

## ADULTERY AND FORNICATION IN HISTORICAL PERSPECTIVES

Lenka Bezoušková\*, Antonín Lojek\*\*

**Abstract:** *This paper deals with the delicts of adultery and fornication. It presents rules related to this delict by referring to the individual pieces of regulation valid within the geographic area of our country and pointing out similarities with rules applicable for these delicts in the Islamic law, especially focusing on the possibility to punish – whether it is capital punishment, lashing or exile. While in our geographical region criminal prosecution has been completely abandoned, the traditional Islamic law still contains these punishments.*

**Keywords:** *adultery, fornication, zinā, hadd, Islamic criminal law, reception of Roman law, principle of monogamy*

### INTRODUCTION

Adultery is an ancient delict that has been prosecuted and punished for centuries and as unlawful behavior it was being suppressed. Legal history of this delict show that centuries ago Christians and Muslims, but also Jews, were much closer in the understanding of this delict and its punishment than we might imagine today. The delicts of adultery and fornication, as we can see them in the Islamic law, were very well known and punished in the geographical region of today European states, but also elsewhere, from ancient times. Perhaps the first legal regulation prohibiting extramarital intercourse can be found in the Hammurabi Code from around 1750 BC, under which the offenders (adulterous woman and her lover) were to be punished by being thrown into water, in which they were to drown. Also in other cultures adultery was punished in various ways.<sup>1</sup>

Punishments for adulterers became less severe in Europe in the 19<sup>th</sup> century. However, this misconduct was still punished – no longer by death, as was the case earlier, but by imprisonment (in extreme cases). Long into the 20<sup>th</sup> century many European countries classified this delict as minor offense. In the Czech Republic adultery was punished as a minor offense until 1 August 1950. In Germany adultery ceased to be a criminal offense in 1969, in Italy in 1968, in France in 1975, in Switzerland in 1990. In Austria courts could impose a sentence up to 1997.

Today, the legal orders of European countries do not consider adultery a criminal offense and this “misconduct” is generally seen only from the moral perspective. This is incommensurable with some legal orders based on the Islamic law, especially when it comes to the harsh punishment.

\* JUDr. Lenka Bezoušková, Ph.D., LL.M., Institute of State and Law of the Academy of Sciences of the Czech Republic. The work was created under subsidies for long term conceptual development of the Institute of State and Law of the Academy of Sciences of the Czech Republic, v. v. i. (RVO: 68378122).

\*\* JUDr. Antonín Lojek, Ph.D., Institute of State and Law of the Academy of Sciences of the Czech Republic. The work was created under subsidies for long term conceptual development of the Institute of State and Law of the Academy of Sciences of the Czech Republic, v. v. i. (RVO: 68378122).

<sup>1</sup> For more see TURNER, D. M. Adultery. In: Smith, Bonnie G. (ed.). *The Oxford Encyclopedia of Woman in World History*. Oxford: Oxford University Press, 2008, p. 27 ff.

However, the purpose of this article is not to provoke a general debate whether or not adultery or fornication should be punished. The aim is to present the legal regulation of unlawful sexual intercourse in the Islamic law and put it into historical context, as well as to point out where we see similarities with the regulations valid in our state in the past. We also wish to contemplate the purpose of forbidding this kind of behavior.

## 1. LEGISLATION RELATED TO ADULTERY AND FORNICATION

The Islamic law, Islamic legal science (*fiqh*), is based on the interpretation of the primary sources of law, i.e. mainly Qur'ān and sunna. Law schools (sg. *madhhab*, pl. *madhāhib*) gradually emerged in the first centuries of the Islamic history and they created doctrines that guided later generations of lawyers and judges. Islamic criminal law can be, generally speaking, divided into three parts based on the potential punishments imposed: *hadd* punishments,<sup>2</sup> imposed also for forbidden sexual intercourse, “residual” category *ta'zīr* (chastisement),<sup>3</sup> and *qisās* (retribution, talion)<sup>4</sup>. Within the Islamic criminal law the basic rules related to non-permissible sexual intercourse can be found in Qur'ān<sup>5</sup> and sunna.<sup>6</sup> The Arabic term *zinā* includes what we consider adultery and fornication and thus represents any non-permissible extramarital intercourse. A false accusation of this crime (*qadhf*) is also considered a crime and is severely punished as well. So in the Islamic law sexual intercourse is only permitted within a marriage or between a slave woman and her master (special rules related to slaves shall be left aside in this article). A man who engages in unlawful sexual intercourse commits a tort.

<sup>2</sup> *Hadd*, pl. *hudūd* has several meaning depending on the context. The main meaning is the following: border, limit, barrier, end. In case of crimes the term is used for acts that violate the divine right and can be punished harshly (lashing, stoning, cutting of limbs or crucifixion). These crimes include, according to the majority view, theft (*sariqa*), banditry (*hirāba*), unlawful sexual intercourse (*zinā*), an unfounded accusation of unlawful sexual intercourse (*qadhf*), drinking alcohol (*shurb khamr*), and most law schools include in *hadd* also apostasy (*ridda*). These are criminal offences for which the Qur'ān and sunna require mandatory punishments.

<sup>3</sup> *Ta'zīr* is often defined as punishment for an offence that violated public order or public interest or rights of an individual but for which the law (Qur'ān and sunna) does not define punishment exactly. *Ta'zīr* is also punishment for different illegal actions. *Ta'zīr* implies the correction or rehabilitation of the culprit, punishment is left to the judge who imposes a discretionary punishment. The severity of punishment could be determined by public authorities that defined more detailed rules in the spirit of *sharī'a*. Usually it was lashing, imprisonment, local banishment, and fines. This authority is based on the concept of *siyāsa sharī'a*, which was fundamentally developed by Ibn Taymīya. According to this concept, but also majority view of other scholars, *ta'zīr* should not be more than ten lashes and vast majority of scholars believe it should never exceed *hadd*. For more details see e.g. Mohammed El-Awa, “Ta'zīr in the Islamic Penal System,” *Journal of Islamic and Comparative Law*. 6, 1976, p. 51.

<sup>4</sup> *Qisās* is a punishment for a person who fails to pay compensation (*dīya*, sometimes translated as “blood money”) to the damaged person(s). The victim or his/her family may surrender claim for damage. This category includes offences against another person that includes also bodily harm and homicide. According to the classical Islamic law punishment is imposed only when the victim or his/her heirs claim the compensation.

<sup>5</sup> The quoted verses from Qur'ān are from the translation of Yūsuf Ali. It is also possible to rely on the translation by Pickthal. Both (and others) are available online (<http://www.quranexplorer.com/quran/>).

<sup>6</sup> Sunna is a source of *sharī'a* and refers to all that is narrated from the Prophet, his acts, his sayings and whatever he has tacitly approved. According to the *ulamā* of *hadīth* sunna contains also all reports which describe his physical attributes and character. A part of all these reports were gathered together into collections and six of them (so called *al-kutub al-sitta*) supposed to contain “sound” *hadīths* (*ahādīth*) – collection from Bukhārī, Muslim, Nasa'ī, Abū Dāwud, Tirmidhī and Ibn Māja.

Let's ask ourselves a question: what were the criminal penalties for adultery in our legal systems? The delict of adultery was, not only in the Czech Lands<sup>7</sup> but in the entire medieval Europe, even before the reception of Roman law based mainly on the customary law and Christian understanding of marriage was taking root only gradually. The first secular regulation in the area of family law were the rights given to Prague bishops in 992 that supported this understanding of marriage.<sup>8</sup>

Only in 1039 Prince Bretislav II., i.e. top secular authority, issued *Bretislav's Decrees* that introduced certain rules to the matrimonial law, putting marriage wholly under the control of the church. Here we come across the first written legal implementation of the delict of adultery in the Czech Lands. This regulation emphasized the principle of monogamy and indissolubility of marriage. Further questions were dealt with via the canon law. Disputes in marriage were addressed by church courts, i.e. still using ordeals – irrational methods of proving guilt or innocence.

Wives remained, as it was in the Roman law, in subordinate position towards husbands, which included a requirement of complete faithfulness to the husband and adultery on her part could be persecuted not just by the court but also by the husband.<sup>9</sup>

The legal regulation of sexual offenses (in feudal society) is practically non-existent in the land law, they can be found elsewhere, e.g. in the city law. Although adultery was considered a crime by the land law it was persecuted based on customary law.<sup>10</sup> City law in the Czech Lands was initially quite localized, albeit we can find certain similarities between individual regions, often due to the influence of the law of northern and southern parts of Germany. In the 16<sup>th</sup> century the efforts to subjugate cities to a unified legal framework intensified.<sup>11</sup>

The result of these efforts was the *Laws of the Cities of the Czech Kingdom* written by Pavel Kristián Koldín in 1579. Koldín based his work on the Prague City Law, as well as on the law books of Brno and Jihlava. We can see influences of the Roman and canon laws, especially in the regulation of adultery. Adultery is understood as a violation of somebody else's bed (Czech word for adultery, *cizoložství*, is merged from *cizo-* meaning *foreign* or *someone else's* and *-ložství* or *lože* meaning *bed*). According to this code of law adultery could be punishable by death. Both, men and women could be convicted (article M XXIX)<sup>12, 13</sup> Besides the death penalty for the convicted woman there was another punish-

<sup>7</sup> On sexual offences in history see e.g. SCHELLE, K., TAUCHEN, J. a kol. *Sexuální trestné činy včera a dnes*. Ostrava: Key Publishing, 2014, 448 pp.

<sup>8</sup> VOJÁČEK, L., SCHELLE, K., KNOLL, V. *České právní dějiny*. 2<sup>nd</sup> edition. Plzeň: Aleš Čeněk, 2010, p. 148.

<sup>9</sup> Briefly on the development of the marriage law in the Middle Ages see VOJÁČEK, L., SCHELLE, K., KNOLL, V. *České právní dějiny*. 2<sup>nd</sup> edition. Plzeň: Aleš Čeněk, 2010, pp. 148–152.

<sup>10</sup> MALÝ, K. *Trestní právo v Čechách v 15.–16. století*. Praha: Universita Karlova, 1989, p. 232.

<sup>11</sup> For details see e.g. JÁNOŠÍKOVÁ, P., KNOLL, V. Ke kodifikaci městského práva v Čechách. In: Karel Schelle (ed.). *Vývoj právních kodifikací*. Acta Universitatis Masarykianae Brunensis Iuridica – Spisy Právnické fakulty Masarykovy univerzity v Brně, Brno: Masarykova Universita, 2004.

