

# Punishment for committing the *hudud* crime of fornication and adultery (*zina*) as a form of assault

Nqobizwe Mvelo Ngema <sup>1</sup>, Desan Iyer <sup>2</sup>  
<sup>1,2</sup> Law Department, University of Zululand, South Africa.  
Corresponding author: [NgemaNM@unizulul.ac.za](mailto:NgemaNM@unizulul.ac.za)

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**Abstract:** This study seeks to investigate the Islamic punishment for committing the *hudud* crime of fornication and adultery (*zina*). According to the tenets of Islamic law, fornication is punishable with 100 lashes and adultery is punishable with death by stoning. South Africa is a country where numerous languages, cultures, religions and ethnic groups are allowed to thrive in one geographical territory. Since South Africa treaded on the path of progressive countries that respect human rights and thereby decriminalizing fornication and adultery (*zina*). The findings of the study are that Islamic punishments of those Muslims who have committed *zina* constitutes assault and are not likely to pass constitutional muster in South Africa. The latter mentioned punishments also conflict with reproductive rights and are more likely to perpetuate the cycle of child marriages. This is because in a quest to avoid *zina* Islamic law permits and tolerates child marriages.

**Keywords:** Assault, punishment of adultery and fornication (*zina*)

## Introduction

As the topic speaks for itself, the aim of the study is to investigate the constitutionality of the Islamic *hudud* crime of *zina* in South Africa. Does the punishment of *zina* constitutes assault on the convicted culprit? This paper will investigate whether the punishment of *zina* constitutes assault or not. Eventually, this will enable the researchers to come up with a more informed decision whether the entire punishment of *zina* is in line with the Constitution or not. The latter punishments also constitute a violation of the right not to be treated or punished in a manner that is cruel, degrading and inhuman (Ngema, 2023). The criminal offence of assault is defined as consisting of the intentional and unlawful action or omission that results in the impairment of bodily integrity or “which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place” (Snyman 2014). As a result, the criminal offence of assault is composed of three elements, namely, intention, unlawfulness and the behavior that leads to the impairment of bodily integrity. Considering the foregoing elucidation, the content of this chapter mainly assesses whether the *hudud* punishment of *zina* constitutes the offence of assault or not.

The *hudud* punishment for adultery (*zina*) is death by stoning with medium sized stones if committed by a married person. On the contrary, if an illicit sexual intercourse is committed by an unmarried person, the punishment is 100 lashes. This paper focuses mainly on assessing the current position of assault in the South African legal framework. In addition, it will discuss the essential elements of assault. The next section will deal with the sexual offences against children. The conclusion will follow.

## The present legal position of assault in the South African framework

The concept of assault as is generally known in contemporary South African society, was unknown in the Roman Dutch law (common law) that South Africa inherited. A behavior which would today be penalized as assault, was penalized as a form of *iniuria*. In our legal order, an attack on another fellow human being’s dignity is punishable as *crimen iniuria*. An offence of tarnishing the reputation of another fellow human being is penalized as criminal defamation of character (De Villiers 1899; Voet 1968). Since South African common law is a combination of Roman Dutch law and English law, English law has also played a major role in influencing the shape of the South African legal system today. As a result, under the influence of English law, South Africa ended up adopting the English style of creating a distinct substantive crime of assault (Snyman 2014). Assault is not merely recognized as a separate substantive crime but also as a crime with differentiations of common assault, indecent assault, and assault with the intent to do grievous bodily harm (GBH). “Assault consists in any unlawful and intentional act or omission-

- a. Which results in another person's bodily integrity being directly or indirectly impaired, or
- b. Which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place" (Snyman 2014).

The criminal offence of assault is composed of three elements, namely (a) the behavior that leads to the impairment of the victim's bodily integrity, (b) intention and unlawfulness. The most common form of committing an offence of assault is through applying force to the body of the victim (Hunt-Milton 1996, 406). The application of force to the body of the victim can be direct or indirect. The application of force is direct if a person applies physical force with a part of his body to the part of the body of the victim, in so doing striking or touching the body part of the victim. The direct application of physical force agrees with the connotation of the word "assault" in general expression as well as that in the layperson's understanding of what constitutes assault. For example, X kicks P, slaps her on the face with the palm of his hand, and punches her with a fist (Bester 1971; Maguire 1969; Schwartz 1971). It is important to bear in mind that even the least contact with P's body may be enough to constitute the offence of assault. It is possible to apply force indirectly, as can happen when X decides not to use any part of his body to apply force on the body of P but use an instrument or other approach for this purpose. For example, X hits P with a cane or throws stones at P.

Hence the *hudud* punishment of 100 lashes to a person who has been found guilty of committing fornication (*zina*) and administering death by stoning for those who have committed adultery (*zina*) amounts to a violation of his right not to be subjected to assault.

