journals.unizik.edu.ng/jcpl/index ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW Vol. 12(3), July, 2025

A JURISPRUDENTIAL REVIEW OF THE CONTROVERSIES ON THE PUNISHMENT OF ADULTERY IN ISLAMIC CRIMINAL LAW

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Abstract

Adultery and fornication are both offences technically referred to as zina under the Islamic law. Adultery and fornication are also both prohibited in Shari'ah through the use of the word zina (an Arabic term) in the text. However, it must be said that punishment attached to adultery by the Shari'ah is different from that of fornication. While the offence of adultery attracts rajm (stoning to death), the offence of fornication attracts whipping with 100 lashes and an exile for a year. Hence, this paper, using a doctrinal research methodology looks into the offence of adultery vis-à-vis its concept, prohibition and its punishment under Islamic law, and the contradiction and confusion galore on the punishment of stoning to death by some contemporary scholars. The paper finds that the punishment for the offence of adultery is rajm (stoning to death), while that of fornication is whipping with 100 lashes and a year exile or imprisonment. Finally, recommendations are made generally to the Muslims Ummah and specifically to those saddled with the responsibility of manning the court where applicable.

Keywords: Rajm, stoning to death, zina, shari'ah, adultery.

1. Introduction

Unanimously, all the Muslim jurists agreed to the fact that the Quran and the *Sunnah* of Prophet Muhammad (peace be upon him) are the main sources of *Shari'ah*. *Hudud*[1] offences are the offences that have both their prohibitions and punishments thereof from the Quran and the *Sunnah*.[2] *Hudud* offences are crimes against rights of Allah or crimes against combined rights of Allah and that of mankind.[3] Adultery (*Zina)* is one of the *hudud* offences which attract capital punishment in Islam. Adultery is also one of the most repulsive crimes. It is also one of the greatest sins. It opens road to many evils. It jeopardizes the interest of children yet unborn. It can also destroy the basis of family lineage consequent upon which the bonds of society may be permanently loosened. It is not uncommon that adultery also causes feuds, loss of reputation, loss of property and even loss of life in the society.[4] These, among others are the reasons while Islamic law attaches a deterring punishment to adultery. More so, these are the reasons why adultery is not only prohibited but any approach of temptation to it should be avoided.[5] Although, voluntary sexual relationships outside marriage are not considered a crime in some penal systems of the world. Sexual freedom is completely unknown to Islamic Law.

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[1] The word *hudud* is the plural of *Hadd*, which means prevention, hindrance, restraint, prohibition, and hence a restrictive ordinance or statute of God. *Hudud* is one of the classifications of punishment in Islamic law whose offences and punishments thereto are specifically stipulated and regarded as capital punishments in the Quran and the *Sunnah*.

[2] Punishments are divided into two classes, one of which is called *Hadd* and the other Ta'zir. The *Hadd* is a measure of punishment defined by the Qur'an and the Sunnah. In Ta'zir, the court, is allowed to use its discretion in regard to the form and measure in which such punishment is to be inflicted. See introduction to the translation of Sahih Muslim: Book 17, Kitab Al-Hudud (The Book Pertaining to Punishments Prescribed by Islam). Available online at: <https://www.iium.edu.my/deed/hadith/muslim/017_smt.html>, accessed February, 2025. Also Etim E O, (2014) 10(14) *Hudud Punishments in Islamic Criminal Law*, European Scientific Law Journal. <file:///C:/Users/User/Downloads/3405-Article%20Text-9940-1-10-20140530.pdf> accessed February 2025.

[3] Abu Malik Kamal Bn As-Sayyid Salim, *Sahih Fiqh As-Sunnah Wa Adilatuh Watawdihi Madhahibil Ahimah,* (Vol. iv, Daru *Tawfiqiyyah lilturath*, Cairo, 2010) pg. 5

[4] Bakr Ishmael M., *Al Fiqh al– Wadih Minal–Kitab Was-Sunnah 'Alal–madhahibil –Arba"ah* (2nd ed., vol. III, Daru al–Manar, Cairo, 1998) pg. 133; see also Yusuf 'Ali A. *The Meaning of the Holy Qur'an* (New ed., amana Publications Maryland, USA, 1998)

[5] Quran 17: 32

1.1 Meaning of Adultery

The word *zina* is an Arabic word which covers both adultery and fornication in Islamic law.[6] It can be used in two different, yet related, ways. It can be used as a general term that refers to a general meaning, and as a legal term defining a criminal act that invites punishments and other legal applications. *Zina* in its broad meaning indicates any *haram* (prohibited) act, whether the act was sexual intercourse or a look, talk, touch, or desire that is related or may lead to illicit sexual relations. *Abu Hurayrah* narrated that the Prophet (Peace be upon him) said:

> *Allah has written for Adam's son (mankind) his share of zina (adultery and fornication), which he commits inevitably. The zina of the eyes is the sight (to gaze at a forbidden thing), the zina of the tongue is the talk, and the inner-self wishes and desires and the private parts testify all this or deny.*[7]

Zina, as a legal term, has a more specific meaning because there are legal applications related to it. According to scholars, in its legal meaning *zina* is 'the voluntary sexual intercourse outside of marriage when the male sexual organ is inserted inside the female one, regardless of the number of times.'[8] Although the discussion in this paper is restricted to adultery, any sexual relationship, which fits this definition, is legally *zina* and deserves the application of a major legal penalty.[9]

2. Prohibition of Adultery (*Zina)*

Muslim jurists unanimously agreed on the fact that the main source of *Shari'ah*, are the Qur'an and the *Sunnah*[10] of Prophet Muhammad (peace be upon him). Other subsidiaries to the main source agreed to by the majority of Muslim jurists are *Ijma`*[11] and *Qiyas*.[12] Hence, *Zina* and its approaches are generally prohibited in Islam by plethora of legal injunctions both in the Quran and the *Sunnah.* These shall be examined one after the other:

2.1 Quranic injunctions

Adultery or extramarital sex is considered as the infringement of matrimonial bond and is regarded as one of the foremost crimes condemned by Allah in the Quran.

Allah says: وَلَا تَقْرَبُواْ ٱلزِّنَىٰٓ إِنَّهُۥ كَانَ فَٰحِشَةً وَسَآءَ سَبِيلًا[13]

> *And come not near to unlawful sex. Verily, it is Fahishah (immoral sin) and an evil way.*[14]

In another verse, Allah says:

وَٱلَّذِينَ لَا يَدْعُونَ مَعَ ٱللَّهِ إِلَٰهًا ءَاخَرَ وَلَا يَقْتُلُونَ ٱلنَّفْسَ ٱلَّتِي حَرَّمَ ٱللَّهُ إِلَّا بِٱلْحَقِّ وَلَا يَزْنُونَۚ وَمَن يَفْعَلْ ذَٰلِكَ يَلْقَ أَثَامًا[15]

Meaning:

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[6] H Wehr, *Dictionary of Modern Written Arabic,* J. M. Cowan (ed.) (New Delhi, N.D) p 383.

