

Adultery and Fornication Offences Penalty according to the Egyptian and Algerian Criminal Law, an Evaluative Study from an Islamic viewpoint

جريمة الزنا والفسق في قانون العقوبات المصري والجزائري في ضوء ما قرره
الشريعة الإسلامية

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Abstract :

The study aimed at evaluating the penalty of adultery and fornication offences according to Egyptian and Algerian Criminal law in the light of Islamic Law (Shari'a). The study used the descriptive methodology to reach the targets in question. To gather the required data, a review of literature was administered. The study came to the conclusions that: first. Islamic Law (Shari'a) imposes the death penalty for the married adulterer and whipping and expulsion penalty for the unmarried adulterer (fornicator); second, the Egyptian and Algerian Criminal law impose imprisonment penalty for the convicted of adultery offence and this contradicts what Islamic Law (Shari'a) necessitates. The study recommended that the Egyptian and the Algerian Criminal law ought to adopt the death penalty for the married adulterers and whipping and expulsion penalty for the unmarried adulterers (fornicators) in response to what what Islamic Law (Shari'a) requires.

Keywords: penalty, adultery, fornication, offence, Islamic Law (Shari'a), penal law.

Introduction:

Praise be to Allah and Peace and Blessings of Allah upon our Prophet Muhammad, his family, his companions and all who follow his guidance to the Day of Judgment .

(O, believers, be pious to Allah and care nothing but to die on Islam) ⁽¹⁾.

(O, people, be pious to Allah Who created all of you from a male and a female and who created the female from the male and created all humans from both of them. O, people, be pious to Allah Who you will stand before for

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Judgment and He will question you about what you have done with your relatives. Remember that Allah observes you all) ⁽²⁾.

(O, believers, fear Allah and say what is right in order that Allah mend your deeds and forgive your sins. Whosoever obeys Allah and His Messenger shall win a great victory) ⁽³⁾.

To proceed ⁽⁴⁾:

Islam accentuates safeguarding honor ⁽⁵⁾. That's why Islam not only forbids adultery of married persons, fornication of unmarried persons and all the ways that lead to but it also imposes particular punishment for those who commit these offences.

But the quick look at the penal legislations of the Muslim countries, one notices that they ignore what Islam decide concerning how to punish adulterers and fornicators and follow suit of the secular legislations relating this question in the name of modernity and mercy which turn out to be false.

It is noted that both Egyptian and Algerian legislature follow in the footsteps of this convention.. That is why the question has been raised about how the Egyptian and the Algerian Legislations deal with adultery and fornication and to what extent they conform with the teachings of Islam. This is the core of the current study.

The Problem of the Study

The study problem is put in the following main question;

How do the Egyptian and Algerian Legislations punish for adultery and fornication offences and to what extent do both of them conform with Islam teachings?

This main question can be divided into the following subcategories;

1- What is Islam's viewpoint of the penalty of adultery and fornication offences?

2- How does the Egyptian Legislation punishes for adultery and fornication and to what extent does it conform with Islam teachings?

3- How does the Algerian Legislation punishes for adultery and fornication and to what extent does it conform with Islam teachings?

The Objectives of the Study

Based on the pre-raised questions, the study objectives are as follows;

1- Investigating Islam viewpoint of penalty of adultery and fornication offences.

2- Investigating how the Egyptian Legislation punishes for adultery and fornication and to what extent it conforms with Islam teachings.

3- Investigating how the Algerian Legislation punishes for adultery and fornication and to what extent it conforms with Islam teachings.

The importance of the Study

The study importance is shown in two aspects;

First: Theoretically;

The study seeks to bridge the gap in this area to develop what previous studies have come to.

Second: Practically;

The study draws the attention of legislators to adopt the Islamic viewpoint concerning the penalty of adultery and fornication offences. .

The Methodology of the Study

The study has used the descriptive methodology to reach the targets in question. To gather the required data, a review of literature has been administered.

The Scheme of the Study

The study has been planned as follows;

- Introduction.
- Chapter I.
- Chapter II.
- Chapter III.
- Conclusion.
- Bibliography.

The introduction has been given. So, the coming lines will tackle the other points in further detail.

