

Adaptation of Sexual Intercourse between Sharia and Law

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Abstract--- *The philosophy of criminalization differs between Sharia and law. At a time when Islamic Sharia views sexual intercourse outside of marriage as an assault on a public right or public interest and is considered one of the five basic interests in society and is the interest of birth control, unlike the philosophy of law that is completely different from Sharia Criminalization of unlawful sexual intercourse, as it regards it as an assault on a personal right, which is sexual freedom that allows its owner to have sexual intercourse when he so desires, provided that this practice with the other party has occurred with the consent of adults of adulthood and without marital marriage.*

Keywords--- Face .

I. INTRODUCTION

Praise be to God, Lord of the worlds, and prayers and peace be upon the best of sleep, our master Muhammad, and upon his pure family and good companions. There is no doubt that all Sharia law, whether it is divine or a state that has intentions and goals aimed at it, otherwise it is in vain, and the wise people are far from tampering, this is what is imposed in man-made laws, either the heavenly laws and laws are issued by someone who is free from tampering by a wise expert who knows who Man was created and is closer to him than his jugular vein, and he is more aware of what he whispered in himself. To be necessary, necessary, or necessary The jurists have counted the necessary purposes in five, namely (keeping religion, soul, mind, offspring or presentation, and money) and these purposes are required by the life of nations and societies all regardless of religion, gender, time and place as it does not concern a nation of nations without the other, and was called necessary Because its danger is so great that if it fails or becomes completely or partly in any society, that society will be disrupted and chaos reign in it and turn into a forest.

What matters to us from these essentials in our research is the preservation of offspring and supply, which is greatly affected in the event of illegal sexual intercourse, as it is an attack on a general right that is not limited to the one who practiced this vice, but extends it to the whole society because adultery is one of the mothers of crimes and major sins for its The mixing of lineages that lead to the death of the plow and the offspring, as a problem with one or more meanings of which is the killing in which the death of that.

The adulterer in Islamic Sharia has two cases: If he is immune: that is, he is married, then he will forgive himself for the forbidden and immunized him from committing the forbidden that leads to the limit, and the second: if he is a virgin who did not know what the fortified knew and did not do what he did, then he has a mitigating excuse for the limit, but he has a punishment of pain for all His body commensurate with his crime.

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Either in statutory law, or when sexual intercourse is permitted, when consent and puberty are met by both parties, and there is no matrimonial relationship between them, or a crime of rape according to (Article 393) occurs when there is no consent between the two parties, or a crime (marital adultery) is available when consent is available and marital status exists Between one side and the other.

Therefore, we divided this research into two topics that dealt with in the first topic the ruling of sexual intercourse in Islamic law by dividing this topic into two requirements. The first was devoted to discussing crime as a marginal crime, and the second was to discuss crime as a defensive crime, either. The second topic was devoted to the discussion of adapting sexual intercourse in the law by dividing it by three demands, we dealt in the first with sexual intercourse as a permissible act, and in the second we addressed it as constituting a crime of rape, and in the third requirement it is a crime of adultery. From God Almighty, success

II. THE TWO RESEARCHERS

First topic

Sex in Islamic law

When God Almighty deposited the sexual instinct in all living things, and because of the pleasure and pleasure that the creature feels during his sexual position, he made it a reason and a motivation for the survival and permanence of these beings, Almighty said in Surat Al-Thariyat (We created all things in pairs, so that you may reflect and ponder) ⁽¹⁾ And because God Almighty honored the children of Adam and preferred him over many of his creatures, he singled it out with legislation that preserves his dignity, so he made his reproduction through legal marriage which entails provisions such as descent, alimony, dowry, and count in the event of death and divorce in addition to the right to enjoy both spouses with the other, Therefore, all the monotheistic religions, including our own, have begun to be gentle There is only one way to eliminate sexual intercourse and engage in sexual intercourse between humans, which is legal marriage, because it is one of the five essential purposes in Islamic law, which is the preservation of offspring and the permanence of the human species and its religious, moral, health, psychological, social and economic effects ⁽²⁾. Either the king of the oath approved by Islamic law, which is considered the second way to eliminate the situation, it does not exist at the present time, so we avoided it in our humble research, and the legal ruling on marriage in general is scarred, for God Almighty said (then marry the women you like) ⁽³⁾

And the Almighty's saying and wed the singles among you, and those who are fit among your servants and maids. ⁽⁴⁾, The scholars said that the wording of the matter in these two verses is beneficial for mourning, except for Ibn Hazm who said that the matter here benefits the obligation, that is, the ruling on marriage He has a duty and is not desirable, and the most correct is the doctrine of the majority of scholars, and according to the Messenger of God (PBUH) (O youth of the youth, whoever is able to commit immorality, let him marry, for he has turned a blind eye

⁽¹⁾adh-dhariyat (49)

⁽²⁾Dr. Abbas Hussein Fayyad, Polygamy and its effects, research published in Al-Mohaqaq Al-Hali Magazine for Legal and Political Sciences, for the year 2012, second edition, p. 153.

⁽³⁾an-nisa (3)

⁽⁴⁾An-nur. (32)

and is fortified for relief, and he who is not able to do it should fast, for him and came) ⁽⁵⁾. The honorable hadith is that the one who is able to have piety and is able to have intercourse with the ability to support the wife has the right to marry and the one who is not able to do so. This indicates that the sexual intercourse in the perspective of Islamic law