An offence of assault can be committed even if there is no direct or indirect physical contact with the body of P. Assault can be indirect even when X instigates fear that force is about to be applied to P with immediate effect. An example is the instigation of fear that force will be applied immediately when X waves his fist in front of P's face or waves a firearm and points it at P. Such action, even without physical contact, can obviously result in an impairment of bodily integrity of a victim's person. One of the aims of the punishment for the *hudud* offence of *zina* is to serve as a deterrence to any Muslim and to send a shiver down the spine of anyone who is harbouring any thoughts of committing fornication or adultery (*zina*).

### Essential elements of assault

The essential elements of assault are: (a) applying force or inspiring the apprehension of it; (b) unlawfully; and intentionally (Butchel and Milton, 1997).

- a. Applying force or inspiring the apprehension of it

The most common method of committing assault is by the application of force by a person to the body of another person. As indicated already, even the slightest contact with the body of another person may be enough to constitute assault. However, our legal system always allows for the principle of *de minimis non curat lex* (our law is not concerned with trivialities). to be given effect to. As mentioned already, the way force is applied may vary in that it may be direct or indirect (Jolly 1923, 179). The offence of assault can also be committed if someone with a legal duty to act to protect or prevent something from happening fails to act as he or she is required. In the case of B, the court held that a woman had a duty to protect her young child from being assaulted and for the fact that she did nothing to prevent her husband from assaulting her child, led to her being convicted for committing the offence of assault.

An offence of assault can be committed even if there is no direct or indirect physical contact or impact on a victim's body. A typical example of this form of assault is when a person cocks his firearm and points it at another person. Here the perpetrator inspires fear in the victim's mind that force will be applied. For this form of assault to result in liability, some requirements must be complied with, namely:

- I. There must be a threat of violence directed at the victim's body and not against his property. Hence, if a person merely threatens to vandalize your property, that threat does not suffice to amount to assault.
- II. It must be a threat to inflict instant violence. Thus, a mere threat to inflict injury in some unknown future date, will not suffice to amount to assault (Fick 1945; Miya 1966). Furthermore, a conditional threat to inflict violence on anyone who attacks you will not constitute an offence of assault. This conclusion follows because everyone is protected against any form of violence. Thus, a threat to use force against those who attack you, only constitutes a threat to do everything humanly possible within your reach to defend yourself (Bates 1903, 277). However, a conditional threat to use or inflict violence constitutes assault if such use of force is unlawful. This conclusion is confirmed in the case of Dlamini (Dlamini 1931; Ximba 1969, 223), where X stood a few meters away from Y's hut and threatened to attack Y with

sticks and stones if she moved out of the hut. Practically speaking, Y became a detainee in his own house. Eventually X was found guilty of committing an offence of assault.

- III. The fact that a person may threaten others and inspire fear that force will be applied is not sufficient. Here use of a subjective test is resorted to by looking at the mind of the threatened person to determine whether he or she believed the person who instigated fear was serious enough to execute it. If Y does not fear the threat of violence, no assault is committed even if X is not just sending empty threats but has a clear intention to carry out her threats (Mtimunye 1994, 485).
- IV. Words can be sufficient to constitute an assault. It doesn't matter how fear is inspired, as long as it is inspired. A typical example of when words constitute assault is, when X phones Y to inform him that he has planted a bomb in Y's house and that he is about to detonate it. In a similar vein, when X deceitfully tells Y who is blind that he is pointing a gun at him with an intention to kill him.
- V. The inspired fear need not be a reasonable one. What is important here is what is in the mind of the threatened person, if the threatened person believed the possibilities and seriousness of the threats, assault will be committed.
- VI. Definition of the prohibited behavior: causing the impairment of bodily integrity. In answering the question whether certain conduct amounts to violence, one needs not be obsessed about the type of an act or force used by X, Here more attention needs to be placed on the consequences of X's behavior on Y and whether X's conduct had a result of impairing Y's bodily integrity. If an action of X indeed resulted in the impairment of Y's bodily integrity, assault is committed.

(a) Unlawfulness

Just like any other crime, the act of assault must be unlawful. According to Snyman a conduct is unlawful if it conflicts with the good morals or the legal convictions of the society. Common sense dictates that human beings reside in an environment where physical contact with others is unavoidable. It would be wrong to criminalize every physical contact as assault because our society tolerates slight physical contact when people pass each other on the corridors or on a full elevator. As a result of this, there are numerous grounds of justification that negate the unlawfulness of some actions. The following serve as the most common grounds of justification that render the conduct lawful, namely, private defence, necessity, official capacity, and consent.

(b) intention

X must have an intention to apply force to another person or to threaten her with immediate violence. After threatening with an immediate violence, he must be fully aware of Y's fear to have intention. However, if for whatever reason, X believed that his threats would not be taken seriously by Y, X lacks the intention to commit the offence of assault.

### Sexual Offences Against Children

Sections 15 to 22 of the Sexual Offences Act regulates sexual offences committed against children. The most common and important sexual offence against children is the consensual sexual intercourse with a child that is below the age of sixteen years. The perpetrator of sexual intercourse with a child below the age of sixteen years cannot raise the consent of the child as a valid defence. Section 15 (1) of the Sexual Offences Act describes this crime as follows:

A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child."

