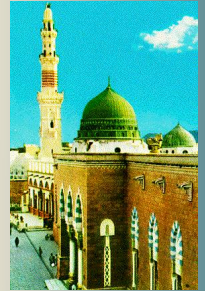


Ex. 2: The Offence of *Zinā*, Penalties and Other Issues

Imran Ahsan Khan Nyazee

info@nyazee.com

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ABOUT THIS EXERCISE

This is an exercise in interpretation that is sometimes given to students for practising their skills. In this exercise, the main idea is to show how certain principles learned in *uṣūl al-fiqh* apply here. Some of these rules pertain to the theory of abrogation, the restriction of the general words in the Qur'ān and the Opinion of a Companion.

THE RULES PERTAINING TO THE OFFENCE OF *zinā* ARE WELL SETTLED; OUR PURPOSE IS TO FOCUS ON THE REASONING. PLEASE NOTE THAT WE ARE INTERESTED IN THE WHY OF AN OPINION MORE THAN THE OPINION ITSELF. YOU ARE, THEREFORE, REQUESTED TO FOCUS ON HOW THE MEANING EMERGES FROM THE TEXT ITSELF.

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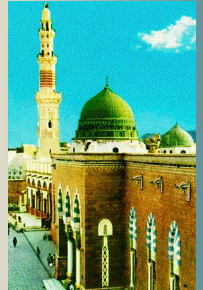
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1. Verses

وَالَّتِي يَأْتِيَنَّ الْفَاحِشَةَ مِنْ نَسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِّنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّىٰ يَتَوَفَّهِنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا

1) (In the case of) those women who bring about *fāhishah*, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or God ordain for them some (other) way. [Qur'ān 4:15]

وَالَّذِينَ يَأْتِيَنَّهَا مِنْكُمْ فَادُّوهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرِضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ تَوَّابًا رَّحِيمًا

2) If two among you bring about *fāhishah*, punish them both. If they repent and amend, Leave them alone; for God is Oft-returning, Most Merciful. [Qur'ān 4:16]

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ
الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

3) The woman and the man guilty of *zinā* (unlawful sexual intercourse), flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day: and let a party of the Believers witness their punishment. [Qur'ān 24:2]

وَلَا تَقْرَبُوا الزَّانِيَةَ إِنَّهُ كَانَ فَاحِشَةً وَسَاءَ سَبِيلًا

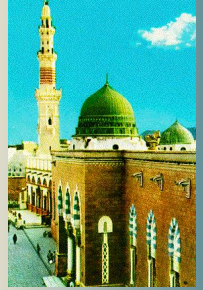
4) And do not go near *zinā*, verily it is *fāhishah* and an an evil way. [Qur'ān 17:32]

وَمَنْ لَّمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكِحَ الْمُحْصَنَاتِ الْمُؤْمِنَاتِ فَمِنْ مَّا مَلَكَتْ أَيْمَانُكُمْ مِّنَ فَتَايِكُمُ الْمُؤْمِنَاتِ

5) If any of you have not the means wherewith to wed *muḥṣanāt*, they may wed believing girls from among those whom your right hands possess. [Qur'ān 4:25]

فَإِذَا أُحْصِنَ فَإِنَّهُنَّ بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ مِنَ الْعَذَابِ

6) When they are taken in wedlock, if they fall into shame, their punishment is half that for the *muḥṣanāt*. [Qur'ān 4:25]



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2. Traditions

1. The Messenger of Allah (peace be upon him) said: “Take from me, take from me. Allah has ordained a way for those (women): A virgin with a virgin, one hundred lashes and banishment for one year; a non-virgin with a non-virgin, one hundred lashes and stoning to death.” [Muslim] This tradition is of the level of *mash’hūr* according to the Ḥanafīs. (al-Sarakhsī).

2. Yazīd b. Nu‘aim on his father’s authority said: Mā‘iz came to the Prophet (peace be upon him) and admitted (having committed adultery) four times in his presence, so he ordered him to be stoned to death, but said to Huzzāl: If you had covered him with your garment, it would have been better for you.

Ibn al-Munkadar said: Huzzāl had ordered Mā‘iz to go to the Prophet (peace be upon him) and tell him (about his having committed adultery).

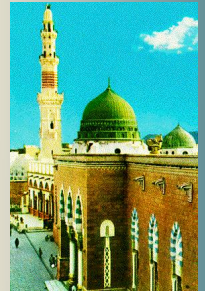
[Traditions 4364 and 4365 from Sunan Abū Dawūd as translated by Dr. Ahmad Hasan]

3. The Prophet (p.b.u.h.) said, “O Unais! Go to the wife of this (man) and if she confesses (that she has committed illegal sexual intercourse), stone her to death.” [Bukhari]

(This was a case where a man came and complained to the Prophet(p.b.u.h.) that his wife had had unlawful sexual intercourse with his servant).

