

Regulation of Adultery (*Zina*) in the Context of Egyptian Human Rights Obligations

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Abstract

According to the Egyptian legal framework, a man is considered to have committed infidelity if he had sexual intercourse with another woman other than his wedded wife and such intercourse must take place within the marital home that he shares with his wife. If a man has sexual intercourse with an unmarried maiden in a hotel, that would not be regarded as an act of adultery. On the contrary, a woman does not enjoy the same privilege as her male counterparts. If a married woman sleeps with another man other than her wedded husband, she will be regarded as the one who committed adultery whether she did it in her marital home or outside it. What is good for the goose must also be good for the gander. An egalitarian society for all is not only a fundamental human right but an essential foundation for a prosperous, peaceful, and sustainable society. This paper intends to contribute to mounting pressure on the Egyptian government to revisit its discriminatory laws and to comply with its international human rights obligations.

Keywords: adultery, gender discrimination, *Zina*, family law.

JEL Classification: K33, K38

1. Introduction

This kind of sexual behaviour (adultery) has been under regulation in Egypt² but the numbers of people who were prosecuted for sexual immorality has increased after the revolution that took place around the year 2011.³ The regulation of adultery (*zina*) is not the same for men and women. According to the legal framework of Egypt, a man is considered to have committed infidelity if he had sexual intercourse with another woman other than his lawful wedded wife and such intercourse must take place within the marital home that he shares with his wife.

If a married man has sexual intercourse with an unmarried woman outside his marital home, that would not be regarded as adultery. However, if he had sexual intercourse with another man's wife outside his marital home, he would be regarded as an accomplice.

If a man has sexual intercourse with an unmarried maiden in a hotel, that would not be regarded as an act of adultery. On the contrary, a woman does not enjoy the same privilege as her male counterparts. If a woman sleeps with another man other than her wedded husband, she will be regarded as the one who committed adultery, whether she did it in her marital home or outside it. The first part of this paper intends to discuss the regulation of adultery (*zina*) in Islamic law, the second part of the paper will discuss the regulation of adultery (*zina*) in the Egyptian criminal law and the third part of the paper will discuss the Egyptian human rights obligations.

2. Regulation of adultery (*zina*) in Islamic law

This paper will focus on the *hadd* (singular of *hudud*) crime of fornication and adultery (*zina*) and its punishment. The main reason behind the punishment for the *hudud* crime of *zina* is to provide the general and specific deterrence to sexual immorality, and to prohibit mixed gatherings for the purpose of discouraging adultery and sexual misconduct.⁴ Moreover, the punishment for the crime of *zina* is the most severe of all punishments under Islamic law and is designed to protect the most basic and important structure in society (the family). Adultery (*zina*) is perceived as undermining the

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² Reynolds James Bronson "Sex Morals and the Law in Ancient Egypt and Babylon" (May 1914-March 2015) (5) 01 *Journal of Criminal Law and Criminology* 21.

³ Ahmed Ezzat "Law and Moral Regulation in Modern Egypt: *Hisba* from Tradition to Modernity" 2020 (52) *International Journal of Middle East Studies* 665.

⁴ *Ibid* at 2-3.

marriage and result to family conflict, jealousy, divorce, *walad-al-zina* (extra-marital children) and the spread of diseases. According to Siddiqi as cited in Lippman⁵ adultery ought to be punished severely because Islam encourages early marriage and polygyny and for him it makes adultery and fornication unnecessary. Islamic law forbids any form of sexual relationship between married lovers. If two unmarried lovers end up having carnal knowledge of each other while still unmarried (fornication), their offence is punishable with one hundred lashes. Illicit sexual relationship is also forbidden amongst those who are married. A married person is not allowed to have carnal knowledge of another person other than his or her marriage partner. If a married person has committed adultery with another person other than the spouse, the punishment is one hundred lashes for both. There is a general agreement amongst Islamic scholars that the punishment for *zina* is 100 lashes if committed by unmarried persons and 100 lashes if committed by married persons.⁶ Other scholars of Islamic law are of the view that one hundred lashes ought to be combined with stoning and they support their view by relying on some of the hadiths. Fornication or adultery requires the eye witness testimony of four reliable adults who have witnessed the act of sexual intercourse taking place.⁷ In practical situations it is not always easy to get the testimony of four witnesses because the adultery must be public in such a manner that it has been witnessed by four persons without invading their privacy.⁸ This led Baderin to argue that the standard of proof make the punishment to be applicable to those with no concern for public immorality at all.⁹ In a similar vein, Coulson viewed adultery's standard of proof in Islamic law as similar to an offence of public indecency that is punishable in terms of the laws applicable in many western countries.¹⁰ Confession is also used as proof in Islamic law and is more practical and effective method of proof for *zina*.¹¹ Confession must be made before the court of law and it must be done four times in order to prove guilt.¹² Unlike any other legal system, confession can be withdrawn at any time before the sentence execution and this stops any punishment.¹³ Confession must not be obtained through any form of coercion or abuse but an individual should make it out of her own free will and volition.¹⁴ There is no agreement amongst the Islamic jurists on how to prove the offence of *zina*. Major Islamic schools of thought (*madhhab*) have huge differences regarding the conditions necessary for a valid confession and for testimonial evidence. The differences are not free from practical and legal consequences, namely:

