

# Islamic Perspectives

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## PUNISHMENT FOR ADULTERY IN ISLAM A Detailed Examination

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### PART I

#### Chapter 4

## The Qur`an and Pre-Qur`anic Penalties for *Zina`*

Both from an Islamic and scientific-historical point of view Islam is a continuation of earlier religions, especially those found in what from a Westerner's perspective is called the Near East but which from an Easterner's perspective could as well be called Near West.

From a scientific-historical point of view no development in history takes place in a vacuum, unrelated to what was before it or contemporary with it. From an Islamic point of view the religion of Islam is a continuation of earlier prophets' work that in many cases was incorporated into Islam in a vastly improved form and in other cases purified from *tahrif* (alteration). It is therefore useful for us to keep before us what earlier religions or cultures or traditions had to say on any topic of interest. Very often such information enables us to see that the Qur`an purified and developed earlier ideas and practices so greatly as to show its origin in divine inspiration.

But in case of the penalty for *zina`* there is a special reason to be aware of earlier religions or traditions: as we shall see in subsequent chapters, there is evidence that at least some of the

ideas in the Hadith regarding the penalty for *zina`* are derived from pre-Islamic sources and not from Islam as taught by the Prophet.

## Sumerian/Babylonia Law

*Zina`*, especially when committed with a married woman has been considered a punishable misconduct since the earliest times for which we have written records. The earliest law document of some comprehensiveness that we possess is the Code of Hammurabi. This document is not a complete codification of the Babylonian law but a collection of legal decisions of the Babylonian king Hammurabi in about the 18<sup>th</sup> century BCE – decisions that must have been partly applications of earlier legal practice, some of which was probably inherited from the Sumerian tradition.

In the Code of Hammurabi, adultery is punished with the death of both parties by drowning, but if the husband of the adulteress was willing to pardon her, then the king could pardon the adulterer. For incest the Code prescribes punishments of varying severity depending on which relative was involved. If a man committed sexual intercourse with his mother, both were burned to death; if with a stepmother, the man was disinherited; with a daughter, the man was exiled; with a daughter-in-law, he was drowned; with a son's betrothed, he was fined and the betrothed girl took her dowry and returned to her family, with freedom to marry as she chose.

For establishing accusations of adultery not proved by evidence, the code of Hammurabi gives the law: "If the finger is pointed at the wife of a citizen on account of another man, but she has not been caught lying with another man, for her husband's sake – she shall throw herself into the river." If the river bore her away her guilt was established; if she remained quiet and uninjured in the water, her innocence was proved<sup>[1]</sup>.

The Code of Hammurabi does not mention any punishment for sodomy, lesbian sex, or sex with animals.

## Egyptian Law

In ancient Egypt, according to the Sicilian historian Diodorus Siculus (circa 90-21 BCE), whoever raped a freeborn woman was castrated. In case the woman let herself be enticed into committing adultery, then the man received a thousand stripes and the woman's nose was cut off<sup>[2]</sup>.

Imprisonment may also have been a penalty for some sexual offences. According to Gen 39:14, 19-20, confirmed by Qur'an 12, when the wife of an Egyptian official who owned Joseph accused him of trying to lie with her, he was imprisoned.

## Hindu Law

One of the primary concerns of the Hindu law is to preserve the purity of castes<sup>[3]</sup>. In Bhagavad Gita and Vishnu Purana adultery is condemned on the grounds that it destroys family and community order by mixing castes. In these writings, there is no mention of any legal punishment, only of divine punishment in the form of shortening of life in this world, falling in hell after death, rebirth as a creeping insect, falling in hell of the dead ancestors because of deprivation from ritualistic water and food.

But Dharma Shastra of Manu (*Manusmriti*) – the primary source of Hindu law (dated from 2<sup>nd</sup> century BCE to first century CE but claimed to be centuries earlier) – does prescribe detailed punishments for sexual misconduct including, of course, adultery (8:353-385). These punishments depend on the degree of intimacy, the marital status of the woman, her willingness or otherwise, and on her caste (*varna*) – caste is important because “mixture” of castes “destroys everything.”

**In case of an unmarried woman**, there is no capital punishment. If the unmarried woman is forced, the man loses two fingers and pays a fine of six hundred *panas*. If the woman is willing and of the same caste as the man, then he will pay a fine of 200 *panas* “to deter him from repeating the crime” and also “pay the nuptial fee, if her father so desires”. If the woman is willing, and is of higher caste, then the man will suffer a corporal punishment. An unmarried woman who makes advances to a man of higher caste will not be fined but rather forcefully confined to her house.

**In case of a married woman**, punishable offences start with talking:

“A man formerly accused of (sexual) offences, who secretly converses with another man’s wife, shall pay the lowest fine. But a man, not before accused, who converses for some cause, shall not incur any guilt, since in him there is no transgression.”

“Mendicants, singers, men who have performed the initiatory ceremony of a Vedic sacrifice, and artisans are not prohibited from speaking to married women.

Let no man converse with the wives of others after he has been forbidden; but he who converses (with them), in spite of a prohibition, shall be fined one *suvarna*.

