

Procedure for Appointment of a Qadi in Nigeria, a Cog in the Wheel of Islamic Theocracy

BY

Mustapha Sodiq Sunkanmi*

ABSTRACT

Nigeria is made up of different religions and in essence the constitution provides for the freedom of religion. The importance of this freedom will be undermined in the absence of the provision for enabling environment for Islamic theocracy which will interpret to mean governing in accordance with the rules of Allah. This equally cannot be achieved if Shariah courts for the Muslims are not established. Establishment of the Judicial Institution is inevitable under the Islamic law to be manned by a *Qadi* (Judge). The position of a judge is so fragile under the Shariah to such an extent that the Prophet (s.a.w) warned people from seeking for the position of a *Qadi*. The proper dispensation of justice starts from the procedure for the appointment of a *Qadi* which is to be done by the leader of the Muslim under the Shariah with the difference of it being made by the President and the Governor under the Nigerian law. The Constitution and the rules of Judicial Council stipulate the procedures for the appointment of a *Qadi* which in turn politicizes the office of a *Qadi*. This has affected the sanctity of the office and those being appointed. Also, the issue of primarily applying for the position of a *Qadi*, confirmation by the legislature, non declaration of sex and religion of those to be appointed is not the true reflection of the Shariah as contained in the rules. For the proper analysis of this topic, doctrinal and exegetical research methods were used which helped in realizing the lacunas of the extant law in appointment procedure as above. 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.

*Lecturer, Islamic Law Department, Bola Ajibola College (BACOLAW), Crescent University, Abeokuta, Ogun State, Nigeria.

Phone number 08101151709

Email: musodiq@gmail.com

PROCEDURE FOR APPOINTMENT OF A QADI IN NIGERIA, A COG IN THE WHEEL OF ISLAMIC THEOCRACY

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 which on its own means 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.³

With the passively enabling environment provided by the constitution and in a like manner embraced, scholars and Muslims have been clamoring for the full fledged enthronement of the Islamic theocracy in Nigeria. One of the major stumbling blocks militating against achieving this aim is the compatibility of the system of government in practice in Nigeria and the Islamic theocracy and battle of supremacy. This is based 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 the Islamic theocracy can only be achieved via the constitution to the extent the constitution permits. Painfully as it is, clamor is still on having it distinct of the constitution. One may hide under precept that pending the time full fledge Islamic theocracy is achieved in Nigeria enabling environment for it application. It is a settled principle of Islamic law that *yurtakab akhafu dararayn*⁴ 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

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) CFRN 1999 (as amended)

³ Detlev H.K “ Theocracy and the Location of Sovereignty”, (Islamic Research Institute, International Islamic University, Islamabad) Vol. 11, No. 3 p. 187

⁴ Abdul Wahab Khallaf, ‘Ilmul Usul l Fiqh’, 8th Ed (Darul Qalam, Cairo, Egypt, no publication year) p.208

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 the quranic verse

..... إِنَّ الْحُكْمَ إِلَّا لِلَّهِ يَفْضُلُ الْحَقَّ وَهُوَ خَيْرُ الْفَاصِلِينَ⁵

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

The understanding from 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.⁶

Consequently, the position of a *Qadi* 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 *Qadi* 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 *Qadi* is a religious obligation ordained by Allah and the Prophet (S.A.W). 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 Abu Musa Al Ash'ariy is on the compulsion of establishing good judicial system.⁷

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).⁸ 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 the Court of Appeal⁹ which is to be comprised of persons learned in Islamic law¹⁰ and the appeal further moves to the Supreme Court.

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

⁵ Suratul An'am Verse 57

⁶ Suratul Baqarah verse 30

⁷ Abu Hassan Al Mawardi ' Ahkamul Sultaniyah', (Darul Hadith, Cairo, Egypt, no year of pub.) vol. 1 p121

⁸ Sec. 275 and 260 CFRN 1999(as amended) respectively

⁹ Sec. 240 and 247(1)a CFRN 1999(as amended)

¹⁰ Sec. 237(2)b CFRN 1999(as amended)

With the expansion of the 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,¹¹ it becomes imperative to look at the procedure for the appointment of the *Qadis* 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 a an unassailable feature of Islamic theocracy.

More so, the position Islam places *Qadis* 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 *Qadi* vis-à-vis the Islamic law provisions.