a) *Hanafi*, *Hanbali* and *Shafi'* Islamic schools of thought require that confession about *zina* to be articulated four times while the Maliki and *Shafi'i* are of the view that one confession is enough to establish the offence of *zina*.¹⁵

b) The majority opinion from the Maliki school of thought is that pregnancy of an unmarried female should be used as evidence that she committed fornication (*zina*) unless if there is evidence to the contrary. If for example, a female got pregnant because of rape, her pregnancy cannot be used as proof of *zina*. In other Islamic schools of thought *zina* is not automatically proved by pregnancy and *zina* must be proved by confession or the testimony of four reliable eyewitnesses.¹⁶

c) *Hanbali* school of thought believes that flogging and stoning to death should be combined

⁵ Lippman M. "Islamic Criminal Law and Procedure: Religious Fundamentalism v Modern Law" 1989 (12) 29 *Boston College International and Comparative Law Review*.

⁶ Ibid.

⁷ Souha Korbatiéh, Adultery Laws in Islam and Stoning in the Modern World, *Australian Journal of Islamic Studies*, 3(2), 2018, at 11.

⁸ Ibid at 11.

⁹ Baderin as cited in Lawan Mamman, Ibrahim N Soda and Shaheen Sordar Ali, *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual* UK: UK Centre of Legal Education 2011, [https://www.heacademy.ac.uk/ststem/files/introduction to islamic criminal justice.pdf](https://www.heacademy.ac.uk/ststem/files/introduction%20to%20islamiccriminaljustice.pdf).

¹⁰ Coulson as cited in El-Awa, *Muhammad Salim Punishment in Islamic law: a Comparative Study* (Indianapolis, USA: American Trust Publications 1982).

¹¹ Roberson Cliff and Dilip K Das, *An Introduction to Comparative Legal Models of Criminal Justice* (Boca Raton, FC: CRC Press 2008).

¹² Lippman M., *op. cit.*, 29-62.

¹³ Bassiouni M. Cheri (ed.), *The Islamic Criminal Justice System* (New York: Oceana Publications, Inc 1982).

¹⁴ Peiffer Elizabeth "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria" 2005 (11) 3 *William & Mary Journal of Women and the Law* 507-539.

¹⁵ Ibid.; Souha Korbatiéh, *op. cit.*, 11-12.

¹⁶ Souha Korbatiéh, *op. cit.*, 2018 at 12.

as punishment for adultery committed by married people. Maliki, *Hanafi* and *Shafei* reject the combination of stoning and flogging.

d) Maliki agree to the banishment of male offenders but against the banishment of female offenders. *Hanafi* rejects the banishment of offenders because it is not mentioned in the Quran but only have its roots on the hadith.

The above differences show that the punishment of *zina* is not free from practical problems of implementation. Kamali has condemned the punishment of *zina* and argued that many things in our contemporary society invite and encourage illicit sexual relationship and “the individual is surrounded by an endless series of temptations.”¹⁷ Such temptations may be the availability of pornography, and obscene materials on television, cellular phones, and the internet. In view of all that, Kamali is of the view that the punishment of *zina* under the latter mentioned circumstances might constitute injustice and oppression.¹⁸ In a similar vein, El-Awa has lambasted the current application of the punishment of *zina* as nonsensical because contemporary Muslim societies have not adequately acquainted themselves with the Islamic way of life and are not properly adopting Islamic law in regard to *zina* law.¹⁹

3. Regulation of adultery (*zina*) in the Egyptian criminal law

The Egyptian Penal Code provides that the wife that is found guilty of committing an act of adultery shall be punished with an imprisonment sentence of not more than two years.²⁰ On the contrary, a husband who is found guilty of committing adultery in the marital home that he shares with his wife shall be punished with an imprisonment sentence of not more than six months.²¹ This is a blatant discrimination against women and such discrimination do not appear to serve any justifiable societal goal other than promoting patriarchy at the expense of women’s rights. The punishment of a wife is harsher than that of a husband and it is four times harsher if compared to that of a husband. A husband who murders his wife after catching her committing adultery red-handed can be exonerated by getting a highly reduced sentence instead of those penalties provided in articles 234 and 236 of the Penal Code of Egypt.²² The scholars of Egyptian criminal law have justified honour killing based on the psychological state of mind of the husband who committed murder. They are of the view that a husband who catches his wife in an act of adultery gets so furious up to such an extent that his actions become uncontrollable.²³ Common sense dictates that a wife who catches her husband in an act of adultery can be equally furious and her actions might not be controllable too but unfortunately the legal system of Egypt does not cater for her uncontrollable actions in the world of men. This is so because a wife who kills her husband after catching him red-handed in an act of adultery does not receive any reduced sentence like her male counterparts. This is also a blatant discrimination against women and shows beyond any doubt that Egyptian society is still dominated by men at the expense of women’s rights.

