

## **Primitive Customs, Not Shariah Law**

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On August 16, 2010, *The New York Times* reported that the Taliban, in Afghanistan, ordered their first public executions by stoning since their fall from power. They stoned a young couple who had eloped. The punishment was carried out by hundreds of the victims' neighbors in a village in northern Kunduz Province. Family members were involved, both in the stoning and in tricking the couple to return home after they had fled.

According to the story, the lovers, a 25-year-old-man and a 19-year-old-woman, defiantly confessed in public to their love relationship. As a result, the Taliban stoned them claiming implementation of Shariah Law, under the charge of *zina* (adultery). While the facts are not clear as to whether the couple got married after eloping, or whether there was an issue about the validity of their possible marriage, the charge and the actions of the Taliban remain unjustifiable and egregious under Islamic law.

If the couple indeed did not get married, the question before us becomes: Did the Taliban really implement Shariah Law against the eloping couple or did they implement the harsh and cruel customs and traditions of the village?

To answer this question I shall first discuss those parts of Shariah Law relevant to this case. In preparation for this task, I would like to briefly introduce the two primary Islamic sources on which Shariah Law is based. I will explain how jurists extract the Shariah Law from these sources, and what the relevant laws are in this case. I will then show conclusively that the stoning of the man and the woman did not accord with Shariah Law, but rather with cruel and oppressive customs.

Finally, I shall also show that, according to Shariah Law, the people who stoned the couple themselves should be punished for the crime of killing two innocent people.

I shall explain first in some detail what the Islamic sources of authority are and how jurists extract laws from these sources.

### **Islamic sources of authority**

Shariah Law may be briefly defined as a set of laws derived from the Qur'an and the Sunnah (teachings of Prophet Muhammad). Jurists are entitled to judge the actions of those who claim to implement Shariah Law, especially when such a claim is used to oppress a person or group of people.

The primary sources of Islamic jurisprudence are the Qur'an and Sunnah. The Qur'an is the central authority and Holy Scripture of Islam, the revealed word of God. It contains all the basic principles and rules of Islamic Shariah Law; however, it does not include all the branches and details of this law.

The Sunnah is the second most important source after the Qur'an and it is defined as the words, actions, and silent assertions of Prophet Muhammad. The Sunnah details various aspects of Shariah Law, and it helps us understand the Qur'an.

Shariah Law can never be separated from these two main sources, which are the authority underlying all Islamic laws and rules.

Jurists engage in reasoning (*ijtihad*) based on the primary texts (the Qur'an and Sunnah) in order to reach their final conclusions. These conclusions are therefore strictly rooted in these primary sources. When applying Shariah Law, jurists also take into account public interest and the welfare of the Muslim community.

Jurists must meet strict standards of knowledge and piety in order to be able to engage in *ijtihad*. While in principle, any Muslim is entitled to engage in *ijtihad*, whether male or female, only those who meet these standards may do so. Therefore, the Taliban do not have the right to engage in *ijtihad* simply by virtue of being Muslims. They need to refer to the conclusions of credible jurists before they can attribute their actions to Islamic Shariah Law.

To summarize, Shariah Laws are divinely ordained laws. They are not determined or specified at will by human beings in satisfaction of their own whims, prejudices, or tribal customs. This is especially true in light of the following Qur'anic verse: "It is not fitting for a believer, man or woman, when a matter has been decided by God and His Messenger, to have any option about their decision. If anyone disobeys God and His Messenger, he/she is indeed on a clearly wrong path." (33:36)

### **The Treatment of *Zina* (Adultery) in Islam**

*Zina* is a sin in all three Abrahamic religions (Judaism, Christianity, and Islam). It is a major sin and a shameful deed because of its effect on the family and society as a whole. The Qur'an states:

"And come not near unto adultery. Lo! It is an abomination and an evil way." (17:32)

*Zina*, in Islam, refers to consensual sexual intercourse between a man and a woman outside of marriage. It is important to note that *zina does not* occur unless actual penetration takes place. This fact was established by prophetic precedent when a man told the Prophet that he had a relationship with a woman who lived at the outskirts of the city. He said (obliquely) that he had a sexual relationship with her which did not include intercourse. He then asked the Prophet to punish him as he saw fit. The Companion Omar, who was present, interjected by saying, “God would shield your privacy if you were to shield it yourself.” The Prophet did not comment (which means that he agreed) and the man left. The Prophet then sent a messenger after him to recite to him this Qur’anic verse:

“And establish prayers at both ends of the day, and parts of the night for good deeds remove bad ones. Let this be a reminder to those who remember.” (11:114)

Then, one of the Prophet’s companions asked, “Is this law for him only or for all people?” The Prophet answered, “It is for all people” (Reported by Muslim in his *Sahih*, and by Abu Dawoud and al-Tirmithi on the authority of Abdullah Ibn Mas’oud).