[7] S Muslim, *Hadith* No. 2657 <http://www.hadithcollection.com/download-hadith-books/download-sahih-muslim.html?> accessed 10 October 2023; see the equivalent report in Sahih Bukhari, hadith No. 5889

[8] Al-Hasi S. *The Meaning of Zina (Adultery)'* <http://www.onislam.net/english/ask-about-islam/ethics-and-values/muslim-character/168864-the-meaning-of-zina-adultery.html> accessed 7 February 2023

[9] *Zina* in its broad meaning and its legal meaning are both *haram* (forbidden). However, committing *zina* (the legal meaning) leads to a major legal penalty, whereas committing anything that brings you near to *zina* is considered a bad deed for which one is accountable before Allah, though attracts *ta'zir,* it does not qualify for any specific physical punishment set out in Islamic law.

[10] *Sunnah* literally means "a well-known path" technically, *Sunnah* has three (3) meanings:

i. *(Al-Sunnah al-Qawliyyah)* comprises of the saying (verbal expression) of the Prophet (peace be upon him) through which He intended the laying down or explaining the law.

ii. *(Al-Sunnah al-fi`liyyah*) comprises of the acts of the Prophet (Peace be upon him) having a legal content, like fasts, *salat*, *hajj*.

iii. *(Al-Sunnah at-Taqririyyah*) this comprises of the commission of certain acts, by word or deed, by some companions of the Prophet which received tacit approval of the Prophet. See: Az-Zuhayliy W., *Usul Al-Fiqh Al-Isalmiy* (Vol. 1, Dar Al-Fikr, Damascus, 2007) pg. 401, see also Khan Nyazee I. A., '*Islamic Jurisprudence (Usul al-Fiqh*) (1st ed., The International Institute of Islamic Thought, Islamabad, 2000) pg. 144.

[11] Consensus of views of the Learned Muslim Jurists.

[12] Analogical deduction based on efforts of individual learned jurist.

[13] Quran 17 v. 32

[14] Al Isra' 17 v. 32

[15] Al-*Furqan*: 68-69

> *And those who invoke not any other god along with Allah, nor kill such person as Allah has forbidden, except for just cause, nor commit illegal sexual intercourse -- and whoever does this shall receive punishment (Athama). The torment will be doubled for him on the Day of Resurrection, and he will abide therein in disgrace. (underline mine)*

Allah say in another verse:

وَٱلَّذِينَ هُمۡ لِفُرُوجِهِمۡ حَٰفِظُونَ فَمَنِ ٱبۡتَغَىٰ وَرَآءَ ذَٰلِكَ فَأُوْلَٰٓئِكَ هُمُ ٱلۡعَادُونَ
إِلَّا عَلَىٰٓ أَزۡوَٰجِهِمۡ أَوۡ مَا مَلَكَتۡ أَيۡمَٰنُهُمۡ فَإِنَّهُمۡ غَيۡرُ مَلُومِينَ[16]

Meaning:

> *And they, who guard their private parts, except from their wives and those their right hands possess, for indeed, they will not be blamed, but whoever seeks beyond that, then those are the transgressors.*

Another says:

يَٰٓأَيُّهَا ٱلنَّبِيُّ إِذَا جَآءَكَ ٱلۡمُؤۡمِنَٰتُ يُبَايِعۡنَكَ عَلَىٰٓ أَن لَّا يُشۡرِكۡنَ بِٱللَّهِ شَيۡـٔٗا وَلَا يَسۡرِقۡنَ وَلَا يَزۡنِينَ وَلَا يَقۡتُلۡنَ أَوۡلَٰدَهُنَّ وَلَا يَ
أۡتِينَ بِبُهۡتَٰنٖ يَفۡتَرِينَهُۥ بَيۡنَ أَيۡدِيهِنَّ وَأَرۡجُلِهِنَّ وَلَا يَعۡصِينَكَ فِي مَعۡرُوفٖ فَبَايِعۡهُنَّ وَٱسۡتَغۡفِرۡ لَهُنَّ ٱللَّهَۖ إِنَّ ٱللَّهَ غَفُورٞ رَّحِيمٞ

Meaning:

> *O Prophet! When believing women come to you to give you the Bai'ah (pledge), that they will not associate anything in worship with Allah, that they will not steal, that they will not commit illegal sexual intercourse, that they will not kill their children, that they will not utter slander, intentionally forging falsehood (i.e. by making illegal children belonging to their husbands), and that they will not disobey you in Ma'ruf (Islamic Monotheism and all that which Islam ordains), then accept their Bai'ah (pledge), and ask Allah to forgive them. Verily, Allah is Oft-forgiving, Most Merciful. (Underline mine)[17] In the above quoted verses, Allah prohibits zina and its approaches, makes the perpetrator liable to punishment and also makes it as one of the conditions for acceptance of Islam respectively.*

In another verse, Allah says:

ٱلزَّانِيَةُ وَٱلزَّانِي فَٱجۡلِدُواْ كُلَّ وَٰحِدٖ مِّنۡهُمَا مِاْئَةَ جَلۡدَةٖۖ وَلَا تَأۡخُذۡكُم بِهِمَا رَأۡفَةٞ فِي دِينِ ٱللَّهِ إِن كُنتُمۡ تُؤۡمِنُونَ بِٱللَّهِ وَٱلۡيَوۡمِ ٱلۡأٓخِ
رِۖ وَلۡيَشۡهَدۡ عَذَابَهُمَا طَآئِفَةٞ مِّنَ ٱلۡمُؤۡمِنِينَ[18]

Meaning:

> *The Zaniyah (the fornicatress) and the Zani (the fornicator), flog each of them with a hundred stripes. Let not pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the Last Day. And let a party of the believers witness their punishment.*

Owing to the foregoing, it must be noted that all avenues for approaching *zina* like *khalwah*[19] (proximity), lustful looking at the opposite sex[20] and display of women's adornment are all prohibited. Kissing, touching, embracing, are prohibited, and their violation is punishable[21] with *ta'zir*.[22] These are forbidden because they may eventually lead to sexual intercourse, and they are forbidden as a preventive issue. The *zina* of eyes or tongue or desire doesn't entail *hadd*[23] punishment but are absolutely *haram* (prohibited). Allah says in the Noble Quran: 'Tell the believing men to lower their gaze (from looking at forbidden things), and protect their private parts (from illegal sexual acts). That is purer for them. Verily, Allah is All-Aware of what they do.' [24] Also says: 'And tell the believing

[16] Al-Mu'minun v. 5-7
[17] Al-*Mumtahinah*: 12
[18] An-Nur v. 2
[19] Literarily means proximity. *Khalwat* denote being alone in a place where there is no intrusion by anyone else of a man and a woman who are neither married to each other nor *muharam* to each other. The Prophet said, '*Whosoever believes in God and the last day must never be in proximity with a woman without there being a Muharam with her, for otherwise Satan will be the third person (with them) see Ahmad ibn Hanbal, 'Al-Musnad'* vol. 2, pg. 286 of
[20] An-Nur: 30-31
[21] Anwarullah, *The Criminal Law of Islam,* (1st ed., Kitab Bhavan, New Delhi, 2006,) pgs. 125-126; see also El-Awa M. S. '*Punishment in Islamic Law'* (America Trust Publications, Indianapolis, 1998) pg. 14
[22] Crime of discretionary punishment.
[23] Fixed punishment for a crime in the *Shari'ah* either by the Quran or the *Sunnah.*
[24] An-Nur: 30

women to lower their gaze (from looking at forbidden things), and protect their private parts (from illegal sexual acts.[25]