It is obligatory in the event of the marriage, and both spouses must satisfy the desire of the other equally, and the one who married with more than one must adjust between His wives are in matrimonial bed and he is not entitled to desert his wife or her husband when Abi Dawood narrated in his Sunnah from the Messenger of God that he said (He who has two wives then tends to one of them came on the Day of Resurrection and his slash is inclined) ⁽⁶⁾, and the wife is not entitled to prevent her husband from His right to have sexual intercourse without a legitimate excuse. Abu Hazim narrated, on the authority of Abu Hurairah, that the Messenger of God (PBUH)said: (If a man invites his wife to his bed, then she does not come to him, and anger turns on her, and the angels curse her until she becomes) ⁽⁷⁾, but the Sharia went The true hadith is further than this. Abu Nusair narrated, on the authority of Abu Jaafar He said: The Messenger of God (PBUH)said to the women: (Do not prolong your prayers to prevent your husbands) ⁽⁸⁾ And he called the Messenger of God (PBUH)from fulfilling Perhaps that is by the misfortune, that is, wasting time on her husband to sleep without satisfying his sexual desire, and this is something that is not approved by the true Sharia, but it is obligatory for the spouses to observe this, so there is no excuse for the woman even if she invokes the prayer, and the husband is not excused for neglecting his wife's rights in bed, so God Almighty said in Surah Al-Baqara (228) And women have rights similar to their obligations, according to what is fair. Ibn Abbas ⁽⁹⁾ went in his interpretation of this verse by saying, and they have rights over men like what men have on them, so that each of them can do what is required of him well, and he said that I would love to adorn women as I would like a woman to adorn me for, because God Almighty says] And they are like He who is known to them [, and if one of the spouses suffers a disease that prevents sexual intercourse between them (such as curse and obligatory for a man, and feasting and daring for a woman) they are entitled to annul the marriage contract or request separation and divorce, because the purpose of the marriage is to dissolve the pleasure and reproduction, and with their mouth or one of them the right of the aggrieved party is entitled to request separation .

But if sexual intercourse takes place outside the marital domain, it is forbidden by law and is considered a crime of adultery punishable by Sharia, whether the act occurred with the consent of the two parties, or if one of them is coercive and the other is satisfied, and whether he is married or not, then the adulterer in Islamic law has two cases: either if he is immune: that is, married So he pardoned himself from the forbidden and immunized him from committing the forbidden that leads to the limit, and the second: If he is a virgin who did not know what the forbidden knew and did not do what he did, then he became an excuse for him from the limit, but he has a discretionary punishment, which is pain for all his body in proportion to his crime.

⁽⁵⁾Abu al-Husayn Muslim bin al-Hajjaj, Sharh Sahih Muslim, vol. 4, p. 613.

⁽⁶⁾Ibn al-Ash'ath al-Sijistani, Sunan Abi Dawood, 1st edition, 1990 AD, Dar al-Fikr for printing, publishing and distribution, part 1, p. 473.

⁽⁷⁾Sunan Abi Dawood, previous source, Part 1, p. 475.

⁽⁸⁾Al-Kafi branches, Muhammed bin Yaqoub Al-Kulaini, Dar Al-Murtada for Printing, Publishing and Distribution, Lebanon - Beirut, 1st edition, 2007 AD, volume 5, p. 1125.

⁽⁹⁾Ahmad Muhammad Shakir, abbreviated interpretation of the great Qur'an called Mayor of Tafsir from Al-Hafiz Ibn Katheer, Dar Al-Wafa, 1st edition, 2003 AD, Part 1, p. 249.

Therefore, we divided this topic into two requirements, the first was devoted to investigating crime as a marginal crime, and we dealt with crime as a prejudicial crime in the second.

The First Requirement: Sexual Intercourse is a Marginal Crime

In this requirement, we will learn about the meaning of the term in language and convention, the characteristics of this punishment, and who it is for.

Limitation is a language: separating the two things so that one does not mix with the other, or so that one does not encroach on the other, and combining them with limits, and union: hostility, disagreement, and conflict, and it is a reaction from the limit as if each of them transcends its limit to the other, and the limits of God Almighty: the things that are forbidden and analyzed, and an order That nothing exceeds it, so it transcends to another matter in it or forbade, and it is prevented from violating it, one of which is an end to the thief's limit, it was called a boundary because it defines any that prevent the introduction of what made penalties in it, and it was called a boundary because it is the ends of God Almighty forbade its transgression, and the origin of the limit is prevention and separation between The two things, as if the boundaries of Sharia separated the lawful and forbidden ⁽¹⁰⁾, It was said: The limit of prevention and from it was said to the gatekeeper (mourning) and to the prison also ⁽¹¹⁾, and the limit may be called and the verdict is intended by him, or it may be intended to end it as we say here the limit of the house for example, and these meanings are mentioned in the wise remembrance of them that is not close to its limit as the forbidden indecency And from him the Almighty saying] These are the limits of Allah, so do not come near them [⁽¹²⁾, and some of them are not permissible as the share of every inheritor in inheritance, and marrying the four, and from him the Almighty saying] These are Allah's limits, so do not transgress them . Those who transgress Allah's limits are the unjust [⁽¹³⁾.

Convention limit: Known as many identical definitions of content, even if they differed in some of their terms, and from these definitions:

Estimated punishment is truly obligatory to God Almighty ⁽¹⁴⁾, unlike ta'zir, it is not destined, and unlike retribution, if it is a prescribed penalty, but it is truly necessary for the servant to be pardoned and reconciled, including: Limit: What is mentioned from flogging or stoning, and so on from every punishment

Capacity ⁽¹⁵⁾, including: Al-Hidd: a punishment that the street defines for a crime such as murder, adultery, and others ⁽¹⁶⁾. We note through definitions that the punishment for limits is what was determined by the amount of God Almighty, and that it is a right for God Almighty and must be applied, because there are three types of penalties in the Sharia are (limits, retribution, parents, and condolences), so crimes of retribution, even if they are also specified, but it is permissible There is peace and forgiveness for the offender, because it is a common right between the

⁽¹⁰⁾Ibn Manzur, Tongue of the Arabs, Dar Al-Hadith, Cairo, year of printing 2003, second volume, p. 353.

⁽¹¹⁾ Muhammad ibn Abi Bakr ibn Abd al-Qadir al-Razi, Mukhtar al-Sahah, Dar al-Risala Kuwait, free of edition number and year of printing, p. 126.

⁽¹²⁾Al-baqarah (187).