4. Penalty of *rajm* awarded to Jews.

5. ‘Alqamah b. Wā’il said on the authority of his father: A woman went out in the time of the Prophet (peace be upon him) for prayer and a man attacked her and got his desire of her (raped her). She shouted and he went off, and when a man came by, she said: That (man) did such and such to me. And when a company of the Emigrants came by, she said: That man did such and such to me. They went and seized the man whom they thought had had intercourse with her and brought him to her. She said: Yes, this is he. Then they brought him to the Apostle of Allah (peace be upon him). When he (the Prophet) was about to pass sentence, the man who had assaulted her stood up and said: Apostle of Allah, I am the man who has done it with her. He (the Prophet) said to her: Go away,



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for Allah has forgiven you. But he said some good words to the man (Abū Dawūd said: meaning the man who was seized), and of the man who had had intercourse with her, he said: Stone him to death. He also said: He has repented to such an extent that if the people of Medina had repented similarly, it would have been accepted from them.

[Tradition 4366 from Sunan Abū Dawūd as translated by Dr. Ahmad Hasan.] (Q. What is the meaning of the words: “When he (the Prophet) was about to pass sentence.” Q. What is the meaning of forgiveness as it occurs in the last sentence)

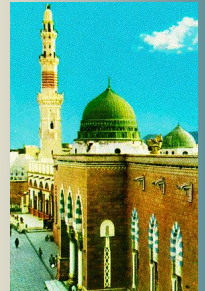
3. Preliminary Issues

1. Do verses at (1), (2) and (3) apply to the same offence? What method will you adopt for determining the meaning?
2. If the verses apply to the same offence, what penalties will you apply for this offence? There are three penalties mentioned: locking up in houses, torment, and one hundred lashes. What method will you adopt for reconciling these verses as regards the penalties?
3. If the verses, in your view, do not apply to the same offence, what is your opinion?

4. Arguments of the Khawārij Against *Rajm*

The Khawārij give the following arguments to show that *rajm* is not a prescribed penalty for the offence of *zinā*.

1. *Rajm* (stoning to death) is a very severe penalty, yet it is not mentioned in the Qur’ān. It is, therefore, not a prescribed penalty (*ḥadd*).
2. Each of the traditions in which *rajm* is provided as a prescribed penalty is a *khavar wāḥid*. A *khavar wāḥid* cannot restrict or alter the general meanings found in the texts of the Qur’ān.



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3. In verse (6) above, the married slave girl is awarded half the penalty fixed for married women. It is not possible to apply *rajm* as half a penalty, but 100 stripes can be converted to 50, therefore, *rajm* is not a prescribed penalty.

How, in your view, would the majority of the jurists answer these arguments. You may give your own arguments against the three arguments provided by the Khawārij?

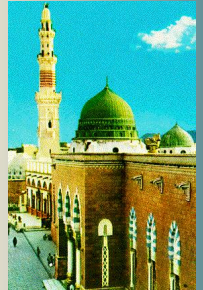
5. Arguments of the Zāhirīs to Show that *Rajm* and 100 Stripes are to be Awarded to the Married Offender and 100 Stripes and Banishment for the Unmarried Offender

1. The Zāhirīs going by the literal meaning of the tradition at #1 maintain that the penalty of *ḥadd* for the married person is *rajm* plus *100 stripes*. The majority disagree. Why?
2. They also maintain, for the same reasons, that the penalty for the unmarried offender is *100 stripes* plus *exile* for a year. Incidentally, the Shāfi'īs also uphold this. The Ḥanafīs disagree with both and maintain that while *100 stripes* is *ḥadd*, exile may or may not be awarded as it is *ta'zīr*. What could be their arguments?

Build up the arguments yourself.

6. The Offence of *Zina* and the Offence of Rape

It is sometimes maintained that the offence of *zinā* and the offence of rape are two separate offences. Islahi Sahib (Amīn Aḥsan) (see *Tadabbur al-Qur'ān*) apparently argued that rape is a much more serious offence and it is similar to *ḥirābah*. This argument has recently been advanced in an article published in *Islamic Studies*. What is your opinion?



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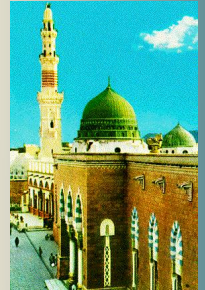
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In *Fed. of Pakistan v Hazoor Bakhsh* (PLD 1983), Justice Aftab has argued against *rajm* on the basis of different versions of the last tradition mentioned above (i.e., about the woman raped while going to the mosque). Please examine those arguments before forming your opinion.



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