<sup>12</sup> *‘Adulterium vel lex Julia, adultery, also violation of other person's bed. Adultery is an act with a woman who has another man or with a man who has a wife but with another lays. The penalty is beheading.’*

<sup>13</sup> Although the template for this codification was Roman *Lex Julia de adulteriis coörcendis*, the punishment was applicable to men as well. In older city law such acts by men were not punishable, as can be seen in the *City Laws* of 1536. 1536, brought by Brick of Licko. In chapter XX, article IX it says: “... *no fine shall be imposed when a married man is found with a unmarried woman, but it is different when he is caught with another man's wife because then the husband may be the accuser...*” JIREČEK, Josef – JIREČEK, Hermenegild (eds.). *M. Brikcího z Licka Práva městská. Dle textu z r. 1536*. Praha: Právnická jednota, 1880, p. 134.

ment – forfeiture of her dowry to the husband (article C XLVII<sup>14</sup>). The husband thus could benefit from pursuing his unfaithful wife. If infidelity was proven he received back his bride token as well as wife's dowry she brought to the marriage. Another possibility was that the husband would punish unfaithful wife in accordance with the custom land law, as well as the *City Laws of the Czech Kingdom*. A husband had the right to punish his wife if he caught her in illegal act. The same right was granted to the father towards his daughter (article M XXXIX).<sup>15</sup> *City Laws of the Czech Kingdom* define also fornication (*stuprum*) as a voluntary sexual intercourse with a virgin or widow committed with the consent of the woman (article M XXX<sup>16</sup>). Consent was an important part of this delict – without it the act would be considered forceful fornication (*stuprum violentum*), which was punished more severely. Fornication was in cities a relatively widespread criminal act.<sup>17</sup> In practice it seems that the delict of bigamy and adultery were often merged. Secular courts would first refer cases of sexual delicts to church courts and only after they made a decision, which city courts considered binding, could the culprit be sentenced.<sup>18</sup>

An important shift in the area of legislation came during the enlightenment era when our region saw the publication of extensive codes of law. These codes introduced new provisions related to adultery. This included in particular the code of law of the emperor Joseph I. from 1708 titled *Constitutio criminalist Josephina* that recognized two types of adultery, each with own punishment. The first type was adultery between an unmarried person and a married person. In this case the punishment was left up to the judges. The second type of adultery was between two married persons – this was to be punished by death.

Another code of law was the *Constitutio Criminalis Thereziana* from 1768 that defined what is adultery<sup>19</sup> and who is considered adulterer.<sup>20</sup> The *Code of law for crimes and punishments* of Joseph II. from 1787 contained article 45 that stated that adultery could be judged only based on a private accusation by either a man or a woman. This moved the crime from the public to the private domain. The criminal code of Franz II. from 3 September 1803 *On crimes and heavy police offences* defined adultery as “... heavy police offence against public morals...” that could be judged only based on a private accusation of the husband. Under article 248 it was expressly forbidden to punish adultery *ex offo*.

Similar principles of this code of law were adopted in the law *On crimes, misdemeanors and offences* No. 117/1852, where section thirteen addressed misdemeanors and offences against public decency that included also fornication and adultery. Under the provisions

<sup>14</sup> “Any woman convicted of adultery or fornication ... shall lose one third of common property but also shall be punished bodily.”

<sup>15</sup> MALÝ, K. (ed.). *Práva městská Království českého. Edice s komentářem*. Praha: Karolinum, 2013, p. 631.

<sup>16</sup> “Stuprum, adultery is an act whereby a maiden or a widow corrupted is voluntarily, when the maiden or a widow consented, and the ancient punishment for such adulterers is banishment from the city.”

<sup>17</sup> MALÝ, K. *Trestní právo v Čechách v 15.-16. století*. Praha: Universita Karlova, 1989, p. 241.

<sup>18</sup> *Ibid.*, p. 233.

<sup>19</sup> “...it is a crime to offend marriage fidelity by corporal intercourse with another person...” article 77.

<sup>20</sup> “a husband and a wife of another man, unmarried man with a wife of somebody, unmarried woman with a married man” article 77.

of article 502 adultery was considered to be only an offence and punishable for married as well as unmarried persons.<sup>21</sup> Special subject matter was corruption of a related minor female by a person from the household, fornication of a maid with an under-age son or relative living in the house and corruption under the promise of marriage (article 504–506). This code of law was, based on reception norm No. 11/1918 Col. accepted in the legal order of the Czechoslovak Republic in 1918. The *Criminal Code* No. 86/1950 Col. removed adultery as an offence.

## 2. DEFINING ATTRIBUTES OF A CRIME

A general rule is that under the Islamic law it is possible to impose a *hadd* punishment or *taʿzīr* only if the person committing the crime is able to bear responsibility for his/her illegal actions. That means the person must be of full age (meaning sexually mature; *bulūgh*),<sup>22</sup> a Muslim,<sup>23</sup> not suffering from a mental illness and not having acted under false belief or force (*ikrāh*).<sup>24</sup> Force includes also threat of killing, bodily harm with lasting consequences to another person, his/her child but also to one of the parents – according to some law schools.<sup>25</sup>

The offender had to commit illegal extramarital sexual intercourse, i.e. intimacies such that they are permitted to husband and wife only. The first fact to establish is whether or not the involved persons are married, i.e. whether or not they had entered into a (valid) marriage. One of the conditions of marriage is the presence of two persons who witness the signing of the marriage contract. However, such condition is only stipulated by the Sunni law schools. Shia Muslims do not require their presence in case of *mutʿa* marriages and the accused could therefore defend themselves by claiming to be a married couple. Similar rules apply in case an unmarried girl becomes pregnant (on pregnancy as a proof of a crime see below).<sup>26</sup>

<sup>21</sup> “A married person committing adultery and also the unmarried person with whom an adulterous act was committed are guilty of an offence and punished by prison sentence of one to six months, however, a woman is to be punished more severely if due to committed adulterous act the father of a child may be doubted.”

<sup>22</sup> Girls are considered sexually mature with their first bleeding and boys with first “wet dreams”. The lower limit in the classical Islamic law is nine years for girls and twelve for boys, the highest is fifteen, when maturity is presumed. The individual law schools differ when it comes to specification of concrete age limits.

<sup>23</sup> Generally, Shāfiʿi law school recognizes that punishment may be carried out also by *dhimmi*, i.e. members of the People of the Book. According to the Hanafi law school non-Muslims are punished for *zinā*, because they cannot be measured against such high moral standards as free Muslims (i.e. persons who are not slaves). However, their actions threaten public morals and judge is therefore entitled to sentence them for their actions to discretionary punishment. JOHANSEN, B. *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*. Leiden: Brill, 1999, pp. 390–391.

<sup>24</sup> When comparing this rule with the Jewish law we find that it approaches the circumstances excluding illegality differently. Adultery is one of the three crimes (idolatry, murder and *gilluy ʿarayot*, which includes adultery as well as incest), that must be avoided under all circumstances, even if it requires sacrificing own life. (Sanh. 74a).

<sup>25</sup> PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 23.

<sup>26</sup> HASHEMI, K. *Religious Legal Traditions, International Human Rights Law and Muslim States*. Leiden: Koninklijke Brill NV, 2008, p. 227.

According to the prevailing opinion the crime has been committed only if genitals connect, i.e. in case of vaginal penetration. Only some law schools consider also other sexual practices to be illicit sexual intercourse but we leave this intentionally aside.<sup>27</sup>

### 3. PROVING CRIMES AND DETERMINATION OF GUILT AND PUNISHMENT

#### 3.1 Prosecution and determination of guilt and punishment

According to the Islamic law adultery should not be primarily punished by an involved person. Determination of guilt and punishment appertains to the court while the proceeding is to be started based on an accusation. The accuser carried the burden of proof and had to prove the crime beyond reasonable doubt. Both sides of the dispute have the right to counsel for legal advice, from pre-trial interrogation to execution of the sentence. If both sides are entitled to appoint representatives, they also have the right to legal advice. What we see here is therefore *wakāla* (agency). In case of disputes connected with the Right of Man (*haqq al-ādami*), the scholars are unified and the party can therefore be represented and also have an agent. In case of Right of God (*haqq Allāh*) the situation is different. The Hanafi law school approaches *zinā* and *qadhif* differently. In case of *zinā* there is no reason for *wakāla* for several reasons: either there is confession or testimony assessed by the court. By its nature this procedure usually does not involve litigation and decisions about the Rights of Men (*haqq ādami*). According to the dominant view within the Hanafi law school in case of slanderous accusation both sides to the dispute may be represented because the offence in question consists mainly of violation of the rights of men. The Shāfi'i law school generally agrees with the Hanafi law school and its lawyers add that counsel restraint in inflicting the penalties laid down for *hudūd* offences. On the other hand, representation should usually seek to promote and facilitate proof. For the Māliki and Hanbali law schools this position is unacceptable because representation may seek to disprove and deny the charge just as it may also seek to secure the proof of the *hudūd* and it therefore permits legal representation.<sup>28</sup> In this context already Roman law defined who is qualified to accuse. In Roman law it was primarily husband who could accuse, but also the father of the female adulterer and after 60 days anybody.<sup>29</sup> In our legal order adultery was prosecuted for many years basically *ex offio* or based on an accusation of the husband or seduced woman who became pregnant as a consequence of a criminal act. It was not until the *Criminal Code of Joseph II.* from 1787 when in article 45 it was stipulated that adultery could only be prosecuted based on a private law action “*The authority should not get involved in this crime until the offended party, man or a woman, requested that it is prosecuted...*”.

This was emphasized by another legal regulation – criminal code of Franz II. from 3<sup>rd</sup> September 1803 *On crimes and heavy police offences* where article 248 stipulates that husband

<sup>27</sup> On the question of homosexual practices and immoral actions in general see e.g.: PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 61 ff.; AFFI, A., AFFI, H. *Contemporary Interpretation of Islamic Law*. Leicestershire: Matador, 2014, p. 43 ff. Other publications on homosexuality are analyzed by Schmidtke. SCHMIDTKE, S. Homoeroticism and Homosexuality in Islam: A Review Article. *Bulletin of the School of Oriental and African Studies*. 1999, Vol. 62, No. 2, pp. 260–266.

<sup>28</sup> KAMALI, M. H. *The Right to Personal Safety and the Principle of Legality in the Shar'ah*. Islamabad: Islamic Research Institute, 2001, pp. 41–43.

<sup>29</sup> VOIGT, M. *Der Ehebruch*. Leipzig: Sturm und Koppe, 1935, p. 8.

must first file action and it was forbidden to punish adultery *ex offio*. The offended husband lost this right after having expressly forgiven this offence or failing to file action within the prescribed time period. The most recent legal regulation permitting prosecution of extramarital intercourse was *On crimes, offences and misdemeanors* No. 117/1852, which in article 503<sup>30</sup> stipulated that prosecution of adultery cannot be initiated by the authorities, it can be initiated only by a private complaint, which was also the case for corruption (articles 504-506).

### 3.2 Testimony as evidence

According to the Islamic law evidence must be sound, free of doubt, loopholes and without recourse to spying. Nobody may be punished without evidence.<sup>31</sup> The Islamic law in this regard, unlike Jewish law,<sup>32</sup> puts more emphasis on testimonies and oaths. That is also the case with *zinā* where the evidence is testimony of four upright eye witnesses (four men),<sup>33</sup> as follows from the Qur'ān (4:15) or confession of the offender. No other evidence is usually accepted in *hudūd*.<sup>34</sup> These must be free (i.e. not slaves) and unblemished Muslims although some recognize also testimonies from non-Muslims.<sup>35</sup> The witness should also have good memory and abstain from disapproved conduct. Testimony from a blind or mute person is generally unacceptable. Testimonies must contain exact descriptions of persons, actions, place and time and be fully aligned. The question is whether this condition can be fully satisfied.<sup>36</sup> At least it may be said that the requirement of four eye witnesses render a conviction

<sup>30</sup> "Adultery may never [except for article 510] be investigated and punished by authorities only, the offended side must first request it. However, the offended party cannot request that once the offence was forgiven or a period of six weeks has passed since the offended party learned about the offence and failed to file action. Also a sentence already imposed shall be forgiven if the offended party wishes to live with the offender once again. However, in such situation punishment is not forgiven to other culprits."

<sup>31</sup> Kamali refers to hadith mentioned by ibn Taymiyya. Muhammad spoke about a woman with bad reputation as regards her sexual conduct: "If I were to stone anyone without evidence, I would have stoned this woman." KAMALI, M. H. *The Right to Personal Safety and the Principle of Legality in the Shari'ah*. Islamabad: Islamic Research Institute, 2001, p. 16.