⁽¹³⁾al-baqarah (229)

⁽¹⁴⁾Abu Bakr al-Kasani, Bada'i al-Sanayi', The Granular Library of Pakistan, 1st edition, 1989, vol. 7, p. 33.

⁽¹⁵⁾Al-Bakri Al-Domyati, Student Benefit, 1st edition, 1997 AD, Dar Al-Fikr for Printing, Publishing and Distribution - Beirut - Lebanon, Part 4, p. 161.

⁽¹⁶⁾Dr. Ahmad Fathallah, Lexicon of Jurisprudence Jafari, Al-Madkhal Press, Dammam, 1st edition, 1995, p. 53

person and his creator, and the ta'zir is not specified in the amount and talk about it will come at the time. As for border crimes, which are crimes of attacking the interests necessary for a person's life from religion, life, money, presentation and reason, and for the seriousness of these crimes it has been criminalized by the text in the Qur'an Holy and Sunnah For the honorable prophet, so it was called the crimes of borders, such as the crime of apostasy, theft, adultery, slander, prostitution, and intoxicating, and it was called border crimes not only because they were defined as punishment from the holy street, but because their perpetrator exceeded the limits that God Almighty set, and he forbade us from transgressing and exceeding the limits of the lawful and approaching the limits of the forbidden And entering into it, the Almighty said in Surat Al-Baqarah, "These are the limits of God, so do not come near them." And God Almighty also said in Surah Al-Baqarah: "These are the boundaries of God, so do not violate them, and on the authority of Abu Abdullah (PBUH)." What was from The road is from the road and what was from the house is from the house until I sprinkle the scratch and what else or the skin and half of the skin)⁽¹⁷⁾, and Abu Abdullah, peace be upon him, said: The Messenger of God (PBUH) said that God Almighty has made everything a limit Whoever transgresses one of the limits of God Almighty to an end, and makes what is less than the four martyrs hidden from the Muslims⁽¹⁸⁾, as well as from the reasons for calling them limits, because whoever witnesses this punishment envisions the solutions of this punishment by himself, if he commences that felony, then this prevents him from directness because one of the meanings of the limit is Prevention, it was said that borders are contraindications and marriages, then they are prohibitions before the act, and marriages after it if a person realizes what awaits the punishment. The crime of unlawful sexual intercourse (adultery) is one of the biggest sins after the killing, for what God Almighty says (And do not come near adultery. It is immoral, and an evil way.)⁽¹⁹⁾ And because all boredom and religions prohibited it, and it is a crime for lineage and display, and for this his punishment was the most severe punishment⁽²⁰⁾ It is an attack on a general right, it is not limited to who practiced this vice, as in the positive law, but exceeds it To the whole society because adultery is one of the mothers of crimes and major sins because of the mixing of lineages that lead to the destruction of plowing and offspring, so he has problems with one or more meanings of which the death of human beings. Those who are not brothers and make women sisters and aunts for those who have no such, and inherited the money of the servants for those who have no right They are the owners and deprived them⁽²¹⁾, and the characteristics of this crime (adultery) and punishable: they demonstrate in two ways:

First, the testimony: The witnesses are required to be four just witnesses and differed in the acceptance of the testimony of women in the crime of adultery, and that the witnesses are original, so the testimony is not accepted, and the statute of limitations is not permissible, and the testimony must be explicit in one council for all the witnesses with their continuing eligibility from (justice) Mind and life, if one of them dies, the judgment will not be carried out) until execution.

The second way: acknowledgment is required in the headquarters puberty and reason and to pass four times on

⁽¹⁷⁾Al-Kulayni, vol. 7, p. 174, previous source.

⁽¹⁸⁾Al-Kulayni, vol. 7, p. 174, Al-Hur Al-Amili, Shia Means, Investigation: Verification, Correction, and Appendix: Sheikh Muhammad Al-Razi, Publisher: Dar Ihya, Arab Heritage - Beirut - Lebanon, Part: 18, p. 310.

⁽¹⁹⁾Al-Isra (32)

⁽²⁰⁾Al-Bakri Al-Domyati, previous source, Vol. 4, p. 161.

⁽²¹⁾Imam Yahya bin Al-Hussein, Al-Ahkam, investigation: Collection: Abu Al-Hassan Ali bin Ahmed bin Abi Harissa, 1st floor

himself and that the declaration is free from imperfections of will such as coercion, intimidation, madness and sleep, and the evidence for that is the Almighty's saying ◦ martyrs⁴ As for those who accuse their own spouses, but have no witnesses except themselves, the testimony of one of them is equivalent to four testimonies, if he swears by Allah that he is truthful ⁽²²⁾ And the majority of scholars said that the crime of adultery is not proven by ijthad And not with clues, but confined to acknowledgment and evidence by four witnesses, because the Messenger of God (PBUH) said (If you were stoning someone without evidence, so and so would be stoned, as suspicion appeared in whom Enclose it and its form and whoever enters it) ⁽²³⁾. Another of its characteristics is that it is not permissible for conciliation, no abdication, no pardon, or intercession if the matter reaches the ruler, and it may be permissible before reaching the judiciary ⁽²⁴⁾ because the owner of the right and the victim is the society as a whole, not the adulterer himself. The texts are express in that and among these texts: On the authority of Umar bin Jarir, on the authority of Abu Hurairah, he said: The Messenger of God said (Someone works with it on earth, it is better for the people of the earth than to rain forty days) ⁽²⁵⁾, and what was narrated on the authority of Rabia bin Najid, on the authority of Ibn Al-Samet, he said: Messenger God (PBUH) (Establish the boundaries of God near and far, and God does not take you as a blame) ⁽²⁶⁾, this means that the benefit of establishing borders is better than the benefit and not The fortune that the human beings receive from the rain is forty days, and because water is the life of the body, the establishment of borders in it is a life of body and soul, so the punishment for adultery was one of the harshest punishments in Islamic law if it fulfills its pillars and conditions and it is stoning to death in the event that the adulterer is immune, and the meaning of the horse is that Married, whether the man or the woman, so that they can have sexual contact whenever they want, but if they are far from each other, the perpetrator will be isolated and not stoned ⁽²⁷⁾, when narrated from Asim bin Hamid, on the authority of Abi Abdullah (PBUH), he said: (stoning is the greatest of God and whipping is the limit of God The smallest, and if the adulterous man committed adultery, he would not be stoned) ⁽²⁸⁾ and because of the Almighty saying ul The adulteress and t he adulterer — whip each one of them a hundred lashes, and let no pity towards them overcome you regarding Allah's Law, if you believe in Allah and the Last Day. And let a group of believers witness their punishment⁽²⁹⁾ And when it was narrated from Ubadah Ibn Al-Samit, he said: The Messenger of God said (PBUH)(Take away from me, take away from me, may God make for them a path, the firstborn in the firstborn, one hundred whore and exile a year, and the one with the whipping whipped One hundred and stoning) ⁽³⁰⁾, the thief is the fortified, i.e. the married, if the adulterer is an old and immune sheikh who whipped and then stoned, as well as the old sheikh, or either the sect that God Almighty commanded its witnesses is the group of believers increases and decreases, and the least of which was said six Imam and four witnesses and executioner ⁽³¹⁾. So the bottom line is that sexual intercourse is an assault on a general right of the entire society due to the mixing of lineages and the violation of God's forbidden things, in addition to losing