The Preamble to the Constitution of Egypt provides that “we are drafting a constitution that affirms that principles of Sharia are the principal source of legislation, and that reference for interpretation thereof is the relevant texts in the collected rulings of the Supreme Constitutional Court.”²⁴ The centrality of Sharia principles in the legal system of Egypt is also emphasised in article 2 of the Constitution, which reiterates that the national religion of Egypt is Islam while Arabic remains an endorsed language. It goes further to emphasise that the source of legislation is Islamic

¹⁷ Kamali Mohammad Hashim “Punishment in Islamic Law: A Critique of the Hudud Bill of Kalantan, Malaysia” 1998 (13) 03 *Arab Law Quarterly* 203-234.

¹⁸ *Ibid.* at 229.

¹⁹ El-Awa, Muhammad Salim, *Punishment in Islamic Law: A Comparative Study* (Indianapolis, USA: American Trust Publications 1982.

²⁰ Article 274 of the Egyptian Penal Code No 58 of 1937.

²¹ Article 277 of the Egyptian Penal Code No 58 of 1937.

²² Article 237 of the Egyptian Penal Code No 58 of 1937.

²³ Ali Moussa “The Judicial Resolution of the Tension between Human Rights Treaties and Shari’a Law Reservations under the Constitution of 2014” 2018 Master’s Thesis, American University in Cairo at 38.

²⁴ The Preamble to the Egyptian Constitution of 2014 with amendments through 2019.

Sharia.²⁵ A closer look at the regulation of adultery in the Egyptian legal system shows that it is miles apart with the Islamic Sharia principles because of numerous reasons, namely:

a) As already mentioned earlier, Islamic law punishes any Muslim who partakes in any form of illicit sexual intercourse whether married or unmarried. On the contrary to Islamic Sharia, Egyptian criminal law has not outlawed fornication or provide any punishment for it. According to Islamic law and the teaching of the Quran in particular, a fornicator ought to be flogged with one hundred lashes to serve as a deterrence and send a clear message across the Islamic community that illicit sexual relations cannot be tolerated at all in their society. The current regulation of fornication (*zina*) in the Egyptian criminal law is not Islamic at all and can open the Pandora's box that Muslims were trying to close in the first place by opening the door for the spread of sexual immorality²⁶, contagious diseases, breaking of families and many other social ills associated with sexual immorality.

b) The Quran prescribes one hundred lashes for both man and a woman if they committed adultery. There are some hadiths that says that if a married person regardless of whether a woman or a man who commits adultery must be stoned (*rajm*) to death. However, this remains a contentious issue amongst the Islamic scholars because some are rejecting stoning as punishment because it is not written in the Quran but merely on some hadiths. On the other hand, some Muslims more especially extremists are in support of stoning as the punishment for adultery. The Egyptian criminal law ignores all these punishments that are prescribed by Islamic law and yet they claim that Islamic Sharia law is the primary source of all legislation.

c) The Islamic Sharia does not discriminate against man and women when comes to the regulation of fornication and adultery (*zina*). Islamic law prescribes the same punishment for fornicators and the same punishment for adulterers without favouring a particular gender over the other. Yet the Egyptian Penal Code discriminates by favouring husbands over wives and this is because a wife who is guilty of adultery can be imprisoned for up to two years while a husband guilty of the same offense can be imprisoned for only up to six months.²⁷ This has got nothing to do with Islam but a clandestine desire to promote patriarchy under the name of promoting the dominant religion of the state.

4. Egyptian human rights obligations

The Egyptian Constitutional provision incorporates international treaties as part of domestic law without the requirement of an enabling legislation. Article 93 of the Constitution provides that "the state is committed to the agreements, covenants and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with specified circumstances."²⁸ It exhibits the characteristics of legal monism. According to monist theory, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law and customary international law is automatically part of national law as well. The Egyptian government signed the Convention on Elimination of all forms of Discrimination against Women (CEDAW) on the 16th of July 1980 during the World Conference on the UN Decade for Women that was held in Copenhagen and ratified it on the 18th of September 1981. CEDAW makes it categorically clear that "state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations."²⁹ It goes further to mandate state parties to the Convention to ensure "the same rights and responsibilities during marriage and at its dissolution."³⁰ Egyptian government has made reservations to the provisions of article 16 of CEDAW by raising religious beliefs that rules conjugal

²⁵ Article 2 of the Constitution of Egypt.