In the interpretation of the above quoted verses, Shaykh 'Abd al-'Azeez ibn Baaz (may Allah have mercy on him) said: 'In these two verses, Allah commands the believing men and women to lower their gaze and guard their chastity, which is because of the serious nature of *zina* and what it leads to of great corruption among the Muslims. Letting one's gaze wander freely is one of the causes of sickness in the heart and the occurrence of immoral actions, whereas lowering the gaze is one of the means of keeping oneself safe from that.'[26]

2.2 *Sunnah*

In the two *Sahihs*[27] it is recorded that `Abdullah bin *Mas`ud* said: "O Messenger of Allah, which sin is the worst" He (peace be upon him) said: **'**That you set up a rival unto Allah though He alone created you. I asked, `Then what' He said, (To kill your child lest he should eat with you.) I asked, `Then what' He said, (To commit adultery with your neighbor's wife.'[28] (underline mine for emphasis)
Ibn Katheer in the interpretation of Q17: 32 quoted the *hadith* reported by Imam Ahmad from Abu *Umamah* saying that a young man came to the Prophet and said:

> *O Messenger of Allah! Give me permission to commit Zina (unlawful sex)." The people surrounded him and rebuked him, saying, "Stop! Stop!" But the Prophet said Come close) the young man came to him, and he said, (Sit down) so he sat down. The Prophet said, (Would you like it (unlawful sex) for your mother) He said, "No, by Allah, may I be ransomed for you." The Prophet said, (Neither do the people like it for their mothers.) The Prophet said, (Would you like it for your daughter) He said, "No, by Allah, may I be ransomed for you." The Prophet said, (Neither do the people like it for their daughters.) The Prophet said, (Would you like it for your sister) He said, "No, by Allah, may I be ransomed for you." The Prophet said, (Neither do the people like it for their sisters.) The Prophet said, (Would you like it for your paternal aunt) He said, "No, by Allah, O Allah's Messenger! May I be ransomed for you." The Prophet said, (Neither do the people like it for their paternal aunts.) The Prophet said, (Would you like it for your maternal aunt) He said, "No, by Allah, O Allah's Messenger! May I be ransomed for you." The Prophet said (Neither do the people like it for their maternal aunts.) Then the Prophet put his hand on him and said, (O Allah, forgive his sin, purify his heart and guard his chastity.) After that the young man never paid attention to anything of that nature.*[29]

Another narration by *Ikrima* from *Ibn Abbas* says that the Prophet (SAW) said: 'When a servant (of Allah) commits *zina*, he is not a believer while committing it…'[30] owing to the foregoing, the jurists of all schools of thoughts unanimously agreed on the fact that *zina* is prohibited in Islam. The jurists thus unanimously defined *zina* as a willful sexual intercourse of a man and a woman who are not validly married or mistakenly believe that they are married to each other and both of them are adult and sane and have the intention and knowledge of making illicit sexual intercourse that amount to the crime of *zina* liable to *hadd*.[31] As said earlier, this paper shall only be dealing with adultery (illicit sex between married man or woman) and its punishment.

3. The Distinction between Adultery and Fornication under Islamic Law vis-à-vis its Punishment

It has been said earlier in the research that the word *zina* is an Arabic word which technically covers both adultery and fornication in Islamic law. What distinguishes the act of adultery from fornication is

[25] An-Nur: 31.
[26] Al-Munajjid M. S. *'Ruling on the things that lead to Zina- kissing, touching and being alone together'* available online at http://islamqa.info/en/27259 accessed on 8/2/2023
[27] Bukhari and Muslim.
[28] Al'Bukhari M. I. *'Al'Bukhari's Sahih'* (Vol. iv, 2nd ed., Dar Al-Kotob Al-ilmiyah, Beirut, 2007) Hadith No. 6811, pg. 281.
[29] See *Ibn Katheer,* (vol. III, 1st ed. Daru Ibnul-Aytham, Cairo, 2005) pgs. 1708-1709
[30] Ibid. hadith No. 6809.
[31] Anwarullah, *The Criminal Law of Islam,* Pg. 128

the marital status of the parties involved. If one or all the parties involved in the crime of *zina* is or are married, it is referred to as adultery. Whereas if one or all the parties involved in *zina* is or are not married, then it is termed as fornication. In other words, it is an adultery when the parties involved are married while it is called fornication if the parties involved in the act are not married. The purposeful difference between the act of adultery from fornication is to make difference in the punishment of the duo. This is evident in the hadith reported by Abu Hurayrah and Zayd bin Khalid Al-Juhani in the *Sahih Bukhari* and *Muslim* about the two Bedouins who came to the Messenger of Allah. One of them said:

> *O Messenger of Allah, this son of mine was employed by this man, and committed Zina with his wife. I paid a ransom with him on behalf of my son one hundred sheep and a slave-girl, but when I asked the people of knowledge, they said that my son should be given one hundred stripes and banished for a year, and that this man's wife should be stoned to death.*[32]

The Messenger of Allah said:

> وَالَّذِي نَفْسِي بِيَدِهِ لَأَقْضِيَنَّ بَيْنَكُمَا بِكِتَابِ اللهِ تَعَالى، الْوَلِيدَةُ وَالْغَنَمُ رَدٌّ عَلَيْكَ، وَعَلى ابْنِكَ جَلْدُ مِائَةٍ ...
> ...وَتَغْرِيبُ عَامٍ، وَاغْدُ يَا أُنَيْسُ لِرَجُلٍ مِنْ أَسْلَمَ إِلَى امْرَأَةِ هذَا،فَإِنِ اعْتَرَفَتْ فَارْجُمْهَا

Meaning:

> *By the One in Whose Hand is my soul, I will judge between you both according to the Book of Allah. Take back the slave-girl and sheep, and your son is to be given one hundred stripes and banished for one year. O Unays -- he said to a man from the tribe of Aslam -- go to this man's wife, and if she confesses, then stone her to death.) Unays went to her and she confessed, so he stoned her to death. This indicates that if the person who is guilty of illegal sex is a virgin and unmarried.*

4. Who is a Married Person (*Muhsan*)?

It is pertinent to examine who is a married person in order to ascertain the appropriate punishment to be meted out on the culprit. The word *Muhsan* is the Arabic term used for a married person in *Shari'ah*.[33] *Muhsan* is from the Arabic word *hasana* which literally means: to be inaccessible, be well fortified; to be chaste.[34] Technically, it means the consummation of a valid marriage between a sane, a free, a Muslim[35] and an adult man and woman.[36] Flowing from this definition is a fact that if a man has intercourse with his minor or insane wife, it shall not be considered *muhsan*. In the same vein, the sexual intercourse must be through her pudendum and not through her rectum or other unnatural ways for it to constitute *muhsan*.[37] The consummation must not be an unlawful one like a sexual intercourse during a woman menstruation.[38] More so, a consummation from an irregular marriage[39] will not be considered *muhsan*.[40] A divorcee, in the view of majority[41] is a *Muhsan* provided the initial marriage contract was a valid one. A widow/widower is not considered *muhsan* so far [s]he has no other wife or has not remarried.[42] The purpose of this division is the difference in the *hadd* punishment to be meted out on the culprit. Except for some few dissenters, all the Muslim jurists agreed on the fact that the punishment of *zina* for a *muhsan* is stoning to death.[43]

