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Means of Proof in the Crime of Adultery and its Legal Validity (A Jurisprudential Study Compared to Positive Law)

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Abstract

Islamic jurisprudence relies on certain methods to prove the crime of adultery that leave no room for doubt about the commission of this crime, such as confession and admission of the crime, and the testimony of four just witnesses. Some modern methods have emerged in our present age, such as photography, video recording, and DNA fingerprinting, through chat programs and the like. This necessitates a reconsideration of the means of proving this crime and the possibility of relying on contemporary methods to prove it. The research reached a number of conclusions, the most important of which is that Islamic law sets precise conditions that are difficult to meet or exist to prove adultery. Jurists agreed that adultery is proven by one of two things: confession and admission, and evidence. They differed on its proof by circumstantial evidence. None of these modern methods are considered a means of proving the crime of adultery, because each of them is subject to possibility. Rather, these methods are taken as acceptable evidence, but they cannot be relied upon unless they contain elements of protection against forgery, imitation, and tampering.

Keywords: *The Crime of Adultery, Means of Proof, Admission, Testimony, Evidence, Genetic Fingerprint (DNA), Islamic Jurisprudence, Positive Law, The Authority of Proof, Criminal Proof, Criminal Justice, Judicial Recognition.*

Introduction

Islam is a comprehensive way of life that aims to improve and benefit humanity, and to guide people to the shore of safety and security. Allah has honored man and placed him in the highest ranks, but man may commit crimes that undermine his dignity and degrade his standing among people. Among these crimes is the crime of adultery. It is a serious crime whose punitive impact goes beyond the perpetrator's body to undermine his dignity and harm the reputation and dignity of his family. Therefore, before attaching this accusation to a person, it is necessary to verify, scrutinize, and confirm the truth of the judgment against him. Islamic law has specified definitive means of proving this crime, leaving no room for doubt about its commission, such as confession and admission of the crime, and the testimony of four just witnesses. Despite the strength of these means, their validity has not been free from doubt. Some modern means have appeared in our present age, such as: photography, video recording, and genetic fingerprinting (DNA), through chat programs and the like. Many discussions have arisen regarding the strength and validity of these modern methods for proving adultery. This requires a re-examination of the methods of proof in the crime of adultery in light of contemporary developments, and ensuring the validity of both old and contemporary methods of proof in proving the crime of adultery.

Research Topic

This research deals with the study of the original and contemporary means of proof in the crime

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of adultery, their legal authority, and the position of positive law on them. This is achieved through: defining the nature of the crime of adultery, the means of proof, their types and their authority in proving that crime of adultery, their most prominent features and what limits their suitability to be relied upon in proof, while clarifying the position of positive laws and contemporary systems on them.

Reason for Choosing the Research

There is no doubt that the legal conditions for proving the crime of adultery are precise conditions that are difficult to meet to prove adultery, especially the conditions for testifying to adultery, which has led some to question the validity of legal means to prove it. The scientific and technological revolution has also had an impact on the emergence of some means in our present age, such as: photography, videography, genetic fingerprinting (DNA), and the like, which apparently indicate the occurrence of the crime of adultery, but they are a source of controversy because of the possibility of forgery, imitation, and tampering with them, which requires studying this problem and determining what is suitable to rely on from these means to prove this crime.

The Research Importance

This topic derives its importance from the significance of the crime of adultery, which is considered one of the most serious crimes threatening the security and safety of societies. The importance of this study lies in shedding light on the disciplined and conclusive means of proving the crime of adultery, so that punishment and the resulting shame and disgrace do not befall an innocent person.

The study also helps clarify the means of proving adultery adopted in Islamic law, what can be considered modern means of proof, how to benefit from them, and present appropriate suggestions and recommendations in this area.

The importance of the study also emerges in demonstrating the primacy of the Sharia system in applying the rules of criminal investigation and evidence, thus achieving social security and protecting human rights.

Research Problem

The emergence of some modern methods in our present age, such as photography and genetic fingerprinting, which provide almost definitive results on the occurrence of the crime of adultery, has led to their adoption by most courts in the world as conclusive evidence in proving adultery and denying lineage. Some in Islamic countries have called for their adoption as evidence of adultery, which can be sufficient instead of the legal means of proof that are difficult to achieve. Hence, the problem of the study can be defined as clarifying the position of Islamic law on the means of proof in the crime of adultery and the adoption of modern methods as evidence of the occurrence of that crime.

Previous Studies

Basri (2024) examined the legal assessment of the criminal offence of adultery in Indonesia and its implementation in legal practice. The employed research method is normative juridical legal study, approached through legislation. This study elucidates that the criminal offence of adultery is governed by the Criminal Code as a complaint offence. The legal examination concerning the criminal offence of adultery must elucidate the application of the Criminal Code provisions

against offenders, as it has failed to yield a deterrent impact. The execution of criminal rules is suboptimal because to societal indifference towards norms, social values, and religion.

Apriyanti (2023) study aims to illustrate the degree to which Islamic criminal law preserves human dignity, especially in cases of individuals accused of adultery. This research utilises a normative approach, applying an Islamic legal framework. The study gathered primary and secondary material from several sources, including texts on fiqh, hadith literature, publications on human rights and dignity, academic journals, and other articles. The Bayani approach will be utilised to analyse the data. Research findings demonstrate that adultery can be established using three methods: the testimony of four witnesses, the confession of the offender, and evidence of pregnancy. However, in fact, obtaining all three types of proof can be exceptionally difficult, as the core principle of Islamic penal law is to avoid imposing punishments in circumstances that are uncertain (*shubhat*). Islam emphasizes the importance of human rights, human dignity, and human value.

Chowbe (2011) discusses the regulation of adultery under the various legal frameworks and the way traditional legal provisions of adultery are historically contoured along the social norms of sexual morality. Section 497 of the Indian Penal Code, which was passed more than 150 years ago by the British colonial administration in India, has been under attack in the country since long due to its gender discrimination nature, being a product of old-fashioned cultural traditions, and being in violation of the constitutional ideals of equality. The clause has attracted continuous debates on whether it should be retained, amended or repealed. This work examines adultery in its legal and conceptual perspective and its wider impacts in marriage relations, property rights and legitimacy of the children, remarriage and divorce and other issues. It also determines the conditions and rationales of criminalizing adultery based on philosophical grounds appreciating its relevance and necessity to that extent in the current society. It is on this reason that the legal dilemma of whether adultery ought to be still maintained in the legal books and to what magnitude is the degree of justification that legal enforcement in the existing social-legal environment is adopted is raised in the analysis.

Al-Zuhayli's study (2008) addressed the authority of contemporary circumstantial evidence by defining it, explaining its legitimacy, its authority, and its ruling, while presenting contemporary applications. The study concluded with a number of findings, the most important of which is that circumstantial evidence is considered one of the means of judicial evidence, and its legitimacy has been proven by the Qur'an, the Sunnah, and reason. It has been practically endorsed by most jurists, and has been established by all contemporary laws and regulations. The study's findings also demonstrated that scientific progress, new discoveries, and contemporary technologies have produced scientific results that can be relied upon as evidence, just like simple circumstantial evidence, such as blood analysis and genetic fingerprinting.

Al-Dasouqi (1999), the book deals with the crime of adultery in terms of its elements, evidence to prove it, the punishment required for it, and trial procedures. It reached important results, including the confirmation that the Islamic system is more regulated for people and more wise in the relationships of the individual, family, and society than the positive laws in which legal texts have striven to deal with the crime after it occurs, unlike what Islam has brought, which has established preventative treatments before the crime occurs.

Al-Batrawy 1991 dealt with the philosophy of criminalizing sexual acts and the main ideas guiding the material element, criminal intent, the marital relationship, and the special conditions of the husband's crime, and the method of dealing with the crime of adultery, defenses and

evidence of proof, arriving at the punishment of adultery and how to implement the punishment within the framework of understanding contemporary positivist thought. Among the most important results that it arrived at: confirming that Islam is a religion of guidance before being a religion of punishment as some understand it, and that the Islamic religion dealt with human problems that reflect the innate natures of human beings with approaches of mercy and firmness in order to stabilize human society with controls that rose to the level of comprehensiveness that achieves the protection of the individual, family and society, unlike the positivist laws whose texts are based on the right to harm and benefit on an individual basis rather than on a societal basis.

