



Adultry, Fornication, and Rape Cases: The Divergent Views of the Four Schools of Jurisprudence

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Received: 19th January 2021

Accepted: 20th May 2021

Published: 3rd June 2021

ABSTRACT

Man was created by Almighty Allah as Khalifatullah on terrain so that he might animate and decree on it. This tenacity cannot be grasped unless the humankind preserve itself, incarnates, flourishes, humanizes, and worships its creator. Consequent upon that the Creator has positioned some desires and instincts in man so that he might be encouraged towards several undertakings which assures the survival of the classes. It is in line with the above, that this paper attempts to examine the concept of adultery, fornication and rape, as well as the divergent opinions of the four schools of jurisprudence among others. Thus, the paper concludes that Islam categorically urges the faithful to distant themselves not even from adultery, fornication and rape, but any lewdness. In addition, Islam battled with the above vices for they lead to confusion of lineage, child-abuse, breaking up of families, bitterness in relationship, and spread of disease, and laxity in morals. Thereupon, the paper recommends among other things that believers should be conscious of their Lord and distant themselves from committing the afore-mentioned indecencies. And when the malfactor is before the law, he should be punished without any fear, prejudice or mercy.

KEYWORDS

Adultery, Fornication, Rape, Divergent Views, Four Schools of Jurisprudence.

INTRODUCTION

Allah (S.W.T.) created man as His vicegerent on earth in order that he might populate and rule it. Obviously, this purpose cannot be realized unless the human species perpetuates itself, living, thriving, cultivating, manufacturing, building and worshipping its Creator – Allah (S.W.T.). And accordingly, the Creator has placed certain appetites and impulses in man so that he is impelled towards the various activities which guarantee the survival of the species. Among the appetites which an individual must satisfy for his personal survival is that of food and drink. The sexual appetite, however, is for that purpose of the survival of the species. Sex is a strong driving force in human being which demands satisfaction and fulfillment. Therefore, human beings have responded to the demands of the sexual appetite in three different ways, vis-à-vis:

1. Satisfy ones sexual need freely with whoever is available and whenever one pleases, without any restraints of religion, morality, or custom.
2. Suppress, and try to annihilate the sexual drives.
3. Regulates the satisfaction of this urge, allowing it to operate within certain limits, neither suppressing nor giving it free reign. This is the stand of the revealed religions, which have institutionalized marriage and have prohibited adultery and fornication. Islam, in particular, drives, facilitates its satisfaction through lawful marriage, and just as it strictly prohibits sex outside of marriage and even what is conducive to it.

Thus, it is not surprising that all the revealed religions have prohibited adultery and fornication and have fought against these crimes within the society. Islam is very strict in prohibiting adultery and fornication, for it leads to confusion of lineage, child-abuse, breaking up of families, bitterness in relationship, and the spread of sexual diseases and a general laxity in morals. Moreover it opens the door to a flood of lust and self-gratification.

Indeed, it is a well-known fact that when Islam prohibits something, it closes all means leading to it. Accordingly, whatever excites passions opens ways for illicit sexual relations between men and women and promotes indecency and obscenity, is unlawful (*haram*). That is why Allah (S.W.T.) says:

چنه نه نو نو نو نو تو چ الأنعام: ۱۵۱

And come not nigh to indecent deeds, whether open
or secret... (al-An'am, 6:151).

In his commentary on the above verse, Ibn Kathir (2007:592) narrated that:

It is stated in the two *Sahihayn* on the authority of Ibn Mas'ud that the Messenger of Allah (S.A.W.) said: None is more jealous than Allah. This is why He has forbidden the immoral sins committed openly or secretly. It is also stated in the *Hadith* that the Messenger of Allah (S.A.W.) said: Do you wonder at the jealous of Sa'd? By Allah, I am more jealous than Sa'd, and Allah is more jealous than I. This is why He has forbidden the immoral sins committed openly and in secret.