<sup>32</sup> Under the Biblical law, the detection of actual sexual intercourse was necessary to establish the crime. According to Talmud a woman could not be convicted of committing adultery if it wasn't proved that she was forewarned (in front of two witnesses) to terminate any communication with the suspicious man. If she met with him even after this warning under circumstances that would make the commission of the crime possible (when she entered a private place with him and stayed with him a time sufficient for misconduct to have occurred), an ordeal ensued. (Mishna - Sotah 2a, Gemara 2b).

<sup>33</sup> According to Sunni law schools convicting an offender generally requires testimonies of four men, Shia law schools usually accept also testimonies from women if at least one of the witnesses is a man. Also in this case the general rule is maintained that a testimony of a woman is half of a testimony of a man and the number of (female) witnesses must be increased to match testimonies of (male) witnesses.

<sup>34</sup> This basically excludes e.g. hearsay or indirect testimony (testimony of a person about other person's witnessing), testimony of a bad reputation of the offender, refusal of oath by the offender from *zinā* is not evidence (except for cases of adultery), "acquaintance of the judge" or "letter from judge to judge" but also confession to the crime by the offer, unless done in front of the court, are not evidence.

<sup>35</sup> AFFI, A., AFFI, H. *Contemporary Interpretation of Islamic Law*. Leicestershire: Matador, 2014, p. 45.

<sup>36</sup> Kamali contemplates in a *maqāsid*-based approach *ijtihād* nad occasions of revelation. Bedouin Arab society, a large part of which consisted of nomads, was different from today's society. The requirement of four eye witnesses was according to Kamali "probably feasible in a nomadic society due to the open space and desert setting of the Arabian lifestyle". He asks the question whether today, when lifestyle is much different, the requirement of four eye witnesses is adequate and whether it would not be possible to use new methods of proof, either beside or instead of four eye witnesses. On the other hand, Badawy refuses categorically photographic evidence because it can be potentially manipulated. KAMALI, M. H. *Shari'ah Law: An Introduction*. Oxford: Oneworld, 2008, p. 131; BADAWY, T. Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses. *Arab Law Quarterly*. 2009, p. 298.

extremely difficult, if not impossible. There are those who believe that *hadd* punishment is more-or-less a “symbolic reminder of sex outside of marriage”.<sup>37</sup>

Also the witnesses themselves may face punishment if they are too few or if their testimonies contain discrepancies, as will be discussed later. We may therefore ask ourselves – who will be willing to undergo this risk?<sup>38</sup>

In connection with the unattainable requirement of four eye witnesses in professional literature we may come across the opinion that *zinā* should be seen as a crime of public indecency. A. Quraishi states “the crime will realistically only be punishable if the two parties are committing the act in public, in the nude. The crime is therefore really one of public indecency rather than private sexual conduct,”<sup>39</sup> and adds another condition: “four people see them without invading their privacy.” H. Mir-Hosseini agrees with her on this.<sup>40</sup> Both authors see the proving of *zinā* in the context, in which A. Quraishi correctly points out the illegality of violating privacy and argues with the decision of caliph ʿUmar, who punished witnesses of *zinā*.<sup>41</sup> It seems that the reason for punishing witnesses of *zinā* was an inconsistency in their testimonies, not the fact that testimonies were acquired by violating privacy. However, we can find many other stories when protection of privacy is generally accentuated in connection with criminal activities<sup>42</sup> and according to T. Badawy testimony of a witness acquired based on unpermitted entry into the house is nullified.<sup>43</sup>

Testimony is given in front of the court as a part of a court hearing. The law schools differ in the opinion whether it must be done once (Mālikīya and Hanafīya) or four times (Hanbalīya). Meeting the requirement of four eye witnesses is a necessary condition of proving that a crime has been committed and the perpetrator deserve a *hadd* punishment. Four eye witnesses is a condition that may be hard to meet.<sup>44</sup> If there are no or less than

<sup>37</sup> FERYAL, E. S. Zinā. In: *The Oxford Encyclopedia of Islam and Law*. [2014-08-28]. Available at [http://www.oxfordislamicstudies.com/article/opr/t349/e0013?\\_hi=0&\\_pos=2#](http://www.oxfordislamicstudies.com/article/opr/t349/e0013?_hi=0&_pos=2#).

<sup>38</sup> Badawy says very aptly: “it is unlikely that someone will have the courage to testify absent four qualified witnesses, and knowing that if something goes wrong in the process, flogging will be inevitable; not to mention the fact that he will permanently lose the quality of justice and good character explained above.” BADAWY, T. Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses. *Arab Law Quarterly*. 2009, p. 298.

<sup>39</sup> QURAIISHI, A. Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective. *Michigan Journal of International Law*. Vol. 18, 1996–1997, p. 296.

<sup>40</sup> MIR-HOSSEINI, Ziba. Criminalising Sexuality: Zina Laws as Violence against Women in Muslim Contexts. *International Journal on Human Rights*. Vol. 8, No. 15, 2001, p. 21.

<sup>41</sup> A. Quraishi refers to Tabarī’s treatise on history and states that the reason for punishment was discrepancies in the witness testimonies (QURAIISHI, A. Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective. *Michigan Journal of International Law*. Vol. 18, 1996–1997, p. 296). If we look closer at this story we see that the main actors were two neighbors – Abū Bakr and al-Mughīra b. Shubʿa. Once Abū Bakr had visitors when the wind opened the peephole of the lattice window of the house, where al-Mughīra b. Shubʿa lived and Abū Bakr saw al-Mughīr b. Shubʿa in a delicate situation. He called his guests to see what was happening in his neighbor’s house. They could not agree on the identity of the woman, as Tabarī states, according to Abū Bakr it was Umm Jamil (“The men exclaimed ‘We only saw buttocks, we don’t know what she looks like’”). So they wrote a letter to caliph ʿUmar and informed him of the matter. ʿUmar confronted al-Mughīra b. Shubʿa with the accusation. He defended himself claiming to have not committed anything unlawful, saying among other things: “How they saw me; was I facing them or did I have my back toward them? And how did they see the woman, or how could they recognize her? [...] On what grounds did they permit themselves to spy on my own home, making love to my own wife?” During the investigation the witnesses could not agree on the position the persons were in and the identity of the woman, for which they were punished by lashing. For more see *The History of al-Tabarī. Volume XIII. The Conquest of Iraq, Southwestern Persia and Egypt*. Translated by Gautier H. A. Juynboll. New York: State University of New York, 1989, pp.110–114.



four witnesses the judge may impose only discretionary punishment (*ta'zīr*), provided that public order was disturbed.

Testimony played an important role in proving adultery and was considered also in our history an essential piece of evidence. Already in the Roman law a husband was entitled to kill an adulterer, regardless of whether adultery was proven, if the husband caught the adulterer with his wife after having given him three times a written warning, signed by three witnesses.<sup>45</sup> The question of testimony and oath played an important role also in our legal order and catching male offenders in “someone’s bed” wasn’t automatically considered to be a proof of crime.<sup>46</sup> For example, according to the *Laws of Cities* from 1536<sup>47</sup>, a condition of conviction was testimony by several trustworthy persons or two neighbors on the side of the cheated husband.<sup>48</sup> So even confession by the girl, with whom a cheating husband had intercourse was not enough. On the contrary, such testimony could lead to the punishment of the girl, who could be banished from the city as an adulteress.<sup>49</sup>

### 3.3 Confession of the offender and indirect evidence of crime

According to the Islamic law, a person who committed adultery or fornication could be punished only if the crime could be proven with witness testimonies or based on a confession. As for confession – it was required that it is done on own free will and verbally in front of the judge. It cannot be limited to a vague admitting such as “*I committed adultery*”; it must be specific and categorical.<sup>50</sup> Some law schools demand that it is confessed four

<sup>42</sup> According to one story a companion of the Prophet, ‘Uqba ibn ‘Āmir al-Juhanī, who settled in Egypt and was Mu‘āwīya’s governor between 665 and 667, had a secretary Dukhaj al-Hajrī. Neighbors of the secretary were allegedly drinking wine at home and the secretary wanted to send the police after them. ‘Uqba told him not to do that but rather talk and threaten them (in words). The secretary did that, but to no avail. So he again wanted to send in the police. ‘Uqba again told him not to do that and quoted a tradition he heard from the Prophet: “*Whoever keeps hidden what would disgrace a believer is as though he had restored a buried baby girl to life from her tomb.*” (Note: tradition refers to the murder of newborn girls in pre-Islamic times). Another story is related to caliph ‘Umar ibn al-Chattāb. ‘Umar once climbed over a wall to get in to someone else’s house, where he caught him in a wrongful act. The sinner objected to ‘Umar that while he offended against one rule, he offended three: 1. He spied, which is forbidden (49:12), came through the roof while God commanded to enter houses through the doors (2:189) and entered without greeting, which is against the command to enter the house and greet first (24:27). ‘Umar then let the man be and only reprimanded him to correct his ways. COOK, M. *Commanding Right and Forbidding Wrong in Islamic Thought*. Cambridge: Cambridge University Press, 2000, pp. 80–82.

<sup>43</sup> BADAWY, T. Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses. *Arab Law Quarterly*. 2009, p. 296.

<sup>44</sup> Al-Zarqā claims that “*it is not possible in reality to establish the crime of zinā except through confession by the person who committed the crime*” and points out that in all cases of stoning in ḥadīth the offenders confessed to their crimes. AL-ZARQĀ, M. A. *Introduction to Islamic jurisprudence: al-Madkhal al-Fiqhī al-‘Ām*. Kuala Lumpur: IBFIM, 2014, p. 226.

<sup>45</sup> VOIGT, M. *Der Ehebruch*. Leipzig: Sturm und Koppe, 1935, pp. 14–15.

<sup>46</sup> MALÝ, K. *Trestní právo v Čechách v 15.–16. století*. Praha: Universita Karlova, 1989, p. 237.

<sup>47</sup> *Laws of Cities* from 1536 were to be initially a codification of city laws. At the end, it became just a legal book with judicial decisions of the land court in Brno and Jihlava. However, it was used in practice quite extensively.

<sup>48</sup> See *Laws of Cities*, chapter XLI., article II., Edition, Jireček, H., Praha: Právnická Jednota, 1880, p. 242.

<sup>49</sup> MALÝ, K. *Trestní právo v Čechách v 15.–16. století*. Praha: Universita Karlova, 1989, p. 235.

