

**THE POSITION OF ILLICIT SEXUAL RELATION IN ISLAMIC
AND MALAYSIAN LAWS**

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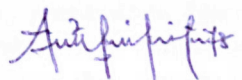
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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries, which have been duly acknowledged.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah Almighty, The Merciful, The Compassionate, praise and gratitude are to Allah for His guidance and His inspiration. And my peace and all blessing are upon the beloved Prophet Muhammad SAW, the last messenger of Allah Taala.

First and foremost, I would like to express my gratitude to Allah, the Almighty for granting my wish and giving me the courage and faith to complete this academic project. With very much pleasure, I would like to take this opportunity to give my precious thanks to my supervisor, Professor Dr. Abdul Samat bin Musa for his initial push, advice, positive criticism, suggestions and guidance as well as for the immeasurable amount of support and encouragement during the writing process. However, I am solely responsible for any mistake that remain in this academic project.

Lastly, I would like to deliver a bouquet of thanks and with the best compliment to all lecturers in Islamic University College of Malaysia and my unforgettable friends especially the third year students in Faculty of Syariah and Judiciary.

I am also indebted to my family who has given me support and encouragement without blasé to finish this academic project. And anyone who may have indirectly helped in the preparation of this academic project. Without your cooperation, maybe my academic project would not have been possible. I love you all very much.

Thank You, May Allah's Peace Be Upon All Of Us.

**SYAIFULHIZAT BIN ABDUL RAHMAN
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ABSTRAK

Kertas projek ini bertujuan untuk mengetahui apakah yang dimaksudkan dengan persetubuhan haram, mengenal pasti asas kepada pengharamannya, menunjukkan sama ada pelaku perbuatan tersebut wajib dihukum atau tidak, mengetahui wujud persamaan atau tidak jika dilihat dalam Undang-Undang Islam dan Malaysia. Sehingga kini, terdapat beberapa undang-undang yang telah digubal oleh kerajaan, persetubuhan haram masih lagi menjadi salah satu daripada masalah yang amat kritikal di negara kita dan juga di seluruh pelusuk dunia, terutamanya terhadap orang-orang yang beragama islam. Kertas projek ini mengandungi tiga bab perbincangan. Bab pertama menjelaskan tentang kedudukan persetubuhan haram berhubung dengan undang-undang islam, yang mana merangkumi maksud persetubuhan haram, pengharaman persetubuhan haram, kesalahan-kesalahan berkaitan dengan persetubuhan haram dan hukuman bagi setiap kesalahan-kesalahan persetubuhan haram. Manakal, dalam bab kedua pula menjelaskan tentang kedudukan persetubuhan berhubung dengan undang-undang Malaysia, yang mana merangkumi maksud persetubuhan haram, pengharaman persetubuhan haram, kesalahan-kesalahan persetubuhan haram dan hukuman bagi kesalahan-kesalahan persetubuhan haram. Dan bab yang ketiga pula akan membincangkan mengenai perbandingan diantara undang-undang islam dan Malaysia, yang mana termasuklah persamaan dan juga perbezaan, yang mana memfokuskan kepada maksud persetubuhan haram, sumber-sumber pengharaman persetubuhan haram, kesalahan-kesalahan dalam persetubuhan haram dan hukuman bagi kesalahan-kesalahan persetubuhan haram. Kertas projek ini adalah dihasilkan berdasarkan kepada kajian yang telah dibuat di perpustakaan. Berdasarkan hasil kajian tersebut penulis juga dapati undang-undang Malaysia kurang memberi kesan untuk menangani masalah persetubuhan haram ini kerana hukuman yang ditetapkan adalah terlalu ringan berbanding dengan hukuman dalam undang-undang Islam.

ABSTRACT

This academic project attempts to examine the nature of the illicit sexual intercourse and the basis of the illicit sexual prohibition. Then, this academic project also will show whether the offender of illicit sex should be punished, and to identify the differences and similarities between the Islamic and Malaysian laws with regard to the illicit sex. Today, even though there are some laws legislated by the government, illicit sexual relation is still becoming one of the most critical problems in our country. This paper consists of three chapters. In the first chapter, it talks about the position of illicit sex in Islamic law, which includes the meaning of illicit sexual relation, the prohibition of illicit sexual activities, and also the punishment of illicit sexual offences. The second chapter discusses about the position of illicit sexual relation in Malaysian Law, which also includes the meaning of illicit sexual relation, the prohibition of illicit sexual activities, the related offences and the punishment of illicit sexual offences. The third chapter compares the Islamic with the Malaysian laws regarding to the illicit sexual offences, which includes the similarities and the differences, focusing on the meaning of illicit sexual problem, the sources of prohibition, the related offences in illicit sexual problem and also the punishment for the illicit sexual offences. In order to finish the research, the process of documentation and research methodology in the form of library research and literature review have been adapted. Through this research the writer found that the Malaysian law is not sufficient to solve an illicit sexual problem because the provided punishment for illicit sexual offences is too light compared with the prescribed punishment in Islamic law.

ملخص البحث

يستهدف هذا البحث لبيان عن حقيقة العلاقة الجنسية المحرمة والدليل على تحريمها أيضا لمعرفة سواء كان يفرض / يقام الحد أو العقوبة على من ارتكب استنادا عن القانون الإسلامي والقانون الماليزي. ومن ثم ليعرف وجه الاختلاف والاتفاق بين القانونين. قد قررت الحكومة بعض الأحكام التي تتعلق بالعلاقة الجنسية المحرمة حتى الآن , ولكن بدون حدود لأن هذه المشكلة ما زالت مستمرة في بلادنا وفي أنحاء العالم وتعتبر هذه المشكلة مشكلة خطيرة لدى المسلمين. مجملا, يحتوي هذا البحث على ثلاثة فصول. يتكلم الباحث في الباب الأول عن العلاقة الجنسية المحرمة وتعريفها ودليل على تحريمها وأنواعها وعقوبات لهذه الجريمة مستندا إلى القانون الإسلامي. نقش الباحث من خلال الباب الثاني عن العلاقة الجنسية المحرمة من حيث تعريفها ودليل على تحريمها وأنواعها وعقوبات لهذه الجريمة مستندا إلى القانون الماليزي. قام البحث بالدراسة المقارنة بين القانونين الإسلامي والماليزي في الباب الثالث مع توجيه من حيث تعريف العلاقة الجنسية المحرمة ودليل على تحريمها وأنواعها وعقوبات لهذه الجريمة. قد استعمل الباحث المنهج الدراسة المكتبية التي تقوم على جمع معلومات من مصادرها الأصلية ثم القيام بنقد وتحليل هذه المعلومات ثم القيام بوضعها في أماكنها المناسبة. وقد خرجت هذه الدراسة بأن توجه سمة الخلاف بين القانون الإسلامي والقانون الماليزي أيضا, أن القانون الماليزي قد فشل في تنفيذ وظيفته لردع مشكلة العلاقة الجنسية المحرمة بشكل مرجوة.