This rule does not apply to the wives of actors and singers, nor (of) those who live on (the intrigues of) their own (wives); for such men send their wives (to others) or, concealing themselves, allow them to hold criminal intercourse. Yet he, who secretly converses with such women, or with female slaves kept by one (master), and with female ascetics, shall be compelled to pay a small fine.

Apparently, if the meeting involves more than conversing, it falls under the category of adulterous acts (*samgrahana*):

“He who addresses the wife of another man at a Tirtha, outside the village, in a forest, or at the confluence of rivers, suffers (the consequences of) adulterous acts.

“Offering presents, romping, touching her ornaments and dress, sitting with her on a bed, all are considered adulterous acts.

“If one touches a woman in a place not (to be touched) or allows (oneself to be touched), all (such acts done) with mutual consent are declared (to be) adulterous.”

For adultery the prescribed punishment in some cases is putting the man on a hot iron bed and then lighting fire all around and tearing the woman apart by dogs.

“If a wife, proud of the greatness of her relatives or (her own) excellence, violates the duty which she owes to her lord, the king shall have her torn apart by dogs in a place frequented by many. Let him have the male offender to be burnt on a red-hot iron bed; they shall put logs under it, (until) the sinner is burned (to death).”<sup>[4]</sup>

One of the cases when the above punishment is not applicable is when the man is a Brahmana, in which case he receives no corporal punishment:

Let (the king) never slay a Brahmana, though he has committed all kinds of crimes; let him banish such an offender, leaving all his property and keeping him unhurt. No greater crime is known on earth than slaying a Brahmana; a king, therefore, must not even entertain the thought of killing a Brahmana<sup>[5]</sup>.

*Manusmitri* also prescribes punishment for Lesbian sex:

An unmarried girl who pollutes another unmarried girl must be fined two hundred (*panas*), pay the double of her (nuptial) fee, and receive ten lashes with a rod. But a (married) woman who pollutes an unmarried girl shall instantly have her head shaved or two fingers cut off, and be made to ride on a donkey.

If a wife was suspected of adultery but no hard evidence exists, then probably she was to be subjected to one or the other of the following three types of ordeals:

- 1) The suspect is given three handfuls of water with a curse spoken on it and a sacred image dipped in it; if the suspect is innocent nothing will happen and if guilty sickness or some other calamity will follow within weeks. As we shall see, a similar ordeal is found in the Jewish law.
- 2) The suspect is made to pass through fire or hold a red-hot iron while walking a certain distance; if the suspect is innocent nothing will happen, but if guilty there will be burns. This test of holding a red-hot iron was also known among the Greeks.
- 3) The suspect is bound and thrown into the water. If the suspect is innocent, she will sink and will be pulled up before death occurs; otherwise the water will cast her up and she will be punished. This procedure was widely used in Europe to “try” women suspected of witchcraft.

The passing through the fire is described in such Hindu codes as that of Yajnavalkya and is used in the Ramayana by Sita to prove her innocence to her jealous husband Rama. In *Manusmriti* it is said: “He whom the fire does not burn or whom the water does not cast up, or whom no harm soon befalls, is to be taken as truthful in his oath.” (8:115)

## Chinese Practice

In China the punishment for adultery seems to have been more secular than religious. It took various forms, including the following:

- 1) Fines, with the male culprit paying more. The fine levied on the woman is paid to the husband, that inflicted on the man goes to the authorities.
- 2) Castration, which at times was also the punishment for abduction, armed robbery, and treason.
- 3) Taking into slavery. A woman guilty of adultery becomes her husband's slave and could not be redeemed.
- 4) A husband could be authorized to cut off his wife's hair, and lead her in that state before the mandarin, who caused her to be thrown to an elephant trained as the public executioner. Death was also the punishment for adultery among the Mongols.

In case of adultery, husbands are permitted to divorce their wives. But, if they did, they cannot take them again for a number of years.

The law in ancient China does not seem to have concerned itself too much with punishment for sexual intercourse with unmarried women.

## Jewish Law

If we go by the Biblical stories, even before the time of Abraham adultery was considered in Palestine a crime for which death is a fitting divine punishment, if not a legal punishment. Abimelech, the Philistine king of Gerar recognized that sex with a married woman was a crime that God punished with death. When he "took" Sarah (Abraham's wife), God appeared to him in a dream and said " ..., Behold, you are about to die, for the woman you have taken is a married woman." (Gen 20:3)<sup>[6]</sup>. Since the king did not know that Sarah was married, he was spared on condition that he restores her to Abraham.

It is thus not surprising that later the Jewish Torah prescribes the death penalty for adultery. The Torah, though purported to be written by Moses, did not take anything like its present form until about eight centuries after the great prophet. There is in any case evidence that the death for adultery did not become a legal punishment until centuries after Moses. Thus, in 2 Sam 11:1-12:25 we are told that one afternoon King David saw from the roof of his house a beautiful woman, Bathsheba, taking a bath. He committed adultery with her, had her husband murdered and married her, later begetting Solomon through her. Although condemned by God

through the prophet Nathan for these actions, the law of the Torah is not at all mentioned. Since Bathsheba was married, both she and King David were punishable by death. Yet this punishment is not at all considered. This probably means that death became a legal punishment after King David, that is, centuries after Moses, to whom it is attributed.