<sup>50</sup> KAMALI, M. H. *The Right to Personal Safety and the Principle of Legality in the Sharī‘ah*. Islamabad: Islamic Research Institute, 2001, p. 17.

times (Hanbali and Hanafi law school),<sup>51</sup> other schools accept also a single confession (Shāfi'i and Māliki law school).<sup>52</sup> The offender may revoke his confession until the moment the decision is executed and possibly avoid a *hadd* punishment.<sup>53</sup>

But what to do if there are no witnesses or confession of the alleged offender and yet it is clear that illegal intercourse took place and resulted in pregnancy of an unmarried woman? Law schools differ in their views. The Māliki law school and ibn Hanbal consider pregnancy of such woman to be evidence of illegal sexual conduct.<sup>54</sup> The only way of avoiding punishment would be her claim to have been raped. But she must produce circumstantial evidence, e.g. the fact that she came back to her village screaming for help. Another possibility is to plead that she was impregnated during her sleep unbeknownst to her, or that the conception was the result of heavy petting without penetration.<sup>55</sup>

There may be other cases as well when we could talk about the criminal offense *zinā*. An example would be pregnancy of a woman who is divorced and a child is born after certain defined period after the divorce, *‘idda*. This period is for divorced or widowed women three periods, i.e. four months and three days and is used specifically to confirm pregnancy.<sup>56</sup> But what if a child is born after this period? According to the Shāfi'i law school pregnancy lasts at least six months and at most four years,<sup>57</sup> according to the Māliki law school four to five years<sup>58</sup> and according to the Hanafi law school not more than two years.<sup>59</sup> Duration of pregnancy is often connected with “dormant pregnancy” or “extended

<sup>51</sup> This would be indicated also by a hadīth that can be found e.g. in Mālik's *Muwatta'*. According to this hadīth one Muslim (a man from the Aslam tribe), who had committed a *zinā* went first to see Abū Bakr and confessed to him. But he asked him: “Have you mentioned this to anyone else?” The Muslim said that he hadn't. Then Abū Bakr told him “Then cover it up with the veil of Allāh. Allāh accepts *tauba* from his slaves.” But the man was still unsettled and asked the same ‘Umar and received the same answer. So he went to Muhammad and said to him, “I have committed adultery,” insistently. Muhammad turned away from him three times. Each time Muhammad turned away from him until it became too much. Then he asked his family if he is mentally healthy, single or married. Because he was married he ordered stoning (*Muwatta'*; Book 41).

<sup>52</sup> BARADIE, A., El. *Gottes-Recht und Menschen-Recht: Grundprobleme der islamischen Strafrechtslehre*. Baden-Baden: Nomos Verlagsgesellschaft, 1983, p. 105.

<sup>53</sup> For more see IBN RUSHD. *The Distinguished Jurist Primer: Volume II*. Reading: Garnet Publishing, 2006, p. 529.

<sup>54</sup> Mālik and ibn Hanbal founded their view on the practice of three rightly guided caliphs - ‘Umar ibn al-Khattāb, ‘Uthmān ibn ‘Affan, and ‘Alī ibn Abī Tālib - that “[a]dultery is public when pregnancy appears or confession is made”. For a critical view on this conclusion see QURAIŠHI, Asifa. Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective. *Michigan Journal of International Law*. Vol. 18, 1996–1997, p. 300.

<sup>55</sup> PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 15.

<sup>56</sup> We can imagine also the opposite situation, when a married woman gives birth after entering into marriage sooner than is the usual duration of pregnancy. ‘Umar was to decide whether a woman whose pregnancy only lasted six months is to be punished. His decision was based on Qur’ān verses: 46:15 *We have enjoined on man Kindness to his parents: in pain did his mother bear him, and in pain did she give him birth. The carrying of the (child) to his weaning is (a period of) thirty months. ...* In connection with the verse 2:233 *The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. ...* AS-SALLAABEE, ‘Alī Muhammad. *The Biography of ‘Umar Ibn Al-Khattab*. Vol. 2. Riyadh: 2010, pp. 143–144. As-Sallaabee states that in this case ‘Umar said about the accused woman “let her go”, while *Muwatta'* contains a tradition identical in its content (Book 41), with Uthmān b. Affan, who is also convinced by ‘Alī and Uthmān “sent for her and found that she had already been stoned”.

<sup>57</sup> AL-MISRI, Ahmad ibn Naqib. *Reliance of the Traveler: A Classic Manual of Islamic Sacred Law*. Beltsville: Amana, 2008, p. 568.

pregnancy”. In this case it was believed that the fetus stopped developing in woman’s body and fell asleep (dormant fetus, *rāqid*), the woman would continue to menstruate and later the fetus would “wake up” and continue to grow.<sup>60</sup> A child born may be attributed to the father (former husband), but he has also the right to question his fatherhood. Of course, the above notion of dormant pregnancy could only prevent a *hadd* punishment if the woman had been married before.

Pregnancy of a woman was also in the Czech city law considered to be a proof of a committed crime – adultery or fornication. *City Laws of the Czech Kingdom*, for example, contain provisions on “burdening” a woman. Pregnancy itself, however, was not sufficient to convict an offender, the court had to establish beyond doubt who was the father of the child, whether or not it was the offender. The accused man could defend himself with an oath (article M XLIII). If the man refused an oath it was believed to be a confession of his guilt.<sup>61</sup> In case a maiden or a widow became pregnant after consensual intercourse, and it was therefore according to the *City Laws of the Czech Kingdom* fornication (*stuprum*), the punishment was different than in case of adultery. A woman could defend herself against accusation of adultery, especially if she could prove the man had promised her marriage. If she could not bear the burden of proof, she herself was in a difficult situation, risking being lashed and banished from the city or even chained to the pillory.<sup>62</sup>

#### 4. PUNISHMENT

According to Islamic lawyers *hadūd* penalties are the claims of God and therefore must be imposed. In this they differ from other punishments that require pleading by the person bearing the damage, i.e. the one who was infringed on his rights, and so their purpose is not to compensate the damage incurred but prevent damage by discouraging.<sup>63</sup> A number of lawyers highlight the function of *hudūd* penalties that first and foremost discourage potential other offenders from committing an unlawful act between both genders.<sup>64</sup>

<sup>58</sup> The upper limit for the duration of pregnancy according to the scholars of the Māliki law school state five or four years (RUXTON, F. H. *Maliki Law: Being a Summary from French Translations of the Mukhtasar of Sidi Khalil. With Notes and Bibliography*. London: Luzac, 1916, p. 141). However, we may come across notions that pregnancy may last even seven years (JONES-PAULY, Ch. Gender Relations. In: Rudolph Peters – Paeri Bearman (eds.). *The Asghate Research Companion to Islamic Law*. Surrey: Asghate, 2014, p. 143, but also BOSSALLER, A. *Schlafende Schwangerschaft\* in islamischen Gesellschaften: Entstehung und soziale Implikationen einer weiblichen Fiktion*. Würzburg: Ergon, 2014, p. 137 ff.). Bosaller believes that everything points out to Māliki’s conviction that pregnancy could last that long, which was to correspond with the notions of the contemporary society in Medina and point to the views held in the Maghreb lands. It also shows the relationship between *rāqid* and dormant pregnancy.

<sup>59</sup> AL-QUDŪRĪ, Ibn Hamdān. *A Manual of Islamic Law According to the Hanafī School*. London: Ta-Ha, 2010, p. 461.

<sup>60</sup> This is at least how Vikør explains it in his book *Between God and the Sultan: A History of Islamic Law*. London: C.Hurst & Co., 2005, p. 285.

<sup>61</sup> MALÝ, K. *Trestní právo v Čechách v 15.–16. století*. Praha: Universita Karlova, 1989, p. 236.

<sup>62</sup> *Ibid.*, p. 242.

<sup>63</sup> From the claims of God we must exclude accusations of *zinā*, because here we see a clash of the claims of God and claims of people. For more see JOHANSEN, B. *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*. Leiden: Brill, 1999, p. 386 ff.

<sup>64</sup> PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 55.

Sūra 24 (An-Nūr) contains a number of provisions on *zinā* in the verse 2 and the rest of the rules are deduced from the sunna. According to the schools of law, unlike in the Jewish law,<sup>65</sup> the punishment for a proven crime depends on whether or not the offender was or was not married. If the offender is or was married (*muhsan*)<sup>66</sup> and had consummated the marriage the punishment is stoning (*radjm*), which is a punishment,<sup>67</sup> that can be found also in the Jewish law.<sup>68</sup> If he/she is unmarried (*ghair muhsan*), meaning that he/she has not been married,<sup>69</sup> the punishment is lashing (*jald*), and an accompanying punishment could be banishment (*taghrīb*).<sup>70</sup> According to al-Zarqā the difference in punishments corresponds to the magnitude of offence and its consequences. In a married person his/her honors and morals are destroyed, family may disintegrate, trust and friendship are lost and “*other crimes may follow*”.<sup>71</sup>

Lashing is, unlike stoning, specified in Qur’ān: “*The woman and the man guilty of adultery or fornication - flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let*

<sup>65</sup> Lev. 20:10 “*If a man commits adultery with another man’s wife—with the wife of his neighbor—both the adulterer and the adulteress are to be put to death.*” And Deut. 22:22 “*If a man is found sleeping with another man’s wife, both the man who slept with her and the woman must die.*” Which corresponds to the general ban from Lev. 18:20 “*Do not have sexual relations with your neighbor’s wife and defile yourself with her.*” So the crime is not sexual intercourse of a man with unmarried woman, even if he is married. In this regard the Jewish law has double standards for a married man and a woman. For more see ELON, Menachem (ed.). *The Principles of Jewish Law*. Jerusalem: Keter Publishing House Jerusalem, 1975, p. 487 f.

<sup>66</sup> Al-Zarqā, unlike most scholars, leans towards a different definition of a *muhsan* person. Based on a linguistic interpretation and other verses from the Qur’ān he believes that these are married person in the moment the crime is committed. AL-ZARQĀ, M. A. *Introduction to Islamic jurisprudence: al-Madkhal al-Fiqhī al-‘Ām*. Kuala Lumpur: IBFIM, 2014, p. 225.

<sup>67</sup> Among lawyers we may see two positions towards the punishment, one of them claims that the offender should be lashed before being stoned. For more see also argumentation: IBN RUSHD. *The Distinguished Jurist Primer: Volume II*. Reading: Garnet Publishing, 2006, p. 524.

<sup>68</sup> Originally it was husband’s right to punish an unfaithful wife and her lover (Gen. 38:24, Prov. 6:34). Stoning as a punishment is considered to be an older tradition appearing for example in Deut. 22:24 (“*you shall take both of them to the gate of that town and stone them to death—the young woman because she was in a town and did not scream for help, and the man because he violated another man’s wife*”) In several hadīths it is recorded that Muhammad sentenced Jews to death by stoning after having the Torah brought to him. But according to Mishna (Sanh. 11.1) the punishment is strangulation, because it is to be the most humane method of capital punishment (Sanh. 52b). An exception was punishing adultery by a priest’s daughter, when the adulteress was burned (Lev. 21:9 “*If a priest’s daughter defiles herself by becoming a prostitute, she disgraces her father; she must be burned in the fire*”), while the adulterer was sentenced to strangulation. Also lashing as a punishment appears – but it is a sentence for a woman who is “designated” for another man and commits adultery. The punishment can be found in Gemara (Ker. 11a) related to Lev. 19:20 “*If a man sleeps with a female slave who is promised to another man but who has not been ransomed or given her freedom, there must be due punishment. Yet they are not to be put to death, because she had not been freed*”. The capital punishment ceased to be used by the Jewish courts until finally courts relinquished their right to inflict capital punishment altogether. Thereafter, the adulterer was scourged, and the husband of the adulteress was not allowed to condone her crime (Sotah, 6. 1), but was compelled to divorce her.

<sup>69</sup> ABDUL-RAHMAN, M. S. *Tafsir ibn Kathir. Juz’ 18 (Part 18): AlMuminun 1 to Al-Furqan 20*. London: MSA Publication, 2009, p. 68.

<sup>70</sup> Also in this case no agreement was found on whether lashing is to be accompanied by another punishment, namely exile. Some authors are against exile altogether, not only in case of women and slaves. For more see IBN RUSHD. *The Distinguished Jurist Primer: Volume II*. Reading: Garnet Publishing, 2006, p. 525 f.

