

STOP STONING IN AFGHANISTAN

November 2011

LEGAL ANALYSIS ON THE PROHIBITION OF STONING FOR SPECULATIVE ZINA UNDER SHARIAH LAW



Aisha (pbuh) narrated that the Prophet (pbuh) said 'Shield Muslims from Hudud as much as you can, if a person has a way let them go, for it is better for a judge to make a mistake in dismissing charges than in applying the punishment on an innocent.'^[40]

A Taliban spokesman, Zabiullah Mujahid defended the practice, saying: 'Anyone who knows about Islam knows that stoning is in the Koran, and that it is Islamic law.' 'There are people who call it inhuman - but in doing so they insult the Prophet. They want to bring foreign thinking to this country.'

Zina

The term zina translates as unlawful sexual intercourse and encompasses fornication and adultery. The offence of zina is covered in the Quran and Hadith. This covers the definition of zina, the evidentiary requirements needed to substantiate an accusation of zina and the appropriate punishment for it.

'Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other (evils))' (17:32)

Chapter 24 of the Quran deals with this more specifically.

'The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes...and let a party of the Believers witness their punishment' (24:2)

No act short of zina, that is physical penetration, will suffice.

Ibn Abbas reported that the Prophet said to Ma'iz: 'Maybe you just kissed, maybe you touched her, or looked...' and the man said: 'No!' The Prophet said, 'So, did you penetrate her? (using no metaphors), and the man said 'Yes!' The Prophet then ordered his punishment.^[18]



Picture and Report by BBC News

The stoning lasts two minutes. Hundreds of rocks - some larger than a man's fist - are thrown at her head and body. She tries to crawl out of the hole, but is beaten back by the stones. A boulder is then thrown at her head, her burka is soaked in blood.

"The Quran makes clear that zina is proof of penetration, and nothing less. Running away is not proof of zina."

Quran clearly requires four witnesses to support a charge of zina.

The Quran sets out the evidentiary requirements to support a charge of zina: ‘And those who launch a charge against chaste women, and produce not four witnesses to support their allegations,- flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors;-’ (24:4)

This is a fixed requirement. No less would be accepted. Furthermore, scholars of Islamic jurisprudence have established that the 4 witnesses must be male, credible, sane, Muslim witnesses of morally upright character. [19]

‘Why did they bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of God, (stand forth) themselves as liars!’(24:13)

Failure to prove with four witnesses will lead to the crime of *qazf* for wrongful accusation.

An unsubstantiated accusation of zina against another person is an extremely grave offence and can amount to the hadd offence of qazf or wrongful accusation against another person for zina. Here the Quran states:

‘Behold, ye received it on your tongues, and said out of your mouths things of which ye had no knowledge; and ye thought it to be a light matter, whilst it was most serious in the sight of God’ (24:15)

‘And when did ye not, when ye heard it say? – ‘It is not right for us to speak of this: Glory to God! This is a most serious slander’ (24:16)

Witnesses must testify to the same act of penetration, committed by the same people, at the same time and place.

In addition to the 4 witness-requirement, the witnesses must testify that he/she saw the actual act of penetration. And the testimony across all 4 witnesses must be with regards to that same act by the same people, at the same time.[20] The slightest differences in testimonies such as disagreement about the time and place of the act or even the colour of the accused clothes will be ruled out and witnesses punished for qazf. [21]

When al-Mughirah was accused of zina, three of the witnesses testified that he had committed the actual act of intercourse. But doubt was created when the 4th man testified. He stated, “I saw a behind going up and down, heavy breathing, and I saw her legs on his shoulders like a donkey’s ears. I do not know beyond that.” The testimony of the 4th man was not sufficiently explicit and created doubt and therefore Khalifah Omar dismissed the zina charge. He also convicted the other 3 men of false accusation.[22]

Conclusively, all 4 male, Muslim, adult and credible witnesses testified with regards to the same act without disagreement as to time and place of the act, failure of which will lead to a charge of slander incurring the penalty of 80 lashes of the cane. Other than that, only the willful confession from the accused can attract the charge and conviction of zina. Moreover, according to the Hanafi madhab, only a confession to zina made repeatedly at 4 separate occasions constitute valid confession[23]. The confession can also be retracted at any time, including during the execution of the sentence.[24]

It seems odd that the Quran attaches an evidentiary burden that effectively makes it very difficult to prosecute a zina offence. Above that Islamic fiqh has added additional procedural intricacies impeding zina prosecutions. Even the narratives of the Prophet show a huge reluctance on his part to indict another for this offence.