Similarly, in another verse, the Glorious Qur'an reiterates that:

يٰۤاَيُّهَا الَّذِيْنَ اٰمَنُوْا لَا تَتَّبِعُوْا السُّبُوْحَةَ اَلْحَرَامَةَ
 ۝۳۳

Say: the things that my Lord has indeed forbidden are: indecent deeds, whether open or secret; sins and transgressions against truth or reason. (al-A'raf, 7:3)

Commenting on the above verse, Ali (1998: 394-395) postulates that the forbidden things are described in four categories:

1. What is shameful or unbecoming; the sort of things which have also legal and social sanctions, not of a local but of a universal kind may be called offences against society.
2. Sins against self and trespasses or excesses of every sort; these are against truth and reason; here would come in indiscipline, failure in doing intangible duties not clearly defined by law; selfishness or self-aggrandizement, which may be conditioned by custom and not punished by laws, etc.
3. Erecting fetishes or false gods; this is treason against the true God; and
4. Corrupting the religion by debasing superstitions, etc.

Ibn Kathir (2007:619) in his *Tafsir* on the above verse (Q7:33) points out saying:

Imam Ahmad recorded that, the Messenger of Allah (S.A.W.) said: None is more jealous than Allah, and this is why He prohibited "Alfawahish", committed openly or in secret. And regarding the saying of Allah (S.W.T.): Unrighteous or oppressions refer to the sins that one commits against himself, while oppression refers to all and every aspect of transgression against others, and Allah prohibited both unrighteous and transgression.

Qutb (2003:356) on the above verse (Q7:33) adds that: Since God has urged His servants to take good care of their families, He has also impressed upon them the need to maintain the family foundation, which is also the basis of society. This equates with purity, decency and chastity.

Hence, they are forbidden to commit all types of indecency, whether openly or secretly. Thus equates with purity, decency and chastity. Hence, they are forbidden to commits all types of indecency, weather openly or secretly. This prohibition is then closely related to the commandment immediately preceding it and to the first commandment. No family can survive and no community can prosper. Cleanliness and chastity are the basic essentials for the healthy living of both the family and the community. Those who like to see indecency spread throughout try to weaken the structure of the family and to trying about society collapse.

From the above verses and the *Ahadith* quoted above together with the explanations given by the scholars, it could be understood that Allah (S.W.T.) is admonishing man not to even come near indecency whether openly or secretly talk less of committing it. And any society or community that sinks into shameful indecency whether openly or secretly cannot prosper even if it survives. Beside these verses that admonish man not to come near indecent deed, a stern warning not to come near adultery is given in chapter 16:32 Allah (S.W.T.) says:

چڑ ژ ژ ک ک ک گ گ چ الإسرائ: ۳۲

Nor come near to adultery: for it is an indecent (deed) and an evil way (al-Isra' 17:32).

Commenting on the above verse, Ali (1998:581) says:

Adultery is not only shameful in itself and inconsistent with any self-respect or respect for others, but it opens the road to many evils. It destroys the basis of the family: it works against the born children or to be born; it may cause murders and feuds and loss of reputation and property, and also losses permanently the bonds of society. Not only should it be avoided as a sin, but any approach or temptation to it should be avoided.

Concept of Adultery (*Zina*)

The crime of *Zina* has been defined by scholars differently. The word *Zina* is use for illicit sexual relation between two persons either of whom is married or between one married and the other unmarried. While Ibn Rushd (n.d:396) defined it as “a sexual intercourse between a man and woman who are not lawfully married to each other”. Khalil (2004:329) further explains that *Zina* includes both fornication with an unmarried person and adultery with a married person.

In legal terminology, *Zina* is defined as the insertion of the male organ into the female sexual organ if the two are not married and the woman is not a slave to the man. The mere penetration of

the glans of the penis is a sufficient legal ground for punishment. And it is not necessary that the penetration be full or that the sexual act be complete (Bambale, 2003).

The act of *Zina* is referred to as either adultery or fornication. What differentiates the two terms is one's marital status. Fornication is where both parties are unmarried, or one party is not married. And if one or all the parties involved in sexual intercourse is married, it is referred to as adultery (*Zina*). So, the difference exists in Islam not to waive the punishment for one against the other, rather, is to vary the degree of punishment to be inflicted. Thus, flogging is for the unmarried person(s) who committed it, while stoning to death is for the married ones.

The Maliki School defines *Zina* as "the entry of male sexual organ into the frontal sexual part or in the rectum of a woman or man, without legal right or any doubt about it being legal". Hanafi on the other hand defines it as "a sexual frontal intercourse of a man and a woman who is neither his wife nor his slave girl nor is there any valid reason to believe that the sexual act was committed under his own wife or his slave girl." The Shafi'i school defines *Zina* as "the insertion of a male organ into the "female sexual organ" (*Imam Shafi'i*, 1986:n.p.n.).