<sup>71</sup> AL-ZARQĀ, M. A. *Introduction to Islamic jurisprudence: al-Madkhal al-Fiqhī al-‘Ām*. Kuala Lumpur: IBFIM, 2014, p. 225.

a party of the Believers witness their punishment” (Qur’ān 24:2). It is generally agreed that the revealed verse, or its part defining the punishment for adultery, has been derogated.

The punishment of stoning is defined by the sunna, not Qur’ān.<sup>72</sup> We can find it in a hadīth in the Muslim’s and also Buchārī’s collection describing the punishment for a man who committed the crime of an unlawful intercourse with a married woman. A hadīth was recorded at the times of Muhammad who acted as a judge. In it he ordered that an unmarried person is to be punished by lashing and married by stoning.<sup>73</sup> But there are several other hadīths.

On the permissibility of stoning as a punishment we may find several positions. A. Affi and H. Affi believe that inferring this punishment from “*weak hadith riddled with inaccuracies*”<sup>74</sup> is impermissible for several reasons. The Qur’ān is clear when it comes to the specification of punishments and hadīth therefore can not nullify a verse from the Qur’ān, even more so when it is a weak hadīth, i.e. a hadīth considered for a certain deficiency to be less trustworthy.<sup>75</sup> They also argue by saying that Muhammed did not order stoning because it is in direct contradiction with a verse. And they can also explain the potential objection that the decision was made before the verse was sent. They say that Muhammad did not make the decision as he did in other cases, in particular in the case when a woman was complaining about a her husband’s expression of *zihār*. From formal standpoint they

<sup>72</sup> However, in literature we may find the opinion that the verse about stoning was not included in Qur’ān in the beginning. According to tradition ‘Umar b. Khattāb claimed that the verse was a part of Qur’ān. Also Hrbek, who translated the Qur’ān into the Czech language, in his extensive introduction to the Qur’ān does not consider this likely and offers a number of proofs to support his claim – from the missing record of reservations to the Qur’ān regarding significant changes or falsifications (see chapter Redakce Korānu [Publishing of the Qur’ān]. In: Korān: z arabského originálu přeložil Ivan Hrbek [Qur’ān translated from the Arabic original by Ivan Hrbek]. Praha: Odeon, 1991, p. 75.). However, Burton states that there are two traditions and according to one of them ‘Umar believed that Qur’ān contained a verse about stoning, according to the other one he was aware that it is not a part of Qur’ān. For more on stoning as a punishment for *zinā* see BURTON, J. *The Sources of Islamic Law: Islamic Theories of Abrogation*. Edinburgh: Edinburgh University Press, 1990, p. 128 ff.

<sup>73</sup> A Bedouin came to the Prophet and said: ‘O Messenger of God, I implore you by God to pass judgment on me in accordance with God’s Book.’ And his adversary, who was better versed in jurisprudence than he, said: ‘Yes, pass judgment between us and allow me to speak.’ The Prophet said: ‘Talk.’ He said: ‘My son worked as a laborer for this man and then he fornicated with his wife. I was told that my son deserved to be stoned to death, so I ransomed him for one hundred sheep and a female slave. I then asked the people of knowledge and they informed me that my son deserved one hundred lashes and banishment for one year and that the woman deserved to be stoned to death.’ The Prophet answered: ‘By the One Who holds my soul in His hand, I shall certainly pass judgment between you in accordance with God’s Book. As for the female slave and the sheep, they must be returned to you. Your son deserves one hundred lashes and banishment for a year. Go, Unays, to this man’s wife and if she confesses, stone her to death.’ Thereupon Unays went to the woman and she confessed. Then the Prophet ordered her to be stoned. (Buchārī and Muslim).

<sup>74</sup> But A. Affi and H. Affi also refer to other hadīths. The first one refers to the situation when a pregnant woman came to Muhammad and was about to confess to *zinā*. Muhammad sent her away saying that she should return when the child is born. But he would not receive her after the child was born and asked her to come back when she is done breastfeeding the child. After two years of breastfeeding she came back, confessed and Muhammad ordered her to be stoned. According to the second hadīth, Muhammad defined the punishment as follows: “For unmarried persons, the punishment is one hundred lashes and an exile for one year. For married persons, it is one hundred lashes and stoning to death.” AFFI, A., AFFI, H. *Contemporary Interpretation of Islamic Law*. Leicester-shire: Matador, 2014, pp. 49–53.

<sup>75</sup> Sunna is classified in different ways. More traditionally two key criteria are considered – subject-matter (*matn*) of sunna and the manner of its transmission (*isnād*). Classification of hadīths in terms of their reliability is *sahīh* (sound), *hasan* (approved, good) and *da‘if* (weak).

consider the hadīth untrustworthy. The narrator, ‘Ubāda bin as-Sāmit, is not well known and he is the only one having witnessed Muhammad’s statement. They believe that he would never had the chance to talk with Muhammed about such an important question. They claim that in such case Muhammad would address a wider audience, especially because the question at hand was so important – as he, allegedly, had done in other cases. Using linguistic interpretation they come to the same conclusion. While the original verse 4:15 was directed at “*those of your women (nisā’kum) who are guilty of lewdness, ...*”, i.e. woman understood as wives, as is usual in other places in the Qur’ān, the verse 24:2 says “*The adulterer and the adulteress [az-zānījatu wa az-zānī], scourge ye each one of them (with) a hundred stripes*” audience being defined in another way and applicable to all women and men, therefore it should be the same for all.<sup>76</sup> A. Affi and H. Affi therefore do not hesitate calling the jurists who base their judgments on this hadīth “*self-styled jurist,*” who only provoke “*contradiction and derision amongst the more learned Islamic jurists*”.<sup>77</sup>

Again, let’s ask the question what punishment was imposed for adultery and fornication in history within the geographic limits of our state. The Roman law punished adulteresses by banishing them to a barren island and other material penalties. As was indicated above, in our region both, women and men were once punished for adultery. Even according to the *City laws of Czech lands* the husband was allowed to kill both offenders when he has caught them during the adulterous act and only then call in witnesses to report his deed. His actions were not punished.<sup>78</sup> In other cases the code of law stipulated that the wife-adulteresses could be beheaded or even buried alive,<sup>79</sup> while the husband-adulterer could be beheaded<sup>80</sup> and no other sanctions were to be applied to him, while the wife-adulteresses lost her dowry she brought to the marriage. The practice of city courts also shows that the husband could prevent the unfaithful wife from being punished by forgiving her the penalty. It was often the case that a husband prevented his unfaithful woman from being beheaded under the condition that he would keep the dowry.<sup>81</sup> In case a man who was accused of adultery by a pregnant woman refused to swear that he has not committed adultery with her it was understood as acceptance of guilt and he had to marry the woman. If he were already married he was tried as an adulterer.<sup>82</sup> A special case was fornication, i.e. intercourse with a maiden or a widow who consented. The punishment for this crime was whipping with sticks for both offenders, generally combined with banishment from the city, although in practice city courts substituted the whipping of man by imprisonment or penalty.<sup>83</sup>

We come across punishments for adultery also in the Enlightenment Period when criminal codes started leaving capital punishment to judges’ discretion. The criminal code *Constitutio criminalis Josephina* from 1708 defines death by decapitation using a sword to be the punishment for adultery committed by married persons. Discretionary power

<sup>76</sup> AFFI, A. AFFI, H. *Contemporary Interpretation of Islamic Law*. Leicestershire: Matador, 2014, pp. xxxiv, pp. 48–51.

<sup>77</sup> *Ibid.*, p. 49.

<sup>78</sup> MALÝ, K. (ed.). *Práva městská Království českého* Praha: Karolinum, 2013, p. 652.

<sup>79</sup> Article M. XL., section. II. Authors follow from edition JIREČEK, J. (ed.). *Práva městská království českého 1579*. Praha: Spolek českých právníků Všeherd, 1876.

<sup>80</sup> *Ibid.*, article. M. XL., section I.

<sup>81</sup> MALÝ, K. *Trestní právo v Čechách v 15.–16. století*. Praha: Universita Karlova, 1989, p. 235.

<sup>82</sup> *Ibid.*, p. 236.

<sup>83</sup> MALÝ, K. (ed.). *Práva městská Království českého*. Praha: Karolinum, 2013, p. 652.

of the judge was permitted only when one of the persons was not married – in such cases judge was free to use a less severe punishment.

*Constitutio Criminalis Theresiana* from 1768 defined monetary fines for adultery, imprisonment with water and bread and other corporal punishments and exile. The judge was free to consider also the capital punishment.<sup>84</sup>

In the *Code of Crimes and Punishments* Joseph II. from 1787 this offence was punished, according to article 46, by lashing or prison. Under article 247 of the Criminal Code of Franz II. from 3 September 1803 *On Crimes and heavy policy offences* a cheating person was punished with 6 months in prison regardless of whether adultery occurred between a married man and married woman or a married man and unmarried woman or vice versa. For women the punishment could be more severe in case of adultery during which a child was conceived.

The criminal code *On Crimes, Misdemeanors and Offences* No. 117/1852 punished adultery with prison from 1 to 6 months. Women could be punished more severely if a child was born after this offence and the fatherhood could therefore be doubted.<sup>85</sup> Also corrupting a minor in a household was punishable under articles 504 and 505 by prison term of one to three months. For corruption under the promise of marriage the offender was not only sentenced to prison but also had to provide compensation to the corrupted person (article 506). Adultery ceased to be a crime, and therefore punishment for adultery disappeared from criminal codes, within the area of the Czech Republic in 1950 when a new criminal code came out that did not consider extramarital intercourse an offence.

## 5. FURTHER CONSEQUENCES OF COMMITTING ZINĀ

Under the Islamic law, a conviction of the crime of fornication has also other consequences than lashing. As stated in Qur’ān, Sūra Nr. 24, verse 3: “*The adulterer [az-zānī] shall not marry save an adulteress [al-zānīja] or an idolatress, and the adulteress none shall marry save an adulterer or an idolater. All that is forbidden unto believers.*”<sup>86</sup>

Unlike in the Jewish law,<sup>87</sup> the Islamic law only allows the male fornicator to marry a female fornicator and vice versa. According to some Sunni law schools, the fornicator is to be lashed and automatically exiled for the period of one year;<sup>88</sup> alternatively the judge may

<sup>84</sup> Cp. article 6 section 77.

<sup>85</sup> Cp. article 502 of the act No. 117/1852.

<sup>86</sup> Vers translated by Pickthal. The Yusuf Ali’s translation follows: “*Let no man guilty of adultery or fornication marry any but a woman similarly guilty, or an Unbeliever nor let any but such a man or an Unbeliever marry such a woman: to the Believers such a thing is forbidden.*” This translation is more proper translation than that from Pickthal because *az-zānī(ja)* refers to a man or woman who committed *zinā*. In the light of the *fiqh* it seems to be therefore a better translation.

<sup>87</sup> Jewish law stipulates that the woman who has had an adulterous relationship becomes forbidden to both her husband and her lover who she cannot marry in the future. If she marries her lover notwithstanding, they were forced to separate, as stated in Mishna, Sotah 5: 1, 26b.