Chapter I

The Penalty of Adultery and Fornication from the Viewpoint of Islam

Islam imposes a particular penalty for adultery and fornication. This penalty is one of the severest and toughest sanctions Islam adopts. This penalty is adapted according to the status of the perpetrator and the circumstances of the crime. The penalty of whipping and expulsion apply in the case of fornication (unmarried person having sex outside marriage) ⁽⁶⁾ and the penalty of being thrown with stones to death applies in the case of adultery (married person having sex outside marriage) ⁽⁷⁾.

There is abundant evidence of the penalty of the adulterer and the fornicator as follows;

I. Evidence from the Holy Book:

-First Evidence; Allah, exalted be He, says: (You shall lash the fornicatress and the fornicator each with a hundred lashes. In the religion of Allah, let no tenderness for them seize you if you believe in Allah and the Last Day; and let their punishment be witnessed by a party of believers) ⁽⁸⁾. Imam Al-Fakhr A-Razi, may Allah have mercy on him, says: " This verse shows that the unmarried persons who commit illicit

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sexual intercourse must be whipped a hundred lashes" ⁽⁹⁾. Imam Qurtobi says: " This punishment is to apply to the fornicatress and the fornicator" ⁽¹⁰⁾. It is clear that the verse decides that whipping is the due punishment for the unmarried persons who commits fornication and " that a party of Muslims must witness the procedures of punishment " ⁽¹¹⁾.

-Second Evidence; Allah, exalted be He, says: (And those who invoke not any other ilah (god) along with Allah, nor kill such person as Allah has forbidden, except for just cause, nor commit illegal sexual intercourse – and whoever does this shall receive the punishment) ⁽¹²⁾. Imam Qurtobi, may Allah be merciful to him, says: " This verse indicates that adultery and fornication are great sins and adulterers must be killed and that fornicators must be lashed" ⁽¹³⁾.

II. Evidence from Sunna:

-First Evidence;

Ubadah Ibn A-Samit (May Allah Please him) reported the Prophet , peace and blessings of Allah be upon him, as saying: " Receive my teachings, receive my teachings, Allah has appointed a way for those women, if the parties have been married, they shall receive a hundred lashes and stones to death, if the parties are unmarried, they shall receive a hundred lashes and banished for a year" ⁽¹⁴⁾. This prophetic say shows that : " The punishment for the fornicator is whipping and banishing whether he fornicates with married or unmarried woman and the punishment for the adulterer is being thrown with stones whether he commits sexual intercourse with married or unmarried woman" ⁽¹⁵⁾.

- Second Evidence;

Abu-Hureira (May Allah Please him) reported that two men made a complaint to the Prophet , peace and blessings of Allah be upon him. One of them said, " O, Messenger of Allah, judge upon the issue in question in the name of Allah". The other who was more learned said," Yeah, Messenger of Allah, judge upon the issue in question in the name of Allah and let me talk". the Prophet , peace and blessings of Allah be upon him, said," You can talk". The man said," My son was working as a servant for this man and he commits illegal sexual intercourse with his wife. People said that my son shall receive stones to death, but I redeemed his soul for a hundred sheep and an endowed slave girl. However, I sought the opinion of the Scholars. They told me that my son shall receive a hundred lashes and banished for a year and the woman shall receive stones to death. The Prophet , peace and blessings of Allah be upon him, said," By Him in Whose hand my life is, I judge upon the issue in question in the name of Allah. Your sheep and the endowed slave girl are unacceptable". The Prophet , peace and blessings of Allah be upon him, whipped the son a

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hundred lashes and banished him for a year and ordered Uneisan Al-Aslami to go to the woman to hear telling him that if she confessed committing adultery, she would be thrown with stones to death. The women admitted committing this crime and was thrown with stones to death ⁽¹⁶⁾. Ibn Battal, may Allah have mercy on him, says: " This prophetic say shows that The punishment for the fornicator is lashing and banishing and the punishment for the adulterer is being thrown with stones to death. This what Imams of Jurisprudence went to" ⁽¹⁷⁾.

