CHAPTER 6

Female Judges in Malaysian Shari‘a Courts: A Problem of Gender or Legal Interpretation?

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Introduction

The Federation of Malaysia is currently made up of 13 states and three federal territories. Its legal system is based on Common Law, a direct influence of British colonialization, which ended in 1957. The parliament of Malaysia enacts federal laws that apply throughout the country. The different states enact laws that have limited application in a particular state only. A particular feature of the Malaysian legal system is its dual system of law, meaning that there are civil courts and Islamic shari‘a courts. Shari‘a courts fall under the jurisdiction of the states rather than the federal government. In general, the shari‘a judiciary deals with personal status laws and ta‘zir offences; it does not include hudud and qisas, which, as we shall see below, are the two types of punishment that constitute the main basis for rejecting the appointment of female judges. The majority of cases brought before the shari‘a courts are family issues, with women making up the majority of litigants (Peletz 2002).

In Malaysia’s dual legal system, female judges were appointed to the lower civil courts as early as the 1960s (Nik Noriani and Masidi 2009) and the High Court in 1983 (The Malaysian Judiciary Yearbook 2012), whereas their entrance

1 Kuala Lumpur, Putrajaya and Labuan.
2 See Part IX and List II Schedule 9 of the Constitution.
3 Ta‘zir offences are punishments other than hudud and qisas.
4 Hudud refers to a fixed penalty in cases of adultery, drinking liquor, highway robbery, apostasy, theft, and qadhaf (false accusation of fornication), where evidentiary requirements and the standard of proof are higher.
5 Qisas refers to the punishment of like for like, involving intentional murder and injury to the body. The standard of equality must be strictly adhered to if such a punishment is to take place. Otherwise, the victim is advised to accept compensation.
6 Common grounds are judicial divorces, which are generally applicable to women, maintenance for children after divorce, and property rights such as mut‘ah (compensation after divorce) and matrimonial property. Some of these concerns are discussed in the report by Moghadam (2006).
to the shari‘a courts did occur until 2010. By way of comparison, in 2012, women represented 35.5 percent of judges at all levels of the federal courts, with full authority to decide on all matters, while only constituting 3.7 percent of judges in shari‘a courts (Statistics on Women, Family And Society 2012). In this chapter, I explore the factors that impeded and continue to impede the appointment of women judges to the religious courts.

The chapter is divided in three sections. The first examines the debates surrounding the appointment of female judges to the religious courts in order, first, to identify the main opponents and proponents of women’s appointment as judges, and, second, to examine how they have justified their particular point of view. Section two asks whether the small number of women judges in the shari‘a courts can be attributed to particular features of the Malaysian legal system. Currently, only ten women are working as judges in the subordinate shari‘a courts and recently, in June 2016, two women judges have been appointed to the Shari‘a High Court in the state of Selangor. In section three, seven female judges were interviewed and asked about their position on the issue of women judgeship as it relates to Islamic jurisprudence. They were also asked to respond to those who argue that there is a dire need to appoint women as judges, as they will be more sensitive to the needs of female litigants.

1 Public Debates

*The Perspectives of the Classical Scholars and the 1982 Fatwa*

The institution of the qadi (judge) is well established in Islamic tradition, as the state is obliged to establish a judicial system to attend to society’s needs. The importance of this exercise has been addressed in Islamic jurisprudence, going so far as to consider rewards to judges who, while having made errors in their judgments, only did so after a careful consideration had been performed to arrive at a fair judgment. As the parties could not be expected to be exceptionally reasonable when the dispute arose, shari‘a law imposed and still imposes the heavy burden on the judge to exercise justice and to provide assistance to the aggrieved party, either in awarding its rights or initiating efforts at reconciliation (Ibn Qudamah, n.d.), for instance, through the process of arbitration (hakam) or peaceful settlement (sulh) (Qur’an: 4:34). On that basis, the jurists set a high standard of qualification for the appointment of judges.

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8 See the Qur’an, al-Nisa: 34.
Judges must be legally competent and knowledgeable and profess their trust in Islamic jurisprudence. They should also be trustworthy and impartial (Ibn Qudamah, n.d.), for they are commanded by their religious duty to deliver a judgment that is just, equitable, earnest, and humane. The requirement to dispense justice and forbid oppression is repeatedly mentioned in Islamic traditions (Qur’an: 6: 42; 4: 135 & 65; 14: 90). Judges are also required to take into account that submitted questions that arise in the community are not necessarily identical, even though the subject of the claim is similar. Most often, this requires more than just knowledge of the facts at hand; a deeper understanding can be gained by various means, including experience and knowledge of other related fields, such as relevant aspects of the humanities and a knowledge of psychology.

Taking into account that women were often thought to lack many of the above qualifications, the issue of female judgeship has generated considerable disagreement among classical and contemporary scholars. The classical jurists are divided on the qualification of women to be a judge. For example, in his celebrated work al Mughni (the most widely known textbook of Hanbali fiqh), Ibn Qudamah (d. 558 AH–1223 CE–) explains that the root of the differences originates from the nature of the judgeship itself. The proponents of women judges, championed by the Hanafis, argue that a person’s gender is not a barrier, except in offences involving hudud and qisas, where women are not well-exposed to work outside the house. Ibn Jarir al Tabari stated that women have an absolute right to be appointed to the judiciary, arguing that if a woman qualifies as a mufti, she will also qualify as a judge (Ibn Jarir al Tabari, d. 310 AH–923 CE–). The opponents represent the majority of the classical jurists (Shafi‘i, Malik, and Ibn Hanbal), who expressly prohibit women from being judges. Among other things, they fear that justice would not be served due to women’s lack of exposure to mundane matters, which might affect the quality of the judgment (Ibn Qudamah, n.d.). This argument is adopted by the Malaysian shari‘a system, which is predominantly based on the Shafi‘i school of law.

The complexity of legal arguments in Islamic classical law and contemporary writings on female judgeship significantly affected the appointment of women as judges in the Malaysian shari‘a courts. This has found reflection

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9 The requirement to dispense justice and forbid oppression is repeatedly mentioned in Islamic traditions. See the Qur’an: al Maidah: 42; al Nisa’: 135 and 65; al Nahl: 90.