MEANING, LEGAL STATUS AND FUNCTIONS OF A *QADI* UNDER ISLAMIC THEOCRATIC SETTING

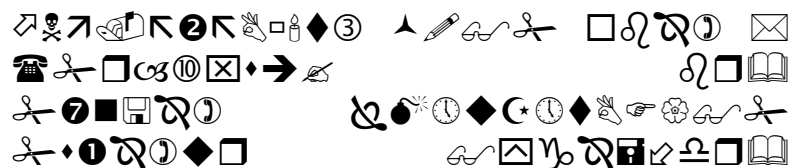
The word *Qadi/Kadi*¹² is an Arabic word which literally means ‘Judge’. Technically it can be succinctly said to be

من يقضي بين الناس بحكم الشرع¹³

‘he who adjudicates between people according to the Shariah Law’. The meaning of a judge as defined according to the law dictionary is similar to the above which is a

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.¹⁴

A *Qadi* 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 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 Quran

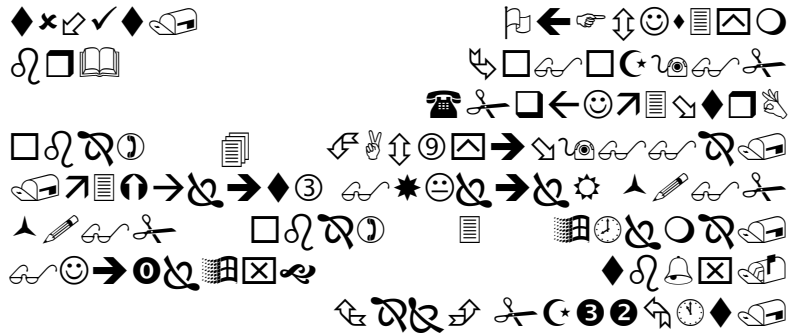


¹¹ Na’iya I. S, ‘The Making of the Zamfara and Kano State Sharia Penal Codes’, in Ostien .P (eds), Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook (Ibadan: Spectrum Books Ltd., 2007), Vol. IV, Chapter 4, Part II, pg.21

¹² Alkali is also another word used but often for lower courts

¹³ Al-Ma’aniy, Mu’jamul ‘Arabiy, ‘Qadi’, Accessed Online via <https://www.almaany.com/ar/dict/ar-ar/%D9%82%D8%A7%D8%B6%D9%8A/> on 21st Oct. 2017

¹⁴ The Law Dictionary ‘What is a Judge?’ <http://thelawdictionary.org/judge/> Accessed on 21st Oct. 2017



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.)¹⁵

Allah also says in another portion of the Quran



O Dawud! 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 Reckoning¹⁶

The Prophet on the same vein also said

عَنْ ابْنِ بَرِيْدَةَ، عَنْ أَبِيهِ، أَنَّ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ قَالَ: " الْقَضَاءُ ثَلَاثَةٌ: قَاضِيَانِ فِي النَّارِ، وَقَاضٍ فِي الْجَنَّةِ، رَجُلٌ قَضَى بِغَيْرِ الْحَقِّ فَعَلِمَ ذَلِكَ فَدَاكَ فِي النَّارِ، وَقَاضٍ لَا يَعْلَمُ فَأَهْلَكَ حُقُوقَ النَّاسِ فَهُوَ فِي النَّارِ، وَقَاضٍ قَضَى بِالْحَقِّ فَدَلِكَ فِي الْجَنَّةِ " ¹⁷

Buraidah (RAA) narrated that the messenger of Allah (S.A.W) said ‘The

¹⁵ Suratul Nisai verse 58

¹⁶ Suratul Saad Verse 26

¹⁷ Muhammad Issa , ‘Sunan Tirmidhiy, 3rd Ed. (Mustapha Babi Halbiy, Library and Printery, Cairo, Egypt, 1975) Hadith No. 1322 Vol. 3 p. 605

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.'

From the above foregoing, 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 (A.S) by citing the case of Prophet Daud (A.S).

To this end, the legal status of the appointment of a *Qadi* is *Fard Kifayah* for all Muslims,¹⁸ 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 *Qadi* to carry out the responsibilities of a *Qadi*. This is further evidenced by the letter of Umar bn Khattab (R.A) to Abu Musa Al Ash'ari where he said establishing the position of a *Qadi* is a must for the Muslim and a Practice of the Prophet (S.A.W) that must be followed.¹⁹

According to the consensus of Jurists²⁰, the function of the *Qadi* 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.²¹ Scholars however controverts on functions like carrying *hadd* punishment, conducting the *Eid* prayers and the *Jumu'at* prayers.²²