- Third Evidence; Abu-Hureirah, may Allah please him, said: A man came to the Prophet, peace and blessings of Allah be upon him, when he was at the mosque and said: " O, Messenger of Allah, I committed illegal sexual intercourse". The Prophet turned away from him but the man repeated what he said four times. When he testified himself four times, the Prophet called him and asked, " Are you mad?". The answered in the negative. The Prophet asked, " Are you married?" The man answered in the affirmative. The Prophet, peace and blessings of Allah be upon him, " Go and throw him with stones to death" ⁽¹⁸⁾. Ibn Battal, may Allah have mercy on him, says: " This prophetic say shows that the punishment for the adulterer is being thrown with stones to death. This what Imams of Jurisprudence went to" ⁽¹⁹⁾.

C. Evidence from the Consensus of Scholars:

There is complete unanimity that the punishment of adultery and fornication is estimated. There is complete unanimity that The punishment for the fornicator is whipping and banishing and the punishment for the adulterer is being thrown with stones to death. These unanimities were reported by many Scholars. Ibn Al-Munzer – may Allah have mercy on him- said," It is evidenced that the the Prophet , peace and blessings of Allah be upon him ordered Muslims to punish the adulterer by being thrown with stones to death and he carried out this punishment ... Undoubtedly, throwing the adulterer with stones to death is evidenced by the Sunnah (Prophetic Tradition), by the deeds of the Orthodox Caliphs and by the unanimity of the Scholars" ⁽²⁰⁾. " There is complete unanimity that the adulterer must be thrown with stones to death" ⁽²¹⁾.

Ibn Qudamah, may Allah have mercy on him- said, " There is complete unanimity of the Scholars of all times everywhere that the punishment for the adulterer is being thrown with stones to death " ⁽²²⁾ and that " the punishment for the fornicator is whipping and banishing " ⁽²³⁾.

Imam Nawawi, may Allah have mercy on him, said, " There is complete unanimity that The punishment for the fornicator is whipping and banishing and the punishment for the adulterer is being thrown with stones to death" ⁽²⁴⁾.

Imam Ibn Hajar, may Allah have mercy on him, said, " Ibn Battal said, "There is complete unanimity of the Companions and all Scholars that the

punishment for the adulterer is to be thrown with stones to death, if he or she committed this sin consciously, intentionally and with free-will" ⁽²⁵⁾.

The Imams of the Fatawa of the Permanent Committee of Scientific Research and Ifta'a said, " There is complete unanimity of the Companions and all Scholars that the punishment for the adulterer is to be thrown with stones to death " ⁽²⁶⁾.

Ibn Al-Qaiem, may Allah be merciful to him, mentions the reason that the adulterer must be punished by being thrown with stones to death saying: " This punishment in particular must be passed on the adulterer for two reasons; first: so as to feel the pain in every part of his body as he felt joy by every part of his body too when committing adultery; second: to make remembrance of the penalty passed on the tribe of Prophet Lut, peace and blessings of Allah be upon him, who were thrown with stones to death because of homosexuality (sodomy: anal sexual intercourse between males) " ⁽²⁷⁾.

Chapter II

The Penalty of Adultery and Fornication from the Viewpoint of the Egyptian Criminal Law

The Penal Egyptian Law criminalizes only adultery between married persons. It imposes a penalty on married adulterers in Acts (274), (275) and (277). Act (274) prescribes that: " The wife that proved guilty of adultery shall receive imprisonment ⁽²⁸⁾ for a period of no more than two years. However, the execution of this judgment can be stalled if the husband accepts to shag her". This means that if the husband waives his right ⁽²⁹⁾, his sinful wife will escape punishment.

Act (275) dictates that: " The man who is proved guilty of adultery with this woman shall receive the same penalty". This means that the adulterer, whether being married or not, will be imprisoned for a period of no more than two years.

Act (277) states that: " A husband who is proved guilty of committing illegal sexual intercourse in the marital home in response to the legal action taken against him by his wife shall receive imprisonment of a period of no more six months".

In the light of these Acts, it is clear that the penalty of the adulterer wife is to be imprisoned for no more than two years but the adulterer husband is to be punished by being imprisoned for no more than six months.

It is noted that the husband has the right to abdicate and to stall the execution of the judgment if he is to shag her. If it is the case, the adulterer wife shall escape punishment.

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Moreover, no legal action can be taken against the adulterer wife or the adulterer husband unless one of them files a constitutional complaint against the other.