The Torah in its present form prescribes in some detail punishments for various cases of *zina`*. Thus in case of fornication with a virgin, the Torah has this to say:

When a man seduces a virgin who is not engaged to be married, and lies with her, he shall give the bride-price for her and make her his wife. But if her father refuses to give her to him, he shall pay an amount equal to the bride-price for virgins. (Exodus 22:16-17)

If a man meets a virgin who is not engaged, and seizes her and lies with her, and they are caught in the act, the man who lay with her shall give fifty shekels of silver to the young woman's father, and she shall become his wife. Because he violated her he shall not be permitted to divorce her as long as he lives. (Deut 22:28-29)

Here a virgin is not punished, presumably because she was seduced or coerced. But a virgin who commits fornication that is discovered after marriage is to be stoned to death:

Suppose a man marries a woman, but after going in to her, he dislikes her and makes up charges against her, slandering her by saying, "I married this woman; but when I lay with her, I did not find evidence of her virginity." ... [If the charge is proved untrue] The elders of that town shall take the man and punish him; they shall fine him one hundred shekels of silver (which they shall give to the young woman's father) because he has slandered a virgin of Israel. She shall remain his wife; he shall not be permitted to divorce her as long as he lives. If, however, this charge is true, that evidence of the young woman's virginity was not found, then they shall bring the young woman out to the entrance of her father's house and the men of her town shall stone her to death, because she committed a disgraceful act in Israel by prostituting herself in her father's house. So you shall purge the evil from your midst. (Deut 22:13-14, 18-21)

Thus a virgin who has committed fornication has four ways open to her: a) she is married for life to the man who deflowered her; b) she remains unmarried; c) she is married to another man who is willing to accept the loss of her virginity; d) she is stoned to death.

A man who has sexual intercourse with a married or engaged woman is to be put to death along with the woman, unless the woman cries for help:

If a man is caught lying with the wife of another man, both of them shall die, the man who lay with the woman as well as the woman. So you shall purge the evil from Israel. If there is a young woman, a virgin already engaged to be married, and a man meets her in the town and lies with her, you shall bring both of them to the gate of that town and stone them to death, the young woman because she did not cry for help in the town and the man because he violated his neighbor's wife. So you shall purge the evil from your

midst. But if the man meets the engaged woman in the open country, and the man seizes her and lies with her, then only the man who lay with her shall die. You shall do nothing to the young woman; the young woman has not committed an offense punishable by death, because this case is like that of someone who attacks and murders a neighbor. Since he found her in the open country, the engaged woman may have cried for help, but there was no one to rescue her. (Deut 22:22-27)

If a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall be put to death. (Lev 20:10)

Just as in the Hindu law the punishment and seriousness of the crime is determined by the caste of the individuals, so also in Jewish law, at least in its rabbinical interpretation, the punishment is determined by the race/religion of the individuals, which means by whether they were Jewish or non-Jewish. Thus the Talmud quotes and interprets Lev 20:10 as follows:

“Our Rabbis taught: [*And the man who commits adultery with another man's wife, even he who commits adultery with his neighbor's wife the adulterer and the adulteress shall surely be put to death*]. ‘The man’ excludes a minor; ‘who commits adultery with another man's wife’ excludes the wife of a minor; ‘even he who commits adultery with his neighbor's wife’ excludes the wife of a heathen; ‘shall surely be put to death’, by strangulation. (Sanhedrin 52b).

That is, a Jewish man is not executed if he commits adultery with a married Gentile woman. But the Gentile woman is executed. Talmudic Encyclopedia elaborates the point as follows:

“He who has carnal knowledge of the wife of a Gentile is not liable to the death penalty, for it is written: ‘your fellow's wife’ rather than the alien's wife ... and although a married Gentile woman is forbidden to the Gentiles, in any case a Jew is exempted.”

“If a Jew has coitus with a Gentile woman, whether she be a child of three or an adult, whether married or unmarried, and even if he is a minor aged only nine years and one day -- because he had wilful coitus with her she must be killed, as is the case with a beast, because through her a Jew got into trouble.” (For reference to the beast, see Lev 20:15-16 quoted further below)

Fornication with a slave woman of another man is not severely punished:

If a man has sexual relations with a woman who is a slave, designated for another man but not ransomed or given her freedom, an inquiry shall be held. They shall not be put to death, since she has not been freed; but he shall bring a guilt offering for himself to the LORD, at the entrance of the tent of meeting, a ram as guilt offering. And the priest shall make atonement for him with the ram of guilt offering before the LORD for his sin that he committed; and the sin he committed shall be forgiven him. (Lev 19:20-22)

The Torah prescribes death by burning in case a priest's daughter commits fornication or adultery:

And the daughter of any priest, if she profanes herself by playing the whore, she

profanes her father: she shall be burnt with fire. (Lev 21:9)

Later rabbis tried to make the law more benign: Thus in the Mishnah one rabbi is quoted as saying: "An incident once occurred with the daughter of a priest who committed adultery. They surrounded her with bundles of branches and burned her." The other rabbis responded to him, "That was done because the court that performed this execution was not knowledgeable." A comment in the Talmud explains that the burning was executed by a court of Sadducees (a Jewish group that did not believe in the oral tradition and was in this respect in opposition to the Pharisees, the forerunners of the later rabbis).