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

¹⁸ Ibrahim Bassam 'Taudihil Ahkam Min Bulugul Maram', (5th Ed. Maktabal Asdi, Makkah, Saudi Arabia, 2003) Vol. 7 p. 155

¹⁹ Sa'ad Shamsudeen Ibn Qayim Al Jauziy, ' 'Ilamul Muqi' in an Rab al Alamin' (1st Ed. Darul Kitab 'Ilmiyah, Beirut, Lebanon, 1991) Vol.1 p. 57

²⁰ Sheikh Abdulazeez Aal Mubarak 'Nizamul Qadaa fil Islam,p12

²¹ Wahba Mustapha Zuhayli, Al Fiqh al- Islamiy Wa Adilatuhu, (4th Ed. Darul Fikr, Damascus, Syria, no year) Vol. 8, p. 5931-5932

²² Ibid

The general procedure for the appointment of a person to the position of Judge or *Qadi* 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 *Qadi*²³ and *Qadi* of the Shariah Court of Appeal Federal Capital Territory and the Grand *Qadi* and *Qadi* of the State Shariah courts of Appeal respectively. The law provides for the following salient procedures.

- i. Recommendation of candidates by National Judicial Council (NJC)
- ii. Appointment from the shortlisted candidates by the President/ Governor of a state as the case maybe.²⁴
- iii. Confirmation by the Senate or State House of Assembly in the case of Grand *Qadi*.²⁵

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.²⁶

- i. Call for application from interested and qualified persons
- ii. Application by interested candidates
- iii. Shortlist of the qualified candidates which must be at least double of the required numbers of *Qadis*
- iv. 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.
- v. 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 *Qadi* is to possess the following qualities as provided by the conjunctive provisions of the CFRN 1999 as amended and the rules of NJC.

²³ The constitution uses the spelling Kadi as against *Qadi* which is preferred in this work.

²⁴ 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.

²⁵ See Generally sections 261 and 276 CFRN 1999 as amended.

²⁶ 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.

- i. 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
- ii. He must have experience on practice of Islamic law or be a distinguished Islamic law Scholar.²⁷
- iii. He must be of impeccable character.
- iv. He must possess sound knowledge of Arabic language and grammar²⁸

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

THE PROCEDURE AND CRITERIA FOR THE APPOINTMENT OF *QADI* UNDER ISLAMIC LAW

The *hadith* of Abdul Rahman bn Samurah (R.A)²⁹ wherein the prophet condemned seeking the post of a *Qadi* or ruler sets a fundamental background to the procedure for the appointment of a *Qadi* and a leader. It literally condemns seeking for the positions. The Hadith 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.

The power to appoint a *Qadi* 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 *Qadi* is a *Wakeel*³⁰ to the Muslim leader³¹ who appoints him. Scholars however controvert on the issue if a bad leader can validly make appointment of a *Qadi*, 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.³² 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

²⁷ The first two criteria are as provided for by sections 261 and 276 of CFRN 1999 as amended.

²⁸ 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

²⁹ Muhammad Ismail al Bukhari, *Sahih al Bukhari*, 1st Ed. Vol. 9 (Dar Tuq Najat 2001), Hadith 7147, p. 63

³⁰ An authorized person to carry out stipulated function.

³¹ Abubakar bn Mas'ud Al Kasani, *Badai'I Sana'I fi Tartib Sharaa'I*, (2nd Ed. Published by Darul Kitab 'Ilmiyah, Beirut, Lebanon, 1986) Vol.7p 4

³² Imam Khassaf 'Adab al Qadi (Islamic Legal and Judicial System)' (1st Ed. Adam Publishers and Distributors, New Delhi, India, 2005) p. 18

caliber of person once he can confirm the truthfulness of his speech.³³ In appointing a *Qadi*, the person has to possess the following immutable features;

- i. 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.³⁴ 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 opinion³⁵ 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 Abu Hanifah.
- ii. He should be sane, this implies that he should be of sound mind, intellectually fit, cautious of mistakes / ignorance and be intelligent.
- iii. 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.
- iv. He should be a Muslim: this condition is in accordance with the Quranic injunction that ‘...never will Allâh grant to the disbelievers a way (to triumph) over the believers’³⁶
- v. He should be an ‘*adl*’; this implies that he should be a just, upright, pious, trustworthy, truthful and a courteous man.³⁷
- vi. He must have good hearing ability and eyesight³⁸
- vii. He should have the profound knowledge of the Rules of Law and its four major sources namely the Quran, the *Sunnah* of the Prophet (S.a.w) , Consensus of the Jurists (*Ijma*) and Analogical Deduction (*Qiyas*).³⁹

³³ Ibid

³⁴ Muhammad Ahmad Ibn Rusd ‘Bidayatul Mujtahid wa Nihayatul Muqtasid’ (Darul Hadith, Cairo, Egypt, 2004) vol. 4 p.243.