10 By ‘classical scholars’ I mean the religious scholars of the tenth century. As will be seen, the perspectives of these early scholars still constitute an important source of reference for participants in contemporary debates dealing with religious issues.
in a *fatwa* issued in 1982 by the National Fatwa Committee, which prohibited women from being appointed as judge for the reason that the post is equal to the position of a leader (Mohd Hisham Mohd Kamal 2009).\textsuperscript{11} This ruling was derived from a literal understanding of the *hadith* which states that “the people who appoint women as rulers will never be successful” (al-Qaradawi 1996).\textsuperscript{12} The Egyptian religious institute, Al Azhar,\textsuperscript{13} ruling in the mid-twentieth century that the major public posts are reserved for men only, had a significant impact on the 1982 *fatwa* (Abu Haniffa and Mohd Yazid Zul Kepli 2008).\textsuperscript{14}

**The Response of Civil Society and the Promulgation of a New Fatwa**

Public debates on whether women should serve as judges did not start immediately after the declaration of the 1982 *fatwa*, as the codification of Islamic law was still being worked on. It was during the late 1990s, when procedural laws were enacted, that lawyers representing clients expressed dissatisfaction with the way male judges in family courts passed judgment, especially in custody dispute cases. In general, the problems pertaining to family litigation proceedings were urgent and the need for more *shariʿa* court judges, including female ones, continued to be highlighted in the media (Bernama 2000).\textsuperscript{15} Among the complaints that were raised in many workshops and seminars dealing with legal issues in *shariʿa* courts were delay in litigation, problems in enforcing court orders, and the long court process needed to obtain an order for maintenance (Workshop on Just and Speedy Trial, 2007 and Towards the Implementation of A National Family Policy: Socio Legal Perspectives, 2011).\textsuperscript{16}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{11} The National Fatwa Committee comprises a membership of selected, qualified individuals and state *muftis*. A *fatwa* issued by the National Fatwa Committee is not binding on the state. The *fatwa* will take effect after it has been adopted and gazetted by the respective states. For further reading, see Mohd Hisham Mohd Kamal (2009).
\item \textsuperscript{12} As quoted in Rosman (2008, 51). This *hadith* is widely quoted by modern Islamic scholars with different modes of interpretation. See for example, al-Qaradawi (1996, 165–166).
\item \textsuperscript{13} Founded in 970 CE in what is now the medieval quarter of Cairo, al-Azhar is a main center of Islamic and Arabic learning in the world.
\item \textsuperscript{14} See also Abu Haniffa Mohammed Abdullah and Mohd Yazid Zul Kepli (2008, 5).
\item \textsuperscript{15} See for example, the Malaysian National News Agency Bernama (May 2 and May 5, 2000).
\item \textsuperscript{16} For example, see the workshops ‘Perbicaraan Adil and Cepat di Mahkamah Shariah’ (Workshop on Just and Speedy Trial) organised by SUHAKAM and JKSM, April 12, 2007; ‘Towards the Implementation of A National Family Policy: Socio Legal Perspectives,’ organised by the Faculty of Human Ecology, University Putra Malaysia (UPM) and Lembaga Penduduk dan Pembangunan Keluarga Negara (Board of the National Population and Family Development) September 14–15, 2011. The author was invited to participate in and speak at these seminars and workshops.
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Nevertheless, no single appointment was made by the 14 states, out of respect to the 1982 fatwa.

From the late 1990s onwards, many Muslim legal professionals and female-oriented NGOs in Malaysia urged that appointments should be based on qualification rather than gender (Abu Haniffa Mohammed Abdullah and Mohd Yazid Zul Kepli 2008; Andek Masnah Andek Kelawa 1997). As we have seen, initially, the call for female representation in shariʿa courts was based on a perceived lack of competence, particularly among junior male judges, in the resolution of family issues. This was attributed to a lack of training in related disciplines, and inadequate experience in judicial proceedings in the application and implementation of the law. Shariʿa lawyers and academic scholars claimed that female judges could offer a better perspective when dealing with highly emotional disputes such as custodial rights and lengthy divorce proceedings (Seminar on Islamic law in Shariah Courts: Practices and Challenges, 1997). They cited many cases in which women had lost the right to child custody when they remarried, despite the fact that, they argued, the child’s welfare should be paramount. According to these legal practitioners, male judges in shariʿa courts employed a literal interpretation of Islamic law, despite clear guidance by statutory provision in Malaysian Islamic Family law to consider the interests of the child as of foremost importance (Section 83 of Islamic Family law Act 1984). The occurrence of these types of cases accelerated the

17 This concern has been raised in ‘Seminar Undang-Undang Islam di Mahkamah-Mahkamah Shariah di Malaysia: Amalan dan Permasalahan’ (Seminar on Islamic law in Shariah Courts: Practices and Challenges), University of Malaya, February 19–20, 1997, in which the author participated. Among the issues raised was the delay in court proceedings regarding an appeal for child custody that could result in the mother losing her right to care for the child. The child was taken by force from the mother’s custody after her remarriage to a man not related to the child.
19 See for example, section 83 of Islamic Family law Act 1984, which provides that: The right of hadana (custody) of a woman is lost:
   (a) by her marriage with a person not related to the child.
   within the prohibited degrees if her custody in such case.
   will affect the welfare of the child but her right to custody.
   will revert if the marriage is dissolved;
   (b) by her gross and open immorality;
   (c) by her changing her residence so as to prevent the father.
   from exercising the necessary supervision over the child,
   except that a divorced wife may take her own child to her birth-place;
demand for the appointment of competent female judges. Accusations that male judges discriminate against women are also common among NGOs representing feminist groups (Women’s Aid Organisation 2012). Numerous studies by a variety of groups maintain that the problems may equally be attributed to incompetent lawyers and litigants who are not well-informed about the proceedings or who are simply tired of the litigation process, which is adversarial in nature. These NGOs voice their concern about the need to improve the adjudication process, and a suggestion that has been strongly emphasized, inter alia, is that female judges, who are both competent and able to understand and care about women and their legal problems, should be appointed.

Meanwhile, the demand for female judgeships persisted, as the success of court proceedings also depends on efficiency in the adjudication processes and the ability to deliver fair and just decisions. In this regard, Ahmad Ibrahim (2000), a prominent scholar in the administration of Islamic law, claimed that “It is only when the Shari‘a court judges and officials can show that they are capable of dispensing fair and equitable justice to all, that the prejudice and apprehension against them will be removed.” Apparently, this element of prejudice remains, especially in court proceedings that involve highly contentious matters, due to a lack of professionalism in handling the cases, lengthy litigation, and poor enforcement of court orders, especially regarding conjugal maintenance and child support. Among the solutions that have been suggested in many seminars and workshops is to have women participate more widely as judges, since they will be more sensitive to female litigants’ needs and feelings (Workshop on Just and Speedy Trial 2007; Towards the Implementation of A National Family Policy: Socio Legal Perspectives 2011).