In spite of all the differences in defining the crime (of *Zina*) among the schools of Islamic law, all jurists agree that the main element in this crime is unlawful cohabitation. Hence, any sexual relationship between a man and a woman which does not involve cohabitation is not punishable by *Hadd*. These relations cannot be considered *Mubah*; on the contrary, they are *Haram*, but their punishment is in the category of *Ta'zir*. And the *Hadd* punishment for *Zina* cannot be applied in such cases.

Indeed, from all the definitions given above, it is only the Maliki School which indicates sodomy (*Liwat*) as an offence deserving the same punishment as the sexual intercourse where it says "the entry of male sexual organ into the female sexual part or in the rectum of a woman or man".

Doi (2007:236) defines *Zina* in the following words:

Zina means sexual intercourse between a man and a woman not married to each other. It is immaterial whether one or both parties have their own spouses living or are unmarried. It is also immaterial whether it is with the consent of the parties to both adultery (where one or both parties are married to a person or persons other than the persons involved in the sexual intercourse) and fornication where both parties are unmarried. Islam considers *Zina* not only as great sin but also as an act which opens the gate for many other shameful acts, which destroys the very basis of the family, which ruins reputation and property and which spreads numerous diseases, both

physical and spiritual. Therefore, the Holy Qur'an enjoins upon people not to even come near adultery.

Doi (2007:236) further explains that the Prophet (S.A.W.) has declared *Zina* to be the greatest sin.

He says:

عن عبد الله بن مسعود رضي الله عنه قال: يا رسول الله أي ذنب أعظم؟ قال: أن تجعل الله ندا وهو خلقك، قلت: ثم أي؟ قال: أن تقتل ولدك من أجل أن يطعم معك، قلت: ثم أي؟ قال: أن تزاني بحليلة جارك. (إمام البخارى vol.8، p.526).

Abdullah bn Mas'ud reported: I asked the Prophet (S.A.W.) 'O! Allah's Apostle which is the biggest sin? He replied: To set up rivals with Allah by worshipping others though He alone has created you. I asked: What is next? He said: To kill your child lest it should share your food. I asked: What next? He said: To commit illegal sexual intercourse with the wife of your neighbour. (*Imam Bukhari vol. 8, P. 526*).

Doi (2007:237) also says "Adultery is undoubtedly a very great sin. If allowed to go unchecked it may disrupt the social fabric of *Ummah*. For this reason severe punishment is reserved for this major crime in the penal law of Islam and great torments for adulterers in the Hereafter if they did not repent".

From the above Qur'anic verses and the *Ahadith* of the Prophet (S.A.W.) quoted or cited above, it is clear and understood that, Islam hates adultery and for that it enjoins the Muslims to shun from anything that leads a man to it. That is to say, one should not even come near to adultery by having passionate look at a woman unknown to him. Not only passionate look is prohibited by Islam, other steps that lead to *Zina* are also prohibited by the Prophet (S.A.W) as contained in the *Hadith* thus:

قال عليه الصلاة والسلام: زنا الرجلين المشي وزنا اليدين البطش وزنا العين النظر.

The Prophet (S.A.W) reported to have said: The adultery of legs is walking (towards an unlawful woman with bad intention) and the adultery of the hands is touching and patting (an unlawful woman) and the adultery of eyes is casting passionate glance at a woman (*Imam Bukhari Vol. 8, P. 527*).

Conditions to be Fulfilled before *Hadd* Punishments of *Zina* are Inflicted On the Accused

Certain conditions need to be fulfilled before the *Hadd* punishment for adultery is inflicted upon the culprit. The conditions to be satisfied according to *Imam* Malik (2007), *Abi al-Azhari* (n.d), *Ibn Rushd* (1996) and *Khalil* (2009) are as thus

1. **The Offender should be a Muslim:** This is so because the word '*Muhsanah*' used in one of the Qur'anic verse means a chaste Muslim woman, which implies to a Muslim man also (*Ibn Rushd*, 1996: 524). He further adds that:

There is no difference of opinion amongst the schools as to whether or not non-Muslim living in the Islamic state should be punished according to the Islamic law for the offence of *Zina*. Maliki School is of the view that the *Hadd* applies to Muslim only. Shafi'i, Hambali and Zahiri schools are of the view that the *Hadd* applies to citizens of the the state, whether Muslims or non-Muslims. Hannafi School is of the view that the *Hadd* applies to Muslims, and as to non-Muslims only lashing applies to them not stoning to death.