5. Proof of Adultery

The offence of adultery can be established by any of these four ways:

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[32]Sahih Muslim, Book 29, The Book of Legal Punishments, Hadith No. 1697/1698. <https://sunnah.com/urn/242090> accessed February 2025.
[33] Anwarullah, *The Criminal Law of Islam,* pg. 129
[34] Wehr H., *Dictionary of Modern Written Arabic,* J. M. Cowan (ed.) pg. 183
[35] This is the Maliki's view and Abu Hanifa, Islam is not part of the condition of *muhsan* with *Shafihis*. see Ahmad Bn Rushd Al-Qurtabiy Al-Andalusiy, '*Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid'*(vol. II, Dar Al-Fikr, Beyruoth, 2010) pg. 357
[36] Anwarullah, *The Criminal Law of Islam,* Pg. 128
[37] Ibid.
[38] Ahmad Bn Rushd Al-Qurtabiy Al-Andalusiy, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid'* pg. 357
[39] Like marriage of a man with a woman during her waiting period from her former husband.
[40] Anwarullah, *The Criminal Law of Islam'* Pg. 128
[41] Comprises of Imam Abu Hanifa, Imam Malik, Imam Shafih, Imam Ahmad and some Shia jurists. See Anwarullah, *The Criminal Law of Islam,* Pg. 129
[42] Anwarullah, *The Criminal Law of Islam,* Pg. 129
[43] Ahmad Bn Rushd Al-Qurtabiy Al-Andalusiy, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid,* pg. 356

i. Testimony of witnesses,
ii. Confession by the parties thereto,
iii. Pregnancy by a woman whose responsibility is denied by her husband,
iv. *Li'an*[44] by a husband and of which his wife refuses to take *li'an*.[45]

The above shall be briefly discussed under different subheading in seriatim:

5.1 Testimony of Witnesses.
The Witnesses to the offence of adultery must be four credible people[46] whose testimony is acceptable, and they should state that they have seen the adultery been committed in a clear term, i.e., they should have seen the man's penis in the woman's vagina. If some of them only testify that they saw them naked, or they describe certain positions or movements that is not sufficient to proof that adultery has taken place *hadd* (capital punishment) i.e. stoning shall not be carried out.[47] All the school of thoughts agreed that the witnesses must be Muslims and male.[48]

5.2 Confession by the Parties to *Zina*.
Confession of a person is to say before a court that [s]he has actually committed an offence under the law or an offence for which he/she is accused. Hence, the confession must not be extrajudicial one. Muslim jurists unanimously agree that offence of adultery can be proved by a confession but however differ on the number of the confession. Majority of Muslim jurists are of the opinion that the number for which a person must confess must be four times. While some say once, others say twice.[49] This is based on the *sunnah* of the Prophet (peace be upon him) (the *Mai'z* B. *Malik* and the *Ghamdiyyah* lady earlier quoted). Similarly, the confessor must be sane, adult, free from any influence of intoxication[50] and capable of self-expression.[51] The confession must be voluntary.[52] The confession of one cannot be used against a co-accused person.[53] This was found in the hadith reported by *Sahl bn Sa'd* that a man confessed to committing fornication with a woman before the Prophet (SAW) but the woman denied this when she was asked by the Prop- het (peace be upon him).[54] *Ibn Qudamah* opines that the confessor, however be punished with *Ta'zir*.[55] Similarly, the confessor can retract his confession at any time before execution of the *hadd* punishment and in such situation *hadd* punishment shall be averted on him.[56]

5.3 Pregnancy by a Woman whose Pregnancy is Denied by her Husband
Pregnancy from a married woman whose husband is away for the period when woman can be reasonably said to have been contacted from him the pregnancy can also be regarded as circumstantial evidence.

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[44] Accusation of *zina*.
[45] Q.24:6-9, see also, Abdullah M. '*Burden of Proof on Zina'* (The Brunei Time) available online at <http://www.bt.com.bn/files/digital/Islamia/Issue101/SP4Jun.4.pdf>
[46] See Q. 4:15, 24: 4, 24:13. Muslim jurists unanimously agree that the witnesses must be 4. See 'Ibn Farhun, *Tabsiratul Hukkam fih Usul Al-Aqdiyyah wa-Manahijil Al-Ahkam* (First ed., vol. 1, Al-Qudus, 2009) *pg. 311*
[47] Ahmad Bn Rushd Al-Qurtabiy Al-Andalusiy, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid,* pg. 360
[48] Ibn Hazm opines that 3 men and two women, 2 men and 4 women, a man 6women or 8women may testify if the requirement of men as witnesses could not be met. See Ibn Qayyim, '*At-Turuq al-Hukmiyyah fih As-Siyasatu As-Shari'yyah'* (Al-Maktabatu Al-A'siriyyah, Beirut, 1st ed. 2006) pg. 149.
[49] Ibn Farhun, *Tabsiratul Hukkam fih Usul Al-Aqdiyyah wa-Manahijil Al-Ahkam pg. 311,* Ibn. Qudamah, Al-*Mughniy,* pg. 165-170
[50] This is found in the Prophetic *Hadith* which says: '*Three persons have been exempted (from any obligation and liability). The minor until he attains puberty; the mad until he recovers and the sleeping person until he awakes.* 'See *'Al'Bukhari's Sahih' pg. 282*. See also Ibn. Qudamah, *Al-Mughniy,* (Vol. X, Darul-Fikr, Beirut, no date,) 163
[51] Confession of a deaf and dumb in writing or intelligible gesture is acceptable. See Ibn. Qudamah, Al-*Mughniy,* p 165.
[52] Ibn. Qudamah, Al-*Mughniy,* P 166.
[53] Unless the co-accused so admit.
[54]Abu Dawud, Book 33, *'Prescribed Punishments' Hadith* No. 4423. < http://www.hadithcollection.com/download-hadith-books/download-abu-dawud.html?> See also the case of Federal Shariah Court, Criminal Appeal; Safia Bibi v. State (1985) 120 available on line at <www.wrcaselaw.files.wordpress.com/2012/12/bibi.pdf> where it was held by Aftab Hussain J. that "*It would be clear that even in Shariah the confession of one accused against the co-accused is not sufficient for the conviction of the latter.'*
[55] Ibn Qudamoh, Al-*Mughniy'* p 168-169.
[56] This is based on the Prophetic *hadith* which says: "*avert the infliction of hadd punishment if there is doubt".* However, *ta'zir* shall be applied to such culprit.