Research Methodology

This topic is studied using an analytical inductive approach, presenting the jurisprudential opinions, their evidence, and a selection of the most likely opinions. This is achieved by defining the issue in general terms, then explaining the opinions contained therein, one by one. I mention each opinion, then the prominent scholars who supported it, then present their evidence. I discuss them in terms of their authenticity and weakness, and the points of objection to them, concluding with the preference for the opinion supported by the evidence and supported by the texts.

Attribute Qur'anic verses to their places in the Holy Qur'an.

A brief definition of the lesser-known figures included in the body of the treatise.

A brief definition of lesser-known cities and countries.

I cite hadiths from the Sahih of Bukhari and Muslim, based on their provenance. If I do not find them in these two collections, I cite them from the four reliable Sunan collections: Sunan Abi Dawud, Sunan al-Tirmidhi, Sunan al-Sughra of al-Nasa'i, and Sunan Ibn Majah. If I do not find the hadith in these collections, I cite the hadiths from the four reliable Sunan collections. I extracted it from all the other chains of transmission.

Research Plan

This research addresses the meaning of proof, adultery, and the intended meaning of each, the most important means of proof, and the positions of Sharia jurists and positive law on them. This research is divided into two main topics.

Topic One: The concept of proof and the crime of adultery.

First requirement: The definition of proof in language and in jurisprudential and legal terminology.

Second requirement: The definition of adultery in language and in jurisprudential and legal terminology.

Topic Two: The validity of means of proof of adultery.

First requirement: Proving adultery by confession.

Section One: Definition of confession.

Section Two: The validity of confession in proving adultery.

Subject Three: Conditions of confession that prove adultery.

Condition One: Repeated confession.

Second requirement: Proving adultery by testimony.

Section One: Definition of testimony.

Section Two: The validity of testimony in proving adultery.

Section Three: Conditions of testimony regarding the crime of adultery.

Third requirement: Proving Adultery by Evidence

Section One: Definition of Evidence

Section Two: The Validity of Evidence in Proving Adultery

Section Three: Images and Videos Captured by Surveillance Cameras

Section Four: DNA Analysis

Chapter One

The Concept of Evidence and the Crime of Adultery

First requirement: Definition of Evidence

This section examines the definition of evidence in language and in the terminology of jurists and legal experts. This is done through three questions:

The first section: Definition of proof in the language

Linguistically, proof is the root of the verb *athbat*, from the root word *thabata*, meaning something is always stable or correct. Ibn Faris said: "The letters *tha*, *ba*, and *ta* are a single word, and it refers to the permanence of something." Someone stayed in a place, he stayed there. The matter became correct.

A firm statement: Correct. He was certain about the matter and opinion and was steadfast. He took his time in it and did not rush, and he was certain about his matter. If he consulted and investigated it. Proof: establishing an argument and providing evidence.

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Second requirement: Definition of Proof in the Terminology of Jurists. In the terminology of jurists, proof has two meanings, depending on its generality and specificity

The first term: Proof in its general sense, which is: ruling that something is proven for another.

What is meant by proof in its general sense is: establishing an argument in all cases, whether it is based on truth or fact, whether it is before a judge or someone else, whether it is during a dispute or before it, and whether it is in a legal, linguistic, or scientific matter.

The second term: Proof in its specific sense, which is: establishing evidence before the judiciary through the methods specified by Sharia regarding a right or fact that has legal consequences.

This specific term is appropriate for this discussion, as it means relying on legal evidence through which arguments can be established before the judiciary to prove crimes, so that the judge can formulate his legal ruling based on it.

Based on this definition, proof has the following characteristics according to jurists:

First: It relies on evidence validated by Sharia law to establish the argument.

Second: It must be presented before a court, which is a necessary condition for judicial proof, especially in proving crimes such as adultery and highway robbery, as proof before anyone other than a judge is meaningless.

Third: It must be presented using the methods specified by Sharia law, such as testimony, confession, conclusive evidence, and oaths. This is an important condition that excludes proof using devious, speculative, and immoral methods.

Fourth: It establishes legal effects, which are those that the Sharia has established or considered, in order to exclude the effects and punishments that humans have established in violation of God's ruling.

Section Three: Definition of proof in the terminology of legal experts

Legal scholars have defined proof in two forms:

The first form: proof in its general sense, which is the attempt to arrive at an abstract truth. This is the case in scientific, historical, or criminal proof, where the aim is to verify an unknown or disputed fact by any means.

The second image: Judicial proof in law, is: presenting evidence before the judiciary through the methods specified by the system on the existence of a disputed fact.

Based on this definition, proof in positive law has the following characteristics:

First, it is judicial proof, meaning that it can only be made before a court, whether it is a state court or before persons chosen by the parties in cases where arbitration is permitted.

Second: It is a restricted proof, meaning that it is only done through the methods specified by the law, according to the procedures specified for each one. The judge cannot form his belief through any other methods.

In this sense, it is similar to proof among jurists. Both agree on the necessity of establishing evidence before the judge and relying on objective means of proof. They differ on some procedures, such as not equating the testimony of women with that of men, and the inadmissibility of women's testimony in cases of hudud (prescribed punishments). Similarly, proof in Islamic law differs from that in law in terms of the legality of the consequences of crimes when proven.

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Section Two: Definition of adultery in language, jurisprudential terminology, and legal terminology

Section One: Definition of adultery in language.

Adultery in the language: the source of zana is yazni zinaan and zinaan: he committed fornication. And the woman commits fornication and zinaan, meaning she deceives.

Al-Jawhari said : "Zina is lengthened and shortened: the short form is for the people of Hijaz, and the lengthened form is for the people of Najd. He committed adultery, he commits adultery. The nisba to the shortened form is: zanawi, and to the lengthened form is: zanai. And he fornicated him with fornication, meaning he said to him: O adulterer."

Adultery: is the act of having intercourse with a woman without a legal contract. Its root is:

narrowness. It is said: the place became narrow, and a narrow, adulterous vessel.

Adultery may also be applied to anything less than sexual intercourse with a foreign woman without a legal contract. The adultery of the eye is looking. The adultery of the tongue is speaking. The adultery of the hand is touching. In the hadith: "The share of adultery has been decreed for every son of Adam, and he will inevitably attain it. The adultery of the eyes is looking, the adultery of the ears is listening, the adultery of the tongue is speaking, the adultery of the hand is touching, the adultery of the feet is walking, the heart desires and longs, and the private parts confirm and deny that."

The second section: Definition of adultery technically.

Jurists differed in defining zina. The Hanafis defined it as: "A man having vaginal intercourse with a woman without ownership or any semblance of ownership."

The Malikis defined it as: "Deliberate intercourse with the vagina of a person who is legally responsible, without ownership, by mutual agreement."

The Shafi'is defined it as: "Perforation of the penis into a vagina that is forbidden in and of itself, free from suspicion, and naturally desired."

The Hanbalis defined it as: "Committing an immoral act in the vagina or anus."

The Zahiris defined it as: "Intercourse with someone whose private parts it is not permissible to look at, knowing that it is forbidden, or intercourse with a woman who is forbidden in and of itself."

The Zaydis defined it as: "Perforation of the penis into the vagina of a living, forbidden person, whether in the vagina or anus, without suspicion."

Anyone who contemplates these definitions will find that they agree that adultery is forbidden intercourse that occurs intentionally, with the condition of being responsible, and the absence of ownership and doubt. They differed on the true nature of forbidden intercourse that warrants the prescribed punishment. The Hanafis restricted intercourse to the woman's vagina. The Malikis expanded it, making it in a human vagina, so it included the vagina and the anus. The Shafi'is agreed with them, but added the condition that the vagina be something that is naturally desired, thus excluding the vagina of a dead woman and an animal. The most appropriate definition of the true nature of intercourse is to say: the obedient, responsible person inserts the amount of his glans into the vagina of a desired woman, whether present or past, without ownership or doubt.