The Torah also prescribes the death penalty for some cases of incest and some unspecified punishment for sex with a menstruating woman:

The man who lies with his father's wife has uncovered his father's nakedness; both of them shall be put to death; their blood is upon them. If a man lies with his daughter-in-law, both of them shall be put to death; they have committed perversion, their blood is upon them. ... If a man takes a wife and her mother also, it is depravity; they shall be burned to death, both he and they, that there may be no depravity among you. ... If a man takes his sister, a daughter of his father or a daughter of his mother, and sees her nakedness and she sees his nakedness, it is a disgrace, and they shall be cut off in the sight of their people; he has uncovered his sister's nakedness, he shall be subject to punishment. If a man lies with a woman having her sickness and uncovers her nakedness, he has laid bare her flow and she has laid bare her flow of blood; both of them shall be cut off from their people. You shall not uncover the nakedness of your mother's sister or of your father's sister, for that is to lay bare one's own flesh; they shall be subject to punishment. If a man lies with his uncle's wife, he has uncovered his uncle's nakedness; they shall be subject to punishment; they shall die childless. If a man takes his brother's wife, it is impurity; he has uncovered his brother's nakedness; they shall be childless. (Lev 20:11-12, 14, 17-21)

Death is also the penalty for sodomy and sex with animals:

If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death; their blood is upon them. (Lev 20:13)

Whoever lies with an animal shall be put to death. (Exod 22:19)

If a man has sexual relations with an animal, he shall be put to death; and you shall kill the animal. If a woman approaches any animal and has sexual relations with it, you shall kill the woman and the animal; they shall be put to death, their blood is upon them. (Lev 20:15-16)

It is interesting to note that the Old Testament nowhere mentions homosexuality among women, although in the above passage sex with animals is mentioned for both men and women. This suggests that homosexuality among women was relatively unknown in ancient times while bestiality was about as common among women as among men.

In Jewish law, adultery is proved by witnesses but even in the absence of such a proof the



husband's mere suspicion can start proceedings against the wife. In Num 5 we find a ritual (*Sotah*) to which the woman is subjected in case her husband gets a "spirit of jealousy" and "becomes suspicion of her faithfulness" without any hard evidence. The ritual requires the man to bring the wife to the priest along with a quantity of barley flour. The priest brings the wife before the altar along with the flour. He also has available "holy water in an earthenware vessel" mixed with the dust that has settled upon the floor of the tabernacle. He then dishevels the woman's hair and pronounces some curses on her in case she is guilty. The curses are written and washed into the water. The priest then makes the woman drink the water, which tastes painfully bitter. As for the barley flour, it is waved in the air and a part of it is smoked on the altar as an offering to the Lord. If the woman is guilty, "her belly will swell, her thigh shall fall away, and she will become execration among her people," which is interpreted to imply that she will die. If she is not guilty, she will be immune to these effects and will be able to bear children.

The rabbis to various degrees neutralized or toned down many of the Old Testament laws and practices and this ritual is one of them. Thus in the Babylonian Talmud it is said: "When adulterers increased, then the *Sotah* ritual was abolished" (*Sotah* 47a).

Finally, we may mention the following law:

If two men are fighting and the wife of one of them comes to rescue her husband from his assailant, and she reaches out and seizes him by his private parts, you shall cut off her hand. Show her no pity. (Deut 25:11-12)

At first sight this law may seem strange, but within the Old Testament thought it does make some sense. It is probably assumed here that the woman damaged man's private parts in some serious way, which will ban the man from the "congregation of Yahweh" (Deut. 23:1). The above passage is applying the law of retaliation – eye for eye, tooth for tooth ... (Deut 19:21). Since the woman does not have what she has damaged in the man, she loses the hand that caused the damage.

## **Greek, Persian and Roman Laws**

The ancient Athenians punished adultery with death. In parts of Crete, an adulterer was covered with a crown of wool in mockery of his soft nature, then publicly made to pay a heavy fine, and barred from holding any government office.

As for the Persians, their custom was to throw the adulteress down headlong into a deep well to die.

Dio the consul, the first King of the Romans, established the law that a woman found guilty of adultery be put to death by her husband or relations in whatever way they thought fit. Later, Cato allowed the husband to execute his wife if he found her guilty, without a verdict from the court.

In the 1<sup>st</sup> century BCE, Augustus legislated that man be exiled after confiscating half of his property and likewise the woman be exiled after canceling half of her dowry and confiscating 1/3 of her property. But it seems that execution for adultery was practiced under some

emperors, since Tacitus in the first century CE says he found in the public records the names of three thousand who had been put to death for adultery.

Homosexuality was rather common in the pagan Graeco-Roman world. There was homosexual temple prostitution, which even some emperors such as Heliogabalus used. Some emperors tried to stop the practice, but only by punishments such as exile and increase of taxes on homosexual prostitutes.

