

PROCEDURE FOR APPOINTMENT OF A *QĀḌĪ* IN NIGERIA: A HINDRANCE TO THE PRACTICE OF ISLAMIC THEOCRACY

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ABSTRACT

*Nigeria is made up of different religions and this is recognized by the constitution which provides for the freedom of religion. For the actualization of this freedom, the constitution permits the establishment of Shariah Courts in the country where needed. Muslims need Islamic Theocracy which will interpret to mean governing in accordance with the rules of Allah to enjoy their right. The proper dispensation of justice starts from the procedure for the appointment of a *Qāḍī* which is to be done by the leader of the Muslim under the Shariah. The Constitution of Nigeria and the rules of Judicial Council stipulate the procedures which run afoul the Shariah. Doctrinal and exegetical research methods were used which helped in realizing the lacunas of the extant law in appointment procedure. It is consequently recommended that the extant law be amended to properly portray the provisions of the Shariah by placing the power to appoint on the leader of the Muslims among others. This will not only sanitize and sanctify the position alone, it will also pave way for enthronement Islamic theocracy strictly for the Muslims and help in fulfillment of the fundamental right to freedom of religion.*

Keywords: *Islamic theocracy, Qāḍī, Shariah*

INTRODUCTION

Nigeria, a country in the western part of Africa is very rich ethnically, with diverse groups and tribes of over 350 predominantly.¹ There are three major Religions in Nigeria namely, Islam, Christianity and the Traditional worshippers. The constitution of Nigeria by Nigerians for Nigerians takes account of this fact and therefore provides for freedom of religion.² It is under this provision that one can legally call for the enthronement of Islamic theocracy. Disjunctively, theocracy literally means rule by God.³ Conjunctively and with the clear understanding that God does not come down to rule directly, Islamic theocracy can be said to be a form of government exercised under divine authority/government which recognizes Allah as the supreme ruler in civic affairs and accepts His revelations as conveyed by His vicegerents as the basis on which state and society must be built (Detlev H.K., 1972: 187).

Pursuant to the provision of section 38(1) of the Constitution of Federal Republic of Nigeria (CFRN) 1999 (as amended) which recognizes freedom of religion, the constitution gives special recognition for the Islamic faith by clearly providing for the establishment of Shariah courts for the state that may need it.⁴ The constitution further provides that the jurisdiction of this court is on Islamic Personal Law while throwing it open for the state to expand this jurisdiction. With this passively enabling environment provided by the constitution, scholars and Muslims have been clamoring for the full fledged enthronement of the Islamic Law which will give rise to Islamic Theocracy. One of the major stumbling blocks militating against achieving this aim is the compatibility of the system of government in practice in Nigeria with the Islamic theocracy and the battle of supremacy between the two. This is premised on the salient fact that the Islamic law is subjected to and derives its validity from the Constitution of Nigeria which is seen as supreme. This is however in gross contradiction with the underlying principle of Islamic law that Allah alone is the Lawgiver, His decrees override that of man. It therefore means Islamic theocracy can only be achieved via the constitution to the extent the constitution permits. Painfully as it is, clamor is still ongoing to have Islamic Law independent of the constitution. One may hide under precept that pending the time full fledge Islamic theocracy is achieved in Nigeria, Muslims

¹ A complete List of Ethnic Groups in Nigeria, Accessed Via www.nigerialocal.com.ng/complete-list on 27th October, 2017.

² Sec. 38(1) Constitution of Federal Republic of Nigeria 1999 (as amended).

³ Albert Sidney Hornby (2000), *Oxford Advanced Learner's Dictionary of Current English*, Eight Edition, London: Oxford University Press, 1547.

⁴ Sec. 275 (1) CFRN 1999 (as amended).

should utilize the avenue available to the best effect by ensuring that Islamic law is practiced to the extent permitted the way the Lawgiver decreed. Relying on the settled principle of Islamic law that *yurtakab akhaf al-ḍararayn* (‘Abd al-Wahhāb Khallaf, n.d.: 208) which means choosing of a lesser evil when there are two evils, the two evils here will be choosing between not having Islamic system and having it along side western practice. This should not be understood to undermine in anyway the ceaseless quest that must be made towards achieving total Islamic theocracy.