⁽²²⁾An-nur (4)

⁽²³⁾An-nur (6)

⁽²⁴⁾Muhammad ibn Yazid al-Qazwini, Sunan ibn Majah, investigation by Muhammad Fuad Abd al-Baqi, free from the year of printing, Dar al-Fikr for printing, publishing and distribution, part 2, chapter of the outrageous outrage part 2, p. 855.

⁽²⁵⁾Ibn Abdin, a footnote to the response of Al-Muhtar, Dar Al-Fikr for printing, publishing and distribution, Beirut - Lebanon, volume 4, p.

⁽²⁶⁾Sunan Ibn Majah, previous source, Part 2, Book of Borders, Chapter on Establishing Borders, p. 848.

⁽²⁷⁾Sunan Ibn Majah, previous source, part 2, p. 848.

⁽²⁸⁾Assaf Al-Kafi, previous source, Part 7, p. 179.

⁽²⁹⁾Assaf Al-Kafi, previous source, Part 7, p. 176.

⁽³⁰⁾(an-nur (2)

⁽³¹⁾Explanation of Sahih Muslim, previous source, vol. 5, p. 504.

financial rights, contrary to the law that considers the sexual intercourse a personal right that its owner has the right to waive.

The second requirement: that sexual intercourse is consolatory:

Al-Taazbar Language: The blame motif, and the origin of disciplining ta'zir, and for this reason beating without limitation is called ta'zira ⁽³²⁾.

The Second Requirement: that Sexual Intercourse is Consolatory

Al-Taazbar Language: The blame motif, and the origin of disciplining ta'zir, and for this reason beating without limitation is called ta'zira ⁽³³⁾.

Terminology as a term: Punishment for major sins is an act of forbidden action, or for leaving the duty for which there is no estimation of the penalty, but rather for the ruler to do what he deems that the estimate does not reach the limit stipulated for the other crimes ⁽³⁴⁾, and it is clear by definition that this punishment has not determined the amount of it In the Book of God Almighty and not in the purified prophetic Sunnah, but he left the matter of determining and estimating it to the ruler and the guardian according to the requirements of public interests, and called the condolence is a delegated penalty, because it was delegated to the ruler's view because the street did not specify the amount or how it is, but he left the matter to the ruler in that.

Ta'zir crimes include every border and retribution crime if one of the conditions of its implementation fails or suspicion occurs, it turns into a discriminatory punishment, and it also includes crimes that have been criminalized by the text in the book and the Sunnah of the Prophet, but its punishment is not specified in the text, and its appreciation will be by the ruler and among these crimes Punishment is not specific espionage crime Almighty said And do not spy on one another, nor backbite one another ⁽³⁵⁾ And the crime of perjury for the Almighty saying (So stay away from the abomination of idols, and stay away from perjury)⁽³⁶⁾ And the crime of bribery, which the prophetic Sunnah forbade and whose punishment was not specified by the Messenger of God (may God bless him and his family and peace) (God cursed the briber, the bribe, and the bribe) ⁽³⁷⁾, in addition to some new crimes, these punishments are left to the guardian to place the appropriate punishment and the sexual intercourse is characterized by the disciplinary punishment in Three cases:

The first case: When a corner or condition of the conditions for carrying out the estimated penalty fails, **such as puberty**, there is no limit to a small lack of his reason and lack of meditation and his distraction in play and play. He appreciates the consequences of things, but he has to be proud, and the choice is no limit to the impurity, the unconscious and the sleeper ⁽³⁸⁾, and likewise, if a person decides what is required by stoning and then retracts from his approval, the limit of stoning is obligatory and the stoning is required. The number of witnesses shall not be less than four Men, and it is permissible for the Shias in front of the testimony of three men and two women. If they are

⁽³²⁾Imam Yahya bin Al-Hussein, Al-Ahkam, Investigation of Abu Al-Hassan Ali bin Ahmed bin Abi Harissa, 1st edition, 1990, p. 209.

⁽³³⁾The Tongue of the Arabs, Vol. 6, p. 226.

⁽³⁴⁾ Dr. Ahmed Fathallah, p. 116, previous source.

⁽³⁵⁾ Al-Hujurat (12).

⁽³⁶⁾ Al-Hajj (30).

⁽³⁷⁾ Ibn Majah, previous source, Vol. 2, p. 775.

⁽³⁸⁾Al-Kasani, previous source, vol. 7, p. 38

less than three, the stoning limit will be reduced and it will be converted to ta'zir⁽³⁹⁾.