2. The Offender should be an Adult:

The offender male or female should be an adult otherwise the punishment to be inflicted shall be by *Ta'azir*. For instance, if an adult woman commits *Zina* with a minor male, *Hadd* punishment applies to her. But if an adult male commits *Zina* with a minor female he is to be punished by *Hadd* if she is fit for sex, but if she is not then the punishment shall be by *Ta'azir*.

Thus, it is pertinent to note that, the question of being fit for sex or not is to be decided only by the physical growth of her body. The Maliki School is of the opinion that a girl of five years may be fit for the sex, while other schools are of the opinion that a girl of nine years is fit for the sex.

3. Sanity:

Here, the offender must be sane. Where it is proved that the offender is of unsound mind, the punishment should be waved. However, where the madness is intermittent i.e. committed during lucid intervals and the punishment will deter the offender the *Hadd* is to be applied.

4. Willingness:

The act of adultery must have been committed willingly without compulsion. That is to say it should be committed or done voluntarily. But where it is proved that the woman is forced, it is regarded as forcible adultery (rape) and the punishment cannot be inflicted. In this regard, the tradition of the Prophet (S.A.W) stresses thus:

Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars (An-Nur, 24:13).

Commenting on the above verse, *Imam Qurtabi* (n.d:323) opines that if any among the defamed persons took the defamation serious, it becomes a duty on him to produce witness (es), in the absence of which they become guilty of what they were defamed with.

Based on the above Qur'anic verse together with the explanations given by the commentators of the Glorious Qur'an above, it means that all the four (4) witnesses mentioned must have witnessed the sexual union at once and at the same time and must also have witness that the sexual union is complete. The statement of all the four (4) witnesses must not contradict each other, otherwise they are considered as liars. Thus, testimony of less than four (4) eye witnesses does not prove the offence.

However, the schools of law differ as to the manner in which the four reliable and pious witnesses should testify. According to *Bambale* (2003:30):

Maliki and Hanbali schools are of the view that the four witnesses should be heard separately in one sitting. Hannafi School is of the view that the four witnesses should be heard in one sitting, by coming together collectively and not separated. And if one of them withdraws his evidence is rejected, the remaining three witnesses are to be flogged 80 lashes each for Qazf (sic). Shafi'I school is of the view that the four witnesses should be heard separately in more than one sitting and does not apply Qazf (sic) punishment in case the number of witnesses who gave evidence does not reach that number of four.

2) By Confession:

In this regard, where the accused person(s) make a confessional statement, it is accepted as a valid proof of *Zina*, but, mere confession is not enough. Yet, the confession must have been made by a person who is sane, adult and freely without any compulsion or duress. A prophetic tradition reported by *Abu-Hurairah* (R.A) states that:

أن رجلا جاء إلى رسول الله صلى الله عليه وسلم إعترف على نفسه بالزنى فأعرض عنه رسول الله صلى الله عليه وسلم ثلاث مرات كل ذلك يعرض عنه رسول الله صلى الله عليه وسلم حتى إذا أكثر عليه فبعث رسول الله صلى الله عليه وسلم إلى أهله فقال: "أشتكى أمّ به جنة؟" فقالوا يا رسول الله والله إنه لشيخ. فقال رسول الله صلى الله عليه وسلم: "أبكر أم ثيب؟" فقالوا بل ثيب يا رسول الله، فأمر به رسول الله صلى الله عليه وسلم فرجمَ (إمام مسلم، (Vol. 3, P. 913

A man came to the Noble Prophet (S.A.W.) while he was sitting in the Mosque and said: that he has committed *Zina* the Prophet (S.A.W.) turned away his face from him and the man came round again facing the Noble Prophet (S.A.W.) and said: He has committed *Zina*. The Prophet (S.A.W.) turned away from him again until the man testified against himself four (4) times. Then, the Noble Prophet (S.A.W.) enquired whether he was sane and it was replied the affirmative, the Prophet (S.A.W.) further enquired whether he was married and it was again replied in the affirmative. There upon, the Noble Prophet (S.A.W.) ordered that the man be stoned to death (*Imam Muslim vol. 3, p. 913*).