Relating the principles of Islamic law to our immediate setting, Allah holds the position of the Lawgiver/lawmaker evidenced by Surah al-An‘ām: 57.

إِنَّ الْحُكْمَ إِلَّا لِلَّهِ يَتَّقُ الْحَقَّ وَهُوَ خَيْرُ الْفَاصِلِينَ

“the command rests with none but Allah. He declares the truth, and He is the best of judges.”

The understanding the above verse is that the word command stands for the laws of Allah and that he Allah understands its dispensation best. It is the duties of His servants to execute His law and explain it to the people in the capacity of a vicegerent (Surah al-Baqarah: 30).

Consequently, the position of a *Qāḍī* which means a Judge is a very important position in any political setting or community in Islam. It is one of the most delicate positions with the major responsibility of interpreting the law. A *Qāḍī* legally belong to the judicial arm of government which in turn is one of the three organs of Government in the democratic setting of Nigeria. Establishment of judicial administration headed by a *Qāḍī* is a religious obligation ordained by Allah and the Prophet SAW. It also a practice strictly followed by companions of the Prophet evidenced to such an extent that that the first sentence of the celebrated and well documented letter of ‘Umar, the second caliph of Islam to Abū Mūsā al-Ash‘arī is on the compulsion of establishing good judicial system (Abū Ḥasan al-Māwardī, n.d.: 121).

In recognition of the rights of the Muslims in Nigeria and in support of the fundamental human right of freedom of religion, the Constitution further provided that there shall be established for any state which requires it the Shariah Court of Appeal and that the Shariah Court of Appeal of Federal Capital Territory (FCT).⁵ The states which consequently have the Shariah Court of Appeal in Nigeria are the Northern states with the inclusion of the FCT they are 19 states. The appeals from the Shariah Court of Appeal lies to

⁵ Sec. 275 and 260 CFRN 1999 (as amended) respectively.

the Court of Appeal⁶ which is to be comprised of persons learned in Islamic law⁷ and the appeal further moves to the Supreme Court.

The constitution further provides for the procedure for the appointment of *Qāḍī* to the Shariah Court of Appeals and other courts of record.

With the expansion of the jurisdiction of the Shariah courts of Appeal to cover criminal matters pioneered by Zamfara State in the year 2000 with 11 other states joining the fold (Na'iyā I.S., 2006: 21) it becomes imperative to look at the procedure for the appointment of the *Qāḍīs* who man this delicate position. This is premised on the fact that, the mode of their appointment will reveal to large extent the level of their merit which will in turn be reflected in their dispensation of Justice which is an unassailable feature of Islamic theocracy.

More so, the position Islam places *Qāḍīs* is so delicate that many venerable scholars have rejected being appointed one. This work will analyze the procedure laid down in the constitution and other subsidiary laws for the appointment of a *Qāḍī* vis-à-vis the Islamic law provisions.

Before explaining the procedure for the appointment of a *Qāḍī*, it is imperative to explain whom a *Qāḍī* is and the significance of the position under the Islamic law. The word *Qāḍī/Kadi*⁸ is an Arabic word which literally means 'Judge'. Technically it can be succinctly said to be:

من يقضي بين الناس بحكم الشرع

*"he who adjudicates between people according to the Shariah Law.."*⁹

The meaning of a judge as defined according to the law dictionary is similar to the above which is a public officer, appointed to preside and to administer the law in a court of justice; the chief member of a court, and charged with the control of proceedings and the decision of questions of law or discretion.¹⁰

A *Qāḍī* listens to the litigants, relate it to the relevant provision of the Shariah and gives judgement. He is mandated to uphold justice to the best of his ability

⁶ Sec. 240 and 247(1)a CFRN 1999 (as amended).

⁷ Sec. 237(2)b CFRN 1999 (as amended).

⁸ Alkali is also another word used but often for lower courts.

⁹ Al-Ma'anī, Mu'jam al-'Arabī, "Qadi", <https://www.almaany.com/ar/dict/ar-ar/%D9%82%D8%A7%D8%B6%D9%8A/> accessed on 21 October 2017.