The voicing of concern at the failure to appoint women as judges in shari‘a courts finally led to the issuing of another fatwa in 2006 by the National Fatwa Committee. This time, it officially announced that qualified women may be appointed as shari‘a court judges after consultation with the State Fatwa

(d) by her abjuration of Islam;
(e) by her neglect of or cruelty to the child.

20 See the shadow report on CEDAW and Malaysia (Women’s Aid Organisation 2012, 168–186).
21 All these issues were addressed in the workshops ‘Perbicaraan Adil dan Cepat di Mahkamah Shariah’ (workshop on Just and Speedy Trial) organised by SUHAKAM and JKSM, April 12, 2007; ‘Seminar Undang-Undang Islam di Mahkamah-Mahkamah Shariah di Malaysia, Amalan dan Permasalahan’ (Seminar on Islamic law in Shariah Courts; Practices and Challenges) University of Malaya, February 19–20, 1997; ‘Towards the Implementation of A National Family Policy: Socio Legal Perspectives’, organized by the Faculty of Human Ecology UPM and LPPKN, September 14–15, 2011.
Committee (National Fatwa, 2006). This fatwa needs to be passed by the respective states in order to take legislative effect (Section 49 Administration of the Religion of Islam (Selangor) Enactment 2003). However, the record shows that only the state of Federal Territories had passed the fatwa in 2007, while the states of Kelantan, Sarawak and Kedah have officially declared that they would not. Other states have not declared their express acceptance or refusal (Department of Islamic Affairs, Prime Minister Department 2006).

The Debate after the 2006 Fatwa

Despite the publication of the 2006 fatwa by the National Fatwa Committee, the debate surrounding the appointment of female judges continues, and the available literature, by both academic scholars and legal professionals, on the feasibility of appointing female judges to serve in the shariʿa judiciary reflects both positive and negative responses. Since the fatwa does not have a binding effect until after it has been passed by the different states, it creates uncertainty and confusion among the public as to the correct attitude to having women sit as judges in the shariʿa courts. This is aggravated further when the dispute plays out among those who have authority on the issue. For example, in his 2007 article, the then-Chief Shariʿa Judge of the Malaysian Shariʿa Court disapproved of female judgeship, citing several authorities from classical Islamic law, especially the books of the Shafiʿi school of jurisprudence. In his writing, this judge argued that women were not competent to be judges due to the complexity of the service and the need to adhere strictly to the Shafiʿi view, the school of law that is officially adopted in Malaysian shariʿa law, which disapproves of women serving as judges. Instead, he concurred that women can be appointed to serve in the shariʿa judiciary as registrars, research officers to Higher Court Shariʿa judges, sulh (mediation) officers and other functions within the judiciary. It has been recorded that the Shariʿa Judiciary of Malaysia

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22 The Fatwa Committee consists of the Mufti (who serves as the Chairman), the Deputy Mufti, the State Legal Adviser, two members of the Majlis, and an officer of the Religious Department established under the respective states to advise the Sultan or Head of the State on Islamic law matters. The National Fatwa Committe consists of all individual Muftis from the respective states and it discusses matters concerning national interests.

23 See for example, Administration of the Religion of Islam (Selangor) Enactment 2003 s. 49 (1). A similar provision is available in all states.

24 Portal Rasmi Fatwa Malaysia, www.e-fatwa.gov.my. This address is the formal portal to access all fatwas that are issued by the Fatwa Committee and that are managed at the federal level by the Department of Islamic Affairs, Prime Minister Department.

25 The institutions of fatwa and the shariʿa judiciary are two separate entities under the respective states.
has been recruiting female officers since 1994 to serve in various departments, except as judges in shariʿa courts (Abdul Rahman 2007, 1).

The view of the former Chief Shariʿa Judge has received support from an influential scholar who is closely associated with the shariʿa judiciary: Mohd Salleh Ahmad. He argues that it is not permitted to appoint women as judges in shariʿa courts based on the majority view of Muslim jurists. Ahmad literally supports the view of the opponents who claim that lack of competence, fear of psychological impacts, and the burden of a woman's duties may lead to a failure to hand down a just decision. He also argues that the Hanafi accommodating approach in allowing women to be judges has been misconstrued, and the fact that women have been entrusted with specific and primary duties as the leader in the household does not qualify them for the post of judgeship (Ahmad 2007).

On the other hand, legal professionals, academics, and women activists are pressing for a more flexible approach, arguing that the interpretation of the legal texts must take contemporary needs into account (cf. Md Nor 2007, 191). They are supported by religious scholars with international reputations, such as Muhammad Saeed Ramadhan al Buti (Syria, 1929–2013), Yusuf al-Qaradawi (b. 1926) and Baghdad-born Yemeni scholar Abdul Karim Zaidan (1917–2014), who endorsed the appointment of female judges in view of the current needs of society, where women are playing an active role in all aspects of life, including the judicial system (Arif 2011). According to these scholars, the opinion of classical jurists (the opponents) should not be the only criterion to decide on the current need to have female judges in the judicial service—a view that is in line with the 2006 fatwa. Those who support female judgeship contend that the classical views are questionable, and even opposed to what had been practiced in the classical period, when women held important posts including that of mufti, and thus are interpreted out of context. This is evident from the fact that many Muslim countries, such as Indonesia and Pakistan, have been active in appointing women to serve as judges in the shariʿa judiciary. They additionally argue that the post of female judgeship is not comparable to that of the head of state. In the context of Malaysia, the shariʿa judiciary deals with personal status laws and taʿzir offences; it does not include hudud and qisas, the two types of punishment that constitute the main basis for rejecting the appointment of female judges. On a similar note, another academic expert in the administration of shariʿa law (Ramizah Wan Muhammad 2008) supports the idea, asserting that the opportunity should be extended to women as long as they fulfill the qualifications for appointment as a judge. Furthermore, there is no express restriction on appointing female judges under the existing law. Therefore, any attempt to disqualify women from appointment as judges due
to their gender will be against the spirit of Article 8 of the Malaysian Constitution of 1957, which prohibits discrimination on the basis of gender. Furthermore, the legal requirement that the judge must reach the level of mujtahid (able to exercise ijtihad) would be met if a person is able to make a fair and just decision (Ramizah Wan Muhammad 2008).