According to this Hadith (what the Prophet said, a part of the Sunnah), Prophet Muhammad encouraged the man not to reveal his sin, to repent, and` ask God for forgiveness instead. Repentance is the most noble and beloved way of purification from sins. The Qur’an also states:

“Do not despair of God’s mercy; He will forgive you and all your sins” (39:53)

### **Requirements for *Zina* punishment**

Although Islam prohibits *zina*, because of the magnitude of the sin, Shariah Law nevertheless imposes a very high threshold for establishing it. It specifies a number of evidentiary and other requirements that make the charge almost impossible to prove. Furthermore, all these requirements must be satisfied simultaneously in each individual case.

First, the adulterer must be a mentally sane adult. Second, the adulterer must have committed *zina* of his/her own free will. Third, the adulterer must be aware that this act is prohibited (jurists agreed that the punishment cannot be implemented if the adulterer does not know that *zina* is prohibited). Fourth, the adulterer must be married at the time *zina* is committed. Fifth, penetration must have occurred. Sixth, either the adulterer has freely confessed to the crime or four credible eyewitnesses saw the same act of penetration. All four of the witnesses must testify at the same session immediately after seeing the act of *zina* and not recant their testimony later.

Clearly, the evidentiary requirements are so rigorous that satisfying them is almost impossible. Even if a man was found alone in bed with a woman covered by the same blanket, this does not satisfy the high standards of proof required for a charge of *zina*. These requirements make it almost impossible to accuse anyone of adultery unless the act was committed in public, thus corrupting public morality.

The Prophet said, "Avoid punishments if there is doubt." A major derivative legal principle states, "Uncertainty wards off punishment for major sins." It is for this reason that not a single act of adultery was established during the lives of Prophet Muhammad or the first four Caliphs. The only reported incidents were those resulting from free and insistent confession by adulterers who were strongly encouraged by the Prophet and his companions to shield their privacy from public view and repent instead.

In one of the two incidents of stoning that occurred during the life of the Prophet, a man called Ma'iz asked the Prophet to purify him. The Prophet turned away his face and said four times: "Go back and ask God's forgiveness and repentance." When the man insisted on being purified, the Prophet asked him a series of questions in an attempt to make him recant his confession. When the people started stoning him, the man cried out, "O people take me back to the Prophet." When this was reported to Prophet Muhammad, he replied, "Why did you not let him off, he might have repented, and God may have accepted it" (Reported by Muslim in his *Sahih*).

It is therefore clear that even if an adulterer insists on confessing, but then retracts his confession, such retraction is acceptable regardless of the stage at which it was made, and is sufficient to ward off punishment.

In a second incident, a pregnant woman from the tribe of Ghamid came before the Prophet to confess, and she was ordered by the Prophet to leave and not return until she had delivered and suckled the baby for two years. In this case, the Prophet gave the woman more than two years to experience motherhood, be with her baby, and reflect on the wisdom of her confession, in order to avoid punishment.

Thus we ought to consider the following:

First, Islam does not prescribe punishment haphazardly; nor does it implement it without strict due process. Second, Islam seeks to protect society from circumstances that may lead to chaos and conflict, and thus prescribes punishment as a deterrent for public behavior that contravenes public interest and social harmony. Third, as we saw above, such punishment has rarely been used. Fourth, if any one of the testimonies of the four required witnesses does not satisfy the evidentiary requirements, the witness will be severely punished for making an accusation without sufficient evidence. This approach is also used to deter people from piercing the privacy

shield of others; they do so at their own risk. Islam defends the individual's right to privacy. For this reason, spying on each other and gossiping is frowned upon. So, if a person engages in prohibited conduct privately, it is viewed as a matter between that person and God. Judgment is God's alone.

Based on the requirements of the Shariah Law for implementing punishment, it should be quite clear at this point that the stoning that took place in Afghanistan is the result of ignorance or brutal customs, not of Shariah Law. I shall now show in detail that none of the requirements for *zina* punishment were met in this incident.

First, the story informs us that the young lovers eloped. Eloping does not qualify as evidence of *zina*. As I explained previously, *zina* is not established without proof of the actual act of penetration.