¹⁰ The Law Dictionary, "What is a Judge?," <http://thelawdictionary.org/judge/>, accessed on 21 October 2017.

and he must not succumb to his whims and desires while adjudicating. The tenderness of this post is emphasized in the primary sources of the Shariah. Allah says in the al-Quran in Surah al-Nisā': 58:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا ﴿٥٨﴾

“Verily, Allah commands that you should render back the trusts to those, to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer.”

Allah also says in another portion of the al-Quran in Surah al-Sād: 26:

يٰۤاٰدُوۤدُ اِنَّا جَعَلْنَاكَ خَلِيۡفَةً فِى الْاَرْضِ فَاحْكُم بَيْنَ النَّاسِ بِالْحَقِّ وَلَا تَتَّبِعِ الْهَوٰى فَيُضِلَّكَ عَنْ سَبِيۡلِ اللّٰهِ اِنَّ الَّذِيۡنَ يَضِلُوۡنَ عَنْ سَبِيۡلِ اللّٰهِ لَهُمْ عَذَابٌ شَدِيۡدٌۢ بِمَا نَسُوۡا يَوْمَ الْحِسَابِ ﴿٦١﴾

“Dāwud! Verily, We have placed you as a successor on the earth; so judge you between men in truth (and justice) and follow not your desire -- for it will mislead you from the path of Allah. Verily, those who wander astray from the path of Allah (shall) have a severe torment, because they forgot the Day of Reckoning.”

The Prophet on the same vein also said:

عَنْ ابْنِ بُرَيْدَةَ، عَنْ أَبِيهِ، أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: الْقَضَاةُ ثَلَاثَةٌ: قَاضِيَانِ فِي النَّارِ، وَقَاضٍ فِي الْجَنَّةِ، رَجُلٌ قَضَىٰ بَغْيَ الْحَقِّ فَعَلِمَ ذَلِكَ فَذَكَ فِي النَّارِ، وَقَاضٍ لَا يَعْلَمُ فَأَهْلَكَ حُقُوقَ النَّاسِ فَهُوَ فِي النَّارِ، وَقَاضٍ قَضَىٰ بِالْحَقِّ فَذَلِكَ فِي الْجَنَّةِ

“Buraydah RA narrated that the messenger of Allah (SAW) said, ‘The judges are three: Two judges that are in the fire, and a judge that is in paradise. A man who judges without the truth, and he knows that. This one is in the fire. One who judges while not knowing, ruining the rights of the people. So he is in the fire. A judge who judges with the truth, that is the one in paradise.’”¹¹

¹¹ Muḥammad Ibn Īsā al-Tirmidhī (1975). *Sunan al-Tirmidhī*, vol. 3. Qāhirah: Muṣṭafā al-Bābī al-Ḥalābī, 605, no. ḥadīth 1322.

From the above foregone, it quite apparent that justice is paramount and non negotiable for any judge and anyone who does anything contrary will be punished with hell. The judge only holds the position as a representative of Allah the Lawgiver. Allah further recounts to us that justice has also been the watch word of the earlier Prophets AS by citing the case of Prophet Dāwud AS.

To this end, the legal status of the appointment of a *Qāḍī* is *fard al-kifāyah* for all Muslims (Ibrahim Bassam, 2003: 155), which means a collective obligation on the Muslims whereby if someone carries it out others are immunized from punishment and if none carries it out, all will be held responsible. In an Islamic theocratic setting, there must be a person who holds the position of a *Qāḍī* to carry out the responsibilities of a *Qāḍī*. This is further evidenced by the letter of ‘Umar Ibn al-Khaṭṭāb RA to Abū Mūsā al-Ash‘arī where he said establishing the position of a *Qāḍī* is a must for the Muslim and a Practice of the Prophet SAW that must be followed (Ibn al-Qayyim al-Jawziyyah, 1991: 57).