It is also noted, from the above- mentioned Acts - that the punishment of adultery and fornication breaks what should be taken from the viewpoint of Islam for many reasons as follows;

First; Islam prescribes that any person, married or not, proved guilty of committing illegal sexual intercourse must be punished, but the Egyptian Penal Law does not criminalize or impose a penalty for fornication, (i.e. illegal sexual intercourse between unmarried persons).

Second; Islam imposes the penalty of killing by being thrown with stones to death on the married adulterer but the Egyptian Penal Law ignores this penalty and imposes imprisonment instead.

Third; Islam imposes the same penalty for the adulterer, whether being a man or a woman, but the Egyptian Penal Law unreasonably discriminates between male and female adulterers. It imposes a tougher penalty of imprisonment for female adulterers in comparison with their male equivalents.

Fourth; Islam imposes a penalty of imprisonment and banishing on an unmarried fornicator, whether being a male or a female, but the Egyptian Penal Law neither criminalize nor impose a penalty for this crime which opens the door wide for the spread of deviation and social deterioration.

Fifth; Islam observes the individualization of punishment principle. It imposes a tougher penalty on the adulterer in comparison with the fornicator taking into consideration the different case of each, but the Egyptian Penal Law abstains from recognizing this fact.

Sixth; Islam imposes a punishment on the adulterer and the fornicator wherever they are proved guilty, whether inside the marital house or outside, but the Egyptian Penal Law criminalizes this act only if it is committed inside the marital house.

Seventh; Islam imposes the penalty of adultery and fornication whether a file is raised or not since it is a right of the society nobody is authorized to concede. However, the Egyptian Penal Law stipulate that a file is to be raised to go on the legal proceedings of this crime.

Eighth; According to Islam, the penalty of adultery and fornication must be passed whether the plaintiff waives his right or not ⁽³⁰⁾, but the Egyptian Penal Law give the plaintiff the right to waive and the right to have the execution of judgment stalled if he accepts to shag her which makes it easy for the adulterer and the fornicator to escape punishment.

It is also noticed that the previous Acts are unconstitutional as they breach the codes of punishment the Egyptian constitution adopts. Act Two of the 2014 Egyptian constitution prescribes that: " Islam is the established religion of the country ... and the principles of Islam are the main source of legislation". According to this Act, Islam is the main source of the codes of punishment the Egyptian constitution embraces. In the light of this, the Egyptian Penal Law, including the before-mentioned Acts - must abide by what Islam states. Since these Acts impose the penalty of imprisonment on the adulterer, not killing as it is decided by Islam, they break the constitution and thus they are unconstitutional.

Furthermore, the penalty of imprisonment is not as effective, repressive and deterrent⁽³¹⁾ as the penalty of killing by being thrown with stones to death.

Chapter III

The Penalty of Adultery and Fornication from the Viewpoint of the Algerian Criminal Law

The Algerian criminal law follows suit of its Egyptian counterpart. It criminalizes and punishes only adultery between married persons. Act (339) states that: " Any wife proved guilty of committing adultery shall receive a penalty of imprisonment for a period from a year to two years and the same penalty applies to anyone commits illegal sexual intercourse with a married woman.

A husband who is proved guilty of committing adultery shall receive imprisonment for a period from a year to two years and the same penalty applies to his partner. No legal proceedings are taken unless a complaint is made from the disgraced husband. If the husband shows forgiveness, the execution of the judgment shall be stalled".

From this Act, it is clear that the Algerian criminal law adopts the penalty of imprisonment for a period from a year to two years for adultery.

It is observed that the Algerian penal law, like its equivalent, ignores criminalizing and penalizing fornication between unmarried persons. It also stipulates that a complaint from the disgraced husband or wife must be made to go on the legal proceedings. In addition, it gives the husband the right to concede and stall the execution of the judgment if he shows pardon.

Nevertheless, the Algerian penal law differs from its Egyptian equivalent in some aspects shown as follows;

First; the Algerian penal law does not differentiate between male and female adulterers in the quantity of punishment as it is the case to the

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Egyptian penal law. According to the Algerian penal law, both male and female adulterers receive the same punishment with no regard to their gender. This is what is required for justice to be done. It is unfair to discriminate between male and female adulterers in the quantity of punishment.