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Officials said a number of religious leaders in the city had been issuing fatwas (Islamic religious edicts) asking people to report any one who was "involved in adultery". Ghazni Stoning, BBC

Prophet's clear reluctance to convict anyone of zina

There is a reported Hadith that the Prophet repeatedly turned away from a man who confessed zina. Abu Hurayrah narrated: *'A man from the tribe of Aslam came to the Messenger while he was in the mosque and said to him: 'Oh Messenger of God, I have committed adultery'. The Messenger turned away from him. The man then stepped in front of the Messenger and said: 'I committed adultery.' The Messenger again looked away. The man did the same thing four times. When he confessed the fourth time, the Messenger called upon him and asked him: 'Are you insane?' The man said: 'No!' The Messenger then asked him: 'Were you married when you committed this act?' He said 'Yes!' It was only after this that the man was ordered to be punished for zina.*[\[25\]](#)

In another Hadith, 'The Prophet turned towards Ma'iz ibn Malik for the fifth time and asked: did you have sexual intercourse with her? He replied yes. The Prophet inquired: 'Just as the collyrium needle enters into the container (or rope enters into the well)? The man replied yes. Thus after insisting on his confession, the Prophet ordered for him to be punished of zina'[\[26\]](#)

Zina according to Hadith was voluntarily confessed

The above Ahadith are not the only two demonstrating this reluctance. One will also notice that for most of such Ahadith on punishment for zina, a voluntary confession on part of the adulterer is made to the Prophet Muhammad as opposed to someone else reporting it to the Prophet. This correlates to the Quranic injunction *'it is not for us to speak of'*[\[27\]](#).

**The Prophet Muhammad mentioned to an adulterer who had confessed to him:
"..Had you kept it a secret, it would have been better for you."[\[34\]](#)**

Zina according to the Quran, "It is not for us to speak of.."

A contextualised reading of the Quranic verses on *zina* will further explain the reasons why the offence of zina was made difficult to prove. When read against the following verses on *qazf* (*wrongful accusation*), it is clear that the Quran is postulating an Islamic society that does not engage in prying or publicizing the sexual indiscretions of others. It is also clear in the Hadith that testimonies obtained by violating the privacy of the accused will be disregarded.[\[28\]](#) Generally in Islamic law, evidence obtained from spying against the privacy of another person's residence or shelter is considered unlawful.[\[29\]](#) When understood in reference to adjacent verses in the Quran and other injunctions of appropriate behaviour in Islam, the nature of *zina* conceived in Islamic law is not adultery per se but public indecency.[\[30\]](#)

Confession of zina intended to be a form of repentance

Next, whilst punishment for zina is likely to carry negative connotations of physical chastisement on part of the state against ill-disciplined citizens, the Prophet conveyed the punishment for *zina* to be a form of repentance. The Ahadith above show that not only were confessions to zina made voluntarily and repeatedly by the adulterer, more importantly it shows him being very insistent that he be punished for it. The Islamic belief that acts on Earth are rewarded or punished in the Hereafter is corollary to this; *zina* cases in the Hadith show a desire on the part of the sinful one to repent on Earth rather than suffer for it in the hereafter.[\[31\]](#) The Prophet himself established this clearly.

A man came to the Prophet expressing his aversion towards a woman who was punished for zina. The Prophet unhappy with his behavior told him, 'She repented such a repentance that if divided between seventy people of Medina, it would be enough for all of them'[\[32\]](#)

Protecting women from zina accusations

If Qur'anic revelations were sent in response to speculations of female sexual misconduct, "Those who slander chaste women," (24:23) a study of the contextual history behind these verses would suggest no different. They were revealed in response to an incident involving the Prophet's wife, Aisha; an incident that came to be known as 'The Necklace Affair'.