²⁶ Hossam Bahgat and Wesal Afifi "Sexuality Politics in Egypt", in Correa, Sonia & Parker, Richard, *Sex Politics – Reports from the Front Lines*, pp. 53-90. Sexuality Policy Watch, 2007, available at http://www.sxpolitics.org/frontlines/book/pdf/capitulo2_egypt.pdf.

²⁷ Muhammad Gabr Al-Said, Abdu-Allah Gameel "Adultery and Fornication Offences Penalty According to the Egyptian and Algerian Criminal Law, an Evaluative Study from an Islamic Viewpoint" 2019 (3) 2 *Journal of Legal and Political Thought* 146.

²⁸ Article 93 of the Constitution, 2014.

²⁹ Article 16 (1) of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), 1989.

³⁰ Article 16 (1) (c) of the Convention on Elimination of all forms of Discrimination against Women (CEDAW), 1989.

relations in Egypt.³¹ Ironically the dominant religious belief in Egypt is Islam and it does not discriminate regarding the issue of fornication and adultery. Reservations makes the provisions of the ratified human right instrument to be not applicable if it conflicts with Sharia law. The Vienna Convention on the Law of Treaties forbids reservations which defeats the aims and purpose of the instrument.³² The Egyptian government has also signed the International Covenant on Civil and Political Rights (ICCPR) on the 4th of August 1967 and ratified it on the 14th of January 1982. The ICCPR protects non-discrimination in terms of the provisions of article two, three and twenty-six.³³ It has also signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the 8th of August 1967 and ratified it on the 14th of January 1982. The ICESCR protects non-discrimination on article two subsection one, two and three.³⁴ The African Charter on Human and Peoples Rights (ACHPR) also protects non-discrimination in terms of article 2.³⁵ The right to equality has been described by Tomasevski as a prevailing principle that is necessary for the operationalising human rights.³⁶

5. Conclusion

As already argued above, the regulation of adultery in the Egyptian legal framework differentiates between a wife and a husband. The husband would only be guilty of adultery if he has done it within his marital home that he shares with his wife. However, if he had sexual relations with a maiden other than his wife in a hotel that would not be regarded as adultery. On the other hand, a wife is guilty of adultery regardless of the location. It does not end there, a wife's punishment for adultery is four times more severe than that of the husband because she receives a prison sentence of not more than two years. A husband who is found guilty of adultery merely receives a punishment of not more than six months. There is no reasonable justification that is raised behind this discrimination and no societal goal that is intended to be achieved except the clandestine promotion of patriarchy at the expense of females. Moreover, a husband is justified if he murders her wife and her culprit after catching them in an act of adultery, and because of this he receives a very lenient punishment. The justification raised for giving him less punishment is that he gets furious and lose control of his emotions when he sees his wife in bed with another men. What is good for the goose must be equally good for the gander. A wife is human too, and her emotions are more likely to be uncontrollable if she finds her husband in bed with another woman. It is so unfortunate that she is not given the same right as her male counterpart because if she kills her husband together with his culprit in an act of adultery, she cannot be exonerated like her male counterpart by getting a reduced sentence and she would receive maximum punishment for murder as prescribed in terms of the Penal Code of Egypt. It is already submitted earlier that the current regulation of adultery is completely against the Islamic principles of Sharia. This is a clear violation of the equality rights for women, and this conflicts with the international human rights instruments that strives to promote and protect an egalitarian society for all humankind. One of the international instruments that specifically deals with the eradication of all forms of discrimination against females is the Convention on Elimination of all forms of Discrimination against Women (CEDAW). The current differentiation between men and women on the issue of adultery in Egypt is a violation of some provisions of CEDAW. There is a need for the Egyptian government to amend its Penal Code by removing all discriminatory provisions in its statutes regulating the issue of adultery to comply with its international human rights obligations.

³¹ Jenefsky Anna, "Permissibility of Egypt's Reservations to the Convention on the Elimination of all Forms of Discrimination against Women" 1991 (15) 2 *Maryland Journal of International Law* 207.

³² Ali Moussa "The Judicial Resolution of the Tension between Human Rights Treaties and Shari'a Law Reservations under the Constitution of 2014" 2018 Master's Thesis, The American University in Cairo.

³³ Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights, 1966.

³⁴ Article 2 (1), (2) and (3) Of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

³⁵ Articles 2, 3, 18 and 28 of the African Charter on Human and Peoples Rights (ACHPR).

³⁶ Tomasevski "Indicators" in Eide, A., Krause, C., Rosas, A. & Toebes, B. (eds.), *Economic, Social and Cultural Rights*, 2nd ed., Martinus Nijhoff, 2001, 533.

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