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GLOSSARY

Al-Hadith	- The speech of Prophet Muhammad
Al-Quran	- The speech of Allah Taala, revealed to the for Prophet Muhammad
Al-Jild	- Whipping punishment
Bikr	- Unmarried women
Fiqh	- An Islamic legal science
Fuqaha'	- Persons who is knowledgeable in fiqh science
Hadd/ Hudud	- A punishment prescribed in the Quran and Hadith
Injil	- A book revealed by Allah to his prophet Isa a.s
Luth	- One of the prophets of Allah
Mahalul wat'I	- vagina
Muhrim	- Male and female who are having blood relationship
Muhsan	- Married men
Muhsanah	- married women
Mukallaf	- Attain the age of majority
Musahaqah	- A lesbian act
Mutawatir	- Not broken in narration
Qamariah	- Month
Qaul Sahabah	- The speech of Rasulullah's Friends
Rejam	- Punishment by stoning to death
Sahih	- Authentic
Sihaq	- lesbian

Surah	- Name of the chapter in the Quran
Syarak	- Islamic law
Syariat/ syariah	- Islamic jurisprudence
Syiah, Khawarij, Azariqah	- Certain group of Muslims in early Islamic history
Syubhah	- Feeling or causing suspicion
Ta'zir	- A discretionary punishment passed by the judge or determined by the state
Taghrib	- Banishment
Torah	- A book revealed by Allah to his prophet Musa a.s.
Zabur	- A book is revealed by Allah to his prophet Daud a.s.
Zina	- Adultery

TRANSLITERATION

Abi	-	أبي
Al-Hadith	-	الحديث
Al-Hamdu	-	الحمد
Allah Taala	-	الله تعالى
Al-Jild	-	الجلد
Al-Nisa'	-	النساء
Al-Nur	-	النور
Al-Quran	-	القرآن
Al-Sahabah	-	الصحابة
Ammah	-	عامه
Azariqah	-	ازارقة
Bikr	-	بكر
Fiqh	-	فقه
Fuqaha'	-	فقهاء
Hadd	-	حد
Ibnu	-	ابن
Injil	-	إنجيل
Jariah	-	جارية
Khawarij	-	خوارج
Luth	-	لوط
Mahalul	-	محلل
Maksiat	-	معصية

	TRANSLITERATION	
Muhrim	-	محرم
Muhsan	-	محسن
Muhsanah	-	محسنة
Mukallaf	-	مكلف
Musahaqah	-	مساخقة
Mutawatir	-	متواتر
Qamariah	-	قمرية
Qaul	-	قول
Rasulullah	-	رسول الله
Rejam	-	رجم
Sahih	-	صحيح
Sihaq	-	سحاق
Surah	-	سورة
Syarak	-	شراع
Syariah/ Syariat	-	شريعة
Syiah	-	شيعة
Syubhah	-	شبهة
Ta'zir	-	تعذير
Taghrib	-	تغريب
Torah	-	توراة
Verse	-	آية
Wat'i	-	وطعي
Zabur	-	زبور
Zina	-	زنى

TRANSLITERATION

a-	ا	c-	ع
b-	ب	gh-	غ
t-	ت	f-	ف
th-	ث	q-	ق
j-	ج	k-	ك
h-	ح	l-	ل
kh-	خ	m-	م
d-	د	n-	ن
z-	ذ, ز	h-	ه
s-	س	y-	ي
sy-	ش	dh-	ض

ABBREVIATION

Dr./Drs.	- Doktor Falsafah
Ibn	- Ibnu (son).
Prof.	- Professor.
SAW	- Sallallahu Alaihi Wasallam
Sdn. Bhd.	- Sendirian Berhad.
SWT	- Subhanahu Wataala.

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INTRODUCTION

Illicit sexual relation is the most heinous and despicable behavior in the society and such deed could bring the utmost happiness to Satan, the human's foe. Allah Taala condemns those who act in manners such as, out of wedlock sexual intercourse, intercourse with animal, and sodomy (homosexual) including the intercourse between legal spouses through "back way".

The violation of the prohibition would invite a severe punishment to the doers and it has been reiterated several times in the Holy Quran. It could be understood from the Quranic verses prohibiting the awful manner that explain the reasonable justification behind the severest punishment imposed in Islamic law for the people who fail to obey.

One of the reasons is to keep public interest running on enlightened path as the companions of the Prophet Muhammad s.a.w. and the previous community (*ummah*) have shown. Therefore the Quranic and Hadith should become our guidelines to keep us in the right path. Otherwise, we would go toward destruction.

Apart from that, if someone committed adultery, the implications could turn out to be worse if the woman become pregnant. The baby might not know who their parents really are, the case of abortion or even abandonment of newly born babies might happen. Imagine the dangers of surrounding areas that the abandoned babies are exposed to: strayed wild dogs, weather, germs, and so on.

From the explanation, it has come to our knowledge that adultery or illicit sexual intercourse is implicitly and gradually jeopardizing our religion, country, and nation and family institution.

In connection of the reason, the Prophet Muhammad (peace be upon Him) and his fellow companions were taking the matter seriously and uncompromisingly. Thus, in this study we would be able to observe and analyze the differences between the Islamic laws and human laws with a reference to the Malaysian law in giving proper punishment to those who commit an illicit sexual relationship. According to the Holy Quran, Surah Al-Nur verse two, Allah Taala order said that:

((الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ))

Means: “the women and the men guilty of adultery or unlawful sexual relation severely whip each of them with a hundred strips: do not let kindness more gain in their case, in a matter that is already decided by Allah. If you (truly) believe in Allah and the last day: and let a party of the believers witness their punishment”.

Allah The Almighty has created humanity, and he is the one who has sent upon His servants the sacred scriptures such as; *Injil* (Bible), *Zabur*, *Taurat* (Torah) and Al-Quran as guidance for them to lead lives. Al-Quran is the last scripture be stowed to the last generation of humanity. It is not for corpses, but for the living human beings, as a way of life in this world and the salvation in the here after.

Al-Quran is a guide for the humanity, preventing us from loathsome acts like stealing, murdering, homosexuality, lesbian, raping, cheating, lying, defaming, unobeying our parent and etc.

Islam is a religion acknowledged by Allah The Almighty and we are His servants as well as the *ummah* (people) of Prophet Muhammad s.a.w.; the greatest *ummah* compared to the previous ones (ancient people).

BACKGROUND OF RESEARCH

The illicit sexual intercourse according to the Islamic Law is called “illegal sexual relation” among the Muslims whether they are married or not. Illicit sex in Islamic law can be defined as the illegal sexual intercourse among Muslims. This includes adultery, homosexual, lesbian, and sexual intercourse with animal and sexual intercourse with corpse. Illicit sexual offences are also one of the *hudud* cases in Islamic law.