Putting the above *Hadith* into cognizance, it can be understood that once a person confess that he has committed the offence of *Zina* and he is matured, sane and not a slave, then the *Hadd* punishment should be inflicted on him. Similarly, the Messenger of Allah (S.A.W.) was reported to have said:

الإقرار أولى من الشهود

Confession is better than a witness (*Imam*

Bukhari, vol. 8, P. 534).

However, scholars differ on whether the confession made in the case of *Zina* can be withdrawn or retracted at any time before the infliction of the punishment. Some are of the opinion that one can withdraw or contradict it. While Malik is one of the views that a person who has made confession of his crime voluntarily should be stoned to death even if he has to be chased (Bambale, 2003). Similarly, as to the number of confessions that is whether the confession should be made once or at four (4) different times or sittings, scholars also differ on. Some are of the opinion that confession is only valid when it is repeated four (4) times in different sittings. They based their view on the issue of a man (Ma'iz bn Malik) who confessed four times. While Malik maintained that, confession made once is sufficient to prove the case of *Zina* against the person confessing (Wali Ullah, 1986).

It is pertinent to note however that in Islam, it is not permitted to ask a person who is confessing to the crime of *Zina* the identity of the other party with whom the act has been committed. But in a situation where he has mentioned a name, then that other party should be questioned so as to find out whether the offender has falsely accused him to determine the crime. Thus, if the crime is

In this regard, the jurists say that this verse is the punishment for fornicators. Exiling the offender implies that he should be banished from the habitation and sent to a very far place. But the purpose of punishment can be served by imprisonment. The Maliki School is of the view that one year exile after the 100 lashes to an unmarried adulterer does not apply to women. Shafi'i and Hambali Schools agree with the view of Maliki School. But they add that if the culprit is a woman, she may be exiled also on condition that her *Mahram* can accompany her. She will not be exiled alone because that will open the way for more immorality and the *Mahram* cannot be compelled to follow her because he had not committed any crime.

Imam Malik further explains that if it is adultery, the punishment is stoning to death (*Rajm*), for married adulterer. He reported that Ubaida bn Samit reported that the Messenger (S.A.W.) says:

خذوا أبن خذوا أبن قد جعل الله هنّ سبيلا البكر بالبكر جلد مائة وتغريب عام. وللمحصن
والمحصنة فاجلدوا كل واحد مائة جلدة وترجم (إمام مسلم، Vol. 3, P. 911)

Receive teaching from me, receive (teaching) from me. Allah has ordained a way for those (women). When an unmarried male commits adultery with an unmarried female, (they should receive) one hundred lashes and banishment for one year. And in the case of married male committing adultery with a married female, they shall receive one hundred lashes and be stoned to death (*Imam* Muslim, vol. 3, P. 911).

The above tradition therefore has made distinction between the punishment to be inflicted on a fornicator and an adulterer. However, jurists have difference of opinion regarding that. For instance, Hambali and Zahiri Schools are of the view that, in case of adultery both the punishment of one hundred (100) lashes and stoning to death shall be awarded. In the light of this, Ali (R.A.), the fourth caliph punished a married woman with a hundred lashes on Thursday and stoned her to death on Friday. He said that he gave the woman a hundred lashes according to the command of Allah (S.W.T.) and stoned her according to the command of the Prophet (S.A.W.).

However, the jurists of Maliki, Hanafi and Shafi'i Schools who are the majority are of the opinion that, it is not advisable to award two punishments together as it was not done by the Prophet (S.A.W.) himself, but only in a case of exceptional circumstance. The case arose in a tradition narrated on the authority of Jabir bn Abdullah (R.A.)

وعن جابر بن عبد الله أن رجل زنى بإمرأة فأمر به النبي صلى الله عليه وسلم فجلد
الحد، ثم أخبره أنه محصن فأمر به فرجم (إمام مسلم Vol. 3, P. 911)

On the authority of Jabir bn Abdullah (R.A), a person committed *Zina* and the Noble Prophet (S.A.W.) punished him with a hundred lashes, but later discovered that he is a married man, and he (the Prophet) ordered that the man be stoned to death (*Imam Muslim*, vol. 3 P. 911).