However, if the woman refuses to admit commission of adultery, *li'an* may be the resort. Imam *Malik* is of the view that pregnancy from an unmarried woman or a married woman whose husband refused the responsibility for such pregnancy is sufficient proof to implement *hadd* punishment except such woman produces evidence (like bleeding) that she was raped to exculpate herself.[57] Imam *Malik* found his support in the word of Caliph *Umar* (may Allah be pleased with him) when he was addressing the *Ummah*[58] on which available evidence can *zina* be proved; he thereby mentioned conception among others.[59] However, the majority of the jurists are of the view that pregnancy cannot constitute sufficient ground for execution of *hadd* punishment. Their basis is found on the *hadith* of the prophet that *hudud* punishment must be avoided when there is uncertainty.[60]

5.4 Li'an by a husband and of which his wife refuses to take *li'an*.

Li'an is when a man accuses his wife of adultery and the wife denied same, both the husband and the wife shall swear for four (4) times and put curse that the wrath of Allah be upon him/her at the fifth time if he/she is lying.[61] Our major concern here is that if, after a husband has sworn to the oaths, the wife refuses to take the oaths; the majority's view[62] is that *hadd* punishment of stoning to death be inflicted on her.[63] Only the Imam *Hanafi* says such a woman shall be imprisoned until she either takes an oath to confess her guilt of adultery.[64]

6. Punishment of Adultery

In the early days of Islam, the punishment of adultery was more or less a *ta'zir*[65] as it was just a confinement to the house until death for woman while that of man was a corporal punishment.[66] Allah says:

> *And those of your women, who commit illegal sexual intercourse, take the evidence of four witnesses from among you against them; and if they testify, confine them (i.e. women) to houses until death comes to them or Allah ordains for them some (other) way. And the two persons among you, who commit illegal sexual intercourse, punish them both. And if they repent and do righteous good deeds, leave them alone. Surely, Allah is Ever the One Who accepts repentance, (and He is) Most Merciful*.[67]

It becomes imperative at this juncture to say that the majority of Muslims jurists and the *Mufasirun*[68] agreed on the fact that the provision in Q24: 2 which provides for a hundred stripes as a punishment for each parties to an illicit sex, though abrogated the provision in Q4: 15-16 quoted above, the punishment is however prescribed for only unmarried parties (i.e. fornicators) to illicit sex.[69] The majority of Muslim jurists also hold that, although there is no demarcation in the Qur'an as to whether the punishment in Q24:2 applies to only unmarried persons, however, the *Sunnah* of the Prophet (peace be upon him) excluded the married persons from the ambit of the verse. The Prophet, in referring to the "way" promised in Q4: 15 above quoted viz: '…*or Allah ordains for them some (other) way*' said in the *Hadith* reported by '*Ubada* B. As-*Samit* on the authority of *Qatada* that the Prophet (peace be upon him) says:

> *Take from me. Take from me, Verily Allah has ordained a way for them, the unmarried that commit fornication (the punishment is) one hundred lashes and exile for one year.*

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[57] Ahmad Bn Rushd Al-Qurtabiy Al-Andalusiy, *Bidayat Al-Mujtahid Wa Nihayat Al-Muqtasid,* pg. 360 see also Ibn Farhun, *Tabsiratul Hukkam fih Usul Al-Aqdiyyah wa-Manahijil Al-Ahkam, pg 29*
[58] The congregation of Muslims
[59] *'Al'Bukhari's Sahih'* pgs. 286-288
[60] Anwarullah, *The Criminal Law of Islam'* P 162
[61] See Q. 24: 6-8
[62] Imam Malik, Imam Ahmad bn Hanbali, and Imam Shafih.
[63] Anwarullah, *The Criminal Law of Islam'* Pg. 177
[64] Ibid.
[65] Light or discretionary punishments.
[66] *Ibn Katheer, Vol. I, pg. 683*
[67] Q. 4: 15-16
[68] The exegetes
[69] As-Sabuniy M. A. *Tafseer Ayatul-Ahkam Minal-Quran,* (1st ed. Vol. II, Daru As-Sabuniy, Cairo, 2007) pgs.15-16, see also *Ibn Katheer, Vol. III, pgs.* 1997-1998

> *(When) a married man (commit adultery) with a married woman there is a punishment of one hundred lashes and stoning (to death)*[70] *(underline mine for emphasis)*

The punishment of stoning to death was executed on several occasions to those that committed adultery during the life time of the Prophet (peace be upon him) in *Madinah*. Two or more of these *hadith* shall be quoted for ease of reference. *Abu Hurayrah, Ibn* Abbas and *Zayd* bin *Khalid Al-Juhani* related in a *Hadith* about the two Bedouins who came to the Messenger of Allah. One of them said: 'O Messenger of Allah, this son of mine was employed by this man, and committed *Zina* with his wife. I paid a ransom with him on behalf of my son…'.[71]

It must be noted that the above quoted *hadith* evidenced the punishment of both married and unmarried parties to *zina.* The male party was unmarried while the female party was married hence the difference in their punishment. In another *Hadith* reported by Abdullah B. *Buraidah* on the authority of his father (May Allah be pleased with them) that:

(a) *Ma'iz ibn Maalik al-Aslami came to the Messenger of Allah (peace and blessings of Allah be upon him) and said: "O Messenger of Allah, I have wronged myself by committing adultery, and I want you to purify me." The Prophet (peace and blessings of Allah be upon him) turned him away. The next day, he came back and said: "O Messenger of Allah, I have committed adultery," and the Prophet (peace and blessings of Allah be upon him) turned him away a second time. The Messenger of Allah (peace and blessings of Allah be upon him) sent for his people and asked them, "Do you know of anything wrong with him mentally? Have you ever noticed any strange behaviour on his part?" They said, "What we know is that he is of sound mind. He is among the righteous people, as far as we can see." Ma'iz came back a third time, and the Prophet (peace and blessings of Allah be upon him) sent for his people too, and they told him that there was nothing wrong with him or with his mind. On the fourth day, the Prophet (peace and blessings of Allah be upon him) had a hole dug for him, and commanded that he should be stoned.*[72]

Another narration by *Ibn Abbas* says that the Prophet (peace be upon him) said to *Ma'iz* b. *Malik*:

(b) *Is it true what has reached me about you? He said: what has reached you about me? He said: it has reached me that you have committed (adultery) with the slave-girl of so and so? He said: yes. He (the narrator) said: he testified four times. He (the holy Prophet) then made pronouncement about him and he was stoned (to death).*[73]

It has been related also on the authority of *Sulaiman* b. *Buraida* that a woman of *Ghamid*, a branch of *Azd*, came to the Prophet (peace be upon him) and said:

(c) *Oh! Messenger of Allah, purify me, whereupon he said: woe be upon you; go back and beg forgiveness from Allah and turn to Him in repentance. She said: I find that you intend to send me back as you sent back Ma'iz b. Malik. He (the holy Prophet) said: what has happened to you? She said that she had become pregnant as a result of adultery. He (the holy Prophet) said: is it you (who has done that)? She said: yes. He said to her: (You will not be punished) until you deliver what is there in your womb. One of the Ansar became responsible for her until she was delivered (of the child). He (the Ansari) came to the Prophet (peace be upon him) and said: the woman of Ghamid has given birth to a child. He (the holy Prophet) said: in that case we shall not stone her and so leave her infant with none to suckle him. One of the Ansar got up and said: Allah's Messenger, let the responsibility of his suckling be upon me. She was then stoned to death.*[74]

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[70]Sahih Muslim, hadith no. 4192 & 4193 <http://www.hadithcollection.com/download-hadith-books/download-sahih-muslim.html?>accessed 10 October 2023, see also Abu Dawud *'As-Sunan'* (Vol. II, Darul-Ihya as-Sunanu An-Nabawiyya, Cairo, 1975 A.D,) pgs. 218-219

[71] See the hadith earlier quoted under No. 3.0. above; Sahih Muslim, book 17 - '*Punishments Prescribed by Islam'* Chapter 005, *Hadith* No. 4209.