Explanation of the definition:

"Mukalif" means: a sane, adult.

"Ta'i" means: not forced.

"The size of a glans penis" means: the glans penis or its size from someone whose penis has been amputated. The word "size" indicates generalization, and that inserting part of it does not warrant the prescribed punishment.

"In the vagina": indicates that he is not punished for sodomy.

"Mushtaha": indicates the exit of a dead body or an animal.

"Currently or in the past": meaning: desired or was desired, so that he could penetrate the

deformed old woman. Although she was not desired at the time, she was desired in the past.

“Without ownership or doubt” meaning: it is not a right-hand ownership or marriage ownership. Nor is it a doubt of right-hand ownership, such as having intercourse with a freed slave girl, nor a doubt of marriage ownership, such as someone who marries a woman without witnesses.

In French penal law, adultery means: the crime that arises from violating the sanctity of the marriage contract, which is committed by a married person by establishing sexual relations with someone other than his wife.

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Section Three: Definition of adultery in positive law

Some commentators on positive law have defined adultery as: desecrating the marital bed and violating its sanctity by consummating intercourse.

In French penal law, adultery means: the crime that arises from violating the sanctity of the marriage contract, which is committed by a married person by establishing sexual relations with someone other than his wife.

This definition of adultery demonstrates that positive law criminalizes adultery only when committed by a wife during the marriage. The purpose of this punishment is to protect the marital relationship by preventing the desecration of the marital bed, which would lead to the severing of the marital bond and the collapse of the family, the nucleus of society.

By comparing the definitions of this crime provided by jurists with those set by commentators on positive law, it becomes clear that the meaning of adultery in Islamic jurisprudence is more general than in positive law. Adultery in Islamic law includes anyone who has sexual intercourse with a woman who is not permissible for him in any way, whether married or unmarried, while positive law limits it to what is done by a husband or wife. Anything other than that is considered an indecent act or sexual intercourse that violates modesty, as stated in Articles [278, 279] of the Egyptian Penal Code.

Jurists have not specified a specific place for adultery, while positive law has specified the place of adultery for the husband, which is the marital home. If the husband commits adultery outside the marital home, he will not be punished, as the wife does not have the right to file a lawsuit for adultery against him unless he commits adultery in the marital bed.

Second Topic: The validity of means of proving adultery

The first requirement: Proof of adultery by confession

This section addresses the meaning of proof, admission, the legitimacy of admission in proving adultery, and the conditions that must be met for an admission to be used as evidence for the crime of adultery. This is explained through four sections:

Section One: Definition of admission.

Section Two: The validity of admission in proving adultery.

Section Three: Conditions of admission that prove adultery.

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Section One: Definition of Acknowledgment

This section addresses the definition of acknowledgment in language, the terminology of jurists, and among legal experts through three issues:

Issue One: Definition of acknowledgment in language

In the language, acknowledgment has several meanings, including: recognition and submission. Ibn Manzur said: "Acknowledgment is submission to the truth and acknowledgment of it." Its opposite is: denial and rejection.

The root of acknowledgment is: to decide. Ibn Faris said: The qaf and the ra are two correct roots, one of which indicates coldness, and the other indicates stability. The first: qurru (cold water). Qaroor (cold water) is used for bathing. The other root is stability. It is said: he settled (qarra) and he settled (istaqrara). The day of qarra (located) is the day people settle in Mina, which is the day after the Day of Sacrifice. From this comes acknowledgment; that is, if someone acknowledges a right, he has acknowledged it with his decision.

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The second issue: The definition of acknowledgment in the terminology of jurists.

Jurists have defined acknowledgment in several ways:

Ibn Abidin defined it as: "A person's declaration of a right owed to another person."

Ibn Arafa defined it as: "A report that requires the judgment of its truthfulness to be passed on to its speaker only by his words or the words of his representative."

Al-Buhuti defined it as: "The expression of a responsible person who has the choice of what he is obligated to do verbally, in writing, or by a mute person indicating that it can be believed."

It is noteworthy that these definitions revolve around one meaning, which is that acknowledgment is: "A responsible, voluntary person's declaration of a proven right of another against him." That is, it is the declaration and disclosure by an adult of sound mind and free will of a right of another that he has established in the past, whether that right is financial, such as debts and deposits, or actual, such as committing crimes that require retaliation, prescribed punishments, or discretionary punishments. And whether the right belongs to the Creator or to created beings, it is declaration of a right that a person has.

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The third issue: the definition of acknowledgment in the terminology of legal experts

In positive law, acknowledgment means recognition. Article [103] of the Evidence Law states that acknowledgment is the opposing party's admission before the court of a legal fact alleged against him, during the course of the lawsuit related to this fact.

They defined confession as: the accused's admission of the truth of the incident attributed to him or its circumstances.

It was also said that it is: the accused's admission of having committed all or some of the facts constituting the crime.

It is noted from these definitions that confession in law is similar to confession in Sharia law in terms of its general meaning and connotation, which is: a person proving the accusation against

himself.

Section Two: The Validity of Confessions in Proving Adultery.

Issue One: The Validity of Confessions in Proving Adultery in Sharia Law.

The validity of the acknowledgment of the Book has been established, as God Almighty said: {O you who have believed, be persistently standing firm in justice, witnesses for God, even if it be against yourselves.} So His Almighty's statement {even if it be against yourselves} indicates the legitimacy of a person's testimony against himself regarding the rights owed to him, and this is the acknowledgment.

Abu Ja'far al-Tabari said in his interpretation of this verse: "If someone were to say: How does a just witness testify against himself? Does a witness testify against himself? It would be said: Yes, and that is if he has a right owed to someone else and he acknowledges it to him, then that is him testifying against himself."

The validity of the confession of adultery has been established by what is authenticated in the Prophetic Sunnah from the Messenger of Allah (peace and blessings of Allah be upon him) when he stoned Ma'iz and the woman of Ghamidiyah based on their confession. It was narrated on the authority of Sulayman ibn Buraydah (may Allah be pleased with him) on the authority of his father who said: "Ma'iz ibn Malik came to the Prophet (peace and blessings of Allah be upon him) and said: 'O Messenger of Allah, purify me.' He said: 'Woe to you! Go back and seek forgiveness from Allah and repent to Him.' He said: 'So he went back not far away, then came and said: O Messenger of Allah, purify me.'" The Messenger of Allah (peace and blessings be upon him) said: Woe to you! Go back and seek forgiveness from Allah and repent to Him. He said: So he went back not far away, then came and said: O Messenger of Allah, purify me. The Messenger of Allah (peace and blessings be upon him) said the same thing until the fourth time, the Messenger of Allah (peace and blessings be upon him) said to him: From what should I purify you? He said: From adultery. The Messenger of Allah (peace and blessings be upon him) asked: Is he mad? Then he was informed that he was not insane. He said, "Did he drink alcohol?" A man stood up and smelled him, but did not find any odor of alcohol on him. The Messenger of Allah (peace and blessings be upon him) said, "Have you committed adultery?" He said, "Yes." So, he ordered that he be stoned. Then a woman from Ghamid, from Azd, came to him and said, "O Messenger of Allah, purify me." He said, "Woe to you! Go back, seek forgiveness from Allah, and repent to Him." She said, "I see that you want to send me back as you sent back Ma'iz ibn Malik." He said, "What is that?" She said, "She is pregnant from adultery." He said, "Are you?" She said, "Yes." He said, "Until you give birth." An Ansar man took care of her until she gave birth. He then came to the Prophet (peace and blessings of Allah be upon him) and said, "The Ghamid woman has given birth." He said: Then we will not stone her and leave her child young and with no one to nurse him. Then a man from the Ansar stood up and said: "I have brought him to me, O Prophet of God." He said: "So he stoned her."

This hadith is a pillar of the legitimacy of accepting confessions. The Prophet's statement to Ma'iz: "Did you commit adultery?" He said: "Yes." So he ordered that he be stoned. This is evidence that it is sufficient to prove crimes and issue rulings regarding them.

The nation has agreed that the confession is evidence against the confessor, and they have imposed the prescribed punishments and retaliation on him.