Second; unlike the Egyptian criminal law, the Algerian penal law criminalizes adultery wherever it is committed, whether it is inside the marital house or outside. This is very important to protect the family from aberrance.

In spite of this, the Algerian penal law breaks the teachings of Islam. Islam imposes the penalty of killing by being thrown with stones to death on the married adulterer and the penalty of lashing and banishing on the unmarried fornicator. The Algerian penal law ignores these penalties too and imposes the penalty of imprisonment which is ineffective in comparison with that of Islam.

No doubt that the punishment Islam imposes for this crime is the best way to guard the family and society from declination because of the following;

First; it has the ability to restrain the wrongdoer from returning to the world of crime ⁽³²⁾ whereas the punishment imposed by the secular law proved to be ineffective to realize this target ⁽³³⁾.

Second; it rehabilitates the wrongdoer and strengthens his weaknesses to be a good citizen ⁽³⁴⁾ whereas the punishment imposed by the secular law is likely to increase the tendency to delinquency especially when the offender is imprisoned with other criminals ⁽³⁵⁾.

Third; it deters others from entering the world of crime ⁽³⁶⁾ whereas the secular penal legislations fail to accomplish this purpose ⁽³⁷⁾.

Conclusion

The study came to two the following findings:

First; Islam imposes the penalty of killing by being thrown with stones to death on the married adulterer and the penalty of whipping a hundred lashes and banishing on the unmarried fornicator, whether being a male or a female.

Second; the Egyptian penal law imposes an alternative penalty. It prescribes the penalty of imprisonment on the married adulterer. This breaks the punishment codes of Islam

Third; the Algerian penal law also imposes an alternative penalty. It prescribes the penalty of imprisonment on the married adulterer. This breaks the punishment codes of Islam as well.

In the light of these findings. The study recommends that the Egyptian and Algerian legislator should impose the penalty of killing by being thrown with stones to death on the married adulterer and the penalty of whipping a hundred lashes and banishing on the unmarried fornicator, whether being a male or a female. This comes in agreement with what Islam dictates in this question and goes line in line with the 2014 Egyptian Constitution Second Act states saying: "Islam is the established religion of the state ... and Islam teachings are the main source of legislation".

In the light of these principles, the study suggests that Acts (274) and (275) of the Egyptian penal law and Act (339) of the Algerian penal law should be modified as follows:

-Any unmarried male or a female that is proved guilty of fornication shall receive a hundred lashes and banishing and their punishment must be witnessed by a party of believers.

-Any married male or a female that is proved guilty of adultery shall be killed by being thrown with stones to death and their punishment must be witnessed by a party of believers.

Notes

- 1) Surat Al-Imran (The Family of Imran) III, verse: 102.
- 2) Surat An-Nisaa (The Women) IV, verse: 1.
- 3) Surat Al-Ahzab (The Confederates) XXXIII, verse: 70.
- 4) Al-Albany, **Sahih Al-Targheeb wa Tarheeb**, edit. 1, p.3.
- 5) Ibn Hajjar, **Fath Al-Bari**, no edition, vol. 1, p. 155.
- 6) Ibn Qudamah, **Al-Moghni**, edit. 3, vol 9, p. 38
- 7) Ibn Qudamah, **Al-Moghni**, edit. 3, vol 9, p. 36.
- 8) Surat An-Noor (The Light), verse: 2.
- 9) Al-Fakhr A-Razi, **A-Tafsier A-Kabeer**, edit. 3, vol. 23, p 139.
- 10) Al-Qurtobi, **Al-Game' Lahkam Al-Qura'n**, no edition, vol. 7, p. 4551.
- 11) Ibn Qudamah, **Al-Moghni**, edit. 3, vol 9, p. 45.
- 12) Surat Al-Furqan (The Criterion), verse: 68.
- 13) Al-Qurtobi, **Al-Game' Lahkam Al-Qura'n**, no edition, vol. 13, p. 76.
- 14) Narrated by Muslim. Refer to, Muslim, **Sahih Muslim**, no edition, Book of Hudud, Chapter: Hadd of Adultery, Hadith no (1690), p. 628.
- 15) A-Nawawi, **Al-Menhaj Sharh Sahih Muslim Ibn Al-Hajjaj**, edit. 2, vol. 11, p. 190.
- 16) Narrated by Al-Bukhari. Refer to, Al-Bukhari, **Sahih Al-Bukhari**, Book of Hudud, Chapter: Who Accuses his wife of Adultery, Hadith no. (6842), p. 172.
- 17) Ibn Battal, **Sharh Sahih Al-Bukhari**, edit. 2, vol. 8, p. 451.