According to the consensus of Jurists (Wahbah al-Zuhaylī, n.d.: 5930), the function of the *Qāḍī* includes but not limited to the adjudicating between disputing parties, repressing the guilty and helping the aggrieved, ensuring Endowments are fulfilled, distribution of inheritance, looking into the affairs of orphans and the psychologically impaired, stand for those without guardian in marriage contract and enforce lawful bequest (Wahbah al-Zuhaylī, n.d.: 5931-5932). Scholars however controverts on functions like carrying *hadd* punishment, conducting the *Eid* prayers and the *Jum‘ah* prayers (*Ibid*).

THE PROCEDURE AND CRITERIA FOR THE APPOINTMENT OF QĀḌĪ UNDER ISLAMIC LAW

The *ḥadīth* of ‘Abd al-Raḥmān bn Samurah RA¹² wherein the prophet condemned seeking the post of a *Qāḍī* or ruler sets a fundamental background to the procedure for the appointment of a *Qāḍī* and a leader. It literally condemns seeking for the positions. The *ḥadīth* does not however set a blanket rule of total prohibition but with exceptions which will be explained after highlighting the procedure for appointment of a Judge under the Shariah.

There is no controversy that the power to appoint a *Qāḍī* belongs to the *Sultan* i.e the leader of the Muslims who is to take several things into consideration before appointing anybody. This will imply that the *Qāḍī* is

¹² Muḥammad Ismā‘il al-Bukhārī (2001). *Ṣaḥīḥ al-Bukhārī*. Lebanon: Dār al-Ṭuq Najah, 63, no. *ḥadīth* 7147.

a *wakīl*¹³ to the Muslim leader (al-Kasānī, 1986: 4) who appoints him. The Prophet did the appointment of *Qāḍī* during his time and his companions followed suit as will be explained subsequently. He appointed Ali as a *Qāḍī* to Yemen and Mu'ādh Ibn Jabal as a *Qāḍī* in an area in Yemen (Hizb ut-Tahrir, 1996: 209). Scholars however controvert on the issue if a bad leader can validly make appointment of a *Qāḍī*, some hold that such appointment is void and no enforceable judgement can be made from the position while the other groups of learned scholars opine that it can be made by either a good or bad leader but the issue will be on who is appointed. If he appoints a credible person who feels he will be able to dispense justice without interference from the bad leader then he is allowed to take up the duty but if he does not appoint a qualified person such appointment will be void (Imam al-Khassaf, 2005: 18). The later opinion looks more convincing; this can also be inferred from the saying of Imam Shafi'i who said he can accept the truth from any caliber of person once he can confirm the truthfulness of his speech (*Ibid*). Inferably, the same can be said of appointment made by a non Muslim but this is not to mean that non Muslims should be the one appointing a *Qāḍī* as this will expressly antagonize the word of Allah.¹⁴

In appointing a *Qāḍī*, the person has to possess the following immutable features;

- a) He must be a man: this criterion covers being an adult and being a male together. It is important to say that majority of scholars maintain that a woman cannot be a judge because being a man is one of the conditions for the validity of a judgement (al-Qurṭūbī, 2004: 243). Some jurists on their own opine that they can be a judge in matters in which their testimony can be allowed or strictly feminine matter others which is the very minority opinion¹⁵ is that they can be judges in all situation. The second opinion which is the middle course seems to be the most convincing of the opinions which is also shared by Imam Abū Ḥanīfah.¹⁶
- b) He should be sane, this implies that he should be of sound mind, intellectually fit, cautious of mistakes/ignorance and be intelligent.

¹³ An authorized person to carry out stipulated function.

¹⁴ Surah al-Nisā' (4: 141).

¹⁵ This is the opinion of al-Imām al-Ṭabarī.

¹⁶ It is important to point out at this stage that the prevalent School of Law in Nigeria is the Maliki School and it regard masculinity as one of the conditions that must be present in a Judge. See Wahbah al-Zuḥaylī (n.d.: 5937). It will then imply that this position should be complied with in Nigeria when appointing a judge.