Ibn Hazm said: "They agreed that if someone confesses to committing adultery in the presence

of a judge - whose judgment is permissible - four different times, disappearing from the court between each time so that he is not seen, and he is a free Muslim, not forced, drunk, insane, or sick, and he describes and identifies the adultery, and he does not repent and the matter does not take long, then the prescribed punishment will be carried out on him unless he retracts his confession.”

* * *

The second issue: the validity of the confession in proving adultery in positive law

Positive law has taken the meaning of confession as one of the strong means of proof, so it has been called the master of evidence, as it is sufficient in place of other evidence. Article [104] of the Evidence Law states: “The confession is conclusive evidence against the confessor.”

The law has taken into account the validity of confession in proving the crime of adultery. Article [276] of the Penal Code states: “The evidence that is accepted and constitutes evidence against the person accused of adultery is: his arrest in the act or his confession...”

Thus, positive law generally agrees with Islamic law regarding the validity of confession as evidence, but the difference between them lies in the extent of the validity of this confession. The law does not grant the confession binding validity, as stated in Article [271] of the Code of Criminal Procedure: “The accused shall be asked whether he confesses to committing the act attributed to him. If he confesses, the court may suffice with his confession and sentence him without hearing witnesses.” Their statement: “If he confesses, the court may suffice with his confession” indicates that the acceptance of the confession is subject to oscillation between rejection and acceptance, and that the deciding factor in this is the judge’s conviction.

Section Three: Conditions for the confession that proves adultery

Issue One: Conditions for the confession that proves adultery in Islamic law

Jurists have stipulated general conditions for the validity of a confession that apply to all the prescribed punishments: namely, that the confession be made by an adult of sound mind and free will. The confession of a minor, an insane person, or one who is forced is not valid.

Muwaffaq al-Din Ibn Qudamah said: “A confession is not valid except from a sane and free person. As for a child, an insane person, a paralytic, a sleeper, or someone who is unconscious, their confession is not valid. We do not know of any disagreement on this.”

They cited as evidence what was narrated on the authority of Ali, may God be pleased with him, that the Prophet, may God bless him and grant him peace, said: “The pen has been lifted from three: from the sleeper until he awakens, from the child until he reaches puberty, and from the insane person until he comes to his senses.”

On the authority of Ibn Abbas, may God be pleased with him, that the Prophet, may God bless him and grant him peace, said: “God has forgiven my nation for mistakes, forgetfulness, and what they are forced to do.”

On the authority of Abu Hurairah, may God be pleased with him, that the Prophet, may God bless him and grant him peace, said to Ma’iz when he confessed to adultery before him: “Are you mad?”

Because the reason for the punishment to be imposed must be a crime, and the boy’s action cannot be described as a crime, his admission of it was a complete lie.

Jurists have stipulated certain conditions for a confession of adultery to be proven, including:

The first condition: Repeated confession.

Jurists have differed on this condition, with two opinions:

The first opinion: It is required to repeat the confession of adultery four times, and confessing it once is not sufficient. This is the opinion of the majority of the Hanafis and Hanbalis.

They cited as evidence what was narrated that Ma'iz came to the Prophet, peace and blessings be upon him, and confessed to adultery. The Prophet, peace and blessings be upon him, turned his face away from him until he repeated his confession four times.

The evidence is that if confession once would have resulted in a punishment, he would not have delayed it to four, because it is not permissible to omit a punishment that is due to God Almighty after it has been proven.

The second opinion: It is sufficient for the adulterer to confess to adultery once. This is the opinion of the Malikis and the Shafi'is .

They cited as evidence what was narrated in the story of Al-Aseef that the Messenger, may God bless him and grant him peace, said: "Go, Unays, to this man's wife. If she confesses, then stone her."

The evidence is that the Prophet made stoning conditional on a mere confession on the first occasion.

- On the authority of Sulayman ibn Buraidah, on the authority of his father, who said: "A woman from Ghamid, from the Azd tribe, came and said: 'O Messenger of Allah, purify me.' He said: 'Woe to you! Go back and seek forgiveness from Allah and repent to Him.' She said: 'I see that you want to send me back as you sent back Ma'iz ibn Malik.' He said: 'What is that?' She said: 'By Allah, I am pregnant from fornication.' He said: 'Is that you?' She said: "Yes" He said to her: Until you give birth to what is in your womb. He said: So, a man from the Ansar took care of her until she gave birth. He said: So he came to the Prophet (peace and blessings of Allah be upon him) and said: The woman from Ghamid has given birth. He said: Then we will not stone her and leave her child young with no one to nurse him. Then a man from the Ansar stood up and said: I have breastfed him, O Prophet of Allah. He said: So he stoned her."

The evidence is that the Prophet (peace and blessings be upon him) ordered her to be stoned as soon as she confessed to adultery, without repeating it four times. They reasoned from common sense that confession only became evidence in Islamic law because its truthfulness outweighed its falsehood. This meaning is the same when it is repeated or singled out, because confession is merely a statement, and the weight of a statement is not increased by repetition. This is why it is not required for all other prescribed punishments.

Discussion and Evaluation

It is possible to object to the proponents of the first opinion that the action of the Prophet (peace and blessings of God be upon him) with Ma'iz was an incident, so it was permissible for the repetition to be for the sake of greater certainty. This is supported by what occurred in the narration of the woman from Ghamid, for he did not order her to repeat her confession when she said to him: "I see that you want to send me back as you sent back Ma'iz, for by God I am pregnant from fornication." So, he did not ask her again, but rather delayed carrying out the

punishment on her because she was pregnant, and when she gave birth, he ordered her to be stoned.

The answer to this objection is that the statement of the Ghamid woman: "She was pregnant from adultery" indicates that her situation was different from that of Ma'iz, because even though they both committed adultery, Ma'iz was able to retract his confession, unlike her. It is as if she said: "I am not able to deny it after confessing, because her pregnancy was evident, unlike him, so there is no need to verify by repeating my confession."

As for the second statement, it can be objected to by saying that not mentioning repetition in the story of the storm is not sufficient to deny its occurrence. The lack of mention does not indicate that it did not occur, and it is possible that the silence about mentioning it here was due to the knowledge of the one commanded to do it.

It is most likely that this matter is left to the judge's discretion. If he sees that the circumstances and evidence are sufficient to dispense with the confession the first time, he will be satisfied with it. If he sees that the circumstances and conditions require verification, he will order the confession to be repeated. This applies to all the narrations.

The second condition: Explicitness and detail in the acknowledgment

The majority of jurists stipulated that the wording of the confession should be explicit, detailed, and clear about the reality of intercourse, so that the confession is considered valid and the suspicion and doubt about it are removed.

They cited as evidence the words of the Prophet (peace and blessings be upon him) to a goat: "Perhaps you kissed, winked, or looked?" He said: "No, O Messenger of Allah." He said: "Did you have intercourse with her?" He should not use a euphemism. He said: "Yes." He said: "Then he ordered that he be stoned." In another narration: "He said: "Until that disappeared from you in that case from her?" He said: "Yes." He said: "Just as the eyeliner stick disappears in the kohl container and the bribe disappears in the well?" He said: "Yes." He said: "Do you know what adultery is?" He said: "Yes, I did with her unlawfully what a man does with his wife lawfully."

The third condition: insistence on confession

The majority of jurists stipulated that the person who confessed to adultery should remain in his confession until the punishment is carried out against him. If he retracts his confession before the punishment is carried out, the punishment is not carried out against him.

They explained this by what was narrated in the hadith of Ma'iz, when he confessed to adultery before the Messenger of God, may God bless him and grant him peace, and the Messenger of God, may God bless him and grant him peace, questioned him, saying: "Perhaps you kissed, winked, or looked." If questioning him had not been a reason for dropping the punishment, then questioning him would have been of no benefit.

Likewise, retraction creates doubt, as the offender's retraction could be true or false. This creates doubt about the validity of the prescribed punishment, and prescribed punishments are not met in situations of doubt.

Retraction may be explicit verbally, such as by saying, "I retracted my confession," or "I lied about it," or "I did not do what I confessed to." It may also be implied by action, such as by fleeing before the prescribed punishment is carried out, as fleeing is evidence of retraction.

