

This paper was presented at the 21st International Conference on Sustainable Development, held at the Faculty of Social Science and Humanities, University of Ottawa, Ottawa, Canada, on July 15-16, 2025.

Regulation of Fornication and Adultery (*zina*): What Malaysia can Learn from International Law to Enhance the Achievement of Millennium Development Goals

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OIDA International Journal of Sustainable Development, Ontario International Development Agency, Canada.

ISSN 1923-6654 (print) ISSN 1923-6662 (online) www.oidaijsd.com

Also available at <https://www.ssrn.com/index.cfm/en/oida-intl-journal-sustainable-dev/>

Abstract: Islamic law forbids fornication and adultery (*zina*) and fornication is punishable with 100 lashes and adultery is punishable with death by stoning (*rajm*). Islamic law is elevated by the Constitution that declares it as the state religion. The Federal government of Malaysia has delegated Islamic matters to be under the legislative competence of individual states. Some states such as Kelantan have retained stoning as punishment for adultery and 100 lashes as punishment for fornication. On the contrary, the state of Perak has done away with the punishment of stoning and replaced it with 1 year imprisonment. Hence there is no uniformity on the regulation of *zina* in Malaysia. Malaysia can learn some lessons from international law which has decriminalised fornication and adultery. Punishment for *zina* contributes to the perpetuation of many social ills such as child marriages, violation of the right to life, reproductive rights, the right to health and many more. It contributes to retaining the cycle of poverty amongst females and is an anathema to the achievement of millennium development goals. International maintains that everyone has a right to choose when to have sex, when to have children and to fall in love out of free will and volition. The punishment for the Islamic *hudud* crime of *zina* is not in synch with modernity that is grounded on the universality of human rights.

Keywords: punishment of adultery and fornication (*zina*), perpetuation of social ills, anathema to sustainable development

Introduction

The Federal Republic of Malaysia is situated in the Asian continent and is comprised of thirteen states. These are Selangor, Sarawak, Sabah, Terengganu, Kedah, Johore, Kelantan, Malacca, Negri Sembilan, Pahang, Perlis, Perak, and Penang. The Federal Constitution of Malaysia distributes the law-making and executive powers between the Federal government and the states (section 1 (2) & 74 of the Constitution). The Islamic religion is elevated above all other revealed or existing religions observed within Malaysia. The Islamic religion is affirmed by the highest law of the land in that the Constitution proclaims the Islamic religion as the official religion of the state but also it affords the other faith people the opportunity to profess other preferred faiths other than Islam in peace and harmony. Islamic law matters fall under the legislative competence of the individual states of Malaysia. According to the provisions of section 1 of the Federal Constitution of Malaysia, states have both the legislative and executive authority in matters of Islamic law. This authority is expressed as follows:

“except with respect to federal territory, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gift partitions and non-charitable trusts, *wakafs*, Malay custom, zakat, fitrah, Baitul-mal, and similar Islamic religious avenues, mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the federal list; the Constitution, organization and procedure of Islamic courts, which shall have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating the religion of Islam: the determination of matters of Islamic law and doctrine and Malay custom (article 1 of the Constitution).”

As indicated in this quote, the states of Malaysia wasted no time to implement the constitutional provisions that vested powers on them to make enactments to regulate Islamic law. This empowerment led to a wave of pieces of legislation purporting to regulate Islamic law matters in the respective state of Pahang (1982), Sarawak (1977), Sabah (1977), Perak (1965), Perlis (1964), Kedah (1978), N Sembilan (1960), Penang (1959), Malacca (1959), Trengganu (1955), and Selangor. The last-mentioned state legislations purported to regulate Islamic matters, particularly the Islamic *hudud* offence of *zina* (illicit sexual intercourse) and to provide for the penalty for committing *zina*. From these pieces of law to regulate the penalties for the commission of the *hudud* offence of *zina*, it becomes clear that contemporary society faces the problem of widespread illicit sexual intercourse amongst both unmarried persons as well as married couples. Numerous causes of illicit sexual intercourse both amongst the married and the unmarried persons can be cited. Marital infidelity can take different forms ranging from sexual infidelity, emotional infidelity, and internet infidelity. Sometimes it happens that couples who have been in a long-term marital relationship can experience boredom in their matrimonial relationship and develop an urge to explore sexual experience outside their marriage (Mileham 2007). It bears noting that contact with the other partner outside the matrimonial relationship may not be purely sexual in nature, but it may also include activities that do not involve physical contact at all. An online sex serves as one of the examples of non-physical interactive contact that is used by a cheating spouse to find sexual experience outside the matrimonial relationship (DeWaal, Lambert, Slotter, Pond et al 2001). Some of the reasons that tempt people to slip into marital infidelity are:“(a) Sexual satisfaction, where there is a search for sexual variety or due to sexual incompatibility with the partner;(b) emotional satisfaction, in which the focus is on emotional satisfaction with a new relationship; (c) social context, including variables such as opportunity or physical separation of the partner; (d) rules and attitudes relating to social norms, such as sexual permissiveness; and (e) revenge, hostility associated with the desire to retaliate for betrayal suffered (Hak, Hashim, and Helmi 2001, 95).”