Another significant body of literature claims that the lack of consistency among Muslim jurists in their arguments in terms of legality has contributed to the confusion (Arif 2011). Arif, a religious scholar who specializes in contemporary issues dealing with Islamic law, claims that most of the arguments are based on rebuttable presumptions. For example, the arguments that women lack intellectual capacity and are weak in their judgment are presumptions that are based on the position that women are not actively exposed to social activities. On the other hand, women in contemporary society are in a parallel position to men in terms of the opportunity to acquire knowledge through education and the freedom to express their thought. According to Arif, even though women were not known in Islamic history to hold any judicial post, except for the post of mufti, there is no comparison between the needs of the past and the present; they are completely different and the law must accommodate such changes. Above all, Arif continues, the role of a judge concerns the needs of society and has nothing to do with worship (ibadah). Arif hopes that his arguments will alleviate the fear of opponents that they might hand down a ruling contrary to shari‘a principles as well as strengthen the argument of those advocating the appointment of women as shari‘a court judges (Arif 2011).

As the above discussion demonstrates, there are different perceptions among contemporary scholars and legal professionals on the role of women judges in Malaysia. These perceptions are generally influenced by the way shari‘a law is interpreted, either taking it literally or applying the law in context. The latter view is usually portrayed as a reflection of contemporary needs, especially on matters where the role of women is perceived to be highly relevant, as in adjudicating family disputes. What is interesting is that the main participants in the debate are legal professionals, academics and activists with no formal education in Islamic law (Sonneveld and Tawfik 2015). While they display divergent views on whether women should work as judges in the shari‘a courts, they have one thing in common: they all use religious argumentation to justify their point of view.

2010: The Appointment of Women Judges to the Shari‘a Judiciary

The fierce and continuous debates finally led to the appointment of more women to the shari‘a judiciary. In some states women had previously served
as sulh officers, in other states they came from the ranks of research officers or lawyers. For example, despite the fact that the state of Kelantan officially declared it would not issue the 2006 fatwa, it was the earliest state to officially appoint female sulh officers (court-annexed mediators) in 2007. As section two explains in more detail, sulh officers conduct mediation proceedings with the authority to perform limited judicial functions (extrajudicial), such as to confirm a divorce settled outside the court. These appointments were not announced publically, as the sulh officer is not a judicial post, even though these posts could enjoy the same salary scale as a lower court judge.

In 2010, two female shariʿa court judges were officially appointed in the Federal Territories. They were Suraya Ramli and Rafidah Abdul Razak, who were 31 and 39 years old at the time of their appointment, respectively. Both women had served as senior assistant directors of the Training Division of the Malaysian Islamic Judicial Department. Although women's NGOs had argued for the inclusion of women judges on the basis that women judges would be more sensitive to women's needs, Suraya Ramli said she would take it as a challenge to dispel the notion that women shariʿa court judges would tend to side with female litigants. Ramli and Abdul Razak's appointments became nationwide news as they were the first such appointments in Malaysia (Mohd Zin 2012, 126). Prime Minister Najib described the appointments as a historic moment for the country. The move, so he claimed, was meant to “enhance justice in cases involving families and women's rights” in Malaysia, where nearly two-thirds of the country’s 28 million people are Muslims. To a question on whether there were plans to increase the number of women shariʿa judges in other states, Najib said it would be up to the relevant state authorities as the matter was under the jurisdiction of the Islamic Council of that particular state. Several other states, such as Malacca, Perlis and Pahang, soon followed, appointing qualified female candidates to judicial posts in their respective Shariʿa Subordinate Courts in 2012 (Statistics on Women, Family and Community 2012). In 2016, the state of Selangor appointed two female judges

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26 The Malaysian shariʿa court introduced court-annexed mediation in 2000, starting with the Federal Territories and followed by the rest of the states.
29 This information is briefly discussed in Mohd Zin (2012, 126).
to serve in the Shari’a High Court, which is a breakthrough for further recognition of female judges at the higher court level. What is interesting is that while the Federal Territories had passed the 2006 fatwa prior to the appointment of the first women shari’ā judges, this was not the case with the other states that appointed women as shari’ā court judges. All these states have yet to pass the fatwa.

2 Legal Framework for the Appointment of Shari’ā Judges

As the previous section has shown, both opponents and proponents used the sources of Islamic law as a justification for their point of view in the public debates surrounding the appointment of women to work as judges in the shari’ā courts. Legal professionals, often high-ranking shari’ā court judges, participated actively in the debate. In this section, I examine the extent to which there are features in the Malaysian legal system that prevent or encourage women to work as judges in the shari’ā courts.

Shari’ā Courts Independent of Civil Courts

While the issue of female judgeship in the shari’ā judiciary has provoked much controversy over the past few decades, the appointment of female judges to the civil courts has never been a public issue, as they are appointed under the federal scheme, which is standardized throughout the country and well protected under the Malaysian Federal Constitution of 1957, which was inherited from the British and modified. Women were appointed to the subordinate courts in the 1960s, and the first appointment of a woman to a High Court position occurred in 1983 (Malaysian Judiciary Yearbook 2012). Since then, the presence of female judges in the High Courts has increased, almost reaching equality with that of their male counterparts in 2012 (see table below). The proportion of women judges in the subordinate courts is relatively high (35.5 percent), which is significant in that it demonstrates that gender is not the main obstacle for women who wish to become a judge (Statistics on Women, Family and Community 2012).32

32 These numbers were obtained from Statistics on Women, Family and Community 2012 and the Malaysian Judiciary Yearbook 2012. The number of female judges has increased in 2013, but the latest figures were not available at the time of going to press.
TABLE 1  The presence of female judges in the Courts

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<tbody>
<tr>
<td>Federal Court</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>4</td>
<td>18</td>
</tr>
<tr>
<td>High Courts</td>
<td>30</td>
<td>35</td>
</tr>
<tr>
<td>Judicial Commissioner of High Courts</td>
<td>9</td>
<td>18</td>
</tr>
</tbody>
</table>

In contrast to the shariʿa system, which is under state jurisdiction, judges in the civil courts are appointed by the Federal Government, and can be transferred throughout the country (Article 122 of Federal Constitution and Muhammad 2003).33 The career path to become a judge in a Federal court starts with a degree in law (LLB) which is necessary to qualify for appointment. The prospect for further promotion is much better, as the Federal court has a five-tier court system, beginning with the Magistrate Court, Session Court, High Court, Court of Appeal, and Federal Court.