The fourth condition: the ability to have intercourse

The person who confesses to adultery must be capable of intercourse. If he is someone who cannot be conceived, such as someone who has been castrated , his confession is not valid.

This is because adultery cannot be conceived of by him due to the lack of the ability to perform it. However, the confession of a eunuch or an impotent is valid, as adultery can be conceived of by them due to the existence of the ability to perform it. Similarly, if he confesses to adultery with someone with whom he cannot have sexual intercourse, his confession is not valid.

* * *

The second issue: the conditions of the confession that proves adultery in positive law

Positive law scholars have set conditions for accepting a confession as evidence of a crime, as follows:

The first condition: The person making the confession must be competent to make the confession.

The confession must be made by a sane, adult, free-willed person, not under guardianship, as indicated in Article [107] of the Evidence Law.

Article [338] of the Penal Code states: If the matter calls for examining the mental state of the accused, the investigating judge or the court before which the case is being heard, as the case may be, may order that the accused, if he is in pretrial detention, be placed under observation in one of the government facilities designated for that purpose for a period not exceeding a total of forty-five days.

The second condition: that the confession be voluntary and issued from a free will

The last part of Article [302] of the Code of Criminal Procedure states: “Any statement proven to have been made by an accused or witness under duress or threat thereof shall be disregarded and shall not be relied upon.”

This is what the Egyptian Constitution stipulates, as Article [42] states: “Any statement proven to have been made by a citizen under duress or threat thereof shall be disregarded and shall not be relied upon.”

The third condition: that the confession be made by the accused himself

Confession is a personal matter relating to the person making the confession, and its evidence is limited to the accused only. The one making the confession must be the accused himself. Therefore, a confession issued by someone other than the accused is excluded, even if it is from the accused’s own lawyer. This confession does not go beyond being testimony, and it is not sufficient to consider the rest of the evidence.

The fourth condition: the confession must be explicit and clear about committing the crime

The accused’s confession must be explicit and clear about committing the crime attributed to him. The court may not infer the confession from the accused’s separate statements. Rather, his confession must be explicit. The Court of Cassation made this clear when it said: “The confession that is considered valid in criminal cases and that is taken into account by the accused must be explicit about committing the crime, and must be so explicit and clear that it does not allow for interpretation.”

Article [157] of the Kuwaiti Code of Criminal Procedure states that “nothing shall be considered a confession of the accused’s statements unless they are explicit and conclusive in his commission of the crime attributed to him with knowledge, freedom, and awareness...”

The fifth condition: The confession must be consistent with the truth and reality

A confession must be true and accurate in order to be accepted, because experience has shown that some people may confess to crimes they did not commit, in order to save those with whom they have strong ties, or to escape from a reality they cannot bear.

The sixth condition: the confession must be judicial

Legal scholars stipulate that the confession must be made by the accused himself before the court. However, if he confesses outside the court, it is not considered a confession in the legal sense.

This is in accordance with what is stated in Article [103] of the Egyptian Evidence Law, which states that: “A confession is the opponent’s admission before the court of a legal fact alleged against him during the course of the lawsuit related to this fact.”

* * *

Section Two: Proof of Adultery by Testimony

This section explains the meaning of testimony, its legitimacy in proving the crime of adultery, and its conditions. It is divided into three sections:

Section One: Definition of testimony.

Section Two: The validity of testimony in proving adultery.

Section Three: Conditions of testimony regarding the crime of adultery.

* * *

Section One: Definition of Testimony

First Issue: Definition of Testimony in the Language

Testimony in the language is derived from the verb "to bear witness," because a witness reports what he or she has witnessed. Testimony in the language has several meanings, including: clarification, disclosure, conclusive information, presence, observation, publicity, oath, acknowledgment, the declaration of monotheism, and death in the path of God.

From the testimony in the sense of witnessing: The Almighty’s saying: {And they have made the angels, who are the servants of the Most Merciful, females. Did they witness their creation? Their testimony will be recorded, and they will be questioned.} . Meaning witnessing with the eyes.

Among the meanings of testimony is the oath or vow: God Almighty says: {Then the testimony of one of them is four testimonies by God that he is among the truthful.} . So testimony here means swearing by God.

And from the testimony in the sense of decisive news: the Almighty’s saying: {And we only testify to what we know.}

Among the meanings of testimony is the Almighty’s saying: {bearing witness against

themselves to disbelief} meaning acknowledging, for testimony against oneself is acknowledgment.

The Shahada is also called the word of monotheism, which is our saying: "There is no god but God." The phrase "I bear witness that there is no god but God, and I bear witness that Muhammad is His servant and Messenger" is also called the Shahadatayn.

Martyrdom, meaning death in the cause of God, is mentioned in the Almighty's saying: {Then those will be with those upon whom God has bestowed favor of the prophets, the steadfast affirmers of truth, the martyrs, and the righteous.} . He is a martyr whom God has granted martyrdom.

* * *

The second issue: The definition of testimony in the terminology of jurists

Jurists have defined testimony in various terms. Ibn al-Hammam of the Hanafi school defined it as: "Truthful information to prove a right by uttering the word of testimony in a court of law."

Al-Dardir from the Maliki school defined it as: "Informing a ruler about knowledge so that he may rule according to it."

Al-Jamal of the Shafi'i school defined it as: "Informing of a right of another over another by saying 'I bear witness'."

Al-Bahuti, from the Hanbalis, defined it as: "Informing what he knows by saying 'I bear witness' or 'I testify'."

Anyone who examines these definitions of testimony will find that they revolve around one meaning of testimony, which is: informing others of a right against them in court.

The third issue: the definition of testimony in the terminology of legal experts.

Legal scholars have defined testimony in several ways. It has been said that testimony is: "Proof of a specific fact through what a person says about what he saw, heard, or perceived with his senses directly."

It has also been said: "A person's report of what he saw or heard himself or perceived generally with his senses."

It has also been said: "A person's telling of a right of another over another."

It has also been said: "A person's giving—orally or in writing, whether of his own volition or at the prompting of another—of what he saw, heard, or perceived generally with his senses."

It has also been said: "Truthful reporting, to prove a right, by the word of testimony in the presence of a judge, even without a lawsuit."

What is noted from these legal definitions is that testimony is: A witness's telling of something he saw, heard, or perceived with any of his senses, whether his testimony is oral or written, and it is a right of one person over another, directly and in the presence of a judge.

The second section: The validity of testimony in proving adultery

The first issue: The validity of testimony in Islamic law

God Almighty has prescribed testimony for His servants. He says: {And bring to witness two

just men from among you} and He also says: {And bring to witness two just men from among you and establish the testimony for God} . God Almighty has commanded witnesses to document rights so that they are not subject to denial and repudiation. Thus, testimony serves as a decisive factor during litigation—whenever its conditions are met—before the court.

The jurists have unanimously agreed on the validity of testimony and the obligation to act in accordance with it.

Ibn al-Mundhir said: "They agreed that the testimony of a Muslim man who is an adult, sane, free, able to speak, of known lineage, and of sound judgment... is permissible, and the judge must accept it..."

Testimony is evidence to prove adultery. Because God Almighty said: {And those of your women who commit an unlawful act, bring against them four witnesses from among you.} And He Almighty said: {And those who accuse chaste women but do not produce four witnesses - flog them with eighty lashes.} And He Almighty said: {Why do they not produce against him four witnesses? But since they do not produce witnesses, then those are the ones in the sight of God.} The liars (al-Kādībūn) . And on the authority of Abu Hurayrah (may Allah be pleased with him) that Sa`d ibn Mu`adh said to the Messenger of Allah (peace and blessings of Allah be upon him): "O Messenger of Allah, if I find a man with my wife, should I give him time until I bring four witnesses?" The Prophet (peace and blessings of Allah be upon him) said: "Yes."

The second issue: the validity of testimony in law

Since crimes occur suddenly, it is inconceivable that they can be proven in advance by contract or writing. Therefore, the importance of testimony in proving crimes is highlighted. Due to its importance, positive laws have stipulated that it is considered a means of proof. Article [110] of the Code of Criminal Procedure states, "The investigating judge shall hear the testimony of witnesses requested by the parties unless he deems it useless. He may hear the testimony of any witness he deems necessary regarding the facts that prove or lead to the proof of the crime, its circumstances, its attribution to the accused, or his innocence."