- c) He should be a freeman; this is to mean that he must not be a slave. Since the testimony of a slave is not acceptable it requires simple logic to say his judgement too will not be valid.
- d) He should be a Muslim: this condition is in accordance with the Quranic injunction that ‘...never will Allāh grant to the disbelievers a way (to triumph) over the believers’ (Surah al-Nisā’, 4: 141).¹⁷
- e) He should be an ‘*adl*’; this implies that he should be a just, upright, pious, trustworthy, truthful and a courteous man.¹⁸
- f) He must have good hearing ability and eyesight¹⁹
- g) He should have the profound knowledge of the Rules of Law and its four major sources namely the al-Quran, the *Sunnah* of the Prophet SAW, Consensus of the Jurists (*ijmā’*) and Analogical Deduction (*qiyās*).²⁰

All the above must be present in a person before he can be appointed a *Qāḍī*. This is partly evidenced by the *ḥadīth* below which also proves the authority to appoint a *Qāḍī*:

عَنْ رَجَالٍ مِنْ أَصْحَابِ مُعَاذٍ، أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَعَثَ مُعَاذًا إِلَى الْيَمَنِ، فَقَالَ: كَيْفَ تَقْضِي؟، فَقَالَ: أَقْضِي بِمَا فِي كِتَابِ اللَّهِ، قَالَ: فَإِنْ لَمْ يَكُنْ فِي كِتَابِ اللَّهِ؟، قَالَ: فَيَسُنَّةَ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: فَإِنْ لَمْ يَكُنْ فِي سُنَّةِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟، قَالَ: أَجْتَهِدُ رَأْيِي، قَالَ: الْحَمْدُ لِلَّهِ الَّذِي وَفَّقَ رَسُولَ رَسُولِ اللَّهِ

“Some men who were companions of Mu‘adh narrated from Mu‘adh that the Messenger of Allah (ﷺ) sent Mu‘adh to

¹⁷ This criterion is important and the wisdom behind it will be better felt in a multi religious state such as Nigeria; this is based on the salient fact that the Islamic Law is the law of the Muslims and for the Muslims and it therefore appeals to common sense that adjudication in such matters should be by the Muslims. Furthermore, Islamic Law does not compel the non Muslims to practise Islamic Law, nor are they subjected to it *stricto sensu*.

¹⁸ Imam al-Khassaf says this is just a preferential condition and not mandatory as against Imam al-Shāfi‘ī.

¹⁹ Malikis add speech to it but considers all the three condition necessary for the continuance of office with the implication that if any is absent the *Qāḍī* is to be relieved of his duty and any judgement given in this state is are executable except unjust. See al-Qurtūbī (2004: 244).

²⁰ It is paramount to state that the Zahiri School of Law do not reckon with *qiyās* as a valid source of law. Therefore, this is not a criterion for a *Qāḍī*.

Yemen, so he (ﷺ) said: "How will you judge?" He said: "I will judge according to what is in Allah's Book." He said: "If it is not in Allah's Book?" He said: "Then with the Sunnah of the Messenger of Allah (ﷺ)." He said: "If it is not in the Sunnah of Messenger of Allah (ﷺ)?" He said: "I will give in my view." He said: "All praise is due to Allah, the One who made the messenger of the Messenger of Allah suitable."²¹

The *ḥadīth* shows that the Prophet SAW being the leader of the Muslim appointed Mu'ādh as a Judge. It is the stand of the classical venerable Jurists that all the companions of the Prophet SAW are *adullah* (just, upright and pious), the *ḥadīth* further shows the remaining qualities required in a *Qāḍī* are all present in him.

To further buttress the point, the Prophet SAW appointed Ali as *Qāḍī* in Yemen, Umar bn Shurayha as *Qāḍī* in Kufah, Ka'ab bn Suwwar as *Qāḍī* in Basrah and he also wrote to 'Ubaydah and Mu'ādh to adjudicate between people from Sham a region in Syria (Abū Muḥammad 'Abd Allāh Ibn Aḥmad Ibn Muḥammad Ibn Qudāmah al-Maqdisī, 1968: 35).