Second, *The New York Times* story also informs us that while the man Khayyam was married, to another woman, at the time of elopement, the woman Siddiqa was not married. Therefore, even under the sloppiest applications of Shariah Law, the Taliban had no right whatsoever to stone Siddiqa because she was a single woman, and even if she had engaged in sexual behavior with Khayyam, including penetration, she should have not been stoned.

Third, punishment cannot be imposed unless a judge is satisfied that the four adult, credible eyewitnesses before him saw the same act of penetration, and none of them retracted their testimony. Did four credible witnesses come before the mullahs in Kunduz? And how could all four of them have possibly witnessed the act of penetration when the couple had eloped? In other words, did the mullahs observe due process and preserve the rights of the defendants, namely that the accused is presumed innocent unless proven guilty beyond the shadow of doubt?

Fourth, the newspaper reported that the couple defiantly confessed in public to their relationship and they said, "We love each other no matter what happens." According to Shariah Law, a love relationship is not a crime, and definitely it is not *zina*. So, how could the couple be punished based on a love relationship?

Fifth, suppose that the couple confessed to having committed adultery with each other. Did the mullahs try to persuade them to retract their confessions? In other words, did they ask them all the questions that the Prophet Muhammad asked adulterers to encourage them to retract their confessions? Did they investigate the existence of extenuating circumstances? If not, then even these confessions are defective and insufficient to establish the crime of *zina*.

At the very least, the couple has been denied due process under Islamic law. At worst, they have been murdered in cold blood for challenging authority in that village. The Prophet said:

“One who relieves a believer from some distress in this world would in turn be relieved from some distress on Judgment Day. And one who eases the burden of another in difficult straits, will have his burden eased by God in this world and the next” (*Reported by Imam Muslim in his Sahih*).

Sixth, if the couple was stoned based on a proper confession, a matter not alluded to in the story, it is important to ask whether either the man or the women recanted this confession at any time. Such recantation should have stopped the process in its tracks.

Seventh, it was reported that the couple was tricked into returning to town after they had fled. The question before us is: How could the mullahs claim that they were implementing Shariah Law although Prophet Muhammad said:

"Four traits whoever possesses them is a hypocrite and whoever possesses some of them has an element of hypocrisy until he gets rid of it: the one who when he speaks he lies, when he promises he breaks his promise, when he disputes he transgresses and when he makes an agreement he violates it. (Reported by Muslim and Bukhari on the authority of Abdullah Ibn Omar)

Eighth, Shariah Law requires that if an adulterer runs away to avoid punishment, then he or she should not be followed. In this case, the couple had left town altogether and hence should have been left alone.

Ninth, in Islam, repentance is very important and is repeatedly mentioned in the Qur'an as the most valued way to seek God's forgiveness. Both the mullahs and the community should have encouraged repentance. In fact, it appears that the couple was ready to reform their actions when the couple decided to return to the village and have a marriage. Unfortunately, they were deceived into returning to the village, publicly humiliated, and then stoned instead. The Qur'an explicitly excludes those who repent from punishment, saying that individuals may be punished: "... unless they repent thereafter and mend (their conduct); for God is Oft-Forgiving, Most Merciful." (24:5)

Tenth, the notion of privacy in Islam is of major importance. The community should have shielded the actions of the couple from public view. This did not happen. Are the mullahs and the community, who claim to be implementing Shariah Law, not familiar with the great number of Hadiths of Prophet Muhammad that highly recommend that Muslims shield each other's privacy and thus earn God's blessings?

Prophet Muhammad said:

“O People, It is time that you observe God’s limits. Anyone who has been involved in any of this filth, let him shield his private life with God’s shield.”

There were several violations of Islamic law in the stoning incident reported by the media. The couple was punished without due process or clear evidence. The couple was tricked into returning to the village, a deceptive act that violates Shariah Law. No one shielded the couple’s privacy or gave them the opportunity to repent or leave that community. Based on what is aforementioned, the people who implemented this punishment have violated Islamic law and deserve severe punishment themselves.

In conclusion, it is not true that the community applied “a harsh version of Shariah Law,” as mentioned in the newspaper. Shariah Law, as it is defined by the Qur’an and Sunnah, is based on compassion, due process, and respect for the dignity and privacy of every person. It is clear from the above discussion that the punishment for *zina* was imposed to deter social unrest, and that it is impossible to implement if the strict requirements of Shariah Law are observed. The community mentioned in this story applied a harsh version of customs and traditions instead, under the guise of applying Shariah Law. Perhaps what the community needs is a good education of what Islam really preaches. The Prophet said, “Those who show mercy are shown mercy by God.” He also said, “Have mercy on those on Earth so that the One in Heaven has mercy on you.”