According to the Malaysian Law, it can be defined as the sexual intercourse between a man and a woman out of wedlock whether both of them were married or not.

Through this research, the causes and the basis to prohibit this offence will be evaluated. Then, the condition to enforce the punishment for the culprit of illicit sexual relation will also be clarified.

Beside that, in this academic project, the effect from this offence will also be identified and the utmost task will also be included here, which is the comparison between the Islamic and Malaysian laws.

AIM OF RESEARCH

This research will describe the position of illicit sexual intercourse in Islamic law and then, the comparison between both of laws will be made regarding to this offence.

RESEARCH OBJECTIVE

All of the research has their objective and the objectives of this research are: -

1. To study what is the illicit sexual relation.
2. To find out what is the basis of its prohibition.
3. To show whether the culprit of illicit sexual relation is liable to be punished or not.
4. To identify whether the Islamic and Malaysian Law have the similarity or not relating to the illicit sexual intercourse.
5. To describe the position of illicit sexual relation.

SCOPE OF THE RESEARCH

This research is based on the Islamic and Malaysian Law. Besides that, this research will focus to the Muslim, which is necessary for the Muslims to know about it. Then, the research scope also focuses on the position of illicit sexual relation in Islamic and Malaysian Laws.

RESEARCH METHODOLOGY

In order to finish this research, the process of documentation and library research or literature review with observation had been under taken. Then, the sources of this academic project were found and selected from materials such as books, newspaper, magazines, Statutes, documents or law journal, which are related to the research. The data of the research can be found from the library, which includes the Islamic

University College of Malaysia library, National University of Malaysia library, National library, and also books store.

LITERATURE REVIEW

By observing on some materials, evidently many researchers had already written on this matter. There are some similarities between this academic project and those writings, but still there are some differences between the scope of this work and the previous.

For example a book which was written by Al- Doktor Wahbah Al- Zuhaili, titled “*Al- Fiqh Al- Islamiy Wa- Adillatihi*, 1997 under sub title “*Had of Illicit sexual*”. This book focused only on the Islamic Law.

Other example is a book which was written by Mohamed S. El- Ewa titled “*Hukuman Dalam Undang- Undang Islam*” 1999.

In this research, the method that will be used is quite similar with the above examples, that observation method, literature review or library research or documentation preview. However the difference is that this research will be including the comparative study between the Islamic and Malaysian law regarding sexual offences.

CHAPTER ONE

THE CONCEPT OF LEGITIMATE SEXUAL RELATION IN ISLAMIC LAW

THE DEFINITION OF LEGITIMATE RELATION

Sexual relation between a man and a woman is not allowed in Islam unless it is in the form of marriage (nikah), which is a legal contract between a man and a woman, observing the conditions of Islamic law. The purpose of marriage is to establish a legal relationship between a man and a woman, which is recognized by the community and the state. The conditions of marriage are: the consent of both parties, the presence of a witness, and the payment of a mahr (dowry).

CHAPTER ONE

Sexual relation between a man and a woman is not allowed in Islam unless it is in the form of marriage (nikah), which is a legal contract between a man and a woman, observing the conditions of Islamic law. The purpose of marriage is to establish a legal relationship between a man and a woman, which is recognized by the community and the state. The conditions of marriage are: the consent of both parties, the presence of a witness, and the payment of a mahr (dowry).

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According to Islamic terminology, *zina* (fornication) is an act of sexual intercourse between a man and a woman who are not married to each other. It is considered a major sin in Islam. The punishment for *zina* is prescribed in the Quran and the Sunnah. The punishment for a man who commits *zina* is 100 lashes, and for a woman, it is 100 lashes and confinement in a house for four months. Further punishment is prescribed for those who repeat the crime.

Sexual relation between a man and a woman is not allowed in Islam unless it is in the form of marriage (nikah), which is a legal contract between a man and a woman, observing the conditions of Islamic law. The purpose of marriage is to establish a legal relationship between a man and a woman, which is recognized by the community and the state. The conditions of marriage are: the consent of both parties, the presence of a witness, and the payment of a mahr (dowry).

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CHAPTER ONE

THE POSITION OF ILLICIT SEXUAL RELATION IN ISLAMIC LAW

1.1 THE DEFINITION OF ILLICIT SEXUAL RELATION

Illicit sexual relation refers to the sexual intercourse between male and female person who are already obliged in Islamic law (*mukallaf*), which is not allowed in Islamic law. Such sexual intercourse is one of the act of *zina* (adultery), which is punishable under *Hudud* law, as long as there is no justification depriving the punishment to be imposed upon both of them, for example, on grounds of unsound mind, not attaining the age of puberty, unintentional act, and misrepresentation.

Women who are not in possession with person that involved in such sexual intercourse as stated are women who has no valid marriage is not or without legal right in possession, for example *ammah*, *jariah* and else are considered to have illicit sexual where as women, such as *ammah* and *jariah*, are allowed legally under Islamic law, to have sexual relationship with their husband or owner, that is any sexual intercourse involving people who is illegal for them or committing such action is illegally without any valid *syarie* justification.

According to renowned terminology among *fiqh* jurist, adultery is an action namely illegal sexual relation, as the basic offence without any contract (knot) that enables them do so. Further more by the view of *fiqh* jurist, such offence would obligatorily require *Hudud* to be imposed on them.¹

Based on the notion, an illicit sexual relation is a general terminology which refer to illegal intercourse the specific types of which will be explained in the chapter 1.3.

¹ Mohamad Zuhdi Ab. Majid. 2001. *Bidang Kuasa Jenayah Mahkamah Syariah Di Malaysia*. Dewan Bahasa Dan Pustaka, Kuala Lumpur. Page 185.

1.2 THE PROHIBITION OF ILLICIT SEXUAL. RELATION

1.2.1 Quranic verse

Allah the all mighty said,

((الرَّائِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ)).²

Means: The women and the men guilty of adultery or unlawful sexual relation severely whip each of them with a hundred strips: do not let kindness more gain in their case, in a matter that is already decided by Allah. If you (truly) believe in Allah and the last day: and let a party of the believers witness their punishment.³

Allah said again,

((وَاللَّاتِي يَأْتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهَدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا))⁴

Means: If any of your women are guilty of being lustful, take the evidence of four witnesses from your own people against them, and if they testify, confine them to the house until they die or Allah decides some other way for them.⁵

² Al-Quran. Surah An-Nur: Ayat 2.

³ Prof. Dr. Syed Vickar Ahamed. *Interpretation Of The Meaning Of The Glorious Qur'an*. Page 423.

⁴ Al-quran. Surah An-Nisa': Ayat 15.