In appointing a person, if the leader knows the qualified persons personally he appoints him, but if he does not know any qualified person he contacts the people who know qualified candidates and if the candidate suggested is a person he knows and he also deems him fit for the post he appoints him. In the event that the person suggested is not known to him, he verifies his qualities and appoints him (*Ibid*). He does his appointment by communicating the appointment to the person appointed. There are considerably two modes of communication of appointment according to the opinion of the jurist. The first is that it can be made orally/declaration while the second is that it can be done in writing. When it is sent to someone from a different location it must be followed with a confirmation by the authority appointing him.

The appointed person is then to accept or reject his appointment, this acceptance or rejection can be written or oral, instantaneous or cunctational depending on the mode it was communicated and the circumstances of each case (Abū Ḥasan al-Māwardī, n.d.: 177). The majority of the scholars of the four sunni schools of law are of the opinion that it better to reject the appointment (Wahbah al-Zuhaylī, n.d.: 5940). Scholars like Imam Khassaf (2005: 22, 42) and al-Kasānī (1986: 4) hold the opinion that rejecting the appointment is better than accepting it considering its delicate nature. Imam Abū Ḥanīfah analogizes

²¹ Muḥammad Ibn Īsā al-Tirmidhī (1975). *Sunan al-Tirmidhī*, vol. 3, 608, no. *ḥadīth* 1327.

accepting the position to swimming in an ocean, the swimmer either gets tired, get carried away by the wave, get drowned or on a very rare case survive. This is no surprise he rejected the position thrice despite being punished on each occasion (Imam al-Khassaf, 2005: 22). Abū Hurayrah RA, one of the companions of the Prophet SAW reported the Prophet SAW to have said:

مَنْ وُلِيَ الْقَضَاءَ، أَوْ جُعِلَ قَاضِيًا بَيْنَ النَّاسِ فَقَدْ ذُبِحَ بِغَيْرِ سِكِّينٍ

“Whoever is appointed a judge or made to adjudicate between people, he has verily been slaughtered without a knife..”²²

This among several other *ahādīth* where relied upon by the scholars who hold this opinion. Fundamentally, an appointed person will be obliged to accept the position of a *Qāḍī* if he knows he is the only person qualified for the post, then, it will become *fard al-‘ayn*²³ on him (al-Kasānī, 1986: 4). Succinctly, the procedure for the appointment of a *Qāḍī* from all the aforestated can be highlighted as below:

- a) The Muslim Leader mind maps the qualified candidates, if he does not know any he asks the citizen and verifies his credit
- b) He communicates the proposal to the candidate
- c) The candidate accepts the proposal
- d) The leader appoints the candidate and communicates same to the people he is to serve.

THE PROCEDURE AND CRITERIA FOR THE APPOINTMENT OF A *QĀḌĪ* IN NIGERIA

The general procedure for the appointment of a person to the position of Judge or *Qāḍī* to the courts of record in Nigeria is contained in the provision of the Constitution with guidelines in the laws of the National Judicial Commission.

Specifically sections 261 and 270 of CFRN 1999 as amended provides for the general procedure for the appointment of persons into the offices of Grand *Qāḍī*²⁴ and *Qāḍī* of the Shariah Court of Appeal Federal Capital Territory and

²² Muḥammad Ibn Īsā al-Tirmidhī (1975). *Sunan al-Tirmidhī*, vol. 3, 606, no. *ḥadīth* 1325.

²³ An individual obligation like *ṣalah*, if a person fails to perform it he will be liable alone.

²⁴ The constitution uses the spelling *Kadi* as against *Qāḍī* which is preferred in this work.

the Grand *Qāḍī* and *Qāḍī* of the State Shariah courts of Appeal respectively. The law provides for the following salient procedures.

- a) Recommendation of candidates by National Judicial Council (NJC)
- b) Appointment from the shortlisted candidates by the President/ Governor of a state as the case maybe.²⁵
- c) Confirmation by the Senate or State House of Assembly in the case of Grand *Qāḍī*.²⁶

The above procedure is as provided for by Constitution, when there is a vacancy in the Shariah courts the NJC via its extant Guidelines & Procedural Rules for the Appointment of Judicial Officers of all Superior Courts of Record in Nigeria provides comprehensive steps which can be summarized as below.²⁷

- a) Call for application from interested and qualified persons
- b) Application by interested candidates
- c) Shortlist of the qualified candidates which must be at least double of the required numbers of *Qāḍīs*
- d) Their names are sent out for confirmation of their characters by Nigerian Bar Association, serving and retired Justices of the Jurisdiction and members of the Judicial Commission.
- e) Interview of the Shortlisted candidates and forwarding of the successful candidates to the President or Governor of the state required

Coupled with the above procedures, a person to be appointed a *Qāḍī* is to posses the following qualities as provided by the conjunctive provisions of the CFRN 1999 as amended and the rules of NJC.