[72] Ibid. Hadith 4206.

[73] Sahih Muslim '*Punishments Prescribed by Islam'* Chapter 005, *Hadith* No. 4201.

[74] *Ibid*. *Hadith* No. 4205.

It was also reported that punishment of 'stoning to death' was executed by the Prophet on two Jewish people; a man and a woman who committed adultery during the early days in *Madinah.*[75] Owing to the foregoing, Muslim jurists agreed on the fact that 'stoning to death' (*rajm*) is the punishment for adultery, if proved.

7. Execution of the Punishment

The person on whose punishment would be applied must be sane, adult, who willfully committed adultery and not coerced by someone.[76] This *Hadd* punishment extends to a non-Muslim living in an Islamic state.[77] The cloth wore by the culprit must not be removed. The punishment must be proved and pronounced by the authority and its execution must be witnessed by some righteous Muslims.[78] More so, the punishment shall be averted if the culprit retracts his/her confessional statement.[79] Similarly**,** the punishment shall be postponed when the culprit is ill until he/she is certified to have fully recovered or pregnant until she delivers and should be given few months after the birth before the execution of the punishment.[80] Lastly, the corpse of a person who received punishment of stoning to death must be treated like any other Muslim, washed, wrapped and funeral prayer must be offered for his/her forgiveness and no one is expected to talk ill of him/her.[81]

8. Stoning for Adultery: Contradictions and Confusions Galore

At this point, it is pivotal to this research to examine the assertion of some contemporary scholars that this aspect of *hadd* punishment (stoning to death) does not exist in the *Shari'ah*.[82] It was first started during the reign of Caliph Ali b. *Abi Talib* by the *Khawarij*[83]

I must say, this is a betrayal of adequate knowledge of the *Shari'ah*. Some, in their argument referred to it as 'so dreadful, so inconceivably barbaric, and boggles the human imagination by its sheer savagery' and that stoning to death as punishment of adultery was not in the *Shari'ah,*[84] some argued that its application during the life time of the Prophet was before the revelation of Q. 24 or that the *Sunnah* of punishment of 'stoning to death' contradict the provision of the Quran.[85] While other argued that its application by the prophet was only on parties to habitual illicit sex.[86] Generally, the argument of the

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[75] This hadith was reported by many people though there are little differences in its wordings but all conveying the same meaning. See Hadith no. 4446, 4447, 4448,4449, 4450, 4451 and 4452 in Abu Dawud *'As-Sunan Abi Dawud'* (1st ed., Darul-Ibn Hizam, Beirut, 1998) pgs. 672-674

[76] This is premised on the hadith of *Ma'iz ibn Maalik al-Aslami* earlier quoted. See also '*Al Fiqh al– Wadih Minal–Kitab Was-Sunnah "Alal–madhahibil –Arba"ah* pgs. 197-198

[77] Ibid. pg. 196

[78] *Ibid*. pg. 207

[79] This is evidenced on the Prophetic *hadith* which says: "*avert the infliction of hadd punishment if there is doubt".* However, *ta'zir* may be applied to such culprit.

[80] This found on the hadith of the Ghamid lady earlier quoted.

[81] *Ma'iz ibn Maalik al-Aslami* received same befitting treatment from the Prophet (peace be upon him) after the award of punishment to death.

[82] See for detail: Syed I. B. '*Zina and Rajm'* <http://www.irfi.org/articles/articles_51_100/zina_and_rajm.htm> accessed 17 February 2023.

[83] The *Khawarij* is a deviant sect who was initially part of the army of Caliph Ali who broke off during the battle of *Saffeen* (657 CE) –a battle between Ali and *Mu'awiyyah* who had refused to accept Ali as Caliph- when arbitrations were held between the two sides in order to stop the bloodshed, a large group from among Caliph Ali's followers, who were mainly from the tribe of *Tameem*, broke off in opposition and elected Abdullah b. *Wahb* Ar-*Rasibi* as their leader, they then declared both Caliph Ali and *Mu'awiyyah* as *kafir* (disbelievers). Caliph Ali was forced to attack them in their camp and inflicted a terrible defeat on them by killing majority of them and their leader. However, this cost Caliph Ali dearly as the rebellion was far from being suppressed, as it prolonged in a series of local uprising in the following two years. Ali himself died in the hand of *Abdulrahman* B. *Maljam*, who was also one of the *Khawarij*. See *'Tafseer Ayatul-Ahkam Minal-Quran'* pgs. 16-17, see also, Bilal Philips 'The Evolution of Fiqh' (3rd ed., International Islamic Publishing House, Riyadh, 2006) pgs. 186-187

[84] Joommal ASK, *'Stoning to Death is not Shari'ah Law'* available online at <http://www.irfi.org/articles/articles_51_100/stoning_to_death_is_not_shariah.htm>; Abdul-Kader A. *'Stoning for Adultery: Contradictions and Confusions Galore in Ahadith'* available online at <http://www.irafi.org/articles/articles_51_100/stoning_for_adultery.htm>

[85] Quadric Y. A. *'All in the Name of God'* (133rd Inaugural Lecture delivered on 23rd May, 2013 at university of Ilorin) available online at <http://www.unilorin.edu.ng/UIL/133.pdf> p 24-26 accessed 15 February 2019

[86] S A Tariq, *'Punishment for Adultery in Islam'* (Vol. 13-04, No. 148, Islamic Voice) available online at <www.islamicvoice.com/april.99/dialogue.htm> accessed 15 February 2022.

opposition of the punishment of 'stoning to death' can be summarily put under the following subheading:

i. Stoning to death is a serious penalty which must have been stipulated in the Quran and the absence of which the punishment does not exist in the *Shari'ah*.[87]
ii. The provision of 'stoning to death' in the *Sunnah* expressly contradict the provision of the Quran.[88]
iii. Stoning to death was a Jewish law which was applied by the Prophet (peace be on him) first to the Jewish and later to the Muslims before the revelation of Q24 hence, *rajm* has been abrogated by Q24 with 100 lashes.[89]
iv. Q4:25 provides for the half of *hadd* punishment to be meted out to a slave who committed adultery. If the desired punishment is 'stoning to death' how then do we determine half of 'stoning to death'?[90]

The above shall be discussed in seriatim meanwhile, the first and the second shall be taken together.

i. 'Stoning to death' is a serious penalty which must have been stipulated in the Quran and the absence of which the punishment does not exist in the Shari'ah. &
ii. The provision of 'stoning to death' in the Sunnah expressly contradict the provision of the Quran.

