

Evidentiary Standards for Sexual Offenses in Islam

Fida Mohammad & Richard Lee

Abstract

This paper analyzes criminal procedure and evidentiary standards for sexual offenses in Islam, detailing the sources of Islamic laws in general and the laws of privacy in particular—including slander, and adultery. The particular focus is an examination of the evidentiary process in Islamic law, called Shari'a, including burdens of proof and punishments for sexual offenses. By compiling summaries by Shari'a juridical experts, this article encapsulates current consensus, even as it recognizes that the Islamic legal system is a moralizing force because Islam encompasses all aspects of individual existence. The article focuses on the Sunni school of thought because it has the largest following, though even Sunni adherents are not monolithic in their beliefs. The article reviews the extant literature that establishes the basis for the Islamic legal structure, locates sexual offenses within the general field of Islamic laws on privacy and slander, details the burdens of proof for various sexual offenses and lists punishments for each.

This paper explains Islamic evidentiary standards for sexual offenses. The Islamic community is a religio-political community called *Ummah*: there is no bifurcation between the secular and religious domains as is the norm in Western cultures. Islam encompasses all aspects of life, refusing individual compartmentalization. The function of law is to protect individual rights within the framework of the cherished ideals of Islam; thus, the Islamic legal system is a moralizing force. Before discussing sexual offenses, it will be appropriate to shed some light on the sources of laws in Islam, acknowledging that there are different schools of thought within Islam as a whole. The focus throughout will be on the Sunni school of thought, which has the largest following, although not even the Sunni sect is monolithic in all its beliefs; for example, there are four Sunni sub-sects: Hanafi, Shafei, Maliki, and Hanabali. This paper presents information specific to the high-consensus area of beliefs of these four sub-sects, or what is generally regarded as the Sunni school of Islamic thought. In order to fully comprehend sexual offenses in Islam, it will be appropriate to view them within the context of Islamic laws on privacy and slander. The Islamic legal system is specific and hierarchical, stemming from the Qur'an itself, and well summarized by Sanad (1991: 38-39):

Keyword

Sexual Offense, Islam, Evidence

1. The Qur'an

“The Qur'an is the Holy Book of Islam” (Sanad 1991: 38). For Muslims, the Qur'an is a revealed book (the words of God) and provides a complete code of life. Qur'anic laws are the supreme laws, and any law that is in conflict with statements in the Qur'an is null and void. According to the author of *The Theory of Crime and Individual Responsibility in Islam*, the Qur'an contains 114 chapters; 500 of its 6,342 verses (passages) deal with legal matters (Sanad, 1999).

2. The Hadith

Hadith are the divinely inspired sayings and practices of Mohammad and conduct and practices of Prophet Mohammad are called Sunna. Muslims are obligated to follow the Qur'an and Sunna. The role of Sunna is very important in Islamic law because it complements as well as interprets the Qur'an. The combined teachings of the Qur'an and Sunna is also called Shari'a, thus “Shari'a Law” (ibid.).

3. Ijma

Ijma means new interpretations by a consensus of Muslim scholars on an issue which is not specifically covered by Shari'a: ijma must be in conformity with the Qur'an and Sunna (ibid.).

4. Ijtihad

Ijtihad in Islamic jurisprudence means making new interpretations within conceptual framework of Qur'an and Sunna. Legality of ijihad is determined by conformity to the boundaries established by Qur'an and Sunna (ibid.).

5. Qiyas

Qiyas means analogical reasoning, where juristic analogy is the basis of judgment. According to Sanad, it means the application of a legal solution cited in the Qur'an or Sunna to a case that is similar to this precedent. (39-40).

Types of Crimes in the Islamic legal System

There are three major categories of crime in Islam: Islamic *Huddud*, *Qisas*, and *Ta'zir*.

Hudud Crimes

Hudud is the plural of “*Hadd*,” and in Islamic law it “expresses the correction appointed and specified by the law on account of the right of God” (Hamilton,

1982: 175). According to Ibn Nujaim, “*Hadd* is a kind of fixed punishment prescribed by God in the exercise of His exclusive Right” (in Zafar, 1981: 14). Simply put, hudud offenses are those whose punishments are clearly defined in the Shari'a combination that is the Qur'an and Hadith (Sunna). *Hudud* offenses are similar to crimes against society in Common Law traditions. Functionally speaking, the goal of hudud is to protect the social and moral fabric of society.