⁵ Prof. Dr. Syed Vickar Ahamed. *Interpretation Of The Meaning Of The Glorious Qur'an*. Page 92.

((وَاللَّذَانِ يَأْتِيَانِيهَا مِنْكُمْ فَأَذُوهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرِضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ تَوَّابًا رَحِيمًا))⁶

Means: If two men among you are guilty of lewdness, punish them both. If they repent and improve, leave them alone, for Allah is often returning, most merciful”.⁷

1.2.2 Hadith

Rasulullah S.A.W said:

"خذوا عني, قد جعل الله لهن سبيلا, البكر بالبكر جلد مائة وتغريب سنة, والثيب بالثيب جلد مائة والرجم"

Means: “Take it from me, surely Allah has made them (the women who commit adultery) in one path, if a (unmarried) young women illegally intercourse with a (unmarried) young men, whip them with a hundred strips, and one year banishment and if any person who had married and intercourse in that wedlock, whip them with a hundred strips and stone them to death”.⁸

Rasulullah S.A.W said:

"من وجدتموه يعمل عمل قوم لوط, فاقتلوا الفاعل والمفعول به".

⁶ Al-Quran. Surah An-Nisa': Ayat 16.

⁷ Prof. Dr. Syed Vickar Ahamed. Interpretation Of The Meaning Of The Glorious Qur'an. Page 92.

⁸ Al-Sindiy, Al-Imam Abi Hasan Al-Hanafi. *Sunan Ibn Majah*. Hadith 2550. Al-Juz'u Al-Thalith. Dar Al-Makrifah. Page 223.

Means: “for those who were to be performing the act of *lut* community (homosexual), kill them both”.

" عن أبي هريرة, عن النبي صلى الله عليه وسلم في الذي يعمل عمل قوم لوط, قال: ارجموا أعلى والأسفل, ارجموا جميعا".

Means: As narrated by Abi Hurairah, from Prophet Muhammad s.a.w regarding some one who performs the act of *luth* community, he said: stone the upper person and the lower person and stone all of them.⁹

Rasulullah S.A.W said:

من وقع على ذات محرم فاقتلوه, ومن وقع على بهيمة فاقتلوه, واقتلوا البهيمة.

Means: Who commits an offence of adultery he must be killed, and who has an intercourse with an animal he must be killed and kill the animal.¹⁰

1.3 THE RELATED OFFENCES OF ILLICIT SEXUAL INTERCOURSE

1.3.1 ADULTERY

There are various definitions of adultery according to various school of laws. The Maliki school of law construed an adultery as sexual intercourse made by *mukallaf*

⁹ Ibid. Hadith 2561 dan 2563. Page 229-230.

¹⁰ Ibid. Hadith 2564. Page 230.

person (male) who is freeman, attains the age of puberty, has a knowledge of Islamic law, through female womb that is not legally in his possession based on Islamic law.¹¹

Whereas, Hanafi school of law interpret an adultery as sexual intercourse between man and women, via her fore sexual organ without any ambiguity or any possession or similar possession.¹²

From Kasaniy point of view stated that an adultery as an illegal sexual relation, at a womb of a living woman deliberated by a man without any possession and reality or thereof and out of legal wedlock.¹³

While, Shafi'I School of law clarified that adultery is an action of illegally inserting pennies into woman's womb with lustful desire.¹⁴

On the other hand, Zahiriy School of law reflected adultery as an illegal sexual intercourse with people who are being prohibited (for other people) to see their sexual organs as well as knowing with the prohibition.¹⁵

Therefore, adultery is apparently an illegal sexual intercourse, which is sternly condemned by Islam and any activity that will lead to such activity (sexual intercourse) are not allowed and definitely frowned upon.

¹¹ Al-Dasuqiy. Lil 'Alim Al-'Ulamah Shamsudin Al-Sheikh Muhammad 'Arafah. *Hashiah Al- Dasuqiy 'Ala Al- Sharh Al-Kabir*. Al-Juz'u Al-Rabi'. Dar Al-Ahya' Al-Kutub Al-Arabiah. Page 313.

¹² Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al- Ilmiah. Page 138.

¹³ Al-Kasaniy, Al-Imam 'Alaudin Abi Bakar. 1997. *Badai' Al-Sanai' Fi Tartib Al-Sharai'*. Al-Juz'u Al-Sabi'. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 33.

¹⁴ Al-Ramliy, Syamsudin Mohammad Bin Abi Al-Abbas. 1992. *Nihayah Al-Muhtaj Ila Sharh Al-Minhaj*. Al-Juz'u Al-Sabi'. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 402.

¹⁵ Ibn Hazm, Abi Muhammad Ali Bin Ahmad Bin Said. 1997. *Al-Muhalla Sharh Al-Mujalla*. Al-Juz'u Al-Hadi 'Ashara. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 229.

1.3.2 HOMOSEXUAL OR SODOMY

Homosexual is an unnatural way relieving the sexual appeal by a man with another man through “back door” or anus.¹⁶

Most of the human being, regardless of man or women have a sexual desire to the opposite gender. It is suitable with the natural inherent created by Allah, which they have their respective spouse; man and women, male and female and negative and positive. In certain circumstances, man and women occasionally have developed interest in their own sexual class to make it more precise; man is attracted to another man and woman are attracted to another woman, what is purportedly as love in similar gender which likely to be inception of homosexual.

According to the several views of Maliki, Shafi’I, Ahmad school of laws and Abu Yusof from Hanafi School of law, such sexual relation could be regarded as adultery, in spite of the final view of Shafi’I school of law, that it is not deemed to be adultery but it is included in the forbidden intercourse as ordained by Allah.¹⁷

The reason behind the opinion that the act of sodomy or homosexual apparently is an adultery and compulsorily to be imposed with *hadd* punishment, is based on the decree of Allah the Almighty that he cursed the doer of such filthy act with severe punishment. He has turned the land of *luth*'s people upside down who had transgressively committed the crime (homosexual) and Allah The Almighty has also eliminated them with disastrous fiery storm as a punishment for what they had done.¹⁸

Hanafi school of law does not assume the sexual intercourse that take place, through woman or man’s anus, as an adultery but they define it as sodomy. By the point of their view that the natural sexual intercourse with women is not regarded as exist unless it is committed with lustful desire for instance; a sexual relation with

¹⁶ Haji Mohamed Zain Salleh. *Penyelewengan Seks Dalam Islam*. Diterbitkan Oleh: Usnie Sdn. Bhd. Page 13.

¹⁷ Al-Ansariy, Lil Qadhi Abi Yahya Zakaria. 2001. *Asna Al-Matalib Sharh Raudh Al- Talib*. Al-Juz’u Al-Rabi’. Dar Al-Kutub Al-Ilmiah. Page 125.