Despite the strength of testimony as evidence, its value has been weakened by the corruption of morals and the audacity of people to give false testimony. Therefore, the law does not require the judge to act on the basis of testimony, but rather subjects it to his absolute discretion, granting him complete freedom to accept whatever testimony he is satisfied with and reject whatever he is not satisfied with. This is as established by the Court of Cassation.

As for the role of testimony in proving adultery, I believe the law has been confused regarding its conclusiveness and the ruling based on it.

As for its validity, it is not stipulated as an acceptable form of evidence against an accusation of adultery in the Egyptian Penal Code. Article [276] states: "The evidence that is acceptable and constitutes evidence against the accused of adultery is: his arrest in the act of committing the act, his confession, the presence of letters or other written papers from him, or his presence in the home of a Muslim in a place designated for women."

Legal commentators have interpreted the absence of testimony here as evidence of proof, stating that it is implicitly present in the case of "caught in the act," which is proven by judicial police officers, just as it is proven by the testimony of any other person. The law does not specify a specific number of witnesses, as the judge's conviction of the veracity of the testimony is what counts, whether it is from one person or more. The term "caught in the act" does not refer to

witnessing adulterers engaging in sexual intercourse; rather, it is sufficient to witness the adulterer's partner in circumstances that leave no room for doubt about the commission of the crime of adultery.

As for ruling on the crime of adultery based on testimony, it can only be issued after a prior lawsuit has been filed by one spouse against the other. Most positive laws only consider adultery when it occurs between spouses, such as Egyptian and French law. However, what occurs between virgins, whether actual adultery or its preliminaries, and whether it occurs in secret or in public, is considered an indecent act, as stated in Articles [278, 279] of the Penal Code.

Between Sharia and law

First, positive law agreed with Sharia in questioning the significance of testimony in proving adultery. Sharia therefore adopted measures to remove doubt and confirm its credibility and the strength of its argument. It increased its conditions, tightened its controls, and doubled the number of witnesses, all to make it binding on the judge in ruling accordingly. Positive law, on the other hand, diminished the value of using it as evidence, thereby neglecting one of the most powerful means of proving crimes.

Second, Sharia viewed adultery as one of the most serious crimes that leads to the destruction of the family and the corruption of society. Therefore, it criminalized it among virgins and imposed harsher penalties among married couples. Positive laws, on the other hand, restricted it to married couples, excluding virgins. This severely limited the laws' ability to protect the family system and society from dissolution.

Third: Positive law does not consider testimony of adultery unless it is preceded by a lawsuit from the husband or wife; because it is an infringement on the marital rights. However, in Islamic law, it is agreed that testimony of adultery does not require a lawsuit to be filed prior to the testimony. Witnesses may come forward with testimony without a lawsuit of adultery being filed, and their coming forward with testimony results in the lawsuit being filed. The jurists cite the case of Abu Bakra in this regard, where he and his companions testified against Al-Mughira without a lawsuit being filed.

The reason for not requiring the establishment of a lawsuit in adultery is that the punishment for adultery is the right of God Almighty, so testimony to it does not require the establishment of a lawsuit, because the lawsuit in all other rights is only from the one who deserves it, and no human being has a right to this to claim it, and if the testimony was dependent on the establishment of a lawsuit, neither the testimony nor the lawsuit would be established.

From this, it can be said that testimony in Islamic law is evidence that must be acted upon if it meets its conditions and pillars and is not affected by any defect that would impair it, while it does not have that evidential value in positive law.

Section Three: Conditions for Testimony Regarding the Crime of Adultery.

Issue One: Conditions for Testimony Regarding the Crime of Adultery in Islamic Law.

Jurists have stipulated two types of conditions for proving adultery by testimony: general conditions that must be met when testifying regarding any prescribed punishment, and specific conditions that must be met when testifying regarding the crime of adultery in particular. The general conditions are:

First: masculinity

There is no disagreement among jurists regarding the requirement of male testimony for hudud crimes; the testimony of women is not accepted in these cases under any circumstances.

Muwaffaq al-Din Ibn Qudamah said regarding the requirement of male testimony for hudud crimes: "We do not know of any disagreement on this, except for a statement narrated from Ata' and Hammad that three men and two women are acceptable. This is an anomaly and should not be relied upon, because the term "four" refers to the number of people mentioned, and it necessitates that four be sufficient. There is no disagreement that four, if some of them are women, is not sufficient, and that the minimum number required is five. This is contrary to the text. Furthermore, their testimony is subject to doubt, as they may be prone to misguidance. God Almighty says: {If one of them should err, then the other may remind her} and hudud crimes are prevented by doubt."

Second: Puberty

A witness must be an adult. If he is not, his testimony is not accepted, even if he is capable of understanding and giving testimony, or even if he is in a position of being just. This is based on the Almighty's statement: {And bring to witness two witnesses from among your men} . Because a child cannot be trusted with safeguarding his own wealth, it is even more appropriate that he cannot be trusted with safeguarding the rights of others. This condition is a matter of dispute among jurists.

Third: Reason

A witness must be sane. A sane person is someone who understands what is obligatory, both necessary and non-necessary, what is possible and impossible, and what harms and benefits them. As for the insane or the unconscious, they unanimously agree to reject their testimony while they are in that state. They cited as evidence the hadith of the Messenger of Allah (peace and blessings be upon him): "The pen has been lifted from three: from the sleeper until he awakens, from the child until he reaches puberty, and from the insane until he comes to his senses."

Fourth: Justice

It is: adherence to the commands of Islam, moderation of reason, and opposition to whims.

It has also been said: religious observance by avoiding major sins and guarding against minor ones.

It has also been said: the balance of a person's religious affairs and the moderation of his words and actions.

There is no disagreement among the jurists regarding the requirement of justice in all testimonies, based on the Almighty's saying: {And bring to witness two just men from among you} ,

Fifth: Islam

Jurists stipulated that witnesses must be Muslims, based on the Almighty's statement: {And bring to witness two witnesses from among your men} , so He specified in His statement {from among your men} Muslims and not others. Moreover, the condition of justice is not met in non-Muslims.

The special conditions for testimony regarding the crime of adultery are:

The first condition: that four witnesses testify to the adultery.

Jurists unanimously agreed that the testimony that proves adultery can only be established by four men. According to the Almighty's saying: {And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept their testimony ever after.} And His saying: {Why do they not produce against him four witnesses?} .

And according to the hadith of Abu Hurairah, Sa'd ibn Mu'adh (may Allah be pleased with him) said to the Messenger of Allah (peace and blessings of Allah be upon him): "O Messenger of Allah, if I find a man with my wife, should I give him time until I bring four witnesses?" The Prophet (peace and blessings of Allah be upon him) said: "Yes."

Because adultery can only be committed by two people, it is like testimony to two acts. And because adultery is one of the most serious of indecencies, testimony to it is made more serious in order to be more concealing.

The second condition: The testimony must be given in one session

The majority of the Hanafi, Maliki, and Hanbali schools of thought stipulated that testimony regarding adultery should be given in one sitting. They based their evidence on the hadith of Abu Bakra, Nafi, and Shibl ibn Ma'bad, "that they testified before Umar against Al-Mughirah ibn Shu'bah for adultery, but Ziyad did not testify, so he punished the three." The evidence for this is that if the same sitting was not a condition, it would not be permissible to punish them, since it is permissible for them to complete it with a fourth in another sitting.

The Shafi'is did not stipulate this condition, so it is the same for them whether the witnesses come separately or together, and whether the testimony is given in one session or more than one, due to the generality of the Almighty's saying: {Why did they not produce against him four witnesses?} without restricting it to being in one session.

The two opinions can be reconciled by leaving it to the judge's discretion and considerations. If fewer than four witnesses testify before the judge, and their veracity is evident, he may give them a chance to complete their number. If the judge has doubts about their credibility and deems it necessary to bring them together in one session, he may do so.

The third condition: Explicit and detailed testimony.