Until 1988, Shariʿa Courts were regarded as subordinate to the High Court, and were presided over by a lower civil court judge and the Chief Qadi in each state (Section 45(6) of Selangor Muslim Law Enactment 1952; Ibrahim 2000).34 But Act A704 provides that the civil High Court shall not interfere in Shariʿa Court matters. Due to this legal development the shariʿa courts were upgraded, starting with the state of Selangor in 1989,35 and followed in subsequent years by the rest of the states. The institution of the shariʿa judiciary is now independently governed, and has been separated from the Council of Muslim Religion and the Mufti office. Moreover, where the Shariʿa Court system had two levels before 1988 (subordinate and High Court), all 14 states now have their own three-tier court system, i.e. Subordinate, High Court and Appellate courts, governed by the administration of Islamic law. The upgrading of the Shariʿa Court system also created more vacant posts for judges to fill; prior to 1988, the size of the shariʿa court’s structure contributed to the reluctance to appoint female judges, as only a limited number of judicial posts were available in the respective states.

33 See Federal Constitution 1957, Article 122. See also Muhammad (2003, 9).
34 See for example, Selangor Administration of Muslim Law Enactment 1952 section 45(6); see also Ibrahim (2000, 87–130).
35 Selangor Administration of Islamic law 1989 replaced the earlier law of 1952.
In terms of jurisdiction, the *shariʿa* courts deal mainly with personal status law; there is limited jurisdiction over criminal offences. The cases are mostly related to Islamic family law disputes, such as marriage and divorce, maintenance, ancillary claims after divorce, gifts (*hibah*) and inheritance, and other claims that do not exceed RM 100,000 (equivalent of approximately USD 30,000 or 25,000 Euros). In criminal jurisdiction, the courts hear cases that are classified as *taʿzir* offences (*Shariah Offences Act (Federal Territories) 1997*), and the punishments must not exceed three years of jail, a fine not exceeding RM 5000, six strokes of the rattan, or both. The prescribed punishment as reflected in the federal law does not reach the level of *hudud* as prescribed in classical Islamic law, and there should be no restriction on females presiding in criminal matters (*Section 52 Administration of Islamic Law (Federal Territories) 1993*).

Even though the power of the lower *shariʿa* judge is rather restricted in terms of jurisdiction, most of the complicated legal disputes, such as marital conflicts and divorce proceedings, are heard in the lower court, apart from child custody and property rights, where the *Shariʿa* High Court has original jurisdiction. Until 2016, when none of the women judges were appointed to the higher *shariʿa* court level (as explained in more detail below), the role of the *Shariʿa* Subordinate Court judges, where women are among those appointed, was significant in the administration of the justice system. For comparison, all family disputes for non-Muslims in civil jurisdiction begin in the High Court, where a significant number of female judges sit.

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36 For non-Muslims, family matters are brought before the civil courts, while for Muslims they are heard in the *shariʿa* courts. Besides these courts, other non-judicial bodies also deal with family disputes. The Marriage Tribunal, which was established under the National Registration Department of Malaysia, has been given the authority to reconcile non-Muslim separating couples. The Malaysian Mediation Centre provides family mediation services, and the Legal Aid Department gives legal advice, provides mediation and assistance to the parties in litigation. The services offered by the Legal Aid Bureau are available to both Muslim and non-Muslim parties. On the other hand, for Muslims, the Islamic Religious Councils, which are established in every state in Malaysia, exercise non-judicial functions when helping the conflicting parties.

37 See, for example, *Shariah Offences Act (Federal Territories) 1997*.

38 All states must provide punishment within the approved limit as set out in the *Shariʿa Court (Criminal Jurisdiction) Act 1965* as amended in 1984.

39 *Administration of Islamic law (Federal Territories) Act 1993*, s. 52.

40 Pahang explicitly restricts this in the statute while other states, except for Selangor, simply have not yet appointed women judges at the higher court level.

41 See *Law Reform (Marriage and Divorce) Act 1976*, s. 2 under the definition of court.
The Judicial Selection Process

In 1997, during a time when the Shari’ā Courts were gradually gaining independence from the Civil Courts, the Rulers in Council passed a resolution that led to the unification of Islamic law across the different states. Before then, Islamic laws were not all uniform, and were governed by the respective statutory laws (Ibrahim 2000). This caused much confusion, especially when people moved from one state to another. The administration of Islamic law as it currently stands has been made uniform throughout the country, with state laws providing general qualifications, which the Chief Shari’ā Judge has to consider for the appointment of judges, as provided under the states’ Administration of Islamic law. The Sultans or the Kings will appoint judges based on the recommendation of the Chief Shari’ā Judge of the respective states.

The administration of Islamic law in all states provides several criteria that must be fulfilled for the appointment of judges to the Shari’ā High Court, including: that a person must be a citizen; that, for a period of not less than ten years preceding this appointment, he has been a Judge of a Shari’ā Subordinate Court, or a Kathi, or a Registrar or a Shari’ā Prosecutor of a State, or sometimes one and sometimes another; or is a person learned in Islamic Law (Section 44 of Administration of Islamic Law (Federal Territories) 1993).

In principle, civil court judges cannot serve in Shari’ā High Courts (although they can be appointed to preside with shari’ā judges at the appellate level). The above criteria generally provide for the appointment of shari’ā judges in the Federal Territories, and similar provisions are available in other states. Literally this implies that judges are appointed from qualified male candidates only. However, the issue is not significant, as the Interpretation Act allows for the use of ‘he’ to represent both sexes. The state of Pahang forms an exception as it spells out very clearly the legislative intent, which is to exclude women as judges in the Shari’ā High Court.

It should be noted, however, that the above law as applicable in the state of Pahang mentions the exclusion of women as judges in the Shari’ā High Courts.

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42 Administration of Islamic law, Islamic family law, Islamic evidence, Islamic criminal law, and Islamic procedural laws for both civil and criminal courts.
43 The states that have sultans are Selangor, Perak, Kedah Perlis, Kelantan Terengganu, Pahang, Johor and Negeri Sembilan.
44 The states that have kings are Penang, Federal Territories, Malacca, Sabah and Sarawak.
45 The old terminology for shari’ā court judge.
46 Administration of Islamic law (Federal Territories) Act 1993, s.44.
47 Interpretation Act 1948, s. 4(2). Words and expressions importing the masculine gender include females.
It does not disqualify women from appointment to lower courts, and in 2013 the state appointed two female judges to serve in the shari’ā subordinate courts. They were Sarah Fawzia Ahmad Fuzi, who had been a sulh officer for three years and practicing lawyer for two years, and Norhidayah Mat Darus, a practicing lawyer and a Research Officer to the Chief Shari’ā Judge of Pahang.