¹⁸ Naveer Mohideen Bin Syed Mohamad. *Seks Yang Dilarang Dalam Islam*. Diterbitkan oleh: Syarikat Nurulhas. Page 19.

corpse is not adultery.¹⁹ In case of the sexual intercourse between married couple via the anus of the wife, although is considered as illicit sexual relation but not an adultery, because the wife by that time is only an object to the occurring sexual intercourse (*mahallul wat'i*) the prohibited matter in this situation is only the place that make the sexual intercourse is anus.

1.3.3 LESBIAN

If sexual intercourse between male human being is called “homosexual”, the sexual intercourse between female human being is termed as “*sihaq*” in Arabic and “lesbian” in English.²⁰ Lesbian is an act of scuffing her sexual organ without ejaculation. There fore, the doer is doubted as the man does to women without penetration.²¹

Such practice is prohibited and regarded as indecent and condemned. More over it is most immoral than the natural sexual intercourse between male and women, because it is being carried out unnaturally in the wrong place than it suppose to be as created by Allah Taala. Islam strictly prohibits the act of lesbian, the act of lesbian as well as homosexuality with severe punishment. Such act is tantamount to adultery.²²

According to Hadith, Prophet Peace and Blessing upon Him said:

Means: “the intercourse between women and women is an adultery among them”.
(Narrated by Al-Tabrani).

Prophet Muhammad s.a.w. Said again:

¹⁹ Al-Kasaniy, Al-Imam 'Alaudin Abi Bakar. 1997. *Badai' Al-Sanai' Fi Tartib Al-Sharai'*. Al-Juz'u Al-Sabi'. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 34.

²⁰ Haji Mohamed Zain Salleh. *Penyelewengan Seks Dalam Islam*. Diterbitkan oleh: Usnie Sdn. Bhd. Page 35.

²¹ Naveer Mohideen Bin Syed Mohamed. *Seks Yang Dilarang Dalam Islam*. Diterbitkan oleh: Syarikat Nurulhas. Page 18.

²² Haji Mohamed Zain Salleh. *Penyelewengan Seks Dalam Islam*. Diterbitkan Oleh: Usnie Sdn. Bhd. Page 37

"إذا أتى الرجل للرجل فهما زانيان, وإذا أتت المرأة للمرأة فهما زانيتان".

Means: "if a man has an intercourse with a man, both of them have committed adultery, if a woman has an intercourse a woman, both of them committed adultery".²³

1.3.4 SEXUAL INTERCOURSE WITH ANIMAL

The action of sexual intercourse between man or women with animal is a condemned and immoral deed.²⁴ For those who possess rational thinking may consider it as forbidden and sinful in Islamic perspective, which might disgrace the dignity of human being themselves, while they are actually regarded as the most honorable creature among others on planet earth.²⁵

As a result such deed is deemed to be the most uncivilised action committed by a human being, the doer is permissible to be killed.

The Prophet Muhammad Peace and Blessing upon Him assented that:

Means: "who ever had a sexual intercourse with animal, they should be killed and you also must kill the animal together". (As narrated by Ahmad, Abu Daud and Termizi)²⁶

According to the renowned view of Shafi'i, Maliki and Hanafi school of laws do not assume the consummation with animal as adultery, but as an act of inobservance

²³ Ibn. Hajar Al-Asqalaniy, Shahabudin Abi Al-Fadhl Ahmad Bin Ali. 1998. *Talkhis Al-Habir Fi Takhrij Ahadith Al-Rafi' I Al-Kabir*. Al-Mujallad Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 158.

²⁴ Haji Mohamed Zain Salleh. *Penyelewengan Seks Dalam Islam*. Diterbitkan Oleh: Usnie Sdn. Bhd. Page 41.

²⁵ Mohd. Ali Bin Abu Bakar. *Pendidikan Sosial Remaja Menurut Perspektif Islam*. Pustaka Aman Press Sdn. Bhd. Page 57.

²⁶ Al-Sajistaniy Al-Azda, Al-Imam Al-Hafiz Abi Daud Sulaiman Ibn Al-Ash'as. 1996. *Sunan Abi Daud*. Al-Juz'u Al-Thani. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 468.

(*maksiat*) that is punishable under *ta'zir* punishment, due to the prevalence of normal human being would not be allured to the disgusting sexual act with animal.²⁷

There is the weak view of Shafi'i and other view of Hanafi School of laws that stated that such act is assumed as adultery based on the previous Hadith. However the majority of Islamic Jurist does not confirm it,²⁸ due to the Hadith narrated by Abu Daud, from Ibn Abbas: the Prophet (peace and blessing upon Him) said:

Means: "*Hadd* would not be imposed on those who had an intercourse with animal".²⁹

The ruling is also applicable to the woman who had sexual relationship with animal that she deserves to be punished with *ta'zir* and the animal must be slaughtered.

1.3.5 SEXUAL INTERCOURSE WITH CORPSE

The sexual intercourse with corpse, which is not legally in his possession like wife according to the Hanafi, one view from Shafi'i and Hambali school of laws, is not termed as adultery even though it is prohibited. The reason behind the views, such act does not take place normally with passion and usually is not harmful that could not be punished under *Hudud* law.³⁰

One school from Syiah sect, for example Al-Zaidiyyah has approved the view. On the other hand, from the other views of Shafi'i, Hanbali and Maliki school of laws, if the consummation occurred not between husband and wife it is still said as adultery

²⁷ Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 152.

²⁸ Al-Ramliy, Syamsudin Mohammad Bin Abi Al-Abbas. 1992. *Nihayah Al-Muhtaj Ila Sharh Al-Minhaj*. Al-Juz'u Al-Sabi'. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 405.

²⁹ Al-Sajistaniy Al-Azda, Al-Imam Al-Hafiz Abi Daud Sulaiman Ibn Al-Ash'as. 1996. *Sunan Abi Daud*. Al-Juz'u Al-Thani. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 468.

³⁰ Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 152.

because it is prohibited and an act of disgrace as well as more harmful than adultery.³¹

In Islamic perspective, unleashing the appeal of sexual relation by having sex with corpse is prohibited; regardless through vagina or anus of the corpse, and attributed it as an adultery and adultery is one of the major sinful deeds that are punishable with severe punishment.³²

1.4 THE PUNISHMENT FOR ILLICIT SEXUAL OFFENCES

The nation of punishment in Islam relied on its two main sources namely Al-Quran and Al-Hadith. Concisely, based on those sources, the types of punishment for illicit sexual offences are different from one to another.