The prosecution of such crimes is mandatory, and punishment must be imposed exactly as prescribed in the Qur'an or the Sunna. Once guilt has been proven, no human judge, governor, or even *Amir* (ruler) can increase, reduce, probate, or suspend the sentence. . . Muslim scholars differ regarding the crimes that fall in this category. They agree on four *hudud* crimes: i.e., adultery, theft, banditry, and defamation (Sanad, 1991: 51).

Qisas

Deal with bodily injuries, defined by Shari'a as a right of the victim or his family. The punishment of Qisas crimes is based on the principle of proportionality: the punishment must be proportionate to the crime.

Ta'zir

“*Ta'zir* is from *azr*, 'to censure or repel.' “That discretionary correction which is administered for offences, for which Hadd, or fixed punishment has not been appointed” (Zafar, 1981: 17). In other words, *ta'zir* deals with those crimes for which there is no clear punishment in Shari'a. A judge relies on circumstantial factors in deciding a case. *Ta'zir* covers offences such as those to “human life and body, public peace and tranquility, decency, morals, religion, perjury, forgery, gambling and contempt of courts, etc.” (Zafar, 1981: 18). In *Ta'zir* cases, judicial discretion is not unbridled. A judge must follow the general guidelines of Shari'a.

Under Shari'a law, adultery is considered a sexual offense. Adultery is called *Zina* in Islamic legal language. (In the Arabic language it means both adultery and fornication, and it is a Hadd crime.) According to Sanad, “adultery in Islamic law is voluntary sexual intercourse with anyone other than one's spouse, no matter if he or she is married or not” (1991: 51). A man and woman are said to have committed *Zina* if they willfully have sexual intercourse without being married to each other” (Mannan, 1990: 363). According to the Hanabali school of Sunni, *Zina* is “Sexual intercourse between a man and a woman without legal right or without the semblance of legal right (*al-milk* or *shubhatal-milk*)” (in EI-Awa, 1982: 14). Sexual relationships outside of marriage are not permitted in Islam. According to a Pakistani Supreme court decision:

Marriage in Islamic law is a civil contract between two individuals of opposite sex. Islam does not view marriage as a sacrament, as do Catholics and other Christians: "Every Muslim of sound mind, who has attained puberty, may enter into a contract of marriage. 'Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years'" (Mst. Aziz V. SHO, in Mannan, 1990: 363).

Zina is a general term, one that encompasses both adultery and fornication, but the punishment prescribed for each is different. Adultery presumes marriage, while fornication presumes no marital relation. Consent in either case is immaterial (Zafar, 1981). Zina must be witnessed by four people, who independently arrived at the scene without prior consultation with one another. (I.e., "let us see what this person is doing" is disallowed.) Holy Qura'n says:

مِئَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ
وَلِيَشْهَدَ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ^(٢٤:٢)

AS FOR the adulteress and the adulterer flog each of them with a hundred stripes, and let not compassion with them keep you from [carrying out] this law of God, if you [truly] believe in God and the Last Day; and let a group of the believers witness their chastisement (Asad Translation, 24: 2).

Al-Nour (The Light)

وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا
لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ (٢٤:٤)

24:4 (Asad) *And as for those who accuse chaste women [of adultery], and then are unable to produce four witnesses [in support of their accusation], flog them with eighty stripes and ever after refuse to accept from them any testimony - since it is they, they that are truly depraved! -*

Al-Nour (The Light)

لَوْلَا جَاؤُوا عَلَيْهِ بِأَرْبَعَةِ شُهَدَاءَ فَإِذْ لَمْ يَأْتُوا بِالشُّهَدَاءِ فَقُولْكَ عِنْدَ اللَّهِ هُمُ الْكَاذِبُونَ
(٢٤:١٣)

24:13 (Asad) *Why do they not [demand of the accusers that they] their allegation? for, if they do not produce such witnesses, it is those [accusers] who, in the sight of God, are liars indeed!*¹

The consensus of juridical belief is clear:

In spite of all the differences in defining the crime of *Zina* among schools of Islamic law, all jurists agree that the main element in *Zina* . . . is unlawful intercourse. Hence, any sexual relationship between a man and a woman which does not involve intercourse is not punishable by the *Hadd* punishment. These relations cannot be considered legal (*mubah*); or the contrary, they are prohibited (*haram*), but their punishment is in the category of *ta'zir*. The *Hadd* punishment for *Zina* should not be applied in such cases (in EI-Awa 1982: 14).