Until June 2016, it was difficult for newly appointed female judges to be promoted to higher posts, such as that of Shari’ā High court judge, even though they may serve in equivalent salary grades as shari’ā officers. This was the case in the Shari’ā Court of the Federal Territories, where the first two female judges (appointed in 2010) were eventually transferred to different posts in the shari’ā judiciary instead of being promoted to the Shari’ā High Court. After their departure in 2013, two other female judges were appointed to take their position in the Shari’ā Subordinate Court. While in the Federal Territories the Shari’ā High Court judges are all male, things are different in the state of Selangor where two women judges were appointed to the Sharia High Court in June 2016. Their appointments constitute an important development: denying women judges access to higher positions in the shari’ā judiciary not only has an impact on the career path of women in the judiciary, but also excludes women judges from working on custody cases. As noted, organisations for the rights of women and children had often argued that it was precisely in child custody cases that women judges could make an important difference.

Even though the appointment of female judges to the shari’ā courts is still in its infancy, the move marks significant progress in the projection of gender

48 The law provides that the Chief Shari’ā Judge and Shari’ā High Court Judge shall be appointed by the Sultan (or the King) on the advice of the Majlis (State Religious Council) and a person is qualified for appointment if he is a male Muslim and a citizen. Apart from that, the qualified candidate must have not less than ten years’ experience in practice as shari’ā lawyer or Shari’ā officer or as a member of Shari’ā courts or is learned in Islamic legislation. Shari’ā officers include shari’ā prosecutors, sulh officers and research officers. The Chief Shari’ā Judge is also responsible for appointing Shari’ā Appeal Court judges for a period not exceeding three years. Even though the gender of selected candidates has not been addressed clearly in the provision, practice has taught that preference will be given to male judges to decide on highly complex matters.

49 It should be noted that at present, the post of High Court judge is rather limited as there is only one Shari’ā High Court in each state. In densely populated states, such as Selangor and the Federal Territories, there are slightly more of them due to the bulk of cases brought.

50 This information was obtained from a telephone interview with the Registrar of the Shari’ā Court of the Federal Territories on April 17, 2013.

51 Data obtained from the Department of Shari’ā Judiciary on March 11, 2013.
equality in a predominantly male job. For example, in July 2010 the Malaysian government lifted its reservation on Article 7 of the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), to which it had previously expressed its reservation on the ground that women are not permitted to hold certain posts, such as mufti. The current state of the law and the court structure cannot accommodate many women in the service, but the receptive attitude towards accepting women judges is significant in removing gender stereotyping in the shari’ā judicial service.

Appointment of Women as Shari’ā Officers

While the issue of women working as judges in the shari’ā judiciary has been the focus of much debate and attention, few scholars and activists have paid attention to the appointment of women legal professionals as shari’ā officers. The appointment of women as shari’ā officers other than judges has been well received by the members of the shari’ā judiciary. Since 1994, several shari’ā officers have been appointed to the shari’ā judiciary of Malaysia, to serve as Registrars, Research Officers for Appeal Court judges, and other administrative posts such as court registrars (Abdul-Rahman 2007, 17). Currently, a significant number of women have been appointed as shari’ā officers, which can be partly attributed to the increase in the number of women who are academically qualified. The table below shows the number of women appointed to the respective posts in all states. Only one woman has attained the level of Chief Registrar; the remaining 13 states do not have women in that position.

With regard to shari’ā officers who work as sulh (mediation) officers, the ratio of male to female sulh officers is almost equal. The sulh process was formally introduced in Kuala Lumpur as a pilot project in 2001 (though it had been practiced informally there since 1976) and spread to various states in the following years. The goal of these experiments was to reduce the backlog of suits that have long plagued the Islamic courts and to help resolve disputes amicably (Peletz 2013).

Sulh officers mediate husband and wife in the settlement of disputes on ancillary matters such as nafkah (spousal maintenance), mut’ah (financial compensation for the wife in case she is not to blame for the divorce), matrimonial property, and custody. If the parties agree to settle, this agreement will be finally endorsed in the court as a consent order. Many Islamic family law matters must be dealt with in sulh proceedings before the matter is brought to trial. The post of sulh officer is occupied by a good proportion of women in judicial service. Their ability to handle mediation processes is beyond question, as they have been given training to handle the proceedings and, so far, no complaints have been raised accusing them of being incompetent. On that
note, the state of Kelantan extended the power of mediators with the power to adjudicate (*tauliah hakim*), even though there is no record of any official appointment of female judges in that state (Wan Muhammad 2008, 34–35). In fact, the state of Kelantan was one of the states that explicitly declared its unwillingness to pass the 2006 *fatwa*.

### Table 2  Number of female Shariʿa officers

<table>
<thead>
<tr>
<th>Shariʿa Chief Judge</th>
<th>0</th>
<th>1</th>
<th>0</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges of the Court of Appeal</td>
<td>0</td>
<td>5</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>States Shariʿa Chief Judge (JUSA C)</td>
<td>0</td>
<td>14</td>
<td>0</td>
<td>14</td>
</tr>
<tr>
<td>Chief Registrar of the State Shariʿa court (LS 54)</td>
<td>0</td>
<td>14</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Shariʿa judge (LS 44–48)</td>
<td>3</td>
<td>113</td>
<td>4</td>
<td>107</td>
</tr>
<tr>
<td>Sulh officers</td>
<td>35</td>
<td>38</td>
<td>44</td>
<td>40</td>
</tr>
<tr>
<td>Shariʿa Officers</td>
<td>41</td>
<td>64</td>
<td>26</td>
<td>44</td>
</tr>
</tbody>
</table>

Despite the substantial physical restructuring of the *shariʿa* court legal system, generally, Malaysian legal scholars did not pay much attention to the issue of gender in judgeship, as their main focus was to upgrade the status of the Shariʿa Courts and improve the uniformity of the *shariʿa* laws across the states. In addition, as we have seen, only a limited number of posts are available in the *shariʿa* judiciary, especially in the High Courts. This is related to the fact that there are only a few Shariʿa High Courts in any case. For example, in Selangor, Malaysia’s biggest state, there are only three Shariʿa High Court Judges (of whom two are now women). Moreover, some states explicitly forbid women from occupying positions in the higher levels of the *shariʿa* judiciary. Hence, even though men and women have equal opportunity in the realm of higher education, and females outnumber males in Malaysian higher education,

52 Data taken from the Department Shariah Judiciary of Malaysia (December 2012).
there are still considerably fewer opportunities for women to occupy higher positions in the Islamic judiciary than for their male counterparts. A number of female judges from different states relate their experiences as judges in the shari'ā courts in the following section.