1.4.1 THE PUNISHMENT FOR ADULTERY

In the beginning of Islam, the punishment for adultery is to be put in detention in their own house, being condemned and whipped. It is vested by Allah Taala in the Holy Quran that:

((وَاللَّاتِي يَأْتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهَدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا))

Means: "If any of your women are guilty of being lustful, take the evidence of four witnesses from your own people against them, and if they testify, confine them to the house until they die or Allah decides some other way for them".³³

³¹ Al-Sharbiniy, Al-Sheikh Muhammad Al-Sharbiniy Al-Khatib. Al-Qarn Al-Ash'ar Al-Hijri. *Mughni Al-Muhtaj Ila Makrifah Ma'ani Alfaz Al-Minhaj*. Al-Juz'u Al-Rabi'. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 55.

³² Haji Mohamed Zain Salleh. *Penyelewengan Seks Dalam Islam*. Diterbitkan Oleh: Usnie Sdn. Bhd. Page 39.

³³ Al-Quran: Surah An-Nisa': Ayat 15.

The meaning of “lustful” in the verse indicates the act of adultery by the view of majority of Islamic jurist. In contrast, as taken from other view, the lustful denotes the heinous act relating to the gender for example adultery, homosexuality or lesbian.³⁴

The meaning of “some other way” as mentioned above in Surah Al-Nisa’ verse 15, is as provided in Al-Quran:

((الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلَيْشَتَهَدَ عَذَابُهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ))

Means: “The women and the men guilty of adultery or unlawful sexual relation severely whip each of them with a hundred strips: do not let kindness more gain in their case, in a matter that is already decided by Allah. If you (truly) believe in Allah and the last day: and let a party of the believers witness their punishment”.³⁵

Allah the Almighty ordained:

((وَالَّذَانِ يَأْتِيَانِيَا مِنْكُمْ فَأْذُوهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرِضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ تَوَّابًا رَّحِيمًا))

Means: “If two men among you are guilty of lewdness, punish them both. If they repent and improve, leave them alone, for Allah is often returning, most merciful”.³⁶

The stated punishment has been abrogated and replaced with the punishment in the following verses of Al-Quran and Al-Hadith from the Prophet (peace and blessing upon Him). The Almighty Allah said:

³⁴ Lihat Al-Quran dan Terjemahannya, (Department Agama Republik Indonesia, 1970).

³⁵ Al-Quran: Surah An-Nur: Ayat 2.

³⁶ Al-Quran: Surah An-Nisa’: Ayat 16.

((الرَّانِيَةُ وَالرَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ))

Means: “The women and the men guilty of adultery or unlawful sexual relation severely whip each of them with a hundred strips: do not let kindness more gain in their case, in a matter that is already decided by Allah. If you (truly) believe in Allah and the last day: and lets a party of the believers witness their punishment”.³⁷

The above verse only mention the punishment for adultery that is, being whipped or punished. It has been corroborated with Hadith Sahih, which the Prophet (peace and blessing upon Him) said:

"خذوا عني, قد جعل الله لهن سبيلا, البكر بالبكر جلد مائة وتغريب سنة, والثيب بالثيب جلد مائة والرجم"

Means: “Take it from me, surely Allah has made them (the women who commit adultery) in one path, if a (unmarried) young women illegally had intercourse with a (unmarried) young men, whip them with a hundred strips, and one year banishment and if any person who had married and had intercourse in that wedlock, whip them with a hundred strips and stone them to death”.³⁸

Based on the above Hadith, it explains specifically the punishment for adultery according to their behavior. In verse two from Surah Al-Nur, it only mentions about the punishment for adultery by whipping a hundred times without differing between unmarried and married adulterer, but the stated Hadith has strengthened and made the verse more specific, which the unmarried adulterer must be whipped hundred times

³⁷ Al-Quran: Surah An-Nur: Ayat 2.

³⁸ Al-Sindi, Al-Imam Abi Hasan Al-Hanafī. *Sunan Ibn Majah*. Hadith 2550. Al-Juz'u Al-Thalith. Dar Al-Makrifah. Page 223.

and banished for one year, while the married adulterer should be whipped hundred strips and stoned to death.

The punishment for adultery in Islam praises two parts:

i. Unmarried person

The punishment for adultery, for unmarried person consists of two types: (a) whipping, and (b) banishment. The banishment based on the Hadith, it is different between a slave and a freeman. Since the slave is no longer in existences the punishment will be focused on the freeman.

Taghrib or banishment in Maliki and Hanafi School of laws is a detention or jail in a state where the adulterer committed the crime within a year.³⁹ *Taghrib* in Shafi'i and Ahmad school of laws is an outcast to other state and he or she is being watched without being detained or jailed.⁴⁰ Although, in Shafi'I school of law said that *taghrib* is banishment out of state or district but such punishment could be replaced with detention or jail if the adulterer might escape by putting him or her in exile.⁴¹

On the other hand, from the view of Shafi'I and Maliki School of laws said, whipping and banishment are compulsory,⁴² as a punishment for adultery based on the previous Hadith and verse 2 of Surah Al-Nur. This view has also been supported by the practice of Sayyidina Umar who implemented both.⁴³

Maliki viewed that the banishment is only for male offender, because his female spouse is unmarried. This is because for unmarried women who travel out of her guardian's supervision, she should be accompanied by her *muhrim* (some one's that

³⁹ Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 134.

⁴⁰ Ibn Qudhamah, Al-Sheikh Al-Imam Al-'Ulamah. *Al-Mughni*. Al-Juz'u Al-Tasi'. Dar Al-Hadith Al-Qahirah. Page 44.

⁴¹ Al-Ansariy, Lil Qadhi Abi Yahya Zakaria. 2001. *Asna Al-Matalib Sharh Raudh Al-Talib*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 130.

⁴² Al-Kasaniy, Al-Imam 'Alaudin Abi Bakar. 1997. *Badai' Al-Sanai' Fi Tartib Al-Sharai'*. Al-Juz'u Al-Sabi'. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 39.

⁴³ Ibn Qudhamah, Al-Sheikh Al-Imam Al-'Ulamah. *Al-Mughni*. Al-Juz'u Al-Tasi'. Dar Al-Hadith Al-Qahirah. Page 42-43.

cannot married with her). Therefore, the banishment only imposed on man.⁴⁴ Nevertheless, as stated earlier, Shafi’I, Ahmad and Zahiriyah school of laws stated that the banishment compulsorily be imposed on unmarried man and woman.⁴⁵

The whipping punishment must be done with hundred stripes. The authority relating to the ruling is taken from the verse 2 of surah Al-Nur as previously said as well as from the stated Hadith. It is a permanent punishment, May not be added or lessen, for unmarried person after being convicted with adultery.

ii. The punishment for married person who committed adultery.

Before the punishment for married person is explained, it is better to reflect pertaining to the conditions of being married (*muhsan*).

a) Have had a valid sexual relation, that is the consummation between man and woman through her vagina (womb), as told by the Prophet Muhammad SAW:

Means: “Take it from me, surely Allah has made them (the women who commit adultery) in one path, if a (unmarried) young women illegally intercourse with a (unmarried) young men, whip them with a hundred strips, and one year banishment and if any person who had married and intercourse in that wedlock, whip them with a hundred strips and stone them to death”.