18) Narrated by Al-Bukhari and Muslim. Refer to, Al-Bukhari, **Sahih Al-Bukhari**, Book of Hudud, Chapter: Throwing the Adulterer with Stones to Death, Hadith no. (6820), p. 1271 and Muslim, **Sahih Muslim**, no edition, Book of Hudud, Chapter: Who Confessed of Committing Illegal Sexual Intercourse, Hadith no (1691), pp. 116-119.

19)) Ibn Battal, **Sharh Sahih Al-Bukhari**, edit. 2, vol. 8, p. 440.

20) Ibn Battal, **Sharh Sahih Al-Bukhari**, edit. 2, vol. 8, p. 431.

21) Ibn Qudamah, **Al-Moghni**, edit. 3, vol 9, p. 36.

22) Ibn Qudamah, **Al-Moghni**, edit. 3, vol 9, p. 35.

23) Ibn Qudamah, **Al-Moghni**, edit. 3, vol 9, p. 43, p. 46.

24) A-Nawawi, **Al-Menhaj Sharh Sahih Muslim Ibn Al-Hajjaj**, edit. 2, vol. 11, p. 189.

25) Ibn Hajar, **Fath Al-Bari**, no edition, vol. 12, p. 118.

26) The Permanent Committee of Scientific Research and Ifta'a, Fatawa A-Lajna A-Daema, part 1, vol. 22, Fatwa no. (19657), pp. 48-49.

27) Ibn Al-Qaiem, **A-Salah wa Ahkam Tarekoha**, no edition, p. 31.

28) For further detail on the penalty of imprisonment; refer to: Mamoun Salamah, **Qanon Al-Okobat; Al-Qesm Al-Aam**, edition 3, p. 648 and Mohamed Zakki Abu-Amer, **Qanon Al-Okobat; Al-Qesm Al-Aam**, no edition, pp. 510-511.

29) Jamal Al-Kherbawi, **Haqq Al-Majni Aleih fe A-Tanazul an A-Da;awa A-Jinaeia**, edit. 1, p. 166, p. 201 and p. 267.

30) Al-Kasani, **Badae'h A-Sanaeh**, edit. 2, vol. 7, pp. 246-249, Ibn Rushd, **Bediat Al-Mojtahid**, no edit., vol. 4, p. 237, Al-Khateeb A-Sherbini, **Moghni Al-Mohtaj**, no edit., vol. 5, p. 511 and Ibn Mofleh, **Al-Foroh**, no edit., vol. 5, p. 506.

31) Mamoun Salamah, **Qanon Al-Okobat; Al-Qesm Al-Khas**, edition 3, pp. 622-630 and Mahmoud Najjuib Hosni, **Elm Al-Eqab**, edit. 3, pp. 94-97.

32) Abd Al-Fattah A-Seifi, **Ta'seel Al-Ejraa;t Al-Jinaeia**, no edit., p. 116.

33) Mohamed Saleem Al-Awwa, **Fe Usul A-Nezam Al-Jinaei Al-Islami, A Comparative Study**, no edit., p. 253.

34) Hani Al-Manaeli, **Al-Okoba fe A-Tashrieh Al-Islami**, no edit., p. 51.

35) Mohamed Saleem Al-Awwa, **Fe Usul A-Nezam Al-Jinaei Al-Islami, A Comparative Study**, no edit., p. 253.

36) Hani Al-Manaeli, **Al-Okoba fe A-Tashrieh Al-Islami**, no edit., p. 53.

37) Mohamed Saleem Al-Awwa, **Fe Usul A-Nezam Al-Jinaei Al-Islami, A Comparative Study**, no edit., p. 253 and Hani Al-Manaeli, **Al-Okoba fe A-Tashrieh Al-Islami**, no edit., p. 53.

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