<sup>88</sup> These schools rely, among others, on a hadīth in which Muhammad is asked by a Muslim named Unais to assess the following situation: a single man, the son of the inquirer, has had unpermitted intercourse with a married woman. To redeem him, his father gave a hundred sheep and a slave. However, the father later learned that his son was to be punished identically to the woman sinner and thus asked Muhammad to issue a judgment. Muhammad said: “*I will judge you according to the Laws of God. Your one hundred sheep and the slave are to be returned to you, and your son has to receive one hundred lashes and be exiled for one year. O Unais! Go to the wife of this man, and if she confesses, then stone her to death.*” (Sahīh al-Bukhārī). If a woman is sentenced to exile, a male relative must accompany her at her costs to supervise her during the term of the sentence.

order an exile if there is a fear that the offender(s) will recidivate.<sup>89</sup> Thus, there are two views on banishment – one view considers it a *hudūd* whereas the other one a *taʿzīr* which fully falls within the discretion of the judge who may but does not have to impose it.<sup>90</sup> If, however, exile is a *taʿzīr*, its purpose is not entirely clear, *i.e.* protection of the society from the sinner or punishment of the sinner by temporary breaking his family ties?

The foregoing punishments follow “in this world.” However, in a whole series of cases the Islamic law, also presume punishments in the afterlife. A Muslim woman who has sinned shall go to hell (the Hellfire) on the Resurrection Day. The sunna, *i.e.* the hadīths recording the *Mīrāj* (Muhammad’s ascent to heaven), includes a colorful description of the punishment.<sup>91</sup> Nevertheless, under the majority opinion of Islamic law schools, the sentenced offender who has received a fixed punishment will not receive additional punishment in the Hereafter. This opinion is based on the Qur ān, verse 5:38 “*But if the thief repent after his crime, and amend his conduct, Allah turneth to him in forgiveness; for Allah is Oft-Forgiving, Most Merciful.*” as well as on the hadīth stating that “*the hand of the repentant thief precedes him to heaven.*” The offender is then cleansed in the eyes of God (Muhammad was to say to a woman punished for theft “*This day, you are free from your sin just as the day your mother gave birth to you.*”).<sup>92</sup>

Imposing ancillary punishments is not specific to the Islamic law. The offense of adultery gave rise to further consequences already in ancient Rome where adultery was punished by exile in a deserted island, *i.e. relegatio in insulam*. A whole series of ancillary punishments existed including property punishments or banning the adulteress from marrying again.<sup>93</sup> Similarity with Islamic law is obvious here.

In our legal order, the *Josephinian Civil Code* effective from 1 January 1787 may be mentioned. Its Article 22 stated that after having fornicated, the fornicator has no capacity to enter into a valid.

According to Article 67<sup>94</sup> of the *General Civil Code* dating from 1811 (the *Allgemeines Bürgerliches Gesetzbuch*, the “ABGB”), marriage could not be validly entered into “*as a consequence of adultery*” or, as set out in Article 68<sup>95</sup>, after “*murdering the husband*”. Adultery thus barred the entry into marriage. Article 543<sup>96</sup> specifies a punishment for this offense: “*Persons having confessed to adultery or fornication before court or who have been con-*

<sup>89</sup> This is the opinion of Abū Hanīfā, Abū Yūsuf a Ibn Hanbal. SIDDUQI, M. I. *The Penal Law of Islam*. New Delhi: Adam Publishers & Distributors, 2003, p. 51.

<sup>90</sup> BLACK, A., ESMAEILI, H., HOSEN, N. *Modern Perspectives on Islamic Law*. Cheltenham: Edward Elgar Publishing, 2013, p. 222.

<sup>91</sup> He saw women hanging by their breasts, naked and screaming. Allah’s messenger asked the angel Jibrayil who they were and the angel replied that they were adulteresses. Then he asked the angel about the men that he had seen. The men had lean and good meat with them as well as rotten and smelly meat but they ate the rotten and smelly meat and did not touch the lean and good meat. He asked: “*Who are these men, Jibrayil?*” He replied: “*They are those who leave the women that Allāh has permitted to them and follow what Allāh has forbidden.*”

<sup>92</sup> ABDUL-RAHMAN, M. S. *Tafsir ibn Kathir. Juz’6 (Part 6): An-Nisaa 148 to Al-Ma’idah 81*. London: MSA Publication, 2009, p. 114.

<sup>93</sup> VOIGT, M. *Der Ehebruch*. Leipzig: Sturm und Koppe, 1935, p. 10.

<sup>94</sup> The provision of Article 67 of the ABGB was repealed by Article 25 of the law on marriage dated 22 May 1919, No. 320 Coll. (the so-called Separation Act).

<sup>95</sup> The provision of Article 68 of the ABGB was valid until 1949.

<sup>96</sup> The provision of Article 543 of the ABGB was valid until 1949.



victed thereof, are mutually excluded from inheritance based on the declaration of last will”, thus setting out an additional consequence of the offense of adultery.

## 6. FALSE ACCUSATION OF ADULTERY AS A CRIME

The Qur’ān contains verses related to the accusation (of a woman) of adultery. The first verse reads: “*And those who accuse honorable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony - They indeed are evil-doers*”<sup>97</sup>. (24:4) This verse is said to be revealed after ʿĀisha, a wife of Muhammad, was accused of adultery. The tradition states that she was travelling with Muhammad’s caravan. During one of the stops, she found out that she had lost her necklace and she started looking for it. Meanwhile, the caravan left without noticing that ʿĀisha was not in the litter. On her way back to the caravan, she was accompanied by Safwan bin Mu’attal Sulami. Spending the night away from the caravan gave cause to slander<sup>98</sup> spread by a certain group of Muslims described in the following terms by another verse of the Qur’ān “*Those who brought forward the lie are a body among yourselves: think it not to be an evil to you: on the contrary it is good for you: to every man among them (will come the punishment) of the sin that he earned and to him who took on himself the lead among them will be a Penalty grievous.*” (24:11). Those who listened to the slander were similarly reprimanded: “*Why did not Believers, men and women when ye heard of the affair - put the best construction on it in their own minds and say “This (charge) is an obvious lie”? (12) Why did they not bring four witnesses, to prove it? When they have not brought the witnesses such men in the sight of Allah, (stand forth) themselves as liars!*” (24:12-13) The following verses include rules for the behavior of a right believer in such a situation.

The punishment for not proving the allegation is first the lashing of the slanderer(s)<sup>99</sup>. Under the opinion of the Shāfi’i law school, another punishment is inadmissibility of the slanderer’s testimony until the slanderer repents. The Hanafi law school claims that the testimony of the slanderer is inadmissible independently of whether the slanderer repents or not.<sup>100</sup> If one accuses another person of unpermitted intercourse without witnesses, he/she is punished. Based on the *fiqh*, punishing of the slanderers generally requires either the testimony of two direct witnesses who are *muhsan*<sup>101</sup> and who testify that the slander was uttered, or the confession of the offender. In the event that court proceedings on the crime of *zinā* are commenced and the requirement of four witnesses is not met, those who have testified are also punished for slander.

<sup>97</sup> This is the translation of the Qur’ān from Pickthal, Yusuf Ali translated *fāsiqūn* not as *evil-doers* but as *transgressors*. *Fāsiqūn* means those who are liars, rebellious, disobedient to Allāh.

<sup>98</sup> The story is described in detail, among others, in the tafsīr ibn Kathīr: ABDUL-RAHMAN, M. S. *Tafsīr ibn Kathīr: Juz’18 (Part 18): Al-Muminun 1 to Al-Furqan 20*. London: MSA Publication, 2009, pp. 63-64 as well as in the biography of Muhammad Ibn Ishaq: GUILLAUME, A. *The Life of Muhammad: a Translation of ibn Ishaq’s Sīrat Rasūl Allāh*. Oxford: Oxford University Press, 2012, pp. 493–499.

<sup>99</sup> ʿUmar allegedly punished all three witnesses with lashing given that *zinā* was not proven due to insufficient number of witnesses. AS-SALAABEE, M. *The Biography of ʿUmar ibn al-Khattāb: Vol. 2*. Riyadh: Dar-us-Salam, 2010, p. 136.

<sup>100</sup> KAMALI, M. H. *Principles of Islamic Jurisprudence*. Cambridge: Islamic Texts Society, 2003, p. 33.

<sup>101</sup> In this case, the witnesses can never in the past have been found guilty of unpermitted intercourse or subjected to the *lʿān* proceedings.

Other verses relating to another specific event were revealed later. Hilāl bin Umayya found his wife with a lover. He decided not to intervene, went to Muhammad and told him: “I saw them with my own eyes and heard with my own ears.” Muhammad was enraged and wanted to punish him with lashing. The verses 4-9 of the surah 24 were subsequently revealed:

*“And those<sup>102</sup> who launch a charge against chaste women, and produce not four witnesses (to support their allegation) flog them with eighty stripes: and reject their evidence ever after: for such men are wicked transgressors (4) Unless they repent thereafter and mend (their conduct): for Allah is Oft-Forgiving, Most Merciful. (5) And for those who launch a charge against their spouses, and have (in support) no evidence but their own their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth; (6) And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie. (7) But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah, that (her husband) is telling a lie; (8) And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth (9).”*

Muhammad thus summoned the wife of Hilāl and recited these verses to them. The wife denied having been unfaithful, performed even the last oath and avoided criminal punishment.<sup>103</sup> This procedure is called the *li‘ān*,<sup>104</sup> and an analogical procedure also exists in Jewish law.<sup>105</sup> The oaths within the *li‘ān* procedure are associated with divorce (in the case mentioned above, Muhammad subsequently divorced the marriage) with the consequence that the husband and the wife cannot re-marry together in the future.

<sup>102</sup> Verse 6 but also verse 11 mentioned above only sets out the right to accuse of adultery for the husband or a man, not (expressly) to a woman. As explained by Ibn Kathīr “usually a man would not go to extent of exposing his wife and accusing her of Zina unless he is telling the truth and has good reason to do this, and she knows that what he is accusing her is true.” ABDUL-RAHMAN, M. S. *Tafsīr ibn Kathīr. Juz’18 (Part 18): Al-Muminun 1 to Al-Furqan 20*. London: MSA Publication, 2009, p. 73.

<sup>103</sup> This story appears in the hadiths in several modifications. For details see ABDUL-RAHMAN, M. S. *Tafsīr ibn Kathīr. Juz’18 (Part 18): Al-Muminun 1 to Al-Furqan 20*. London: MSA Publication, 2009, pp. 73–75.

<sup>104</sup> For details see, e.g., NASIR, J. A. *The Status of Woman under Islamic Law nad Modern Islamic Legislation: Third Edition of the Revised and Updated Work*. Leiden: Brill, 2009, p. 117 f. or ROHE, M. *Das islamische Recht: Geschichte und Gegenwart*. München: C. H. BECK, 2009, p. 93 ff.

<sup>105</sup> Proving adultery was difficult. If a husband suspected his wife of extramarital intercourse, he could initiate an “ordeal of jealousy” or an “ordeal of the bitter waters” described in Num. 5:11-31. In short, a man is to take his wife to the priest. The priest shall take some holy water in a clay jar and put some dust from the tabernacle floor into the water and put the woman under oath and curse. The priest is to write these curses on a scroll and then wash them off into the bitter water. He shall make the woman drink the bitter water that brings a curse, and this water that brings a curse and causes bitter suffering will enter her. If she has made herself impure and been unfaithful to her husband, this will be the result: When she is made to drink the water that brings a curse and causes bitter suffering, it will enter her, her abdomen will swell and her womb will miscarry, and she will become a curse. If, however, the woman has not made herself impure, but is clean, she will be cleared of guilt and will be able to have children. During the ritual, the man brings a grain offering for jealousy, a reminder-offering to draw attention to wrongdoing, which also plays its role in the ritual when it is burned by the priest on the altar; after that, the priest is to have the woman drink the water. Details are described in Mishna where a woman was taken to Great Sanhedrin and asked to confess. When she confessed, she was divorced. When she denied that she had committed adultery, she was brought to the priest and subjected to the ritual under Num. 5:11-31. If the woman refused to subject to the ordeal, this was considered as circumstantial evidence of her criminality and she was divorced (Sotah 1:5). The ordeal was later abolished.