The Necklace Affair

It was narrated that Aisha had been accidentally left behind in the desert whilst she was looking for her necklace. She returned home, accompanied by a young man who had discovered her. Not long after, rumours of an alleged affair between Aisha and the young man pervaded throughout the Medinan enclave. It was this incident that prompted the revelations against public discussion and slander of female dignity; an occurrence so prominent in this cultural phenomenon. This explains the Quran's direct mention of impugning female honour, to the exclusion of impugning the honour of the male. Any speculation of her sexual impropriety had to be supported by insurmountable evidence. Failure to produce this attracted a harsh punishment; 80 whips of the cane.

'Those who slander chaste women, indiscreet but believing, are cursed in this life and in the Hereafter: for them is a grievous penalty' (24:23)

Quraishi opines, 'Where the public refuses to perpetuate rumours, responding instead that: *'it is not for us to speak of'*, the patriarchal tendency to invest the honour of society in women's sexuality loses force....The honour of a woman is not a tool, it is her fundamental right.'

Moreover, following these verses, it is stated that where a woman is accused of zina by her husband, immediate and absolute protection is given by *'her calling God four times to witness that he is indeed telling a lie'* Quran 24:8. Alwazir states, *'a woman's word to swear her innocence is sufficient to both preserve her reputation and result in punishment of her accusers. It is thus clear that singling out women for punishment based only on accusations or assumptions has no basis in Islam.'*

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CALL TO ACTION

In addition to the violation of the laws in Afghanistan, the act of stoning is brutal and a violation of human rights. As a gathering of Afghan youth and women's organizations, human rights organization and civil society activists, we urge the Islamic Republic of Afghanistan to take immediate action against the brutal act of stoning to protect the human rights of men and women in Afghanistan. We demand the following actions from the government, which is responsible for the wellbeing of all its people and justice for all individuals in the country:

1. The government of Afghanistan must prosecute those involved in sentencing individuals to stoning or in implementing stoning.
2. The government of Afghanistan must publicly condemn stoning using media through a statement by the President Hamid Karzai himself.
3. Political pressure must be applied on the Ulema Council to condemn stoning, rather than support it.
4. Economic and political pressure must be applied to local governments that have not been able or willing to prosecute those involved in stoning or prevent them.

We also urge the United Nations, European Union, and other international bodies to take strong actions to pressure the Islamic Republic of Afghanistan to take a stand against the stoning of individuals.

KEY POINTS

1. Running away is not the equivalent of zina, nor can it be regarded as proof of zina. According to the Quran, zina is proved through the unequivocal testimonies of 4 male, credible Muslim witnesses to the actual act of penetration. Moreover, the testimonies must corroborate with each other as to the actual act, taking place at the same location and time, without one or more of the witnesses retracting their testimony at any time during and after testifying.
2. Prying, gossiping and publicizing the private affairs of others is considered a grave sin in Islam. Evidence gathered from such behaviour should not be used in an Islamic judicial forum for a zina prosecution. The Quran instructs that without the 4-witnesses requirement, zina is “not of us to speak of”. The Prophet’s example clearly affirmed this principle reminding adulterers “Had you kept it a secret, it would have been better for you.”[34]
3. Mullahs and Judges are responsible for ensuring respect of due process and the preservation of the rights and privacy of the defendants. Even in the event a couple confesses to adultery, Mullahs and Judges as bearers of justice, are obliged to encourage adulterers to retract their confession as the numerous examples of the Prophet above displays.
4. A confession to zina can be withdrawn at any time during the process of investigation and punishment. At the point confession is withdrawn, all investigation and punishment related to the offence should cease immediately.
5. Repentance is a foundational concept in Islam towards the path of God’s mercy. Though punishment is not an empty concept in Islam, the Quran qualifies punishment by stating: “... unless they repent thereafter and mend (their conduct); for God is Oft-Forgiving, Most Merciful.” (24:5)
6. To pre-empt potential allegations against women’s groups of what the above suggests, we clarify that this analysis does not hold the view that zina is permissible or should be encouraged or considered morally acceptable. The analysis in contrary, stresses the importance of using Quranic principles and examples of the Prophet as a manner of respecting due process for any zina charge against a person. It should remind the community that it is not for us to gossip and publicize the private affairs of others on frivolous grounds and speculations. We call upon all judicial actors to heed the seriousness of frivolous accusations as clearly instructed by the Quran and ensure due process is respected throughout the entire process.

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