- a) He must be a Legal Practitioner with of upto 10 years post call experience or have qualification in Islamic law for upto a period of 12years both from institution recognized by the NJC

²⁵ The President is to make the appointment in cases of Shariah Court of Appeal of FCT, Abuja while the Governor is for that of the states.

²⁶ See Generally sections 261 and 276 CFRN 1999 as amended.

²⁷ Extant Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial Officers Of All Superior Courts of Record in Nigeria 3rd November, 2014, Accessed via <http://www.njcgov.org/Press/Judicialofficersappointment> on 26th October, 2017.

- b) He must have experience on practice of Islamic law or be a distinguished Islamic law scholar.²⁸
- c) He must be of impeccable character.
- d) He must possess sound knowledge of Arabic language and grammar²⁹

The above is the summary of the criteria and procedure for the appointment of *Qāḍī* in Nigeria.

COMPATIBILITY ANALYSIS OF THE TWO PROCEDURES

A critical study of the procedure for appointment of *Qāḍī* in Nigeria and the as required under Islamic theocratic setting is one which shows similarities and differences. It was found out that all aforesaid that;

- a) There are some similarities in the qualities expected of a *Qāḍī* under the two systems
- b) The appointment of a *Qāḍī* is made by the President or Governor according to the relevant Nigerian laws while fundamentally, it should be made by the *Sultanul Muslimin* i.e the head of the Muslim according to the Islamic law
- c) The guidelines as contained in CFRN 1999 as amended and NJC does not make any distinction between a female and a male *Qāḍī* which is a matter of importance under the Shariah guidelines most importantly in Nigeria where the Maliki Law is the preferred school of law
- d) Applying for the post of a *Qāḍī* as required by the relevant Nigerian law is not the true reflection of the principles of Shariah.
- e) The NJC rules and CFRN 1999 as amended does not include Islam as a criterion.

The importance and effect of these discrepancies cannot be overemphasized. Taking the issue of President or Governor making the final appointment, it will then mean that even if a non Muslim is the Executive Head of a State he still appoints the *Qāḍī* of the Islamic courts which is expressly against the provision of al-Quran (Surah al-Nisā', 4: 141). Sultan or the Chief Imam of each state

²⁸ The first two criteria are as provided for by sections 261 and 276 of CFRN 1999 as amended.

²⁹ For the third and fourth criteria see Rule 4 of Revised NJC Guidelines & Procedural Rules for the Appointment of Judicial Officers of all Superior Courts of Record in Nigeria 3rd November 2014.

should instead be the one to appoint the *Qādī* which will be in tandem with the word of Allah.

Also, the issue of applying for the post of *Qādī* seems not to be the true reflection of the Islamic law based on the explicit prohibition made by the Prophet on seeking for position of *Qādī* or ruler.³⁰ Even though scholars have understood that the practice of seeking for these positions is not prohibited by undesirable. Imam Ibn Ḥajar al-‘Asqalānī (1959: 124) explained that seeking for the position of a *Qādī* is an undesirable act i.e *Makruh*. He says *ḥadīth* does not give a stern prohibition but rather an admonition. He explains further that most *ahādīth* are only warning against getting ephemeral, being too keen about the position of a *Qādī* (*Ibid*: 125). Scholars explain that if a person seeks Allah help over what he desires if Allah wishes he grants it. Imam Ibn Tin as quoted by Ibn Hajr in line with the majority of scholars said Prophet Sulaiman AS prayed for a Kingdom and Allah granted him and was helped over it (Surah al-Ṣād: 35), so also did Prophet Yūsuf AS (Surah Yūsuf: 55).