Abdul-Fattah (2004:973) while explaining the punishment of *Zina* elucidates that, a person who commits *Zina* is either '*Muhsan*' or non-*Muhsan*. A *Muhsan* person is one who has experienced sexual intercourse through a valid marriage, whereas non-*Muhsan* person is one who has not married yet, a virgin. He then said that if a *Muhsan* person, who is free and legally responsible (*Mukallaf*), commits *Zina* willingly, he is to be stoned to death.

... وروي عن جابر ابن عبد الله أن رجلا من بني أسلم جاء إلى رسول الله صلى الله عليه وسلم إعترف على نفسه بالزنا وشهد على نفسه أربع مرات، فأمر به رسول الله صلى الله عليه وسلم فُرجم (إمام مسلم، Vol. 3, P. 913)

It has been narrated on the authority of Jabir bn Abdullah that a man from Aslam came to the Messenger of Allah (S.A.W.) and told him that, he (the man) had committed *Zina*. He testified four times that he had done that, so the Prophet (S.A.W.) ordered that he be stoned to death as he was *Muhsan* (*Imam Muslim*, vol. 3, P. 913).

Abdul-Fattah (2004:974) further expatiates that it has been narrated on the authority of Ibn Abbas, may Allah be pleased with him, in a long *Hadith* that as part of this *Hadith* Umar bn Khattab, May Allah be pleased with him, delivered a sermon and said:

عن ابن عباس رضي الله عنهما قال: قال عمر، لقد خشيت أن يطول بالناس زمانٌ حتى يقول القائل لا تجد الرجم في كتاب الله فيضلوا بترك فريضة أنزلها الله، ألا وإن الرجم حق على من زنى وقد أحصن إذا قامة البينة، أو كان الحمل، أو الإعتراف... (إمام البخارى، Vol. 8, P. 536 - 7)

On the authority of Ibn Abbas may Allah be pleased with them said: Umar (R.A) said: I am afraid that after a long time has passed, somebody will say, 'By Allah, we do not find the verse of *Rajm* in Allah's Book'. And thus they will go astray by leaving an obligation which Allah has revealed. And the punishment of *Rajm* is to be inflicted to any *Muhsan* person (male/female) who commits illegal sexual intercourse (*Zina*), 'If the required evidence is available or there is conception or confession... (*Imam Bukhari*, vol. 8, P.536-7 and *Muslim*, vol.3 P. 912).

Doi (2007:38) further states that the second revelation covered both men and women and was a little more specific regarding punishment of *Zina*. It reads:

چ ڈ ٹ ف ق ق ق ف ق ق ق ج ج ج ج ج ج ج ج ج ج النساء: ١٦

If two persons among you are guilty of adultery, punish them both. If they repent and amend, leave them alone: For Allah is oft returning, Most Merciful (Qur'an, 4:16)

The third verse came with specific punishment for adultery. It reads:

چ پ پ پ ن ن ن ن ن ن ن ن ن ن نور: ٢

The women and the man guilty of adultery or fornication, flog each one of them with a hundred stripes... (Qur'an, 24:2)

When this verse was revealed, it was understood that those guilty of adultery should be given one hundred lashes as a punishment. The Prophet (S.A.W.) clarified the injunction as follows:

خذوا عني خذوا عني فقد جعل الله لهن سبيلا - البكر بالبكر جلد مائة وتعذبهن عاما - الثيب بالثيب جلد مائة والرجم (رواه مسلم 3 vol. 911 p).

Take from me accept from me, undoubtedly Allah has now shown path for them (adultery). For unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stoning to death (*Imam Muslim Vol. 3, P. 911*).

The above tradition, therefore, shows that if the culprit is unmarried, he should be punished with one hundred stripes and should be exiled away from his town for a period of a year. But, if the malefactor is married, he should be stoned to death. However, some jurists hold the opinion that a malefactor who is going to be stoned to death, should not be flogged with one hundred lashes as the Noble Prophet (S.A.W.) stoned to death two Jewish adulterers and did not punish them with lashes.