The human need for sexual variety and income possibility is one of the main reasons that lead married couples to become unfaithful to their married partners (Buunk 1980, 28). This section of the exposition discusses the regulation of *zina* in Malaysia. It aims to identify the disadvantages, and the good observations gleaned from the Malaysian experience.

Current legal framework on the regulation of *zina* punishment in Malaysia

Negatives

The state of Kelantan has adopted radical measures to discourage adultery. The following punitive measures were implemented as *hudud* punishments. According to the state of Kelantan, if a married person (*mahsan*) is found guilty of adultery, such a deviant must be stoned to death with stones of medium size (section 13(1) of the Criminal Code). On the contrary, if the culprit of fornication is an unmarried person (*ghairu mehsan*), such a violator is liable to a punishment of flogging for one hundred times. Moreover, he or she is not only severely flogged but is put behind bars for twelve months (section 13 (1) of the Criminal Code). The Syariah (Criminal Code (ii) (1993) 2015 clearly regulates adultery and fornication (*zina*) as follows:

“If the offender who commits adultery is a *mahsan*, the offender shall be punished by stoning, which is stoned until death with medium stones. (2) If the offender who commits adultery is a *ghairu mehsan*, the offender shall be punished with whipping of one hundred lashes and in addition shall be liable to imprisonment for one year (section 13 (1) of the Criminal Code).”

The reading of the above section that is aimed at regulating the Islamic *hudud* offence of fornication and adultery (*zina*) shows that the state of Kelantan has adapted a classical method of regulating *zina*. As already argued earlier, the punishment of stoning to death (*rajm*) conflicts with numerous guaranteed human rights principles such as the right not to be subjected to cruel, inhuman, or degrading treatment (Ngema & Iyer 2023). Moreover, both forms of punishment for *zina* seem to produce impacts that clash with the culture of universal human rights. According to Islamic law, the offence of *zina* is proven by the confession of the culprit who admits that he or she has committed adultery or fornication (*zina*). Confession must be given by the culprit in his sound and sober senses, out of his free will or volition. In the absence of such a confession, the offence of *zina* ought to be confirmed by a testimony of four reliable male Muslim witnesses who have witnessed the commission of *zina*.

Against the background of modern progressive thinking that respects the universal appeal of human rights, the standard of proof that requires the evidence of four male Muslims of reputable character does not look equitable because the requirement of male witnesses insinuates that women are incapable of giving evidence in defence of their own right to dignity in *zina* cases. In short, the requirement of four male witnesses constitutes an unfair discrimination against the female victim in rape cases.

The accusation of *zina* is not something that is taken lightly in Islamic law. As a result, anyone who accuses another person of committing the offence of adultery is expected to provide the testimony of four reputable male witnesses. The failure to provide the required proof is regarded as a mere smear campaign to tarnish the image of the accused. This is an offence of *qadf* and is regulated as follows: “17 (1) A person is committing *qadf* if he- (a) Makes an accusation of adultery or sodomy, which is not substantiated by four witnesses, against an *aqil baligh* Muslim and who is known as chaste of the behavior of adultery or sodomy; or (b) Subject to subsection (2), who expressly or impliedly makes a statement that a particular person has committed adultery or sodomy or expressly or impliedly alleged that a particular person is not a father or a child to another person (section 17 of the Criminal Code).”

So, if a person accuses another person of committing adultery, he is expected to provide evidence of four male witnesses. One who alleges must prove and the failure to produce acceptable evidence will result in a conviction of *qadf*. On the contrary, if the person who raises an allegation of *zina* manages to provide acceptable or admissible evidence, the person against whom the allegation is made is guilty of *zina*. This is aptly provided in terms of section 17 (2) which provides that,

“A statement under paragraph 1 (b) is regarded as *qadf* unless it is proven by four male witnesses, and if the statement cannot be proved then the person making the allegation shall be guilty of *qadf* offence; but if it has been proved, then the person against whom the statement is made is guilty of adultery and sodomy (section 17 (2) of the Criminal Code).”

A wrongful accusation of another person for committing *hudud* offence of *zina* is punishable by 80 lashes. Moreover, his testimony will no longer be acceptable as evidence until he repents. The state of Kelantan not only legislates against wrongful accusation but also legislates on accusation of adultery (*zina*) under oath as follows:

“19 (1) Al-li’an is an accusation of adultery by oath made by a husband against his wife, while his wife by an oath rejected the accusation, and both the accusation and rejection are made before a judge by uttering the words as specified under subsection (2), (3), (4), (5) and (6) as the case maybe” (section 19 (1).”