## Pre-Islamic Arab custom

We have no firm information about the pre-Islamic Arab tradition concerning penalty for *zina`*. But considering that cultures and traditions all around Arabia and the Jewish tradition within it prescribed the death penalty at least in some cases of *zina`*, it is strongly expected that the Arab custom also considered some cases of *zina`* punishable by death.

Some indication of the Arab custom is provided by the stoning “verse” that some later Muslim traditions allege was once a part of the Qur`an (see Chapter 3). This “verse” is said to read:

*al-shaykh wa al-shaykhah idha zaniya fa arjimuhuma al-battatah*

The old man (*al-shaykh*) and old woman (*al-shaykhah*), when they commit *zina`* stone them to death outright.

As noted in Ch. 3, this verse is remarkably different from anything we find in the Qur`an or even the views of the *fuqaha*, who do not make any distinction on the basis of age. It is also very different from the punishments prescribed in other neighboring traditions and cultures. So it is natural to think that it reflects the pre-Islamic Arab view. The idea is that in case of young persons, who on the one hand have strong sexual passions and, on the other hand, lack the maturity and wisdom to control them, *zina`* may be treated somewhat lightly. But when the person is old, the crime becomes much more serious and punishable by death.

## Christian Outlook

Jesus did not rise as a new law-giver but rather accepted the Old Testament laws, although he interpreted some of them more liberally. This means that he and his eyewitness Jewish disciples probably took for granted the Old Testament penal code for fornication and adultery, possibly understood in a liberal way. But Paul, the real founder of Christianity as we know it today, rejected the authority of the Jewish religious law. He apparently taught his followers that they should instead follow the law of the country in which they were living. Thus he told his followers in Rome that it was their religious duty to submit to the Roman rule and authority:

Let every person be subject to the governing authorities; for there is no authority except from God, and those authorities that exist have been instituted by God. Therefore whoever resists authority resists what God has appointed, and those who resist will incur

judgment. For rulers are not a terror to good conduct, but to bad. Do you wish to have no fear of the authority? Then do what is good, and you will receive its approval; for it is God's servant for your good. But if you do what is wrong, you should be afraid, for the authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer. Therefore one must be subject, not only because of wrath but also because of conscience. For the same reason you also pay taxes, for the authorities are God's servants, busy with this very thing. (Romans 13:1-6)

This means that Paul accepted whatever penalty the Romans deemed fit for adultery. If we go by what Luke attributes to him in the following passage in Acts, then it appears that Paul had no difficulty with the death penalty in principle and that therefore the death penalty for adultery would have been acceptable to him in case the "authorities" decreed it.

Now if I am in the wrong and have committed something for which I deserve to die, I am not trying to escape death; but if there is nothing to their charges against me, no one can turn me over to them. I appeal to the emperor. (Acts 25:11)

As for Christians who came after Paul, they, because of the fact that Jesus did not bring any new system of law and Paul nullified the Jewish religious Law, developed a somewhat flexible attitude to the capital punishment for adultery in the Old Testament. But at the same time they developed a much stricter, almost repressive sexual ethic.

The flexibility is reflected in the story in the Gospel of John of a woman caught in adultery, a story that is unhistorical not only in the sense that it never happened but also in the sense that the original writer of John never wrote it, being added to his gospel centuries after him.<sup>[7]</sup> The story does not outright reject the stoning penalty but it also does not fully accept it.

After the Roman Empire became Christian with the "conversion" of Constantine, the civil law became even more acceptable to Christians and in some matters reflected Christian religious position. Constantine (306-337 CE) himself enjoined the death penalty for adultery. Emperors Marcian (450-457) and Leo (457-474) changed this into imprisonment for life. In the time of Justinian this was modified to flogging the woman and putting her in a monastery, with the husband having the right either to get her out within two years or let her stay there for the rest of her life.

For some important Christian thinkers of the past also the death penalty for adultery was acceptable. Thus Thomas Aquinas in his *Summa Theologia* discusses whether a husband on his own authority kills his wife for adultery. His answer is that he cannot. But in his discussion he takes it for granted that adultery is a capital offence.

Secular law in Christian lands, accepted by the churches in the spirit of Roman 13:1-6 and Acts 25:11, has often considered adultery a punishable offence, with the punishment ranging from fine to imprisonment to death. Even today in about half the states in the USA adultery is illegal. Some members of the US Congress have called on the federal government to make it a federal offence punishable by law on the grounds that it is a violation of the marriage contract and has negative social effects.

Strictness of sexual ethic is reflected in the views of Augustine (354-430 CE), who was a primary shaper of Christian theology. Augustine taught that sex was sinful even within marriage if it was done for pleasure and not for conception. Consequently, the faithful, if they did indulge in marital sex for pleasure had to confess this “sin” before a priest and pay the church a donation.