The principle that the accused is presumed innocent is fundamental in Islamic law. Whoever claims otherwise must prove it. The corollary to this principle is that the burden of proof is on the complainant (Salama 1982: 109). According to Asad's commentary, "from a legal point of view, every woman must be considered chaste unless conclusive proof to the contrary is produced" (1980: 533). Adultery is the physical penetration of the male organ into the female organ. Any sexual contact less than that should not be considered as the crime of adultery, and therefore the adultery *Hadd described* above should not be inflicted. This is a very narrow definition.

The severity of punishment to be meted out in such cases, as well as the requirement of *four* witnesses—instead of the two that Islamic Law regards as sufficient in all other criminal and civil suits—is based on imperative necessity of preventing slander and off-hand accusations. As laid down in the several authentic sayings of the Prophet (Mohammad), the evidence of the four witnesses must be direct, and not merely circumstantial: in other words, it is not sufficient for them to have witnessed a *situation* which made it evident that sexual intercourse was taking or had taken place: they must have witnessed the sexual *act* as such, and must be able to prove this to the entire satisfaction of the judicial authority. . . . *Since such a complete evidence is extremely difficult, if not impossible to obtain, it is obvious that the purpose. . . is to preclude, in practice, all third-party accusations relating to illicit sexual intercourse* (our emphasis) (Asad 1980: 533).

Those who testify in *Zina* cases must be of unimpeachable character and have to describe that they have seen both persons in the very act of actual intercourse. Guilt must be proven beyond all possible doubts. Doubt will negate punishment. According to Muhammad, "Remit punishment on account of doubt, as long as you have ability" (Zafar 1981: 248).

This rigid evidentiary standard is not designed to deter such offenses. If a sexual act is performed in such a way that it can be witnessed by four individuals, it is wanton behavior (Zafar 1981). It shows lack of respect for collective morality, and it is more like publically indecent behavior.

If guilt of adultery is proven through the Islamic modes of evidence, then different penalties apply depending on the status of the guilty party.

God says in the Holy Qur'an:

The adulterer and the adulteress, scourge ye each one of them a hundred stripes, and let not pity for the twain withhold you from obedience of Allah, if ye believe in Allah and the Last Day (Surat al-Nur V:2).

Zina is liable to *Hadd* if

- a.) it is committed by man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married; or
- b.) it is committed by woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be married (Zafar 1981: 245).

Whoever is guilty of *Zina* is liable to *Hadd*

- a.) if he or she is *muhsan* (married), be stoned to death at a public place; or
- b.) if he or she is not *muhsan* (*ghair muhsan*), be punished at a public place with whipping numbering one hundred stripes (Zafar 1981: 245).

The immorality of *Zina* is the same whether it is committed by a married or an unmarried person. A married person has no valid reason to commit *Zina*, while an unmarried person does not have that opportunity and that is a mitigating factor in lighter punishment. "According to 'Abduh, the punishment of the offender who has been married, but is no longer so, should be lighter or at most equal to that of the unmarried offender" (in EI-Awa 1982: 19).

Zina-bil-Jabr (Rape):

Zafar (1981) defines the crime of *Zina-bil-Jabr* as follows:

1. A person is said to have committed *Zina-bil-Jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in the following circumstance, namely:
 - a) against the will of the person;
 - b) without the consent of the victim;
 - c) with the consent of the victim, when consent has been obtained by putting the victim in fear of death or of hurt; or

- d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and the consent is given because the victim believes that the offender is another person [i.e., making sexual intercourse by impersonating her husband] to whom the victim is or believes herself or himself to be validly married. Whoever is guilty of *Zina-bil-Jabr* is liable to Hadd:

If he or she is *muhsan*, be stoned to death at a public place; or

if he is not *muhsan*, be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the Court may deem fit having regard to the circumstances of the case (1981: 252).

If an offender is not adult and is guilty of *Zina* or *Zina-bil-Jabr*; the *Hadd* punishment will not be applied because of age; however, it becomes a *Ta'zir* offense. The guilty party may be given a “prison term, [a], or both, and may be awarded the punishment of whipping not exceeding thirty stripes” (Zafar 1981: 262).