The majority of jurists stipulated that for the testimony concerning adultery to be valid, it must be convincing to the judge. It must clarify the nature and manner of adultery, when and where it occurred, and with whom the adultery was committed. The judge must inquire of the witnesses about all of this in order to arrive at the truth of the matter. This is based on what was narrated in the story of Ma'iz: When he confessed to adultery before the Prophet (peace and blessings of Allah be upon him), the Messenger of Allah (peace and blessings of Allah be upon him) said to him: "Did you have intercourse with her?" He said: "Yes." He said: "Until that disappeared from you in that regard from her?" He said: "Yes." He said: "Like a kohl stick disappears in a kohl container or a bribe in a well?" He said: "Yes." So if the detail in the confession is considered, then it is more appropriate to consider it in testimony. Because if they did not describe the adultery, it is possible that what was witnessed does not warrant the punishment, so its disclosure was considered.

The second issue: Conditions for testimony regarding the crime of adultery in the law

Positive law stipulates that a witness must be eligible to testify, namely, that he or she be fifteen

years of age, sane, and free-willed. The court must hear the testimony orally, and that the witness must have directly witnessed the incident.

However, in the case of adultery, the law does not consider testimony of adultery as evidence unless one of the spouses has previously filed a lawsuit against the other. Most positive laws, such as Egyptian and French law, consider adultery only when it occurs between married couples.

In such cases, the testimony is established by the testimony of any number of witnesses. The law does not set a specific number for testimony, as the judge's conviction of the veracity of the testimony is what counts, whether it is from one person or more. The judge also has the right to reject the testimony of witnesses if he is not convinced.

The witness does not have to have seen the adulterers during the sexual act; it is sufficient for him to have seen the adulterer's partner in circumstances that leave no room for doubt about the occurrence of the crime of adultery.

As for what occurs between virgins, whether it is actual adultery or its preliminaries, and whether it occurs in secret or in public, it is considered an act that violates modesty; testimony concerning it is not considered until a complaint is filed, as stipulated in Articles [278, 279] of the Penal Code.

The third section: Proving adultery by circumstantial evidence.

This section addresses the meaning of circumstantial evidence, its legitimacy in proving the crime of adultery, and its conditions. This section examines two aspects:

Section One: Defining Qarayin.

Issue One: Defining Qarayin in the Language.

Qara'in in the language: The plural of qarayin, derived from the word "iqtaqun," meaning companionship and association. From this, the word qarayin refers to a wife and qareen to a husband. To connect something to something means to tie it to one another and connect it to the other, like joining two camels together with a single rope, or like the connection between Hajj and Umrah.

The second issue: The definition of presumption in Islamic jurisprudence.

In terms of meaning, presumption is divided into definitive and presumptive. The Majallat al-Ahkam al-Adliyya defined definitive presumption as: "an indication that reaches the level of certainty." Conjectural presumption, on the other hand, indicates the likelihood of one side when there is doubt, based on conjecture.

Fawaatih al-Rahmut states: "Presumption is that which supports the weight of what is less likely."

It has also been said: "Any apparent indication that accompanies something hidden and indicates it."

Third Issue: Definition of presumption in legal terminology.

Presumption: What the legislator or judge infers from a known fact to indicate an unknown fact.

It has also been said: It is the deduction of a ruling on a specific fact from other facts in

accordance with the requirements of reason and logic. This means that the fact sought to be proven is inferred from other established facts for which evidence has been provided.

The Sudanese Evidence Law defined presumption in Article [48] as: an indication indicating the proof or denial of any fact based on the preponderance of circumstances.

The French Civil Code defined presumption in Article [1349] as: the conclusions drawn by the law or the judge from a known fact to determine an unknown fact.

Presumptions may be legal, which is the work of the legal legislator, or judicial, which is what the judge infers through his own diligence and intelligence regarding the subject matter of the case.

Section Two: The Validity of Presumptions in Proving Adultery.

Issue One: The Validity of Presumptions in Proving Adultery in Sharia.

The majority of jurists believe that presumptions are permissible and consider them a means of proof. And among the evidence they used is the Almighty's saying: {...And a witness from among her people testified: If his shirt is torn from the front, then she has told the truth, and he is among the liars. (26) But if his shirt is torn from the back, then she has lied, and he is among the truthful. (27) And when he saw that his shirt was torn from the back, he said: "Indeed, it is of your plot. Indeed, your plot is great." (28)}

This verse indicates that the witness relied on the evidence of the front or back of the shirt to prove the truth of one witness and the falsity of the other. When the Holy Qur'an recounted this ruling, it did so as a confirmation, not a denial, indicating the permissibility of acting on these evidences and rulings based on them.

The evidence considered in the prescribed punishments varies from one case to another. The three most important evidences considered in adultery are:

The first evidence: the appearance of pregnancy in an unmarried woman, or one whose husband is unknown.

The second circumstance: The wife's refusal to engage in li'an with her husband after li'an.

The third circumstance: Giving birth less than six months after the marriage.

The following details the first circumstance only, which is specific to virgins and is punishable by flogging and exile. The second and third circumstance relate to married women, who are not subject to exile, as their punishment is stoning.

Jurists differed regarding proving adultery based on the circumstance of pregnancy, with two opinions:

The first opinion: Adultery is not proven based on the circumstance of pregnancy. This is the opinion of the majority of jurists from the Hanafi, Shafi'i, and Hanbali schools.

They argued that pregnancy may be the result of dubious intercourse or coercion, and that the prescribed punishment is averted by doubt. It was narrated that "a woman who had no husband was brought before Umar who was pregnant. Umar asked her, and she said, 'I am a heavy-headed woman. A man fell on me while I was asleep, and I did not wake up until he pulled away.' Thus, the prescribed punishment was averted from her."

The second opinion: Adultery is proven by pregnancy on the part of a woman who has no husband, whether she was previously married and divorced, or her husband died while she was not pregnant, or she was a virgin who had not yet married. This is the opinion of Malik .

They cited the following as evidence:

First: It was narrated from Umar (may Allah be pleased with him) that he said: "I feared that a long time would pass before people would say, 'We do not find stoning in the Book of Allah,' and they would go astray by abandoning an obligation revealed by Allah. Stoning is a right for one who commits adultery while married, if evidence is established, pregnancy is established, or a confession is made."

The basis of the evidence: Umar (may Allah be pleased with him) enumerated the means of proving adultery, including pregnancy. He said this in the presence of the Companions (may Allah be pleased with them), and no one opposed him, which indicates that they considered the evidence of pregnancy a means of proving the crime of adultery.

Second: It was narrated from Ali (may Allah be pleased with him) that he said: "O people, adultery is of two types: secret adultery and public adultery. Secret adultery is when witnesses testify, and the witnesses are the first to throw stones. Public adultery is when pregnancy or a confession is made, and the imam is the first to throw stones."

The evidence is that Ali considered the presumption of pregnancy as evidence to prove adultery as long as it was from a woman who was not married or a master, and there was no suspicion of her. Umar, may God be pleased with him, agreed with him on this, and there was no one among the Companions who disagreed with them, may God be pleased with them. They said this in a gathering of people, which indicates that they considered the presumption of pregnancy as a means of proof in adultery.

Discussion and evaluation:

Considering the above evidence, the majority of scholars are more likely to support the view that the prescribed punishment is waived for her and that mere pregnancy is not considered evidence of adultery. This view is consistent with the caution of the wise Shari'ah in proving this crime. What was narrated from 'Umar and 'Ali (may Allah be pleased with them) regarding proving adultery through pregnancy is questionable, as the opposite has been proven from them. It was narrated from 'Umar (may Allah be pleased with him) that a woman asked a shepherd for water, but he refused to give her water unless she allowed him to have intercourse with her. So she did, and the matter was brought to 'Umar, who asked 'Ali (may Allah be pleased with him): "What do you think of her?" He said: "She was forced." So 'Umar gave her something and left her.

It was also narrated from him that a pregnant woman was brought to him, and she claimed that she had been forced. He said: "Let her go." He wrote to the commanders of the armies that no one should be killed except with his permission.