Apart from the punishments mentioned in the above tradition, there are many others as recorded by Guibi (1997:52-55) as follows:

P. ٤ ، vol. ٨ البخاري... (رواه البخاري) ... (525).

The Messenger of Allah (S.A.W), said: "An adulterer will not commit adultery at the time he/she does that while he/she is still a *Mu'min* (faithful believer)... (*Imam Bukhari, Vol. 8, P. 525*)

Lastly, the Prophet (S.A.W.) describes an adulterer who continuously commits *Zina* as an idol worshipper. The *Hadith* reads:

وقال عليه الصلاة وسلم: المقيم على الزنى كعابد وثن.

The Prophet (S.A.W.), said: whosoever makes *Zina* a part of his life, i.e. continually commits *Zina* (and did not repent) he is like an idol worshipper (Abu Dawud, vol. 2, P. 806).

The *Hadith* quoted above, has explicitly prohibited transgression or violation of others' rights. Therefore, committing *Zina* with a lady or a woman is an act of violation of rights of others. Hence, a person who makes *Zina* habitual his sin is tantamount to *Shirk* (associating a partner to Allah S.W.T.).

Method of Awarding the Punishment of Adultery (*Zina*)

The wisdom behind awarding the severe punishment of *Zina* is that, to serve as deterrent to others (society). And this kind of punishment is only inflicted when it is proved beyond any reasonable doubt by the testimony of four reliable, just, pious and Muslim (men) witnesses given at the same time, that they saw the malefactor actually committing the crime. Thus the benefit of any slightest doubt in the statement of testimony of the witnesses should go in favour of the culprit.

Other proof of guilty of the culprit may come in form of confession made four times which such culprit completely makes on his own (voluntarily) in one sitting. Thus, if he confesses three times in which he retracts his fourth confession, he should not be stoned to death. Added to the above, the man or woman confessing the crime must be sane, mature, major and married.

As Islam commands purity of sex life for both men and women at all times, punishment of committing *Zina* is carried out openly so that it will serve as deterrent to others in the community or society. This can evidently be seen when we refer to the cases of adultery brought before the Prophet (S.A.W.) and the one made by confession of the offender in which he (the Prophet) executed the punishment openly before his *Sahabah* and other people of the community.

A good example of adhering to the punishment of *Zina* as commanded was the action of Caliph Umar (R.A.) when he expatiated the said punishment. The following narration buttresses the incidence:

One day Ubaidallah (a second son to Caliph Umar) was passing by the house of a Jew, he saw a sleeping woman and committed *Zina*

with her and became pregnant. When she gave birth she took the baby to the Caliph and narrated the whole story. The Caliph then went home and asked Ubaidallah, where he responded in an affirmative way. The Caliph then took him to the rest of the companions and made it known to them. Caliph Umar then ordered Maflah to give stripes. When seventy stripes were given to him, the companions appealed to the Caliph. He then replied: O companions of the Prophet! Have you not read in the Qur'an? "Do not show mercy over them". He was then given 100 lashes, as a result of which he died (Doi, 2007:240-241).

Moreover, the punishment for *Zina* or fornication according to Guibi (1997:52) a follower of Maliki School of law that it is not to be carried out in secret; rather, it has to be publicized and extend before the witness of people. Similarly, *Imam* Malik said that when executing the punishment, no pit is to be dug for the person to be stoned to death. This is because according to him Jabir (R.A.) reported that "We stoned him (Ma'iz) in the place of prayer and when the stones enveloped him, he bolted, but we took him by the stony (volcanic) area and crushed him". Likewise, when executing the punishment of stripes, *Imam* Malik said that stripes should be applied on the person's back and the proximate areas (Ibn Rushd, 1996:527).

Forcible *Zina* (Rape)

This simply refers to rape. It is a situation whereby a man uses his position, rank or status, or power and copulates with a woman against her will.

According to Bambale (2003:39) "all the rules that apply in *Zina* apply here. The only difference is that the one who commits the rape will be punished by stoning to death if he married or married before, or by 100 lashes if unmarried plus one year in exile (now substituted with imprisonment)". He adds that, according to *Imam* Malik (2007:758) the woman raped will receive damages as compensation:

It is reported by Wa'il ibn Hujz that a woman went out in the time of the Holy Prophet (S.A.W) to go to prayer and a man who met her, attacked her and got his desire of her. She shouted and he went off and when a company of the emigrants came by, she said, "that man did such and such to me". They seized the man and brought him to Allah's Messenger who said to the woman, "Go away for Allah has forgiven you". But of the man who had intercourse with her, he said, "Stone him to death", because he was married.