Islamic Law of Slander:

At this point it is appropriate that we discuss the Islamic laws of slander called ***Qadhaf or Kazaf***. This is a fourth *Hadd* offense and deals with false accusation. According to the *Kazaf* ordinance in Pakistan:

If any person makes or publishes any imputation of *Zina* against any person whether by words spoken or intended to be read, or by signs or other means with intention of harming or knowing or having reason to believe that such imputation would harm the reputation or hurt the feelings of such person, the person making such imputation has committed the crime of *Kazaf* (in Zafar (1981: 178).

Zafar has the following commentary on the *Qadhaf (Kazaf)* Law:

- a. Imputation of *Zina* to a dead person would be tantamount to *qadhaf* if it would hurt his or her reputation if that person was living. Also, if that accusation is harmful to the feelings of his or her family or other close relatives.
- b. Alternative or ironical expression could . . . [rise to the level of] *qadhaf*. Accusation could be conveyed either directly or indirectly: e.g., “by hints or signs, or by pictorial representation or by other modes and symbols, or by way of question, irony, exclamation, conjecture, or insinuation” (1981: 178).
- c. There must also be a specific intent and knowledge or reason to believe that it will harm the reputation of the person concerned.

Slander could be proven in the following ways:

1. Offender makes confession;
2. Accusation in court; or,
3. When at least two witnesses testify before a court under the guidelines of *tazkiyya al shahood* (the good character requirement of witnesses) (Zafar 1981:186).

Punishment for Slander

A free person guilty of slander will get eighty stripes; a slave guilty of slander incurs forty stripes. (Here, bondage could mitigate the sentence.)

The punishment for such slander (*qadf*) is prescribed in the Qur'an: "And those who accuse chaste women but do not bring four witnesses, flog them (with) eighty stripes and never (again) accept their testimony. They are indeed evil-doers, except those who afterward repent and make amends" (Surah XXI verses 4-5).

Slander must be clear. According to EI-Awa,

A clear accusation is one that is expressed in a word which does not have more than one meaning, that is, a word derived from the word *Zina* or any word having the same meaning. On the other hand, an insinuated accusation is one in which the accuser uses a word which merely means, among other things, that the accused has committed the crime of *Zina* (1982: 21).

There is disagreement about insinuated accusations. Except for the Maliki School, all other Sunni schools believe that an accusation must be unambiguous. Insinuating, damaging comments cannot be subject to *Hadd*. If "someone uses a word which has several meanings, one of which can be understood as *Zina*, he may be liable to a *ta'zir*" (EI-Awa 1982: 21).

There is some disagreement among jurists as to whether it is crime against God or the person slandered. Those who think that it is a crime against a person believe that if the victim forgives the accuser, then it should be a mitigating factor. According to Al-Awa,

the punishment for *qadhf* is one, which pertains to the realm of the public interest, *haqq Allah* (Right of God). The infliction of this punishment is not dependent upon the request of the accused, and once the crime is proved either by testimony or by confession, the guilty person should be punished. The principle of forgiveness before the matter as reported to the judge still applies to the crime of *qadhf* but without affecting the fact that its punishment is classified as *haqq Allah* (1982: 23).

Proof of Zina (adultery) or Zina-Bil-Jabr (rape) Liable to Hadd:

Testimony

Hanafis, Shafeis, and Hanbalis are of the opinion that the witness must start his testimony with the word *ashhadu* ("I testify"), since it indicates bearing witness (seeing with one's own eyes) and being certain of one's testimony, in addition to taking the oath. No other word can be substituted because it would be less affirmative, and would cast doubt on the testimony, and thereby requires it to be rejected in accordance with the principle "Doubt nullifies the *Hadd* punishment." However, Imam Malik did not require that testimony begin with these words so long as the substance indicated direct eye witnessing (Salama 1982: 115).

