that Muslim women are weaker than men is based on Quranic verses which are analysed in isolation of their context and removing the socio-historical context from the interpretation.

Activist Anwar emphasised that men’s authority over women had nothing to do with the Quran. “Through interpretation, the legal framework has been derived to justify male authority,” she said.

Addressing the Hadeeth that no community will prosper with a woman as its leader, Anwar said there was a dispute over the narrator of this statement.

She pointed out that the only leader mentioned in the Quran as an example of wise leadership was Bilqis who was a woman.

Explaining the significance of context in interpreting Islamic teachings, Anwar said: “We have a different context now where women are educated, are leaders, in positions of authority.” Therefore, women should be appointed as judges and there is no bar against it in Islam.

Justice Minister Thalatha Athukorala has stated several times that the ministry was unable to take the reforms process forward because there was divided opinion among members of the 2009 committee. “Since then, there had been attempts both by male-led Muslim organisations and Muslim ministers to bring both sides of the committee’s recommendations to find some compromise

Impact

Speaking about the impact of not having female Quazis, Juwairiya Mohideen of the Muslim Women Development Trust in Puttalam, said women were reluctant to speak about very private details about their marriage in front of a male Quazi. “How can she go before a male Quazi and speak about what happens in the bedroom?” This results in justice not being meted out in favour of victimised women. She also stressed that women in the community level were ready-educated and qualified to hold the position of Quazi.

Legal Framework

Article 12 of the Constitution of Sri Lanka states all persons are equal before the law and are entitled to the equal protection of the law. The article further notes that no citizen shall be discriminated against on the grounds of race and religion. However, Attorney-at-Law Ermiza Tegal said the discrimination caused by MMDA could not be challenged in a court of law on the basis of equality owing to Article 16 and because the Sri Lankan law did not allow for the judicial review of legislation once it was enacted.

“Article 16 of the Constitution says any law that existed prior to the Constitution being operative is protected even if it resulted in inconsistency. So even if that law violated your fundamental rights, you cannot go to court because it is protected within the Constitution itself. MMDA is one of those laws which the Constitution does not allow to be challenged. So we cannot challenge the fact that

only men can be Quazis in Sri Lanka,” she said.

“In addition to Article 16, Sri Lanka has a grave problem of not having judicial review of enacted legislation. So once a law comes into being, there is no way the Supreme Court can strike it down by checking to see whether it is compliant with our Constitution. Our Supreme Court does not have that power, whereas many other jurisdictions do. Those two things incapacitate Muslim women from advocating equality within MMDA. So basically, Muslim women are second-class citizens,” she added.

However, she underscored that the position of the Quazi was one funded by the State. “Our taxes are used to pay for these positions. This money is then used to cause discrimination. How can we put our taxes to a system that is promoting and practising this kind of inequality?”

It should be noted that disputes in relation to child custody, recovery of *kaikuli* and *mahr* and enforcement of maintenance orders under MMDA are taken up before civil courts where both men and women preside as judges. Further, a person aggrieved by a decision given by the Board of Quazis can appeal to the Court of Appeal. A party aggrieved by the decision or order of the Court of Appeal can appeal to the Supreme Court. Both males and females preside as judges in these top most courts of the country.

Way Forward: Reforms

In the “split report” submitted to the Justice Minister by the 2009 committee appointed to recommend amendments to MMDA, in January last year, the faction which included Justice Saleem Marsoof PC, Mrs. Safana Gul Begum, Deshabandu Mrs. Jezima Ismail, Mr. Razmara Abdeen, Mrs. Faleela Jurangpathy, Dr. Sharya Scharenguivel, Mrs. Sharmeela Rassool, Mrs. Dilhara Amarasinghe and Suhada Gamlath PC recommended to delete the word ‘male’ in Article 12(1) and 14(1) of MMDA enabling women to be considered for the position of Quazi.

However, the faction that included Faisz Musthapha PC, Shibly Aziz PC, Justice A.W.A. Salam, Mrs. Fazlet Shahabdeen, Justice M. Mackie, Dr. M.A.M. Shukri, Mr. Nadvi Bahudeen, Mufti M.I.M Rizwe and Ash-Shiekh M.M. Ahamed Mubarak has recommended to not delete the word ‘male’ thereby perpetuating the discrimination meted against women.

Justice Minister Thalatha Athukorala has stated several times that the ministry was unable to take the reforms process forward because there was divided opinion among members of the 2009 committee. “Since then, there had been attempts both by male-led Muslim organisations and Muslim ministers to bring both sides of the committee’s recommendations to find some compromise,” said Hamin.

“Piecemeal reform or amendments to one or two issues only is not going to work because women face discrimination on multiple issues. Simply upgrading the Quazi court system is not going to work because the court will only be implementing bad law. Any injustice or discrimination that continues in MMDA will contribute to the same problems and challenges continuing into the future and the voices against these injustices growing louder and stronger. We have to address all areas of discrimination in MMDA by going back to the root of the issues and analysing the 2009 committee report recommendations simply as a starting point,” stressed Hamin.

Amra Ismail

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