A husband who accuses his wife of marital infidelity as stipulated above, is expected to swear an oath before the mighty Allah that “Allah is my witness that I speak the truth that I accused my wife...has committed adultery” (section 19 (2) of the Criminal Code). The husband who accuses his spouse of infidelity is expected to utter the above-mentioned oath four times in a row. After uttering the oath for four times, he ought to make a fifth utterance invoking the curse of the Almighty Allah on him if it happens that he was telling a lie (section 19 (3) of the Criminal Code). In denying the accusation levelled against her, the wife is expected to swear four times in a row saying that “Allah is my witness that my husband...had lied in making the adultery accusation against me” (section 19 (4) of the Criminal Code).

After swearing an oath for four consecutive times, she makes a fifth utterance by invoking the curse of Allah on her life should she be telling a lie (section 19 (5)). The accusation of adultery that is made under oath has detrimental consequences not only for couples who are at loggerheads with each other but also against children conceived because of *zina* (Ngema, 2023; Ngema, 2023). If her pregnancy has been denied by her husband, the husband is expected to utter the following words: “The child/what is being conceived by my wife is not from me” (section 19 (6) of the Criminal Code).

The divorce by *Al Li’an* invites detrimental consequences for children conceived and born because of adultery (*zina*). Such children are labelled with the derogatory classification such as *walad-al-zina* (an extra-marital child). An extra-marital child is denied child maintenance from the father (Ngema, 2023). To make it worse, the child cannot inherit from his or her biological father (Ngema, 2023). As pointed out above already, such exclusion proves contrary to the guaranteed rights of children, particularly following the doctrine of the best interest of the child.

Positives

The state of Perak is one amongst many states that has adopted progressive legislation aimed at regulating *zina*. It has managed to do so through the enactment of the Administration of Muslim Law Enactment, 1965. It provides that: “Any person who has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man and such intercourse not amounting to offence of rape, is guilty of the offence of adultery and shall be liable to imprisonment of a term not exceeding one year and to a fine not exceeding one thousand dollars” (Section 155 of the Administration of Muslim Law Enactment).”

The reading of the above section shows that the state of Perak has done away with death by stoning (*rajm*) and flogging of those found guilty of committing fornication.

Conclusion

As indicated already, the Republic of Malaysia has decentralized the legislative powers regarding the enactment of Islamic personal laws. This development means that the federal government has delegated the power to legislate on issues of Muslim personal law to states. However, there is no uniformity regarding the punishment of *zina*. *As a result, it will be seen that state practices differ from one state to the other.* The Malaysian regulation of *zina* is filled with some negatives and positives. The negative aspect is that the state of Kelantan adopted death by stoning as punishment for adultery and flogging with 100 lashes as punishment for fornication. It has already been argued in chapter 2 and chapter 3 above that death by stoning as punishment for adultery and flogging with 100 lashes as punishment for fornication as practiced in Kelantan state is not in line with the fundamental values espoused in human rights. In this respect, the state of Perak in Malaysia deserves some commendation. This accolade is justified because the state of Perak did away with the sentence of death by stoning and flogging but adopted the sentence of imprisonment for a term that is not more than 12 months and a fine of not more than 1000 dollars. In the researcher's view, this form of punishment is more likely to pass the constitutional test because it does not violate the rights of girls.

References

1. Buunk, B. (1980). Extra-Marital sex in the Netherlands Motivations in Social and Marital Context. (3) 1 Journal of Family and Economic Issues 28.
2. De Wall, C.N., Lambert, N.M., Slotter, E.B., Pond, R.S. Jr, Deckman, T., Finkel, E.J., Luchies L.B. and Ficham, F.D. (2001). So far Away from one's Partner, Yet so close to Romantic Alternatives, and Infidelity. (101) 6 Journal of Personality and Social Psychology 1302-1316.
3. Mileham, B.L.A. (2007). Online Infidelity in Internet Chat Rooms: An Ethnographic Exploration, Computers in Human Behavior. 23 11-31.
4. Ngema, N. M. and Iyer, D. (2023). Extra-Marital Child (*walad al zina*) and their inheritance Rights under Islamic Law: A Comparison of Islamic Law and South African Common Law. (12) 1 *Perspectives of Law and Public Administration*.
5. Ngema, N. M. and Iyer, D. (2023). Penalty for Committing Fornication and Adultery (*zina*) in Islamic Law as a Violation of Freedom from Torture. (15) 06 *OIDA International Journal on Sustainable Development*.
6. Ngema, N. M. and Iyer, D. (2023). Extra-Marital Child (*walad al zina*) and his Right to Maintenance (*nafaqah*): A Comparison of Islamic Law and South African Common Law. (12) 02 *Academic Journal of Interdisciplinary Studies*.
7. Ngema, N. M. (2023). Regulation of Adultery (*zina*) in the Context of Egyptian Human Rights Obligations. (12) 02 *Perspectives of Law and Public Administration*.
8. Nora Abdul Hak, Noraini Mohd Hashim, Muhammad Helmi, Md Said (2021). Repercussions of Marital Infidelity in Malaysia: A Legal Response. (29) *IJUMIJ* 91-109 at 95.

Legislation

Administration of Muslim Law Enactment, 1965

Federal Constitution of the Republic of Malaysia.

Syariah (Criminal Code (ii) (1993) 2015.