The above Hadith mentioned about a man who has had intercourse through the vagina of a woman which he married or legally in his possession or a woman who has had sexual relation with a man through her vagina in wedlock and legitimate possession.⁴⁶ In contrary, if the married person do not have sexual intercourse by the mean that require them to take obligatory both (both due to intercourse) or the sexual relation which, occurred not through vagina (the front sexual organ of female), they are not regarded as *muhsan*, may still a *bikr* (unmarried). The insertion of penis

⁴⁴ Ibid. Page 43.

⁴⁵ Al-Ansariy, Lil Qadhi Abi Yahya Zakaria. 2001. *Asna Al-MatalibSharh Raudh Al- Talib*. Al-Juz’u Al-Rabi’. Dar Al-Kutub Al-Ilmiah. Page 129.

⁴⁶ Ibn Qudhamah, Al-Sheikh Al-Imam Al-’Ulamah. *Al-Mughni*. Al-Juz’u Al-Tasi’. Dar Al-Hadith Al-Qahirah. Page 38.

(sexual organ for male) into vagina or womb either the ejaculation took place or not, and the intercourse happened in marriage ties, the woman is presumed as *muhsanah*.

The consummation through illegal or void marriage for instance, having sexual relation with the fifth wife while the other four wives are still alive, or by adultery or ambiguous consummation (*syubhah*), are not sufficient for them to become *muhsan* or *muhsanah*. This view is taken from the majority of Islamic jurist.⁴⁷ The sexual intercourse that happen in the legal wedlock, would not also make a person become *muhsan* or *muhsanah*, if it take place within the restricted period, in example menstrual, after giving birth, ihram and else.⁴⁸

- b) Attain puberty and sound mind; this condition encapsulates all kind of liability whether in respect of criminal, daily transaction, family and so on. In connection with that, when someone had sexual relation before attaining puberty or in state of mental disorder, he or she is not regarded as *muhsan* even in a legal marriage.⁴⁹
- c) Both husband and wife should fulfill the previous conditions to be *muhsan* or *muhsanah*, for example, if a husband who has attained the age of puberty and has sound mind, had sexual relation with his wife who is insane or has not attained puberty. In this case, he is still not a *muhsan* although he has under gone the sexual relationship. This is the view of Abu Hanifah and Ahmad school of laws.⁵⁰
- d) On the other hand, for Maliki School of law, the husband or wife still becomes a *muhsan* even though a party only fulfills the condition. In the mean time, Shafi'i School of law has two views regarding with the matter, first, similar to the view of Hanafi and second, as aquiver lent with the view of Maliki.⁵¹

⁴⁷ Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 130-131.

⁴⁸ Al-Ansariy, Lil Qadhi Abi Yahya Zakaria. 2001. *Asna Al-Matalib Sharh Raudh Al- Talib*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 128.

⁴⁹ Ibn Qudhamah, Al-Sheikh Al-Imam Al-'Ulamah. *Al-Mughni*. Al-Juz'u Al-Tasi'. Dar Al-Hadith Al-Qahirah. Page 139.

⁵⁰ Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 130.

⁵¹ Al-Ansariy, Lil Qadhi Abi Yahya Zakaria. 2001. *Asna Al-Matalib Sharh Raudh Al- Talib*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 128.

The reason of schools who prescribed the condition of *muhsan* to be together with both party during the time of intercourse that make them *muhsan* due to the perfection of such sexual intercourse and gaining the maximum satisfactory of the intercourse, as stoning to death is the maximum punishment in adultery, there fore the conditions of *muhsan* also must be perfectly fulfilled a perfect sexual relationship.⁵²

- e) Islam, Abu Hanifah and Maliki school of laws put Islam as one of the condition to become *muhsan*, but it was refused by Shafi’I and Ahmad school of laws by saying that the Prophet Muhammad himself had stoned two Jews to death (man and woman) who committed adultery, as narrated in Hadith sahih by Ibn Umar:

Means: “Verily the Prophet has stoned two Jews to death, and I (Ibn Umar) was one who has stoned both of them to death and verily I have seen the Prophet protected the female Jews with stone”.⁵³

Means: “And from the narration of Muslim, from Abdullah bin Umar, surely the Prophet himself has stoned a Jew, who committed adultery, to death after he was brought to him and He pointed out and ensured that the verse regarding the punishment (stoning to death) existed in Torah”.⁵⁴

The view that prescribed Islam as a condition to become *muhsan*, is based on a Hadith which, a Muslim (man) had a sexual intercourse with a *Kitabiah* women (people of the scriptures; Injil and Torah), the man is not regarded as *muhsan* by such consummation. The Hadith mentioned that prophet SAW had said to Huzaifah (may Allah pleased with him), one of Prophet’s companions:

Means: “Leave the Jews woman, because surely she may not make you *muhsan*”.⁵⁵

⁵² Ibn Qudhamah, Al-Sheikh Al-Imam Al-‘Ulamah. *Al-Mughni*. Al-Juz’u Al-Tasi’. Dar Al-Hadith Al-Qahirah. Page 39.

⁵³ Al-Sindi, Al-Imam Abi Hasan Al-Hanafi. *Sunan Ibn Majah*. Hadith 2556. Al-Juz’u Al-Thalith. Dar Al-Makrifah. Page 354.

⁵⁴ Al-Nawawi, Al-Imam Mahyudin Al-Nawawi. 1999. *Sahih Muslim*. Al-Juz’u Al-Hadi ‘Ashara. Dar Al-Makrifah. Page 208-209.

⁵⁵ Al-Kasaniy, Al-Imam ‘Alaudin Abi Bakar. 1997. *Badai’ Al-Sanai’ Fi Tartib Al-Sharai’*. Al-Juz’u Al-Sabi’. Dar Al-Ahya’ Wal-Turath Al-Arabi. Page 38.

The punishment would be more severe upon man and woman who is *muhsan* and *muhsanah* if they commit adultery, just what the Prophet did to Maiz (stoning to death) who was *muhsan* after he confessed (for committing adultery) four times and requested to the Prophet to be purified.⁵⁶ There is a Hadith Sahih explaining that any person who have tasted the excitement of sexual consummation from a legal marriage, he commits adultery. They are among three persons who their blood is permissible (to be killed), the other two, are a person who renounces Islamic religion and a person who unrightfully kills others.⁵⁷

If we observed on the other aspect, why should a *muhsan* who committed adultery, be imposed with a severe punishment. A person who is *muhsan* has already had a wife or husband in present or previous, and also has had a legitimate sexual relation. Above all, if the *muhsan* person is a male, he may be able to marry up to four wives.