Rules of evidence and admissibility of evidence in the prosecution of *hudud* and *Qisas* crimes are confined to tangible evidence to be produced by the accuser or an uncoerced and free confession by the accused. The testimony of four male eyewitnesses is required to prove adultery, and that of two male witnesses in the other *hudud* crimes and for *Qisas* crimes. The witness must be sane, of legal age, free, not dumb, mute or blind, and must not have been punished for a *hudud* offense. Also, a witness cannot be related to the accused (his father or son) or be married to the accuser. Further, he must not bear malice toward the accused, and he must be a person of integrity. The victim's testimony as a witness in his case is disregarded unless supported by oath. Hearsay testimony is inadmissible because of unsupported oaths (Al-Saleh 1982). Umar ibn al-Khattab has stated: "Those who testify to a *Hadd* without being eye-witnesses testify out of hatred and their testimony is invalid." Thus, such testimony is inadmissible if it is suspected of being motivated by hatred (Salama 1982: 113). Proof of adultery or rape could be established in two ways:

- a). the person accused makes confession to the crime of adultery or rape in front of a Court of Competent Authority; or
- b). at least four Muslim adult males testify under the guidelines of '*Tazkiyyah al-Shahood*'. Before they give eyewitness account of the act of penetration, witnesses have to tell the court that they have not committed major sins (*kabair*). The only exception to this rule will be when the accused is a non-Muslim, then witnesses may be non-Muslim (Zafar 1981). If four competent witnesses are not produced, the crime is not proven and the witnesses will become guilty of slander (Salama 1982).

Requirements of *Tazkiyya-ul-Shahood*: Witnesses before testifying must satisfy tazkiyya inquiry:

- a. Truthful person;
- b. who abstains from major sins, e.g., adultery; stealing; drinking; plundering; embezzlement; associating other deity with God; tormenting their parents; murder; swearing to lies; taking interest on money (usury); taking the property of orphans; and there could other considerations. *Tazkiyya* is product of Islamic criminal procedure. *Tazkiyya* procedure could be secret or public.

It is neither part of cross-examination nor a substitute for cross-examination because cross-examination is the right of the accused while *tazkiyya* is an obligation on the part of judge to ascertain the righteousness of witnesses (Zafar 1981: 284).

Testimony must meet certain general criteria in all crimes, in addition to special ones in the case of adultery.

Criminal Evidence

The following information is taken from Dr. Nagaty Sanad's *The Theory of Crime and Criminal Responsibility in Islamic Law*, specifically the section entitled "Conditions for the Validity of Criminal Evidence". His work effectively and efficiently summarizes the criteria for Shari'a evaluation;

In order that evidence, no matter of what kind, be sufficient for criminal conviction, it must meet certain conditions:

Evidence must be conclusive; that is, it must prove the occurrence of the crime and the guilt of the accused clearly and explicitly.

Evidence loses its conclusiveness when it relies on other evidence or facts to explain it. The requirement of conclusiveness of evidence is a corollary to the presumption of innocence, which is seen as a cornerstone in the structure of the Islamic criminal (justice) system.

The definiteness of evidence depends upon its corroboration of other facts and circumstances in the case. If a contradiction occurs, then evidence becomes doubtful and is not conclusive.

Evidence should remain conclusive until the execution of the judgment. It is not enough that the evidence looks conclusive in a given stage of the criminal action. If the defendant confesses in the investigation stage and retracts his confession before the judge, or confesses during the trial but withdraws his confession before the rendering of the judgment, this confession is no longer conclusive and cannot support a criminal conviction. (Sanad 1991: 105-6)

A judge must examine the witness regarding the fact of the case, asking every witness to define adultery; the witnesses must describe the manner in which the act was committed. Witnesses must describe the location, time and the identity of the accused (Zafar 1981). The witness may have a very different definition of *Zina* or certain acts may be a sexual offense for a witness, but legally that act may not constitute a crime. This process is meant to clarify different issues in an adultery case.

Takdeem is another legal principle that would make evidence inadmissible except in slander cases. *Takdeem* means delay in evidence gathering. All hudud punishments are rendered void by delay. There is some disagreement among jurists as to what constitutes “delay”: ultimately it is left to the discretion of judge (Zafar 1981).

Contradiction

Contradictory accounts of an act could lay ground for doubt.

If there is evidence after accusation and testimony of the four witnesses that the accused woman is virgin in such a situation neither of the accused could be subjected to punishment. Examination could be done by a female employee. Exoneration of the accused cannot trigger slander. The evidence is sufficient to prevent punishment but not sufficient to cause slander (Zafar 1981).

Incompetent Witnesses

According to Zafar (1981) evidence of the following is not admissible:

Evidence given by the blind;

testimony given by person convicted of slander;

testimony by slave.

Witnesses who are convicted cannot even bring a doubtful *Zina* charge. Such testimony will become slander and the witness(es) will be punished for slander.