The evidence is that Umar and Ali, may God be pleased with them, considered the mere claim of a pregnant woman being forced to do so as a suspicion that prevented her from being subjected to the prescribed punishment or not. The rule is that if two pieces of evidence contradict each other, they are invalidated.

Anyone who studies methods of conception will know that pregnancy can occur without sexual intercourse between a man and a woman. It can occur through lesbianism with a woman who

had intercourse with her husband shortly before the lesbianism, or through artificial insemination, etc. There is no disagreement that the prescribed punishment is not required except in the case of complete intercourse, which indicates that pregnancy is not considered conclusive evidence of adultery, but rather a possibility of it. The prescribed punishment is only carried out on someone who has been proven to have committed adultery with conclusive evidence that does not contain any possibility or doubt. This is what is in accordance with the Shari'a's method of verification.

The second issue: the validity of circumstantial evidence in proving adultery in the law

In law, presumptions are indirect evidence, and they are of particular importance, as they are relied upon in facts that cannot be proven by direct means, such as admission and testimony.

The law has given the judge broad powers to deduce evidence. Article [100] of the Evidence Law states: "The judge is left to his discretion to deduce any evidence not stipulated by the law, and evidence by these evidences is not permitted except in cases where evidence by witness testimony is permitted."

The evidence may be actions, signs, messages, pictures, etc., which carry a strong indication of certain matters. The law has decided on some evidence as proof of the crime of adultery, as stated in Article [276] of the Penal Code: "The evidence that is accepted and is evidence against the accused of adultery is his arrest in the act, his confession, the presence of letters or other papers written by him, or his presence in a Muslim home in the place designated for women."

However, evidence indicating adultery is not sufficient to implement the penalty for adultery, except after a lawsuit for adultery is filed by one of the spouses against the other, as stated in Article [273] of the Penal Code: "An adulteress may not be tried except based on a lawsuit filed by her husband."

Between Sharia and law

It is noted from the above that Sharia law relies on circumstantial evidence as a complete proof of adultery, and the ruling is based on it. Positive law, while agreeing with Sharia law regarding the legitimacy of relying on circumstantial evidence, conditioned its application on the husband's consent or refusal to commit adultery. This may appear to be a contradiction within the provisions of positive law, as it interprets a single act, committed by the same persons, as both one thing and its opposite. It holds that a woman proven to have committed adultery by conclusive circumstantial evidence is an adulteress, but at the same time, she is not an adulteress if her husband consents. By conditioning the punishment for adultery on the husband's consent, society's right to punish those who threaten its morals and family order is squandered.

Section Three: Evidence of adultery based on differences in the newborn's genetic fingerprint (D.N.A.)

The first question: Definition of genetic fingerprint, or DNA fingerprint, or D.N.A.

Scientists define genetic fingerprinting as: the genetic structure that identifies each individual person. In clearer terms: "It is the hereditary material found in the cells of all living organisms. It is like blood analysis, fingerprints, semen, hair, or tissues, revealing the extent of similarity and similarity between two things or the differences between them. Based on the components of the human genome, it is the code that determines the extent of the relationship between similar things and determines the existence of differences or variations between mixed people by

understanding the genetic makeup of a person in the light of genetics, one of the life sciences."

This fingerprint contains all the characteristics, traits, diseases, and changes that will occur in a person from the time the sperm meets the egg until the end of his life.

The success rate of DNA fingerprinting is very high, with some experts setting it at 99.9999%, given that no two people are identical in all genetic traits. Therefore, it can be considered conclusive evidence that is beyond question or challenge, as it is based on tangible scientific evidence, provided multiple samples are taken and analyzed in different locations. Each step of the DNA fingerprinting process is documented, from sample transfer to results, ensuring that the sample does not belong to identical twins. It has been recognized by most courts in the United States, Europe, and many other countries around the world, and has been relied upon to adjudicate numerous cases.

The second issue: the validity of relying on genetic fingerprints as evidence of the crime of adultery

Sharia and legal scholars have differed on the acceptability of DNA evidence as evidence of adultery. Some scholars support its validity while others reject it due to the possibility of tampering with or interference with its results. The most likely view is that DNA evidence is a true indication, but the marital bed is stronger. If the results contradict a valid marital bed, then the presumption of the marital bed is accepted, and the presumption of DNA evidence is disregarded.

This is what the courts in Egypt and the Kingdom of Saudi Arabia have adopted, as in the legal instrument issued by the Grand Court in Jeddah in 1414 AH, which stated the following: "...and since Islam aspires to establish lineage, and since genetic tests are not infallible, and the principle is to establish lineage, and the possibility of establishing lineage in this case is valid, indeed it is the strongest, due to the existence of a marriage contract, consummation, intercourse several times, and the delivery of the pregnancy nine months after intercourse, all of which confirms the establishment of lineage." This view was confirmed by the Court of Cassation's decision in 1417 AH, which stated: "The defendant was made to understand that the ruling of God and His Messenger is that the child belongs to the bed, so as long as the plaintiff is a wife, has been consummated with, and the defendant has had intercourse with her, there is no room left for doubt about the child."

Section Four: Evidence of Adultery Using Cameras and Recording

Question One: Definition of Cameras

Automatic photography: is the science that deals with creating and fixing an image on a strip or plate, made of light-sensitive material. Photography and cinematography fall under this, and it is what transmits the moving image with sound over a specific period of time and with all the events and incidents that this period includes .

The Second Issue: The Validity of Proving Adultery Using Contemporary Photographic Methods

Scholars, jurists, and legal scholars have differed on the acceptance of contemporary photographic methods as evidence of the commission of adultery. The bottom line is that they prohibit the use of this evidence, for the following reasons:

1 - The Wise Lawgiver has made the establishment of the prescribed punishments dependent on the utmost clarity, and photographs are not a true, secure proof against falsehood, as they are often tainted with forgery and deception.

2. He is more cautious in proving the prescribed punishments than others, especially if the prescribed punishment involves destruction. Destruction is not ruled upon except with clear and evident evidence, uncontradicted by a weakening possibility or suspicion.

3. The ease of fabricating and collaging images. A person's image may be taken and merged with another person's while they are committing a crime. This is known among practitioners of this art as "dubbing." This is a practice resorted to by those with weak faith and sick souls, with the intent of accusing others of slander and immorality, out of aggression and malice, to undermine public and community confidence in him. They then delude people into believing that this is his crime so that they will distance themselves from him.

4. People's images often resemble each other.

5. With the significant technological development in the field of artificial intelligence, it has become possible for specialists in this field to create distorted images and videos that are difficult to detect.

Since this depiction is subject to possibility and suspicion, experts and specialists are not certain about this matter. The prescribed punishments require clear evidence that demonstrates the truth. Therefore, the prescribed punishment for adultery cannot be proven using such evidence. Similarly, the evidence of adultery is based on audio recordings, such as recording telephone conversations or conversations with the perpetrator in a particular location, and recording their confession and admission to their actions. Some researchers have addressed this issue and concluded that crimes cannot be proven by recordings, citing the following reasons:

1. Voices are similar and cannot be verified.

2. Voices can be imitated.

3. It is technically possible to introduce substitutions, alterations, deletions, and the transfer of phrases from one location to another on a recording. This is what experts call "montage." Thus, it becomes easy to alter the content of the recording.

4. The process of voice identification is still limited to speculation, and studies and experiments have not yielded any concrete results, nor have they proven anything. From the above, it becomes clear that such instruments cannot be used to prove such limits. However, these may be considered evidence incriminating the defendant, and should not be ignored or disregarded. Indeed, what may increase the accusation and strengthen this evidence is if the defendant is a person of immorality and debauchery. And God knows best.

Conclusion

After studying the means of proof and the validity of the crime of adultery, the research reached a set of conclusions, the most important of which are: Sharia law sets precise conditions for proving the crime of adultery to protect honor from tampering. Jurists agree that adultery is proven by confession, admission, and evidence, but they differ on its validity by circumstantial evidence. None of the modern means of proof are considered evidence for the crime of adultery, as each is subject to possibility. However, they can be accepted as acceptable evidence unless they are contradicted by stronger evidence. They can only be relied upon if they are free from

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