In view of Christian outlook on normal heterosexual relations, it is hardly surprising that Christianity also strongly condemns unnatural sex. Jesus and his eyewitness Jewish disciples are only expected to accept the Old Testament view of the homosexuality. But even Paul and his associates who had “freed” themselves from the Jewish law shared that view. In Romans and 1 Corinthians, both widely accepted as authentic letters of Paul we read:

For this reason God gave them up to degrading passions. Their women exchanged natural intercourse for unnatural, and in the same way also the men, giving up natural intercourse with women, were consumed with passion for one another. Men committed shameless acts with men and received in their own persons the due penalty for their error. (Rom 1:26-27)

Do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived! Fornicators, idolaters, adulterers, male prostitutes, sodomites ..., none of these will inherit the kingdom of God. (1 Cor 6:9-10).

In 1 Timothy – attributed to Paul by tradition but actually written after Paul’s death by one of his disciples – sodomites are included among the “lawless and disobedient”, “the godless and sinful”, “the unholy and profane” (1:10). Jude, a short letter purported to be written by someone called Jude the brother of James, reminds heretics of the divine punishment that visited the people of Sodom and Gomorrah for sexual immortality and pursuit of “other flesh” (unnatural lust) (verse 7). With the possible exception of Rom 1:26, all of these references are to homosexuality among men.

The unnatural sex leads to divine punishment but since early Christianity did not have a legal system of its own, this punishment is not a punishment in law. Later, when the Roman Empire became Christian with the conversion of Constantine, there was also legal punishment for

homosexuality, which became more and more severe.

In 305-6 CE the Council of Elvira forbade the giving of last rites to homosexuals who had sex with boys. In 314 CE the Council of Ancyra in Asia Minor excluded all homosexuals from receiving the sacrament. In 390 CE Gregory of Nyssa required that homosexuals go through self-mortification for 15 years as penitence. In the same year, civil law issued by Valentinian, Arcadius and Theodosius prescribed death by burning for homosexual prostitutes. This punishment was extended to all passive<sup>[8]</sup> homosexuals in 438 CE by Theodosius II. In 506 CE Rome was under the rule of the Barbarians when Alaric II, King of the Visigoths extended the punishment of death by burning to active homosexuals.

In 528 CE under the Byzantine emperor Justinian, the bishop of Rhodes named Isaiah and the bishop of Diospolis named Alexander were “examined and condemned by Victor the city prefect” for homosexual practices. He “tortured Isaiah severely and exiled him and he amputated Alexander's genitals and paraded him around.” Justinian “immediately decreed that those detected in homosexuality should have their genitals amputated”. In 538 CE Justinian declared homosexuality a crime of heresy against God as well as against civil law, quoting the story of Sodom for scriptural support. In 559 he also used Paul’s letters in his support and this time apparently prescribed castration followed by death by burning.

## Sacred Prostitution

Although adultery is considered a punishable crime in many pre-Islamic traditions, some of the same traditions did not hesitate to encourage sex outside of wedlock in temples. Ancient historians Herodotus (5<sup>th</sup> century, possibly 485- 420 BCE) and Thucydides (460 – 395 BCE) mention a practice which sanctified prostitution when done within a temple cult. Thus Herodotus says: “There is one custom amongst these people [Babylonians] which is wholly shameful: every woman who is a native of the country must once in her life go and sit in the temple of Aphrodite [Militta] and there give herself to a strange man.”

There were also sacred male prostitutes available for homosexual intercourse. They were called dogs because of their devotion to the goddess of the temple.

Although Herodotus describes the practice as shameful, his own Greek culture also practiced it. In the century before that of Herodotus, brothels were established in Athens, the earnings from which were used to build a temple dedicated to Aphrodites Pandemo. Later, in the temple in Corinth, Greece, there were over thousand prostitutes, according to Strabo (64 BCE – 24 CE).

Sacred prostitution was also practiced in Phoenician cultures, usually in honor of the goddess Astarte or Ishtar. It was also practiced in Israel and, as we learn from the following Biblical story, Judah, the ancestor of the Jews also participated in it, although, later it was prohibited by the Torah and condemned by prophets like Hosea and Ezekiel.

Judah had three sons named Er, Onan and Shelah. Er, Judah's first born, was married to Tamar, but he was wicked and "the Lord slew him." According to custom, if a brother died and left no children, then his younger brother must marry the deceased's wife and perpetuate his name. So Judah told his second son Onan to do this duty. But Onan became jealous and thinking that his seed should not be used to perpetuate someone else's name "he spilled it on the ground" at the critical moment. As a result the Lord "slew him also". Judah sent Tamar to her father telling her to wait as a widow till Shelah, the third son, comes of age and does his duty. But in his heart he never intended to marry Shelah to Tamar "lest peradventure he die also, as his brothers did". In due course Shelah came of age but Judah did not marry him to Tamar, who resolved to take revenge on her father-in-law. Her opportunity came when she learnt that Judah was coming to her village to shear his sheep. Covered in a veil she sat in his way at the entrance of a village called Enaim and when Judah, who by now had himself become a widower, saw her, "he thought her to be a prostitute". He came up to her and not recognizing her, proposed: "Come, let me come in unto you." She asked a price and he promised to send her a goat kid. As a guarantee she receives "his signet, bracelet, and staff." Then the old man "came in her, and she conceived by him." Judah sends a friend to deliver to her the goat kid and get back his things. The friend enquires in the village: "Where is the *qedsha* who was at Enaim by the wayside?" (The word *qedsha* here with the root q-d-sh, containing the idea of holiness means holy prostitute or, as translated by NRSV, the temple prostitute.) Judah's friend finds no trace of Tamar and returns to Judah. Three months later Judah heard that his daughter-in-law was "with child by whoredom." Furious at the news, Judah shouted: "Bring her forth and let her be burnt." The revengeful young woman simply sent him back his signet, bracelets, and staff. Recognizing these things as his own, Judah admits his fault, in not marrying his surviving son with Tamar. (Gen 38:1-26).