The second case: In the case of suspicion and the meaning of suspicion among jurists: What is confusion is his command does not know whether it is permissible or forbidden, true or corrupt⁽⁴⁰⁾

Or it is: unless he is certain that it is forbidden or permissible, or what he is ignorant of his analysis of the truth and its prohibition on the truth or something similar to the constant and not fixed⁽⁴¹⁾

Sheikh Muhammed Ishaq Al-Fayyad says (What is meant by the suspicion that the limit of the limit is ignorance of a failure or failure, in the introductions with the belief of the current state of hypocrisy, and as for those who were ignorant of the ruling about negligence, and turning to his ignorance at the time of work, he was sentenced to adultery and proven limit)⁽⁴²⁾ The suspicion is also that a woman who is forbidden by Islam is legally held and who was ignorant of the ruling and her footsteps fell off the limit, and likewise from the suspicion who found on his bed a woman, he put her on the line thinking that it is his wife, and if the suspicion is from one of the parties without the other, the limit is dropped from the suspect without the other, if a woman likened to a man with his wife Indeed, it must reduce it and vice versa.

The third case: sexual intercourse by a virgin who did not marry and who is called in Islamic jurisprudence without a fortified, and the statute in the language is immunization which is (piety, chastity, marriage), while the fortified in the term jurists: who has a permissible marriage from a permanent marriage contract or A king who becomes on him and goes away⁽⁴³⁾ The Islamic law gave great importance to the horse. In it, she distinguished between the punishment of the adulterer, the guardian, which is stoning to death, the unvaccinated, and his punishment of flogging a hundred lashes, and this distinction is related to Islamic law from the rest of the statutory legislation, and this indicates the greatness of Islamic legislation and the summit of justice And fairness, when Ako relaxed In the case of a non-immunized person, where you have made the horse, that is, marriage, like a fortress, which is the safe haven to which the fearful and endangered are harbored, and the unvaccinated does not possess this safe place in which the lust of his lusts is curbed. The possibility of sexual intercourse with his wife has violated the conditions for describing the horse because one of them may be immune without the other and one of the conditions that the most beautiful jurists have included is: puberty, reason, freedom, if he is married and the marriage between the spouses has already taken place, and that the marriage contract is valid, if it is corrupt then this Not horse, and jurisprudence differed E in the condition of Islam Hanafi and Maliki same number of terms of chastity, while not prepared Shafi'i and Hanbali of the conditions, because the Messenger of Allah ﷺ stoned Jewish and Jewish, who committed zina⁽⁴⁴⁾

As for the conditions of the horse in the Imami Shiites, the standard they have in the horse and the lack thereof is that the man has what he sings, i.e., he can whenever he wants to enjoy, that is, if he has a permanent wife who has entered into it, and he is able to marry her whenever he wants, if his wife is absent from him, So that he could not

⁽³⁹⁾Sheikh Muhammad Ishaq al-Fayyad Minhaj al-Salihin, 1st edition, Printing Press Amir-Qom, publisher: Samaha office, vol. 3, p 279.

⁽⁴⁰⁾Ahmad Fathallah, previous source, p. 240.

⁽⁴¹⁾Mahmoud Muhammad Al-Hassan, descent and its provisions in Islamic law and Kuwaiti law, i 1, 1999, p. 4

⁽⁴²⁾Muhammad Ishaq al-Fayyad, Minhaj al-Saliheen, 1st floor, vol. 3, 804

⁽⁴³⁾Ahmad Fathallah, previous source, p. 33.

⁽⁴⁴⁾A footnote to the response Al-Muhtar, previous source, Vol. 4, p. 179.

enjoy her, for confinement or for travel that he was unable to reach, the ruling on immunity did not entail him, and the woman as well.

Among the provisions that apply to the immunized and the unvaccinated if sexual intercourse (adultery) occurs in one of the incest (such as the mother, sister, daughter, aunt, aunt, and the like), it is killed and there is no difference in that between the fortified and others, and there is no difference between the man and the woman if you agree with that, and a group must attend to watch the punishment, no There is a difference in the aforementioned rulings between the living and the dead, so whoever commits adultery with a dead woman and is immune to stoning, even if he is not immune to the skin because the violation of the sanctity of the dead is like a living⁽⁴⁵⁾.

The Second Topic: Sexual Intercourse in Law

This topic was divided into three requirements, the first was devoted to sexual intercourse as a permissible act, the second dealt with sexual intercourse that constitutes a crime of rape, while the third requirement was left for sexual intercourse that constitutes the crime of adultery.

The First Requirement: Sexual Intercourse as a Permissible Act

The philosophy of criminalization and punishment in the criminal law is based on the principle of legitimacy, whose content is that the act is not criminal unless a text that criminalizes that act and establishes punishment is specified for it, and in a sense contrary to this principle, the act will be permissible as long as there is no text criminalizing it, even if the act carries a measure of Ugliness, or perhaps it violates Islamic morals or Sharia, because the basis for actions is permissibility and exclusion is the prohibition, so I need the text because it is contrary to the general principle, and also in the case of exception should be restricted and not expanded in its interpretation, and that who has the authority to put texts that criminalize acts is the legislator alone⁽⁴⁶⁾ Therefore, legislation is pain The only role in the criminal law and in this way the criminal law differs from other laws in terms of its source, it has only one source is the legislation, and through careful consideration of this principle we reach that the law is the only source of criminalization and punishment, which does not stipulate that criminalization is really Permissible and this is from the concept that contradicts the text, as each text has two indications, the first is called the operative of the text and from it the verdict is taken from the words and expressions of the texts whether the text is explicit or not explicit, and the second is called the concept of the text and here the rule is deduced from the spirit of the text and its significance and the wisdom of its legislation whether it is a concept of approval and it is It is taken from the spirit and rationality of the text and be mu Always agree with the operative, or the concept of a violation, which is what the text is silent about, and a judgment that violates the ruling of the concept of approval⁽⁴⁷⁾ will be proven here.

The judge may actually criminalize and set a penalty for him without a legal text criminalizing him, and if he does so, his ruling will be reversed.