The possibility to withdraw the allegation is disputed, which is caused by the conception of the punishment for this type of conduct. Given that the demands of God overlap with demands of the man in this matter, it is questionable which demands should be given priority.<sup>106</sup>

To briefly summarize the viewpoint of Islamic law on the crimes of adultery and fornication, proving the crime requires four credible and reliable eye witnesses who give a detailed testimony on the course of the act and their testimonies may not differ. This by itself represents a burden of proof which may only be met with difficulties. If the privacy of an individual were also to be respected, the crime is wholly impossible to prove. If a person accuses another, typically a woman, of the crime of *zinā* without the requisite number of witnesses, they themselves are punished. The same applies to those who testify in court and the requirement of a given number of testimonies is subsequently not met or these testimonies differ. If a husband accuses his wife of adultery without being able to prove it, a specific procedure is set out which leads to the divorce of the marriage. The foregoing appears to indicate that the purpose indeed was to prevent slanders and to protect the honor of a chaste woman (see the story about ʿĀisha where her honor was to be protected). As confirmed by A. Quraishi:

*“No one may cast any doubt upon the character of a woman except by formal charges, with very specific, secure evidence (i.e. four eyewitnesses to actual intercourse) that the woman is disrupting public decency with her behavior. [...] As for the public at large, they must leave her alone, regardless of the outcome. In the face of any hint of a woman's sexual impropriety, the Quranic response is: walk away. Leave her alone. Leave her dignity intact. The honor of a woman is not a tool, it is her fundamental right”*.<sup>107</sup>

Practice however not always reflects the foregoing principles as shown most notably by the frequency of the so-called “honor crimes”. Especially in a patriarchal society, honor plays a key role and its loss may lead to unforeseeable consequences for the individual and his/her family. There are several terms relating to honor in Arabic. While the term *sharaf* reflects more or less our perception of honor in the meaning of reputation or good name, *ʿird* refers to the honor of a woman in relation to her sexuality which, once lost, may not be restored. Once a woman loses her honor, she jeopardizes the honor of a man or her entire family and that is the reason why the male family members often control the woman's (potential sexual) conduct to avoid the loss of the honor.<sup>108</sup> Given that being the subject of gossip may by itself lead to the loss of honor, women and their male family members sometimes suffer from substantial pressure where it might appear that the only solution is to kill a woman by her close family member, typically a father or a brother of

<sup>106</sup> For details see EMON, Anver M. Huqqúq Alláh and Huqqúq al-ʿIbád: A Legal Heuristic for Natural Rights Regime. *Islamic Law and Society*. 2006, p. 337 ff.

<sup>107</sup> QURAIISHI, A. Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective. *Michigan Journal of International Law*. Vol. 18, 1996-1997, pp. 298–299.

<sup>108</sup> ABU ODEH, L. Crimes of Honor and the Construction of Gender in Arab Societies. In: YAMANI, M. (ed.). *Feminism and Islam: Legal and Literary Perspectives*. London: Ithaca Press, 1996, p. 153 f.

the woman.<sup>109</sup> This social practice is subject to criticism not only from the feminist approach to Islam.<sup>110</sup>

Defining the essence of “honor crimes” or even “killing for passion” would deserve a more substantial analysis beyond the scope of this paper and they will thus be analyzed only marginally. On one hand, more liberal Muslim authors accentuate the protection of woman’s honor and emphasize the requirement set by Qur’ān for the relevant number of testimonies as well as the punishments for false accusations of unpermitted intercourse; on the other hand there are less demanding approaches of some schools of law that tolerate the killing of the woman in the event that she undisputedly committed the act. Failing this requirement, the killing is considered to be a murder.<sup>111</sup>

## 7. TA‘ZĪR, HIYAL AND OTHER POSSIBILITIES TO AVOID THE *HADD* PUNISHMENT FOR A PURPORTED OFFENDER

If the crime of *zinā* is not demonstrated without any doubt, for example because of missing testimony of the required number of persons or there is a “doubt or uncertainty” (*shubha*), *hudūd*-type of punishments may be abandoned and the area of *ta‘zīr*-type of punishments may be entered. This area sets out punishments for unlawful conduct which threatens especially public order or state security, the so-called discretionary punishments. Uncertainty may relate to the intention of the offender, object or the manner in which the act was performed. It is not limited solely to substantive law but also includes procedural law.<sup>112</sup> To the offender’s advantage, there is a possibility to impose a different type of punishment than lashing or stoning and the judge is not bound by strict rules of evidence to show that the crime has been committed, circumstantial evidence is also admissible. Thus a man who accompanies a woman with dubious reputation to her home could be punished if he stays in her house for a longer time.

One significant rule which should be applied in this area of Islamic law, which is often omitted or is merely marginally mentioned in various analyses on *hudūd*-type of punishments, is that *hudūd*-type punishments should not be used in case of doubt.<sup>113</sup> This rule is said to have been established already by the hadīths or on legal sayings<sup>114</sup> “if you can,

<sup>109</sup> For details on reasons why a woman is killed see, among others, TELLENBACH, S. Ehrenmorde an Frauen in der arabischen Welt: Abmerkungen zu Jordanien und anderen Ländern. In: S. Tellenbach (ed.). *Die Rolle der Ehre im Strafrecht*. Berlin: Duncker & Humblot, 2007, p. 704 ff.

<sup>110</sup> ABU ODEH, L. For basic overview, see Honor: Feminist Approches to. In: *Encyclopedia of Woman & Islamic Cultures: Family, Law and Politics*. Volume 2. Leiden: Brill, 2005, pp. 225–227.

<sup>111</sup> ABU ODEH, L. Honor: Crimes of. In: *Encyclopedia of Woman & Islamic Cultures: Family, Law and Politics*. Volume 2. Leiden: Brill, 2005, p. 221.

<sup>112</sup> For more on Hanafi doctrine see JOHANSEN, B. *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*. Leiden: Brill, 1999, p. 354 ff.

<sup>113</sup> However, the lack of knowledge of the essentials of the law is not considered (with the exception of a fresh convert). Lack of knowledge of detailed rules of the law may result in the *ta‘zīr*-type of punishment, not the *hadd*. For details see: BARADIE, Abdel El. *Gottes-Recht und Menschen-Recht: Grundprobleme der islamischen Strafrechtslehre*. Baden-Baden: Nomos Verlagsgesellschaft, 1983, p. 103 f.

<sup>114</sup> For details see FIERRO, M. Idrah’ū l-hudūd bi-l-shubuhāt: When Lawful Violence Meets Doubt. *Hawwa*. Vol. 5, Issue 2, pp. 208–238; RABB, I. Islamic Legal Maxims as Substantive Canons of Construction: Hudūd-Avoidance in Cases of Doubt. *Islamic Law and Society*. Vol. 17, 2010, pp. 63–125.

*than avoid using hudūd penalties” or “ward off the fixed punishments from the Muslims on the strength of shubha as much as you can”.*

Some lawyers try to take cases out of the *hadd* area and use a series of legal devices (*hiya*) for that purpose. However, the admissibility of legal constructs is disputed. Even those who admit legal constructs reject their application where the rights of other persons could be affected, most notably the right to claim damages.

The accused may withdraw his/her confession generally until the moment the sentence is to be carried out. If the accused withdraws his/her confession that the crime was committed any testimonies that were given become null and void at that moment. The crime is thus insufficiently proven and the *hadd* punishment cannot be imposed. The withdrawal of the confession gives rise to a doubt, therefore the sentence cannot be carried out.<sup>115</sup> Using this legal construct (*hīla*) is considered admissible also by the otherwise conservative Hanbali law school<sup>116</sup> and is recommended also by Hanafi lawyers.<sup>117</sup>

Hanafi law school is the only law school convinced that the offender may not be punished for *hadd* crimes after the lapse of one month, with the exception of the unfounded allegation of unlawful intercourse. The reason for the time limitation is seen in the possible malice of the witnesses who have been silent on the crime for a longer time.<sup>118</sup> This does not mean that the (alleged) offender would remain unpunished; the judge may impose discretionary punishment. For example, in the Ottoman Empire where the Hanafi law school dominated, an imperial decree of 1550 forbade judges to hear cases if more than fifteen years had passed after the commission of the crime and the plaintiff had no legal excuse for not bringing the offence to the notice of the authorities.<sup>119</sup>

## 8. CRIMINAL LAW AS A MEAN OF PROTECTING VALUES – THE PAST AND PRESENT

Criminal law was a regulatory mean of limiting or eliminating adultery, i.e. marital infidelity, or even fornication. Generally we may say that criminal law reflects the protection of values in society that are considered crucial for maintaining stability and that can't be sufficiently protected by private law. It targets socially harmful actions that are illegal because they bring a high degree of danger for the society and strongly interfere with interests protected by the law. In this context we may agree with Peters, that “*criminal laws give an insight into what a society and its rulers regard as its core values*”.<sup>120</sup>

<sup>115</sup> KAMALI, M. H. *The Right to Personal Safety and the Principle of Legality in the Sharī'ah*. Islamabad: Islamic Research Institute, 2001, p. 16.

<sup>116</sup> BARADIE, Abdel El. *Gottes-Recht und Menschen-Recht: Grundprobleme der islamischen Strafrechtslehre*. Baden-Baden: Nomos Verlagsgesellschaft, 1983, p. 106.

<sup>117</sup> JOHANSEN, B. *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh*. Leiden: Brill, 1999, p. 392.

<sup>118</sup> PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 11.

<sup>119</sup> *Ibid.*, p. 11.

<sup>120</sup> PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 1 ff.

The Islamic criminal law has become the subject of discussions among lawyers some of whom started working much more with general legal principles and the purpose of the punishment no longer focusing just on the literal meaning of the Qurʾān and sunna. The first primary purpose, a “relative objective”, is to punish the offender and cause him harm that will lead him to repentance and away from similar conduct in the future. His punishment serves as a warning for others. The second purpose is “absolute objective” – the protection of society (public good). The *hadd*<sup>121</sup> has preventive function as well as cleansing,<sup>122</sup> in the sense of becoming clean from the sin that would bring punishment in the afterlife. This is a traditional understanding of the purpose of punishment. More recently the purpose of punishment was seen to be “*reforming people, protecting people from acts leading to corruption, making them abstain from foolish behavior, guiding them away from error, deterring them from transgressions, and encouraging them to obey [the law].*”<sup>123</sup>

If we look at the second function of the *hadd* from a broader perspective we may investigate the higher objectives of sharīʿa in general, i.e. *maqāsid as-sharīʿa*. According to Abū Hāmid al-Ghazālī (d. 1111) any (religious) legal system, whose purpose is people’s wellbeing has the same “necessary elements of human existence” – values, i.e. religion (*dīn*), life (*nafs*), intellect (*ʿaql*), progeny (*nasl*), and property (*māl*), and forbidden is everything that threatens these. In the area of the *hadd* law, as specified by Peters, the priority is the protection of values such as public order, private property, sexual order and personal honor,<sup>124</sup> when all these values can be classified under the above five basic values protected by the law. It is no coincidence that the basic list contains just these five values. Their identification is based on a positivist understanding of Qurʾān and the included criminal punishments in the form of *hudūd*,<sup>125</sup> with these values quickly extended to honor (*al-ʿird*), that covered also the crime of denunciation (*qadhf*). As a part of the new *maqāsid* concepts we see the attempts to approach these traditional values different and expand them.<sup>126</sup>

What is the purpose of forbidding extramarital intercourse? According to al-Ghazālī punishment *zinā* is to protect progeny and lineage.<sup>127</sup> Al-Rāzī (d. 1209)<sup>128</sup> and al-Zaqā<sup>129</sup>

<sup>121</sup> *Taʿzīrāt* is primary a correction for the offender himself and a deterrent for the others. It therefore differs from *hadūd* in purpose. COULSON, N. J. The state and the Individual in Islamic Law. *The International and Comparative Law Quarterly*. 1957, Vol. 6, p. 53.