³⁵ This is the Opinion of Imam Tabariyu

³⁶ Suratul Nisa;i Verse 141

³⁷ Imam Al khassaf says this is just a preferential condition and not mandatory as against Imam Shafi’i

³⁸ 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 *Qadi* is to be relieved of his duty and any judgement given in this state is are executable except unjust. See Muhammad Ahmad Ibn Rusd Op cit. Vol4 p. 244.

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

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: أُجْتَهَدُ رَأْيِي، قَالَ: «الْحَمْدُ لِلَّهِ الَّذِي وَفَّقَ رَسُولَ رَسُولِ اللَّهِ»⁴⁰

Some men who were companions of Mu'adh narrated from Mu'adh that the Messenger of Allah (ﷺ) sent Mu'adh to 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."

The *Hadith* shows that the Prophet (S.a.w) being the leader of the Muslim appointed Muadh as a Judge. It is the stand of the classical venerable Jurists that all the companions of the Prophet (S.a.w) are *adullah* (just, upright and pious), the *Hadith* further shows the remaining qualities required in a *Qadi* are all present in him.

To further buttress the point, the Prophet (S.a.w) appointed Ali as *Qadi* in Yemen, Umar bn Shurayha as *Qadi* in Kufah, Ka'ab bn Suwwar as *Qadi* in Basrah and he also wrote to Ubaidah and Muadh to adjudicate between people from Sham a region in Syria.⁴¹

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.⁴² He does his appointment by communicating the appointment to the person

³⁹ It is paramount to state that the Zahiri school of law do not count Qiyas as a valid source of law, therefore not a criterion for a *Qadi*.

⁴⁰ Muhammad Issa, 'Sunan Tirmidhiy, Op. Cit. P. 608 Hadith 1327

⁴¹ Muwafiqudin Abdullah bn Qudamah, 'Al Mughni li Ibn Qudamah', (Maktabah Qahirah, Cairo, Egypt, 1968) Vol.

10 p. 35

⁴² Ibid

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.⁴³ The majority of the scholars of the four sunni schools of law are of the opinion that it better to reject the appointment.⁴⁴ Scholars like Imam Khassaf⁴⁵ and Al Kasani⁴⁶ hold the opinion that rejecting the appointment is better than accepting it considering its delicate nature. Imam Abu Hanifah analogizes 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.⁴⁷ Abu Hurayrah (R.A), one of the companions of the Prophet (S.A.W) reported the Prophet (S.A.W) to have said

مَنْ وَلِيَ الْقَضَاءَ، أَوْ جُعِلَ قَاضِيًا بَيْنَ النَّاسِ فَقَدْ ذُبِحَ بِغَيْرِ سِكِّينٍ⁴⁸

‘Whoever is appointed a judge or made to adjudicate between people, he has verily been slaughtered without a knife’. This among several other *ahadith* where relied upon by the scholars who hold this opinion.

Fundamentally, an appointed person will be obliged to accept the position of a *Qadi* if he knows he is the only person qualified for the post, then, it will become *Fard Ayn*⁴⁹ on him.⁵⁰

Succinctly, the procedure for the appointment of a *Qadi* from all the aforesaid can be highlighted as below;

1. The Muslim Leader mind maps the qualified candidates, if he does not know any he asks the citizen and verifies his credit
2. He communicates the proposal to the candidate

⁴³ Abu Hassan Al Mawardi, ‘Ahkamul Sultaniyah’ Op cit. P.177

⁴⁴ Wahba Mustapha Zuhayli, Al Fiqh al- Islamiy Wa Adilatuhu, Op. Cit. p. 5940

⁴⁵ Imam Khassaf ‘Adab al Qadi (Islamic Legal and Judicial System)’ Op. Cit. P. 22 and 42

⁴⁶ Abubakar bn Mas’ud Al Kasani, ‘Badai’l Sana’l fi Tartib Sharaa’l’ Op. Cit. Vol.7 p. 4

⁴⁷ Imam Khassaf ‘Adab al Qadi (Islamic Legal and Judicial System)’ Op. Cit. P.22

⁴⁸ Muhammad Issa , ‘Sunan Tirmidhiy, Op. Cit. P. 606 Hadith 1325

⁴⁹ An individual obligation like Salat, if a person fails to perform it he will be liable alone.