There were also male prostitutes (*qedeshim*) in Palestine, as we see from Deut 23:17-19, which prohibits the daughters and sons of Israel from being temple prostitutes and prohibits using for the temple any fee from such prostitution, including *mahir kelev*, "the pay of a dog", which refers to the payment to a male prostitute.

In ancient Rome, the priestesses of the goddess Vesta initiated young boys to sex when they had their head shaved for entering priesthood. They also kept a fire lit in the temple. The use of a perpetually lit fire has been recorded in many coastal temples, and was probably meant to guide the sailors to the temple in case they wanted to use the services of the temple prostitutes.

Until 1988, there existed in southern India a practice called *devadasi*. It involved marrying adolescent girls to a deity or a temple and making them practice prostitution when they reached puberty. Only members of upper castes can use the service.

## The Qur`anic Light

If we now compare the penalties for *zina`* in the Qur`an and in the traditions before Islam, it becomes clear that the Qur`an has continuity with those earlier traditions and at the same time makes a great leap forward by reforming them, thus manifesting the divine love and wisdom that is its source.

The continuity is reflected in the fact that almost universally pre-Islamic traditions recognize that some forms of sex such as adultery, incest, homosexuality, and bestiality are to be condemned and in some cases to be legally punished. The Qur`an confirms this universal wisdom of the pre-Islamic times.

The great leap forward is reflected in the following reforms:

- 1) Unlike Catholic Christianity, the Qur`an does not consider sexual pleasure a sin. In the Qur`anic view sexual pleasure becomes sin if it is sought out of marriage, that is, out of a solemn publicly known relationship that can ensure well being of the children.
- 2) Unlike some pagan cultures there is no place in the Qur`an for “sacred prostitution” based on the idea that such sex pleases a goddess of sex – Astate or Ishtar or Aphrodite.
- 3) Unlike almost all pre-Islamic traditions, the Qur`an makes no distinction between men and women who commit heterosexual offences, neither in the degree of sin nor in the punishment.
- 4) Almost all pre-Islamic traditions are quite lenient to a man, married or unmarried, who has sexual intercourse with an unmarried woman. The Qur`an greatly strengthens the sanctity of marriage by making all heterosexual intercourse outside of marriage equally punishable.
- 5) Unlike some pre-Islamic traditions such as Judaism and Hinduism, in the Qur`an or the views of the *fuqaha* the penalty of a Muslim does not depend on the caste or race or religion or social status of the person with whom *zina`* is committed. In the Qur`an, a Muslim’s punishment only depends on whether he or she himself/herself is free or slave and the punishment for a slave, unlike the punishment for a low caste person in Hinduism or a heathen in Judaism is not increased but decreased. In the views of most *fuqaha* the punishment also depends on the marital status of the Muslim who commits *zina`*. As for a non-Muslim the Qur`an does not give explicit guidance<sup>[9]</sup>. The *fuqaha* prescribe for him/her either the same punishment as a Muslim or some lesser punishment or the punishment prescribed in his/her own legal tradition<sup>[10]</sup>.
- 6) Unlike most pre-Islamic traditions, in the Qur`an the husband has no authority to execute punishment for *zina`* on the basis of his own judgment. If he suspects guilt on her part, he can accuse her by prescribed oaths. But the wife can avert punishment by rejecting the charge through similar oaths. She is not subjected to painful and humiliating ordeals, as the ordeal of water in Babylonian law, passing

through fire in Hinduism or the ordeal of *Sotah* in Judaism. Her word is as good as his word.

- 7) The Qur`anic punishment of 100 stripes is painful enough to be effective. But it does not lead to amputation or loss of life, as is the case in most pre-Islamic traditions<sup>[11]</sup>.
- 8) For unnatural sex the Qur`an stresses reform with punishments like house imprisonment for women and some other forms of punishment – left for the authorities to specify – for men (see Chapter 5). As noted earlier, imprisonment is also the punishment for adultery in the code of the Christian emperor Justinian. But in the Justinian code imprisonment is for life unless the husband takes the woman back within two years. In contrast, in the Qur`an the imprisonment can end at any time and not just if the husband decides to take her back; any new circumstances with a reasonable promise of rehabilitation of the woman can secure her release.