Four reprobate witnesses' evidence can be taken in court, but because of their defective character it will be seen with suspicion. Their testimony can establish doubtful *Zina* charges which have no penal consequences. Reprobate witnesses are not liable to slander.

If fewer than four witnesses testify to witnessing *Zina*, they are liable to slander.

If four persons bear evidence against a man or woman that he or she has been guilty of *Zina*, and the judge imposes punishment on the accused parties accordingly, and afterwards it appears that one of the witnesses was slave or had

been convicted of slander, now the number of witnesses left is three and they are liable to slander. If a person suffers punishment because of defective punishment, the state will pay damages to the victim or victim's family. According to Salama any of the following attributes disqualifies the testimony of a witness:

Blood Relation

The majority of jurists with the exception of some Shafi'is argue that the testimony of the major and minor branches of families for each other is inadmissible. Abu Hanifa, Malik and Ahmad ibn Hanbal disqualify spouses from testifying for or against each other, but the Shafi'is do not.

Enmity

The majority of jurists agree that enmity between a witness and a party to a case arising out of worldly matters disqualifies the witness. Enmity by reason of matter involving the rights of God does not disqualify a witness if he possesses the quality of *'adl* (justness or fairness). In order that testimony provided by a witness assist in establishing justice, security, and tranquility in Muslim society, witnesses must be inspired by these considerations only. If a witness holds any hostile feelings toward the defendant or any other party, his testimony is disqualified.

Partiality

A claim of partiality exists when there is a relationship between the witness and one of the parties, which suggests partiality or a personal interest that may be advanced by the witness through his testimony (1982: 118).

The Judge's Power in Evaluating A Confession

Confession establishes guilt: it is the judge's responsibility to make sure that it fulfills all the requirements set by Islam. Confessional statements must be corroborated by circumstantial evidence. The judge has to make sure that there was no coercion and intimidation. In case the woman is proven to be virgin, then her confession becomes inadmissible. Some jurists are of the opinion that judges should suggest the possibility of retraction of confessions. "Some jurists hold the view that the judge should suggest to the accused the possibility of retracting his confession, as the Prophet did in the case of a confessing adulterer and a woman accused of theft" (Salama 1982: 120). Sanad believes:

If a confession meets these conditions for admissibility, the judge still has the power to determine its validity to sustain criminal conviction. He has the right to disregard such confession if he realizes that it contradicts other circumstances in the case (Sanad 1991:103)

Islam also protects an accused from the abuse of power by the prosecutor and judge. The accused cannot be punished if a prosecutor fails to produce the required positive “in terms of kind, number and conditions. The judge is without authority in the absence of such proof to convict and cannot rely on his discretion or personal conviction” (Al-Saleh 1982: 78). If new evidence not known to the judge during sentencing come to his attention, “which might have cast doubt on the testimony of witnesses or the validity of the confession, then the evidence lacks credibility and the verdict must be reversed. If punishment has been imposed, it must cease” (Salama 1982: 113). Muslim jurisprudence constrains the judge in situations where he becomes (*de facto*) both judge and witness at the same time. Reference is made to the practice of Caliph Umar: he declined to judge a case he was aware of, saying: “Either I judge or testify” (Sanad 1991:105).

The essence of Islamic jurisprudence is that justice is better served if a judge sets free a culpable person than if he convicts an innocent one. Every person is presumed innocent and his or her rights should not be abridged until such proof is established. “Accusation alone does not invalidate this presumption, since accusation by nature is not devoid of doubt, and doubt does not negate certainty; whereas, the accused's prior innocence is a certainty” (Awad 1982: 94).

Regarding modes of evidence in criminal cases Awad is of the opinion that,

The majority of Muslim scholars (*Shafi'i, Hanafi, and Hanbali*) adopt a restricted view. They maintain that evidence in criminal cases is restricted basically to (a) testimony and (b) confession. The judge is forbidden to render a criminal conviction on the basis of another kind of evidence. He cannot rely on his prior personal knowledge, for example. A majority do allow using other methods of proof in noncriminal cases, however (1982: 95).

In Islam an accused has right to present a vigorous defense in order to prove his innocence and rebut the accusation. Right to defense enables the defendant to deny the accusation, “either by showing the insufficiency or invalidity of the evidence on which it is based or by submitting evidence, such as an alibi, to prove innocence” (Awad 1982: 95).