⁵⁰ Abubakar bn Mas’ud Al Kasani, ‘Badai’l Sana’l fi Tartib Sharaa’l’ Op. Cit. Vol.7 p. 4

3. The candidate accepts the proposal
4. The leader appoints the candidate and communicates same to the people he is to serve.

JUXTAPOSING AND RECONCILING THE TWO PROCEDURES

A critical study of the procedure for appointment of *Qadi* 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;

1. the qualities expected of a *Qadi* is virtually similar in the two systems
2. the appointment of a *Qadi* is to be made by the President or Governor of a State while fundamentally it should be made by the *Sultanul Muslimin* i.e the head of the Muslim
3. the appointment and confirmation by politically elected personnel has politicized the whole process and runs afoul of the Islamic principles
4. the guidelines as contained in CFRN 1999 as amended and NJC does not make any distinction between a female and a male *Qadi* which is a matter of importance under the Shariah guidelines
5. the normal norm of applying for the post is not the true reflection of the principles of Shariah.
6. 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 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 *Qadi* of the Islamic courts which is expressly against the provision of Quran in Suratul Nisai verse 141 . Sultan or the Chief Imam of each state should instead be the one to appoint the *Qadi* which will be in tandem with the word of Allah.

Also, the issue of applying for the post of *Qadi* 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 *Qadi* or ruler.⁵¹Even though scholars have understood that the practice of seeking for these positions is

⁵¹ Muhammad Ismail al Bukhari, *Sahih al Bukhari*, 1st Ed. Vol. 9 (Dar Tuq Najat 2001), Hadith 7147, p. 63

not prohibited by undesirable. Imam Ibn Hajar al Asqalan explained that ⁵²seeking for the position of a *Qadi* is an undesirable act i.e *Makruh*. He says Hadith does not give a stern prohibition but rather an admonition. He explains further that most *Ahadith* are only warning against getting ephemeral being too keen about the position of a *Qadi*.⁵³ 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 (A.s) prayed for a Kingdom and Allah granted him⁵⁴ and helped over it, so also did Prophet Yussuf (A.s).⁵⁵

The understanding of the writer is also that the Hadith is not making a prohibition but a stern warning as evidenced in another Hadith 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 وَتَرَمَهُ الشَّيْطَانُ " ⁵⁶

[Abdullah] Ibn Abi Al-Awfa narrated that the Messenger of Allah (S.a.w) 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 Shaitan

The above Hadith shows that irrespective of how a person attains the position of a *Qadi* (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 (S.a.w) for appointment as a *Qadi*, 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 *Qadi* 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.

It is pertinent to note that, it will be a commendable act if a person who knows he is capable of being a *Qadi* and there is nobody who merits the position in the locality to request according to the position of the venerable Jurist.⁵⁷

⁵² Ahmad Ali Bn Hajr, 'Fathul Baari Sharih Sahih Bukhari', (Darul Ma'rifah, Beirut, Lebanon, 1379) Vol. 13. P. 124

⁵³ Ibid. P.125

⁵⁴ Suratul Saad Verse 35

⁵⁵ Suratul Yussuf verse 55

⁵⁶ Muhammad Issa , 'Sunan Tirmidhiy, Op. Cit. P. 610 hadith 1330.

⁵⁷ Wahba Mustapha Zuhayli, Al Fiqh al- Islamiy Wa Adilatuhu, Op. Cit. p. 5941

Another area of discrepancy between the two systems is the procedure for the confirmation of the appointment of Grand *Qadi* 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 *Qadi* 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;

1. The general norm of applying for the post should be made an exception and preference should be given to appointing qualified people who do not apply.
2. The Nigerian laws be amended to the effect that the Religious leader of the Muslim should have the responsibility of appointing a *Qadi* and if need be for confirmation of the position of appointment of Grand *Qadi* it should be done by the National Council on Islamic Affairs or its equivalence.
3. That the relevant Nigerian laws should be amended to explicitly bar woman from becoming a *Qadi* or differentiate between the when they are allowed a *Qadi* and when they are not as provided for under Shariah.
4. To avoid ambiguity and confusion, the relevant extant laws should be amended to include Islam as criterion before anyone can be made a *Qadi*.
5. 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 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 freedom of religion which will in turn enable at least to a large extent enthronement of Islamic theocracy. If All the above is the ideal procedure

for the appointment of a *Qadi* of Islamic law. If the judicial system is faulty or tainted, then the whole state will faint, be stained and painted with faults.