And by reference to the current Iraqi Penal Code, we did not find a text criminalizing sexual intercourse for

⁽⁴⁵⁾ Muhammad Ishaq al-Fayyad, Minhaj al-Saliheen, First Edition, Vol. 3, p. 288.

⁽⁴⁶⁾Dr. Ali Hassan al-Khalaf, Dr. Sultan al-Shawi, previous source, p. 30.

⁽⁴⁷⁾ D, Mustafa Ibrahim Al-Zalami, The Origins of Jurisprudence in His New Texture, Al-Atak for the Book Industry Cairo, 2009, p. 397, Dr. Abdel Qader Odeh, previous source, first volume, p. 155.

itself, i.e. just because it occurred away from the marital relationship between the two parties, and this is not an oversight by the legislator, but because of the difference in perception of sexual intercourse within the framework of the criminal policy adopted by the legislator, the positive law considers adultery as a desecration of marital bed. Only, therefore, as it occurred from the unmarried and with their consent, there is no punishment for them because their action does not affect the family, even if it violates the rules of ethics or violates Islamic law, and for this to be the act of sexual intercourse criminal and under the description of adultery, one of the parties or both must be married⁽⁴⁸⁾, and if I stopped The conjugal act was accompanied by the consent of the parties negating the crime, no longer exists, so the act is permissible because it is the exercise of sexual freedom in the eyes of the legislator positive⁽⁴⁹⁾. Because positive laws consider sexual intercourse as one of the personal matters that affect the relationship of individuals and does not affect the group, so if it occurs with the consent of the two parties and without the establishment of matrimony, there is no crime in this case, unlike Islamic law, which it regards as an assault on the entity of the group and its integrity as it threatens the family system which is the nucleus Society, and the lack of criminalization of adultery contains rumors of outrage and destruction of the family, then the corruption and dissolution of society, and the law is keen on the cohesion of the family and this is the most important characteristic of it and is keen on it and defends it, for adultery in Islamic law has a broad meaning and contradicts its meaning in positive law as it includes every sexual contact with any woman Other than the wife whose husband has contracted her with a legal contract, and if a foreign woman gives herself and accepts sexual intercourse with a man other than her husband, this is fornication because no one has the right to analyze what God Almighty has forbidden.

As for the positivist lawmaker, he considers sexual intercourse by a person with another in the event of the marriage or without his consent or with one of the "Mahrams" an attack on the right of others. In other cases, the sexual intercourse is permitted and lawful because there is no text that criminalizes it for itself, and if some conditions must be met For the verb to be permissible, we conclude these conditions from the concept that contradicts the text of Article (393) Iraqi sanctions and Article 267 Egyptian penalties as follows:

1- The sexual intercourse between two persons (a man and a woman) who are adults of adulthood and that is the completion of the age of eighteen years of age according to Article (106) of the Iraqi Civil Law, and this is done by referring to the official documents such as the civil status ID or passport and others, but if any Contrary to that, for if a person who has reached the age of eighteen suffers from insanity, if his injury is proven, his ruling shall be the ruling of the minor⁽⁵⁰⁾.

2- That the consent is with the consent of the two Parties

According to the interest for which the law criminalized sexual intercourse, which he considered a personal interest (sexual freedom for individuals), if it occurred without consent it is a crime of rape, but if the person chooses to exercise this sexual freedom with his consent, it is not criminal, but legal and permissible, so the description of the sexual intercourse changes from Permission in the case of consent to criminalization in the

⁽⁴⁸⁾Ahmad Hammoud Khalil, previous source, p. 93.

⁽⁴⁹⁾Abdel Hamid Ahmed Shehab, previous source, p. 19.

⁽⁵⁰⁾See Article (107 and 108) of the Iraqi Civil Code.

absence of it, and lack of consent is achieved by all means that benefit its absence, whether by force, by surprise, by deception, or any other means. It must be noted that a sexual intercourse may occur between two adults and with their consent and without the existence of a restriction preventing them from being practiced, but nevertheless it is also a crime when the sexual intercourse is based on a promise to marry and the intercourse takes place on the basis of this promise, meaning that the promise of marriage falls previously on the intercourse and the subsequent intercourse, then The perpetrator refuses to fulfill his promise to marry her, and then the intercourse takes on a new adjustment in accordance with the text of Article 395 Iraqi sanctions. It is the crime of engaging in solicitation for the promise of marriage⁽⁵¹⁾, and it is a crime punishable by imprisonment.

Therefore, if the sexual intercourse took place by two adults of the age of majority and with their express consent of the word, the act or the tacit approval of not rejecting the act and surrender to the other party without any objection from it, then it is explained by the consent as well, and the court can conclude that the explicit or tacit approval has been obtained from the facts of the lawsuit and its implications that are relevant to it. The trial court, and there is no oversight of the court of distinction over it in that, because sexual intercourse with the consent of the female does not constitute an assault on sexual freedom and is not criminal, and also the intercourse that is based on the establishment of the marital relationship between the two parties is legitimate, regardless of whether the marital relationship exists. And a verdict, even if it occurred under duress.

Permission here means absolute freedom to take or leave the act, so that some jurisprudence defined legalization as a right or permission⁽⁵²⁾, and legalization in its general sense coincides with the principle of individual freedom, so the general rights and freedoms derive from it within the framework of common law, as all other rights stem from. Private law, and this is what jurisprudence expresses in the civil law with civil freedom, and this freedom is what allows everyone to do whatever he wants as long as the law does not prohibit it⁽⁵³⁾.

3- If there is no Restriction that Prevents it from being Practiced: here are Two Restrictions

A - The fact that the marriage is established in fact or by law: It does not end except with divorce or the death of one of the spouses, and if the sexual intercourse took place by a person with one of the spouses with the establishment of the marriage, then it is adapted as a crime of fornication if the intercourse took place with the consent of the husband or wife according to Article (377) of the Penal Code Iraqi and Article (274) Egyptian penalties, and the crime of rape if it occurs under duress or lack of consent, according to Article (393) in the same law, and in the opposite case, that is, if the sexual intercourse takes place with consent and the marriage is not valid, and both are adults of age, the fact is permissible in this case.