The understanding of the writer is also that the *ḥadīth* is not making a prohibition but a stern warning as evidenced in another *ḥadīth* of his where he said:

عَبْدُ اللَّهِ بْنِ أَبِي أَوْفَى، قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِنَّ اللَّهَ مَعَ الْقَاضِي مَا لَمْ يَجْرُ فَإِذَا جَارَ تَخَلَّى عَنْهُ وَلَزِمَهُ الشَّيْطَانُ

“ ‘Abd Allah Ibn Abi al-Awfa’ narrated that the Messenger of Allah SAW said: [Indeed] Allah is with the judge as long as he is not unjust. So when he is unjust, He leaves him and he is attended by Shayṭān..”³¹

The above *ḥadīth* shows that irrespective of how a person attains the position of a *Qādī* (i.e seeking for it or just being appointed) if he does maintain justice Allah will be with him. In addition to this, when Abu Dhar Al Ghifari approached the Prophet SAW for appointment as a *Qādī*, he was warmly advised against it as the Prophet saw that he is a weak a person and not fit for the post. Hence, he was not appointed based on the fact that he lacked one of the qualities of a *Qādī* not because he asked for it. In reconciling the two procedures, it therefore means that the law should not make application for the post the only mode but rather one of the modes.

³⁰ Abī ‘Abd Allāh Muḥammad Ibn Ismā‘il al-Bukhārī (2001). *Ṣaḥīḥ al-Bukhārī*, vol. 9. Lebanon: Dār Ṭūq Najah, 63, no. *ḥadīth* 7147.

³¹ Muḥammad Ibn Īsā al-Tirmidhī (1975). *Sunan al-Tirmidhī*, 610, no. *ḥadīth* 1330.

It is pertinent to note that, it will be a commendable act if a person who knows he is capable of being a *Qāḍī* and there is nobody who merits the position in the locality to request according to the position of the venerable Jurist.³²

Another area of discrepancy between the two systems is the procedure for the confirmation of the appointment of Grand *Qāḍī* by the legislatures as provided under the constitution of Nigeria. In an Islamic theocratic setting, the position of legislature lies with Allah and therefore means that the issue of confirmation by the legislature cannot come to play.

Importantly, the extant laws in Nigeria have not made any explicit provision for the criterion of being a Muslim to be *Qāḍī* or for anybody adjudicating a matter of Islamic law. This omission or exclusion is a significant rule which cannot be neglected if the actualization of Islamic law is to be really achieved.

CONCLUSION AND RECOMMENDATIONS

Based on the findings of this work, the following are hereby recommended that;

- a) The general norm of applying for the post should be made an exception and preference should be given to appointing qualified persons who do not apply.
- b) The Nigerian laws be amended to the effect that the Religious leader of the Muslim should have the responsibility of appointing a *Qāḍī* and if need be for confirmation of the position of appointment of Grand *Qāḍī* it should be done by the National Council on Islamic Affairs or its equivalence.
- c) That the extant Nigerian laws should be amended to explicitly bar woman from becoming a *Qāḍī* in conformity with the Maliki School of law embraced in Nigeria.
- d) To avoid ambiguity and confusion, the relevant extant laws should be amended to include Islam as criterion before anyone can be made a *Qāḍī* as the law is for the Muslims alone.
- e) Most importantly, the constitution for true actualization of freedom of religion should not subject the laws of Shariah as a subordinate but rather exclude the religious affairs of the Muslims to the qualified personnel. If this is not done, the constitution itself has and will be the real cog blocking

³² Wahbah al-Zuhaylī (n.d.). *Al-Fiqh al-Islāmī wa Adillatuh*, vol. 8. Dimashq: Dār al-Fikr, 5941.

the wheel of having Islamic theocracy which is strictly for the Muslim and consequently jeopardize the fundamental human right of freedom of religion.

It is strongly believed that, if the above recommendations are well followed, this will be a bold step towards actualizing the fundamental right of freedom of religion which will in turn will enable to a large extent the enthronement of Islamic theocracy without jeopardizing rights of other religionists.

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