Unfortunately, even some early Muslims did not fully appreciate the light and wisdom in the Qur`an, as will be shown in the rest of this book. While the Qur`an made a tremendous advance forward over the pre-Islamic traditions and cultures, these Muslims moved backward, trying even to pull Islam down with them by distorting and fabricating traditions about the stoning “verse”, death penalty for unnatural sex, and stories about stoning of adulterers and adulteresses done by the Prophet. What is even more unfortunate is that they managed to circulate so many of these false *ahadith* that in the subsequent generations most Muslims were unable to free themselves from them.

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<sup>[1]</sup> Winkler, "Die Gesetze Hammurabis", Leipzig, 1902, 10.

<sup>[2]</sup> Interestingly, this led Egyptian surgeons to develop plastic surgery.

<sup>[3]</sup> The Sanskrit word for caste is *varna* which also means color. This supports the view that originally the caste system was developed to preserve racial purity of the Aryan invaders of fair color settling among Dravidians of much darker color.

<sup>[4]</sup> It is not clear how the rules presented so far are to be related with the following rules:



“Regarding a Sudra who has intercourse with a woman of a twice-born caste (i.e. the other three higher castes), guarded or unguarded: if she was unguarded, he loses the (offending) part and all his property; if she was guarded, everything (including his life). For intercourse with a guarded Brahmana a Vaisya shall forfeit all his property after imprisonment for a year; a Kshatriya shall be fined one thousand (*panas*) and be shaved with the urine (of an ass). If a Vaisya or a Kshatriya has connexion with an unguarded Brahmana, let him fine the Vaisya five hundred (*panas*) and the Kshatriya one thousand. But even these two, if they offend with a Brahmani (not only) guarded (but the wife of an eminent man), shall be punished like a Sudra or be burnt in a fire of dry grass.”

“If a Vaisya approaches a guarded female of the Kshatriya caste, or a Kshatriya a (guarded) Vaisya woman, they both deserve the same punishment as in the case of an unguarded Brahmana female. A Brahmana shall be compelled to pay a fine of one thousand (*panas*) if he has intercourse with guarded (females of) those two (castes); for (offending with) a (guarded) Sudra female a fine of one thousand (*panas* shall be inflicted) on a Kshatriya or a Vaisya.”

“For (intercourse with) an unguarded Kshatriya a fine of five hundred (*panas* shall fall) on a Vaisya; but (for the same offence) a Kshatriya shall be shaved with the urine (of a donkey) or (pay) the same fine.”

[5] The punishment for a Brahmana is prescribed as follows:

“A Brahmana who carnally knows a guarded Brahmani against her will, shall be fined one thousand (*panas*); but he shall be made to pay five hundred, if he had connexion with a willing one. Shaving of the head is ordained for a Brahmana (instead of) capital punishment; but other castes shall suffer capital punishment.”

“A Brahmana who approaches unguarded female Kshatriya or Vaisya, or a female Sudra, shall be fined five hundred (*panas*); but (for intercourse with) a female (of the) lowest (castes), one thousand.”

[6] See also Jeremiah 29:21-23 and Genesis 38:24. In the first of these passages, Jeremiah prophesies that God will deliver certain Zedekiah, the son of Maaseiah, and Ahad, the son of Kolaiah, to the King of Babylon who will roast them to death because they were false prophets and committed adultery with their neighbors' wives. In the second passage, Judah learns that his daughter-in-law is pregnant from whoredom and he says: “bring her out and let her be burned”.

[7] This is now recognized by almost all translations of the New Testaments.

[8] The reason the law at first was much harsher on the passive homosexual seems to be that he truly departs from his male nature. The active homosexual retains something of his natural maleness, since he performs the specifically male function of penetration. Also, passive homosexuals mostly worked as prostitutes and it was thought that if the homosexual prostitution is stopped, this will reduce homosexuality. Harsh punishment were extended later to active homosexuality probably because cruel punishment of passive homosexuals did not stop homosexuality and also because after Augustine Christians tended to view all sex in the worst possible light.

[9] In 4:15-15 punishments are suggested for sexual offences for “your [Muslim’s] women” and for men “among you”. This suggests that the punishments are as a rule meant for those who accept Islam. In view of this and the spirit of the Qur`an generally, a non-Muslim is to be punished according to his/her own legal tradition. In modern times when some legal systems have no punishment for *zina`*, it would be necessary for a Muslim society to protect its values by some punishment for non-Muslim which could be the same as for Muslims.

[10] According to most *fuqaha* a non-Muslim **resident** in a Muslim land is to be punished like a Muslim, so that he or she is not to be treated more harshly than a Muslim. According to Imam Malik, the prescribed penalty for *zina`* is meant only for Muslims, so that for non-Muslim residents their own law will be applicable. According to a view attributed to Imam Abu Hanifah a non-Muslim never becomes *muhsin*, since for *ihsan* it is necessary to be a Muslim. Consequently, death by stoning is not applicable to a non-Muslim.

As for a non-Muslim **visiting** a Muslim land, according to some *fuqaha* he or she is subject to the Islamic penalty, but according to others he or she is subject to the law of his own land.

[11] For stealing there is hand cutting, but stealing is not as natural an impulse as sex, except in case of serious deprivation, in which case the Qur`anic rule of necessity and some *ahadith* require that there should be no hand cutting.

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