3 Perceptions of Female Judges in Shari'ā Courts

A number of academic studies suggest that women judges rule differently than men in some fields, and that certain feminine attributes would be better suited in certain legal disciplines, such as family law (Boyd et al. 2010; Feenan 2008).53 Despite these arguments, a number of legal-anthropological studies have shown that male judges display a positive approach to women, such as those of Peletz (2013) on Malaysia, and Moors (1999, 142), and Tucker (1998) on the Middle East. Hirsh (1998) reveals that many women in Kenya won their court cases against their husbands. For this section, we asked a number of female judges what they think of the contention that women judges rule differently than their male peers, and whether they agree with those who say that women are less qualified than men to work as judges.

The fact that the state and federal governments have started to open a pathway for women in the lower shari'ā judiciary is an indication that the old contention among a number of judicial officials and academic scholars, who believe that women cannot hold a judicial post, is slowly losing its vigour. In order to understand the working culture of female judges who have been appointed to a shari'ā court, we conducted interviews with 7 out of 10 female shari'ā court judges in Spring 2013 and Spring 2015. The aim was to get their views on: (a) the perception expressed by senior male colleagues that women are not competent to be judges due to the complexity of the service and the need to adhere strictly to the view expressed by the Shafi'i school of Islamic jurisprudence, which, as we have seen, disapproves of women serving as judges, and (b) the perception expressed by female-oriented NGOs that women judges are more sensitive towards the needs of female litigants, including whether these female judges think they rule differently than their male colleagues.

The interviews in 2013, either face-to-face or by telephone, were conducted by the author with the assistance of a research assistant. In 2015, we also

53 This observation has been generally discussed in Boyd, Epstein and Martin (2010). While acknowledging that female judges may judge differently, Feenan (2008) claims that the participation of women should be based on the need for diversity in the role of judicial officer due to background and experiences rather than gender.
distributed questions through e-mail. All women judges are working in subordinate shari’a courts, in five different states. The majority of the respondents have a personal relationship with the present author, as students in the institution of higher learning. Since the author sits on several committees under the Shariah Judiciary of Malaysia and is one of the permanent trainers for the ‘Diploma in Administration of Shariah Judiciary’ (DAIJ), a professional qualification essential for the recruitment into the post of shari’a officers, the assumption is that the information given is relatively frank and reliable.

All female judges are graduates of local universities in Law and have obtained a professional diploma from a local university. They had previously served for a number of years in shari’a related posts in the shari’a courts, either as sulh officers, research officers or practicing lawyers. They hear all cases except for cases concerning the appointment of the wali hakim or wali raja. The concept of wali hakim refers to the appointment of a marriage guardian (wali) to those women who have no marriage guardian among their own relatives. Since the marriage guardian (wali) is a male post, women judges are exempted from acting as wali hakim.

Are Women Competent Enough to be Judges?

As we have seen above, in 2007, former Chief Shari’a Judge Abdul Rahman disapproved of female judgesthips in shari’a courts, arguing that women were not competent enough to be judges due to the complexity of the service and the need to adhere strictly to the Shafi’i view, which disapproves of women serving as in the judiciary. In April 2015, we asked ten women judges to respond in writing to the statement of this senior judge. We received five responses from newly appointed female judges in the northern states (Perlis and Kedah) where the mufti of Kedah had issued a fatwa in favour of women’s appointment as judges in 2013.

All five women judges disagreed with the statement of the former Chief Shari’a Judge. Women, they argued, are sufficiently qualified in terms of education. One judge, a young woman in her twenties whom I will refer to as Zara, even claimed that the large number of women in institutions of higher education shows that women are more intelligent than men, and therefore more competent to become judges. The mere fact that many women are judges in the civil courts shows that women are competent and qualified enough too. Her colleague, Nor, who was appointed to work as a judge in 2013, added that women judges are generally not only more disciplined and work more

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54 One woman judge worked in the state of Malacca, one in Perlis, three in Kedah, one in Pahang, and one in the Federal Territories.
efficiently than their male colleagues, but also have a greater desire to study and acquire knowledge.

While all five women judges felt that women are as qualified as men to become judges or even more so, Aishah, who was appointed as judge in 2013, admitted that the teachings of the Shafi’i school of Islamic jurisprudence hardly justify the inauguration of women as judges. Although she did not want to claim that she was against the opinion of the majority of classical scholars, she felt that since the jurisdiction of contemporary Malaysian shari’a courts is limited to family law and ta’zir cases only, it would make more sense to follow the opinions of the Hanafi jurists instead of those of their Shafi’i colleagues. According to her, the teachings of the Hanafi school of law are more suitable to keep Islamic law abreast of the demands and welfare of modern society. Damia, a judge in her late twenties, also believed that the Shafi’i point of view was stricter than the teachings of the other schools of law, and that it limits women to work in specified fields of law only. By contrast, Zara said that the Mufti of Kedah had issued a fatwa giving women the right to work as judges and, consequently, the opinions of the Shafi’i jurists were no longer an issue worth discussing.

Although all women judges were of the opinion that women are as competent as men to act as judges, or even more so, in some cases they nevertheless experienced forms of discrimination. Rafidah, who obtained her first degree from the International Islamic University of Malaysia in a double degree programme (LL.B and L.L.B in Shari’a), was appointed as a shari’a subordinate court judge in Pahang in 2013. At the start of her service, she experienced difficulty in demonstrating her ability to hold the post, especially among local Muslim scholars and the public. However, such perceptions gradually changed and she now says she enjoys equal treatment, meaning that she no longer experiences prejudicial perceptions from senior male judges and administrative staff about women’s ability to serve in the judiciary. When asked about the issue of gender differences with regard to judicial competence, Rafidah argued that allegations insinuating that women are weak and less intelligent are not true; it all depends on an individual’s competence, knowledge and integrity.55

In the northern state Kedah, women judges reported that they faced discrimination. Following the proclamation of a fatwa in 2013 by the Mufti, in which he stated that women can work as judges, three women judges were appointed to the shari’a subordinate court in 2015. However, these appointments, Zara argued, did not have the desired effect, as she and her colleagues are not carrying out the duties expected of a judge but instead work as sulh and