The reading of the above section shows that any adult person who commits consensual sexual intercourse with a child between the age of 12 years and below the age of 16 years will be guilty of statutory rape. The tenet of Islamic personal law permits valid marriages between persons who have reached the stage of puberty. Normally, the age of puberty can be reached at an age that is below 16 years. Hence, according to South African law, any Muslim official who solemnizes a marriage where one of the parties is a child that is below the age of 16 commits a crime. Similarly, a husband who eventually enjoys the conjugal right of sexual intercourse with her will be guilty of statutory rape. The finding of statutory rape will be the position even if the culprit was honestly believing that he is married to the victim. All legislations that regulate marriages in South Africa make it clear that the minimum marriageable age is 18 years for both males and females. This position permeates throughout the Constitutional provisions which regard any person below the age of 18 years as a child. As a result, any form of child marriage would not be permitted in terms of South African law.

By the same token, any person who engages in sexual intercourse with a child that is below the age of 16, falls in breach of the law. If found guilty, he will be punished with the appropriate sentence applicable to statutory rape. The Act further defines a child as a person that is below the age of 18 years but with reference to the provisions of sections 15 and 16, an individual between the ages of 12 years and 16 years but not above the age of 16 years. Under the provisions of section 15 of the Sexual Offences Act, this offence is commonly referred to as statutory rape. Hence any person who commits sexual penetration with a child that is below the age of 16 is guilty of rape. This inference follows because any supposed consent by a child below the age of 16 is invalid in terms of the South African legal order. The rationale behind the invalidation of consent by a child below the age of 16 is that such a minor is not regarded as sufficiently matured to comprehend the implications and consequences of her sexual acts. Considering the foregoing, it comes as no surprise that the legal system affords special protection to children who are below the age of 16 years. The protection of children means that even if the child consented out of her ignorance or lack of discernment, such consent is not regarded as valid in law. This conclusion is not only the position under the new Sexual Offences Act but was the position even during the time of the old, repealed act.

The Islamic law permits marriage at puberty. But on consideration of the fact that different female persons reach puberty at different stages, puberty always depends on the individual's biological development. According to Islamic law, it is possible for children who are below the age of 16 years to be allowed to get married, if they have reached the stage of puberty. This is normally done to prevent a child from getting pregnant outside the confines of a lawful matrimonial relationship.

The prohibition of sexual penetration of children poses a provoking question when during the time of sexual penetration both culprits were below the age of sixteen years (Snyman 2014, 384). This twist is partly because section 1 of the Sexual Offences Act defined the crime of sexual penetration of children but failed to specify the age threshold considered necessary to constitute the criminality of penetration. However, the Act specifically mentions that if the person who commits an act of sexual penetration of a child is also a child, the prosecution of that offence must be authorized in writing by the National Director of Public Prosecutions so that eventually both children will be prosecuted. Thus, the criminalization of consensual sexual intercourse between children who are below the age of sixteen may be problematic or questionable. Thus, criminalizing children sexual activity is likely to defeat the very initial purpose of children protection. The reason behind statutory rape is that children are not matured enough to comprehend the consequences of their sexual actions. This prohibition will also rob adolescents of the freedom to explore their sexuality since it is common for teenagers to get involved in sexual exploration of their bodies (Snyman 2014). Such a practice of punishing children who engage in consensual sexual intercourse, among themselves, has the effect of encroaching upon constitutionally protected rights of children, such as the best interests of the child, children's right to dignity, privacy and bodily integrity. In the case of *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*, the Constitutional Court approved the criticisms levelled against criminal liability of children below the age of sixteen years. The court held that its judgment would not be applicable if the person who committed the act of sexual penetration of a child is sixteen years or seventeen years of age. The court granted parliament the period of 18 months to make the necessary amendments to the Sexual Offences Act.

### Conclusion

Islamic law forbids any form of illicit sexual intercourse. Marriage is a sacred institution where the spouses have every right to make love with each other. Thus, sexual intercourse is specifically reserved for persons who have tied a marriage knot. If unmarried lovers decide to have sexual intercourse with each other, the deviation is punishable with 100 lashes while the punishment for illicit sexual contact is death by stoning, if committed by a married person.

As it was argued earlier, the punishment of 100 lashes constitutes assault because the force that is applied to the body of a transgressing actor is likely to impair the bodily integrity of the victim.

Islamic law permits and encourages child marriages for social reasons. According to Islamic law, any person is considered mature enough to enter a marriage relationship if he or she has reached the puberty stage. However, people do not all reach puberty at the same chronological age. According to the laws of South Africa, a person below the age of the minimum age of 18 is not eligible to marry. If a Muslim marries a bride who is below the age of 16 years, he is likely to face charges of statutory rape. A person who is below the age of 16 is perceived by South African law as not mature enough to appreciate the consequences of his or her sexual decisions.

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#### **Legislation**

Sexual Offenses Act