B - The existence of the relationship of kinship between the two parties (the prohibition of descent): so it is adapted here as a crime of fornication and if it occurs with the consent of the two parties, even without the establishment of matrimony, the fact that in this case constitutes another crime for another description, which is the incest of adultery when it is combined with consent based on Article (385) penalties and if Coupled with dissatisfaction, it adapts as rape associated with a case of stress according to Article (393/2). Sanctions and the

⁽⁵¹⁾ Dr. Jamal Al-Haidari, Previous Reference, P186.

⁽⁵²⁾ Muhammad Muhammad Musbah al-Qadi, Good Faith Principle in the Penal Code, Arab Renaissance House, Cairo, 1977, p. 70.

⁽⁵³⁾ Muhammad Muhammad Musbah al-Qadi, previous source, p. 73.

sanctity intended here is the prohibition of descent and not the prohibition of the cause, and in conclusion, sexual intercourse can be adapted as it is permissible as long as there is no text criminalizing it, so the act If the law does not consider it a crime, it will be described as permissible in terms of A criminal, and the judge must only verify that there is no text that applies to the incident assigned to the person in order to rule on his innocence ⁽⁵⁴⁾, and the criminal judge is obliged to apply the written legislative text in the case of his presence as a single source of the criminal law because only the legislator has the right to determine the punishable acts and determine the punishment Necessary for it ⁽⁵⁵⁾in contrast to Islamic law, which is sexual intercourse as a marginal crime wherever it occurs and in any way outside the scope of marriage, and this difference is caused by the perception of the protected interest between the law and the law.

The Second Requirement: that it Constitutes a Crime of Rape

Sexual intercourse can constitute a crime of rape, when a man has fully sexual intercourse with a woman by penetration by the penetration of the man's penis in the place designated for him in the woman's body without her consent, and the most important characteristic of this case is the lack of consent in the sexual intercourse, which is considered illegal and criminally legally raped⁽⁵⁶⁾, Rape as a crime can only be achieved with dissatisfaction, as it is an assault on the sexual freedom of women, and this is consistent with the cause of criminalization, because the sexual intercourse constitutes an assault on the offer, as the perpetrator confiscates the sexual freedom of the woman by coercing her on this behavior without her will, and it also constitutes an assault on the general freedom of the victim On it k It constitutes an assault on the immunity of her body ⁽⁵⁷⁾, and the woman must be alive, and if the body of a female is committed, another crime occurs, in another description, which is a violation of the sanctity of a corpse according to Article (374) penalties, and the man must be able to have sexual contact and the woman is fit Therefore, otherwise the description changes from the crime of rape to another description, as it is adapted as a crime that violates an offer in accordance with Article (396) penalties, and it is not required to achieve the crime of rape if the semen is delivered as long as penetration has occurred, so it is not conceivable for this crime unless it occurs only with positive activity. Dr . Gamal Al-Haidari, Previous Reference, Pg. 168.

With regard to lack of consent, it was not limited to a specific means, but it can be achieved through coercion with its material and moral types, by surprise, by deception, deception, trick, or any other means, and material coercion is achieved by using the physical force that falls on the victim's body and the failure of its resistance ⁽⁵⁸⁾, so that its resistance is thwarted. By any means, even if by intimidating and terrorizing it, and does not count as little violence that does not execute the will, and also does not satisfactorily if the victim surrenders herself voluntarily and chooses without resistance from it, and it is not required that coercion persist throughout sexual intercourse or leave an impact on the victim's body, either Coercion of meaning And the threat means human beings, and that evil is severe and immediate, and it is the one who falls in a moral force, and the essence of the threat is human, scandal, or harm to the female or another person dear to her, such as her threat to kill her son or burn her money, for

⁽⁵⁴⁾Muhammad Muhammad Misbah, previous source, p. 81.

⁽⁵⁵⁾Dr. Ali Hassan al-Khalaf, Dr. Sultan al-Shawi, previous source, p. 30.

⁽⁵⁶⁾Dr. Maher Abd Shwish, previous source, p. 126. Dr. Mahmoud Naguib Hassan, previous source, p. 528.

⁽⁵⁷⁾D. Gamal Al-Haidari, Previous Source, P.166.

⁽⁵⁸⁾Dr. Mahmoud Mohsen Hassan, previous source, p. 534.

example, and there is no difference if the subject of the threat is a criminal act or it may be legitimate As her threat to report a crime she actually committed as fraud, for example if she does not accept the crime ⁽⁵⁹⁾.

Lack of consent includes other cases, including consent that is not legally considered, such as complacency from non-discrimination for young age, madness, or drunkenness. Satisfaction in these cases is not valid and does not have legal value and does not negate the crime.

And the cases of lack of consent are satisfied with the fraud that is issued under the influence of fraud or error, whether the fraud is the subject of the offender or the subject of the offender is the character of the offender in taking the act as if he deluded her that he had contracted a valid contract to marry her, assumed that it was his wife, believing that it is his wife, there is no legal value for this consent, and also a meaningful meaning Lack of consent, the woman's inability to express her will and the cases of disability are many and it is up to her to extract it to the subject judge, and from these cases sleep, fainting and fatigue - etc., the law does not take into account except with the right consent, which is the consent issued by a woman who enjoys awareness and choice, for example, the minor does not consider D with its consent in accordance with Article (106) of the Iraqi Civil Law, this is the basic requirement for the crime of rape to take place, and it is the criterion for distinguishing between permissible and criminal sexual intercourse, because if consent is achieved, the sexual intercourse is permissible and not criminal according to the concept that contradicts the text of Article (393/1). That was mentioned above in addition to the types of contentment that are not legally recognized.