There is no doubt on the fact that the main sources of Islamic Law are the Quran and *Sunnah*. The Quran laid down some injunctions to be followed by human being. The Quran provides for rules/injunctions in a general term rather than in detail. One of the fundamental conditions that are sine qua num to the obedience of *Mukallaf* (i.e., human being who is the subject of law) to Allah's injunctions is that the injunctions/rules must be well understood by him.[91] The Almighty Allah, in order to achieve this goal sent Prophet Muhammad (peace be upon him) to explain and put into practice all His rulings and injunctions to the comprehension of mankind. Allah says: 'And we have sent down unto thee (also) the Message that thou mayest explain clearly to men what is sent for them.'[92]

Many Quranic injunctions like acts of *ibadat* (worship) were understood through the *Sunnah* of the Prophet (peace be upon him).[93] Many *Sunnah* of the Prophet (peace be upon him) explain further the meaning of the Quran, hence, it is my humble submission that the *hadith* of the Prophet (peace be upon him) *'Take from me, Verily Allah has ordained a way for them…*' earlier quoted does not contradict the provision of the Quran but rather renders additional explanations to Q24 and specifically to Q4: 15, where Allah promised to '*ordains for them some (other) way'.* This is because one relates to an unmarried person while the other relates to married person.

Similarly, by way of making the saying (*hadith*) of the Prophet (peace be upon him) as part of revelation, Allah also says: 'nor does he say (aught) of (his own) desire. It is no less than inspiration sent down to him.'[94] Allah commands obedience to the Prophet (peace be upon him)[95] and even equate the obedience to the Prophet (peace be upon him) with the obedience to Him (SWT) by saying: 'he who obeys the

[87] Joommal ASK., *'Stoning to Death is not Shari'ah Law'*
[88] F A R Adeleke, *'The Offence of Adultery: Proof and Punishment in the Shari'ah and Challenges for the Muslim Jurists'*(A Digest on Islamic Law and Jurisprudence in Nigeria, Essay in Honour of Hon. J. Umar Faruk Abdullah, Zakariyau I. Oseni ed., Auchi, 2003) Cap. 9, 87-90, Quadric Y. A. *All in the Name of God,* pgs 24-28,
[89] Quadric Y. A. *All in the Name of God,* pgs 24-28, Okunnu F. *The Shari'ah: Adultery as a Case Study,* (A Digest on Islamic Law and Jurisprudence in Nigeria, Essay in Honour of Hon. J. Umar Faruk Abdullah, Zakariyau I. Oseni ed., Auchi, 2003) Cap 16, pgs. 204-206
[90] Adeleke F. A. R., *The Offence of Adultery: Proof and Punishment in the Shari'ah and Challenges for the Muslim Jurists,* pg 88, see also Quadric Y. A. *All in the Name of God,* pg 25
[91] Az-Zuhayliy W., *Usul Al-Fiqh Al-Isalmiy,* pg. 136,
[92] Q16:44
[93] Like *salat* (5 daily congregational prayer), fast, Hajj all of which general provision was only made for their performance in the Quran. Likewise in the crime of theft, it was through the *Sunnah* of the Prophet (peace be upon him) that the quantum of what must be stolen to be entitled to *hadd* was known.
[94] Q53:3-4
[95] Q4:59

Messenger obeys Allah.[96] Allah ordered submission to the instruction of the Prophet (peace be upon him) viz: 'take what the messenger assigns to you, and deny yourselves that which he withholds from you…'[97] more so, disobedience to the Prophet (peace be upon him) attracts divine punishment.[98] Hence, the fact that the Prophet (peace be upon him) practiced stoning to Death as *Sunnah* during his life time becomes the law in *Shari'ah*.

iii. Stoning to death was a Jewish law which was applied by the Prophet (peace be on him) first to the Jewish and later to the Muslims before the revelation of Q24 hence, has been abrogated by Q24 with 100 lashes.

Okunnu in his paper[99] and the prolific writer – Quadri in his inaugural lecture[100] canvassed their argument among others, against 'stoning to death' on the ground that it was Jewish law which was imitated by the Prophet (peace be upon him) before the revelation of Q24, hence the revelation of Q24 abrogated the punishment of 'stoning to death'. Quadri quoted Abdullah b. *Abi Awfa* -a *Sahaba*- (companion of the Prophet [peace be upon him]) that when he was asked the question: 'Did the Messenger of Allah (SAW) stone (anyone) to death?" He said, "yes". I said: was it before the revelation of *Suratun-Nur* or after it? He replied; "I don't know.'[101]

It is my humble belief, with due respect, the punishment of 'stoning to death' was inflicted on Muslim culprits by the Prophet (peace be upon him) after the revelation of Q.24 based on the following proof:

(a) According to the history, the occurrences which led to the revelation of Q.24 were in the 5th or 6th year after the *hijrah* (migration of the Prophet [peace be upon him] and his companion from *Makka* to *Madinah*) consequence upon which Q.24 was revealed, hence, Quran 24 was revealed in the fourth year, some said fifth while some said sixth year after the *hijrah*.[102]

(b) It is also worthy to note that history shows that Khalid B. *Walid*, (who was on the side of the unbelievers during the pact of *Hudaybiyyah* and later embrace Islam alongside with '*Amru* B. Al-'As and *Uthman* b. *Talihah* after 6th i.e. in the 7th year of *Hijrah*)[103] *Ibn Abbas,* who also witnessed the *rajm* only migrated to *Madinah* during Ramadan with his mother after the conquest of Makkah in the 8th *Hijrah*, some even said 9th *Hijrah*[104] and Abu *Hurayrah* (who embraced Islam in the 7th year after *Hijrah* and arrived *Madinah* the same day *Ja'far* b. *Abi Talib* returned from Ethiopia) were all present in *Madinah* at the time the execution of *hadd* punishment of stoning to death was meted out on *Mai'z* B. *Malik*, and the *Gamdiyyah* lady, while Q. 24: 2 was revealed in the fifth year after *Hijrah*, hence the assertion that Q. 24 which was revealed earlier to the infliction of *rajm* on culprits of adultery by the Prophet (peace be upon him) has abrogated the punishment of stoning to death is, with due respect, defeated and incorrect. Similarly, if the punishment of *rajm* the was erroneously awarded and inflicted by the Prophet (peace be upon him) on some Muslims, Allah in His usual habit of correcting any mistake made by the Prophet (peace be upon him) must have corrected it with a revelation since revelation had not stopped at the time.[105] More so, it was also reported Abdullah b. *Abbas* that `*Umar Khattab*, may Allah be pleased with them, stood up on pulpit of Allah's Messenger (may Allah be pleased with him) and praised and glorified Allah, then he said:

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[96] Q4: 80
[97] Q59:7
[98] Allah says: 'let those beware who withstand the Messenger's order, lest some trial befall them or a grievous penalty be inflicted on them' Q24:63
[99] Okunnu F., *The Shari'ah: Adultery as a Case Study. Pg. 205*
[100] Y A Quadric, *All in the Name of God, pg. 24-25*
[101] Ibid. PP. 24-25
[102] Imam Muhammad Abu Zahra, *Al-Jarimah wa' l 'Uqubah fil- Fiqh al-Islami: al-'Uqubah,* (Darul Fikril 'Arabiy, Egypt 1998) p 91