Conclusion

Contrary to the popular misconception about the severity of Islamic Criminal Justice System, it is very forgiving and does not look forward to punishing people. Islam is the religion of, compassion, mercy and forgiveness and the preceding proves that point. One may wonder why testimony by women and slaves in the case of Zina is not admissible. In some cases two womens' testimony is equal to a man's. One may raise a question: is there something wrong with women biologically. The answer is no. In our opinion, if we see women's testimony in the context of slave

testimony, then it makes some sense. Slave testimony is not admissible in case of Zina, although he is man. The reasoning is that a slave is the living property of another person, and as property he is not completely free and could be manipulated by his owner; there is a danger that he may not give objective testimony. In order to protect the rights of the accused, his testimony is not admissible. In the same way, Islam took cognizance of patriarchal arrangements in 7th century Arabia, some of which persists even today. In patriarchal societies a woman is susceptible to pressure from her husband and other family members. Because of her vulnerability to pressure, she is not considered an objective witness, one able to resist all patriarchal forces. *It is her position in the social structure, not biological inferiority, that renders her an incompetent witness in Zina cases.* Like slavery, patriarchy is a socio-historical reality, and not an ahistorical natural reality. Historicity of a practice means that it could be changed by new historical realities. Exclusion of certain evidence should be understood within the jurisprudential paradigm of Islam. In Islamic jurisprudence, especially in hadud offenses, evidentiary standards are very high, and the reason for that is to protect the dignity and privacy of human beings. Practically speaking, it is almost impossible to convict somebody on the charges of consensual sexual activities.

End Notes

Both Arabic text and Mohammad Asad's Translation are copied

¹IslamiCity: Quran Search. (n.d.). Retrieved April 18, 2015, from <http://www.islamicity.com/quranSearch/>

ⁱⁱ*Tazkiyyah al-Shahood* is a mode of inquiry adopted by a court to satisfy itself as to the credibility of witnesses (Zafar 1981).

Bibliography

- Al-Saleh, Osman Abd-el-Malek. 1982. "The Right of the Individual Personal Security in Islam." *The Islamic Criminal Justice System*, Cherif Bassiouni (ed), Oceana Publications, Inc., London, Rome, New York
- Asad, Muhammad. 1980. *The Message of Qur'an*. Dar Al-Andalus, Gibraltar
- Awad M. Awad. 1982. "The Rights of the Accused Under Islamic Criminal Procedure." *The Islamic Criminal Justice System*, Cherif Bassiouni (ed), Oceana Publications, Inc., London
- Bahnassi, Ahmad Fathi. 1982. "Criminal Responsibility in Islam." *The Islamic Criminal Justice System*, Cherif Bassiouni (ed), Oceana Publications, Inc., London, Rome, New York
- El-Awaw, Mohamed S. 1982. *Punishment in Islamic Law: A Comparative Study*. American Trust Publications, Indianapolis
- Garland, Norman M. and Gilbert B. Stuckey. 2000. *Criminal Evidence for Law Enforcement Officers*. New York: Glencoe McGraw-Hill
- Hamilton, Charles. 1982. *The Hedaya: Commentary on the Islamic Laws*. Islamic Book Trust, Delhi (India)
- IslamiCity (Quran search Engin): Quran Search. (n.d.). Retrieved April 18, 2015, from <http://www.islamicity.com/quranSearch/>
- Manan, M. A. (1990). D. F Mulla's Principles of Mohamden Law. Lahore, Pakistan: P. L. D. Publishers
- Mansour, Aly Aly. 1982. "Hudud Crimes," *The Islamic Criminal Justice System*, Cherif Bassiouni (ed), Oceana Publications, Inc., London, Rome, New York
- Salama, Ma'moun M. 1982. "General Principles of Criminal Evidence in Islam." *The Islamic Criminal Justice System*, Cherif Bassiouni (ed), Oceana Publications, Inc., London, Rome, New York
- Sanad, Nagaty. 1991. *The Theory of Crime and Individual Responsibility in Islam*, The University of Illinois at Chicago
- Zafar, Emmanuel. 1981. *Laws & Practices of Islamic Hudood*, Khyber Law Publishers, Lahore, Pakistan

The author Fida Mohammad, Ph. D., is a Professor, at Sociology Department, State University of New York, Oneonta, New York 13820 USA

The author Richard Lee, Ph. D., is a Professor, at English Department, State University of New York, Oneonta, New York 13820 USA