<sup>122</sup> BLACK, A., ESMAEIL, H., HOSEN, N. *Modern Perspectives on Islamic Law*. Cheltenham: Edward Elgar Publishing, 2013, pp. 227–228.

<sup>123</sup> Thus defines the purpose of the punishment ʿAbd al-Qādir ʿAwda in his book on Islamic Criminal Legislation. Cited according to: LANGE, Ch. R.. Public Order. In: Rudolph Peters – Paeri Bearman (eds.). *The Asghate Research Companion to Islamic Law*. Surrey: Asghate, 2014, p. 164.

<sup>124</sup> PETERS, R. *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*. Cambridge: Cambridge University Press, 2005, p. 187.

<sup>125</sup> For more see BASSIOUNI, M. *Menschenrechte zwischen Universalität und islamischer Legitimität*. Berlin: Suhrkamp, 2014, p. 188.

<sup>126</sup> *Ibid.*, p. 207 f.

<sup>127</sup> OPWIS, F. *Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> Century*. Leiden: Brill, 2010, p. 68.

<sup>128</sup> *Ibid.*, p. 100.

<sup>129</sup> He goes even further when saying “*The punishment of adultery is related to the duty of purifying the society from means of temptation and arousal of sexual drives, enlightening people through the religion, encouraging them fear Allāh, and facilitating marriage*”. AL-ZARQĀ, M. A. Introduction to Islamic jurisprudence: al-Madkhal al-Fiḥī al-ʿĀm. Kuala Lumpur: IBFIM, 2014, p. 221.

share this view. However, this does not necessarily mean that the offender will be found guilty of committing *zinā*. Progeny is one of the protected values but another value with higher priority, typically life, may be protected more. Al-Shātibī (d. 1388), one of the main theoreticians working with *maqāsid as-sharī'a*, came to the conclusion that protection of life is more important than protection of progeny. So if a woman commits *zinā* in an effort to acquire means necessary to survive she will not be punished.<sup>130</sup> Also ʿUmar in several cases decided not to punish persons who committed *zinā*.<sup>131</sup> All this indicates which values are to be protected by the Islamic law. These values protected by the law are given and one of their consequences is the punishment of extramarital sexual intercourse. In this regard the Islamic law probably indeed represents the merging of morality and law. But we must remember also some of the rules of the Islamic law we mentioned earlier, i.e. *fiqh*, whose application rule out the possibility of punishing (alleged) offender.

Current legal systems in Muslim countries, especially in certain areas, are more or less based on sharī'a. "Traditional" Islamic law plays an important role for example in Saudi Arabia and Iran where the legal systems correspond to the basic axioms of the Islamic criminal law. Codifications of criminal laws in a number of Muslim countries were influenced by western legal systems. Basically, some countries were adopting western criminal codes. Special role in this played French criminal code from 1810, which led to the removal of *hadūd* punishments in a number of cases. This French code was also the inspiration for the Ottoman criminal code from 1858, which was a template for other criminal codes.<sup>132</sup> One of the received rules was based on article 324 of the French criminal code on the acquittal of criminal responsibility of a husband who killed his unfaithful wife<sup>133</sup> (article 188 of the Ottoman criminal code). Similar is true also for *Codice Zanardelli*, the Italian criminal code from 1889 that, after partial changes, became the criminal code in 1926 in Turkey. However, in the 20<sup>th</sup> century we see in several countries re-introduction of criminal sanctions for extramarital intercourse by the state authority – either state-wide or local, typically in Iran, Pakistan, Nigeria, Indonesia and Malaysia.<sup>134</sup> There are also cases when the (alleged) offender is punished extra-judicially, which is pointed out by a number non-governmental organizations, typically Amnesty International. Taking justice in own hands and punishing the alleged offender is usually carried out by the family of the offender and its purpose is to recover or maintain family honor by committing "honor killing" or "honor crime".<sup>135</sup> Together with the revival of *qisās* laws, which are primarily fo-

<sup>130</sup> OPWIS, F. *Maslaha and the Purpose of the Law: Islamic Discourse on Legal Change from the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> Century*. Leiden: Brill, 2010, p. 321.

<sup>131</sup> ʿUmar ibn al-Chattāb left without a punishment one woman who asked water from a shepherd who would only give it to her in exchange for a "service". AS-SALAAABEE, Muhammad. *The Biography of ʿUmar ibn al-Khattāb: Vol. 2*. Riyadh: Dar-us-Salam, 2010, pp. 134–135.

<sup>132</sup> For more see e.g. TELLENBACH, S. *Gesetze auf Wanderung – zum Strafrecht in der muslimischen Welt*. In: Hekkel, M. *Rechtstransfer*. Frankfurt am Main: Peter Lang, 2011. Beiträge zum islamischen Recht, VIII., pp. 47–60.

<sup>133</sup> For more see HUNT, M. *Woman in Eighteenth Century Europe*, New York: Routledge, 2014, p. 118 ff. and WARRICK, C. *Law in the Service of Legitimacy: Gender and Politics in Jordan*. Asghate, 2009, p. 82 ff.

<sup>134</sup> For more see MIR-HOSSEINI, Z. *Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts*. *International Journal on Human Rights*. Vol. 8, No. 15, 2001, p. 11 ff.

<sup>135</sup> For more on statistics see e.g. TELLENBACH, S. *Ehrenmorde an Frauen in der arabischen Welt: Abmerkungen zu Jordanien und anderen Ländern*. In: S. Tellenbach (ed.). *Die Rolle der Ehre im Strafrecht*. Berlin: Duncker & Humblot, 2007, p. 704 ff.

cused on collecting claims for the damaged party, a person committing an “honor crime” will usually escape with at most a few years imprisonment.<sup>136</sup> Criminal codes of Arab countries differ in their attitudes towards these crimes, from total exemption from penalty to its reduction. An important factor is the group of persons who committed the crime.<sup>137</sup>

In the western world we observe in the last century the opposite tendency. Criminal law no longer regulates intimate relationships it does not punish extramarital intercourse. The protection of progeny and family is left exclusively on in the private law domain. And private law does not directly penalize intimate relationships outside of marriage. It doesn't mean that such conduct is completely irrelevant from the legal perspective. An indirect sanction was for a very long time maintained differentiation between the rights of legitimate and illegitimate children, but that is in the past. Nevertheless, we may still come across certain consequences of infidelity in western legal systems (divorce in fault-based family law jurisdictions and property settlement), as well as limitations, e.g. in testament that could be against good morals if benefiting a mistress.<sup>138</sup>

## CONCLUSION

The perception of adultery and fornication has been changing over time. Hammurabi Code assumed a punishment for adulteresses and her lover and so did other ancient legal systems. All three monotheistic religions perceived adultery negatively and specified various penalties, including the most severe – death of the offenders. While according to the Islamic law adultery is still a crime punishable in some cases by death, e.g. in the Jewish law such punishment is no longer applied, it was replaced with other forms of punishment. Although medieval and later European legal systems were based on different sources than the Islamic law they approached adultery negatively and considered it illegal. In this regard there was not much difference between them. A relevant difference between the legal systems can be seen in that the Islamic law punishes any intercourse outside of marriage, i.e. also between unmarried persons. European legal systems usually focused on punishing extramarital intercourse involving at least one married person, typically married woman. Typical evidence included testimonies of eye witnesses or pregnancy – and that was common for the Islamic law and legal systems in our legal history. A punishment for adulterer was death; in case of Islamic law it was stoning, under our medieval legal systems it was beheading or burying. However, from the 18<sup>th</sup> century we see more frequent use of imprisonment, corporal punishment and banishment. A less severe punishment, lashing and banishment, was prescribed by the Islamic law only for intercourse between unmarried persons. The Islamic law accentuated the protection of honor and ac-

<sup>136</sup> MIR-HOSSEINI, Z. Criminalising Sexuality: *Zina* Laws as Violence against Women in Muslim Contexts. *International Journal on Human Rights*. Vol. 8, No. 15, 2001, p. 13.

<sup>137</sup> For more on judicial practice in Lebanon, Syria, Jordan and Egypt see e.g. TELLENBACH, S. Ehrenmorde an Frauen in der arabischen Welt: Abmerkungen zu Jordanien und anderen Ländern. In: S. Tellenbach (ed.). *Die Rolle der Ehre im Strafrecht*. Berlin: Duncker & Humblot. 2007, pp. 712–719. Generally on this topic and some Muslim countries (Pakistan, Egypt, Jordan, Palestine, Israel, Iraq) see HOSSAIN, Sara – WELCHMAN, L. (eds). *Honor : Crimes, Paradigms and Violence against Woman*. London: Zed Books, 2005.

<sup>138</sup> BEZOUŠKA, P. Civilněprávní otázky testovací svobody. *Právník*. 2014, Vol. 153, No. 10, p. 823 ff.



cusations of adultery and fornication without the ability to prove it resulted in punishment for the calumniator in the form of lashing and illegibility to testify in the future. This was to prevent unfounded slander and protect the honor of woman.

In the Europe adultery was prosecuted based on a customer law and later, after the reception of the Roman law, we can see a clear shift from prosecuting adultery *ex officio* to prosecuting based on a private action, typically from the husband, and to gradual elimination of prosecuting adultery altogether. Initially, husband had the right to kill unfaithful wife if he caught her *in flagrante delicto*, as well as her lover, without being punished. The notion behind it was that the power of the husband as the head of family was violated and there was a risk of a child born of adultery. We could say that this viewpoint is not foreign to Muslim societies where family structures are still quite patriarchal. The ability of the husband to act with impunity during or immediately after the crime of adultery was committed with his wife gradually disappeared from legal systems valid within our geographical region and there are no immediate sanctions for adultery in current legal systems. As we have seen in this article, according to Qur'ān and sunna it is necessary to adhere to very strict proceeding rules before an offender can be punished. Muslim lawyers work within *fiqh* with the principle *in dubio pro reo* legal devices that allow them to impose a less severe punishment than that defined by Qur'ān and sunna with relative ease. It changes nothing about the criminality of the act, however the consequences can be much less severe, especially if we accept the argument that only such conduct should be prosecuted that has been committed (at least partially) publicly. Nevertheless, there have been and still are cases when justice is taken into own hands by a woman's family member. Whether "honor crimes" are consistent with the Islamic law is at least questionable. They may be a product of society but they are in conflict with the spirit and purpose of verses in Qur'ān and a number of hadīths, as is clear from our article. Prosecuting those who committed "honor crimes" is difficult from the point of view of traditional Islamic law, as well as a number of current legal systems in Muslim countries. The impossibility or difficulty with prosecuting those who commit "honor crimes", it seems, has to do with the reception of foreign, European, legal provisions into criminal law in Muslim countries, based on which offenders often succeed in escaping the justice.