And the crime of rape is premeditated, and the criminal intent is sufficient and the general intent is sufficient, in addition to the knowledge of the offender that the victim is not satisfied, and thus the law differed from Islamic Sharia by criminalizing sexual intercourse if it occurred without consent while the law went to criminalize it and if it obtained consent from both parties because it is an attack on a public interest And interest in the perspective of the Holy Street is not limited to bringing benefits and warding off evil only, but the five purposes of Sharia (religion, soul, offspring, money, and reason) must be preserved.

The third Requirement: It is a Crime of Adultery

According to the positive law, adultery is the sexual intercourse of a married person, a man or a woman, without a wife ⁽⁶⁰⁾, as it is a crime that the husband commits through his sexual contact with a woman, whether married or not, or the wife commits with a man, whether he is married or not.

And the crime of adultery occurs only through the presence of two parties (a man and a woman) and the perpetrator is the married party and the other is a partner for him, but if the two parties are married then here are two independent crimes, as each party in this case is considered an actor of the crime of adultery that was assaulted against the right of his wife and partner In the fornication committed by his colleague in the crime against the right of his wife, and that this multiplicity is an unrealistic moral diversity, given that the two crimes committed one act and applied more than one description ⁽⁶¹⁾.

⁽⁵⁹⁾ Mahmoud Naguib Hassan, p. 535, Gamal Al-Haidari, p. 170.

⁽⁶⁰⁾ Hassan Hassan Mansour, Attacks on Ethics, University Press House, Alexandria, 1985, p. 72.

⁽⁶¹⁾ Article (14) Iraqi sanctions.

So the crime of adultery is the intentional unlawful intercourse between a man and a woman, both of them, or one of them is related to a marriage contract that is actually valid or a judgment at the time of the occurrence of intercourse⁽⁶²⁾.

Adultery in the law has a special and specific idiomatic meaning and it is the adultery of a married person in the event that the marriage is established or an act, in short it means betraying the marital relationship, as it is a breach of marital trust that falls on the perpetrator to the effect of a valid marriage contract at the time of the act⁽⁶³⁾, and thus the fornication in Sharia differs from the law, whereby adultery is forbidden for each forbidden relationship between a man and a woman, whether they are married or not. In the positive law, adultery is limited to the case of a married person (a man or a woman). Therefore, it is one of the crimes of the adjective quality, which of the crimes for which the adjective (husband) is required. In the perpetrator⁽⁶⁴⁾, because adultery is the essence of a breach of sincerity Marital and not sexual intercourse for itself, and if there was no matrimonial marriage, the act was permissible. Because the marriage contract imposes rights and obligations between the two parties, and this is the essence of the marriage contract. Otherwise, the marriage loses its substance and its existence, because marriage is the basis of forming a family that is the nucleus of society and it is also a social and legal system, so this system must be protected⁽⁶⁵⁾, and accordingly the husband's consent in advance Adultery is not a reason for it to be permitted because the husband does not have the entire right, but society shares that right, for fornication is an attack on society.

Through the foregoing, we find that adultery in the framework of the law has a idiomatic meaning of its own from a legal point of view, as it is in contrast to Islamic law, as it does not represent all the cases that are called in the law (adultery). Therefore, in the jurisprudence of the law they do not call the word fornication on the prohibition of a forbidden woman in In the case of her consent, and they call the word rape the sexual intercourse with a woman other than in the case of marriage and without her consent⁽⁶⁶⁾, and the prohibition of sexual contact with another person other than the husband justifies that he is the husband of another, because he is occupied with the wife as a fact or a ruling, and just as it is not permissible to conclude a marriage contract with another person during The establishment of matrimonial, it is a matter of the first, it is not permissible to sign and marital existing as it is Take the taboo of women sentenced to time⁽⁶⁷⁾.

III. CONCLUSION

First: Conclusions

1. We found that sexual intercourse as an asset there is no text that criminalizes it for itself in positive law, and thus sexual intercourse is permissible as an asset based on the concept that contradicts the text of Article (393) Iraqi penalties.

⁽⁶²⁾Abdul Hamid Ahmed Shihab, The crime of adultery in the Iraqi Penal Code, MA, submitted to the College of Law, University of Baghdad, 1990, p. 13.

⁽⁶³⁾Ahmad Muhammad Khalil, Offenses of Defamation and Corruption of Ethics, Modern University Office, 2009, p. 85.

⁽⁶⁴⁾Article 377 considers Iraqi sanctions.

⁽⁶⁵⁾Mahmoud Naguib Hassan, previous source, p. 594.

⁽⁶⁶⁾D. Abdul-Malik Abdul Rahman Al-Saadi, previous reference, p. 62.

⁽⁶⁷⁾Dr. Ahmad Al-Kubaisi, Personal Status in Jurisprudence, Jurisdiction, and Law, Al-Rashad Press, Baghdad, 1971, Part 1, p. 93.

2. Sexual intercourse legally criminalized takes more than a legal description, because the legislator has criminalized some cases of sexual intercourse, but in different descriptions without being considered a crime of adultery.

We find that it criminalizes sexual intercourse without consent under the description of a crime of rape in accordance with Article (393), or marital adultery based on Article (377) if the marriage exists and the sexual intercourse took place, or incest if there is a relationship of kinship between the two parties according to Article (385) penalties.

3. We found the legislator interested in complacency and had an effect in the field of criminalization or punishment. Satisfaction executes a crime if it comes from a free will and an adult of adulthood.
4. We found that there is a conflict between positive law and Islamic Sharia in the view of sexual contact, as the Sharia considered that sexual intercourse in all its cases and images is prohibited under the description of adultery or sodomy unless the marriage exists between the two parties contrary to the law.

Second: Recommendations

1. We call on the Iraqi legislator to adopt the position of Islamic Sharia in the consideration of sexual contact between a man and a woman, and he considers it an offense with an explicit text, whether it occurs with consent or without it, in the event that the marriage does not take place.
2. We call on the Iraqi legislator to tighten the punishment for anyone who is in charge of one of his forbidden persons, or who is in the event of marrying (the horse) or under the promise of marriage.

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