After understanding the term of *muhsan*, the punishment of adultery for *muhsan* person may be classified as follows:

a) Stoning to death

A recognized punishment by all *Fuqaha'* jurist except several views from *Azariqah* and *Khawarij*, which non-*mutawatir* Hadith is inadmissible in their school. Thus, the punishment of adultery for people of *muhsan* in this schools is only whipping hundred times, as stated in verse 2 of Surah Al-Nur, which stoning to death is not mention in the verse. However this view is weak and unacceptable.

On the other hand, the majority of *Fiqh* jurists have come to the agreement by concerns, that the previous hadith relating to the punishment for adulterer irrespective of *muhsan* or not or by the corroboration of the practice of Prophet Muhammad SAW as explained in the beginning of the topic. The form of this punishment is by throwing anything like stone to the offender until he or she die.

⁵⁶ Ibid. Page 39.

⁵⁷ Al-Nawawi, Al-Imam Mahyudin Al-Nawawi. 1999. Sahih Muslim. Al-Juz'u Al-Hadi 'Ashara. Dar Al-Makrifah. Page 37.

b) Whipping

It is the second punishment for *muhsan* an adulterer based on the stated Hadith, which the whipping must be carried on with hundred stripes. Nevertheless, the jurists disagree about whether stoning to death and whipping must be conducted together upon person who is *muhsan* and committed adultery; or the first punishment (stoning to death) would be sufficient. The justification behind the view that it must be implemented both due to whipping is the basic punishment based on Surah Al-Nur as stated before, while stoning to death is relied on the previous Hadith.

The majority of jurists viewed that the punishment of adultery for *muhsan* is only stoning to death, because the Prophet only punished Maiz with stoning to death and Maiz actually is *muhsan*. It also the same with the case of two Jews that they were stoning to death without being whipped, in advance, while they were *muhsan*. Both narration do not mention about whipping be conducted before stoning to death was implemented for *muhsan* adulterer.

1.4.2 THE PUNISHMENT FOR HOMOSEXUAL

As the views of who said that the act of the homosexual as the act of adultery, hence for who is *mukallaf* person performs the offence must be punished by adultery punishment or *hadd* penalty, but the majority of Islamic jurist gave a difference views with regard to the punishment of the offence. The Maliki school of law said, the punishment of homosexual offence is ‘stoned’ only, whether the doer is ‘married person’ or not.

The Shafi’I School of law and Ahmad school of law have said in three views:⁵⁸

First: the homosexual offence is the same offence with adultery offence, hence the punishment to both of the offences must be similar, if the doer is “married person”, he

⁵⁸ Al-Ramliyy, Syamsudin Mohammad Bin Abi Al-Abbas. 1992. *Nihayah Al-Muhtaj Ila Sharh Al-Minhaj*. Al-Juz’u Al-Sabi’. Dar Al-Ahya’ Wal-Turath Al-Arabi. Page 403-404.

must be punish by “stoned” until death and if the doer is “unmarried person”, he must be whipped and must leave his origin state. Their opinion is based on the Hadith as below:

"من وجدتموه يعمل عمل قوم لوط فاقتلوا الفاعل والمفعول به"

Means: “for those who were found performing the act of *lut* community (homosexual), kill them both”.⁵⁹

A Hadith has been narrated by Al-Baihaqi from Abi Musa:

Means: “Whenever a man performs sexual intercourse with a man, hence both of them are performing adultery”.⁶⁰

Second: who has performed the homosexual act must be “stoned” and a person is acted the homosexual with him cannot be “stoned” but only must be whipped and must leave his origin state. It is base on all of the situation, whether a male or female, “married person” or not, because “unmarried person” is exist by sexual relation through towards the front way, but if the sexual relation through the back way such as to a person is acted homosexual with him cannot be considered that he is “unmarried person”, and that’s why he cannot be punish by “stoned” punishment.

Third: Both of the persons who commits homosexual must be killed, whether he is “married person” or not. There are two views about the punishment in this situation:

First: Whether be killed by a sword, it is based on the hadith of rasulullah s.a.w:

⁵⁹ Al-Sajistaniy Al-Azda, Al-Imam Al-Hafiz Abi Daud Sulaiman Ibn Al-Ash’as. 1996. *Sunan Abi Daud*. Al-Juz’u Al-Thani. Dar Al-Ahya’ Wal-Turath Al-Arabi. Page 468.

⁶⁰ Al-Sharbiniy, Al-Sheikh Muhammad Al-Sharbiniy Al-Khatib. Al-Qarn Al-Ash’ar Al-Hijri. *Mughni Al-Muhtaj Ila Makrifah Ma’ani Alfaz Al-Minhaj*. Al-Juz’u Al-Rabi’. Dar Al-Ahya’ Wal-Turath Al-Arabi. Page 144.

"من وجدتموه يعمل عمل قوم لوط فاقتلوا الفاعل والمفعول به"

Means: "for those who were found performing the act of *lut* community (homosexual), kill them both".⁶¹

Second: Whether be killed by "stoned" with stone until death. It is because the homosexual offence is assumed as adultery offence.

The School of law of Abu Hanifah said, the homosexual offence is not adultery offence, hence the doer of the offence cannot be punished by "stoned" punishment, but must be punished by *ta'zir* punishment, and cannot be detained or to imprisonment until death or until he repent. When the offence repeatedly made, hence a person who performs the offence and found guilty shall be punish to death as the interest of the peoples and not as the *hadd* punishment. Abu Yusof and Muhammad from the Hanafi School of law gave their view about the offence, who is performs the homosexual offence must be punish such as the punishment for any person who performs adultery offence.⁶² But, the Syiah School of law has two views as below:

First: The homosexual offence is similar with adultery offence, which must be punished by "stoned" punishment to any "married person" and must be whipped to who is not "unmarried person".

Second: Must be killed from any situation. But the Zahiriyah School of law said, they are considered that the homosexual offence is not same with adultery offence. Beside that it cannot be punish by *hadd* punishment, but must be punish by *ta'zir* punishment if a person found guilty commits the homosexual offence.⁶³

⁶¹ Al-Sajistaniy Al-Azda, Al-Imam Al-Hafiz Abi Daud Sulaiman Ibn Al-Ash'as. 1996. *Sunan Abi Daud*. Al-Juz'u Al-Thani. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 468.

⁶² Ibn Humam Al-Hanafi, Al-Imam Kamaludin Bin Abdul Wahid. 1995. *Sharh Fath Al-Qadir*. Al-Juz'u Al-Rabi'. Dar Al-Kutub Al-Ilmiah. Page 150.

⁶³ Ibn Hazm, Abi Muhammad Ali Bin Ahmad Bin Said. 1997. Al-Muhalla Sharh Al-Mujalla. Al-Juz'u Al-Hadi 'Ashara. Dar Al-Ahya' Wal-Turath Al-Arabi. Page 285.