Imam Malik further explains that where the woman dies by reason of rape, *hadd* and the compensation (in form of *diya*) are due as punishment to the malefactor. *Imam* Malik related that

Abdul Malik Ibn Marwan gave judgment whereby a rapist had to pay the raped woman her bride-price as explained thus:

الأمر عندنا في الرجل يغتصب المرأة بكرا كنت أو ثيبا، أمّا إن كانت حرة فعليها صدق
مثلها والعقوبة في ذلك على المعتصب ولا عقوبة على المعتصبة في ذلك كله (إمام مالك،
(1982:343)

What is done in our community about a man who rapes a woman, virgin or non-virgin, if she is free, is that he must pay the bride-price of the like of her. The *hadd* punishment in such cases is applied to rapist and there is no punishment to be applied to the raped woman (*Imam Malik, 1982:343*).

Regarding their disagreement about the application of *hadd* due to the appearance of pregnancy along with a claim of rape, a group of jurist imposed *hadd* in such a case as is recorded by *Imam Malik* in his *al-Muwatta* in the tradition of Umar. This was the opinion of *Imam Malik*, unless she could provide evidence of coercion, as in case she was a virgin and complained while she was bleeding or shows on her body the signs of coercion. The case is the same, according to him when she claims to be married; she has to prove it. The exception is the one on an unexpected visit. While Ibn al-Qasim said that when she claims marriage on a sudden visit, her statement will be accepted (*Imam Malik, 2007:850*), (*Ibn Rushd, 1996:530*), (*al-Ribatani, n.d:72*) and (*Abiy al-Azhariy, n.d:285*).

From all the discussions and explanations from the *Ahadith* of the Prophet (S.A.W) one can simply understand that, a person who committed forcible *Zina* (rape) should be punished with 100 stripes if he is unmarried with an exile (now with imprisonment). If he is married should be stoned to death. However, in a situation whereby the woman dies by the reason of rape, both the two punishments has to be inflicted to the culprit, that is *Hadd* and compensation (in form of *Diyah*) are due to him as unanimously agreed by the Jurists.

Lesbianism (*al-Sihaq*)

This simply means sexual intercourse between a woman and a woman; it is popularly known as lesbianism. This is also an unnatural and unlawful act of satisfying one's desire. According to Bambale (2003:43) it is a crime and is committed by the friction or the touching together of the organs of two females.

Thus, Islam requires of every Muslim, male or female to take care of his organ and not expose it except to those joined to them in marriage bond or in the case of illness whereby the ill person cannot do certain things by him or herself and there is no way his private organ cannot be seeing.

It has been reflected in both the text of the Glorious Qur'an and the *Sunnah* of the Noble Prophet (S.A.W) that Muslim, male or female should take care of his organ, the Glorious states:

والذين هم لفروجهم حافظون. إلا على أزواجهم أو ما ملكت أيمانهم فإنهم غير ملومين
(المؤمنون، 23: 5-6).

Who guard their modesty; except with those joined to them in the marriage bond, or (the captives) whom their right hands possess, for (in their case) they are free from blame- (al-Mu'minun, 23:5-6)

In the *Hadith* of the Prophet (S.A.W) according to Fazlul-Karim (n.d: 547):

If a woman comes into another woman both are adulterers.

Based on the above texts from the Glorious Qur'an and Prophetic traditions, it is evidently shown that, the crime of *Sihag* is punishable crime. And all the schools of law are unanimous that, it is punishable by *Ta'azir*.

CONCLUSION

It has been pointed in this paper that Islam categorically urges the believers to distant themselves not even to adultery and fornication, but any indecency. And all the revealed religions have prohibited adultery, fornication and rape, and have fought against them in the society. Islam in particular, is very strict in prohibiting them, for they lead to confusion of lineage, child-abuse, breaking up of families, bitterness in relationship, and the spread of sexual diseases and the general laxity in morals. They also open the door to flood of lust and self-gratification. Indeed, when Islam prohibits something, it closes all means leading to it. And whatever excites passion opens the ways for illicit sexual relation(s) between the sexes and promotes indecency and obscenity, is unlawful (*haram*).

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