Al-Khadariy M. *Nuru Al-Yaqeen fih Sirah Sayyidil-Mursaleen,* (8th ed., Daru Ibn Katheer, Beirut, 1997) pgs. 164-165, see also '*The Meaning of the Holy Qur'an'* pg. 864
[103] According to a Hadith narrated by Aishah (RTA) that Khalid was on the side of the unbelievers during the pact of *Hudaibiyyah* and later embrace Islam after 6th i.e., in the 7th Hijri. See for details: *'Nuru Al-Yaqeen fih Sirah Sayyidil-Mursaleen' pgs. 214-215*
[104] Ibid. pgs. 227-228. See also: Imam Muhammad Abu Zahra, '*Al-Jarimah wa' l 'Uqubah fil- Fiqh al-Islami: al-'Uqubah'* pg. 91
[105] Like the way and manner Allah corrected the Prophet's attitude (peace be upon him) toward a blind man in Q.80

> *"O people! Verily Allah sent Muhammad (peace be upon him) with the truth, and revealed to him the Book. One of the things that were revealed to him was the Ayah (verse) of stoning to death. We have recited it, retained it to our memory and understood it. The Messenger of Allah (peace be upon him) carried out the punishment of stoning (to the married adulterer and adulteress) and after him we also awarded the punishment of stoning, but I am afraid that as time goes by, some people (may forget it) and may say: we do not find the Ayah of stoning in the Book of Allah, and thus go astray because they abandoned one of the obligations revealed by Allah. Stoning is duty laid down in the Book of Allah for married men and women who commits adultery, if decisive evidence is established, or if pregnancy results from that, or if they confess to it.*[106]

Quadri falsifies the above saying of *Umar* (may Allah be pleased with him) on the ground that it was contradictory to the one reported of Caliph Ali (may Allah be pleased with him) who was reported to have said, whipping is from Quran while *rajm* is from *Sunnah*. I humbly submit that both statements are not contradictory. This is because *Umar* was referring to the abrogated part of Q.24 which read thus: 'if an old man and an old woman (i.e. married man and woman) commit adultery, stone both of them to death as a decisive exemplary punishment from God'[107]. It is deducible from the words of *Umar* (may Allah be pleased with him) that; firstly, he had the knowledge of the verse being revealed but was abrogated and was not written but its principle remains. Secondly, he was hesitant to write and include it in the Quran since the Prophet (peace be upon him) did not do so, hence, showed his concern about people going against *rajm* in future like it is happening today. It was reported that *Zayd* b. *Thabit* (who was one of the writers of the Quran and even the revelation during the life time of the Prophet (peace be upon him) said to *Mirwan* (may Allah be pleased with both of them) that; the verse of *rajm* was part the Quran which they used to recite. *Mirwan* then asked him: why didn't you include it in *Mashaf* (i.e. Quran)? *Zayd* replied reason for not writing was deduced from the Prophet (peace be upon him) attitude toward a man who came and asked him to write the verse of *rajm* for him and the Prophet (peace be upon him) replied him 'I cannot do that now'.[108] While the statement of Caliph Ali was only in reference to the execution of the punishment as was being carried out on people during his life time and nothing more. I must add that the reputation of Abdullah b. *Abbas* (may Allah be pleased with him) who reported the saying of *Umar* (may Allah be pleased with him) makes it difficult for one to believe that it was fabricated.

iv. Q4:25 provides for half of the hadd punishment to be meted out to a slave who committed adultery. If the desired punishment is stoning to death how then do we determine half of 'stoning to death'?

The view of the majority of Muslim jurists is that there is no *hadd* punishment (i.e. whipping) for an unmarried slave who committed fornication.[109] Similarly, in accordance with the opinion of many *mufasirun* (The exegetes), the half punishment contemplated in Q.4: 25 is that of whipping and not *rajm*.[110] 50 lashes is the *hadd* punishment to be meted out to a married slave who commits adultery. They added that the reason for this is that Allah knows that slaves are not well protected like a free person hence may be easily molested.[111]

9. Summary and Conclusion

The perception of social values varies from one society or culture to the other; nonetheless, both the ancient and the modern idealist societies have given regard in their respective circumstances to the

[106] Sahih Muslim '*Punishments Prescribed by Islam'* Chapter 004, *Hadith* No. 4194
[107]This verse is being referred to have been abrogated only in its wording but its principle still remains See *Tafseer Ibn Katheer, Vol. III, pgs.* 1998, see also Bakri Ismael M. *'Dirasatul fih 'Uloom al-Quran'* (Daru al-Manar, Cairo, 2nd ed., 1999) pgs. 249-250
[108] See for detail; *Ibn Katheer, Vol. III, pg.* 1998,
[109] This view was premised on the *hadith* reported by ibn Abbas that the Prophet (peace be upon him) says *hadd* punishment shall not be awarded to an unmarried slave. See for detail; *Ibn Katheer, Vol. I, pg. 704*
[110] *Ibn Katheer, Vol. I, pg. 704, see also 'Tafseer Ayatul-Ahkam Minal-Quran'* pg. 16
[111] *'Tafseer Ayatul-Ahkam Minal-Quran'* pg. 16

protection of life and protection of property. Similarly, Islamic criminal law being a divine law revolves around the protection of the following five fundamental values:

i. Protection of religion,
ii. Protection of life,
iii. Protection of the sanctity of family,
iv. Protection of property and
v. Protection of intellect.

As said earlier at the introductory parts of this paper that *zina* opens road to many evils. It jeopardizes the interest of children yet unborn. It can also destroy the basis of family lineage consequent upon which the bonds of society may be permanently loosened. It also causes feuds, loss of reputation, loss of property and even loss of life in the society. The havoc *zina* can bring upon a society cannot be underestimated; hence the punishment is meant to serve as a deterrent to someone who has not committed adultery, hence if he thinks of the offence and the punishment thereto, he will realize that the potential damages resulting from the punishment is far greater than the benefit likely to accrue thereto. This is, among other things why Islam attached a grave punishment to the offence of adultery.

10. **Recommendations**

It behooves all Muslims to live their total life in conformity with the provision of the *Shari'ah* even if such Muslim(s) live in a state where adultery is not an offence known to their law. Allah enjoins the Muslims to enter into Islam fully and wholeheartedly.[112] Similarly, a Muslim must borne in mind that every human acts and/omissions either good or bad shall definitely be recompensed both in this life and hereafter.[113] Hence, if one is not punished for *zina* in this life one shall definitely not escape the punishment on the day of resurrection except for those who repent and meet Allah's forgiveness. More so each family should train and inculcate into their offspring the principles, tenets and the provision of *Shari'ah* so as to be their guard and guide. All Muslims must borne in mind and strive towards it that the only applicable laws that should regulate a Muslims' life is the *Shari'ah*. Allah condemns and qualifies as the unbeliever, the wrongdoer and the rebel whosoever chooses any other law(s) to regulate his affairs outside the provision of *Shari'ah.*[114] The writer is not unmindful of the status of the operative legal system in Nigeria and the status of Islamic law that is operational in Nigeria, nonetheless, this cannot defeat or cause a change to the principles of *Shari'ah* as it is.

[112] Quran 2: 208
[113] Quran 3: 185
[114] Al-Maidah: 44, 45 and 47.