55 Face-to-face interview, May 27, 2013, in the state Terengganu.
research officers, which means that they have to help the judge in pre-court mediation and research to prepare for judgment. Even as judges, she claimed, we do not have the same rights and opportunities as our male colleagues.\textsuperscript{56}

Other female judges had different experiences. In the state of Perlis, which is the smallest state in Malaysia, Khadijah was the first female shariʿa court judge. Appointed in 2012, Khadijah had previously served as a registrar under the Shariʿa Judiciary of Malaysia, and had been posted to the shariʿa court of the Federal Territories. Between her appointment in April 2012 until the interview in April 2013, she was the only lower court judge in Perlis.\textsuperscript{57} Only recently has the state appointed another judge, who is male. At present, there are two Shariʿa High Court judges and one Chief Shariʿa Judge serving in the Shariʿa High Court of Perlis.\textsuperscript{58} Khadijah further stated that throughout the period she sat as a judge, she had received good cooperation from all staff, male judges, and lawyers. In her view, there is no personal discrimination. The only problem she faces is the bulk of cases that need to be handled, with only two judges available in the lower court. In general, Khadijah stated, the number of cases brought before the shariʿa courts has increased steadily year by year, but the number of judges has not increased for several reasons, including the lack of suitable infrastructure and a lack of staff,\textsuperscript{59} an issue about which most female judges voiced their concern. With only a limited number of judges available in the lower courts, there is a relatively large bulk of cases that need to be handled.\textsuperscript{60} Any improvement will depend on sound finances and the state's level of bureaucracy. After all, the post is a state appointment, where the salary, benefits, and promotion are the responsibility of the state.

\textit{Do Female Judges Rule Differently?}

In section one, we have seen how Malaysian female-oriented NGOs often argue that it is of paramount importance to have more women working as judges in the shariʿa family courts, as they are more sensitive and understanding of female litigants. Judge Damia agreed that female judges are more sympathetic and supportive of the needs of female plaintiffs. According to her, God created women to be more sensitive and capable of dealing with emotions than

\begin{itemize}
\item \textsuperscript{56} E-mail correspondence, May 29, 2015.
\item \textsuperscript{57} Telephone interview, April 19, 2013.
\item \textsuperscript{58} The small number of judges is due to the geographical location of the state, the state's staffing budget, and the relatively small number of cases registered compared to the rest of the states in Malaysia.
\item \textsuperscript{59} Telephone interview, April 19, 2013.
\item \textsuperscript{60} Telephone interview, April 19, 2013.
\end{itemize}
men. Women, for example, have more patience than men in dealing with the needs of children. Nowadays, single mothers are capable of raising their children without receiving any maintenance from the children's fathers. This, she claimed, clearly shows that women are more responsible than men. Female judges will have a good understanding of how much maintenance it takes to raise a child, how a mother who has lost custody of her child feels, and, most importantly, what the best interest of the child is. In custody cases, for example, most divorced women do not remarry, as they are afraid of losing custody of the child. Nevertheless, Damia argued, women will discern these feelings when making a decision.\footnote{E-mail correspondence, April 2015.} Aishah and Alya, however, disagreed, saying that a judge must be free of bias and be able to set her emotions aside. The most important thing is for judges to be qualified and to serve the needs of society.\footnote{E-mail correspondence, April 2015.} Similarly, Khadijah agreed that gender is not an issue because judges are guided by the Qur'an, the \textit{sunna} (saying and teachings of the Prophet Muhammad), and the law.\footnote{Telephone interview 19 April 2013.} One senior female federal civil court judge vehemently disagreed with the contention that gender makes a difference in judicial decision-making, arguing that the function of judges is to follow and apply the law.\footnote{This information was obtained on December 5, 2013 in a random interview with a female civil court judge who works at the Court of Appeal level.} Although this survey does not permit generalizations as to whether female judges judge differently than male judges, it does indicate that six out of the total number of seven interviewed female \textit{shari'a} court judges disagree with the contention that female judges rule differently than their male counterparts. In general, this small survey provides an interesting insight into the involvement of women in the \textit{shari'a} judiciary, where they are presiding over all cases involving personal law, ranging from marriage and divorce, through ancillary claims, to criminal matters that fall within the jurisdiction of \textit{shari'a} subordinate courts.

Even though the number of women as judges is not that significant, certainly not in comparison to the civil jurisdiction, women have been playing important roles in the \textit{shari'a} judiciary for a long time as \textit{shari'a} officers. The current receptive attitude among those in legal circles is demonstrated by the allocation of more posts to female judges; moreover, the public at large also seems to be in favor, as discussed in many newspapers where positive references outnumber those of the opponents. This also goes to show that the female judges’ competence is a measure of their intellectual capabilities, an
area in which they are comparable to their male colleagues. It would therefore seem reasonable to conclude that the issue of gender and the complex nature of legal arguments in classical Islamic law texts no longer form a significant barrier to the appointment of women as judges in the shariʿa courts. This applies to their appointment as such: the scope and content of their work differ from state to state. In some states, women perform the same duties as their male counterparts, whereas in other states, such as Kedah, they perform ancillary tasks to benefit a male judge.

4 Conclusion

This chapter on the entrance of women to the Malaysian shariʿa judiciary indicates that there is a significant correlation between gender and the interpretation of the classical Islamic texts. Though this situation should not create rigidity in practice, one of the continuing causes of the disagreement among contemporary religious scholars is methodological, that is to say, an inability to relate the theory of justice to practice and to translate divine justice to practical human concerns (Khadduri 1984, 193). The conservatives (opponents) view the Islamic texts as eternal commands, while the modernist (proponents) give weight to social change and the need for wider representation of qualified female judges.

This unwillingness to interpret the text and the law within its context has caused considerable confusion among the public and led the public to blame the shariʿa courts for being less sensitive to women and to having a bias against them. Hence, the demand for the appointment of female judges, with the understanding that they could provide a different way of judging, has been viewed as a solution when litigating family conflicts. In another perspective, the appointment of female judges in civil jurisdictions is significant, where, by comparison, the appointment is decided by the qualification, experience, and background of a person, and there are no restrictions on the type of cases to be heard. Thus, the latest development in the appointment of female judges in the Malaysian shariʿa courts should be viewed as an attempt to open up the shariʿa judicial system to women. However, restrictions remain in a number of aspects. These include: the limited number of judicial post available in the states, which reduces women’s (and men’s) opportunity for future promotion in the shariʿa judiciary; state legislation which explicitly forbids women from occupying positions as judges in the High Courts; and discrimination sometimes experienced from male colleagues or court personnel.
References


